February 16, 2016

TO:	Rep. Maxine Grad, Chair
	Rep. Willem Jewett, Vice-Chair
	House Judiciary Committee
FROM:	Michele Olvera, Supervising Attorney
RE:	H.818- Stalking

Members of the House Judiciary Committee, I thank you for the opportunity to speak to you about H.818 – revisions to the stalking laws. I will start by saying that, as others have testified, stalking is a very serious crime; it is dangerous and traumatizing.

I would like to respond to the concerns presented by Judge Toor in her memo presented on February 12th related to the impact of the proposed stalking and sexual assault restraining orders on our court system. The Network agrees with Judge Toor in that stalking behaviors create a real risk of danger and justifiable fear, and are appropriately addressed by the courts. We also concur with Judge Toor that the statute is not perfect and it is hard to follow. These are the very reasons we have sought to modify the stalking statute so that the courts are better able to meet the needs of victims seeking protections. We believe the purpose of our legal system is to ensure justice and protection for all individuals.

Frivolous Petitions

Judge Toor was concerned about frivolous petitions for protection orders. One example included ex-boyfriends and girlfriends "badmouthing" each other on social media. Individuals may receive a restraining order if they prove by a preponderance of evidence that they have been subjected to a "course of conduct" that reasonably makes them fear for their safety or that of another person or they suffer substantial emotional distress. This is a very high standard to prove. If they are successful, then what they have been subjected to is not properly characterized as "bad mouthing" – it is stalking.

Substantial Emotional Distress

The proposed stalking law would define "stalking" as a "means to engage in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of another or would cause a reasonable person substantial emotional distress."

Judge Toor voiced a concern that orders could be granted against stalking just because a person was upset, regardless of whether they were in real danger. "Upset" is far different than "substantial emotional distress." I was unable to find a definition for "substantial emotional

distress" in Vermont case law; however, I did find a North Carolina Court of Appeals case, *Ramesy v. Harman*, that sought to define substantial emotional distress (there was no NC statutory definition). The Court found that "substantial" is defined as 'considerable in value, degree, amount or extent. Black's Law Dictionary defines emotional distress as 'a highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct." Thus, "substantial emotional distress" is something that is far beyond a teenage girl who is called "fat" with some expletives after it.

Trivial Behavior

Judge Toor expressed some concern that someone could get a restraining order simply because someone was observing them. This is not the case. The person must show a "course of conduct", meaning they have to do something more than once – and it must cause a reasonable person fear for his or her safety or the safety of another, or cause a reasonable person substantial emotional distress. A judge would not find that observation alone, without the cause of fear or emotional distress, could meet the requirements of the statute.

A young person who gets her hat removed and tossed in the air on the way home from school cannot get a stalking order. The person would not be able to show reasonable fear. Neither could a Bernie supporter get a restraining order because their favorite candidate was insulted by Trump. Fear or emotional distress would not be reasonable.

Constitutional Challenges to Stalking Laws

Defendants have argued that stalking laws are unconstitutionally vague. The essential test for vagueness was set out by the U.S. Supreme Court in 1926. A Government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Whether a given term is unconstitutionally vague is left to the interpretation of each state's courts.
The Supreme Court of Kansas found that state's stalking statute unconstitutionally vague because it used the terms "alarms," "annoys," and "harasses" without defining them or using an objective standard to measure the prohibited conduct. "In the absence of an objective standard, the terms . . . subject the defendant to the particular sensibilities of the individual…" Kansas has since amended its statute, and the amended statute has been ruled constitutional, because the court specifically found that the revised law included an objective standard of a reasonable person and defined the specific terms in the statute. Similarly, Vermont proposed H.818 would meet these standards as well.

Prohibiting constitutionally protected behavior has been upheld in the courts when under the circumstances the behavior was dangerous. 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. Another example that is often cited is shouting "fire!" in a crowded theater.

<u>Intentions of the Stalker</u>
Originally, most stalking statutes were "specific intent" crimes; they required proof that the stalker intended to cause the victim to fear death or personal injury or to have some other particular reaction to the stalker's actions. The subjective intent of a person, however, can be difficult to prove. Prosecutors had to litigate what was in the defendant's mind when he or she engaged in the stalking behavior. As a result, many states revised their statutes to make stalking a "general intent" crime – the perpetrator intended to engage in the conduct that caused a reasonable person fear or substantial emotional distress.

The "reasonable" standard was recommended in the NIJ Model Anti-Stalking Code project. At least two courts have discussed the model's language in finding that general intent is sufficient. *Elonis v. United States* discussed the importance of statutory clarity on what level of intent is required. Furthermore, in *Staples v. United States*, the court rested its decision on the statutory absence of any particular intent, therefore indicating that an express statement by Congress as to whether or not intent was required would have been sufficient.

As Legislative Counsel indicated to this Committee on February 12, 2016, the current draft of H.818 is "consistent with what the courts have said about the threat doctrine – an intent to threaten is not required." However, given the complications caused by legislative lack of clarity with regard to intent as indicated in *Elonis* and *Staples*, it is necessary to clearly state in H.818 that no intent is required in H.818.

<u>"No Legitimate Purpose":</u>
It is an untenable requirement that a prosecutor prove a negative. This remains one of the confusing points of the current Vermont statute. In fact, the Oregon Court of Appeals, did invalidate that state's stalking law on the grounds that the term "legitimate purpose" was unconstitutionally vague. The court found that the statute did not tell a person of ordinary intelligence what was meant by the term "legitimate purpose"; therefore, the statute gave no warning as to what conduct must be avoided.

<u>Sexual Assault – Lewd and Lascivious</u>
In Vermont's jury instructions, an offender can be charged with lewd and lascivious conduct if his/her conduct was lustful or indecent, or the sexual behavior was open and gross, meaning that the alleged act was committed within the view of at least one non-consenting member of the public. Jurors are further instructed to apply their sense of the community standards of sexual decency, propriety, and morality when weighing the commission of the crime.

Judge Toor expressed concern that such an addition would amount to "fraternity parties [becoming] a whole new court docket. A recent study of fraternity members and student athletes revealed that they are more likely than any other men on campus to commit a sexual assault (Murnen & Kohlman, 2007).[i] Fisher, Cullen and Turner (2000) found that of the rapes reported by students surveyed in their study, 10.3 percent occurred in a fraternity house.[ii] Dismissing such behavior simply because it might occur at a fraternity party suggests a willingness to minimize the serious nature of such an offense.

Minor Defendants

Judge Toor indicates that minors cannot be defendants in Relief from Abuse orders. However, minors, represented by a parent or guardian have had orders issued against them in Vermont. For example, under Rule 55 (b) (1) of the Vermont rules of Civil Procedure a default judgement may be issued against a minor if the minor is represented by a guardian, conservator, or other such representative.

Model Policy Proposal:

The proposed revisions to our stalking statute in H.818 are drawn from the National Center for Victims of Crime (which houses the national Stalking Resource Center) "Model Stalking Code: Responding to the New Realities of Stalking (2007)". As the only national training and technical assistance center focused solely on stalking, the Stalking Resource Center has provided training to tens of thousands of victim service providers and criminal justice practitioners throughout the United States and has fostered innovations in programs for stalking victims and practitioners who support them. A copy of the model policy is posted on the committee's website for your review.

Thank you for your time and consideration.

---

[i] Murnen, S. & Kohlman, M. (2007). Athletic participation, fraternity membership, and sexual aggression among college men: A meta-analytic review. *Sex Roles, 57*, 145-157.

[ii] Fisher, B., Cullen, F. & Turner, M. (2000). *The Sexual Victimization of College Women*. Washington, DC: U.S. Department of Justice.