To Be Argued by:
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15 minutes

Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee,

– v. –

MARQUAN M.,

Appellant.

ON APPEAL FROM THE ALBANY COUNTY COURT, Docket No. CA-332-12
APL #2013-00231

REPLY BRIEF OF APPELLANT MARQUAN M.

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INTRODUCTION

The Facial Unconstitutionality of the Cyber-bullying Law

The state and federal constitutional protections of free speech demand, at a minimum, that government criminalize communication narrowly and with regulatory precision. The Albany County Cyber-bullying Law is anything but narrow and precise.

In a tacit acknowledgment of this fact, the County advances on appeal interpretations of the Law never before suggested by the People and utterly divorced from the original text of the enactment. Taken together, the various additions, subtractions, and re-interpretations proposed by the County fall outside the boundaries of the Court's authority to impose reasonable limiting interpretations on statutes to avoid constitutional problems and would transform an unconstitutional statute into an unacceptably vague one.

Even taken individually, the County's various attempts to re-fashion the Cyber-bullying Law fail. The County argues that the Cyber-bullying Law is a regulation of defamation—an interpretation never before suggested by the People, the County, or any lower court. This interpretation is indefensible. The text of the Cyber-bullying Law contains none of the limiting principles imposed by the First Amendment on the reach of defamation laws and its plain language extends so far

beyond defamation that no reasonable person would characterize it as a defamation law.

Moreover, even if it could be read as a defamation law, the County fails to grapple with the complex constitutional issues raised by criminal defamation. The County cites no authority to establish that criminal penalties for defamation are constitutional at all in New York, let alone constitutional in the absence of a showing of "actual malice" (one of very few concepts the County has not attempted to read into the law). Thus, because the Cyber-bullying Law is not a defamation statute—and because, even if it were, it would exceed constitutional boundaries—the law should be struck down on its face as an unconstitutional, content-based regulation of speech.

Next, the County suggests that the Court interpret the Cyber-bullying Law as a privacy tort. But the Cyber-bullying Law is a criminal statute, not a civil remedy. Nor is it a generally applicable tort law, such that the Court could dispose of its incidental application to protected speech on a case-by-case basis. The Cyber-bullying Law is a direct, criminal regulation of speech, such that the Court must consider whether it is limited to the well-defined and narrow categories of speech deemed unprotected by the state and federal constitutions. "Purely private" speech is not, and never has been, one such category.

Finally, the County suggests that the Court find the Cyber-bullying Law facially constitutional by reading the phrase "no legitimate private, personal, or public purpose" to exclude, by fiat, all constitutionally protected speech. There is no precedent to support such a broad, creative reading of this phrase. The County's attempt to read such meaning into the text underscores its unconstitutional vagueness.

Because it regulates a broad swath of constitutionally protected speech, the Cyber-bullying Law must satisfy strict scrutiny. Protecting children from emotional harm is an important goal. There is no question that Albany County's motive to prevent cyber-bullying is well-intentioned. But the County has multiple less speech-restrictive alternatives to accomplish that goal and has made no effort to demonstrate otherwise.

The Vagueness of the Cyber-bullying Law

For similar reasons, the Cyber-bullying Law is unconstitutionally vague on its face. The County's contorted and variable readings of the Cyber-bullying Law's terms and its heavy reliance on the inherently vague phrase "no legitimate purpose" only underscore the statute's unconstitutional vagueness.

The Unconstitutionality of the Cyber-bullying Law as Applied to Appellant's Conviction

Finally, the County's defense of the Cyber-bullying Law's application to Appellant's speech rests on a specific allocution of guilt that exists only in the

County's imagination. The County claims that Appellant's guilty plea constitutes an admission that his speech was false, defamatory, and uttered for the specific purpose of inflicting emotional distress on children. As such, they argue, the speech is unprotected. But Appellant's guilty plea was, at most, an admission that his speech fell (or appeared to fall) within the broad scope of the statute generally, as it was understood by Appellant at the time of his plea, not based on the County's newly proffered limiting interpretations of the statute. There is nothing in the record pertaining to Appellant's conditional plea that allows the County to presume that Appellant's speech meets the elements of the newly re-written version of the Cyber-bullying Law the County offers on appeal. Absent the admissions Albany County relies upon to characterize Appellant's speech as unprotected, the County has no response to Appellant's as-applied First Amendment and vagueness challenges.

ARGUMENT

I. THE CYBER-BULLYING LAW IS UNCONSTITUTIONAL ON ITS FACE BECAUSE NO REASONABLE INTERPRETATION LIMITS IT TO UNPROTECTED SPEECH.

