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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 139

MARQUAN M.,

Appellant.

20 Eagle Street
Albany, New York 12207
June 05, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 139.

2 Counselor, would you like any rebuttal
3 time?

4 MS. STOUGHTON: Yes, Your Honor, I'd like
5 to reserve three minutes, if I could?

6 CHIEF JUDGE LIPPMAN: Three minutes? Go
7 ahead.

8 MS. STOUGHTON: Good afternoon, may it
9 please the court, Corey Stoughton from the New York
10 Civil Liberties Union, representing the defendant-
11 appellant, here.

12 This case is a Constitutional challenge to
13 Albany County's cyber-bullying law. Cyber-bullying
14 is a serious problem that government can and should
15 address, but this is the wrong way to do it, and more
16 importantly, for purposes of this court, it's an
17 unconstitutional way to do it.

18 CHIEF JUDGE LIPPMAN: Counsel, assuming
19 that there's something wrong with this statute, or a
20 number of things wrong with this statute, why isn't
21 it severable? Can you - - - let's say on one or two
22 or three of the points that you're going to make, or
23 more, as to what's wrong with the statute, we agree
24 with you; why isn't it severable? Why can't the
25 statute be - - - be salvaged, even if there's some

1 things wrong with it?

2 MS. STOUGHTON: Because in - - - as this
3 court has held, in order for a severability clause to
4 work, there has to be a word to sever. And the
5 defect - - -

6 CHIEF JUDGE LIPPMAN: Has to be what to
7 sever?

8 MS. STOUGHTON: A word to sever.

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MS. STOUGHTON: You can't sever concepts or
11 rewrite or reimpose language and put that under the
12 umbrella of severability. There are some defects
13 with this law that could be severed. But not - - -

14 JUDGE GRAFFEO: So you couldn't - - - you
15 couldn't - - -

16 MS. STOUGHTON: - - - a sufficient number
17 of them.

18 JUDGE GRAFFEO: - - - do what - - - you
19 couldn't do what the County Court judge did here in
20 saying it would only apply to children and not to
21 adults?

22 MS. STOUGHTON: Well, no, Your Honor, you
23 couldn't do that, because that's not severing.
24 That's, again, rewriting. But more importantly,
25 that's not enough to save the Constitutionality of -

1 - -

2 CHIEF JUDGE LIPPMAN: How do you know where
3 you're severing and where you - - - where you're
4 rewriting?

5 MS. STOUGHTON: Well, I - - -

6 CHIEF JUDGE LIPPMAN: What's the dividing
7 line?

8 MS. STOUGHTON: You know, the dividing line
9 - - - one easy dividing line is, are you taking a
10 word out and then lea - - - or a portion of the
11 statute out - - -

12 JUDGE SMITH: Well, on Judge - - - on Judge
13 Graffeo's question, you are just taking a word out,
14 aren't you? Taking out "or a person"?

15 MS. STOUGHTON: Well, no, you're - - -
16 you're taking - - - you're taking a word out and
17 putting a word back in, which is putting in "minors",
18 instead of "all persons".

19 JUDGE SMITH: Isn't - - - isn't "minors" in
20 there? Sorry.

21 MS. STOUGHTON: No, it's not in there.

22 JUDGE SMITH: Oh, I see. I misread it.

23 MS. STOUGHTON: But I think the better
24 answer to Judge Graffeo's question is simply that
25 that doesn't save the statute. There's no case that

1 would hold that if you limited an - - - this
2 otherwise overbroad regulation of speech to speech
3 that was targeted at children, that makes it
4 Constitutional.

5 CHIEF JUDGE LIPPMAN: What - - -

6 MS. STOUGHTON: In fact, Brown v.
7 Entertainment Merchants suggests that that actually
8 is -

9 JUDGE GRAFFEO: Is there more than one
10 problem that you see with the language of the
11 statute?

12 MS. STOUGHTON: Yeah, there are at least
13 eight problems. Or one way to think about it is that
14 the County's - - -

15 JUDGE GRAFFEO: How about the top three?

16 MS. STOUGHTON: Well, okay, the top - - -
17 the top three - - - I mean, the - - - the top three
18 is to - - - is - - - let me start with what the
19 County is trying to read onto the statute that's
20 inappropriate. The County is trying to, at least
21 now, before this court, advance the argument that
22 this statute is a criminal defamation statute.

23 And the problem with that is that to make -
24 - - to turn this statute into a criminal defamation
25 statute, not only requires the court to excise terms

1 the County wants to excise - - - excise, like "hate
2 mail" and "sexually explicit photographs", it also
3 requires the court to read in a no public - - - not -
4 - - not about a matter of public interest, not about
5 a public figure, an actual malice requirement, and a
6 requirement that the speech not be sexual, personal,
7 private, or false, but that it be all of those
8 things, including that it always be false, which is
9 not in the statute.

10 And those - - - I mean, that - - - those
11 are five - - - four problems right there, that I
12 consider the top - - -

13 JUDGE PIGOTT: What's the difference
14 between - - -

15 MS. STOUGHTON: - - - four problems with
16 reading this as a defamation statute.

17 JUDGE PIGOTT: - - - Ms. Stoughton, what's
18 an example of somebody who's being harmed by the
19 statute? I - - - I understand you're saying that
20 it's vague, et cetera. Can you give me a picture of
21 somebody that is being harmed by - - - by the
22 statute?

