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## MEMORANDUM

**TO:** The House of Representatives of Pennsylvania

The Senate of Pennsylvania

**FROM:** Andy Hoover, Legislative Director, ACLU of Pennsylvania

**DATE:** October 14, 2014

**RE: OPPOSITION TO HOUSE BILL 2533 (VEREB) AND SENATE BILL 508  
(BAKER)**

This week the House and Senate may consider House Bill 2533 or Senate Bill 508. Both of these bills attempt to shut down public speech by people who are currently or formerly incarcerated by giving a victim, the district attorney, or the Attorney General the power to file a civil action against a person before the speech occurs if the conduct “perpetuates the continuing effect of the crime on the victim.” This is defined as “conduct which causes a temporary or permanent state of mental anguish.” The language of these bills is overbroad and vague and completely undermines the fundamental value of free speech found in the First Amendment of the federal constitution. The American Civil Liberties Union of Pennsylvania opposes both HB 2533 and SB 508. On behalf of the 23,000 members of the ACLU of Pennsylvania, I respectfully urge you to please vote “no” on these bills.

If the House and Senate are interested in crafting good law, these bills will be scuttled. The legislation is certain to face a high constitutional hurdle in light of two key decisions by the United States Supreme Court (“the court”). In 1991, the court overturned a New York law that seized proceeds that inmates received from publications that detailed their crimes and placed the proceeds in an escrow account for crime victims.<sup>1</sup> The court found that the law was based on content discrimination and that it placed a burden on a particular type of speech that it did not place on other speech.

More recently, the court’s ruling in *Snyder v. Phelps*<sup>2</sup> is instructive for this discussion. Albert Snyder sued Fred Phelps of the Westboro Baptist Church for infliction of emotional distress after Phelps and his adherents picketed at the military funeral of Snyder’s son, Matthew, who was killed in Iraq in 2006. The court ruled decisively, 8-1, in Phelps’ favor, finding that the church’s speech was of public interest and, therefore, protected under the First Amendment’s free speech clause.

Supporters of HB 2533/SB 508 are confusing the moral high ground with the legal high ground. Even the most strident defender of free speech would agree that Snyder had the moral high ground. Phelps’ actions at Matthew Snyder’s funeral shocked the conscience. But Phelps had the legal high ground by exercising his free speech rights on public property and without interfering with the funeral.

<sup>1</sup> *Simon and Schuster Inc. v. Members of the New York State Crime Victims Board* (1991) 502 US 105

<sup>2</sup> *Snyder v. Phelps* (2011) 131 US 1207

Victims of crime have existing legal avenues available when they are truly being harassed and abused by an offender. Civil common law allows a person to bring an action against another person for intentional infliction of emotional harm, and state criminal law includes the crime of “harassment,” which criminalizes repeated communication with the intent to harass, annoy, or alarm. The broad swath painted by HB 2533 and SB 508 is wholly unnecessary.

If enacted, this legislation will have a chilling effect on the advocacy efforts on issues of public interest by inmates and former offenders. Many of you have been visited by, held press conferences with, or attended hearings with testimony by former offenders. The Senate Judiciary Committee once held a hearing that featured testimony via video-conferencing by an inmate who is currently incarcerated. The Pennsylvania Prison Society regularly publishes *Graterfriends*, a newspaper that features articles written by inmates. HB 2533 and SB 508 are written so broadly that it is unclear what speech, exactly, is prohibited. If a person talks about the crime for which he was convicted, the criminal justice system, or any unknown thing, he could face civil action brought by a victim, by the district attorney, or by the Attorney General.

All of the advocacy described above could potentially be shut down if one of these bills becomes law.

This legislation undermines Americans’ fundamental right to free speech. If enacted, the only people who will benefit from it will be the lawyers who successfully overturn it in federal court. Please vote “no” on HB 2533 and SB 508.