UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ISABEL VINSON, **Plaintiff,** **v.** **CHARITY CLARK, in her official capacity as Attorney General for the State of Vermont, and TRACY KELLY SHRIVER, in her official capacity as State's Attorney for Windham County,** **Defendants.**	**Civil Action No. 2:22-cv-20**

PLAINTIFF ISABEL VINSON'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Isabel Vinson moves this Court to enter summary judgment in her favor because there are no genuine issues of material fact and she is entitled to judgment as a matter of law. As explained further below, 13 V.S.A. § 1027 is unconstitutional on its face.

INTRODUCTION

This case arises from a scenario that is now ubiquitous: an individual posts online, and their community reacts. Plaintiff Isabel Vinson, a resident of Brattleboro, saw a local business owner publicly post his personal views about Black Lives Matter on Facebook—views that, in Ms. Vinson's opinion, were racist. So Ms. Vinson did what thousands of other Vermonters do every day when they encounter speech they disagree with: She responded with speech of her own. In this case, she reposted the statements she found unacceptable, publicly condemned the business owner's views, and educated others by tagging the business on her profile and in a group dedicated to informing the public about individuals or organizations deemed to be racist. Just as Ms. Vinson intended, the community reacted: Her posts sparked a lively back-and-forth on her Facebook page, with many criticizing the business owner's views. Unsurprisingly, those public reactions made the business owner uncomfortable. Indeed, for many commenters reacting to what they perceived as racist speech, that was the point.

One might see this robust dialogue about race and policing as the epitome of the First Amendment; an embodiment of the idea that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Instead, following the plain text of the Vermont criminal code, local officials saw a crime and cited Ms. Vinson for "disturbing [the] peace by use of a telephone or other electronic communications." 13 V.S.A. § 1027. This statute makes it a crime for a Vermonter to make

"contact by means of a telephonic or other electronic communication with another" and either issue a threat; "make[] any request, suggestion, or proposal that is obscene, lewd, lascivious, or indecent;" or "disturb[], or attempt[] to disturb," an individual's "peace, quiet, or right of privacy" through electronic communications. *Id.* And although the statute ostensibly requires that a defendant act with "intent to terrify, intimidate, threaten, harass, or annoy," the statute also allows a factfinder—and law enforcement—to infer an individual's intent through their statements alone.

By its plain, expansive terms, § 1027 criminalizes the kind of protected speech tens of thousands of Vermonters engage in every hour, every day. As anyone who has spent time online can attest, the internet is essentially an engine of annoying, harassing, or "disorderly" speech, where individuals constantly engage in debate, advocacy, self-help, or humor through statements that some may consider lewd, indecent, or disturbing to their peace and quiet. Indeed, when standing up to public officials, powerful institutions, or businesspeople, electronic speech is often most effective *precisely because* it has the characteristics outlawed by § 1027.

As explained further below, settled First Amendment principles make clear that § 1027 is facially unconstitutional. The law's overbreadth authorizes criminal liability for a huge scope of protected communications without regard to a speaker's intent. It does so using presumptively unconstitutional content- and viewpoint-based restrictions. And it employs vague, subjective language that fails to give the public fair notice of what the law prohibits, inviting arbitrary and discriminatory enforcement of the kind Ms. Vinson experienced. 13 V.S.A. § 1027 is therefore unconstitutional.

Although Ms. Vinson's charges were ultimately dropped, § 1027's chill remains. As the Supreme Court has repeatedly emphasized, "First Amendment freedoms need breathing space to

survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Because the statute's expansive reach continues to choke the "uninhibited, robust, and wide-open" dialogue guaranteed by the First Amendment, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), Ms. Vinson filed this facial challenge. And because 13 V.S.A. § 1027 is unconstitutionally overbroad and vague on its face, Ms. Vinson is entitled to judgment as a matter of law.

FACTUAL BACKGROUND

Plaintiff Isabel Vinson is a long-time resident of Brattleboro, Vermont, and strongly believes that racism, bigotry, and discrimination of any kind are not welcome in this State. Statement of Undisputed Material Facts (SUMF) ¶ 6. For several years, Ms. Vinson used the large social media presence she developed as a professional photographer and model to express her political perspectives and engage in political debate. SUMF ¶¶ 4–5, 7. During the 2016 election cycle, Ms. Vinson was especially active on social media, regularly using Twitter, Instagram, and Facebook to criticize politicians and others who were engaging in behavior she deemed fascist, racist, or otherwise unacceptable. SUMF ¶ 7.