23 MS. STOUGHTON: Well, Judge Pigott, do you
24 mean a victim of cyber-bullying?

25 JUDGE PIGOTT: Yeah. Yeah, that - - - in

1 other words, somebody comes in and says I got
2 arrested on this cyber-bullying thing, and it clearly
3 does not apply to me. I - - - I'm just shocked,
4 stunned, and amazed that I'm - - - that I've been
5 arrested under this, because it certainly wasn't
6 clear to me that I was - - - that I would be - - -
7 that I would fall under the statute.

8 MS. STOUGHTON: Well, we have - - - we have
9 several examples of that in our - - - in our brief.
10 I mean, one example would be, you get into a dispute
11 with your neighbor, or even your neighbor's children,
12 because they're very loud. And you post something on
13 a neighborhood forum that suggests that their - - -
14 their children are mis - - - you know, misbehaving.
15 You say some really nasty things that I'd prefer not
16 to specifically articulate, but we can use our
17 imaginations.

18 And, you know, that - - - and you're angry.
19 And you express that opinion about the proclivities
20 of your neighbor's children, because you're angry
21 about their noise, and you get arrested for cyber-
22 bullying.

23 And that - - - you know, that - - - that
24 kind of speech isn't laudable, and I'm not saying
25 it's the core of political expression. But it

1 shouldn't be subject - - -

2 JUDGE PIGOTT: If you - - -

3 MS. STOUGHTON: - - - to arrest.

4 JUDGE PIGOTT: - - - if you stood on the
5 sidewalk and said all of those things that you just
6 said and got arrested for harassment, is that a bad
7 thing?

8 MS. STOUGHTON: Absolutely. I mean, you
9 know, that would not be disorderly conduct unless you
10 could meet the requirements this court imposed - - -

11 JUDGE PIGOTT: That's right. What - - -
12 what you would then do is move to dismiss and you'd
13 probably win.

14 MS. STOUGHTON: Well - - - well, okay. The
15 question is, even under Coun - - - if you look at the
16 County's interpretation of this law - - -

17 JUDGE PIGOTT: No, I'm just looking for a
18 victim.

19 MS. STOUGHTON: A hypothetical victim. I
20 mean - - - I mean, the point - - - Your Honor, the
21 point of the overbreadth doctrine of the First
22 Amendment is that people shouldn't have to even go
23 through the process of fearing that arrest.

24 JUDGE PIGOTT: I'm looking for the person
25 who's in fear. Somebody says, gee, you know, I'm

1 looking at this thing. I'm never going into Albany,
2 because they've got this statute out there and it
3 could be me because?

4 MS. STOUGHTON: Well - - - well, look, I
5 mean, look at what the statute says on its face.
6 You're that person trying to conform to that
7 behavior. And let's not also forget law enforcement
8 officers called upon to interpret this statute.

9 Any time you disseminate an embarrassing or
10 sexually explicit photograph, any time you
11 disseminate private, personal, false, or sexual
12 information about another person or send something
13 that might be considered hate mail.

14 I mean, these are things that, frankly, if
15 you just go onto the Internet, are prevalent aspects
16 of communication on the Internet in message forums,
17 on - - -

18 CHIEF JUDGE LIPPMAN: How targeted does
19 your legislation have to be to get out - - - get out
20 from under the kind of overbroad nature of this, in
21 your view? What - - - what do you have to do to make
22 the statute legitimate?

23 MS. STOUGHTON: It needs to stick to the
24 well-established categories - - - categories of
25 unprotected speech, which we - - - we know what those

1 are. They are - - - they are true threats - - -

2 JUDGE GRAFFEO: And how - - - how can you
3 do that for - - - for the kind of bullying that's
4 involved with this type of Internet activity?

5 MS. STOUGHTON: Well, for one thing, you
6 could have a statute that was actually targeted at
7 true threats, something that the County - - -

8 JUDGE PIGOTT: Actually targeted at what?

9 MS. STOUGHTON: At true threats.

10 JUDGE PIGOTT: At what?

11 MS. STOUGHTON: True threats.

12 JUDGE PIGOTT: True threats, okay.

13 MS. STOUGHTON: Yeah, true threats. You
14 know - - -

15 JUDGE GRAFFEO: So one student has to
16 threaten to physically attack another student before
17 there's a valid statute, in your mind?

18 MS. STOUGHTON: Well, let's - - - let - - -
19 let me ask what you mean by a valid statute. Because
20 we're - - - we're talking about a criminal statute
21 here, so you know, to some extent, the answer to that
22 question, in addition to, you know, fighting words,
23 and the other categories, is yes.

24 But let's not forget that there's a range -
25 - -

1 JUDGE SMITH: Are you saying - - -

2 MS. STOUGHTON: - - - of other acts - - -
3 actions the government can take to address that
4 behavior that falls short of giving fifteen-year-olds
5 criminal records and subjecting them to misdemeanor
6 penalties.

7 JUDGE SMITH: Are you - - - are you saying
8 that your client had a Constitutional right to post
9 the stuff he posted?

10 MS. STOUGHTON: Yes, Your Honor, we are
11 saying that. I mean, there is - - - there is no
12 credible ar - - - I mean, first, let me identify, we
13 obviously have both a facial and an as-applied
14 challenge. So it's not necessary, and in fact, we
15 urge the court - - -

16 JUDGE SMITH: Isn't it - - - isn't it - - -
17 I mean, isn't it implicit in - - - in Snyder, I mean,
18 when they said that the speech in Snyder was
19 protected, all over the opinion is, it's protected
20 because it's not a matter of public interest. You're
21 not claiming that - - - that your guy was talking
22 about a matter of public interest, are you?

23 MS. STOUGHTON: No, Your Honor, we're not
24 claiming - - -

25 JUDGE SMITH: Isn't it - - - isn't it

1 pretty clear from Snyder that when you're talk - - -
2 when you're just abusing someone in private, it's not
3 protected?

