TOWN OF FALLSBURG JUSTICE COURT
COUNTY OF SULLIVAN : STATE OF NEW YORK
----------X
PEOPLE OF THE STATE OF NEW YORK,

-vs-

WILLIAN BARBOZA,

Defendant.
----------X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant Willian M. Barboza submits this memorandum of law in support of his motion to dismiss the Aggravated Harassment charge. For the reasons outlined below, the charge does not state a claim, and Penal Law § 240.30(1)(a) is unconstitutional as applied to this defendant. This Court should dismiss the charge in its entirety.

STATEMENT OF FACTS

The People have charged defendant with one count of Aggravated Harassment in violation of P.L. § 240.30(1)(a). The charge reads:

> That Willia[n] M. Barboza, on or about the 20th of August, 2012, at 120 North Main Street, in the Village of Liberty, County of Sullivan, New York, in that he did, at the aforesaid time and place:
>
> **Count one**: A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm, he or she: Communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm.
>
> The facts upon which this information is based are as follows: The aforementioned defendant did commit the offense of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he communicated with a person by mail in a manner likely to cause annoyance and alarm. **To wit**: The aforementioned defendant, Willia[n] M. Barboza, on the above date and location did knowingly and intentionally communicate with Town of Liberty Court employees by mail by sending a traffic ticket payment correspondence with the words "FUCK YOUR SHITTY TOWN BITCHES" written across the top.

(Exhibit 1 to Bergstein aff.).[1]

The charge arises from defendant's speeding ticket, issued in May 2012. After plaintiff

[1] Defendant advises that he also crossed out the name of the town, "Liberty," and replaced it with "Tyranny."

mailed in the traffic ticket payment with his handwritten message, Town of Liberty Justice Brian P. Rourke wrote to defendant advising that his payment by mail was not accepted. Defendant was ordered to appear at court in person. (Exhibit 2 to Bergstein aff.). Plaintiff was arrested when he showed up in court on October 18, 2012.

LEGAL ARGUMENT

P.L. § 240.30(1)(a) IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT AND THE INFORMATION SHOULD BE DISMISSED

P.L. § 240.30(1)(a) reads, "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm, he or she: Communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm." State and Federal courts at nearly every level of our legal system have held that this provision cannot apply where the defendant's written comments do not pose a "clear and present danger" to the imminent risk of harm, impinge upon substantial privacy interests or constitute "fighting words" as defined by the U.S. Supreme Court. Defendant's arrest violates the First Amendment to the State and Federal Constitutions.

The First Amendment forbids the silencing of speech merely because it is objectionable or offensive to the listener. *Texas v. Johnson*, 491 US 397, 414 (1989). Only "well-defined and narrowly limited classes ... includ[ing] the lewd and obscene, the profane, the libelous, and the insulting or fighting words ... which by their very utterance inflict injury or tend to incite an immediate breach of the peace" may properly be proscribed. *Chaplinsky v. New Hampshire*, 315 US 568, 571-572 (1942). As the Court of Appeals reiterated in *People v. Dietze*, 75 N.Y.2d 47 (1989), speech alone may neither be forbidden nor penalized "unless [it] presents a clear and present danger

of some serious substantive evil." *Id.* at 51. The cases emphasize that prosecutions under § 240.30(1) "must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace." *Id.* at 52. This includes "fighting words" or "verbally inciting a riot in disregard of police orders to desist." *Id.* (citations omitted). In contrast, "[t]he fact that certain modes of expression may be 'annoying' to others does not require an individual to forfeit his rights under the First Amendment to make those expressions." *People v. Dupont*, 107 A.D.2d 247, 255-56 (1st Dept. 1985). *See also*, *People v. Behlin*, 21 Misc. 3d 338, 340-41, 863 N.Y.S.2d 362 (Crim. Ct. Kings Co. 2008) ("[b]ecause of the risk that a statute proscribing communication might infringe on constitutionally protected speech, Penal Law § 240.30 has been strictly construed to reach only conduct intended to threaten or harass, such as threats which are unequivocal and specific, and communications which are directed to an unwilling recipient under circumstances wherein 'substantial privacy interests are being invaded in an essentially intolerable manner'") (citations omitted).

