

To Be Argued by:  
Corey Stoughton  
15 minutes

# Court of Appeals of the State of New York

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THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee,*

– v. –

MARQUAN W. MACKEY-MEGGS,

*Appellant.*

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ON APPEAL FROM THE ALBANY COUNTY COURT, Docket No. CA-332-12

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## **BRIEF OF APPELLANT MARQUAN W. MACKEY-MEGGS**

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## INTRODUCTION

This case challenges the constitutionality of a criminal statute that makes it a misdemeanor to speak hatefully, share private information, disseminate sexual content, tell lies, or embarrass people via the Internet.

Albany County's so-called "Cyber-bullying Law" criminalizes the communication of "private, personal, false, or sexual information," "hate mail," and "embarrassing or sexually explicit photographs," where such communication is intended to "harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" and has no "legitimate . . . purpose." These terms encompass countless emails, text messages, and postings on social networking and other websites, putting thousands of people in Albany County in jeopardy of criminal prosecution for expressing anger, criticism, intimacy, parody, gossip, and opinion.

The Cyber-bullying Law is an unconstitutional regulation of speech because its terms reach far beyond the narrow categories of unprotected speech that the government may regulate—namely, fighting words, incitement, obscenity, and true threats—and its criminalization of speech based on content fails strict scrutiny. The Cyber-bullying Law is unconstitutionally vague because several of its terms—such as "annoy," "abuse," "taunt," "humiliate," "embarrassing," "sexually explicit," "hate mail" and "no legitimate private, personal, or public purpose"—

are undefined and susceptible of countless interpretations, creating a risk that protected speech will be chilled and that the law will be enforced in an arbitrary or discriminatory manner.

The law is also unconstitutional as applied to the communications that form the basis for this particular conviction. Marquan W. Mackey-Meggs, who was fifteen years old when he was charged with violating the Cyber-bullying Law, created a Facebook page on which he posted photographs of friends and other classmates at his high school and made crude, disparaging, and degrading remarks about their appearances, personalities, and sexual activities. Although this speech may rightly be punished by parents and educators, it cannot be criminalized because it does not fall into any of the narrowly defined categories of speech unprotected by the First Amendment.

Several jurisdictions in New York have followed Albany County's lead in passing broad, criminal "cyber-bullying laws" designed to address the modern problem of Internet-based taunting of schoolchildren.<sup>1</sup> The proliferation of such laws risks eroding constitutional protections for speech that takes place online and transforming children's misbehavior into criminal activity. The government can and should address cyber-bullying through various means—including through the

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<sup>1</sup> See, e.g., Monroe County Code section 382; Suffolk County Code section 538; Rensselaer County Local Law No. 4 of 2010; Erie County Local Law No. 1 of 2012.



government's educational functions and by enforcing criminal penalties against acts of harassment and true threats—but it must do so within the bounds of the federal and state constitutional limitations. Criminalizing protected speech goes too far.

### **STATEMENT OF THE COURT'S JURISDICTION**

The Court has jurisdiction over this appeal from the Albany County Court's affirmance of a criminal conviction pursuant to CPL § 470.35(1) because it raises questions of law. Judge Graffeo granted leave to appeal on August 19, 2013.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Marquan W. Mackey-Meggs, a fifteen year-old boy, was arrested on June 14, 2011 and charged with violating Albany County Local Law "F" for 2010 (the "Cyber-bullying Law").<sup>2</sup> The charges were based on allegations that, in December 2010, Marquan created a Facebook webpage entitled "Cohoes Flame Page," on which he posted pictures of other students at Cohoes High School. (R. 1-35). Beneath each picture, Marquan wrote anecdotes about the individuals depicted, including details about their relationships with other students, quips about their appearances, and comments about their personalities. (R. 3, 7, 13, 16, 22). Some of the anecdotes were sexual in nature, many were offensive, and all were immature.

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<sup>2</sup> At the time of his arrest, Marquan was also wrongly charged with Harassment in the Second Degree, Penal Law § 240.26(3). Those charges were properly dismissed as facially insufficient by the Cohoes City Court. (R. 47-48).

Other students made comments as well, some of which were insulting and others of which were critical of Marquan's postings. (*Id.*). Marquan stated to police that he intended the pages to be funny. (R. 4).

The Cyber-bullying Law makes "cyber-bullying against any minor or person in the County of Albany" a misdemeanor punishable by up to one year in prison and a fine of up to \$1,000. (R. IV). It defines "cyber-bullying" as:

any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.