4 MS. STOUGHTON: No, Your Honor, to the
5 contrary. There has never been a decision from the
6 United States Supreme Court or this court suggesting
7 that speech about - - - purely about a - - -

8 JUDGE PIGOTT: Well, no - - -

9 MS. STOUGHTON: - - - private person is
10 unprotected.

11 JUDGE PIGOTT: - - - so your argument is
12 that you don't think bullying should be a crime.
13 It's not - - - it's not cyber-bullying, it's any
14 bullying. You don't think that ought to be a crime.
15 You think that if - - - if you threaten somebody, we
16 have statutes for that. If you hit somebody, we have
17 statutes for that. But if you just bully them like
18 so - - - it gets so common these days, and then - - -
19 and do the same on a - - - on a computer, that under
20 no circumstance is bullying a crime?

21 MS. STOUGHTON: Your Honor, I - - - I think
22 there may be a more narrowly drawn statute - - - I
23 mean, there's also stalking. You know, there's - - -
24 there's when - - -

25 JUDGE PIGOTT: Yeah, so I think your answer

1 is yes.

2 MS. STOUGHTON: - - - con - - -

3 JUDGE PIGOTT: Bullying is not a crime, and
4 cannot be made to be a crime. It can be a - - - it
5 can be discretely certain things: assault,
6 harassment, things like that. But bullying itself is
7 too vague to make a crime.

8 MS. STOUGHTON: I think that's right. It
9 really - - - because it really comes down to what you
10 define as bullying.

11 JUDGE RIVERA: Well, but - - - well, yes,
12 that's what I was going to say. I mean, bullying
13 that has the character of what you had already
14 recognized as true threats, you would distinguish
15 that, would you not?

16 MS. STOUGHTON: Absolutely. If - - - if -
17 - -

18 JUDGE RIVERA: Okay. Can I ask, why - - -
19 why can't this be limited to only minors? Excise "or
20 person" in the definition on the prohibition, section
21 3?

22 MS. STOUGHTON: I'm sorry, can you - - -

23 JUDGE RIVERA: Why can't you just limit
24 this to minors quite easily, as opposed to the
25 rewriting, which is what you're suggesting you would

1 need to do?

2 MS. STOUGHTON: Well, Your Honor, because
3 you'd have to read a term into the statute that isn't
4 there. And I - - -

5 JUDGE RIVERA: It say - - - no, no, no.
6 With respect to limiting it to minors, can't you just
7 excise out two words out of Section 3, take out the
8 words "or person" and just leave it "against any
9 minor", and if you could do that, or if we would do
10 that, does it - - - does it then save this statute?

11 MS. STOUGHTON: Well, Your Honor, no - - -
12 the answer is no, that does not save this statute.
13 And I think the best case on that, again, is Brown v.
14 Entertainment Merchants, the video - - - violent
15 video games case, in which the Supreme Court clearly
16 said there's no such thing as a category of
17 unprotected speech that's designed to harm children.

18 That's not sufficient to save the statute
19 here, because it's still overbroad.

20 JUDGE SMITH: Well, but that - - - that was
21 a - - - that was a case where the - - - the state was
22 prohibiting children from consuming products they
23 wanted to consume to protect them from themselves.
24 Here, we're protecting children from being bullied by
25 other children. Isn't there a difference?

1 MS. STOUGHTON: Well, that was a state
2 (sic) that regulated people that were trying to
3 communicate something to children that the state
4 thought was not in the interests of those children to
5 hear.

6 JUDGE SMITH: I mean, does it - - - is it -
7 - - can you really say that this is some interference
8 with a basic Constitutional right to stop this
9 fifteen-year-old boy from doing what he did to his
10 classmates?

11 MS. STOUGHTON: Well, yes, Your Honor. I
12 mean, the First Amendment is obviously designed to
13 protect public discourse, but it's also meant to
14 protect a realm of speech that shouldn't be
15 criminalized or penalized by the government.

16 JUDGE SMITH: Well, but you limit it - - -
17 so could it be the product of a civil law - - - could
18 the kids he was talking about sue him civilly for
19 intentional infliction of emotional distress?

20 MS. STOUGHTON: I - - - I think if they can
21 meet the elements of the crime, then yes. But when
22 it comes to criminal statutes, the court - - - this
23 court and the Supreme Court have been very specific
24 that there are only a small number of narrowly
25 defined categories of speech that the government's

1 able to - - -

2 JUDGE RIVERA: So you're saying it's the -
3 - - it's the criminalization of the bullying. You
4 can find some other ways to address the bullying - -
5 -

6 MS. STOUGHTON: Absolutely.

7 JUDGE SMITH: - - - but you just can't make
8 it a crime?

9 MS. STOUGHTON: Exactly. Exactly, right.

10 JUDGE ABDUS-SALAAM: But why not, counsel?
11 Because you started to say something about bullying
12 depends on how you define bullying. So if you define
13 bullying in a certain way you could then, presumably,
14 make it a crime. And there might be a way to limit
15 the statute or rewrite it, as you said, that might
16 make bullying a crime. But you're claiming, I think,
17 that this statute doesn't do it.

18 MS. STOUGHTON: I - - - well, that's right.
19 All I mean to say is that in - - - is that if you
20 defined bullying such that it fell into those
21 existing categories of un - - - recognized
22 unprotected speech that the government's permitted to
23 criminalize, that would be a Constitutional statute.

