WASHINGTON
LEGISLATIVE OFFICE

February 27, 2013

Dear Representative:

RE: ACLU Urges NO Vote on the House Substitute Amendment to the Violence Against Women Reauthorization Act of 2013 (S.47)

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our nation's civil rights laws, we write to urge Members of the House of Representatives to vote NO when the House Substitute Amendment to the Violence Against Women Reauthorization Act of 2013 (S. 47) comes to the floor.

We recognize that at least one element of the House substitute amendment improves upon the Senate-version of S. 47, specifically in the provisions relating to cyberstalking. On balance, however, the substitute contains far too many significant deficiencies as compared to the Senate-passed bill. We did not take a position on the Senate bill due to the civil liberties concerns offsetting the undeniable benefits of the core domestic violence provisions. But in comparing the Senate bill to the proposed substitute, the latter raises many more serious issues adversely impacting the civil rights and liberties of individuals. Accordingly, we urge Members to oppose the House substitute amendment to S. 47.

The following sections offer detail on provisions of particular concern to civil liberties advocates.

A. Complete Omission of Coverage for Those Who Are LGBT

We strongly oppose the complete omission of explicit coverage for the lesbian, gay, bisexual, and transgender (LGBT) community in the House substitute amendment. By contrast, the ACLU supports the inclusion of the LGBT community in the Senate-passed version of S. 47.

The LGBT-inclusive provisions in the Senate bill represent a critical step forward for VAWA, ensuring that it will reach those most in need of its services, regardless of sexual orientation or gender identity. The need could not be clearer. Studies indicate that LGBT people experience intimate partner violence at roughly the same rate as the general population. However, it is estimated that less than one in five LGBT domestic violence victims receives help from a service provider and less than in one in ten victims reports violence to law enforcement. The House legislation does nothing to address the unacceptable discrimination that LGBT people often face when attempting to access services for those who experience intimate partner violence, and nothing to change the fact that the LGBT community is underserved in this area.

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B. Applying PREA Standards to All Immigration Detainees

The Prison Rape Elimination Act of 2003 (PREA), which set standards for preventing, detecting, and responding to sexual abuse in custody, was intended to protect every detainee from sexual abuse and assault. To date, that has not occurred. We are mostly pleased that section 1001(c) of the House substitute amendment has taken a positive step forward by requiring that the Department of Homeland Security (DHS), which detains almost 430,000 persons annually, and the Department of Health and Human Services (HHS), which detains 9,000 unaccompanied alien children annually, recognize a unanimous Congress's intent under PREA to cover all immigration detainees.

Section 1001(c) allows DHS and HHS to undertake their own rulemaking, but under a strict deadline of 180 days and with "due consideration" to the extensive work conducted by the National Prison Rape Elimination Commission. The PREA Commission concluded that "[n]o period of detention, regardless of charge or offense, should ever include rape." Section 1001(c)'s compliance provision would require DHS and HHS to conduct and include PREA performance assessments in their evaluations of detention facilities, ensuring system-wide oversight based directly on PREA's requirements. This uniformity of coverage across criminal and civil facilities is supported by the National Sheriffs' Association, which has advised Congress that "DHS PREA standards need to be consistent with [the Department of Justice's] PREA standards. This would ensure that there are not differing standards for jails based on the federal, state, or local detainees held, as well as help with the swift and successful implementation of final PREA standards."

We are concerned, however, that the House substitute amendment lacks a definitional provision as compared with section 1101(c) in the Senate-passed version of S. 47. This provision states that "[a]s used in this section, the term 'detention facilities operated under contract with the Department' includes, but is not limited to contract detention facilities and detention facilities operated through an intergovernmental service agreement [IGSA] with the Department of Homeland Security." DHS detention facilities operate under a wide variety of contractual arrangements and it is important for section 1001(c)'s language to be as inclusive as possible to ensure universal and uniform PREA coverage of detainees. Without this definitional provision, the House substitute amendment risks misinterpretation that would perpetuate the patchwork PREA coverage the bill commendably aims to prevent.

