November 1, 2022

The Honorable Tom Wolf
Governor, Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, Pennsylvania 17120

Re: Request to veto House Bill 103

Dear Governor Wolf:

With House Bill 103 currently on your desk, the ACLU of Pennsylvania urges you to please consider vetoing this dangerously expansive and unnecessary bill. The bill was opposed by nearly all members of the House Black Caucus even while most were simultaneously battling the democracy-undermining effort to impeach the Philadelphia district attorney. The ACLU-PA rarely makes direct requests to veto legislation awaiting your decision; we choose to engage at this stage of the process only when we believe a bill poses a unique legal, policy, and/or constitutional threat. HB 103 poses such a threat.

Police are already granted special protections against assault under current law, but HB 103 would create **two new felony offenses** that only apply when committed against a peace officer:[1]

1. A **third-degree felony offense** for the intentional ***or attempted*** act of throwing, tossing, spitting, or *expelling* saliva, blood, seminal fluid, urine, or feces that comes into contact with an officer, punishable by up to 7 years in prison and $15,000 in fines.
2. A **second-degree felony offense** if (1) a person knows, should have known, *or believed* that the fluid or material was infected by a reportable communicable disease; and (2) that the communicable disease was transmissible by the saliva or other bodily fluid that was used—***or attempted to be used***—against the officer, punishable by up to 10 years in prison and $25,000 in fines.

There is no "loophole" in the law. The bill sponsor and some law enforcement officers have argued there is a "loophole"[2] in our criminal code that fails to punish someone who spits on or throws semen, urine, or feces on a police officer. They argue that existing offenses applicable to corrections officers[3] should be applicable to all peace officers. The ACLU-PA strongly disagrees for three primary reasons:

1. Corrections officers work in a unique environment, spending entire shifts in close proximity to the people incarcerated at their facility. As such, they have unique safety concerns that are different and distinct from those of police officers. Duplicating this offense for police officers ignores both the dissimilar contexts and the wide-ranging opportunities to abuse its provisions.
2. Because prisons are equipped with security cameras, they can provide evidence to sustain (or dismiss) allegations of an assault using bodily fluids or material. Allegations of spitting or "expelling saliva" on a police officer would be nearly impossible to disprove.
3. HB 103 would amend the "assault by prisoner" offenses with the F2 language described above. But the bill goes further—it creates an entirely new base offense (F3) that **is not** in current statute and is untethered from the communicable disease elements required under the assault by prisoner offenses.

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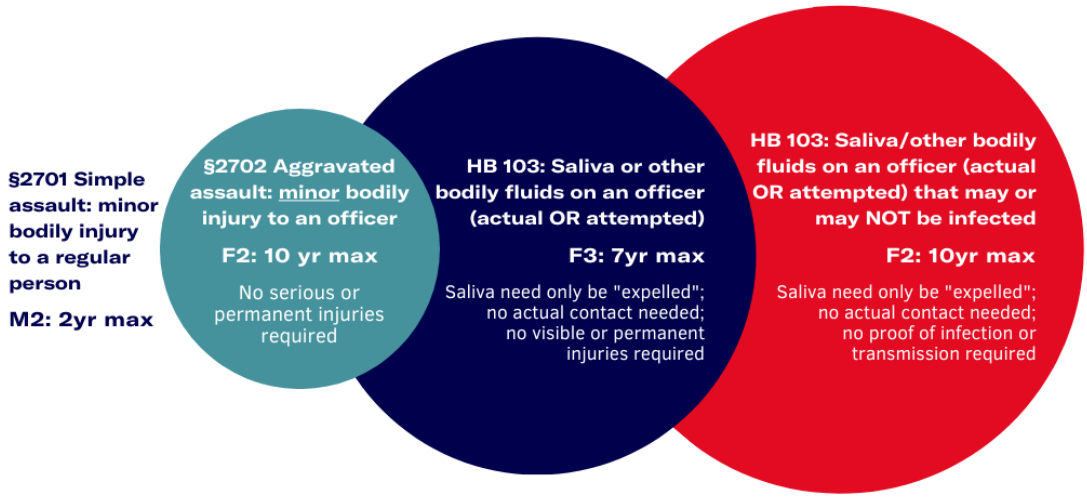
[1] 18 Pa.C.S. § 501. "Peace officer" includes police, but also sheriffs, constables, park rangers, game wardens, conservation officers, and more.
[2] Representative Louis Schmitt, Co-Sponsorship Memorandum: *Harassment of Law Enforcement Officer*, December 9, 2020.
[3] 18 Pa.C.S. § 2703 and 18 Pa.C.S. § 2704

Under current law, the behavior criminalized by HB 103 could already be charged, and punished more severely, as an aggravated assault on a police officer.[4] Police already have special protections not afforded to most people. The threshold for assault is lowered in cases involving police, so when an otherwise misdemeanor simple assault is committed against a law enforcement officer, it is automatically considered an aggravated, second-degree felony offense. In other words, a simple assault against almost anyone else would result in up to 2 years incarceration. But against a police officer, that same simple assault can carry up to 10 years incarceration, which amounts to an **additional 8 years in prison**.

Law enforcement officers have not provided a single example of a district attorney who was unable to bring charges against someone alleged to have thrown semen, urine, or feces at a police officer. Surely that action would be considered simple assault against an officer, in which case, it would be charged as an F2 aggravated assault—one degree higher than what HB 103 would provide.