(*Id.*).

On August 10, 2011, Marquan moved to dismiss the charges on the grounds that, *inter alia*, the Cyber-bullying Law violates the federal and state constitutions on its face and as applied to him. (R. 36-47). On December 1, 2011, Cohoes City Court denied the motion. (*Id.*). On March 1, 2012, Marquan pled guilty to one count of violating the Cyber-bullying Law, conditioned on his right to appeal. (R. III-IV).

On May 20, 2013, on appeal of Marquan's conviction, Judge Herrick of the Albany County Court upheld the constitutionality of the Cyber-bullying Law. (R. II-XII). The County Court agreed that the Cyber-bullying Law was unconstitutional insofar as it criminalized "cyber-bullying" directed at "any person," but held that its

application to speech directed at minors was constitutional. (R. IX-X).<sup>3</sup> Despite holding that the law could not constitutionally extend to speech directed at adults, the County Court suggested that the Cyber-bullying Law regulated conduct, not speech, insofar as it regulated “using mechanical or electronic forms of communication.” (R. VIII). In the alternative, “to the extent that pure speech is implicated,” the County Court held that “substantial privacy interests” trumped the First Amendment. (*Id.*). The County Court also held that the Cyber-bullying Law was not unconstitutionally vague. (R. XI). Finally, the court rejected the as-applied challenge, holding that, “[f]or the reasons already discussed, defendant’s speech was neither protected nor was the statute vague.” (R. X-XI).

## **ARGUMENT**

The Court should reverse Marquan Mackey-Meggs’s conviction under the Albany County Cyber-bullying Law for any one of three separate and independent reasons. First, the Cyber-bullying Law, on its face, is an unconstitutional regulation of fully protected speech that fails to meet strict scrutiny, in violation of

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<sup>3</sup> Neither the People nor the County of Albany appealed County Court’s holding that the Cyber-bullying Law is unconstitutional insofar as it criminalizes “cyber-bullying” against individuals who are 18 or older.

the First Amendment.<sup>4</sup> Second, the law is unconstitutionally vague on its face, in violation of the First and the Fourteenth Amendment. Third, the law is unconstitutional and vague as applied to the speech that forms the basis of Marquan’s conviction. Each of these arguments is addressed in turn below.

**I. THE CYBER-BULLYING LAW IS A FACIALLY INVALID CRIMINALIZATION OF CONSTITUTIONALLY PROTECTED SPEECH.**

The Cyber-bullying Law, on its face, cannot survive constitutional scrutiny.<sup>5</sup> It regulates a broad swath of protected speech, making no attempt to confine itself to the narrow categories of speech the government has been permitted to regulate and punish. Its two limiting clauses—the requirement of specific intent and the absence of “legitimate purpose”—do not save the law. And the lower court’s attempt to salvage the law by limiting its application to speech directed at minors

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<sup>4</sup> Appellant challenges the Cyber-bullying Law as a violation of both the federal and state constitutions. The free speech and due process provisions of New York State Constitution are at least as expansive as their federal counterparts. (*See Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 [1986]). Thus, throughout this brief, Appellant references the federal constitutional provisions as a matter of convenience, not to suggest waiver or abandonment of his independent state constitutional claims.

<sup>5</sup>In cases, like this one, that raise First Amendment concerns, the Court may consider whether the law at issue is invalid on its face whether or not it is overbroad or vague with respect to the defendant. (*See, e.g., Gooding v Wilson*, 405 US 518, 521 [1972] (explaining that, when a statute regulates First Amendment-protected speech, a defendant “is permitted to raise its vagueness or unconstitutional overbreadth as applied to others” even though it “may be neither vague, overbroad, nor otherwise invalid as applied to [him]”), citation omitted).

has already been rejected as a means of salvaging otherwise improper regulations of speech. Thus, because Albany County has made no effort to demonstrate that this broad criminalization of speech is necessary to protect minors from harm, the Court should strike the Cyber-bullying Law down on its face.