C. Making Deportation Proceedings Less Efficient and Less Fair By Discarding Well-Established Supreme Court Precedent on Evidentiary Rules in Immigration Court

The House substitute amendment contains a provision at section 811 titled "consideration of other evidence," which would allow the use of documents beyond conviction records to determine whether an individual is deportable for a crime of domestic violence. This provision does not appear in the Senate-passed bill and would introduce enormous inefficiencies into both criminal trials and civil deportation proceedings by erasing the important dividing line between them. The Supreme Court has repeatedly said that only an individual's conviction record may be considered in determining whether criminal grounds exist to support deportation, and this

doctrine can be traced back to 1914.[1] Immigration proceedings should not become protracted mini-trials collaterally assessing evidence that was unnecessary to a criminal conviction.

As of March 2012 there was a backlog of more than 300,000 immigration cases, which would be significantly exacerbated by section 811.[2] The American Bar Association emphasizes that the current rules targeted by section 811 promote "uniform treatment of convictions, fairness, and due process, as noncitizens convicted under identical provisions of criminal law will face the same set of immigration consequences and will not be forced to defend themselves against old criminal allegations without the due process protections of a criminal proceeding."[3] Section 811 would second-guess the results of criminal trials, with new evidence debated in immigration court that was not scrutinized at trial. Witnesses may no longer remember what happened or be available to testify. Moreover, without knowing that a person's conviction record is all that can be examined in future immigration proceedings, criminal defense attorneys would be unable to provide constitutionally-required advice on a criminal conviction's deportation consequences. This would bog down criminal courts and hamper plea bargaining, with domestic violence survivors compelled to testify against their abusers or have cases dismissed.

Section 811 fundamentally would undermine the rights of immigrants to a fair deportation proceeding. The government is required to provide clear, unequivocal, and convincing evidence of deportability.[4] By failing to mention exculpatory evidence, however, the amendment unfairly weights the scales of justice by favoring one side of what is designed to be an adversarial proceeding. This at once reduces the independence of immigration courts and their due process protections.

The severe consequences of deportation on criminal grounds, including destruction of families with U.S. citizen spouses and children, must not depend on evidence untested by the rigors of a criminal trial. Section 811 would allow all sorts of currently inadmissible evidence to deport immigrants without any benchmark of accuracy. Erroneous deportations are repugnant to American values of due process and the rule of law, which the Supreme Court's well-established precedent on conviction records in immigration proceedings should continue to govern.

D. Housing Protections

In the last reauthorization of the Violence Against Women Act, Congress specifically acknowledged the interconnections between housing and abuse.[5] It recognized that domestic violence is a primary cause of homelessness; that 92% of homeless women have experienced severe physical or sexual abuse at some point in their lives; that victims of violence have experienced discrimination by landlords; and that victims of domestic violence often return to

[1] *See* Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005); *see also* Rebecca Sharpless, *Towards a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979, 994-95 (July 2008) (describing case law from 1914 on setting out categorical approach for immigration adjudications).
[2] TRAC Immigration, "Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases." (Apr. 24, 2012), available at http://trac.syr.edu/immigration/reports/279/
[3] American Bar Association, "Preserving the Categorical Approach in Immigration Adjudications." (Aug. 2009).
[4] *See, e.g.*, Woodby v. United States, 385 U.S. 276 (1966).
[5] *See* 42 U.S.C. § 14043e (2011).

abusive partners because they cannot find long-term housing.[6] The ACLU has represented victims of violence who faced eviction because of the abuse perpetrated by their batterers, and worked closely with survivors, advocates, and housing managers to preserve their access to safe housing.[7] VAWA's current housing protections make it unlawful to evict survivors of domestic violence, dating violence, and stalking from certain federal housing programs solely because the tenant is a survivor. We are pleased that, like the Senate-passed bill, the House substitute amendment strengthens the current housing protections by applying protections consistently across housing programs and protecting survivors of sexual assault, and requiring notice of housing rights.