On or about June 1, 2020, Christian Antoniello, the owner of a business in Brattleboro called the Harmony Underground, posted language on his personal Facebook page that Ms. Vinson believed was disrespectful of the Black Lives Matter movement. SUMF ¶¶ 12, 16–17. Mr. Antoniello posted, in part: "How about all lives matter. Not black lives, not white lives. Get over yourself no one's life is more important than the next. Put your race card away and grow up." SUMF ¶ 12. In response, Ms. Vinson wrote that she was "so disappointed" to see Mr. Antoniello's post, and, to convey that Mr. Antoniello's post was racist and "gross," Ms. Vinson

tagged[1] the Harmony Underground on her Facebook page and stated: "Disgusting. The owner of the Harmony Underground here in Brattleboro thinks this is okay and no matter how many people try and tell him it's wrong he doesn't seem to care." SUMF ¶¶ 15–17.

A lively conversation thread subsequently ensued with more than ten people commenting on Ms. Vinson's posts, resulting in more than fifty comments on her Facebook page. SUMF ¶ 18. In the comments on her post, Ms. Vinson tagged a Facebook group called "Exposing Every Racist" and later posted screenshots of Mr. Antoniello's Facebook posts to the group's page. SUMF ¶ 20. Exposing Every Racist is a group where "[p]eople post[] screenshots of others being racist," but the group strongly encourages members "not to harass other people." SUMF ¶ 21. Accordingly, when Christian Gleason, a former Brattleboro resident, commented on Ms. Vinson's post that Mr. Antoniello "needs his ass beaten," Ms. Vinson deleted the comment as it was both "concerning" and unrelated to her initial post. SUMF ¶ 23–24.

On or around June 27, 2020, Mr. Antoniello and his wife reported to the Brattleboro Police Department that they were being harassed on Facebook. SUMF ¶ 25. A few days later, the Antoniellos told Officer Tyler Law that Ms. Vinson's post tagging the Exposing Every Racist group made them fear for their safety as that was—in their view—a "dangerous" group where "they put your name out there so people can come and find you and hurt you." SUMF ¶¶ 25–27. When Officer Law suggested that the Antoniellos contact Facebook about the situation, Mr. Antoniello responded that he "used every option" he could to get the posts removed, but was

[1] "'Tagging' is a process where a social media user creates a link to another user's social media profile page." *State v. Williams*, No. 2 CA-CR 2016-0345, 2018 WL 3569309, at *1 n.1. (Ariz. Ct. App. July 24, 2018). On Facebook specifically, "when a user tags someone, the other user is notified and the associated posting becomes visible to that user and generally the tagged user's Facebook 'friends.'" *Id.*

now "depending" on the police department to "at least make a phone call and say 'you're causing a lot of problems.'" SUMF ¶ 28.

Without conducting any further investigation, Officer Law criminally cited Ms. Vinson under 13 V.S.A. § 1027 for disturbing the peace by electronic means merely because her posts in the Exposing Every Racist group reportedly made the Antoniellos fear for their safety. SUMF ¶¶ 29–32. The statute's breadth is immense, encompassing a vast amount of protected speech. On its face, it criminalizes, *inter alia*, "any request, suggestion, or proposal that is obscene, lewd, lascivious, or indecent" or "disturbs, or attempts to disturb . . . the peace, quiet, or right of privacy of any person[.]" *Id.* § 1027(a). Going further, it allows a speaker's criminal intent to be "inferred" from the mere use of its content-based and viewpoint-discriminatory prohibited-language categories. *Id.* § 1027(b).

When Officer Law delivered the citation to Ms. Vinson, he informed her that the citation stemmed from the Antoniellos' reported fear. SUMF ¶¶ 31–32. He did not inquire into her mental state or her intent behind her posts. When Ms. Vinson protested that the Antoniellos' fear was not genuine, Officer Law responded "I can't determine if they are in fear or not; [or] if they're saying it just to say it" but made clear she would be cited regardless. SUMF ¶ 32. He also requested that she delete her posts in the group and cautioned that she should be careful with what she posts in the future. SUMF ¶ 33–34.

A day after the ACLU of Vermont submitted a public records request to the Brattleboro Police Department for documents related to Ms. Vinson's citation, Lieutenant Adam Petlock reviewed Officer Law's work and determined the "probable cause" for Ms. Vinson's charge was "very thin." SUMF ¶ 36. Several days later, Lt. Petlock decided not to charge Ms. Vinson based "solely on his experience as a police officer and supervisor." SUMF ¶ 38.

