IN THE

Supreme Court of New Jersey

No. A-6-16 (077,623)

	CRIMINAL ACTION
	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISON, DOCKET NO. A-5103-13T3
STATE OF NEW JERSEY, *Plaintiff-Appellant,*	*Before*: MARIE LIHOTZ, P.J.A.D., WILLIAM NUGENT, J.A.D., *and* CAROL HIGBEE, J.A.D.
v.	
WILLIAM BURKERT, *Defendant-Respondent.*	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY, MUNICIPAL APPEAL NO. 6070.
	Before: STUART FEIM, J.S.C.
	ON APPEAL FROM THE ELIZABETH MUNICIPAL COURT, SUMMONS NOS. G2011-056368, G2011-056369, G2011-056370.
	Before: DANIEL RUSSELL, J.M.C.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

EDWARD BAROCAS
JEANNE LoCICERO
ALEXANDER SHALOM
American Civil Liberties Union of New Jersey Foundation
Post Office Box 32159
89 Market St., 7th Floor
Newark, New Jersey 07102
973-854-1717

Of Counsel and On the Brief.

RONALD K. CHEN, NJ Atty No. 02719-1983
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, New Jersey 07102
973-353-5551
ronchen@andromeda.rutgers.edu

Attorney for Amicus Curiae American Civil Liberties Union of New Jersey

December 7, 2016.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Amicus Curiae ACLU of New Jersey respectfully submits this brief in support of Defendant—Respondent William Burkert in the above captioned matter.

New Jersey's criminal harassment statute, N.J.S.A. 2C:33-4, provides in part:

> § 2C:33-4. Harassment
>
> Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
>
> b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
>
> c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

Thus, the statute either expressly criminalizes actions that are inherently communicative in nature (N.J.S.A. 2C:33-4(a)), or else — as in the present case — sanctions conduct due to the unwelcome communicative message that it conveys (N.J.S.A. 2C:33-4(c)). On its face, the language of the statute triggers some preliminary First Amendment concern.

For over twenty years, beginning with State v. Mortimer, 135 N.J. 517 (1994), this Court has, in a variety of contexts,

engaged in the delicate task of interpreting New Jersey's criminal harassment statute in a way that does not run afoul of First Amendment proscriptions. Through prudent use of the doctrine of constitutional avoidance and other interpretive techniques, the Court has thus far successfully avoided constitutional difficulties in the contexts presented to it. Amicus ACLU-NJ respectfully suggests that this case also requires the Court to refine its interpretation of both the mens rea and actus reus elements of the criminal harassment statute in order to avoid both First Amendment and procedural due process infirmities.

As argued further below, the term "purpose to harass" should be construed to require that the defendant acts with the conscious object to trigger in the victim an apprehension of intrusion into safety, security or "privacy" (meaning violation of personal solitude or seclusion). Merely acting with the purpose to cause "annoyance" or "alarm," as those terms are commonly used, is insufficient. Similarly, a "course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person" must also be construed to refer to actions that are both consciously intended and reasonably instill such apprehension.

ARGUMENT

I. PURPOSE TO HARASS MAY NOT BE INFERRED UNDER N.J.S.A. 2C:33-4 SIMPLY BECAUSE CONDUCT IS ALARMING, ANNOYING OR OFFENSIVE.

In State v. Mortimer, 135 N.J. 517 (1994), this Court was confronted with statutory language in N.J.S.A. 2C:33-4 that, at least when viewed in isolation, was concededly vague, since it "does not establish standards by which we are to appraise 'offensively course' and 'annoyance or alarm.'" Mortimer, 135 N.J. at 536. In order to rescue the statute, therefore, this Court utilized the mens rea element, i.e. that the defendant must act "with purpose to harass another," and found that it served to clarify the otherwise-vague language defining the actus reus elements of the offense. Id.

For the term "purpose to harass"[1] to have the required

---

[1] Even apart from the requirements imposed by the word "harass," the term "'purposeful' or 'with purpose' is the highest form of mens rea contained in our penal code, and the most difficult to establish." State v. Duncan, 376 N.J. Super. 253, 262 (App. Div. 2005)(striking down conviction under N.J.S.A. 2C:33-4 for failure to prove "purpose to harass"). N.J.S.A. 2C:2-2(b)(1) provides:

> Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed,"

clarifying and defining effect, however, it is necessary to further define the word "harass." Normally "the words and phrases used by the Legislature should be accorded their normal and accepted connotations as well as their ordinary and well understood meanings." State v. Hoffman, 149 N.J. 564, 580 (1997) (using dictionary definitions to define "annoy" under N.J.S.A. 2C:33-4); id. at 582 (utilizing the "ordinary usage of the term 'harass'"). See State v. Cullen, 424 N.J. Super. 566, 581 (App. Div. 2012) (citing Webster's Third New International Dictionary 1031 (1981), defining "harass" as "to vex, trouble, or annoy continually or chronically").