24 JUDGE RIVERA: And are any of those - - -

25 MS. STOUGHTON: This is - - -

1 JUDGE RIVERA: - - - not already covered by
2 another statute?

3 MS. STOUGHTON: That's what's not - - -

4 JUDGE RIVERA: Can you give me an example
5 of something that's not already criminal?

6 MS. STOUGHTON: I'll have to think about
7 that and come back to you on the rebuttal - - -

8 JUDGE RIVERA: I think, yes. Okay.

9 MS. STOUGHTON: I will think about. I
10 don't have a ready answer to that.

11 JUDGE RIVERA: All right.

12 CHIEF JUDGE LIPPMAN: But your basic
13 argument is it has to be narrowly tailored into
14 existing - - -

15 MS. STOUGHTON: Abso - - - when we are
16 talking about criminalizing speech, the intersection
17 of overbreadth and vagueness means that what the
18 County is asking the court to do to this statute, to
19 make it into a statute that you could uphold - - -

20 CHIEF JUDGE LIPPMAN: What would a credible
21 - - -

22 MS. STOUGHTON: - - - is too far.

23 CHIEF JUDGE LIPPMAN: - - - statute labeled
24 as bullying look like that would be okay?

25 MS. STOUGHTON: Well, Your Honor, I mean,

1 for one thing, obviously, if it was limited to
2 threats, that would be okay. For - - - for another
3 thing, you know, if the statute didn't have criminal
4 penalties but instead, like the Dignity for All
5 Students Act, got at educational responses of the
6 government to patterns of cyber-bullying, that's
7 okay.

8 But this statute, you know, the revisions
9 that the County is asking the court to do to this
10 statute, creates such a gap between what's written on
11 paper and what would actually be enforceable in a
12 courtroom, that that range of people out there who
13 risk arrest both because an officer might
14 misinterpret that by looking at their memo book
15 instead of reading this court's opinion that rewrites
16 the statute, and what a person called upon to walk
17 into Albany County and think about what am I going to
18 do in this county; what do I fear in terms of, you
19 know, the level of vitriol I'd like to direct at my
20 neighbor over the dispute over their children, it's
21 too much.

22 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

23 JUDGE SMITH: Can I ask - - -

24 CHIEF JUDGE LIPPMAN: Oh, sure, Judge
25 Smith.

1 JUDGE SMITH: - - - I'm sorry, one more
2 question. Kind of a technical one.

3 You argue that the severance doesn't work,
4 the whole thing is invalid. Suppose we - - - if we
5 were to disagree with you and say that the statute as
6 - - - as modified with the concessions made by Albany
7 County on appeal, so that the - - - the severed
8 portion of the statute is valid, are you entitled to
9 your plea back, and do you want your plea back?

10 MS. STOUGHTON: Absolutely, Your Honor. I
11 mean, this - - - this - - - let's keep in mind that
12 the County's interpretation before this court is
13 different from the interpretation it offered to the
14 court below - - -

15 JUDGE SMITH: You're saying he pleaded to a
16 statute that they don't defend, so he's entitled to
17 his plea back.

18 MS. STOUGHTON: They - - - they pleaded to
19 a statute that never - - - has never existed, and
20 that they did - - - certainly weren't articulating a
21 vision of when he pled. And so their attempt to
22 shoe-horn into his guilty plea admissions - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

24 MS. STOUGHTON: - - - is in appropriate.

25 CHIEF JUDGE LIPPMAN: - - - thanks,

1 counselor.

2 MS. STOUGHTON: Thank you.

3 CHIEF JUDGE LIPPMAN: You'll have your
4 rebuttal.

5 MS. STOUGHTON: Thank you.

6 CHIEF JUDGE LIPPMAN: Counsel?

7 MR. MARCELLE: Your Honor, may it please
8 the court.

9 CHIEF JUDGE LIPPMAN: Counsel, let's ask
10 the same question we asked your adversary. It's
11 possible to save this statute?

12 MR. MARCELLE: Absolutely, Judge.

13 CHIEF JUDGE LIPPMAN: How - - - how do you
14 save it?

15 MR. MARCELLE: And by the way, let's - - -

16 CHIEF JUDGE LIPPMAN: How do you tailor it
17 narrowly enough to save the statute?

18 MR. MARCELLE: Sure.

19 CHIEF JUDGE LIPPMAN: Into accepted areas,
20 already that we know? Go ahead.

21 MR. MARCELLE: Absolutely. So just to
22 begin with, Section 3 does make it a crime against a
23 minor or any other person, so you could just sever
24 "or any other person" that's in the statute. So
25 that's not a problem.

1 So if the problem is the - - - there's two
2 parts to the statute. It makes it a crime to
3 communicate with no legitimate purpose with the
4 intent to inflict harm. And then there's this
5 "including" clause, which has a host of examples,
6 okay, which are all in the statute. The "including"
7 clause - - -

8 JUDGE GRAFFEO: Many of those - - - many of
9 that - - - a lot of those items in that litany are
10 beyond the three recognized categories.

11 MR. MARCELLE: Absolutely. And this is
12 what I'm about to - - -

13 JUDGE GRAFFEO: So that's - - - that's
14 going to require more than - - - more than just - - -

15 MR. MARCELLE: Here's what I - - -

16 JUDGE GRAFFEO: - - - a little excising
17 isn't it?

18 MR. MARCELLE: - - - would say, Judge Gra -
19 - - absolutely. No - - - no, I wouldn't say that.

20 CHIEF JUDGE LIPPMAN: And is that the job
21 of the court to be pruning around and trying to
22 sculpt something that's going to work, or is that the
23 job of the legislature?

