November 25, 2019

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Dear County Executive Dinolfo, Mayor Warren, Sheriff Baxter, Chief Singletary, Mr. O'Brien, Mr. Ciminelli, Mr. Curtin, Mr. Davis, and Members of the Monroe County Legislature:

We write to object to the "Prohibited Harassment of a Police Officer, Peace Officer or First Responder in Monroe County" proposed county law (hereinafter referred to as the "Annoyance Law"), which is clearly unconstitutional. For the reasons detailed below, we urge County Executive Dinolfo not to sign the bill into law.

If enacted, the bill will be challenged and stricken by the courts as unconstitutionally vague, overbroad and violative of the First Amendment. The statute makes unlawful a range of clearly established First Amendment protected speech and conduct. Thus, if individuals are arrested and charged under this

statute, their criminal cases will be dismissed, and they will be entitled to compensatory damages and attorney's fees in a subsequent civil rights action. We hope this letter persuades you to avoid these consequences that will be detrimental to the County.

I. Introduction

A. History

On November 12, 2019, the Monroe County Legislature voted in a strict party-line vote to pass the Annoyance law. GOP members voted in favor of the law despite concerns raised by Democratic members that the law was unconstitutional. The law was passed after being deemed a "matter of urgency," though there was nothing urgent about the need for passage other than the pending change in county leadership from a Republican County Executive to a Democratic one. It did not pass through committee, and the public was not notified.

Despite extensive community opposition, on Friday, November 22, 2019 (and not before), the County Executive indicated she would sign the law, and set a hearing for Monday, December 2, 2019. Notably, the week following the Friday she announced this is Thanksgiving week, when many are out of town, and the county offices are closed on Thursday and Friday. The hearing was set for 2:00 p.m. on the Monday after Thanksgiving, unlike the evening timing of many committee and legislature meetings, when community members can attend.

B. The Law

As you know, the Annoyance Law in Section 1 states, "A person is guilty of harassing a police officer, peace officer, or first responder when he or she intentionally engages in conduct against a police officer, peace officer or first responder, [sic] that intends [sic] to annoy, alarm or threaten the personal safety of a police officer, peace officer or first responder." This law, according to Section 3, is classified as a misdemeanor punishable by up to a year in jail or a $5,000 fine.

C. Summary of the unlawfulness of the Annoyance Law

The proposed statute violates the New York State and United States law in the following ways:

1. It is "void for vagueness," as discussed more fully below in Section II;

2. It is unconstitutionally overbroad, as discussed more fully below in Section III; and

3. It violates the Preemption doctrine, as discussed more fully below in Section IV.

In addition, the law will damage our community in the following ways, as discussed more fully in Section VI below:

1. It will create police policies that counter the best practices and newest principles of policing, which seek de-escalation, instead of penalization;

2. It will lead to unlawful stops, arrests, and searches of members of the community;

3. It will increase distrust of the police as they will have carte blanche to stop anyone for any behavior they subjectively consider "annoying;"

4. It will cost taxpayers money for the litigation that will follow, including attorneys' fees for the attorneys who will prevail in the litigation;

5. It will likely have greater detrimental impact on communities of color and poorer communities;

6. It will undermine the efforts and goals of the newly formed Police Accountability Board;

7. It increases police officers' discretionary authority and intrusion into people's lives.

II. Vagueness

The proposed law, like most laws, appears to include both a *mens rea* (state of mind) and *actus reus* (conduct that is prohibited by the law). The *mens rea* appears to be clear – intent to annoy, alarm or threaten the safety of the protected parties. The prohibited conduct is less clear. In fact, it is entirely unclear. According to this law, the conduct appears to be any action that may offend an officer. Although the statute says the prohibited conduct is conduct that "intends to" annoy, alarm or threaten", conduct cannot intend anything. So we are left with

a statute that essentially bars any conduct at all that is intended to annoy, alarm or threaten a protected party.

Citizens will have no idea of what conduct is barred. And apparently, every behavior intended to annoy, alarm or threaten a protected party is barred. This can include name-calling, cursing, giving an officer "the finger," recording them, telling them you will contact their supervisors, requesting a supervisor's name, laughing at them, screaming at them, and the whole range of human behavior. It may include journalists' questioning of officers or video recording them. The failure to specify what conduct is prohibited makes this statute void for vagueness.