The County defends the Cyber-bullying Law by offering various, new interpretations of the law intended to demonstrate that it targets, or primarily

targets, constitutionally unprotected speech.[1] The County argues, first, that the law is limited to defamation, (*see* Brief of Intervenor-Respondent (hereinafter "Resp.'s Br.") at 17); second, that it targets only unprotected speech already regulated by privacy torts (*id*. at 20); and, third, that the requirement that speech serve "no legitimate private, personal or public purpose" automatically "excludes constitutionally protected speech from its reach." (*Id*.) The first argument is a tortured re-imagination of the Cyber-bullying Law, the second is an unavailing attempt to define a new category of unprotected "private" speech, and the latter only underscores the unconstitutional vagueness of the law. Collectively, the County's proposed revisions of the Cyber-bullying Law far exceed the boundaries of appropriate judicial interpretation of a statutory text.

[1] The County attempts to hold Appellant's facial challenge to a more stringent standard of review by claiming that Appellant failed to raise a First Amendment argument inasmuch as he "fail[ed] to describe the instances of arguable overbreadth of the contested law." (Resp.'s Br. at 18 (quoting *Citizens United v Federal Election Comm'n*, 558 US 310, 401 n 6 [2010]).) The County is wrong. Appellant clearly labeled the first point of his argument as a challenge to a "facially invalid criminalization of constitutionally protected speech" and described it as a "broad criminalization of speech" that "sweeps far beyond narrow categories of unprotected speech." (Brief of Appellant (Oct. 17, 2010) (hereinafter "Appellant's Br.") at 6-7.) The cases cited within that point all pertain to facial challenges raising First Amendment concerns. (*Id.* at 6-18.) The brief presents multiple, specific examples of "arguable overbreadth." (*Id.* at 11 (listing examples of constitutionally protected speech criminalized by the Cyber-bullying Law).) Thus, there is no basis for concluding that Appellant waived his First Amendment facial challenge or that he must demonstrate that the Cyber-bullying Law is unconstitutional in all its applications. To the contrary, as a direct and content-based regulation of speech, the Cyber-bullying Law is "presumed invalid . . . and that the Government bear[s] the burden of showing [its] constitutionality." (*Ashcroft v American Civil Liberties Union,* 542 US 656, 660 [2004], internal citation omitted.)

A. The County's Defense of the Cyber-Bullying Law Turns on an Indefensible Revision of the Statutory Text.

The Court need not consider the individual errors of the County's many interpretations of portions of the Cyber-bullying Law because the sheer magnitude of judicial amendment required to bring the law within constitutional boundaries exceeds the appropriate role of the Court.

Although the County's interpretation of the statute is unstable even within its presentation to this Court, the County appears to ask the Court to interpret the text as limited to "purely private" defamation about children—i.e., to the public dissemination of false, sexual information about children who are non-public figures and which does not pertain to a matter of public concern, where the dissemination of that information was done with the sole purpose of intentionally causing significant emotional distress to those children. (Resp.'s Br. at 20.) Adopting this view would not be an interpretation of the Cyber-bullying Law, it would be an act of judicial legislation.

The validity of the County's interpretation of its own statute must be judged, first and foremost, by reference to the law's plain language. The Cyber-bullying Law 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.

(R. IV).

To make the Cyber-bullying Law constitutional under the County's theories requires no fewer than eight major amendments to this text. The Court, as the County admits, would have to excise entirely the terms "hate mail" and "embarrassing photographs," terms that the County admits "are vague and thus unenforceable." (Resp.'s Br. at 8, n. 8.) Although the County does not admit it, the Court would also have to excise the term "sexually explicit photographs," since an unaltered photograph cannot be false, and the County suggests interpreting the statute to confine it to defamation. The Court would have to read "private, personal, false *or* sexual" to mean "private, personal, false, *and* sexual," an interpretation that turns the phrase into the opposite of its plain meaning. The Court would have to add that the "private, personal, false and sexual information" be "about the minor whom the speech is intended to harm," in order to bring the statute into compliance with the County's assumption that the speech is entails public disclosure of purely private information. Although the County disputes this point, the Court would have to add an "actual malice" requirement to make this an acceptable criminal defamation law, *see New York Times v Sullivan*, 376 US 254 [1964], as the County never suggests any language that could be interpreted to require knowledge of or reckless indifference to

the falseness of the statement, as well as a currently non-existent limitation that the speech not pertain to matters of public interest. The Court would have to read out the terms "harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate" and limit the specific intent clause to the County's preferred focus on "intent to inflict significant emotional harm."[2] The Court would have to read "no legitimate private, personal, or public purpose" to mean "no purpose other than to inflict significant emotional harm on a minor." Finally, the Court would have to excise the term "another person" and replace it with "another minor who is not a public figure."

This is several steps too far to salvage the Cyber-bullying Law. Although the Court undoubtedly has leeway to defer to a reasonable interpretation of a statute to avoid a constitutional defect, the First Amendment's demand of precision sets an outer limit on such efforts. (*See Reno v American Civil Liberties Union*, 521 US 844, 884-85 [1997] ("In 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").) Although the statute contains a severability clause, "[a] severability clause requires textual provisions that can be severed." (*Id.* at 882.)