Though Ms. Vinson was not charged, the incident scared her. The potential for criminal charges based on her speech has made her reluctant to post about certain political topics on social media—she has no prior criminal history and wants to keep it that way. SUMF ¶¶ 39–41. As a result of the citation, Ms. Vinson has repeatedly either "decided not to post on social media" or posted and then "immediately" removed the post. SUMF ¶ 42. When Ms. Vinson has used social media, she has been "less assertive" and "more careful" by, among other things, making her Facebook posts only visible to friends and using only her Twitter account to engage in political arguments, which she feels is safer because she has a comparatively small number of Twitter followers. SUMF ¶¶ 43, 44. She also no longer "tags" local individuals or businesses in posts critical of their actions or statements—losing a critical mechanism for engaging those with whom she disagrees. SUMF ¶ 45. The statute presents an ongoing chill to Ms. Vinson's exercise of free speech online. SUMF ¶ 39.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), the Court may enter summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In considering summary judgment, the Court construes the evidence "in the light most favorable to the nonmoving party, and draw[s] all inferences and resolv[es] all ambiguities in favor of the nonmoving party." *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir. 2007). As the Court knows, "statutory construction" is a "question of law." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 334 (2d Cir. 2011).

ARGUMENT

I. 13 V.S.A. § 1027 Is Unconstitutionally Overbroad Because It Criminalizes a Vast Array of Protected Speech Without a Meaningfully Legitimate Sweep.

Isabel Vinson is entitled to summary judgment on Count I of her Complaint because, on its face, 13 V.S.A. § 1027 is unconstitutionally overbroad: It criminalizes a substantial amount of protected speech, and by its "very existence . . . has the potential to chill the expressive activity of others not before the court." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

The United States Supreme Court has repeatedly recognized that overbroad statutes pose acute threats to robust democratic discourse, particularly where the statute at issue imposes criminal sanctions. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Faced with the burden of vindicating their rights through the courts (and the risk of criminal penalties), many people "will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* (citation omitted); *see also Reno v. ACLU*, 521 U.S. 844, 872 (1997) (explaining the heightened chilling effect of criminal sanctions against speech). Because of the significance of this threat to speech, the Court has adopted an "expansive" approach to overbreadth claims. *Hicks*, 539 U.S. at 119. A plaintiff challenging overbroad statutes need not show that the law has *no* permissible scope; instead, they need only demonstrate that "a substantial number of its applications are unconstitutional, judged in relation to the [statute]'s plainly legitimate sweep."[2] *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation and internal quotation marks omitted); *see Farrell v. Burke*, 449 F.3d 470, 495–96 (2d Cir. 2006).

[2] In weighing "whether too many of [a statute's] applications interfere with expression for the First Amendment to tolerate," the determination of precisely "[h]ow many potential applications would be impermissible" depends upon "the degree of scrutiny being applied"—and, by extension, the strength of the First Amendment interest at stake. *Citizens United v. Schneiderman*, 882 F.3d 374, 383–84 (2d Cir. 2018).

Such is the case with § 1027. A substantial number of the law's applications are plainly unconstitutional. It criminalizes protected speech that Vermonters engage in every day—in particular, "request[s], suggestion[s], or proposal[s]" that are "indecent" or communications that "disturb[], or attempt to disturb[] . . . the peace, quiet, or right of privacy of any person"—without requiring proof of a speaker's criminal intent. And it does so through content-based and viewpoint-discriminatory prohibitions, which are "presumptively unconstitutional" restrictions. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). In comparison, "the statute's plainly legitimate sweep"—that is, its applications to conduct that does not implicate speech or to narrow categories of unprotected speech—is meager. *United States v. Williams*, 553 U.S. 285, 292 (2008). The statute is therefore substantially overbroad and facially unconstitutional.

A. Section 1027 criminalizes a substantial swath of protected speech regardless of the speaker's intent.

Addressing the first step in the overbreadth analysis, there is no question that a substantial number of § 1027's applications impermissibly restrict speech that the First Amendment protects. Section 1027 authorizes criminal punishment whenever a Vermonter, acting with "intent to terrify, intimidate, threaten, harass, or annoy," makes "contact by means of a telephonic or other electronic communication with another and[:]"

> [1] makes any request, suggestion, or proposal that is obscene, lewd, lascivious, or indecent;
> [2] threatens to inflict injury or physical harm to the person or property of any person; or
> [3] disturbs, or attempts to disturb, by repeated telephone calls or other electronic communications, whether or not conversation ensues, the peace, quiet, or right of privacy of any person at the place where the communication or communications are received.