The Court of Appeals (the highest court in New York) has reviewed numerous statutes for vagueness. A few of the applicable cases follow.

A. *People v Stephens,* 28 NY3d 307 (2016)

In *People v Stephens*, the Court of Appeals analyzed a noise ordinance in Syracuse. Although the Court found the statute to be constitutional, its review of the "void for vagueness" doctrine explains the perils of a vague statute:

> With these general principles in mind, we analyze this vagueness challenge using a two-part test (cites omitted). First, we must determine "whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" (cites omitted). Second, we must determine "whether the enactment provides officials with clear standards for enforcement" so as to avoid "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application" (cites omitted). Accordingly, a statute is "unconstitutionally vague under the Due Process Clauses of the Federal and State Constitutions [where] it fails to give fair notice to the ordinary citizen that the prohibited conduct is illegal, [and] it lacks minimal legislative guidelines, thereby permitting arbitrary enforcement" (cites omitted). On the other hand,
>
> "[a] statute which employs terms having an accepted meaning long recognized in law and life cannot be said to

> be so vague and indefinite as to afford the defendant insufficient notice of what is prohibited or inadequate guidelines for adjudication, even though there may be an element of degree in the definition as to which estimates might differ" (*People v Cruz*, 48 NY2d 419, 428 [1979] [internal quotation marks and citations omitted]).

People v Stephens, 28 NY3d 307 (2016).

B. *People v Marquan M.*, 24 NY3d 1 (2014)

In *People v Marquan M.,* a case addressing a cyberbullying statute, and finding it unconstitutional, the Court of Appeals stated that, "a statute is seen by the courts as vague if 'it fails to give a citizen adequate notice of the nature of proscribed conduct, and permits arbitrary and discriminatory enforcement'" (*People v Shack*, 86 NY2d 529, 538 [1995])."

The Court further addressed whether unconstitutional parts of the statute could be severed from constitutional portions, concluding in *Marquan*, it could not:

> We conclude that it is not a permissible use of judicial authority for us to employ the severance doctrine to the extent suggested by the County or the dissent. It is possible to sever the portion of the cyberbullying law that applies to adults and other entities because this would require a simple deletion of the phrase "or person" from the definition of the offense. But doing so would not cure all of the law's constitutional ills.

The proposed statute contains a severability clause, but as the portions cannot be severed, as in *Marquan,* the statute fails in its entirety.

C. *People* v *Stuart*, 100 NY2d 412, 431 (2003)

In *People v Stuart*, the Court of Appeals discussed a United States Supreme Court case, *Coates v Cincinnati* in its evaluation of a stalking statute. The Court stated,

"Similarly, in *Coates v Cincinnati* (402 US 611), the Supreme Court struck down as vague on its face an ordinance prohibiting persons assembled on a sidewalk from "conduct[ing] themselves in a manner annoying to persons passing by." The Court explained that "[i]t is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from engaging in countless forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. **It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed**" (402 US at 614 [citation omitted]) (Emphasis added). Again, a defendant whose conduct was "clearly within the city's constitutional power to prohibit" and who challenged the statute only as applied would have lost but yet the statute would still have been unconstitutional on its face.

This makes sense because vagueness is different. Insofar as a statute's language may be read to cover both criminal and innocent conduct — and thus may in some circumstances be constitutional as applied and in others unconstitutional — it may fail to provide fair notice as to just what conduct is in fact meant to be prohibited, rendering it unconstitutional on its face. It is only in this sense — that no one can define the limits of the situations that a statute is meant to proscribe, even though some may know with certainty that their conduct is included within the vast universe of what is prohibited — that it may be said that a facially vague statute is vague in all its conceivable applications.

In other words, a facially vague statute fails to give anyone notice of its limits, even though everyone might understand its core, and even though it may not be unconstitutional as applied to this core. A vague statute grants the police "too much discretion in every case," regardless of whether that discretion is applied "wisely or poorly in a particular case. And if every application of the ordinance represents an exercise of unlimited

> discretion, then the ordinance is invalid in all its applications" (*Morales*, 527 US at 71 [Breyer, J., concurring] [emphasis in original]). Indeed, the Supreme Court has declared that "the more important aspect of vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement" (*Kolender*, 461 US at 358 [citation omitted]).