In *People v. Mangano*, 100 N.Y.2d 569, 764 N.Y.S.2d 379 (2003), the defendant was charged under P.L. § 240.30(1) after he left five telephone messages on the Village of Ossining Parking Violations Bureau's answering machine. *Id.* at 570. "After mentioning license plate numbers and vehicles, defendant rained invective on two village employees, wished them and their families ill health, and complained of their job performance, as well as tickets that she had received." *Id.* The Court of Appeals held that the statute was unconstitutional as applied to defendant. "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." The Court of Appeals held that defendant's speech did not

"fall within any of the proscribable classes of speech or conduct." *Id.* at 571.

The Court of Appeals' ruling in *Mangano* was foreshadowed by the Appellate Division's ruling in *People v. Dupont*, 107 A.D.2d 247, 486 N.Y.S.2d 169 (1st Dept. 1985). The Court in *Dupont* held that § 240.30 did not prohibit defendant from distributing written materials intended to embarrass his former attorney by exposing "the attorney's homosexual lifestyle." The "perjorative" and "uncomplimentary" materials were distributed in the attorney's community. *Id.* at 248-250. The Court stated, "[t]hroughout the history of the harassment statute in its various forms running back more than a century, it has not been applied to make the mere distribution of printed material a crime." *Id.* at 251. Unlike cases in which defendants were properly convicted under the statute, "there is no direct communication, there is no interference with privacy, nor is there a use or tying up of phone lines. There is merely the distribution of literature, offensive though it may be. Such conduct is plainly not within the 'hard core' of the statute's proscriptions." *Id.* at 252. After raising questions about the "vagueness" of the statute and its potential to chill others from engaging in protected speech, *id.* at 253, citing Supreme Court authority, the Appellate Division noted that the written dissemination of foul language, by itself, does not violate the statute. The Court reasoned,

> While it is true that not every resort to epithet or personal abuse will be viewed as a communication safeguarded by the Constitution (*Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940), the "fighting words" exception set forth in *Chaplinsky* will only apply where the expression of ideas was accomplished in a manner likely to cause a breach of the peace (*Cohen v.California*, 403 U.S. 15, 20 (1971). Even if the material in the magazine was provocative, that would not render its distribution the equivalent of "fighting words" so as to except such activity from the protection of the 1st Amendment. Defendant's distribution of [the magazine] was neither a violent nor a potentially violent act.

Id. at 256.

Building upon the holding in *Dupont*, the New York Court of Appeals held four years later in *People v. Dietze*, 75 N.Y.2d 47 (1989), that a comparable statute was unconstitutionally overbroad in violation of the First Amendment. That case arose under P.L. § 240.25(2), which, like § 240.30(1), prohibited abusive communications with intent to "harass" or "annoy." *Id.* at 50-51. The defendant in *Dietz* called a woman a "bitch" and her son a "dog" and said she would "beat the crap out of [the mother] some day or night on the street." The mother and son were both mentally retarded. *Id.* at 50. The mother "fled in tears and reported the incident to authorities. Defendant had been aware of the complainant's mental limitations and had, on a prior occasion, been warned by a police officer about arguing with her again." *Id.*

The *Dietze* Court noted that "unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized. ... At the least, 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 or other breach of the peace." *Id.* at 51-52 (citing, *inter alia*, *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)). The Court of Appeals reversed the conviction under § 240.25(1), holding that "[t]here is nothing in the record demonstrating that defendant's statement that she would 'beat the crap out of [complainant] some day or night in the street' was either serious, should reasonably have been taken to be serious, or was confirmed by other words or acts showing that it was anything more than a crude outburst." *Id.* at 53-54.