But in light of this Court's pronouncement that "purpose to harass" must have a clarifying effect on the other terms of the statute, "harass" cannot be construed to be merely a synonym for "annoy" or "alarm." Cf. Cullen, 424 N.J. Super. at 581-82 (rejecting dictionary definition of "harass" and interpreting it for purposes of Endangered Nongame Species Conservation Act as "intentional or negligent act which creates the likelihood of injury to an endangered species by annoying the species to such an extent as to significantly disrupt its normal behavioral patterns."); but see, State v. Fuchs, 230 N.J. Super. 420, 427

"with design" or equivalent terms have the same meaning.

(App. Div. 1989) (apparently equating "purpose to harass" with purpose to annoy or alarm); State v. Zarin, 220 N.J. Super. 99, 101-02 (Law Div. 1987)(same).

Obviously, if the word "harass" were simply equated with "annoy", "alarm" or "offend," then the statute would amount to a tautology (i.e. "one who annoys or alarms with purpose to annoy or alarm") and the words would remain unconstitutionally vague. This Court in Mortimer clearly intended "purpose to harass" to have a meaning independent of the other elements of the statute, in order that it could serve the salutary purpose of curing otherwise fatally indeterminate language.

Even if not unconstitutionally vague, a statute that would criminalize communications or conduct that "annoy" or "alarm" would be overbroad and proscribe significant amounts of protected speech, even if it were established that the defendant's purpose was to annoy or alarm. "Many forms of speech, oral or written, are intended to annoy. Letters to the editor of a newspaper are sometimes intended to annoy their subjects. We do not criminalize such speech, even if intended to annoy, because the manner of speech is non-intrusive." Hoffman, 149 N.J. at 583. Similar examples abound. A law professor making energetic use of the Socratic Method may very well intend to "annoy" his students (albeit with sound pedagogical motives ultimately in mind). And as recent events

demonstrate, participants in modern partisan political discourse regularly engage in communications or conduct that are surely intended to annoy, and indeed alarm, their political opponents, as well as possibly significant segments of the public. Yet no matter how coarse, such communications lie at the heart of the protections of the First Amendment and could never be criminalized. Id.

> The harassment statute was not enacted to proscribe mere speech, use of language, or other forms of expression. Because the First Amendment to the United States Constitution "permits regulation of conduct, not mere expression, the speech punished by the harassment statute must be uttered with the specific intention of harassing the listener. A restraining order based on harassment cannot be entered if based on a mere expression of opinion utilizing offensive language."

E.M.B. v. R.F.B., 419 N.J. Super. 177, 182-83 (App. Div. 2011).

Moreover, in determining whether the defendant acts with purpose to harass, the cases usually focus not on the content of the communications but the manner in which they are delivered.

> Thus, in enforcing subsection (a) of the harassment statute, we must focus on the mode of speech employed. That subsection of our statute, like those elsewhere, is "aimed, not at the content of the offending statements but rather at the manner in which they were communicated. Speech that does not invade one's privacy by its anonymity, offensive coarseness, or extreme inconvenience does not lose constitutional protection even when it is annoying.

Hoffman, 149 N.J. at 583-84 (emphasis added; citation and internal quotes omitted).

Amicus ACLU-NJ believes that a sensible construction of "purpose to harass" in the context of § 2C:33-4 requires that the defendant have the conscious object to cause in the victim the fear or apprehension of intrusion into the victim's safety, security, or seclusion. It is not sufficient that the defendant have the purpose to insult, embarrass or even humiliate. While such conduct might possibly be the subject of private tort claims, or trigger other civil consequences such as loss of employment, the Legislature could not impose criminal sanctions upon such communications. And this Court has wisely construed the Legislature's intent so that it does not.