24 MR. MARCELLE: So the answer - - -

25 CHIEF JUDGE LIPPMAN: What - - - yeah.

1 MR. MARCELLE: - - - to both question is -
2 - -

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. MARCELLE: - - - the court - - - I
5 think Judge Cardozo said it best - - - you have a
6 duty to save if you can. And so if the offending
7 words, Judge Graffeo, are in that "including" clause,
8 if that's what it is, that is not the operative
9 clause to make cyber-bullying a crime.

10 JUDGE PIGOTT: But is it our job - - -

11 JUDGE GRAFFEO: Okay, so tell us - - -

12 JUDGE PIGOTT: - - - is it - - -

13 JUDGE GRAFFEO: - - - what you think has to
14 be deleted.

15 MR. MARCELLE: Well, what do I think has to
16 be deleted, or what - - -

17 JUDGE GRAFFEO: What are you - - -

18 MR. MARCELLE: - - - do I think the
19 defendant - - -

20 JUDGE GRAFFEO: - - - suggesting - - - what
21 are you suggesting - - -

22 MR. MARCELLE: Sure.

23 JUDGE GRAFFEO: - - - that we delete?

24 MR. MARCELLE: Look, I think - - -

25 CHIEF JUDGE LIPPMAN: Within our - - -

1 suggesting that we delete, within our appropriate
2 role - - -

3 MR. MARCELLE: Sure.

4 CHIEF JUDGE LIPPMAN: - - - rather than
5 being - - - asking us to be the legislature and to
6 sculpt a new statute. Go ahead.

7 MR. MARCELLE: I agree completely. So - -
8 - so here's what - - - if you're worried about that,
9 all the examples - - - they're not operative, but all
10 the examples after the word "including" can be
11 stricken. It does not change the statute, and here's
12 why.

13 Because if you said "any communication with
14 no legitimate purpose with the intent to inflict
15 emotional harm on a child," will never violate
16 anyone's First Amendment right. It is the equivalent
17 of what Virginia did in the Cross Burning Statute.
18 You cannot ban cross burning, but if you do it with
19 the intent to intimidate, the Supreme Court found
20 that it survives any First Amendment challenge.

21 And more to the point, I think the
22 defendant here made a concession - - - a concession,
23 I think that's dispositive of the case in - - -
24 answering one of Judge Smith's questions, that the
25 victims in this case could maintain a privacy tort

1 suit.

2 If you can sue for the speech, and if you
3 can collect damages for the speech, the money damages
4 under the First Amendment, makes no difference
5 whether it's a criminal sanction or a civil sanction;
6 if you sanction speech, and it - - - you - - - that
7 speech is protected, it makes no difference whether
8 it's money or probation. And therefore, you know the
9 statute's Constitutional.

10 JUDGE PIGOTT: Well, the standard of proof
11 is lower in - - -

12 MR. MARCELLE: Well, the standard of - - -

13 JUDGE PIGOTT: - - - so - - - go ahead.

14 MR. MARCELLE: Right to my point, Judge
15 Pigott. Exactly. It's easier to get the - - - a
16 large amount of money damages which would be a
17 greater deterrent than - - -

18 JUDGE PIGOTT: Somebody could intentionally
19 inflict emotional distress on someone, and not commit
20 a crime. You're saying, we're now going to make it a
21 crime, right?

22 MR. MARCELLE: Well, no, because we have a
23 higher burden. Right?

24 So we have to show all the elements of
25 that, plus it had no legitimate public or private

1 purpose, and it was done with the intent to inflict -
2 - -

3 JUDGE PIGOTT: But isn't Ms. Stoughton
4 right, with - - - you know, I asked her for an
5 example. When you're talking about teenagers, and I
6 - - - and these are particularly vicious, it's really
7 something. But you know, high school kids don't like
8 each other's high schools. And if all of a sudden
9 there's a big contest over insults over your high
10 school and my high school and everything else, I
11 mean, does somebody get mad enough to go down to
12 County Hall and file a criminal complaint against
13 somebody for cyber-bullying them because they called
14 the Bulldogs puppies? Or - - -

15 MR. MARCELLE: No. Right, because one,
16 there's a - - - first of all, I don't think under
17 that hypothetical or the hypothetical that was given
18 earlier about the neighbors, there's: a) no intent
19 to inflict significant emotional harm on a minor - -
20 -

21 JUDGE PIGOTT: Oh, yes, there is.

22 MR. MARCELLE: - - - and 2) there's no - -
23 - there's legitimate purpose for - - -

24 JUDGE PIGOTT: No, there's not.

25 MR. MARCELLE: - - - for - - - well, Judge,

1 I think - - -

2 JUDGE PIGOTT: And what's why you go down
3 to - - - you go down and say - - - I mean, my son
4 can't study because there's a big ball game coming,
5 and they keep picking on him because he's the - - -
6 he's the point guard, and he's the one that they
7 think's going to beat 'em, and they're trying to
8 drive him nuts, and they're doing it.

9 And it has no legitimate purpose, and it's
10 really serious, and I want that young kid arrested,
11 because he keeps picking on my - - -

12 MR. MARCELLE: Oh, if, by the way - - - if
13 you're telling me, as a matter of fact, provable
14 beyond any reasonable doubt, that there was no
15 legitimate public, private, or personal purpose,
16 which is what the statute says, and it was done with
17 the intent to inflict emotional harm, yes, you can
18 crim - - - but it doesn't violate the First
19 Amendment, if that's the case.

20 JUDGE PIGOTT: No, well, yes it does.
21 Well, how many? I mean, how many - - - how many
22 e-mails do you exchange? What about the ones that -
23 - - young son who Mom thinks is a great athlete, is
24 exchanging back and - - - and how do we then say in
25 Albany cyber-bullying does not include, you know,

1 teenage nonsense over sports teams?

