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To: Judiciary Committee Members

From: Sandra J. Staub, ACLU-CT Legal Director

Written Testimony Opposing Raised Bill No. 456

An Act Concerning the Harassment, Electronic Harassment and Cyberstalking

Good afternoon Senator Coleman, Representative Fox and members of the Judiciary Committee. My name is Sandra Staub. As the Legal Director for the ACLU of Connecticut, I am here to oppose Raised Bill No. 456, An Act Concerning Harassment, Electronic Harassment and Cyberstalking.

In 1796, Thomas Paine published the following statement about George Washington:

> And as to you, Sir, treacherous in private friendship (for so you have been to me, and that in the day of danger) and a hypocrite in public life, the world will be puzzled to decide whether you are an apostate or an impostor; whether you have abandoned good principles, or whether you ever had any.

If I want to annoy someone, say one of you, maybe, or Governor Malloy and cause him substantial embarrassment, I can say here in my testimony the same things Paine said about Washington: that the he is treacherous and a hypocrite in public life and that I can't decide whether he is an apostate or an impostor and whether he has abandoned his good principles, or whether he ever had any. I can say this intending to annoy the Governor, and intending to cause him substantial embarrassment and intending that the Judiciary Committee staff will post my testimony on the Internet, as it always does when it receives timely, written testimony.

And, despite the long-established First Amendment protections for my statements, under this proposed legislation, I could be prosecuted. The only substantial difference between Thomas Paine's statement and mine is that his was not published on the Internet, although if he were writing today, it would be. Therefore, we have the Connecticut legislature proposing to criminalize speech that has long been protected and will and should continue to be protected, regardless of the medium used.

The ACLU of Connecticut is as concerned as anyone with protecting those who are threatened or harassed, regardless of whether someone is victimized in person, by telephone or using the Internet. Case law under the Connecticut and United States Constitutions defines these crimes so as to protect people from true threats and harassment. Criminal laws are already in place to protect people, regardless of the medium for the threats or harassment. This bill does nothing new besides create a new and powerful way to chill a substantial amount of speech protected by the First Amendment. Specifically, subsections (2) through (5) of Section 2 are unconstitutionally vague and overbroad on their face.

"If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City or Rockford, 408 U.S. 104, 108-10 (1972). Under the proposed bill, who defines what constitutes "substantial embarrassment or humiliation?" Or "substantial interference with academic performance?" A middle schooler? A governor? The police officer who takes the complaint? The prosecutor? What if a truthful statement of fact posted on the Internet causes the embarrassment? There is no satisfactory answer to these questions and the bill does not even try to answer them. It is unconstitutionally vague.

The Supreme Court in 1971 struck down an ordinance that would bar conduct that would "annoy" police or passersby, holding the law void for vagueness in that "[c]onduct that annoys some people does not annoy others." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, (1971). Section 2, subsections 2 thorough 5 of the proposed bill present the same if not more of a vagueness problem. Even with its liberal use of the modifiers "substantially" and "substantial," the bill does nothing to clarify, for instance, what constitutes "interfering with[a] person's ...ability to benefit from any academic or community-based services." Under this language, a person who posts a statement on Facebook that embarrasses another may be subject to at least two counts of violating the proposed statute if the person they wrote about complains to law enforcement that she was too upset by the post to do her homework.

"Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). The proposed bill would limit a substantial amount of protected speech *without* that requisite degree of specificity, and is therefore fatally vague.

This bill is facially overbroad as well as unconstitutionally vague. The Supreme Court has explained that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma* 413 U.S. 601, 612 (1973). The fact that the bill requires scienter, or the "intent to harass, annoy, or alarm," does nothing to fix the bill: if the speech is otherwise protected, the speaker is entitled to annoy, harass

or alarm: "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

This bill's expansive definition of harassment attempts to prohibit all kinds of protected speech. If this bill becomes law, a speaker who makes a statement intending to annoy another person and who causes substantial embarrassment to that other person by electronically posting the statement will be subject to criminal prosecution. Whether on the Internet, on the radio or with in-person heckling, our Constitution protects our right to be annoying and to cause embarrassment to others.

Our legal system already provides for intervention for true threats and harassment, as those crimes have been defined. Criminal laws forbid speech that harasses or threatens imminent bodily harm. In addition, injunctions and damages are available in the civil context to address defamatory speech. The fact that a perpetrator of threats or harassment or of defamation may use the Internet does not remove him or her from the reach of existing laws; if anything, the evidence from the Internet makes these crimes and claims easier to prosecute. The state does not need this law to address criminalized conduct simply because it takes place on the Internet.