13 V.S.A. § 1027(a). While the first subsection of the statute purports to impose a *mens rea* requirement ("intent to terrify, intimidate, threaten, harass or annoy"), the second paragraph

effectively nullifies this requirement, allowing the requisite *mens rea* to "be inferred . . . from the use of obscene, lewd, lascivious, or indecent language or the making of a threat or statement or repeated telephone calls or other electronic communications as set forth in this section." *Id.* § 1027(b).

As explained below, the statute trenches upon protected speech in several ways. First, it criminalizes particular types of routine speech based on the content of the speech alone by allowing intent to be inferred from the use of particular types of speech. In so doing, it allows for criminal arrest and prosecution of those engaged in core First Amendment speech, including speech challenging the positions and actions of government officials, powerful corporations, and public figures. Second, the statute's prohibition of "obscene, lewd, lascivious, or indecent" suggestions or requests inevitably authorizes content-based regulation of speech in contravention of the First Amendment. Third, in prohibiting speech that "disturbs, or attempts to disturb . . . the peace, quiet, or right of privacy of any person at the place where the communication or communications are received," the statute again necessarily engages in regulation of speech based on its content—as well as viewpoint discrimination, by elevating the interests of those who may be "disturbed" by a given message above those engaged in legitimate, protected speech. Each of these forms of regulation authorized by § 1027 violates the First Amendment's protections.

1. Vermont's statute criminalizes pure speech transmitted via telephone and the internet regardless of the speaker's intent.

As an initial matter, one aspect of the statute's broad and indefinite language is unequivocal: It criminalizes pure speech. First Amendment protections, while always substantial, are at their high-water mark when the State attempts to restrict "the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Yet, on its face, § 1027 restricts spoken or written

words from an individual directed to another person, a group of people, or to the general public; all that is required is that "[a] person . . . makes contact . . . with another." And these communications need not be commercial, or even publicly accessible—the statute applies equally to private speech between spouses or siblings and to public speech published on a website.

Section 1027 also restricts pure communication through virtually *any* electronic medium—speech sent via "telephonic or other electronic communication with another." Although the statute does not define "electronic communication," that phrase's plain meaning encompasses nearly any conceivable form of modern online interaction, including websites, blogs, social media, emails, or instant messages; spanning from one-to-one messages (email, direct messages, texts); to communications directed at a potentially massive, but circumscribed, universe of recipients (like Facebook, Instagram, or listservs); to even speech directed to the general public (like blog posts). *See State v. Amsden*, 2013 VT 51, ¶ 19 ("Where the statute does not specifically define a term, courts resort to the common understanding of a term."). Moreover, other Vermont and federal statutes using the same phrase confirm its broad scope. *See, e.g.*, 13 V.S.A. § 8101(2) ("'Electronic communication' means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, a radio, electromagnetic, photoelectric, or photo-optical system."); 18 U.S.C. § 2510; *see generally Hinkson v. Stevens*, 2020 VT 69, ¶ 34 ("[C]oncluding that the elements and definitions (not just isolated words or phrases) in the respective statutes mean two different things would be incongruous."). First Amendment protections apply with full force to such electronic or internet speech. *See generally Stevens*, 559 U.S. 460; *Reno*, 521 U.S. 844.

Moreover, the statute is far-reaching—it brings within its scope most of the protected political and cultural speech that constitutes the contemporary internet. Whether posting a single stinging Facebook post on a political candidate's page, sending repeated tweets to an unscrupulous (but unresponsive) business, or posting content intended to humiliate a boss about intolerable working conditions, citizens routinely engage in advocacy, education, and mutual aid by "mak[ing] contact" through "electronic communications" with the intent to annoy, harass, or disturb the readers of their messages—conduct that § 1027 criminalizes. Such speech is not only protected but lies at the very core of the First Amendment's promise: When a community member challenges the actions of a powerful individual or institution, speech that captures private and public attention precisely because it is "indecent" or "disturbs, or attempts to disturb . . . the peace, quiet, or right of privacy of any person" may be their most effective tool for advocacy. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."). As New York's highest court explained when invalidating a similar statute, "the First Amendment protects annoying and embarrassing speech[,]" *People v. Marquan M.*, 24 N.Y.3d 1, 11 (2014), as it does speech that is merely intended to harass, *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.").