2 MR. MARCELLE: Sure. Because I think with
3 teenage nonsense over sports teams, Judge, it's not a
4 crime. This court - - -

5 JUDGE PIGOTT: I agree with you, but no - -
6 - do you understand my problem? When I asked Ms.
7 Stoughton about who's - - - what do you - - - who's
8 afraid of the statute - - -

9 MR. MARCELLE: Right.

10 JUDGE PIGOTT: - - - one of the people that
11 might be afraid of the statute is every student who
12 thinks that - - - somebody's got, you know, a
13 helicopter parent, who's going to pick on them
14 because they were insulting their kid on the Internet
15 about his soccer game.

16 MR. MARCELLE: Right. I suspect the
17 district attorney and the police would view that as
18 not having proof beyond a reasonable doubt. And I
19 cite to the court - - -

20 JUDGE PIGOTT: So that relies on the good
21 faith of the DA and the - - -

22 MR. MARCELLE: Well, I think we - - - in a
23 lot of criminal statutes we rely - - - whether it's
24 any - - - aggravated or - - -

25 JUDGE SMITH: But not in the First

1 Amendment. I mean, yeah, we don't say - - - or we
2 don't have to worry about protecting free speech,
3 because we can trust the DA not to interfere with it.

4 MR. MARCELLE: No, I - - - no, I - - - what
5 I think - - -

6 JUDGE RIVERA: Counsel, counsel, can I just
7 ask you, what's - - - what - - - I understand you
8 want - - - you're suggesting excising all the - - -
9 what you're calling - - - examples. What's the point
10 of "with no legitimate private, personal, or public
11 purpose"?

12 MR. MARCELLE: Sure. That's - - -

13 JUDGE RIVERA: By the way, is that an
14 exhaustive list of purposes, or is there a purpose I
15 can't think of that fits a different category you
16 didn't list?

17 MR. MARCELLE: I think it - - - it mimics
18 People v. Stuart and People v. Shack, right?

19 JUDGE RIVERA: Yeah.

20 MR. MARCELLE: So you need some type of - -
21 - what we say is, look, even if you intend to inflict
22 the harm on the minor, you can have that evil intent.
23 But if you do it with no purpose whatsoever, and
24 that's defined in People v. Stuart and People v.
25 Shack, now you've crossed the line.

1 You're not about communicating ideas.
2 You're not about entering the First Amendment
3 protected areas. What you're doing is trying to
4 inflict harm. And that's your sole purpose. And I
5 think the government, and I think even the defendant
6 concedes, that Albany County and any government has
7 the right to protect minors from the infliction of
8 emotional harm. And that's a compelling interest.

9 And the fact that I think the two limiting
10 clause: the specific intent clause and the no-
11 legitimate-purpose clause narrows the statute to
12 reach that is permissible.

13 JUDGE RIVERA: Are you saying there's a - -
14 -

15 JUDGE GRAFFEO: Are all the - - -

16 JUDGE RIVERA: - - - difference between the
17 - - - I'm sorry. Is there difference between
18 legitimate and lawful in your - - - in that
19 provision?

20 MR. MARCELLE: I think there is a slight
21 difference. And again, I think - - -

22 JUDGE RIVERA: Can you give me an example
23 of what's - - - I'm serious.

24 MR. MARCELLE: No, I know. I'm just - - -
25 it's a tough question, Judge. And I don't mean to -

1 - -

2 JUDGE RIVERA: Well, you get the - - -

3 MR. MARCELLE: - - - I laugh at my own
4 fallibility.

5 JUDGE RIVERA: - - - you get the problem.
6 If you can't figure it out as a lawyer - - -

7 MR. MARCELLE: Well, I just - - -

8 JUDGE RIVERA: - - - how is someone else
9 going to figure it out?

10 MR. MARCELLE: Right, sure. I think when
11 we talk about - - - I think the court defined it in
12 Stuart and versus Shack as things to hound, to
13 frighten, to - - - you know, to - - - to harass.
14 It's all that repeated type of - - - of conduct,
15 where you're not trying to - - - to communicate.
16 Right?

17 Again, I guess - - - and I make the point -
18 - -

19 JUDGE ABDUS-SALAAM: Counsel, taking one of
20 the examples here, one of the milder ones. When
21 somebody puts on the Internet a picture of a
22 classmate and says your legs look like cottage
23 cheese, is that bullying?

24 MR. MARCELLE: No. I think that was one of
25 the things. Right. So this - - - Marquan did a lot

1 of stuff. That was just happened to be one of the
2 posts. I don't think it was that individual post. I
3 don't want to - - - I won't repeat verbatim what's
4 said, but I mean, that's the - - - this case is the
5 classic example of cyber-bullying.

6 JUDGE ABDUS-SALAAM: You're saying the
7 totality of what he did - - -

8 MR. MARCELLE: I'm sorry, Your Honor?

9 JUDGE ABDUS-SALAAM: You're saying the
10 totality of - - - if it's one or two things like
11 that, no problem. But if he puts on something
12 stronger, you know, says something, you know, more
13 offensive, in the view of whom? The statute?

14 MR. MARCELLE: Well, it - - - it depends on
15 his particular intent, right? So the district
16 attorney has the burden to prove beyond a reasonable
17 doubt that his intent was to inflict significant
18 emotional harm.

19 JUDGE SMITH: Is - - - is the word - - - is
20 the word "significant" significant here, that is - -
21 -

22 MR. MARCELLE: Yeah I - - -

23 JUDGE SMITH: - - - that, yeah, that if
24 it's just one - - - one of the relatively less
25 intense statements in this record, you might say that

1 there's - - - that the - - - there was no significant
2 emotional harm inflicted?