**A. The Cyber-Bullying Law Extends Far Beyond the Well-Defined, Narrow Categories of Unprotected Speech.**

The Cyber-bullying Law is a content-based regulation of pure speech and sweeps far beyond narrow categories of unprotected speech to encompass the dissemination of any “private, personal, false, or sexual information,” “hate mail,” and “embarrassing or sexually explicit photographs.” (R. IV).<sup>6</sup>

The First Amendment generally permits the government to regulate speech based on its content only if it falls within one of the “few limited areas”—namely,

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<sup>6</sup> The County Court relied on *People v Shack*, 86 NY2d 529, 535 [1995], to conclude, incorrectly, that the Cyber-bullying Law prohibits conduct, not speech. The telephone harassment statute at issue in *Shack*, however, was limited to the conduct of making repeated telephone calls “without any legitimate purpose of communication.” (86 NY2d at 536 (explaining that the statute is narrowly aimed at “persons who employ the telephone, not to communicate, but for other unjustifiable motives”). Thus, by definition, the telephone harassment statute was not directed at the content of communication and was confined to telephone calls as conduct that reaches into a private home. *Shack* does not stand for the proposition that any “act of communication” is “conduct” *per se*. Unlike the telephone harassment statute, which prohibited conduct without reference to content (indeed, only if there *was no* intended content), the Cyber-bullying Law unconstitutionally punishes communications based *exclusively* on their content. (See *Cohen v California*, 403 US 15, 18 [1971] (holding that where the conviction “rests upon the asserted offensiveness of the words,” the government punishes speech, not conduct)).

fighting words, incitement, obscenity, and true threats—that “represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’” (*Brown v Entertainment Merchants Ass’n*, 131 S Ct 2729, 2733 [2011], citation omitted). “Fighting words” are limited to “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” (*Cohen v California*, 403 US 15, 20 (1971), citing *Chaplinsky v New Hampshire*, 315 US 568, 572 [1942]).<sup>7</sup> “Incitement” is limited to speech that “is directed to inciting or producing imminent lawless action and is likely to incite or to produce such action.” (*Brandenburg v Ohio*, 395 US 444, 447 [1969]). “Obscenity” is limited to material that, as a threshold matter, “depict[s] or describe[s] patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law.” (*Miller v California*, 413 US 15, 27 [1973]). And “true threats” are limited to “those

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<sup>7</sup> The Court in *Chaplinsky* also suggested in dicta that fighting words include words that “by their very utterance inflict injury,” (315 US at 572), but subsequent Supreme Court cases have dropped reference the term “inflict injury” and made clear that fighting words are limited to those face-to-face communications “inherently likely to provoke violent reaction.” (See, e.g., *Texas v Johnson*, 491 US 397, 409 [1989] (defining fighting words as “that small class” of words “that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace,” internal quotation marks omitted); see also *Purtell v Mason*, 527 F3d 615, 625 [7th Cir 2008] (reviewing numerous cases and concluding that “[i]t seems unlikely that speech causing emotional injury but *not* tending to provoke an average person to an immediate breach of the peace would qualify as fighting words”) (emphasis in original)).

statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” (*Virginia v Black*, 538 US 343, 359 [2003]).

The U.S. Supreme Court has repeatedly rejected efforts by federal, state, or local governments to add “new categories of unprotected speech” simply because a legislature “concludes [that] certain speech is too harmful to be tolerated.” (*Brown*, 131 S Ct at 2734). In just the past three years, the Supreme Court has refused to create new categories of unprotected speech for false statements of fact, (*United States v Alvarez*, 132 S Ct 2537, 2547 [2012]), violent video games disseminated to minors, (*Brown*, 131 S Ct at 2732-38), and depictions of animal cruelty, (*United States v Stevens*, 559 US 460, 468-72 [2010]). In striking down the federal statute at issue in *Stevens*, the court rejected as “startling and dangerous” the government’s suggestion that whether speech could be prohibited was subject to a “categorical balancing of the value of the speech against its societal costs.” (*Id.* at 470).

This Court and the U.S. Supreme Court have routinely invalidated on their face criminal enactments that, like the Cyber-bullying Law, proscribe speech beyond those narrow categories. In *People v Dietze*, this Court struck down Penal Law § 240.25(2), which criminalized the use of “abusive or obscene language, or . . . an obscene gesture . . . with intent to harass, annoy or alarm another person,” on

the grounds that “the scope of constitutionally proscribable expression” is “considerably narrower than that of the statute.” (75 NY2d 47, 51-52 [1989]).

