

To: Vermont Senate Committee on Judiciary
From: Harrison Stark, Staff Attorney, ACLU of Vermont
Re: S.265
Date: 1/28/2022

Thank you for the opportunity to submit testimony on S.265. The American Civil Liberties Union of Vermont shares the Committee's profound concern over growing threats to public officials. However, while protecting electoral workers is unquestionably a worthy goal, we are concerned that S.265 as-introduced risks chilling Vermonters' constitutionally protected speech.



PO Box 277
Montpelier, VT 05601
(802) 223-6304
aclvt.org

James Duff Lyall
Executive Director

Falko Schilling
Advocacy Director

As you know, the First Amendment protects “uninhibited, robust, and wide-open” debate, including communication that may be “vituperative, abusive, and inexact.” *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). This extends to “political hyperbole,” which “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 707-08. And while the First Amendment does not protect “true threats,” *id.*, the U.S. Supreme Court has defined true threats as “serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” made with the “intent of placing the victim in fear of bodily harm or death,” *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (plurality opinion).

We are concerned that, as drafted, S.265's reference to “a group of persons” or “a person in the group of persons” is superfluous and risks chilling certain forms of political hyperbole. Both phrases are vague and, particularly in our present era of robust online speech, we are concerned that those charged with enforcing S.265's new reference to “a group of persons” could apply the statute overbroadly, criminalizing speech that is merely critical of certain groups. Moreover, we read Section 1702's existing prohibition on “threaten[ing] another person” to already criminalize bona fide threats against both singular individuals and multiple persons. Adding these phrases is therefore unnecessary to prohibit true threats directed at more than one individual. To avoid introducing confusion into this sensitive area and to leave sufficient breathing room for valid First Amendment expression, we would therefore urge the Committee to remove the bill's reference to “a group of persons” or “a person in the group of persons.”

In the event the Committee chooses to retain this language, we urge the Committee to amend S.265 to reference “a **particular** group of persons” and “a **particular** person in the group of persons.” That modifier would more closely align with the Supreme Court's instruction that the First Amendment limits any prohibition to genuinely “serious expression[s] of an intent to commit an act of unlawful violence to a *particular* individual or group of individuals.” *Black*, 538 U.S. at 359 (emphasis added). However, as explained above, we believe these additions to be unnecessary.

The American Civil Liberties Union of Vermont has no constitutional objections to S.265's additional amendments, including prohibiting threats to harm third persons, nor do we see a constitutional barrier to removing Section (f)'s

affirmative defense. We simply note, however, that we do not believe that additional legislation—whether in the form of S.265 or any other bill—is necessary to protect Vermont’s public servants. We believe that 13 V.S.A. § 1702 already provides the necessary statutory authority for law enforcement to prosecute bona fide threats to election workers. Indeed, although many Vermonters appeared alarmed when officials declined to prosecute the threats to officials recently reported by Reuters, nothing in S.265 remedies the barriers cited by law enforcement when declining to press charges. In our view, S.265 is therefore unnecessary. Should the Committee move forward with S.265, however, we urge it to address the language discussed above.



Thank you for the opportunity to submit testimony on this important issue. If we can provide any further information, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Harrison Stark", written over a light blue horizontal line.

Harrison Stark
Staff Attorney
ACLU Foundation of Vermont

PO Box 277
Montpelier, VT 05601
(802) 223-6304
acluvt.org

James Duff Lyall
Executive Director

Falko Schilling
Advocacy Director