Officers supporting HB 103 downplay the spitting/saliva elements of the offense, but insist it stays in the bill. As HB 103 moved through the General Assembly, officers rejected proposals to remove the saliva provision and rejected a Senate amendment to lower the grading of the base offense from a third-degree felony to a third-degree misdemeanor. Those refusals are strong indicators that the most dangerous and punitive parts of the bill are the ones officers are most committed to keeping, despite their arguments that HB 103 is necessary to deter assaults using bodily fluids or material—a fact pattern they have yet to establish.

Sending someone to prison for 3.5-7 years for spitting on an officer is unjustifiably punitive. Spitting on *anyone* is certainly offensive, disrespectful, and, in some instances, may be illegal. In those instances, there are laws on the books to charge an alleged offense. However, is spitting a heinous enough act to justify the creation of a separate crime, penalized by 3.5-7 years in prison? Worse, that may not be the only offense charged. Notably, because HB 103 creates its new offenses under § 2702.1 (assault of a law enforcement officer) and ***not*** under § 2702 (aggravated assault), it's altogether likely that someone could be charged with **BOTH offenses** for the same spitting or bodily fluids incident, i.e., charged with an F2 aggravated assault on an officer **AND** with the bill's new F3 assault of a law enforcement officer.

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[4] Aggravated assault offenses are designed to impose tougher penalties for actions that cause greater harm, injury, or risk of death. Pennsylvania law primarily distinguishes simple assault from aggravated assault based on intent and severity of the injury—a distinction intended to ensure that the punishment fits the crime:

- **Simple assault** (18 § 2701) is charged when someone intentionally, knowingly, or recklessly inflicts bodily injury on another person. Bodily injury is any physical impairment, including physical pain, and typically results in minor, non-permanent injuries like bruises or scratches. Simple assault is a second-degree misdemeanor, punishable by up to 2 years incarcerated and $5,000 in fines.
- **Aggravated assault** (18 § 2702) is intentionally, knowingly, or recklessly causing—or attempting to cause—serious bodily injury to another person under circumstances that show an extreme indifference to human life. Serious bodily injury causes serious, permanent disfigurement, protracted loss or impairment of a bodily function, or creates a substantial risk of death. An aggravated assault that causes, or attempts to cause, ***serious bodily injury*** is graded as a first-degree felony, punishable by up to 20 years in prison and $25,000 in fines. In special cases, like those involving police officers, aggravated assault that ***does not involve*** serious bodily injury is a second-degree felony, punishable by up to 10 years in prison and $25,000 in fines.

HB 103 would still criminalize people living with HIV/AIDS. Despite a cosmetic amendment, HB 103 would retain and even expand its communicable disease provision, which remains problematic because it:

- **Allows any "reportable disease" to trigger a second-degree felony charge:** HB 103 uses the list of reportable diseases by regulation to define the felony offense (28 Pa. Code § 27B). There are 75 reportable diseases on this list, including HIV, AIDS, all forms of hepatitis, influenza, chickenpox, whooping cough, and of course, COVID-19, creating a dangerous expansion of police pretext to arrest.
- **Still does not require proof of infection or transmission:** The second-degree felony offense does not require proof that the defendant tested positive for a reportable, communicable disease, nor proof that the fluid or material was actually infected. And the offense does not require that transmission occurred. Arrests could be made and felony charges filed solely on an unsubstantiated, falsely perceived, or negligible risk of harm.
- **Still does not require actual contact:** HB 103 defines the F2 charge to include even *attempted contact* with a police officer—no actual contact with saliva or bodily fluids is necessary.

Furthermore, HB 103 could weaponize police interactions with the public, particularly during the pandemic. The persistence of COVID-19 uniquely compounds HB 103's already fraught communicable disease provision. Because COVID-19 can be transmitted by droplets, merely "**expelling**" saliva could trigger a second-degree felony charge. It's easy to imagine any number of saliva-expelling interactions with police, all of which would heighten the risk of a felony charge, e.g., someone yelling or speaking loudly with an officer, protestors chanting in front of a police line, a heated exchange while being questioned, or a person upset or angry upon arrest. And given the high rate of asymptomatic transmission of COVID-19, an officer or prosecutor could argue that the defendant "should have known" they could be infected. In this context, police could use the communicable disease provision, supercharged by the specter of COVID-19, to justify use of force, arrest, or as pretext to arrest or unconstitutionally shut down First Amendment protected speech, protest or assembly.

Finally, HB 103 would create a nearly undetectable felony offense—one that would be practically impossible to disprove or capture on a body camera. HB 103 will almost certainly open a floodgate of felony charges against those who are already over-policed. Allegations of assaulting a police officer can be difficult to challenge. Absent injury, often the best chance defense attorneys have to successfully defend against allegations like physical contact is body camera footage. But even when equipped with a body-worn camera, it is unlikely to capture someone spitting at an officer. What remains is a decision to charge a felony offense, with no evidence of injury or contact, that may rest solely on whose word is believed—the word of the police officer or the word of the defendant.

Enacting HB 103 is sure to trigger an avalanche of foreseeable and perhaps even intended consequences, unleashing vastly expanded police power to arrest under greater punitive threat with less accountability. Following the murder of George Floyd, we were dismayed by the majority party's successful efforts to thwart legislative responses to the widespread calls for increased police accountability and improved police-community relations. And now, at the end of your term, it is deeply unfortunate that the bill on your desk not only fails to offer you the opportunity to enact meaningful reform, it would instead invite a troubling step backwards.

For these reasons, and on behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to veto House Bill 103.

Sincerely,

Elizabeth Randol, Ph.D.
Legislative Director, ACLU of Pennsylvania