The provision in the House substitute amendment relating to emergency relocation and transfer, however, does not enhance protections for survivors because it does not require that public housing agencies and owners or managers of housing covered by VAWA adopt the emergency relocation and transfer plan developed by federal agencies. Instead, adoption of the plan remains voluntary. Public housing agencies and owners already have the option to create and implement emergency relocation plans. But although HUD has encouraged adoption of these plans for the last nine years, the vast majority of PHAs and owners still have not. Unless VAWA requires that covered PHAs and owners adopt a plan based on the model plan developed by HUD and other federal agencies, they will have little incentive to do so. The status quo—victims forced to choose between staying in a dangerous location or losing their housing subsidy and becoming homeless—will endure. Requiring adoption of a plan would ensure that PHAs and owners have policies in place, tailored to their resources and capacities, when survivors need to pursue alternative safe housing.

Additionally, the House substitute amendment does not require that survivors be given notice of their VAWA housing rights at the time of eviction. Without such notification, domestic violence victims may never know that their eviction was improper or unlawful. It defies commonsense to expect, as some have suggested, that a survivor should rely on the notice of VAWA rights that she received at the time she moved into her housing. Years will have passed, along with the exigencies of everyday life, since that initial notice of VAWA rights and it's therefore unreasonable to expect a survivor of domestic violence to have ready or easy access to such a document. The House shouldn't countenance such a pinched approach to access to information for victims of domestic violence.

E. Combatting Violence Against Native American Women

The crisis of violence against Native American women has been well documented.[8] Native American women are almost three times as likely to be raped or sexually assaulted as all other

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[6] Lisa A. Goodman et al., *No Safe Place: Sexual Assault in the Lives of Homeless Women* (2006), *available at* http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=558; Lenora Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 J. GENDER, SOC. POL'Y & LAW 377 (2003).

[7] Information about these cases can be found at www.aclu.org/fairhousingforwomen.

[8] *See e.g.*, AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), *available at* http://www.amnesty.org/en/library/asset/AMR51/035/2007/en/cbd28fa9-d3ad-11dd-a329-2f46302a8cc6/amr510352007en.pdf.

races in the United States and more than one-quarter of Native women have reported being raped at some point in their lives.[9]

Additionally, while violence against white and African-American victims is primarily intra-racial, nearly four in five American Indian victims of rape and sexual assault described their offender as white.[10] This is particularly significant because the legal decision that stripped Indian tribes of criminal jurisdiction over non-Indians[11]— even for crimes committed against Native American women on tribal lands— and thus placed non-Indian perpetrators of violence outside the reach of tribal courts, has exacerbated the cycle of violence on tribal lands.[12] Because tribal governments lack the authority to prosecute an alleged non-Indian abuser and federal law enforcement officers and prosecutors are, for a variety of reasons, [13]unable or unwilling to investigate or prosecute, victims are left without legal protection or redress and abusers act with increasing impunity.

The Senate–passed bill, S. 47, takes an important step forward to address this legal impediment by restoring tribal authority to exercise concurrent criminal jurisdiction over non-Indian perpetrators of domestic violence and dating violence that occurs in the Indian country of a participating tribe.

However, the House substitute bill seeks to impose additional qualifications that make it increasingly more difficult and more onerous on tribes to exercise jurisdiction. Many of the requirements in the House legislation hold tribal courts to higher standards than state and federal courts. The ACLU supports protecting the rights of all defendants, including non-Indian criminal defendants in tribal courts. If Congress is going to confer on non-Indian criminal defendants in tribal court a right to file interlocutory appeals in federal court from every tribal court order, we see no reason that this new right should be created *only* for non-Indian criminal defendants if it is not also conferred on all criminal defendants in state court proceedings. Similarly, if criminal defendants in tribal court are permitted to seek review in federal court prior to exhausting the tribal appellate process, we see no reason why the same right should not be enjoyed by criminal defendants in state court. There is no reason not to confer rights on criminal

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[9] RONET BACKMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN, 33 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf; CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, 3 (2011), *available at* http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Executive_Summary-a.pdf.