3 MR. MARCELLE: Yes. And again, that is a
4 critical element. The district attorney's got to
5 look. And whether or not a - - - the web page - - -
6 assuming there's no confession, nothing else - - -
7 that in and of itself, there's enough evidence to
8 convict - - -

9 CHIEF JUDGE LIPPMAN: Counsel?

10 MR. MARCELLE: Yes.

11 CHIEF JUDGE LIPPMAN: Would you agree this
12 is a flawed statute?

13 MR. MARCELLE: I would agree that the words
14 "or a person" is particularly troubling. I think the
15 list of examples, because they're not operative, are
16 - - - are certainly - - - raise issues. But because
17 they're not operative - - -

18 CHIEF JUDGE LIPPMAN: Counselor, but - - -
19 but I think it's clear that there are issues relating
20 to this, whether you agree or disagree with your
21 adversaries as to exactly what's troublesome or not.
22 Why is it good policy to want to save this statute?
23 Why doesn't the legislature go and pass another
24 statute that's tightly drawn, that - - - that
25 actually one could look at, in a - - - in a focused

1 way, and make an easily ascertainable ruling as to
2 whether it passes, you know, Constitutional muster?
3 Why are we going through this exercise, in - - - in
4 what I think you'd agree is, it's not the best
5 statute in the world by anyone's imagination. Why
6 are we doing this?

7 MR. MARCELLE: Sure. First - - -

8 CHIEF JUDGE LIPPMAN: What's the purpose?

9 MR. MARCELLE: Sure. So there's two
10 purposes. Right?

11 CHIEF JUDGE LIPPMAN: Tell us.

12 MR. MARCELLE: First of all, because
13 Marquan committed a crime and he should be punished
14 for that crime. And second - - -

15 CHIEF JUDGE LIPPMAN: If you can find it.
16 If you can find the crime.

17 MR. MARCELLE: Well, he communicated with
18 no legitimate purpose with the intent to inflict
19 emotional harm. He did that. There's no question
20 that he pled guilty to it. He was convicted of it.

21 So that's - - -

22 CHIEF JUDGE LIPPMAN: And second?

23 MR. MARCELLE: The second reason, Your
24 Honor, I believe the deference between the two
25 branches, if there are ways by excising words from

1 the statute that - - -

2 CHIEF JUDGE LIPPMAN: You think it's
3 showing deference to the other branch by - - - by
4 resculpting the statute to make it work, the
5 judiciary is showing deference to the legislative
6 branch?

7 MR. MARCELLE: I think - - - again, I - - -
8 I do. I think Judge Cardozo said it best. You have
9 a duty to save - - -

10 CHIEF JUDGE LIPPMAN: He always said it
11 best. But go ahead.

12 MR. MARCELLE: A duty to save. And we put
13 a severability clause in here. Right? You can sever
14 - - - again, the "including" clause are just
15 examples.

16 CHIEF JUDGE LIPPMAN: Yeah, but it doesn't
17 mean that you make a statute that has ninety-nine
18 parts to it and hope that two or three or four or
19 five are going to stick and then you sever them.
20 That's no way to legislate, is it?

21 MR. MARCELLE: But that - - - we're not,
22 Judge. Here's the focus. The focus is on exactly
23 this defendant's conduct. Right?

24 JUDGE RIVERA: But - - - but counsel, isn't
25 it possible to excise the way even you're suggesting

1 and - - - and not really reflect the intent of the
2 legislature? I mean, that strikes me as what your
3 interest would be in taking this back.

4 MR. MARCELLE: Right. I don't think it aff
5 - - - because the "including" clause doesn't have any
6 really operative language, the - - - look, the intent
7 of the legislature was to protect these, usually
8 teenagers, who become cyber-bullied so bad where they
9 drive the point of suicide. We've seen that across
10 the nation. It's been all in - - - in the paper.

11 This is a real problem in 2014. It was a
12 real problem in 2010. When you're - - - look, in - -
13 - the play-yard bullying, the taunting stuff, at
14 least home was a safe haven. That is no longer a
15 safe haven. The Internet penetrates into your - - -
16 your own house and gives these kids no respite.

17 In the severe cases like Marquan, the
18 government needs to act, because the suggestion that
19 somehow - - - that this - - -

20 JUDGE ABDUS-SALAAM: Well, I don't even
21 think your adversary is saying that you couldn't pass
22 a statute that would pass muster here. It's just
23 that this one doesn't.

24 MR. MARCELLE: Well, I - - - I thought I
25 heard her say bullying wasn't - - - could never be a

1 crime. But - - -

2 JUDGE ABDUS-SALAAM: Well, she conceded
3 that it could be, if - - -

4 JUDGE RIVERA: So that it depends how you
5 define it.

6 JUDGE GRAFFEO: I don't - - - I don't think
7 any of us are questioning the laudable legislative
8 purpose here. I think the question is, do we have
9 any precedent where we have so significantly
10 redrafted or reinterpreted a statute?

11 MR. MARCELLE: Sure. I'm just going to
12 argue with the premise of that question, Judge
13 Graffeo, if I could.

14 I'm not asking you to redraft or
15 reinterpret.

16 JUDGE READ: Well, what - - - what comes -
17 - -

18 MR. MARCELLE: I'm asking - - -

19 JUDGE READ: - - - closest in your view, to
20 what you're asking us to do, in terms of just the
21 amount of wordage that's excised. What would be the
22 closest we've ever come before?