"The statutory target [of N.J.S.A. 2C:33-4] was behavior annoying enough to cause a reasonable person fear and apprehension." State v. Saunders, 302 N.J. Super. 509, 522 (App Div. 1997). In further defining the matters that the person must fear or apprehend, the cases make clear that the statute cannot criminalize communications or conduct that are part of the common aggravations of daily life. See, e.g., Hoffman, 149 N.J. at 598 (in analyzing the harassment statute, the court determined that "'annoyance' and 'alarm' must be construed together as prohibiting behaviors "which are alarming or which cause annoyance of some moment, not those which are merely nettlesome"); Saunders, 302 N.J. Super. 509 (same); State v. Duncan, 376 N.J. Super. 253, 263 (App. Div. 2005) ("[t]he mere

exposure to profanity, though irritating to many people, is not necessarily indicative of an intention to harass."); State v. L.C., 283 N.J. Super. 441, 450-51 (App. Div. 1995) (rejecting inference that defendant had purpose to harass when he yelled vulgarities that would embarrass victim when spoken in the presence of other people in the community.)

A. Most Successful Prosecutions Under N.J.S.A. 2C:33-4 Have Been In The Context Where There Was Fear Of Physical Harm.

The great majority of reported decisions in which a "purpose to harass" has been upheld have been in the context of domestic violence cases. See, e.g., H.E.S. v. J.C.S., 175 N.J. 309, 314 (2003) (video surveillance by one spouse of the other spouse's bedroom was with purpose to harass in context of other incidents of domestic abuse); C.M.F. v. R.G.F., 418 N.J. Super. 396 (App. Div. 2011) (purpose to harass was found where defendant sent numerous text messages, yelled profanities in public at victim, engaged in prior physical domestic abuse, and property vandalism); Cesare v. Cesare, 154 N.J. 394 (1998) (in light of prior physical domestic abuse, the court found a purpose to harass); N.G. v. J.P., 426 N.J. Super. 398, 404-405 (App. Div. 2012) (purpose to harass found where estranged brother with long history of acrimony against his family picketed 60 year old sister's home 29 times, repeatedly stating "F--- you G----," "Burn in hell," and "I hope you rot in hell,"

often accompanied these remarks by an obscene gesture).

In domestic violence cases, it is often easy to understand how the victim was put in fear or apprehension of physical harm or insecurity by defendant's repeated or intrusive conduct (even if that conduct did not itself rise to the level of verbal assault). Because the totality of the circumstances in determining whether conduct is harassing can take into account the history of the parties, these cases involve balancing the risk of further domestic violence against the possibility that the allegedly harassing conduct itself may seem relatively innocuous. See generally, N.B. v. S.K., 435 N.J. Super. 298, 306 (App. Div. 2014) ("The greatest difficulties encountered with the day-to-day application of the PDVA in our trial courts have been with claims of domestic violence based on alleged acts of harassment.")

It is also not uncommon in such cases for the record to sustain a finding that the defendant acted with the specific purpose to trigger such fear and apprehension, since such intimidation is often at the heart of domestic abuse situations. The State has a strong governmental interest in deterring such threats, and moreover communications designed to instill fear of such harm lose constitutional protections. Once the context of the case ventures beyond purposeful acts designed to cause fear

or apprehension of harm, however, the State's interest dissipates, and the constitutional protections predominate.

B. The State May Validly Proscribe Conduct That Has The Purpose To Intrude Upon Reasonable Expectations Of Privacy.

This Court has noted that a principal objective of 2C:33-4 is to protect against unreasonable intrusions into privacy. "N.J.S.A. 2C:33-4(a) should generally be interpreted to apply to modes of communicative harassment that intrude into an individual's 'legitimate expectation of privacy.'" Karins v. Atlantic City, 152 N.J. 532, 558 (1998) (quoting Hoffman, 149 N.J. at 583). "Speech that does not invade one's privacy by its anonymity, offensive coarseness, or extreme inconvenience does not lose constitutional protection even when it is annoying." Hoffman, 149 N.J. at 583-84.

In this context, "privacy" refers to the type of intrusion into individual solitude that is exemplified by communications sent anonymously, or at an extremely inconvenient hour, or in offensively coarse language. "Those three types of communication properly can be classified as being invasive of the recipient's privacy. Thus, we believe the Legislature intended that the catchall provision of subsection (a) encompass only those types of communications that also are invasive of the recipient's privacy." Id. at 583.