[10] DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, A BJS STATISTICAL PROFILE, 1992-2002: AMERICAN INDIANS AND CRIME, 9 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.

[11] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[12] SAVE Native Women Act: Hearing on S.1763 Before the S. Comm. on Indian Affairs, 112th Cong. (2011) (statement of Thomas J. Perrelli, Associate Attorney General).

[13] "Federal resources . . . are often far away and stretched thin [and] [f]ederal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years—precisely the sorts of prosecutions that respond to the early instances of escalating violence against spouses or intimate partners." Letter from Ronald Weich, Assistant Attorney General, to Hon. Joseph R. Biden Jr., Vice President, (July 21, 2011), *available at* http://www.justice.gov/tribal/docs/legislative-proposal-violence-against-native-women.pdf.

defendants in state court that are being given to non-Indian criminal defendants in tribal court. We take the same position on the certification requirement on similar grounds.

Congress should not just focus its efforts on ensuring rights of defendants in tribal courts, but also the constitutional rights of defendants in federal and state courts across the country. The ACLU has advocated for over 90 years for equal justice for all and that equal justice applies in federal, state and tribal courts.

1. The House substitute amendment would ensure that non-tribal defendants in criminal cases receive all the same constitutional rights and privileges that defendants would receive if the cases were proceeding in federal court.

Although the ACLU opposes the House substitute bill, we support the language in Section 901 that, similar to the Senate-passed bill, would require all tribes that prosecute non-Indians to provide such defendants with the same constitutional rights in tribal court as they would have in federal and state courts. Therefore, non-Indian defendants would be entitled to the full panoply of constitutional protections, including due-process rights and an indigent defendant's right to appointed counsel (at the expense of the tribe) that meets federal constitutional standards. This includes the right to petition a federal court for habeas corpus to challenge any conviction and to stay detention prior to review, and explicit protection of "all other rights whose protection is necessary under the Constitution of the United States."

2. The House substitute amendment fails to clarify that non-Indian defendants have the right to direct appellate review of their sentences in tribal appellate courts in addition to petitioning for writ of *habeas corpus* in Federal courts.

This substitute, like the Senate-passed bill, does not clarify whether non-Indian defendants would have a direct right of appeal to a tribal appellate court or even whether all local tribal courts have access to appellate courts. While the legislation does provide that there would be a right to petition a Federal court for a *writ of habeas corpus* for non-Indians who are prosecuted in tribal courts, *habeas corpus* is only one method of challenging a sentence and it should by no means be the only way for a defendant to challenge his or her sentence. In the normal course of a criminal case, a defendant would have several opportunities for a federal or state court to rectify mistakes or constitutional errors made by a lower court during trial before filing a *writ of habeas corpus*. Considering the extension of jurisdiction that is being proposed in the House substitute, non-Indian defendants should also have the right to appeal their sentence to an appellate court to ensure their constitutional rights are not being violated. We urge the House to provide funding and appropriate assistance to support the creation of appellate courts if a tribe does not already have one.

F. "Cyber-Stalking" Criminal Expansion

The House substitute amendment fails to address certain constitutional deficiencies in existing "cyber-stalking" law, 18 U.S.C. § 2261A (2006) ("section 2261A"), though we note that section 1002 of the bill is preferable to its Senate-passed counterpart, S. 47. We recognize that perpetrators of domestic and sexual violence and stalking can use the Internet to inflict harm.

Laws addressing this problem, however, must be narrowly tailored to target "true threats" in order to comply with the Constitution.

Below we address the House substitute amendment, section 1002 and first provide comments on the deficiencies in the Senate-passed legislation to permit comparisons between the two.