[2] The County suggests that "harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate" should be read as "non-exhaustive ways to inflict emotional harm." (Resp.'s Br. at 8-9.) But to do so would be to transform the term "emotional harm" into an unconstitutionally overbroad and vague phrase. If "emotional harm" in the context of the Cyber-bullying Law means "annoyance" or being "taunted" or "humiliated," then it suffers from the same constitutional defects as the terms "annoy," "taunt" or "humiliate." (*See infra,* Part I.D. & Part II.) The County cannot avoid the constitutional repercussions of the language it chose to include in its statute.

The County does not ask the Court merely to sever words or phrases, it asks the Court to add and alter the meaning of words—to fundamentally transform the statute into a better, constitutionally defensible enactment.

To adopt the County's view of the statute would be to render its terms meaningless to the ordinary person called upon to enforce the law or conform his behavior to it. Indeed, the County's lawyers themselves plainly struggle to keep straight their own interpretation of the statute.[3] As this Court held in *Dietze*, because "no fair reading of the statute's unqualified terms support[ed] or even suggest[ed] the constitutionally necessary limitations on [the law's] scope," the language cannot not be read in a constitutionally permissible manner without "transforming an otherwise overbroad statute into an impermissibly vague one; the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different." (*People v Dietze*, 75 NY2d 47, 52-53 [1989].) The Court should similarly reject the County's eleventh-hour attempt

[3] For example, the County provides no less than four distinct suggestions as to what the inherently vague term "no legitimate private, personal, or public purpose" might mean. (*See* Section II, *infra*.) Similarly, the County is inconsistent in whether it considers falseness a necessary or an alternative element of the crime. At one point, it states that the statute proscribes, separately "(i) sexually explicit photos, (ii) private or personal sexual information, *or* (iii) false sexual information," (Resp.'s Br at 7-8, 24 (emphasis added)), but at another point the County contends that Appellant's guilty plea necessarily constituted an admission that his statements were false. (Resp.'s Br. at 13-14). These inconsistencies underscore the constitutional problem with the County's dramatic re-writing of the statute in an effort to salvage its constitutionality. If the County's lawyers cannot derive a plain and stable meaning from their interpretation of the law, the Court cannot expect law enforcement and ordinary citizens to do so.

to re-imagine the terms of the Cyber-bullying Law and should hold that, on its face, the law is unconstitutional.

B. The Cyber-Bullying Law is Not a Valid Regulation of Defamation.

Turning to the first of the County's specific attempts to re-shape the Cyber-bullying Law, the County argues that the law is a valid regulation of defamation. But the Cyber-bullying Law contains none of the limitations required to make a defamation law constitutional. First, truth must be a defense to defamation. (*See, e.g., Philadelphia Newspapers, Inc. v Hepps*, 475 US 767, 777 [1986] (holding that the plaintiff in a defamation action bears the burden of demonstrating the falseness of the defendant's statements).) The Cyber-bullying Law, *in addition* to criminalizing "false information," criminalizes the dissemination of "private, personal" information, "sexual information" and "sexually explicit photographs" (along with "hate mail" and "embarrassing photographs") even when that speech is true. (R. IV). The statute isolates "false statements" as only one among the many types of speech prohibited and places no burden on a prosecutor to prove falseness to obtain a conviction. This alone renders the statute unconstitutionally overbroad.

Criminal defamation laws, if they are constitutional at all, also must contain an element of "actual malice" to satisfy constitutional standards. As such, criminal defamation must involve proof not only that the speech was false, but that the speaker knew it was false or spoke with reckless indifference to its truth or falsity.

(*Gertz v Robert Welch, Inc.*, 418 US 323, 350 [1974]; *Garrison v State of Louisiana*, 379 US 64, 67 [1964]; *New York Times v Sullivan*, 376 US 264, 279-80 [1964]; *cf. Hustler Magazine, Inc. v Falwell,* 485 US 46 [1988] (requiring that state tort claims pertaining to speech about public figures meet the "actual malice" standard).) The Cyber-bullying Law contains no actual malice standard, nor does it contain any language that could be interpreted as such. To the contrary, its intent requirement is much broader, encompassing "intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate or otherwise inflict significant emotional harm on another person," irrespective of the speaker's knowledge or indifference to the truth of his statements. (R. IV).

The County argues that an actual malice requirement is not required because the Cyber-bullying Law excludes "speech on public concerns or public figures" and that "purely private" defamation is completely unprotected by the Constitution. (Resp.'s Br. at 10 n.5.) This argument is wrong both as a matter of statutory interpretation and as a matter of law.