Similarly, in *City of Houston v Hill*, the U.S. Supreme Court struck down an ordinance that made it a crime for a person to “in any manner oppose, molest, abuse or interrupt” police officers in the course of their duties. (482 US 451, 461 [1987]). The Court held that the ordinance was unconstitutional on its face because “[i]t is not limited to fighting words nor even to obscene or opprobrious language but prohibits speech that ‘in any manner . . . interrupt[s] an officer.’ The Constitution does not allow such speech to be made a crime.” (*Id.* at 462, citation omitted). And, in *United States v Playboy Entertainment Group, Inc.*, the Supreme Court struck down a regulation prohibiting the dissemination of “sexually explicit adult programming” during times of the day when children are likely to be watching, holding that to “prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection.” (529 US 803, 811-12 [2000]).

As in *Dietze*, *Hill*, and *Playboy*, the speech regulated by the Cyber-bullying Law cannot be prohibited by the government. Each of the law’s three operative definitions of proscribed speech is independently problematic; together, they



represent an unprecedented criminalization of protected speech.<sup>8</sup> To provide just a few examples: The Cyber-bullying Law’s proscription on disseminating “private, personal, false or sexual information” criminalizes publishing a Page Six rumor about the sex life of a well-known personality, posting a jealous Facebook rant about an ex-boyfriend’s recent engagement, and emailing a confidant with exaggerated tales of one’s sexual experiences. The proscription on the dissemination of “hate mail” criminalizes tweeting vituperative opinions about a newspaper columnist, sending an electronic message through whitehouse.gov expressing hateful opinions about President Obama, and emailing the New York Civil Liberties Union to express opinions about its work (as individuals regularly do). The proscription on the dissemination of “embarrassing or sexually explicit photographs” criminalizes posting evidence of a “wardrobe malfunction” on a celebrity gossip blog, uploading to Facebook an embarrassing picture of smiling grandchildren before they got braces, and texting a compromising picture of a friend’s bachelor party to his absent fraternity brother.

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<sup>8</sup> Read literally, the Cyber-bullying Law criminalizes “*any* act of communicating or causing a communication to be sent by mechanical or electronic means”, and then provides examples of communications that are “includ[ed]” in that prohibition. (R. IV, emphasis added). Albany County and the courts below, however, interpreted the law to be confined to its examples—“private, personal, false, or sexual information,” “hate mail,” and “embarrassing or sexually explicit photographs.” Even so limited, the Cyber-bullying Law is unconstitutional.

Collectively, the terms of the Cyber-bullying Law encompass a broad range of protected expression—including a substantial portion of the emails, text messages, blog content, comments on news media websites, and postings on social media sites such as Facebook and Twitter—disseminated every day by thousands of people. The law is a broad and direct regulation of constitutionally protected speech.

**B. The Requirement of Intent to “Harass, Annoy, Threaten, Abuse, Taunt, Intimidate, Torment, Humiliate, or Otherwise Inflict Significant Emotional Harm” Does Not Sufficiently Limit the Cyber-bullying Law’s Regulation of Speech.**

The Cyber-bullying Law’s requirement that the violator act “with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person” does not limit its scope to proscribable speech. In fact, several of these terms have already been found fatal to the constitutionality of previous attempts to criminalize protected speech.

In *Dietze*, this Court struck down a criminal statute that prohibited the use of abusive or obscene language “with the intent to harass, annoy, or alarm another person.” (75 NY2d at 50 n.2). Federal courts have likewise found that provisions in criminal statutes proscribing speech intended to “annoy,” “alarm,” or “harass” are unconstitutional. (*See Vives v City of New York*, 305 F Supp 2d 289, 301-02 [SDNY 2003] (holding that the aggravated harassment statute, Penal Law § 240.30(1), is facially unconstitutional “to the extent it prohibits communications[]

made with the intent to annoy or alarm”), *rev’d on other grounds*, 405 F3d 115 [2d Cir 2004]; *Vives*, 405 F3d at 123-24 (Cardamone, J., concurring in part and dissenting in part) (finding that the Second Circuit should have reached the issue of the constitutionality of Penal Law § 240.40(1) because “[a] criminal prohibition on communicating in an annoying or alarming way is facially unconstitutional”); *Saxe v State Coll. Area Sch. Dist.*, 240 F.3d 200, 210-11 [3d Cir 2001] (invalidating a school district’s anti-discrimination policy because, among other things, “it extend[ed] to speech that merely has the ‘purpose’ of harassing”); *United States v Popa*, 187 F3d 672, 674-77 [DC Cir 1999] (holding unconstitutional, as applied, a federal statute prohibiting making anonymous phone calls “with intent to annoy, abuse, threaten, or harass”).