1. Only "true threats" do not receive full First Amendment protection

Under settled law, even the most heinous and offensive speech receives full First Amendment protection, unless it falls within one of a small number of narrow exceptions.[14] Relevant to the current statute, the only threatening or intimidating speech that does ***not*** receive full First Amendment protection is the "true threat."[15] At the heart of the cases attempting to define what constitutes a true threat are the same considerations at play in cases of violent incitement. Under those cases, the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing ***imminent*** lawless action and is ***likely*** to produce such action."[16] Extending this analysis to the "true threats" doctrine, the harm from a "true threat" must be likely and immediate, and the individual making the threat must have the specific intent to threaten.[17]

Without bright lines delineating lawful speech from unlawful "true" threats, vague or overbroad statutes criminalizing speech that could be construed as "harassing," "intimidating," or that is claimed to cause "serious" or "substantial" emotional distress, have a significant chilling effect on protected speech. Simultaneously, they may fail to cover actual "true" threats, which themselves have a chilling effect on the exercise of other constitutional rights and may be legitimately proscribed.[18] As written, section 1002 would not fix the existing unconstitutional overbreadth and vagueness in section 2261A but is preferable to the Senate legislation.

2. Section 107 of the Senate-passed bill would inappropriately expand existing cyber-stalking law

Section 107 of the Senate bill would significantly expand section 2261A, which, notably, was recently subject to a successful as-applied constitutional challenge.[19] That case, *United States v. Cassidy*, involved the posting of offensive messages on publicly accessible blogs and Twitter.[20] The comments at issue, though crude and in poor taste, were critical of a public religious figure

[14] *Cf.* United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (finding emails containing fantasies about violence against women and girls, sent to third party, protected by First Amendment and not subject to punishment under statute criminalizing threats sent in interstate commerce).
[15] Watts v. United States, 394 U.S. 705 (1969) (finding statement that, "[i]f they ever make me carry a rifle the first man I want to get in my sights in L.B.J.," in the context of a small political rally, ***not*** a "true threat" and protected under First Amendment).
[16] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
[17] Though context-specific, threats targeted at certain relations, including immediate family members, may also rise to the level of a true threat (given that the threat will ultimately be communicated to that individual).
[18] *See* Brief for Am. Civil Liberties Union Found. of Or., Inc. as Amicus Curiae Supporting Affirmance at 3, Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
[19] United States v. Cassidy, 814 F. Supp. 2d 574, 576 (D. Md. 2011).
[20] *Id.* at 577-78.

and were thus fully protected by the First Amendment. The court ruled that the application of 2261A to the communications was a content-based restriction on protected speech, prompting strict scrutiny and requiring invalidation of the law as applied because the government lacked a compelling reason to criminalize offensive speech that does not rise to the level of a true threat.[21]

Additionally, the comments were posted on what the court found to be the equivalent of a physical bulletin board, from which, unlike direct one-on-one threats, the individual targeted can "avert[] her eyes" and avoid any harm.[22] Because the government has no compelling interest in regulating protected *public* speech that merely inflicts emotional harm, the statute also failed strict scrutiny as applied to Cassidy.[23]

As amended by section 107 of the Senate bill, section 2261A would provide the government even more leeway to target the kind of protected speech at issue in *Cassidy*.

First, the revised statute would remove the requirement of ***actual harm***. Under current law, the defendant must (1) travel in interstate or foreign commerce with the requisite intent, and the travel must "*[p]lace [the victim] in reasonable fear of the death of, or serious bodily injury to, or cause[] substantial emotional distress to*" the victim or certain close family members; or (2) use the mail, any interactive computer service or any facility of interstate or foreign commerce, with the requisite intent, "*in a course of conduct that causes substantial emotional distress to [the victim] or places [the victim] in reasonable fear of the death of, or serious bodily injury to*," the victim or certain close family members.[24] Under section 107 of the Senate bill, the amended statute would merely require that the speech be "reasonably expected to cause substantial emotional distress."[25] Aside from the overarching concern with criminalizing speech that merely results in emotional distress, this amendment could result in the criminalization of purely private speech that is ***never seen*** by the intended recipient. Further, it would apply equally to postings in an online public forum like Twitter without any showing that the speech had any harmful effect on a third party. While the amended section does limit the specific intent requirement to "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure,

