



MEMORANDUM

TO: The Pennsylvania House

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: May 7, 2024

RE: OPPOSITION TO HB 2017 P.N. 3072 (MUNROE)

Bill summary: [HB 2017 \(PN 3072\)](#) would amend [Title 50](#) (Mental Health) to add new requirements for social media platforms accessible to minors. The bill would:

- Require social media platforms to verify the age of all users.
- Require a minor under 16 years old to have the express consent of a parent or legal guardian to open an account. The Attorney General can enforce this provision via civil penalties.
- Allow a parent or legal guardian the ability to view the privacy settings of their minor's account.
- Prohibit social media platforms from collecting certain data from a minor user. The Attorney General can enforce this provision via civil penalties.
- Require social media platforms to post a "Hateful Conduct Prohibited" policy explaining how the platform will respond to online speech that could "vilify, humiliate, or incite violence" against a protected class; create a mechanism for visitors to submit complaints about "hateful" content; and mandate that platforms respond directly to complaints. The Attorney General can enforce this provision via investigations, subpoenas, and daily fines of \$1,000 per violation.

The ACLU-PA applauds the bill sponsor for amending [HB 2017 PN 2746](#) (which the [ACLU-PA also opposed](#)). The amendments vastly improve the bill by striking some of its most intrusive and unconstitutional provisions, specifically:

- **"Notice of Flagged Content":** PN 3072 strikes the invasive chat monitoring section, which would have required platforms to monitor minors' chats and then inform parents if their child engaged in a chat with one or more people that involved "flagged content" (as defined by the platform).
- **Subchapter E § 1141. Unlawful Activity:** PN 3072 strikes the unconstitutional censorship section ("Unlawful Activity"), which would have required platforms to restrict minors' access to content that is "detrimental to the physical health, mental health or the well-being of a minor or that creates a reasonable likelihood of bodily injury or death to the minor."
- **Under § 1123. Duties:** PN 3072 removes two options to verify parental consent—confirmation via video conference call and verification via government-issued ID, both fraught with privacy concerns.
- **Under § 1132. Protections:** PN 3072 adds additional privacy protections for minors under 18 that prohibit (1) geolocation tracking, (2) the use of "dark patterns", and (3) unknown adult contact. Similar / identical language can be found in [VT S.289 \(2024\)](#) and [CT SB3 \(2023\)](#), among others.

Unfortunately, [PN 3072](#) replaces one unconstitutional provision with another—it eliminates the "flagged content" section and adds a new, also unconstitutional, provision titled "Hateful Conduct Prohibited."¹ The "Hateful Conduct Prohibited" section is **facially and as-applied unconstitutional** for the following reasons:

- HB 2017 would violate platforms' First Amendment **right to editorial judgment** and the **right to publish** protected expression, including offensive or unpopular speech.

¹ The "Hateful Conduct" section is taken nearly verbatim from a [NY state bill](#) enacted, then enjoined, in 2022 (see [Volokh v. James](#)).

- HB 2017 would be unconstitutional under the First Amendment because it constitutes a **content-based** and **viewpoint-based regulation** of speech.
- HB 2017 would be unconstitutional under the First Amendment because it **compels speech**, requiring platforms to endorse the state’s message and respond to reports of state-defined hate speech.
- HB 2017 would be unconstitutional under the First Amendment because it is **overbroad**, as it targets a wide-range of protected expression.
- HB 2017 would be unconstitutional under the First and Fourteenth Amendments for being **impermissibly vague** because its operative terms are unclear and undefined.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 2017.

HB 2017 attempts to evade First Amendment protections by referring to speech as “conduct”.

The First Amendment prohibits the government from censoring, compelling, or otherwise abridging expression. To evade constitutional scrutiny, HB 2017 purports to regulate “hateful conduct,” but its definition of conduct—“the use of a social media network to vilify, humiliate, or incite violence against a group or a class of persons”—only includes speech. Of course it does, because the only way to “use” social media is to create, share, or consume speech, or for platforms to exercise editorial discretion over their content.

First Amendment protection of speech does not vanish when the government renames it “conduct.”

HB 2017 would violate platforms’ First Amendment right to editorial judgment and the right to publish protected expression, including offensive or unpopular speech.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications, including whether and how to publish content written by others. Social media and other interactive websites have a constitutional right to adopt, define, and implement their own editorial policies without interference from the state. They have the right to curate speech published on their sites, regardless of whether they curate a lot or a little, and regardless of whether their editorial philosophy is readily discernible or consistently applied.

HB 2017 flouts this well-established First Amendment protection of publishers’ editorial judgment. The bill is an effort to distort private entities’ editorial decisions by forcibly exposing, scrutinizing, pressuring, and punishing editorial decisions the government doesn’t like. On its face, HB 2017’s “Hateful Conduct Prohibited” section is not only a *compelled-speech provision*, but by targeting and changing editorial decisions, it also functions as *content-based speech regulation*.

HB 2017 would unconstitutionally violate the editorial freedom that all publishers, print and online alike, enjoy, burdening their right to publish all kinds of protected speech through explicit threats of Attorney General investigations, subpoenas, and daily fines of \$1,000 per violation.

This scheme—targeting legal speech the government itself cannot directly outlaw—attempts an end-run around the First Amendment. As such, HB 2017 amounts to unconstitutional coercion.

HB 2017 would violate the First Amendment because it constitutes a content-based and viewpoint-based regulation of speech.

The First Amendment protects a wide variety of “humiliating” or “vilifying” speech, including about people based on their sex, race, religion, or other protected category. Despite settled precedent protecting such speech, HB 2017 would target much of this expression, mislabeling it “hateful conduct”.

