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MEMORANDUM

TO: HOUSE OF REPRESENTATIVES OF PENNSYLVANIA

FROM: ANDY HOOVER, LEGISLATIVE ASSISTANT

DATE: JUNE 27, 2008

RE: OPPOSITION TO A07476 TO HB 2289 (MANN AMENDMENT ON GANGS)

Amendment A07476 on House Bill 2289 would create a criminal offense of “criminal gang activity.” The amendment is unrelated to the bill on which it has been filed, which deals with vandalism of a veteran’s grave. As written, A07476 poses numerous constitutional problems, including violations of freedom of speech, expression, and assembly. The amendment criminalizes the clothes people wear and the neighborhoods where they live. The American Civil Liberties Union of Pennsylvania opposes A07476, and on behalf of the 19,000 members of the ACLU of Pennsylvania, I urge you to vote against this amendment.

The broad definition of “criminal gang member” in the Mann amendment has the potential to dramatically increase unwarranted prosecution of children and youth, especially low-income youth and youth of color. Given the natural tendency for children and youth to associate in peer groups- a tendency child development experts view as essential for fostering resilience and social-emotional competence- the breadth and vagueness of a poorly defined “gang” is very problematic.

The ACLU does not deny the existence of gangs and the problems they can cause. When gang members break the law, they should be punished for the crimes they commit. There are already statutes on the books for prosecuting those who commit crimes like robbery, assault, rape, homicide, and conspiracy.

In this amendment, a person is considered a criminal gang member if he fulfills two of seven indicia. These include where the person lives or spends time and the clothing he wears, “identification as a criminal gang member by physical evidence **such as photographs** or other documentation” (my bold), and “identification as a gang member by a Pennsylvania law enforcement agency.”

The criminalization of how people dress, where they live, with whom they associate, and how they express themselves poses serious constitutional concerns. A person’s residence, wardrobe, and circle of friends are all part of everyday living for most Pennsylvanians. These alleged characteristics of a “criminal gang member” are broad and vague.

Basing identification on dress is unconstitutional. Not only do we have a liberty interest in our personal appearance, *Kelly v. Johnson*, 426 U.S. 238, but bans of “gang” clothes have consistently been held to give authorities too much discretion. *See, e.g., Stephenson v. Davenport*, 110 F.3d at 1309 (8th Cir. 1997).

Because of this broad criteria, the bill has the potential to be used disproportionately against young African-American and Latino men who are not gang members. Related to this, in December, 2007, *The Philadelphia Inquirer* ran a series of articles on tough tactics used against largely minority communities by police officers in southeastern PA. The report indicated that innocent African-Americans were harassed by police overzealously using nuisance laws like disorderly conduct and loitering. A copy of the first article in that series is available at <http://www.philly.com/inquirer/special/12418176.html>.

The ACLU of PA believes that, if enacted, the Mann amendment could be abused in much the same manner.

Charging a person as a “criminal gang member” in part because the person has been identified as such by a Pennsylvania law enforcement agency is a self-fulfilling prophecy. Our system of jurisprudence does not allow law enforcement to charge a person as a criminal simply because they say so. This provision allows the authorities to identify the person as a gang member with very little check on that authority.

The United States Supreme Court has addressed this issue. In 1999 in *Chicago v. Morales*, the Court struck down an anti-gang ordinance in the city of Chicago. This ordinance allowed law enforcement to charge people as gang members if they did not disperse upon being ordered to do so by police. The Court found this was a violation of the Fourteenth Amendment.

The Mann amendment does not require police to ask people to disperse. It simply allows the admittance of photographs as physical evidence to determine that a person is a gang member. It is not clear what would be in these photographs to indicate that someone is a member of a gang. One might conclude that these would be photos of young people gathered together in a group, which is legal.

The Chicago law was struck because police officers were allowed to enforce it against those whom they “reasonably believed” to be gang members. The Mann amendment is no better because the definition of “gang member” is based on whether someone has been “identified” as such (with no specified criteria for that identification) by police, parents, informants, etc. Thus, it is just as vague and violative of 14th Amendment due process as the Chicago law.

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School released a report in March that found that prevention and intervention techniques are the most effective and least expensive strategies for dealing with gangs. The report, entitled *No More Children Left Behind Bars*, was an analysis of the body of research on this topic and came to these conclusions, among others:

- Many education-related and community based youth programs demonstrate effectiveness and promise in redirecting young people away from gangs, by preventing gang affiliation in the first place, and by assisting teens in completing high school, which translates into reduced crime and healthier communities.

- In the short- and long-term, economic analyses demonstrate that well-tested prevention programs are likely to be more cost effective than “suppression” policies that lead to more prosecution and incarceration.
- Public opinion data strongly suggests that people who live in the United States are far more likely to support education and prevention strategies for youth rather than more prosecutions and jail time.
- “Suppression” policies and expansion of law enforcement power have not proven effective in stemming youth crime associated with gangs and research suggests that such tactics may even strengthen gang affiliations.
- “Suppression” and expanded law enforcement power will likely target children and teens of color, disproportionate shares of whom are economically disadvantaged and live in distressed communities that lack sufficient educational, recreational, and economic opportunities.
- Data suggest that the number of communities with active youth gangs increased in the last three decades, peaked in the early 1990s and has recently declined. Youth gang prevalence declined in non-urban areas but gang violence remains a serious problem in some urban communities. This suggests that gang involvement is related to a lack of opportunity in certain communities and calls into question the need for expanded law enforcement power and the appropriation of even more federal dollars to jails and prisons for children and teens.

This report is available at
<http://chhi.podconsulting.com/assets/documents/publications/NO%20MORE%20CHILDREN%20LEFT%20BEHIND.pdf>.

Ironically, the bill on which the Mann amendment is based, HB 326, included grant funding for the Pennsylvania Commission on Crime and Delinquency to distribute to local entities that have prevention and intervention programs, but this language was left out of the Mann amendment.

A07476 on HB 2289 is bad public policy and may very well be unconstitutional. It criminalizes clothing. It criminalizes tattoos. It criminalizes the neighborhoods where people live. I urge you to vote against A07476, an unrelated amendment on HB 2289.