23 MR. MARCELLE: I don't know an example off
24 my head, but I - - - I can tell you, again, it's an
25 "including", right? It's any communication. Whether

1 or not that list of "including" is in the statute or
2 out of the statute, is of no moment.

3 JUDGE GRAFFEO: Well, let me ask you about
4 the - - - the intent clause, because you've got - - -
5 the statute has intent to harass, annoy, threaten,
6 abuse, taunt, intimidate, torment, humiliate or
7 otherwise inflict. Are all those - - - does that all
8 that terminology also pass Constitutional muster?

9 MR. MARCELLE: Without a doubt. And this
10 court has said so twice in People v. Shack and People
11 v. Stuart, and here's why.

12 This is a specific intent. Right? And
13 when someone possesses that intent, it's not subject
14 to vagary or by accident, it's an intent you must
15 present.

16 So the aggravated harassment second
17 statute, which is both the stalking statute and the
18 telephone harassment statute in 240.30, I believe,
19 has that exact same intent clause, except for
20 "otherwise inflicting significant emotional harm".

21 JUDGE SMITH: Again, if I can get one
22 overtime question?

23 CHIEF JUDGE LIPPMAN: Go ahead, Judge
24 Smith.

25 JUDGE SMITH: You - - - are you - - - do I

1 understand, you're conceding that this thing can't be
2 validly applied where the victim's an adult? In
3 other words "or a person" has to be out?

4 MR. MARCELLE: Sure. I'm not conceding
5 that, because - - -

6 JUDGE SMITH: You concede it for the sake
7 of the argument, but you're not - - -

8 MR. MARCELLE: For the sake of - - - sake
9 of the arg - - - and because that's what the
10 legislature actually intended. I think it goes back
11 to talking about the privacy torts that were
12 mentioned.

13 JUDGE SMITH: It's a weird statute as
14 written. If you're going to say - - - why would you
15 say "minor or person" if you were just going to say
16 "person"? What were they thinking?

17 MR. MARCELLE: Judge, I - - - there's
18 thirty-nine members of the Albany County legislature.
19 I often ask that question myself.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 On that note, counsel, rebuttal.

22 MS. STOUGHTON: Thank you, Your Honor. A
23 couple points.

24 First on the issue of whether it being
25 civil or criminal as a dispositive admission. That's

1 - - - that's wrong. Gertz, that case in the Supreme
2 Court, held for example, that the penalties do matter
3 in a First Amendment analysis.

4 JUDGE SMITH: Can you think of another
5 situation where it's okay to have a civil but not
6 criminal sanction?

7 MS. STOUGHTON: Other than defamation? I
8 mean, I think defamation is a great example.

9 JUDGE SMITH: Okay, that's - - - well,
10 that's one.

11 MS. STOUGHTON: So that's - - - I think
12 that's an important one, and that's what Gertz is
13 about. Gertz is actually about the difference
14 between, you know, punitive and ex - - - compensatory
15 damages. But it is relevant.

16 The second is, you know, just to go back to
17 Judge Smith's point about, you know, is this realm of
18 private nasty speech protected. I mean, that again,
19 is this Court's decision in Dietze. There is
20 definitely a Constitutional right to say nasty things
21 on the sidewalk, even when they're about purely
22 private - - - about people. So there's no question
23 about that.

24 JUDGE SMITH: Even - - - even about
25 children?

1 MS. STOUGHTON: Even about children. I
2 mean, the - - - ultimately, the County is asking the
3 court to do one of two things, either to cre - - -
4 well, to do one thing - - - to create a new category
5 - - -

6 JUDGE SMITH: I guess, I'm just - - - I'm
7 just having an intuitive problem with the idea that
8 there is a Constitutional right to treat - - - for a
9 fifteen-year-old boy to treat his classmates like
10 this.

11 MS. STOUGHTON: Well, there's a
12 Constitutional right to be free from arrest for
13 treating your classmates like this. But there's not
14 a Constitutional right to be free from consequences
15 for it. So I think that's important to keep in mind.

16 The County is ultimately asking this court
17 to create a new category of unprotected speech, which
18 is something the Supreme Court has been very cautious
19 - - - cautious against. And I think this court
20 fairly has been too.

21 And - - - and that category of speech would
22 be either speech that's intended to harm minors, or
23 criminal defamation directed towards minors. The
24 court's never recognized either of those as a
25 category of unprotected speech before.

1 And the court's question to my adversary
2 really illustrated the vagueness problem of turning
3 this statute into one of those types of statutes,
4 because who deci - - - it's that question of who
5 decides whether the cottage cheese comment is
6 sufficient or it was the other comments that were
7 sufficient, or whether Judge Pigott's hypothetical
8 about the child being harassed by - - - and a
9 helicopter parent coming in.

10 From the statute, a reasonable person who
11 is motivated to arrest that person could look at the
12 statute and say yeah, I can arrest that person for
13 you. And they might go out and do it. And that is
14 the essence of what's wrong with this statute.

15 To get it anywhere near Constitutionality
16 from the County's view, requires this court to, as
17 they said in Dietze, as you said in Golb, to
18 transform an unconstitutional statute into an
19 unconstitutionally vague statute.

20 JUDGE GRAFFEO: Are there any other court
21 decisions around the country that you would suggest
22 we look at, or are we on the forefront of evaluating
23 these cyber-bullying?

24 MS. STOUGHTON: This is - - - this is the
25 forefront. I mean, that's - - - that's right. I

1 think there - - - there are really complicated
2 Constitutional questions about how far legislatures
3 can go. But this one actually isn't that
4 complicated, because the statute on its face is so
5 plainly not that right balance for the First
6 Amendment.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you both. Appreciate it.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Marquan M., No. 139 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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