HB 2017 would constitute content discrimination because it singles out speech directed at or pertaining to groups of people in specified protected class statuses. Specifically, it is directed against hate speech, not against other forms of speech. And it pertains only to hate speech directed against people based on certain categories—a person’s race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity, and gender expression. Hate speech directed against any other class of persons—people with substance use disorders, criminal records, or any other category—is permitted under HB 2017.

HB 2017 would constitute viewpoint discrimination because it applies only to speech perceived to “vilify, humiliate, or incite violence against a group or class of persons” and not to speech that, for instance, is perceived to affirm or inspire.

HB 2017 would also place unconstitutional content- and viewpoint-based burdens on protected speech through the ever-present threat of Attorney General investigations or civil penalties for failing to respond to complaints about viewpoints the state deems “hateful”. It also places content- and viewpoint-based burdens on speech by requiring platforms to bear the cost of developing and publishing a hate speech policy, creating a reporting mechanism, and managing responses to complaints.

HB 2017 would therefore target online speech in a presumptively unconstitutional content- and viewpoint-based manner.

HB 2017 would violate the First Amendment because it compels speech, requiring platforms to endorse the state’s message and respond to reports of state-defined hate speech.

HB 2017 seeks to defy the First Amendment’s prohibition against compelled speech by demanding, under threat of punishment, that platforms endorse the state’s message of disdain for “hate speech” by explaining to those who complain how they will “address” and “resolve” it.

HB 2017 would compel platforms to fulfill three requirements regarding “prohibited” hate speech:

1. Social media platforms would be required to develop and publish a policy for addressing speech on their online services that *some may perceive* to “vilify, humiliate, or incite violence against a group or class of persons” based on race, color, religion, or other protected category, describing how they “will respond [to] and address” visitor complaints of hate speech.
2. Social media platforms would be required to create a “clear and easily accessible mechanism” for visitors to report instances of perceived hate speech..
3. Social media platforms would be required to “provide a direct response to any individual” complaining about perceived state-defined hate speech, “informing them of how the matter is being resolved.”

Forcing platforms to (1) develop and publish a policy singling out state-defined hate speech, (2) create a mechanism to report instances of perceived hate speech,, and (3) “provide a direct response” describing “how the matter is being handled”, would **compel platforms both to endorse the state’s message and to speak to complainants.**

At a minimum, these requirements would compel platforms to tacitly endorse the position that state-defined hate speech is particularly worthy of a designated policy and reporting mechanism, and that complaints about such speech deserve to be “addressed” and “resolved” by a “direct response”.

HB 2017 would violate the First Amendment because it is overbroad, as it targets a wide-range of protected expression.

The First Amendment [overbreadth doctrine](#) holds that if a statute is so broadly written that it deters protected expression, then it can be struck down because of its chilling effect on free speech.²

HB 2017 is overbroad because it would pressure platforms to chill, prohibit, or remove a substantial amount of constitutionally protected online speech. HB 2017 would affect all manner of comedy, art, journalism, historical documentation, and commentary on important matters of public concern just because someone, somewhere perceives it to “vilify” or “humiliate,” despite the fact that most, if not all, offensive speech is constitutionally protected. Writers, bloggers, independent journalists, scholars, and ordinary citizens would refrain from discussing many of the most controversial and important issues facing our democracy to avoid being reported for engaging in “hateful conduct.”

HB 2017 would force platforms to address vast swaths of protected political, social, scholarly, and artistic discussion and debate on all manner of topics, sweeping in a wide variety of protected expression presumably to target a small, perhaps non-existent, sliver of unprotected speech—precisely what the overbreadth doctrine is meant to protect against.

HB 2017 would violate the First and Fourteenth Amendments for being impermissibly vague because its operative terms are unclear and undefined.

In the First Amendment context, the constitutional [doctrine of vagueness](#) has a special significance when applied to governmental restrictions of speech—vague restrictions may cause people to self-censor, thereby deterring constitutionally protected, as well as unprotected, speech.³ In the Fourteenth Amendment context, statutes may be [void for vagueness](#) for violating due process if they “fail to give adequate guidance to those who would be law-abiding [or fail] to advise defendants of the nature of the offense with which they are charged”.⁴

HB 2017 would be unconstitutionally vague for two reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, and (2) it would authorize or even encourage arbitrary and discriminatory enforcement.

HB 2017 uses broad and ambiguous terms. Its most important terms, such as “vilify,” “humiliate,” “incite,” “clear and concise,” among others, do not have an objective plain meaning. Vague terms chill speech because speakers will have difficulty determining whether their speech falls on the permissible or impermissible side of the (unclear) line the law draws. HB 2017’s vague definition of “hateful conduct” would certainly invite self-censorship because it is not clear what terms like ‘vilify’ and ‘humiliate’ mean.

Finally, the vagueness of the bill’s operative terms affords the Attorney General unbound discretion to adopt an expansive interpretation of these terms. Platforms will have no way of knowing whether the law will be taken to an extreme and must operate with the expectation that it will.

HB 2017’s vagueness would unconstitutionally incentivize companies to chill speech on their platforms in order to avoid investigation and civil penalties.

For these reasons, we urge you to oppose House Bill 2017.

² See Cong. Rsch. Serv., [Amdt1.7.2.1 The Overbreadth Doctrine, Statutory Language, and Free Speech](#), Constitution Annotated. Also see David L. Hudson, Jr., [Overbreadth Overview](#), FIRE, February 15, 2017.

³ Cong. Rsch. Serv., [Amdt1.7.2.2 Vagueness, Statutory Language, and Free Speech](#), Constitution Annotated.

⁴ Cong. Rsch. Serv., [Amdt14.S1.7.3 Void for Vagueness](#), Constitution Annotated.