Thus, invasion of privacy in this context is very similar

in quality and effect as actions that instill fear of physical harm of insecurity. Amicus ACLU-NJ thus does not believe, however, that N.J.S.A. 2C:33-4 criminalized all aspects of the modern civil tort of invasion of privacy. See generally, RESTATEMENT (SECOND) OF TORTS § 652 (in civil actions, right to privacy invaded by (a) unreasonable intrusion upon the seclusion of another, (b) appropriation of the other's name or likeness, (c) unreasonable publicity given to the other's private life, (d) publicity that unreasonably places the other in a false light before the public). Such an overly broad interpretation would be tantamount to criminalizing all forms of speech that might be civilly actionable, including defamation. Criminal libel laws, while technically not per se unconstitutional (see, Beauharnais v. Illinois, 343 U.S. 250 (1952)(upholding state law criminalizing publication of writing or picture portraying the "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion"), are nevertheless effectively moribund for purposes of the First Amendment. See, New York Times Co. v. Sullivan, 376 U.S. 254 (1964)(First Amendment protects even false speech about public figures unless uttered with actual malice; see generally, Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195, 198 (1966) ("the English common law of criminal libel is inconsistent with constitutional provision").

Criminalizing all forms of privacy invasions known to tort law (including "false light", appropriation of name, and publicity to private life) would likely suffer the same fate.

The gravamen of the conduct proscribed by N.J.S.A. 2C:33-4 focuses on intrusion into the physical solitude of the victim. See RESTATEMENT (SECOND) OF TORTS § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."). This narrower interpretation of privacy is consistent with the violations of physical safety and bodily integrity that are described in other portions of the statute, and thus the provisions of the statute should be construed where possible as consistent with each other.

Thus, in State v. Finance American Corp., 182 N.J. Super. 33, 36 (App. Div. 1981), defendant credit collection company made numerous telephone calls to debtor at her place of employment after she informed appellant that she was not permitted to accept such calls. One of appellant's employees directed a racial slur at her and also threatened police and casino control commission intervention. Id. The court found that "the victim's privacy interest prevails over any right of commercial expression defendant may enjoy in the circumstances."

Id. at 41. In Hoffman, this Court found a "substantial evidentiary basis" to sustain a finding of "purpose to harass" when an estranged former spouse who was subject to restraining orders and currently incarcerated due to assaultive behavior mailed a torn-up support order on two occasions to his ex-wife. Hoffman, 149 N.J. at 577. Nevertheless, the Court ultimately concluded that the conduct did not amount to harassment under the statute "because those mailings did not invade Mary's privacy so as to constitute harassment." Id. at 584. But in Karins v. Atlantic City, this Court found no purpose to harass when an off-duty firefighter directed a racial epithet at an on-duty African American police officer. "Although the racial epithet used by Karins was extremely offensive, the record does not provide a basis to conclude that his intention was to harass Officer Rassmann." 152 N.J. at 558.

C. The Facts Of This Case Do Not Establish Beyond A Reasonable Doubt A Purpose To Harass.

In this case, defendant Burkert acknowledges that he doctored a wedding photo of complainant Gerald Hatton from the Internet, and marked it with vulgar language that belittled Hatton's physical endowments and suggested a propensity towards infidelity by Hatton's former wife. Even against the backdrop of the years of animosity between Burkert and Hatton as co-workers, it is difficult to discern how the record establishes

beyond a reasonable doubt that it was Burkert's conscious object to create fear or apprehension of physical harm or insecurity by Hatton.

Although Hatton testified that he was fearful of possible repercussions from Union County Jail inmates as a result of these doctored photos, there is no indication that inmates ever saw these photos, and even less that Burkert intended that they see them. In order for a third-party's act [the inmates] to fall within the statute's proscribed conduct as to defendant Burkert, "the State was required to introduce evidence adequate to prove beyond a reasonable doubt that . . . it was his conscious object to use [the third-party] as an instrument of harassment." State v. Castagna, 387 N.J. Super. 598, 605 (App. Div. 2006), certif. denied, 188 N.J. 577 (2006). There is no evidence that Defendant Burkert ever attempted to communicate or engage with any inmates regarding Hatton.

It is perhaps a more debatable issue as to whether the record establishes a purpose by Burkert to intrude upon Hatton's privacy by triggering a fear or apprehension of intrusion upon his reasonable expectation of solitude or seclusion. As in Finance American, the conduct here injected personal matters unexpectedly into the workplace environment, and there is probably some reasonable expectation that individuals will be able to keep their personal and work lives separate. On the

other hand, unlike Finance American, this case does not involve the commercial speech of someone external to the workplace, but rather an individual disagreement among co-workers. Such disputes are often an inevitability of modern life, and the natural location where such disputes are played out is also, inevitably, the workplace.