A review of both United States Supreme Court law and New York Court of Appeals law clearly establishes that this statute, with its dependence on whether an officer is annoyed, and its failure to specify prohibited conduct, is unconstitutional due to its vagueness. It is also clear that the statute cannot be rescued by severability.

III. Overbreadth

The constitutional doctrine of overbreadth addresses whether a statute that prohibits some illegal conduct is so broad that it also prohibits protected conduct. The Annoyance statute fails in this respect as well. The extent to which this statute prohibits conduct and speech protected by the First Amendment is breathtaking.

The Court of Appeals and the United States Supreme Court have addressed overbreadth on many occasions in review of statutes that prohibit conduct or speech. A few of the cases are cited below:

A. *People v Dietze*, 75 NY3d 47 (1989)

In *People v Dietze*, the Court of Appeals struck down a harassment statute, stating,

> Under Penal Law § 240.25 (2), the use of "abusive" language with the intent to "harass" or "annoy" another person is a violation punishable by a 15-day imprisonment. Because the statute, on its face, prohibits a substantial amount of constitutionally protected expression, and because its continued existence presents a significant risk of prosecution for the mere exercise of free speech, we hold section 240.25 (2) to be invalid for overbreadth, under both the State (art I, § 8 and Federal (1st & 14th Amends) Constitutions. The information, to the extent that it charges defendant under that

> subdivision, must, therefore, be dismissed. Additionally, because the evidence presented was legally insufficient to support a conviction for a threat under Penal Law § 240.25 (1), the remainder of the information, charging defendant with violating that subdivision, must be dismissed as well.

People v Dietze, 75 NY2d 47 (1989).

B. *People v Golb*, 23 NY3d 455, 466 (2014)

In *People v Golb*, a decision that addressed the former aggravated harassment statute in New York, striking down part of it (and partly reversed on other grounds in federal court), the Court of Appeals stated,

> Penal Law 240.30(1)(a) provides that '[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she ... communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.' We agree with defendant that this statute is unconstitutionally vague and overbroad, and that his conviction of three counts of aggravated harassment related to his conduct toward Schiffman, Goranson and Cargill must be vacated.
>
> In *People v Dietze*, 75 NY2d 47, 550 NYS2d 595, 549 NE2d 1166 (1989), this Court struck down a similar harassment statute, former Penal Law § 240.25, which prohibited the use of abusive or obscene language with the intent to harass, annoy or alarm another person. We determined that the statute was unconstitutional under both the State and Federal Constitutions, noting that 'any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence' (*id.* at 52, 550 NYS2d 595, 549 NE2d 1166).

> The reasoning applied in *Dietze* applies equally to our analysis of Penal Law § 240.30(1)(a). The statute criminalizes, in broad strokes, any communication that has the intent to annoy. Like the harassment statute at issue in *Dietze*, "no fair reading of this statute's unqualified terms supports or even suggests the constitutionally necessary limitations on its scope" (*id.* at 52, 550 NYS2d 595, 549 NE2d 1166; *see also People v Dupont*, 107 AD2d 247, 253, 486 NYS2d 169 [1st Dept 1985] [observing that the statute's vagueness is apparent because 'it is not clear what is meant by communication' in a manner likely to cause annoyance or alarm to another person]). And, as in *Dietze*, 'we decline to incorporate such limitations into the statute by judicial construction' because that would be 'tantamount to wholesale revision of the Legislature's enactment, rather than prudent judicial construction' (*id.* at 52-53, 550 NYS2d 595, 549 NE2d 1166)."

People v Golb, 23 NY3d 455, 466 (2014).

C. *People v Mangano*, 100 NY2d 569, 570 (2003)

The Court of Appeals has also held it unconstitutional to prosecute a defendant for leaving crude and offensive messages wishing government employees and their families ill health, made in the context of complaining about government actions, on a telephone answering machine set up for the purpose (among others) of receiving complaints from the public, since that speech was constitutionally protected (*People v Mangano*, 100 NY2d 569, 570 [2003]). In that case the Court reversed convictions for aggravated harassment based on five phone calls made to the answering machine of the Village of Ossining Parking Violations Bureau. The primary purpose of the phone number called was to provide information on vehicles that would be parked on the street at night. In addition, callers were able to leave complaints. As noted by the Southern District of New York, the phone calls clearly contained offensive content:

