



TESTIMONY OF
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NEUTRAL ON SB 128
KANSAS SENATE JUDICIARY COMMITTEE

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- WRITTEN TESTIMONY ONLY -

The American Civil Liberties Union (ACLU) of Kansas is a non-partisan, non-political membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas. We work to preserve and strengthen our constitutional rights and freedoms through policy advocacy, litigation, and education. We proudly serve over 10,000 supporters in Kansas and represent more than 1 million supporters nationwide.

The ACLU of Kansas is neutral on SB 128, which increases the penalties when individuals are convicted of committing hate crimes. The ACLU has a long history of supporting civil rights legislation, including legislation responding to criminal violations of civil rights. At the same time, no other organization in the country has a longer and more consistent record in protecting the freedoms embodied in the First Amendment to the Constitution. The ACLU has a long record of support for stronger protection of both free speech and civil rights. Those positions are not inconsistent. In fact, vigilant protection of free speech rights historically has opened the doors to effective advocacy for expanded civil rights protections.

Although we strongly support the concept of SB 128—increased penalties for hate crimes—we cannot support the bill in its current form. We are neutral on SB 128 because:

- **We believe that civil rights violations should be criminally punished and that stronger penalties are warranted.** SB 128 enhances the penalties for hate crimes, that is, crimes where a person's civil rights are violated at the same time. SB 128 uses the existing Kansas statute's definition of these crimes as ones "motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim or the crime was motivated by the offender's belief or perception" about those characteristics "regardless of whether the offender's belief or perception was correct." Harsher penalties for hate crimes are appropriate because no person should ever be targeted for violence because of characteristics that are part of their identity. When hate crimes are not punished, an environment of fear, harassment, and intimidation are created, especially for populations that have historically been and continue to be vulnerable and marginalized. It is the responsibility of government—and, indeed, all citizens—to counter the creation of such an atmosphere and take proactive steps to protect marginalized and vulnerable people.

Particularly at a time when hate crimes appear to be on the rise nationwide, SB 128's strengthening of the existing law is both appropriate and vitally necessary.

- **The bill inexcusably omits one particularly vulnerable group—transgender Kansans—from protection.** Although a number of protected categories are included in SB 128, the bill inexcusably offers no protection to individuals who are targeted because of their gender identity. Targeted violence against transgender Americans has risen dramatically in recent years. Indeed, according to the Human Rights Campaign, 2015 and 2016 each set tragic new records for fatalities among transgender Americans targeted because of their gender identity. When this violence is coupled with the routine harassment to which transgender Kansans are subjected—which in turn leads to heartbreakingly high rates of suicide—it is clear that gender identity is a category in need of protection under the statute. If Kansas truly intends to ensure that no one is targeted for violence because of who they are, if we wish to make our state a warm and welcoming place, and if we are committed to creating an atmosphere free of harassment and intimidation, then gender identity must be included in the hate crimes statute.
- **The statute should include robust protections for constitutionally protected speech and association.** Since the first federal hate crimes legislation was first introduced in 1997, the ACLU has called for bills of this kind to incorporate language that blocks the introduction of evidence of speech and association not specifically related to a crime. Unless such language is included, bills will have a dangerous chilling effect on constitutionally protected speech. Such language provides guidance to prosecutors and judges about which evidence is admissible, reduces the risk of a mistrial being declared because of improperly admitted evidence, and reduces the constitutional scrutiny of the bill. Many hate crimes statutes now include this vital language.

Clear rules are needed that govern the evidence admissible under hate crimes prosecutions. Most importantly, the state must be able to prove that a defendant's speech is linked to specific criminal behavior. Past associations or speech that are not related to a specific criminal incident should not be admitted as substantive evidence. To allow the admission of associations or speech that are unrelated to a specific incident is to create a chilling effect on association or speech that are constitutionally-protected, and to raise the specter of politically inspired prosecution. In order to offer more robust protection for constitutionally-protected speech and association, including speech and associations whose content may be reprehensible to some, we suggest the addition of language such as:

Evidence of expression or association of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing the impeachment of a witness.

Despite the fact that we support the concept of stronger penalties for hate crimes, the weaknesses in and omissions from SB 128 compel us to take a neutral position on it.