


Oppose HB 4198 (Flider)



Criminalization of Protected Electronic Speech

HB 4198 (Representative Flider) attempts to criminalize the civil tort of “Intentional Infliction of Emotional Distress” (IIED). This approach represents a substantial departure from traditional norms of criminal law by regulating a broad swath of daily e-mail traffic and thereby impermissibly infringing on Free Speech.

HB 4198, as amended, defines criminal electronic harassment as:

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- [1] Electronically communicating directly with another person;
 - [2] With the intent to knowingly intimidate or cause emotional distress to another person or with the intent that physical harm would result from the communication; and
 - [3] When the person initiating the communication is 18 years of age or older and the party communicated with is under 18 years of age.

Yet, the tort of IIED, upheld under Illinois law, involves:

- [1] Truly ***extreme and outrageous conduct***;
- [2] The actor “either intended that his conduct inflict ***severe emotional distress***, or knew that there was a ***high probability*** that the conduct would cause severe emotional distress;” and
- [3] The “conduct, in fact, ***caused severe emotional distress***.”

Feltmeier v. Feltmeier, 207 Ill.2d 263, 268-69 (2003) (emphasis added).

In short, HB 4198’s substantial departure from the tort of IIED (i.e., wholly lacking prongs 1 and 3 and deviating from prong 2’s severity and high probability requirements) make it constitutionally flawed:

- **Due Process Concern: “Void for Vagueness”**
Criminal statutes are often unconstitutional for being so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” Here, prosecutors can reasonably disagree about whether specific online speech constitutes “an intent to knowingly intimidate or cause emotional distress.” Due process requires that a law be reasonably definite as to what conduct/speech is covered.
- **First Amendment Concern: Overbroad & Abridges Protected Speech**
To be constitutionally valid, criminalization of speech must (1) further a compelling state interest; and (2) be narrowly tailored to achieve that interest. Here, the lack of limiting concepts like severity and high probability means HB 4198 is not the least restrictive means to further the articulated interest in stopping online harassment. In other words, this passage is overbroad and covers protected speech, making this proposed enactment unconstitutional should it become law.

Moreover, HB 4198 is a rushed attempt to address the serious issue of online harassment:

- **A Rush Toward Bad Public Policy**
Speech on the Internet and through other electronic means is an emerging and critical realm that must be given the highest levels of First Amendment deference and protection. HB 4198 appears to be modeled loosely on legislation from Missouri to deter the online harassment that preceded the tragic suicide of 13 year old Megan Meier. The Missouri legislation, however, comes from a deliberative task force review of the issue.

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