> Over a four day period, Ms. Mangano, the defendant placed five calls to the Parking Bureau Office and left the following messages to named employees of the Bureau:

> "I wish all of you death ... You should all die. You should all die of cancer and your children also. Save this fucking message Gracie ..."
>
> "For each ticket I get people, I am taking this personally. I will pray for an early death for your kids. Mark it. Nasty person. Just remember people, every action."
>
> "People, for every action there is a reaction. I paid my money. Don't you ever wonder why, Gracie, I get so fucking upset. I think of you and my fucking blood boils. Am I ashamed of myself for cursing ... I am ashamed of you ... Rene, consider yourself warned. I'm fucking fed up. I don't care about it, any directive you get. I'm taking this personally now ...."
>
> "Every action people, there is a reaction. You have provoked the nastiness in me. I paid my money, where are the certificate of parking permits? Selective enforcement Rene. Wait, Gracie I wish you harm and your kid Tommy harm. Jesus Christ, aren't I getting goddam nasty? Every action is a reaction schmucks"

Mangano v Cambariere, 2007 WL 2846418, at *3 (SDNY 2007).

In reversing these convictions the Court of Appeals held that "defendant's messages were crude and offensive but made in the context of complaining about government actions, on a telephone answering machine set up for the purpose (among others) of receiving complaints from the public. We cannot agree with the People's argument that appellant's messages fall within any of the proscribable classes of speech or conduct." (*People v Mangano*, 100 NY2d 569, 570 [2003]).

D. *City of Houston v Hill*, 482 US 451 (1987)

In 1987, the Supreme Court of the United States struck down a similar local statute passed by the city council in Houston Texas. In *City of Houston v Hill*, 482 US 451 (1987), the Supreme Court held that Houston's statute was unconstitutionally overbroad because it permitted police officers to arrest people for merely interrupting a police officer in the line of duty. Under the statute, police officers regularly arrested people for, *inter alia,* "arguing," "[t]alking," "[i]nterfering," "[f]ailing to remain quiet," "[r]efusing to remain silent," "[v]erbal

abuse," "[c]ursing," and "[v]erbally yelling" at a police officer in the line of duty—which, without more, is unconstitutional.

The bill passed by the GOP Monroe County legislators is similarly unconstitutionally overbroad because it would permit police officers to arrest people for the same protected speech.

IV. Preemption

A. *People v De Jesus*, 54 NY2d 465, 468 (1981)

The legal doctrine of preemption bars exercise of police power by a municipality unless that authority has been specifically designated to the locality. In *People v DeJesus,* the Court of Appeals reviewed this doctrine, held that a City of Rochester ordinance which made it unlawful to patronize an establishment that served alcohol after hours was pre-empted by the State Alcohol Beverage and Control Law even though the State law had no provision covering such patrons because the State law occupied the field. The Court explained that,

> Our analysis begins with the general observation that, since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority (56 Am.Jur.2d, Municipal Corporations, Counties and Other Political Subdivisions, § 428). As pertinent here, in the spirit of this broad principle, article IX (§ 2, subd. [c], par. [ii]) of the New York State Constitution specifies that any local law be not inconsistent with any general law 'and that the legislative power of local government is limited to the extent that the legislature shall restrict the adoption of such a local law.'

Critically, the Court held that "such 'inconsistency' or 'restriction' is not limited to cases of express conflict between local and State laws. . .". Rather, it exists where the subject matter being regulated is covered by State law which by its scope "demonstrate[s] a 'design to pre-empt the subject. . . and occupy the entire field so as to prohibit additional regulation by local authorities.'" (*People v De Jesus*, 54 NY2d 465, 468-69 [1981] [internal citations omitted]).

The current statute violates the doctrine of preemption. It prohibits conduct which is, to a great extent, deemed unlawful by state statutes, such as harassment, obstruction of governmental administration, and assault in the second degree, while enhancing punishment for conduct already addressed by the harassment statute. Importantly, the extensive state statutes dealing with such conduct indicates an intent of the State to occupy the field on a topic which requires a careful balance of first amendment and public safety concerns.

VI. Policy and equitable reasons for withdrawing this proposed law.

While there are several reasons that the statute is unlawful and should not be implemented, the policy and equitable reasons for not implementing it are even more numerous.