First, as a matter of statutory interpretation, the Cyber-bullying Law contains no language limiting its reach to matters not of public concern or matters pertaining to non-public figures. "Private, personal or sexual" information can be matters of public interest and gossip. Even under the County's narrow, mangled interpretation of the Cyber-bullying Law, a teenager could be prosecuted for speculating on her

blog that a member of a popular boy-band is gay, for posting on Twitter that the son of the Mayor of New York was drunk at a party, or for commenting on a newspaper article about students caught up in a cheating scandal by disclosing "personal" information about those individuals. Moreover, matters that begin as discussions of public concerns on the Internet—such as debates about school policy or the hiring of a new high school football coach—often turn emotional, particularly among minors, and spill over into speech that qualifies as the dissemination of "private, personal, false or sexual information" spoken with the "intent to intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate or otherwise inflict significant emotional harm on another person." Such speech, which the First Amendment requires to be tolerated as an element of public discourse, is unequivocally criminalized by the Cyber-bullying Law.

Second, as a matter of law, the County is simply wrong when it argues that defamatory statements about private persons and not of public concern fall entirely outside the protection of the First Amendment. To be sure, as the cases the County cites demonstrate, this Court and the Supreme Court have afforded the government greater leeway to regulate such speech and suggested that it is less protected than speech on matters of public concern. But those cases involve a balancing test that weighs the relative value of the speech against the imposition caused by the government's regulation, and may involve the imposition of limits on the extent of

the punishment deemed necessary by the First Amendment. (*See, e.g., Dun & Bradstreet, Inc. v Greenmoss Builders*, *Inc.*, 472 US 749, 760 [1985] (holding that civil remedies for purely private defamation are constitutional but that "such speech is not totally unprotected by the First Amendment"); *Gertz*, 418 US at 348-49 (holding that the First Amendment forbids punitive damages against the press for defamation against a purely private individual absent a showing of actual malice).) Moreover, whether considered an interpretation of federal constitutional law or an application of the independent state-law rights, this Court has repeatedly applied constitutional limits to purely private defamation. (*See, e.g., 600 West 115th Street Corp. v Von Gutfeld,* 80 NY2d 130 [1992] (dismissing a defamation action based on speech at a public hearing by one tenant accusing another tenant of having a fraudulent building permit).)

The County cites no authority supporting the notion that the government can *criminalize* defamation—even purely private defamation—in the absence of a showing of actual malice. New York has no criminal defamation statute and, therefore, this Court has never been called upon to apply a balancing test to judge the constitutionality of such a law. As the Supreme Court noted in *Garrison*,

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore

> inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.

(*Garrison*, 379 US at 69-70 (quoting Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44).)

Garrison struck down Louisiana's criminal defamation statute for its failure to include an actual malice requirement. (379 US at 77.) Although the Court left open the possibility of a different standard for "purely private libels, totally unrelated to public affairs," (*id*. at 72 n.8), the Court did not hold, and has never held, that criminal penalties for "purely private libels" are constitutional. Even if the U.S. Supreme Court were to uphold such criminal penalties, the free speech protections of the New York State Constitution are broader than their federal counterparts, particularly in the context of defamation. (*See, e.g., Immuno-Ag v Moore-Jankowski*, 77 NY2d 235, 248-49 [1991] (holding that New York's recognition of protection for opinion is broader than the federal constitution and noting that the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution") (internal citation omitted).) The County's brief does not even begin to grapple with the complicated and unresolved legal question of how the First Amendment and the New York State Constitution limit schemes to criminalize defamation.

But the Court need not reach this question because the Cyber-bullying Law is not in any manner designed to target defamation, public or private. To the extent that defamatory speech is implicated, it is merely incidental to the broad sweep of constitutionally protected speech regulated by the statute. Therefore, because the Cyber-bullying Law facially regulates non-defamatory speech, it is unconstitutional. (*See Dietze*, 75 NY2d at 51-52 (striking down Penal Law § 240.25(2), on the grounds that "the scope of constitutionally proscribable expression" is "considerably narrower than that of the statute").)

C. The Existence of Privacy Torts Does Not Establish the Constitutionality of the Cyber-bullying Law.

As an alternative to its defamation-based defense, the County suggests that the Cyber-bullying Law is constitutional by analogy to a privacy tort. (Resp.'s Br. at 24-26.) If the County means to suggest that the mere existence of privacy torts demonstrates the government's authority to criminalize speech that invades another's privacy or is uttered with intent to cause harm, that suggestion should be rejected.

As an initial matter, the Cyber-bullying Law is not a civil tort, it is a criminal statute. The County makes no effort to justify the notion that the existence of privacy torts can justify criminal sanctions on speech, even if that speech invades privacy. (*Cf. Ashcroft v ACLU*, 542 US at 660 ("Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive

force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid").) Moreover, as the Supreme Court has held, "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." (*Snyder v Phelps*, 131 S Ct 1207, 1215 [2011].)

Torts are generally applicable laws pertaining to conduct that incidentally implicate free speech. The Cyber-bullying Law, by contrast, is a direct regulation of speech. As such, in contrast to the privacy torts at issue in *Snyder*, the Court must consider the law's facial constitutionality and judge whether its direct regulation of speech reaches beyond the narrow and well-defined categories of unprotected speech and, if so, whether it meets strict scrutiny. (*See, e.g., Brown v Entertainment Merchants Ass'n*, 131 S Ct 2729 [2011]; *United States v Stevens*, 559 US 460 [2010].) The only such category the County has identified as possibly justifying the sweep of the Cyber-bullying Law is defamation, a matter addressed in Part I.B., *supra*.