More broadly, the *Dietze* Court struck down § 240.25(2) as unconstitutionally overbroad because its language, "'abusive or obscene language' and 'intent to harass [or] annoy – simply does not even suggest a limitation to violence-provoking or substantial injury-inflicting utterances." *Id.* at 52-53. Indeed, in striking down this statute as unconstitutional, the Court expressed dismay that

its "past decisions under § 240.25(2), overturning convictions for mere vulgar speech on the ground that such expression did not come within the meaning of the statute ... have not succeeded in halting the prosecution thereunder of protected expression." *Id.* at 53 (citing *People v. Carvelas*, 35 N.Y.2d 803 (1974); *People v. Collins*, 31 N.Y.2d 878 (1972); *People v. Shaheen*, 32 N.Y.2d 675 (1973)). *See also*, *id.* at 54 (Wachtler, concurring) (" In case after case arising under Penal Law § 240.25 (2), we have held that the statute, despite its broad language, did not apply to language and gestures that can only be described as 'abusive or obscene,' but which are nonetheless constitutionally protected (*see*, *e.g.*, *People v. Bacon*, 37 N.Y.2d 830 (1975) ("go fuck yourself"); *People v. Sickles*, 35 N.Y.2d 792 (1974) (defendant gave "the finger"); *People v. Burford*, 34 N.Y.2d 699 (1974) ("fuck you"); *People v. Pecorella*, 32 N.Y.2d 920 (1973) (defendant called police officer a "fucking liar"); *People v. Shaheen*, 32 N.Y.2d 675 (1973) ("fuck you" and "son of a bitch"); *People v. Collins*, 31 N.Y.2d 878 (1972) ("all you fucking cops are no good")).

The Federal courts have also reviewed the constitutionality of prosecutions under P.L. § 240.30(1) for conduct that does not inflict injury or incite an immediate breach of the peace. In *Schlagler v. Phillips*, 985 F. Supp. 419 (S.D.N.Y. 1997), *rev'd on other grounds*, 166 F.3d 439 (2d Cir. 1999), Judge Brieant stated that "Penal Law § 240.30(1) is over broad as well as vague. It is unclear what type of communication would be considered to be initiated 'in a manner likely to cause annoyance or alarm' to another person. ... The statute in this case is utterly repugnant to the First Amendment of the United States Constitution." *Id.* at 421.

In 2003, Judge Scheindlin also addressed the scope of § 240.30(1), noting that the law could not be applied to a defendant who sent alarming but non-threatening religious literature to a political candidate who found it "alarming and/or annoying." *Vives v. City of New York*, 305 F.

Supp. 2d 289 (S.D.N.Y. 2003), *rev'd on other grounds*, 405 F.3d 115 (2d Cir. 2004).

Like the State courts that held that § 240.30(1) could not be applied to defendants whose communications merely alarmed or annoyed without creating a clear and present danger, citing settled Supreme Court authority, Judge Scheindlin stated that "[a] state may punish words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Both 'fighting words' – words that are likely to provoke a violent reaction when heard by an ordinary citizen – and 'true threats' may be proscribed without offending the First Amendment. 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 298 (citations omitted).

Judge Scheindlin next reviewed the history of § 240.30(1)'s enforcement, noting that "for nearly half of its thirty-eight year history, the statute's constitutionality has been questioned." *Id.* at 300. Referencing the Appellate Division's analysis in Dupont, the *Vives* Court added, "[t]his rather dubious history raises questions regarding why state and local police officers and prosecutors have continued to arrest and prosecute persons for intentionally communicating in a manner likely to 'annoy' or 'alarm.' Though § 240.30(1) has never before been declared unconstitutional on its face, its fate has been foreshadowed since 1985." *Id.* at 301. The *Vives* Court concluded that the statute "is unconstitutional to the extent it prohibits communications, made with the intent to annoy or alarm." *Id.* The plaintiff's arrest in *Vives* was therefore improper.