The objection to Burkert's behavior lies in its insulting and vulgar content, not the manner in which the content was delivered. This case therefore seems more akin to Karins, which involved indisputably vulgar, insulting and offensive racial epithets, delivered at the complainant's "place of work" while on duty and no doubt uttered with purpose to annoy, but in the end not delivered with "purpose to harass."

II. DISTRIBUTING PICTURES WITH OFFENSIVE PHRASES ON TWO DAYS IN ONE WEEK IS AN INSUFFICIENT COURSE OF CONDUCT FOR CONVICTION UNDER N.J.S.A. 2C:33-4(C).

Each of the subsections of N.J.S.A. 2C:33-4 is "free-standing . . . [as] an offense in its own right," State v. Mortimer, 135 N.J. 517 (1994), although the sections share common terminology. See State v. Hoffman, 149 N.J. 564, 576-81 (1997). First and most importantly, as described in Part I above, they share the common element that the State must prove beyond a reasonable doubt that a defendant acted with the "purpose to harass." This prosecution was brought under subsection (c) of N.J.S.A. 2C:33-4. (Outside the domestic

violence context, reported application of subsection (c) is relatively rare when compared to subsection (a)). As described below, the conduct that satisfies the actus reus elements of subsection (c) has several distinctive attributes that distinguish it from subsection (a).

A. Defendant's Conduct Did Not Constitute A "Course Of Alarming Conduct" Or Repeated Conduct "With Purpose To Alarm Or Seriously Annoy."

When construing a statute, the first consideration is the statute's plain meaning. State v. Szemple, 135 N.J. 406, 421 (1994). Subsection (c) sanctions one who, with purpose to harass, "Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." (Emphasis added). Thus, unlike subsections (a) and (b), by its terms subsection (c) contains, as an element of the offense, a requirement that the proscribed conduct be engaged in repeatedly or as a course of conduct. [2] "A

[2] Indeed, the concept of repetitive conduct is also inherent in the dictionary meaning of the term "harass."

> To fatigue; to tire with repeated and exhausting efforts; esp., to weary by importunity, teasing, or fretting; to cause to endure excessive burdens or anxieties. Webster's Revised Unabridged Dictionary.

> 1. To irritate or torment persistently. 2. To wear out; exhaust. 3. To impede and exhaust (an enemy) by repeated attacks or raids. The American Heritage Dictionary of the English Language.

violation of the harassment statute, N.J.S.A. 2C:33-4(c), requires proof of a course of conduct." J.D. v. M.D.F., 207 N.J. 458, 464 (2011). As this Court further explained in Hoffman:

> The purpose of subsection (c) is to reach conduct not covered by subsections (a) and (b). For example, if a person were to ring a former companion's doorbell at 3:00 p.m. on Sunday, flash bright lights into her windows on Monday at 6:00 p.m., throw tomatoes into her front door on Tuesday at 6:30 p.m., throw eggs on her car on Wednesday, and repeat the same conduct over a two-week period, a judge could find that subsection (c) has been violated. We do not imply by that example that five or more episodes are required to establish a course of alarming conduct. That determination must be made on a case-by-case basis. We conclude only that serious annoyance under subsection (c) means to weary, worry, trouble, or offend.

Hoffman, 149 N.J. at 580-81.

Here, defendant's was based on two arguably distinct incidents: one on January 8, 2011 (complainant's discovery of flyer in the parking lot), and one on January 9 (complainant given a second flyer with different written message by a co-

---

Although a prosecution under subsection (a) of § 2C:33-4 may be based upon "a single act of communicative conduct" (Hoffman, 149 N.J. at 582), it may only do so "when its purpose is to harass" (id.), and thus such a single act must at least be part of a contemplated and purposeful plan of persistent or systematic conduct. Under subsection (c), however, the requirement of a course of conduct or repeated conduct is explicit in the text of the statute.

worker, which was found in the locker room vestibule area).[3] State v. Burkert, 444 N.J. Super. 591, 597 (App. Div. 2016).

It seems facially implausible that these two incidents could form the basis of a "course of conduct" or "repeatedly committed acts" that could form the basis of a prosecution under subsection (c). At any rate, the trial court did not articulate any specific findings on how the record supported such a course of conduct or repetitive action, and there is therefore no basis by which such a finding could be reviewed. For that reason alone, the conviction based on subsection (c) cannot stand.