Compounding the statute's constitutional infirmities, § 1027 authorizes criminal punishment of speech based on what, in practice, amounts to strict liability. Although subsection (a) ostensibly proscribes only those communications sent with "with intent to terrify, intimidate, threaten, harass, or annoy," subsection (b) permits conviction based on no intent at all, providing that "[a]n intent to terrify, threaten, harass, or annoy may be inferred . . . from the use of obscene,

lewd, lascivious, or indecent language . . . or statement or repeated telephone calls or other electronic communications as set forth in this section." 13 V.S.A. § 1027(b). In other words, the statute allows a speaker to be convicted based on the fact of their speech alone.

This renders § 1027 overbroad. As the Supreme Court has repeatedly explained—and reaffirmed just this past term—even for most categories of *unprotected* speech, the First Amendment "demand[s] a subjective mental-state requirement" and "precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce" the unlawful effect on a listener. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114–15 (2023). The reason, the Court explained, is that "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries," and an intent "requirement lessens 'the hazard of self-censorship' by 'compensat[ing]' for the law's uncertainties." *Id.* (quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966)); *see also id.* at 2115–16 (explaining the scienter requirements in obscenity, incitement, and defamation cases, and extending that requirement to true threats).

To avoid such unconstitutional chilling, a statute must require subjective intent to be proven, not assumed. *Virginia v. Black*, 538 U.S. 343 (2003), shows why. There, the Supreme Court confronted Virginia's statute criminalizing cross-burning, which included a provision stating: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* at 363 (plurality op.) (quoting Va. Code Ann. § 18.2-423 (1996)). "The prima facie evidence provision," a plurality of the Court concluded, "renders the statute unconstitutional[,]" *id.* at 364, because it "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself[,]" and "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is

intended to intimidate" or whether it might be protected expression. *Id.* at 365, 367. As the plurality explained, "[t]he First Amendment does not permit such a shortcut." *Id.* at 367.[3]

So too here. Just like the prima facie evidence provision in *Black*, subsection (b) "ignores all of the contextual factors that are necessary to decide whether a particular [communication] is intended to [terrify, threaten, harass, or annoy]," *id.*, and allows Vermont "to arrest, prosecute, and convict a person based solely on the fact of [the communication] itself," *id.* at 365. Subsection (b) provides the exact type of "shortcut" forbidden by the First Amendment, precisely because of its potential to sweep in so much protected speech. *Id.* at 367.

Ms. Vinson's experience is illustrative. She spoke out on her public Facebook page against what she believed were racist comments posted by a well-known local businessman. A related conversation ensued on her Facebook page. She also tagged the businessman to a Facebook group to "expose" him as a racist. She was expressing her own opinions. But when the Brattleboro Police investigated her comments and applied § 1027, they did not even inquire into her intent. As Officer Law told the complaining businessman, Ms. Vinson faced criminal liability under § 1027 for the effects of her protected speech alone. Indeed, when Ms. Vinson told Officer Law that the businessman's claimed fear was unreasonable—indicating that she had not intended her post to cause any fear, *see* SUMF ¶ 32—Officer Law, acting within the scope of § 1027(b)'s inferred *mens rea* provision, responded that only the businessman's subjective response mattered. Section 1027(b)'s inferred *mens rea* provision permits exactly this kind of interaction, allowing the State "to arrest, prosecute, and convict [Ms. Vinson] based solely on the fact of" her written

[3] Justices Scalia and Thomas concurred in part—although disagreeing with the plurality's facial invalidation of the prima facie provision, they nonetheless agreed that Black's conviction could not stand because the provision was interpreted to allow cross-burning "by itself" to be sufficient basis to infer intent. *Black*, 538 U.S. at 379 (Scalia, J., concurring in part, concurring in the judgment, and dissenting in part).

words transmitted electronically to the general public. *Black*, 538 U.S. at 365. It is therefore unconstitutional.