In creating an environment conducive to free and robust discourse, the First Amendment protects speech that may “annoy,” “humiliate,” or even “harass.” As this Court held in *Dietze*, “[c]asual conversation may well be ‘abusive’ and intended to ‘annoy;’ so, too, may be light-hearted banter or the earnest expression of personal opinion or emotion. But unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized.” (*Dietze*, 75 NY2d at 51). “The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.” (*R.A.V. v City of St. Paul*, 505 US 377, 414 [1992] (White, J.,

concurring)). Thus, rather than saving the Cyber-bullying Law, its intent requirement only underscores the law's facial unconstitutionality.

**C. The Requirement of “No Legitimate Purpose” Does Not Sufficiently Limit the Cyber-bullying Law’s Regulation of Speech.**

Likewise, the requirement that communications have “no legitimate private, personal, or public purpose” does not save the Cyber-bullying Law. As discussed in greater detail in Part II, *infra*, the law does not define the vague term “no legitimate purpose,” and it is susceptible of so many possible interpretations that it chills protected speech and invites selective and arbitrary enforcement. “[R]egardless of whether [the term] is so vague that it violates” due process, the “ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.” (*Reno v Am. Civil Liberties Union*, 521 US 844, 870 [1997]).

Even if the term were not fatally vague, the protections of the First Amendment are not limited to speech that the speaker can demonstrate has a “legitimate purpose.” In striking down a prohibition on renting or selling violent video games to minors in *Brown*, the U.S. Supreme Court explained, “[e]ven if we can see in them ‘nothing of any possible value to society . . . , they are as much entitled to the protection of free speech as the best of literature.’” (131 S Ct at 2737 n.4 (quoting *Winters v New York*, 333 US 507, 510 [1948]); *see also Stevens*,

559 US at 479-80 (“Even ‘[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”), quoting *Cohen*, 403 US at 25 [1971]).

The notion that the government may apply its own value judgment to distinguish “legitimate” from “illegitimate” purposes, and thereby remove some speech from constitutional protection, is antithetical to the underlying purposes of the First Amendment. It would be difficult for a law enforcement official to distinguish legitimate from illegitimate purposes, and dangerous to try. Here again, rather than saving the Cyber-bullying Law, its “no legitimate purpose” provision only amplifies the need for constitutional scrutiny.<sup>9</sup>

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<sup>9</sup> The Cyber-bullying Law cannot be saved, as County Court suggested, by interpreting the term “no legitimate private, personal, or public purpose” to limit the law to unprotected fighting words. (R. VIII). Reading the term that way would render the law incomprehensible, as the rest of the law is specifically designed to embrace broad swaths of protected speech. (*See Reno*, 521 US at 884-85 (“[i]n considering a facial challenge, [courts] may impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction” and “will not rewrite a law to conform it to constitutional requirements”). As this Court held in *Dietze*, because “no fair reading of the statute’s unqualified terms support[ed] or even suggest[ed]” that it was limited to fighting words, the language cannot not be read in a constitutionally permissible manner without “transforming an otherwise overbroad statute into an impermissibly vague one.” (*Dietze*, 75 NY2d at 52-53).

**D. The County Court’s Proposed Rewriting of the Cyber-bullying Law to Limit its Scope to Speech Directed at Minors Cannot Save It From Unconstitutionality.**

While the County Court correctly held that the Cyber-bullying Law is facially overbroad insofar as it criminalizes “cyber-bullying against any . . . person,” the court erred in holding that the law is permissible in scope when limited to communications directed at minors. (R. IX-X). The idea that speech directed at minors is entitled to less constitutional protection—or subject to different constitutional standards—than speech directed at adults has been expressly rejected by the U.S. Supreme Court. In *Brown*, the Court rejected the State of California’s effort “to create a wholly new category of content-based regulation that is permissible only for speech directed at children,” calling such an endeavor “unprecedented and mistaken.” (131 S Ct at 2735). “Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” (*Id.* at 2736, citation omitted).

Likewise, Albany County cannot criminalize broad swaths of speech that falls short of true threats, fighting words, or obscenity simply because the speech is directed at minors. Even applied only to speech directed at minors, the Cyber-bullying Law would give a permanent criminal record to teenagers gossiping about intimate relationships, engaging in hateful arguments over Twitter, posting false

information on a Facebook page, and sharing sexualized images from newspapers and magazines—in other words, for engaging in some of the daily online transactions that make up modern teenage life. Even if Albany County Legislature (or the Court) might deem it scandalous for minors to engage in some of these communications, the First Amendment holds that the government cannot make it a crime.