B. The State Has Not Shown Beyond A Reasonable Doubt That Defendant Committed Acts Which Sought To Target Complainant With "Alarming Conduct" Or Conduct "With Purpose To Alarm Or Seriously Annoy" Anyone.

Subsection (c) further requires that the proscribed "course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." N.J.S.A. 2C:33-4(c) (emphasis added). Hoffman defined serious annoyance (as contrasted to the simple annoyance required under subsection

[3] On January 11, a lieutenant found two lockers overturned and the offensive photos strewn on the floor. The complainant was not at work that day but was involved in union business, during which a superior officer handed the Sergeant a copy of the second flyer stating, "this came out the other night." The State did not establish defendant was working that date. State v. Burkert, 444 N.J. Super. 591, 594-95 (App. Div. 2016). There is no indication that communication to a third-party targeting complainant would in fact be alarming or have purpose to seriously annoy or alarm him, since the speech was not conveyed to him.

(a)) as "to weary, worry, trouble, or offend."[4] 149 N.J. at 581. This Court further noted that "to alarm" and "alarming conduct" precluded conduct that did not produce "anxiety or distress." Id. at 579.

But just as the term "annoy," if viewed in isolation, is impermissibly vague without some narrowing construction, the term "seriously annoy" would likewise be just as vague. Therefore, Amicus ACLU-NJ respectfully suggests that Hoffman's explanation – that "seriously annoy" means "to weary, worry, trouble, or offend" – must also be limited so that it does not sanction expressive activity because of the content of its speech, no matter how insulting or coarse. Just as "purpose to harass" provides definitional clarity that cures the vagueness of "annoy or alarm" under subsection (a), so too "purpose to alarm or seriously annoy" under subsection (c) should be limited actions that have as their conscious object the goal of causing fear or apprehension of intrusion into the victim's safety, security or seclusion.

Such a construction will avoid confronting a constitutional infirmity of the first order. Compare, People v Golb, 23 N.Y.3d

[4] Such conduct cannot occur in a vacuum. To fall under subsection (c), conduct must be threatening to a person specifically targeted for harassment.[4] Conduct under subsection (c) must be "done with the purpose 'to alarm or seriously annoy' the intended victim." J.D. v. M.D.F., 207 N.J. at 478 (2011). See also, Fuchs, 230 N.J. Super. 420; N.T.B. v. D.D.B., 442 N.J. Super. 205, 222 (App Div. 2015)).

455, 15 N.E.3d 805, 813, 991 N.Y.S.2d 792 (2014). In Golb, the New York Court of Appeals recently struck down as overbroad under First Amendment New York's criminal harassment statute, which is worded in a manner strikingly similar to New Jersey's N.J.S.A. 2C:33-4 (both of which are drawn from a provision of the Model Penal Code).[5] For the past twenty years, this Court has chosen an alternative path, through more aggressive use of the doctrines of judicial surgery and constitutional avoidance, in order to sustain the Legislature's intent while at the same time preserving constitutional values. Amicus ACLU-NJ supports this methodology so long as those values can truly be sustained, as suggested above.

CONCLUSION

As an empirical matter, insulting and even vulgar communications such as those at issue here are an inevitable part of daily existence. Society may and should use a variety of methods to elevate the level of private and public discourse,

---

[5] N.Y. Penal Law § 240.30(1)(a), as worded at the time Golb was decided, provided: "[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."

but among those methods, criminalizing expressive activity should not number among them. Outlawing the act of insult would open a door not easily closed, and would introduce a frigid and chilling atmosphere on robust speech. For the reasons set forth herein, Amicus ACLU of New Jersey respectfully urges this Court to affirm the judgment of the Law Division below.

December 7, 2016.

Respectfully submitted,

RONALD K. CHEN
Rutgers Constitutional Rights Clinic, Atty No. 02719-1983
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
(973) 353-5551

*Attorney for Amicus Curiae**

EDWARD BAROCAS
JEANNE LoCICERO
ALEXANDER SHALOM
American Civil Liberties Union of New Jersey Foundation
Post Office Box 32159
89 Market St., 7th Floor
Newark, New Jersey 07102
973-854-1717

Of Counsel and On the Brief.

* Counsel is grateful to Annabel Pollioni and Michael Sheflin, students in the Rutgers Constitutional Rights Clinic, for their assistance in the preparation of this brief.