D. The Cyber-bullying Law's Intent and Purpose Requirements Do Not Save It.

Finally, the County argues that elements of "intent and "purpose" in the Cyber-bullying Law salvage its facial constitutionality, insofar

as the law is limited to speech that has no other purpose but to cause emotional harm to children. (Resp. Br. at 21-28.)

As an initial matter, the Court should reject the County's suggestion that the phrase "no legitimate private, personal or public purpose" "expressly excludes constitutionally protected speech from its reach." (Resp.'s Br. at 20.) There is no obvious reason why "no legitimate purpose" means only defamation, fighting words, threats, obscenity, or incitement.[4] The County cites *People v Shack*, 86 NY2d 529 [1995], in support, (Resp.'s Br. at 535, 539), but in *Shack* the phrase at issue, used in a statute criminalizing telephone harassment, was "no legitimate purpose *of communication*" (emphasis added). That phrase excluded constitutionally protected speech because it excluded *all* speech and limited the statute's reach to "conduct"—namely, the use of a telephone purely to harass, through repeated calls, and not to communicate. In the case of the Cyber-bullying Law, the phrase "no legitimate private, personal or public purpose" is used to distinguish *among* forms of communication. In this manner, the notion of "no

[4] (*See, e.g., Bolles v People*, 541 P2d 80, 83 [Colo. 1975] (holding that statute was facially unconstitutional because the phrase "'without any legitimate purpose' . . . injects a vagueness into the statute which cannot withstand First Amendment scrutiny").) Even if the term could somehow be read to exclude all constitutionally protected speech, such a catch-all cannot save a statute that otherwise criminalizes protected speech. (*See State v Machholz*, 574 NW2d 415, 421 [Minn 1998] (holding that a provision that "conduct protected by the state or federal constitutions is not a crime under this section . . . cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments," citation omitted).)

legitimate purpose" is inherently constitutionally suspect. It invites the government to judge the quality and value of speech based on its content.

The County further argues that the Supreme Court's decisions in *Brown*, 131 S Ct 2729, and *Stevens*, 559 US 460, are distinguishable in that the laws at issue in those cases "had no *scienter* requirement" and, thus, those cases have no application to "the issue in this case: the punishment of a person who uses speech with the specific intent of harming minors." (*Id*. at 21, 22.) This proposition is wrong both as a matter of statutory interpretation and as a matter of law.

As a matter of statutory interpretation, the Cyber-bullying Law is not limited to speech with the specific intent of harming minors. Instead, the statute's intent requirement sweeps in anyone with "intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person." (R. IV) Even if, as the County suggests, the Court views words such as "annoy," "taunt" and "humiliate" as species of "significant emotional harm," (*see* Resp.'s Br. at 8), that would mean that "emotional harm," for purposes of the statute, includes being annoyed, taunted or humiliated. In *Dietze*, the Court struck down a criminal statute that contained an indistinguishable intent requirement. (75 NY2d at 50 n.2.) *Dietze* is controlling authority that the County fails to cite in any part of its brief to the Court.

Moreover, contrary to the County's contention, speech intended to cause harm—even speech intended to cause harm to minors—is not categorically unprotected. (*See* Resp.'s Br. at 23.) Indeed, that proposition has been expressly rejected by the Supreme Court. (*See, e.g.*, *Brown*, 131 S Ct at 2741 ("Even where the protection of children is the object, the constitutional limits on governmental action apply.").) Protection of minors may be the state interest to be evaluated in application of the strict scrutiny test—an issue discussed in the section that follows—but an intent or motive to cause harm to minors has never been identified as a categorical exemption to the First Amendment.

E. The Cyber-bullying Law Fails Strict Scrutiny.

The County argues that the Cyber-bullying Law is the least speech-restrictive means to "protect the psychological well-being of minors." (Resp.'s Br. at 28.) There is no dispute that bullying—including bullying via the Internet—is a significant problem that requires government action. But the County has made no showing whatsoever that the Cyber-bullying Law is narrowly tailored to that goal.

The only support the County offers for its position is a citation to a newspaper article that, contrary to the County's argument, calls into question attempts to link cyber-bullying to children's suicides and raises concerns about the constitutionality of using criminal statutes to charge a child based on her Facebook postings. (Resp.'s Br. at 29 (citing Lizette Alvarez, *Charges Dropped in*

Cyberbullying Death, but Sheriff Isn't Backing Down, NY Times, Nov. 22, 2013 at A14).)[5] This showing is utterly insufficient to meet the County's "demanding" burden to establishing that the regulation of speech is "necessary" to accomplish its goal. (*Brown*, 131 S Ct at 2738.)