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[21] *Id.* at 582-84.
[22] *Id.* at 585.
[23] *Id.* The court also rejected the government's claim that section 2261A regulates conduct, not speech, and that any impact on speech would be incidental and content-neutral. The court again noted the difference between restrictions on intimidating or harassing speech posted on Twitter and blogs, which the target is free to disregard, and those on telephone harassment, which arguably serve a "strong and legitimate" interest because of the one-on-one nature of the communications and the fact that harassing phone calls arguably involve more conduct than speech. *Id.* at 585-86. Even if section 2261A is largely concerned with conduct, however, the court then found that any restriction on speech is not incidental, and restricts exactly the type of speech the First Amendment is intended to protect. The court noted that convictions under even telephone harassment statutes had been vacated when their impact on protected speech was more than incidental. *Id.* at 586-87 (citing United States v. Popa, 187 F.3d 672, 677 (D.C. Cir. 1999) (holding statute restricting calls made with intent to "annoy" to be unconstitutionally applied to individual calling U.S. Attorney's Office with complaints containing racial epithets and comments on police brutality)).
[24] *See* 18 U.S.C. § 2261A(1)-(2) (2006). For paragraph (1), which covers conduct associated with interstate or foreign travel, the intent standard is "with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate. . . ." For paragraph (2), the intent standard is "with the intent . . . to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress . . . or to place a person . . . in reasonable fear of . . . death . . . or serious bodily injury."
[25] H.R. 4271, § 107(b)(1)(B), (b)(2)(B).

harass, or intimidate,"[26] the terms "harass" and "intimidate" are still likely vague, overbroad and accordingly violative of the First and Fifth Amendments.

Second, section 107 would add two additional electronic facilities that, if used, could trigger the statute. Currently, section 2261A only lists an "interactive computer service," which is defined in 47 U.S.C. § 230(f) (2006) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Section 107 would add to "interactive computer service" both "electronic communication service[s]" and "electronic communication system[s] of interstate commerce."[27] To the extent these added terms are intended to broaden the scope of the statute to online public forums like Facebook or Twitter, from which the recipient of a potentially threatening communication can "avert her eyes," they are unconstitutional.[28] As it is, the term "interactive computer service" likely warrants limitation to carve out protected, public speech on forums like Twitter or blogs.

3. Section 1002 of the House substitute amendment does not fix the underlying problem with section 2261A, but is preferable to the Senate language

The House substitute effectively streamlines the existing statute by collapsing the paragraphs covering conduct associated with interstate or foreign travel and "use of the mail, any interactive computer service or a facility of interstate or foreign commerce in a course of conduct" into one section. It helpfully does not extend the triggering electronic devices or services beyond an "interactive computer service." Additionally, it limits the intent standard for the "use of the mail" provision by removing liability for actions taken merely with the "intent to . . . cause substantial emotional distress," which is currently in section 2261A(2)(A) and was at issue in *Cassidy*.

On the flip side, the House substitute amendment would, similar to section 107 of the Senate bill, extend the intent standard to conduct taken with the "intent . . . to intimidate," which previously had just been included in the "place under surveillance" clause. In other words, action taken *without* the intent to place an individual under surveillance only triggers the law when it is taken with the intent to "kill, injure or harass." Again, the term "harass" is likely unconstitutionally vague and overbroad, but adding conduct taken simply with the intent to "intimidate" would exacerbate the vagueness and overbreadth problems in existing law. By untethering the language from the "place under surveillance" requirement, the section could now be extended to, for instance, a vigorous business negotiation or a parent threatening a disobedient child (assuming that the speech in question causes "substantial" emotional distress).