#### **E. The Cyber-bullying Law Fails Strict Scrutiny.**

Having established that the Cyber-bullying Law is a content-based regulation of pure, constitutionally protected speech, the question becomes whether it can survive strict scrutiny, meaning that it is “justified by a compelling government interest and is narrowly drawn to serve that interest.” (*Brown*, 131 S Ct at 2738, citation omitted).

Albany County cannot meet that standard. “[A]s a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (*Brown*, 131 S Ct at 2733, *quoting Ashcroft v American Civil Liberties Union*, 535 US 564, 573 [2002]). “It is rare that a regulation restricting speech because of its content will ever be permissible.” (*Playboy*, 529 US at 818).

Protecting children is a worthy purpose, but criminalizing speech in the name of that purpose goes too far. As the Supreme Court noted in rejecting the

State of California’s claim that a ban on violent video games was necessary to prevent harm to minors, the protection of children does not trump First Amendment freedoms:

[W]e do not mean to demean or disparage the concerns that underlie the attempt to regulate [violent video games]—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say . . . whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest . . . . Even where the protection of children is the object, the constitutional limits on governmental action apply.

(*Brown*, 131 S Ct at 2741, internal citation and quotation omitted).

Moreover, Albany County has done nothing to demonstrate to the Court that multiple common-sense alternatives to criminalization of speech—including working with parents, schools, and social media and internet service providers to prevent and address bullying and the harms caused by bullying—are insufficient to address the County’s interest in protecting children. Establishing that the regulation of speech is “necessary” to accomplish its goal is Albany County’s “demanding” burden to bear. (*Brown*, 131 S Ct at 2738). It has not even attempted to meet that burden here.

Accordingly, the Court should strike the Cyber-bullying Law down as an unconstitutional restriction on protected speech.



## II. THE CYBER-BULLYING LAW IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

The Cyber-bullying Law should likewise be struck down as impermissibly vague on its face. The law employs a list of ambiguous and subjective terms—such as such as “annoy,” “abuse,” “taunt,” “humiliate,” “embarrassing,” “sexually explicit,” “hate mail” and “no legitimate private, personal, or public purpose”—to define what is prohibited.

The federal and state constitutions prohibit laws that are “so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.” (*United States v Lanier*, 520 US 259, 266 [1997], citation omitted; *see also People v Bright*, 71 NY2d 376, 382-83 [1988] (holding that the law must “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute”), internal quotations omitted). “[S]tandards of permissible statutory vagueness are strict” when First Amendment rights are concerned, (*NAACP v Button*, 371 US 415, 432 [1963]), and vagueness is “a matter of special concern” in the context of a criminal law that regulates speech. (*Reno*, 521 US at 871-72. *See also Dietze*, 75 NY2d at 53 (explaining that vagueness “is especially intolerable in a statute regulating speech”)).

Vague laws, particularly those that regulate speech, are impermissible for several reasons. First, they “fail to provide the kind of notice that will enable ordinary people to understand what conduct [they] prohibit[.]” (*City of Chicago v*

*Morales*, 527 US 41, 56 [1999]). Second, they “may authorize and even encourage arbitrary and discriminatory enforcement” by law enforcement officials. (*Id.*) Third, vague criminal laws have an “obvious chilling effect on free speech.” (*Reno*, 521 US at 871-72). “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (*Grayned v City of Rockford*, 408 US 104, 109 [1972], quoting *Baggett v Bullitt*, 377 US 360, 372 [1964]).

Several of the Cyber-bullying Law’s terms, or their synonyms, have already been struck down as too vague to provide sufficient guidance to those whose conduct might be covered and to those who are called on to enforce the law. For example, the Cyber-bullying Law criminalizes certain communications where there is intent to “annoy,” “abuse” “taunt,” or “humiliate,” or where the communications can be labeled “embarrassing.” (R. IV). This Court found such language unconstitutionally vague in *Dietze*, when it struck down a statute criminalizing the use of “abusive or obscene language” used “with the intent to harass, annoy, or alarm another person.” (75 NY2d at 47). The U.S. Supreme Court likewise struck down a statute criminalizing attempts to “in any manner oppose, molest, abuse or interrupt” police officers in the course of their duties, finding that it “provide[d] the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” (*City of Houston v Hill*, 482 U.S. at 465). The Court also

invalidated an anti-loitering statute barring gatherings that annoyed police and others, noting that “[c]onduct that annoys some people does not annoy others.” (*Coates v City of Cincinnati*, 402 US 611, 614; *see also People v Dupont*, 107 AD2d 247, 253 [1st Dep’t 1985] (“How does one measure ‘annoyance’?”)).<sup>10</sup>