While the Court of Appeals in *Vives* reversed Judge Scheindlin's ruling on other grounds – the defendant officers were entitled to qualified immunity on any damages claims – in his partial dissent, Judge Cardamone aptly summarized the state of the law governing the arrest of persons who

annoy or alarm others:

> Speech of this sort may only be proscribed in three very limited circumstances: (1) the speech constitutes "fighting words" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); (2) the speech constitutes "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); and (3) the speech constitutes a "true threat" by which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

Vives, 405 F.3d at 123-24 (Cardamone, J., dissenting in part).

Defendant Barboza did not violate § 240.30(1), and the accusatory instrument does not establish otherwise. Barboza did not threaten anyone when he sent in his traffic ticket payment. There was no "clear, unambiguous and immediate" threat in writing, "fuck your shitty town bitches." "True threats" only include "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). *Compare*, *People v. Yablov*, 183 Misc. 2d 880, 883, 706 N.Y.S.2d 591 (Crim. Ct. N.Y. County 2000) (complaint alleging that defendant left angry messages on her ex-boyfriend's answering machine, including the statement "we'll get you," and called him 22 times in a period of 12 hours was insufficient to establish harassment or aggravated harassment where the defendant made no specific threat) *with People v. Limage*, 19 Misc. 3d 395, 851 N.Y.S.2d 852 (Crim. Ct. Kings County 2008) (complaint alleging that defendant sent six threatening text messages to complainant's phone in less than 17 hours stating that he was outside of her residence and that she would end up in the hospital was facially sufficient).

A recent Southern District ruling further confirms that Barboza's crude message was not

actionable as a "true threat." In *Holley v. County of Orange*, 625 F. Supp. 2d 131 (S.D.N.Y. 2009), the angry plaintiff sent a bouquet of dead flowers to her son's probation officer with a note that stated, "Thinking of you – Your 'HELP' will long be remembered." *Id.* at 135. The plaintiff was charged with aggravated harassment. Judge Eginton granted the plaintiff's motion for summary judgment on liability on her false arrest claim, reasoning that the flowers and note were not a "true threat." Rather, "[p]laintiff's bouquet and note were criticisms of the Probation Department's role in her son's conviction. Her message was delivered via a 'very crude offensive method' that was the result of poor judgment. Plaintiff's actions, however, do not rise to the level of a true threat. The evidence supports the view that the bouquet and card were not serious expressions of an intent to commit unlawful violence against the receipient. They were neither unequivocal nor unconditional insofar as plaintiff expressed her dismay with the Department of Probation and asked for an apology." *Id.* (citing *Watts v. United States*, 394 U.S. 707, 708 (1969)).

That defendant Barboza directed vulgarities at the Town also fails to make out a charge under § 240.30(1). In *People v. Livio*, 187 Misc. 2d 302, 725 N.Y.S.2d 785 (Nassau Co. Dist. Ct. 2000), the Court held that "the words 'dumb nigger,' though reprehensible, improper and uncalled for, do not rise to the level of aggravated harassment as defined by Penal Law § 240.30 (1). ... Defendant's statement contained no threats, nor invaded complainants's privacy in an intolerable manner. The comment made by the defendant to the complainants, although offensive and uncalled for, is a mere opinion which is not 'likely to cause annoyance or alarm' within the meaning of the statute." *Id.* at 303, 307. The Court added, "[r]ude and angry words are not enough to constitute aggravated harassment. Not every scurrilous or unsavory communication concerning an individual, no matter how repulsive or in what degree of poor taste, necessarily constitutes criminally harassing