Last, the section adds five years to the maximum term of imprisonment if the offense (1) involves the violation of a protection order; or (2) if the victim is under 18 or over 65, the

[26] Paragraph (2)(A) of *current* section 2261A covers conduct taken with the intent merely to "cause substantial emotional distress," which was of particular concern to the *Cassidy* court. *Cassidy*, 814 F. Supp. 2d at 580-81.
[27] H.R. 4271, § 107(b)(2).
[28] Granted, Twitter also has a "direct message" functionality, which allows for private messages between Twitter users. However, one must affirmatively "follow" the other individual in order to exchange direct messages.

offender is over 18 and the offender knew or should have known the victim's age. Extending the maximum sentence is unnecessary given the significant sentences already provided for in existing law, and is overly punitive given the danger that the law could be used to criminalize protected speech.

4. The existing cyber-stalking statute can already be misused to violate Americans' First Amendment rights to freedom of speech, assembly, petition and press

The current "cyber-stalking" statute is already subject to misuse, and has been used by prosecutors to reach public speech on matters of public importance in online public forums. Further, the speech that was prosecuted was not alleged to have conveyed a threat of physical harm; it was merely alleged to be emotionally distressing. Such speech is protected under the First Amendment freedoms of speech, assembly, petition and press, and it occurs with regularity in contemporary discourse. As the *Cassidy* court noted, the First Amendment protects speech "even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste."[29]

Section 2261A thus goes beyond punishing the "true threats" that may receive lesser First Amendment protection. Cyber-stalking laws targeting speech (as opposed to conduct) should be limited to these "true threats," which occur only when an individual engages in communications directed at the recipient where the speaker has a *subjective* intent to cause the recipient to be in apprehension of harm and where the recipient reasonably fears for her safety.

The appropriate amendment to section 2261A in this case would be to limit the scope of the statute exclusively to "true threats." Instead, the House substitute would still permit the application of the statute to purely public, constitutionally protected speech.

G. Taxpayer-Funded Employment Discrimination

The Senate-passed version of S. 47 included important prohibitions against discrimination for individuals who receive services under and are employed by taxpayer-funded programs authorized by VAWA. However, the House substitute amendment strips protections for employees in taxpayer-funded jobs. We oppose this change. For more than seventy years, the federal government has made a commitment to ending taxpayer-funded employment discrimination. The first success of the modern civil rights movement was a decision by President Franklin Roosevelt to bar federal contractors from discriminating based on race, religion, or national origin. This was the first action taken by the government to promote equal opportunity for all Americans, which paved the way for the enactment of scores of civil rights statutes that prohibit discrimination, especially by recipients of federal funds. The substitute version of the bill undermines this enduring commitment.

Under Title VII, when using their own funds, religious organizations can choose their employees on the basis of religion or religious beliefs. When the government funds programs, like those authorized under this bill, however, no person should be disqualified from a job in the programs

[29] *Cassidy*, 814 F. Supp. 2d at 581-82.

because of his or her religion, or lack thereof. Yet, this sort of discrimination is just what the provision in the substitute bill would permit.

H. New Crime of Strangulation and Suffocation

The House substitute amends the federal criminal code to provide a 10-year offense for assaulting a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate. In its current form, the bill does not clearly define the intent required to commit either strangling or suffocating. Instead, the bill simply states that intent "to kill or protractedly injure the victim" is not required.

While we recognize that this provision is intended to address the difficulties of prosecuting strangulation, there is insufficient clarity about the requisite intent and harm. For example, the legislation could have clarified that the acts of strangling or suffocating require the intent to harass, put in fear of injury or death, or cause injury or death. Without such language, this provision could be applied to situations where such malicious intent does not exist and impose inappropriate criminal penalties.

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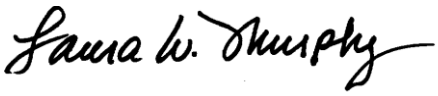
Because of the deficiencies outlined above, we urge House members to vote against the House substitute amendment. Should you have any questions, please don't hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or vleveille@dcaclu.org.

Sincerely,



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