These prior rulings are grounded in common sense. An ordinary person would have no way of knowing if, for example, the posting of an unflattering picture on Facebook might “embarrass” or “humiliate” a friend, if the publication of a personal jibe on Twitter might be considered to have the intent to “taunt” worthy of criminal sanctions, or if a tetchy email criticizing a neighbor or classmate’s behavior might be interpreted as an attempt to criminally “annoy.”

Although this Court has not, to date, considered terms such as “sexually explicit,” and “hate mail” in the context of a criminal statute regulating speech, the logic of this Court’s and the Supreme Court’s past decisions—as well common sense—demonstrate their unconstitutional vagueness. Such terms, undefined as they are, allow “policemen, prosecutors, and juries to pursue their personal predilections” in deciding how the Cyber-bullying Law will be enforced, (*Smith v*

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<sup>10</sup> For the same reasons, other courts have held that the word “embarrass” is impermissibly vague in defining prohibited conduct. (*See, e.g., Comm’n for Lawyer Discipline v Benton*, 980 SW2d 425, 440 [Tex 1998] (holding, in context of attorney conduct rule, that the word “embarrass” was “fatally vague”); *Fire Fighters Ass’n, D.C. v Barry*, 742 F Supp 1182, 1197 [DDC 1990] (holding that fire department prohibition on bumper stickers “which may cause embarrassment or harassment of Department members” was unconstitutionally vague)).

*Goguen*, 415 US 566, 575 [1974]), and are “so vague and standardless that [they] leave the public uncertain as to the conduct it prohibits.” (*Giaccio v Pennsylvania*, 382 US 399, 402 [1966]). For instance, Albany County police officers and prosecutors could choose to arrest and prosecute those offenders who email “sexually explicit photographs” of women but not of men. They could rely on the prohibition on transmitting “hate mail” to arrest offenders whose messages of “hate” pertain to certain viewpoints but not others. The public has no way to know whether an email sent in the midst of heated dialogue might be considered “hate mail,” or whether a provocative photograph might be considered “sexually explicit.”

Likewise, the phrase “with no legitimate private, personal, or public purpose” is susceptible to countless interpretations. The Cyber-bullying Law does not clarify what types of purposes would be considered “legitimate,” leaving interpretation of that term entirely open to the whim of whatever government official is enforcing the law. Thus, this term invites discriminatory enforcement against speakers with whose views the official disagrees with and would consider “illegitimate.”<sup>11</sup>

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<sup>11</sup> This Court’s decision in *Shack* is not to the contrary. The term that the Court in *Shack* held was not vague in the context of the telephone harassment statute—“no purpose of legitimate communication”—refers to the notion that a telephone call was not made for the purpose of communicating. (*Shack*, 86 NY2d at 536 (explaining that the statute is narrowly aimed at “persons who employ the telephone, not to communicate, but for other unjustifiable motives”). It made clear that communication of any message whatsoever is a permissible purpose; the only

Each of these examples takes a term from the statute in isolation and considers its vagueness. But the Cyber-bullying Law must be read as a whole to comprehend the true threat of arbitrary, discriminatory enforcement it presents, and the risk of chilling the speech of people seeking to avoid the risk of prosecution in their everyday, online communications. Taken as a whole, there is no doubt but that the law must be struck down, on its face, as unconstitutionally vague.

### **III. THE CYBER-BULLYING LAW IS UNCONSTITUTIONAL AS APPLIED TO THE APPELLANT'S SPEECH.**

Even if the Court could find the Cyber-bullying Law constitutional on its face, which it cannot, Marquan Mackey-Meggs's conviction still must be reversed because the law is unconstitutional as-applied for two reasons. First, Marquan's postings on the "Cohoes Flame Page," while offensive and immature, are constitutionally protected First Amendment expression. Second, the law's vague terms did not give Marquan fair notice that his attempt to be funny would not constitute a "legitimate purpose" for the Facebook postings, and would subject him to a criminal record that will follow him for the rest of his life.