conduct. Words must be legally obscene or 'fighting words' in order to be exempt from the category of protected speech." *Id.* at 307-08 (citing *People v. Dupont, supra*; *People v. Morgenstern*, 140 Misc. 2d 861 (Rochester City Ct. 1988)). *See also*, *People v. Todaro*, 26 N.Y.2d 325, 330, 310 N.Y.S.2d 303 (1970) (conviction under P.L. § 240.25(1) reversed where "[t]he only evidence in the case bearing upon this charge was the police officer's testimony that the appellant stated, 'I'll get you for this' while seated in a patrol car after his arrest for disorderly conduct. This single, equivocal statement does not suffice to establish beyond a reasonable doubt that the appellant 'with intent to harass, annoy or alarm' the police officer ... Something more must be established than that a teenager, angered or annoyed at being arrested upon what he considered to be insufficient grounds, expressed his anger or annoyance in terms of apparent bravado, particularly in the absence of proof of any further words or acts tending to confirm the criminal nature of the act charged").

Nor did defendant Barboza invade any substantial privacy rights. He did not contact any public officials at home. In *People v. Shack*, 86 N.Y.2d 529 (1995), the Court of Appeals stated, "[a]n individual's right to communicate must be balanced against the recipient's right 'to be let alone' in places in which the latter possesses a right of privacy, or places where it is impractical for an unwilling listener to avoid exposure to the objectionable communication. ... As the *Rowan* Court noted in regulating unwanted mail, permitting communications to be foisted upon an unwilling recipient *in a private place* would be tantamount to licensing a form of trespass, and thus 'a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.' ... Manifestly, an individual has a substantial privacy interest in his or her telephone; in the context of a telephone harassment statute, the device is easily conceptualized as the functional equivalent of the mailbox. Thus, to the extent Penal Law § 240.30 (2) limits a caller's right to free speech, it permissibly

subordinates that right to the recipient's right to be free of unwanted telephone calls." *Id.* at 536 (quoting *Rowan v. Post Office*, 397 U.S. 728, 736-37 (1970) (emphasis supplied).

Moreover, while individuals enjoy a zone of privacy at home, there is no corresponding privacy right in a government office. In *People v. Henderson*, 177 Misc .2d 672, 677 N.Y.S.2d 669 (Briarcliff Manor Justice Ct. 1998), the Court held that § 240.30(1) was not unconstitutional as applied to defendant who mailed a letter to an elected official at his residence containing profane, inflammatory and threatening language, including threats to kill, although defendant contended that she was simply voicing her objection to position taken by elected official. In contrast, in *People v. Behlin*, 21 Misc. 3d 338 (Crim. Ct. Kings Co. 2008), the defendant was charged with violating § 240.30(1) for telling a school principal over the phone that she had better "watch it" and that he was going to "get" her after the principal told the caller that his son was suspended. *Id.* at 339. In dismissing the charges, the court reasoned:

> Firstly, our complainant telephoned defendant in her official capacity as school principal, and therefore her privacy rights are not implicated. Secondly, defendant in no way solicited the call from the principal. Thirdly, as discussed in detail above, Ms. Reyes was not subjected to any "threats of violence" during the telephone conversation. Finally, defendant's response, while perhaps rude, is hardly shocking, and certainly should not have alarmed an experienced school principal. Common sense tells us that the defendant's alleged outburst was not the first, and will likely not be the last time that parents will react sharply to being told that their child is suspended, or perhaps is not doing as well in school as the parent might like. A school principal, like many other public servants, is required to accept a certain amount of rudeness from the public, without turning her displeasure into a criminal case.

Id. at 343.

In sum, Barboza's written response to his speeding ticket falls outside the scope of § 240.30(1). He threatened no one. Nor did he invade anyone's substantial privacy rights. He did not

direct any "fighting words" at anyone. He did not create a "clear and present" danger of any disruption. While defendant's written comment was offensive, it was directed to public office. The First Amendment protects plaintiff's written comments, and this Court should dismiss the charge in its entirety.

CONCLUSION

This Court should grant this motion to dismiss the Aggravated Harassment charge against defendant Barboza.

Dated: December 17, 2012

Respectfully submitted,

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