First, it will create police policies that counter the best practices and newest principles of policing, which seek de-escalation, instead of penalization.

As noted by former Chief of Police, now Monroe County legislator James Sheppard, in Rochester City Newspaper, "You can't make it where an officer can arrest someone just because they're annoyed or alarmed." According to the newspaper,

> Sheppard said the law conflicts with a shift in training in many police departments that teaches officers to de-escalate tense situations instead of jumping to a punitive action such as arrest. He also said terms like "annoy" and "alarm" are so subjective that they're essentially meaningless.
>
> "Even the courts have said it: police have to be more thick-skinned," Sheppard said.

This law will enhance tension, and provide officers who are particularly sensitive with a tool to punish those who bother them. There are already numerous lawsuits pending against the Rochester Police Department, often involving the same officers time and again. This statute may give them a sense that they decide what the law is. Because this statute does give them that authority.

Second, it will lead to unlawful stops, arrests, and searches of members of the community.

As the statute is unconstitutional, any acts taken under it will be unconstitutional. Thus, the teen who taunts a police officer verbally, who is engaging in constitutionally protected behavior, will be subject to stop, perhaps chase, perhaps injury, perhaps arrest, and perhaps search. As our community is deeply segregated by wealth and race, it is likely that conduct some police believe to be threatening or annoying – kids standing on a corner when they do not have backyards to play in, or local parks – will lead to arrests.

Third, it will increase distrust of the police as they will have carte blanche to stop anyone for any behavior they subjectively consider "annoying;"

The statute, if applied unevenly, will lead to further distrust, and ultimately greater safety concerns, for police who abuse it. Currently, suburban residents are rarely if ever stopped for riding a bicycle without a bell, failing to signal a turn more than 100 feet before turning, having items dangling from rearview mirrors, walking in the street when the sidewalk is available, and various other offenses that city residents, often young black men, are stopped for every day. This will be yet another offense that further increases the perception and reality that we have two types of policing in our community – one for suburbanites and white residents, and another for city residents and people of color.

Fourth, it will cost taxpayers money for the litigation that will follow, including attorneys' fees for the attorneys who will prevail in the litigation

Although we certainly cannot predict how courts may rule on the law with certainty, given the types of statutes that have been struck down based on violations of the doctrines of overbreadth and vagueness, it is extremely likely this law too will fail. If a defendant who is arrested under this statute serves jail time, is harmed in a chase, or loses a job, has their reputation harmed, or faces other consequences, their lawsuit will cost the county money. And we are prepared to take these lawsuits. We also intend to seek attorney's fees. Knowing this, and the likely failure of the statute, if the Republicans in the legislature do not withdraw the statute, and County Executive Dinolfo signs it, we believe they will be directly responsible for the costs to the taxpayers, unless the legislators and Ms. Dinolfo are willing to post a bond to cover costs because they are so certain that they will prevail in this litigation. If they are not that certain, they should not gamble with taxpayers' money.

Fifth, it will likely have greater detrimental impact on communities of color and poorer communities.

As noted above in paragraph 3, this statute is likely to have a disproportionate impact on communities of color and those in poverty.

Sixth, it will undermine the efforts and goals of the newly formed Police Accountability Board.

The Police Accountability Board was implemented through the most recent election. As with the CABLE Act, the community has spoken. But this statute will serve to provide officers who are engaged in improper conduct an excuse and a veneer of protection against review by the PAB – that their conduct is protected by this law. We urge you not to undermine the will of the community.

Seventh, the bill increases police authority and intrusion into people's lives. Is this really what conservatives want? Or is there an expectation that this statute will not be applied to them?

For all of the reasons described above, we urge the legislature to withdraw the bill, County Executive Dinolfo not to sign it, and police departments to make public statements that they will not enforce it due to its unconstitutionality.

Very truly yours,

Elliot Dolby Shields, Esq.
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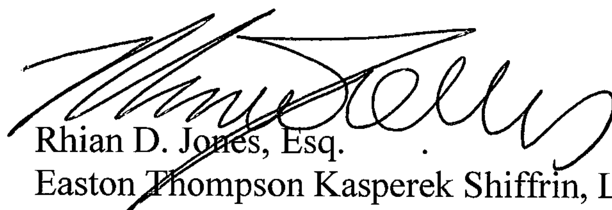

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