As Appellant pointed out in his opening brief, and as the County failed to address, there are many other avenues to address cyber-bullying. (Appellant's Br. at 2-3, 18.) For example, New York State's Dignity for All Students Act, Chapter 482 of the Laws of 2010, which became effective in July 2012, is specifically designed to prevent and address bullying, including cyber-bullying, and contains a number of positive, proactive measures to accomplish those goals. Yet the County made no showing that those measures have been implemented in Albany County, let alone that they are insufficient. Moreover, if, as the County suggests, Cyber-bullying is equivalent to defamation, then existing defamation laws are a more narrowly tailored approach to remedying the harm caused by such speech. The County has made no effort to demonstrate that these avenues have been attempted and failed.

[5] The County also relies, in a puzzling manner, on *People v. Tichenor*, 89 NY2d 769 [1997], for the proposition that the Cyber-bullying Law is narrowly tailored. (Resp.'s Br. at 30-31.) But *Tichenor* upheld a portion of the disorderly conduct statute on the grounds that it regulated constitutionally unprotected fighting words—"words and conduct reinforced by a culpable mental state to create a public disturbance." (*Tichenor*, 89 NY2d at 775.) The County has not suggested that the Cyber-bullying Law is a valid regulation of fighting words.

Moreover, to the extent that harm to minors is the interest served, the Cyber-bullying Law does not accomplish that goal. By the County's own admission, harm to minors is not required to violate the law. (Resp.'s Br. at 30 ("Defendant . . . can offend, annoy or disturb his readers . . . the reaction of the listener is immaterial.").) The Cyber-bullying Law punishes subjective intent—the speaker's thoughts and motivation—not actual harm to minors.

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

The County's various interpretations of the Cyber-bullying Law only reinforce its unconstitutional vagueness. Appellant argued in his opening brief that the phrase "with no legitimate private, personal, or public purpose" is susceptible to countless interpretations. (App.'s Br. at 22 & n.11.) The County's opposing brief illustrates that point well. In the County's view, the phrase "no legitimate purpose" means numerous things. It means "only constitutionally unprotected speech." (Resp.'s Br. at 20.) It means an exclusion of "speech on public concerns or public figures." (*Id*. at 10, n. 5 & 27.) It means an exclusion of anything meant to be humorous. (*Id*. at 14.) It means "singularity of purpose," i.e. "no other reason or justification than with the intent to inflict harm." (*Id.* at 9.) In short, it means anything the County can think of to avoid a constitutional problem.

The actual text of the Cyber-bullying Law contains none of the limitations that the County recognizes are necessary to save the enactment from invalidation.

A fair reading of the text leaves citizens only to guess at its proscriptive reach and bestows upon law enforcement officials insufficient guidance to ensure that their enforcement of the law comports with constitutional limitations. (*See Dietze*, 75 N.Y.2d at 53 (holding that where "the statutory language would signify one thing but, as a matter of judicial decision, would stand for something entirely different . . . persons of ordinary intelligence reading [the statute] could not know what it actually meant").)

The County relies on *People v Shack*, 86 NY2d 529 [1995] for the proposition that "no legitimate private, personal or public purpose" is not vague. (Resp.'s Br. at 20.) In *Shack*, the Court held that the phrase "no purpose of legitimate communication" was not vague in the context of the telephone harassment statute because it refers to the notion that telephone calls were 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 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. This alone renders the Cyber-bullying Law unconstitutionally vague.

Other terms of the statute add to its vagueness and enhance the risk of arbitrary enforcement and chilling of constitutionally protected speech. To begin with, the County now concedes that "hate mail" and "embarrassing photographs," two of the four operative terms of the statute—that is, half of the descriptive phrases defining the nature of the communications that are criminalized— "are subjective terms that lack any concrete definition." (Resp.'s Br. at 34.) The remainder of the statute, however, also contains subjective terms that lack any concrete definition.

The County's defense of the terms "annoy," "abuse," "taunt," and "humiliate," turns on the proposition that a "specific intent element immunizes" the Cyber-bullying Law from a vagueness challenge. (Resp.'s Br. at 38.) This is not the case. While it may be the case that a specific intent requirement "relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware," it "may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain." (*Screws v United States*, 325 US 91, 102 [1945].) Appellant's argument is not that he was unaware that some other person was annoyed, abused, taunted or humiliated by his speech, or that his crime turned on "the unascertainable sensitivities of the victim." (*Shack*, 86 NY2d at 538-39.) His argument is that he would have no way to

measure what it means to have "intent to . . . annoy . . . abuse, taunt . . . [or] humiliate," because those terms are inherently vague and uncertain.

Although the statute at issue in *Coates v City of Cincinnati*, did not employ the term "annoy" in the context of a specific intent clause, it held that the term itself had no definite meaning. (402 US 611, 614 [1971] ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.").) An inherently vague term does not become clear simply because the statute requires specific intent to achieve that inherently unclear goal. An ordinary person would have no way of knowing if, for example, the posting of a personal jibe on Twitter or the sending of a critical email in the midst of a dispute with a neighbor, teacher, or friend might be considered to have the intent to "taunt," "humiliate" or "annoy" worthy of criminal sanctions.