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discretion lay in determining whether the purpose of a call was communication or not. The term "legitimate purpose" here, by contrast, is used to judge the value of the content of communication, and the scope of the law is thus dependent on which of the many possible interpretations of that word is adopted, and how the person enforcing the law evaluates the legitimacy of a communication's message.

### **A. Marquan’s Facebook Postings Are Protected Speech.**

The speech for which Marquan was convicted is protected by the First Amendment, so the application of the Cyber-bullying Law is unconstitutional as applied to him. The “Cohoes Flame Page” contained opinions, gossip, insults, swear-words, and other offensive speech. Some of the content describes in vulgar terms the purported sexual activities of Marquan’s classmates. But none of it contains any hint of a threat of physical violence, the incitement of unlawful acts, face-to-face words that are inherently likely to provoke violence, or a depiction of hard-core sexual activity. Thus, none of it falls into any category of unprotected, and hence punishable, speech, such as true threats, incitement, fighting words, or obscenity. *See* Part I.A., *supra*.

Here again, the Court’s decision in *Dietze* controls. In addition to finding the harassment statute unconstitutional on its face, the Court found that it could not be applied in that case. Ms. Dietze, who previously had been admonished by a police officer to cease her behavior, called a mentally disabled complainant a “bitch” and her son a “dog,” and screamed that she would “beat the crap out of [the complainant] some day or night on the street[,]” as the complainant ran away in tears. (75 NY2d at 50). Like Marquan’s speech here, Dietze’s speech was offensive, but still constitutionally protected. (*Id.* *See also, e.g., Purtell v Mason*, 527 F.3d 615, 617-19 [7th Cir 2008] (holding that a front-lawn display of wooden

tombstones containing insults and descriptions of specific neighbors' deaths, which neighbors reported made them feel "intimidated," was "protected speech" that could not be considered fighting words)). As the Court in *Dietze* explained, "[s]peech is often 'abusive'—even vulgar, derisive and provocative—and yet it is still protected under the State and Federal guarantees of free expression unless it is much more than that." (*Dietze*, 75 NY2d at 51. *See also Playboy*, 529 US at 826 ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."))).

Accordingly, the conviction should be vacated because Marquan's postings were protected by the First Amendment.

**B. The Cyber-bullying Law Did Not Provide Marquan with Fair Notice That His Facebook Postings Fell Within Its Prohibitions.**

The Cyber-bullying Law is also unconstitutionally vague as applied to Marquan because its terms gave him insufficient notice that his comments could be considered to have "no legitimate private, personal, or public purpose." (*See Holder v Humanitarian Law Project*, 130 S Ct 2705, 2718 [2010] ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.")), citation omitted). As discussed above, *supra* Part II, that term is

inherently vague. Moreover, as a signed statement by Marquan contained in the Superseding Indictment indicates, Marquan made the Facebook postings because he “thought [he] was being funny.” (R. 4). The Cyber-bullying Law, however, provided Marquan with no guidance to determine whether a humorous purpose (however misguided) would be considered “legitimate” by Albany County law enforcement officials. (*Cf. Cliffs Notes, Inc. v Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F2d 490, 493 [2d Cir 1989] (noting that “parody is a form of artistic expression” entitled to a “broad scope” of First Amendment protection)).

The vagueness of the “legitimate purpose” limitation as applied to this case is evident in the selective prosecution of Marquan when other students made similarly offensive and opprobrious comments in the same forum, including derogatory comments about other students’ sexual acts and physical appearances. (R. 13, 22, 25, 29, 33 (comments of students I.G. and K.D.M.)). Even the students who stood up to bullying on the “Cohoes Flame Page” violated the terms of the Cyber-bullying Law when they made threats such as: “I guess I’ll play a game of baseball with your head and a metal bar,” (R. 13), and “im gonna fuck this dude up bad like im stompin his face in.” (R. 7).

Because the law did not provide Marquan with fair notice that he lacked a “legitimate purpose” for his Facebook postings and because it in fact led to selective prosecution of Marquan and not others who made comments in the same forum that



fall within the vague terms of the Cyber-bullying Law, his conviction should be overturned.

### **CONCLUSION**

For all of the reasons described above, the Court should hold that the Cyber-bullying Law is unconstitutional and should overturn Marquan W. Mackey-Meggs's conviction.

Respectfully submitted,

/s/\_\_\_\_\_

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