2. The statute's prohibition of lewd, lascivious, and indecent speech impermissibly embraces content-based regulation.

Section 1027(a)'s ban on "requests, suggestions, or proposals" that are "obscene, lewd, lascivious, or indecent" targets speech based on its content and viewpoint and is therefore "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The First Amendment embodies our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. "As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). Indeed, "it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring in part and concurring in the judgment). The State, accordingly, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content[,]" *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972), and therefore "[c]ontent-based laws—those that target speech based on its communicative content" —are impermissible, *Reed*, 576 U.S. at 163. A law is content based if it "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). And even where a law appears facially neutral, it is content based if it "cannot be justified without reference to the content of the regulated speech[.]" *Reed*, 576 U.S. at 164 (citation and internal quotation marks omitted). This includes "obvious" facial distinctions that distinguish between speech "by particular subject matter"— but also "more subtle" distinctions

that prohibit communications because of their "function or purpose." *Id*. Section 1027 is content based in both ways.

Section 1027's prohibition on certain communications considered "obscene, lewd, lascivious, or indecent" is not simply a quintessential "content-based regulation of speech," *Reno*, 521 U.S. at 871, but rather viewpoint discrimination, an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The government is not permitted to "'single out a particular idea for suppression because it is dangerous or disfavored.'" *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 37 (2d Cir. 2018) (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)) (alterations omitted); *see also Cipolla-Dennis v. Cnty. of Tompkins*, No. 21-712, 2022 WL 1237960, at *2 (2d Cir. Apr. 27, 2022) ("To determine if a restriction rises to the level of viewpoint discrimination, we consider 'whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.'" (quoting *Matal*, 582 U.S. at 248 (Kennedy, J., concurring in part and concurring in the judgment))).

Here, targeting "request[s], suggestion[s], or proposal[s]" that are "lewd, lascivious, or indecent" bans only speech that represents views that are "grossly improper or offensive," *Indecent*, Merriam-Webster (2023), "tending to moral impurity or wantonness," *Lewd*, Black's Law Dictionary (11th ed. 2019), or "tending to excite lust," *Lascivious*, Black's Law Dictionary (11th ed. 2019).[4] True, speech with those characteristics may offend many. But as the Supreme

[4] Bans on taboo words or language are quintessential content-based restrictions, even if the Supreme Court has not always used that exact formulation to describe them. For example, in *Cohen v. California*, the Supreme Court overturned a conviction where the defendant wore a jacket emblazoned with the message "Fuck the Draft" in a courthouse. 403 U.S. 15, 26 (1971). Although it did not use the phrase "content-based" in the opinion, the Court has since treated the restriction in *Cohen* as exactly that. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 805, 813 (2000) (citing *Cohen* for the proposition that "[w]here the designed benefit of a content-

Court has explained, "[g]iving offense is a viewpoint." *Matal*, 582 U.S. at 243. Because § 1027 allows requests, suggestions, or proposals that, for example, advocate for moral purity or condemn lust, it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[5] *Iancu*, 139 S. Ct. at 2300. The statute, therefore, restricts protected speech in ways that presumptively "violate[] the First Amendment." *Id.* at 2302.

The Supreme Court's decision in *Iancu* is illustrative. There, the Court considered whether the Lanham Act's prohibition on registration of "immoral[ ] or scandalous" trademarks violated the First Amendment, in an appeal from denial of registration of the mark "FUCT" because it "was highly offensive and vulgar, and that it had decidedly negative sexual connotations." *Id.* at 2298 (internal quotation marks omitted). Rejecting the Government's assertion that the registration bar was viewpoint neutral, the Court held that it was ineluctably viewpoint based, as it permitted "registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety." *Id.* at 2300. Section 1027 invites the same manner of viewpoint-based determination.

Section 1027's proscription on "obscene" speech fares no better. True, genuinely "obscene speech—sexually explicit material that violates fundamental notions of decency—is

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based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"); *Mosley*, 408 U.S. at 95 (invoking *Cohen* for the rule that the government may not restrict speech "because of . . . its content").

[5] The viewpoint-discriminatory distinction is exacerbated by the provision's content-based limitation to "request[s], suggestion[s], or proposal[s]"—as opposed to explanations, descriptions, stories, or jokes. *See Reed*, 576 U.S. at 163 (government regulations may not draw "facial distinctions based on a message"); *id*. at 164 (content-based restrictions on speech are those that "cannot be justified without reference to [its] content").

not protected by the First Amendment." *Williams*, 553 U.S. at 288. But it is entirely unclear what it would mean for a "request, suggestion, or proposal" to fall within this narrow category. As the Supreme Court has explained, "obscenity" refers to materials that "depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law," and can apply only when (a) "the 'average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) [when] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [when] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 27, 24 (1973) (citations omitted). