

**Prepared Testimony of
Professor William Wagner & Katherine Bussard
Before the Michigan House of Representatives Judiciary Committee
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Distinguished Chair and Members of the Committee: Thank you for the opportunity to provide testimony on HB 5400 and 5401, which propose to amend the Michigan penal code pertaining to “Hate Crimes.” Professor William Wagner holds the academic rank of Distinguished Professor Emeritus (Law) and holds the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Katherine Bussard serves as the Executive Director & C.O.O. of Salt & Light Global. Today, we testify in our personal capacities. Out of an abundance of concern for the liberties protected by the First Amendment, we speak in opposition to these bills in their current form.

Frist Amendment Protections

As Daniel Webster famously said, “Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions.”¹ While the bill sponsors undoubtedly have only the best intentions in mind, and while heinous acts of violence and intimidation must be universally condemned, this body must respect the legislative limits of the Constitution. The First Amendment of the US Constitution provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²

Because HB 5400-5401 has the potential to infringe on the free exercise of religious expression and conscience, chill free speech, and penalize people who peaceably assemble, these bills should not be adopted in their current form.

Specific Concerns & Possible Remedies

The most significant point of concern is that the proposed legislation clearly conflicts with the First Amendment. The most poignant illustration of this fact can be seen in the US Supreme Court’s 2023 ruling in *Counterman v. Colorado*: The High Court ruled, in an opinion authored by Justice Kagan, that it violates the First Amendment to prosecute an individual based upon the effect of his words on the hearer. Rather, a speaker can only be prosecuted if “the [speaker] had some subjective understanding of the threatening nature of his statements. ... The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” Pursuant to *Counterman*, if Michigan’s hate speech bill is passed as currently written, it will violate the First Amendment. To “frighten” or “intimidate” or “harass” a person does not equal “unlawful violence” and is, therefore, protected speech.

The Supreme Court further stated:

[T]he First Amendment may still demand a subjective mental state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State’s showing of a culpable mental state. [3]

Michigan’s proposed law has no such *mens rea* requirement for the speaker. A prosecution of a speaker based upon the mental state of the listener is unconstitutional. Such an improper standard will cause “a speaker to swallow words that are in fact not true threats.” [4] This chilling effect on protected speech is not permissible.

¹ *Daniel Webster Quotes*, LIBERTYTREE.CA, http://quotes.liberty-tree.ca/quotes_by/daniel+webster.

² U.S. CONST. amend. I.

The prosecutor must show an awareness on the part of the speaker that his statements threatened unlawful violence. Michigan's proposed law fails to meet this standard and, therefore, violates the First Amendment.

Of further concern, item (d) on page two of HB 5400 classifies damage of "any real or personal property of another" as a hate crime. From the American Revolution to the Civil Rights movement, peaceful boycotts have been a fundamental component of American politics. For decades, the Supreme Court has upheld this practice as one protected by the First Amendment.³ However, under the proposed legislation, an organizer or participant of a conscientious boycott could be charged with a felony if a victim alleged personal property damage, including damage to intangible items such as their brand. If people are lawfully, peacefully assembled in a public space, but patrons of a business are uncomfortable with the assembly resulting in financial loss to a business, are those assembled guilty of hate crime if the business owner is part of a protected class and claims lost revenue as damage?

Another point of concern is the "reckless disregard" definition and its relationship to the "true threat" language on page 5 of HB 5400, which creates a subjective standard that negates the speaker's intent from the true threat definition. Lines 20-21 state "A true threat includes such a communication made with reckless disregard." However, it is followed by a seemingly conflicting statement that "a speaker is not liable for communicating a true threat if that speaker was unaware that the individual or the group of individuals could regard the statement as threatening violence." If someone reads a passage from a sacred religious text, and an individual or group regards that reading as a threat, is the speaker guilty for a felony hate crime if they read or teach on that text again after being told that someone regarded it as a threat?

A possible remedy and clarification of legislative intent can be found in a similar bill package that the Michigan Senate is currently considering, SB 600-601. On page 5, Section 9 of SB 601 S3, clarifying language states "This section does not enjoin any individual's exercise of the constitutional right to free speech." Additional amendments are being offered to add religious liberty to this section. This body should consider similar language protecting all First-Amendment issues, including speech, religious exercise and conscience, and peaceable assembly.

Conclusion

There is no doubt that HB 5400 and 5401 are well-intended, but there is substantial concern about how they could infringe on the First Amendment if enacted. HB 5400-5401 have the potential to infringe on the free exercise of religious expression and conscience, chill free speech, and penalize people who peaceably assemble. As ACLU attorney Christopher Anders communicated to Congress: "It has been our experience that the fight for better and stronger civil rights protections is more successful when free speech and association are protected along the way. Fierce protection of free speech rights has historically created the space for the improvement of civil rights protections."⁴ Government deterrence of citizens enjoying free speech, religious expression, and peaceable assembly has never been proven to deter acts of hate and violence; only preserving and encouraging the free exercise of civil rights aids such matters. If the goal of this body is to deter crime and better protect civil liberties, than these bills should not be adopted in their current form.

³ "In *NAACP v. Claiborne Hardware Co.*, the Supreme Court in 1982 unanimously upheld the First Amendment right of Black Mississippians to boycott local businesses in protest against segregation and racial inequality." Hauss, Brian. Senior Staff Attorney, ACLU Speech, Privacy, and Technology Project. "It's time to Reaffirm Our First Amendment Right to Boycott." October 20, 2022. <https://www.aclu.org/news/free-speech/its-time-to-reaffirm-our-first-amendment-right-to-boycott>

⁴ *Senate Passes Hate Crimes Amendment Lacking Free Speech and Association Protections*, ACLU, July 17, 2009, http://www.aclu.org/lgbt-rights_hiv-aids/senate-passes-hate-crimes-amendment-lacking-free-speech-and-association-protect.