Likewise, law enforcement and the public have no way to know whether a provocative photograph might be considered "sexually explicit." In defense of the term, the County relies on cases and statutes that regulate sexually explicit *conduct*, not sexually explicit images, or that pertain to statutes with specific, limiting definitions of the term "sexually explicit." (*See* Resp.'s Br. at 34-35.) Statutes regulating speech require a higher standard of precision, and the Cyber-bullying Law

contains no limiting definition of the term "sexually explicit." Absent such a definition, the terms like "sexually explicit" and its close analog, "pornography," are inherently vague. (*See, e.g.*, *US v Simmons*, 343 F3d 72 [2d Cir 2003] ("[D]etermining whether material deserves the label of pornography is a subjective, standardless process, heavily influenced by the individual, social and cultural experience of the person making the determination.").)

Taken as whole, the Cyber-bullying Law—and, in particular, the phrase "no legitimate private, personal or public purpose"—is unconstitutionally vague.

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

A. The County's New Interpretation of the Cyber-bullying Law Underscores the Law's Vagueness as Applied to Appellant's Speech.

As discussed above, the County's use of the phrase "no legitimate private, personal or public purpose" as a constitutional panacea underscores the Cyber-bullying Law's unconstitutional vagueness. This is especially true in application of that term to Appellant's speech. The County uses the flexibility afforded by the phrase's vagueness to argue that his guilty plea constitutes an admission to various facts the County now considers essential to its defense of Appellant's conviction. (*See, e.g.*, Resp.'s Br. at 33 (interpreting Appellant's plea as an admission that "his speech was absent any expression or thoughts other than utterances inten[ded] to inflict emotional harm on a minor.").)

In particular, the County argues that Appellant waived his argument that his speech was parody, hyperbole, or humor because his guilty plea constituted an admission that his speech "served no legitimate private or public purpose." (Resp.'s Br. at 13-14.) But the only evidence of intent in the charging instrument was the statement attached to the criminal information stating that Appellant's intent was to be funny. (R. 4, 8, 14, 17, 23, 26, 30, 34.) While the County's appellate attorneys interpret humor as a "legitimate purpose," the law enforcement officials who charged Appellant apparently thought humorous intent was consistent with "no legitimate purpose." Thus, the County's waiver argument only reinforces the statute's unconstitutional vagueness as applied to Appellant.

B. The Cyber-Bullying Law is Unconstitutional as Applied to Appellant Because His Speech is Not Defamation.

The County attempts to justify Appellant's conviction on the grounds that his speech was defamation. (*See* Resp.'s Br. at 10, 13 (characterizing Appellant's speech as "fall[ing] within the friendly confines of speech similar to defamation").)

As an initial matter, the Court should reject out of hand the County's suggestion that *all* false speech is constitutionally unprotected. (*See* Resp.'s Br. at 10-11.) That proposition is wrong as a matter of law. In *United States v. Alvarez*, the Supreme Court held that "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding

that some false statements are inevitable if there is to be an open and vigorous expression of views in *public and private conversation*, expression the First Amendment seeks to guarantee." (132 S Ct at 2544 [2012] (emphasis added).) The County's citations to cases suggesting, in dicta and in concurring opinions, that false speech is unprotected, are not good law, as the Supreme Court recently made clear in *Alvarez*. (*Id.* at 2544-45 (explaining that "isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection"); *see* Resp.'s Br at 10, 12-13 (citing *Herbert v Lando*, 441 US 153 [1979]; *BE & K Constr. Co. v NLRB*, 536 U.S. 516 [2002]; *Philadelphia Newspapers, Inc. v Hepps*, 475 US 767 [1985] (Stevens, J., concurring).) Thus, the County must establish not only that Appellant's speech was false, but that it was defamation.

The County cannot establish that Appellant's speech was defamation because the People never accused Appellant of the elements of criminal defamation. The Cyber-bullying Law on its face does not require the elements of criminal defamation.

On March 1, 2012, Appellant pled guilty in Cohoes City Court to one count of violating the Cyber-bullying Law, conditioned on his right to appeal the denial of his constitutional challenge. (R. III-IV). As is typical in local justice courts, there is no transcript of the plea or allocution and the digital audio recording of that court proceeding is not part of the record. Intervenor Albany County took no part in that

proceeding. The People were represented by the Albany County District Attorney's Office, which has declined to submit a brief in support of Appellant's conviction. The record, therefore, provides no indication that there was a colloquy pertaining to the plea, let alone an allocution in which Appellant admitted to particular facts.

