Testimony on H.818 Stalking Bill
House Committee on Judiciary
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Thank you for the opportunity to offer support for this legislation on behalf of the Center and the State's Attorney Victim Advocates who work directly with stalking victims.

One of the difficulties the Center encountered when gathering data about this issue from State's Attorney Victim Advocates is that *you don't know what you don't know*. If only one in four civil protection orders for stalking and sexual assault are granted in Vermont, even fewer cases ever make it to the prosecutor's office for civil protection order violations. If the definition of criminal stalking is too complicated or fails to address common misunderstandings about what constitutes stalking behavior, law enforcement officers don't refer cases for prosecution. According to a 1999 national study, 54% of femicide victims reported stalking to police before they were killed by their stalkers.[1] Stalking cases that do reach the state's attorney's office often come with lengthy histories of stalking victimization, denied motions for civil protection orders, and discouraging conversations with law enforcement—with escalating behavior.

H.818 offers an opportunity help law enforcement, prosecutors, and judges stop stalking behavior before it escalates to a more harmful, or even fatal, crime.

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1. Judith McFarlane et al., "Stalking and Intimate Partner Femicide," *Homicide Studies* 3, no. 4 (1999).

First, H. 818 eliminates the "no legitimate purpose" element required under the current law.

- "No legitimate purpose" places an extra burden on prosecutors to prove a negative. This element is also confusing; law enforcement officers, judges, and juries are required to square the "no legitimate purpose" element with the objective, reasonable person standard. If the behavior would cause a reasonable person in the victim's circumstances to fear for his or her safety, the inquiry should end.
- "No legitimate purpose" is not required to immunize the statute from constitutional challenges premised upon First Amendment free speech or the Fifth and Fourteenth Amendment void-for-vagueness doctrine. Other Vermont criminal statutes, such as disorderly conduct (13 V.S.A. § 1026) do not require the prosecution to prove beyond a reasonable doubt that the defendant had "no legitimate purpose" for engaging in threatening behavior.
- In *State v. Albarelli*, 2011 VT 24, the Vermont Supreme Court held in a disorderly conduct case that so long as the speech targets a specific individual and could constitute an overt or implied threat to a reasonable person under the circumstances, the First Amendment is not implicated. *Albarelli* is codified in the new element requiring that the course of conduct be *"directed at a specific person*."
- *Albarelli* and predecessor cases also underscore the difference between **facial** and **as-applied** constitutional challenges. Just because certain conduct that fits within the elements is constitutionally protected does not necessarily mean that the statute is unconstitutional on its face.

Second, H. 818 allows for early intervention by expanding the scope of the reasonable person standard.

- Instead of requiring conduct that "would cause a reasonable person to fear for his or her ***physical*** safety," the proposal expands the definition to conduct that *"would cause a reasonable person to fear for his or her* ***safety or the safety of another****".*
- The specific type of threat posed by the offender—whether physical or sexual violence—does not change the dangerousness of the behavior. Causing victims to fear an unknown threat can result in greater fear under some circumstances.

- A California court held in *In re Joseph G.*, 7 Cal. App. 3d 695, 703 (1970) that threat to "safety" alone is not unconstitutionally vague.
- Engaging in behavior that would cause a victim to fear for the safety of others—such as causing a mother to fear for the safety of her child—may, in certain, contexts be construed as a part of a course of conduct directed at the victim.

Third, H.818 further defines "emotional distress" to avoid unnecessary inquiry into the victim's mental state.

- By clarifying that "emotional distress" need not require actual medical treatment or counseling, the statute leaves no doubt that whether or not a victim sought mental health treatment as a result of the crime is not relevant to the proceeding.

Fourth, H. 818 eliminates archaic terminology and brings clarity and simplicity to the statute.

- The proposal would eliminate the "lying in wait" prong from the course of conduct element. The definition of "lying in wait" is not readily ascertainable on its face and perpetuates stereotypes about how stalking crimes happen.
- Instead, the proposed definition of "course of conduct" encapsulates the original intent of "following, lying in wait for, or harassing" by providing one streamlined definition. The language also covers the development of new methods of electronic communication, including any "method, device, or means."

The Center also requests one minor amendment:

- The definition of "course of conduct" (Sec. 2, pg. 2, ln. 12 and Sec. 4, pg. 15, ln. 7) should include: "two or more acts <u>over a period of time, however short,</u> "
- Some judges have interpreted a prolonged series of incidents spread over one day to be a single "act" and not the "two or more acts" required under the statute.

Thank you again for considering these remarks and for taking up this important issue.