Nonetheless, the County claims that Appellant's guilty plea constitutes an admission that his speech conveyed "defamatory lies," "false sexual information," that he spoke "with the intent to cause emotional harm to a minor," and that his speech "served no legitimate private or public purpose." (Resp.'s Br. at 1.) The mere fact of a guilty plea, however, cannot constitute such an admission. The Cyber-bullying Law does not contain the phrase "defamatory lies" and the charging instrument did not allege facts to support that. The Cyber-bullying Law criminalizes "private, personal, false *or* sexual information," not necessarily "false sexual information," and, at the time Appellant entered his plea, the County had not disavowed the term "hate mail" and "embarrassing or sexually explicit photographs," so it cannot be said that Appellant plead to a particular sub-set of these many categories of criminalized speech. Finally, Appellant conditioned his plea on his argument that the terms of this statute—including terms like "no legitimate private, personal, or public purpose" and "the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person"—are vague in that they failed to provide him with

sufficient notice of whether his speech fell within the statute. Appellant's guilty plea cannot now be used to manufacture facts not in the record to support the conclusion that Appellant is guilty of criminal conduct for which he was never specifically charged.[6]

Taken at face value, moreover, Appellant's speech does not as readily fall into the "friendly confines" of defamation as the County seems to believe. First, although Appellant made statements about the purported sexual activities of his classmates, he primarily voiced opinions and offered commentary about the subjective attributes of those classmates. (R. 3, 7, 13, 16, 22, 25, 29, 33.) Therefore, looking to "the content of the whole communication, its tone and apparent purpose," Appellant's speech was protected opinion rather than "actual facts," and, therefore, not defamation. (*See Immuno AG*, 77 N.Y.2d at 254.) Second, Appellant's humorous purpose, and some of Appellant's speech was so crude as to be outlandish, such that his speech was in the nature of hyperbole and name-calling, rather than actual facts, and, therefore, not defamation. (*See Milkovich v. Lorain Journal Co.*, 497 US 1, 20 [1990] (holding

[6] In the unlikely event that the Court upholds the Cyber-bullying Law based as a regulation of defamation, the Court should reverse Appellant's conviction, vacate his guilty plea, and remand to allow the development of a factual record on the elements of defamation. Notwithstanding the plea, Appellant has not waived his defenses to a defamation charge because, to the extent the Cyber-bullying Law could ever be understood as a defamation law (and it cannot for the reasons stated in Part I, *supra*), it was not understood as such as the time, and therefore to deprive him of the opportunity to present such defenses would implicate the integrity of the process. *See People v Green*, 75 NY2d 902, 907 [1990]("The line we have drawn to differentiate those claims that survive a guilty plea from those that do not reflects the critical distinction between jurisdictional or constitutional defects which implicate the integrity of the process and other less fundamental flaws—e.g., evidentiary or technical matters. The test, in short, is whether the claimed defect is a matter of basic fairness affecting societal interests in our criminal justice system.").

that the constitution protects "statements that cannot reasonably be interpreted as stating actual facts about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation") (internal citation omitted); *Greenbelt Co-op. Pub. Ass'n v Bresler*, 398 US 6, 14 [1970] (holding that "rhetorical hyperbole, a vigorous epithet" is constitutionally protected and not defamation); *Nat. Ass'n of Letter Carriers, AFL-CIO v Austin*, 418 US 264, 284-86 [1974] (holding that "rhetorical hyperbole, a lusty and imaginative expression of . . . contempt" cannot be defamation).)[7]

If Appellant had been charged with criminal defamation, the government would bear the burden of proving that Appellant's speech was defamatory and, therefore, unprotected. (*See Ashcroft v Free Speech Coalition*, 535 US 234, 255 [2002] ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.").)

[7] This argument does not turn on, but is supported by, the fact—undisputed in the record—that Appellant's intent in posting his comments was to be funny. The County claims that Appellant "waived this argument when he pleaded guilty." (Resp.'s Br. at 14.) But it was the People's own charging instrument that articulated Appellant's intent to be funny when they appended his statement as part of the basis of his charge. (R. 4, 8, 14, 17, 23, 26, 30, 34.) That the County now finds it more convenient to disavow the People's interpretation of the statute and claims that "no legitimate purpose" excludes rather than includes a humorous purpose has no bearing on the meaning of Appellant's guilty plea. There is nothing in the charging instrument or in the record about the context in which Appellant's comments were made that could support a finding that, "viewed in their context[,] . . . a reasonable person would view them as expressing of implying any facts." (*Immuno AG*, 567 NY2d at 254, emphasis in original.) Moreover, as argued in Part II, *supra*, the County has no basis for interpreting "no legitimate private, personal or public purpose" to necessarily exclude humor. Indeed, the County has multiple, competing interpretations of that phrase.

Therefore, to the extent that the County seeks, for the first time in its brief to this Court, to transform the Cyber-bullying Law into a defamation statute and apply that law, *post hoc*, to Appellant's speech, it bears the burden of proving that Appellant's speech was defamation. Because the County has not established that Appellant's speech is defamation, the Cyber-bullying Law should be held unconstitutional as applied to Appellant.

CONCLUSION

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

Respectfully submitted,

_/s/_____

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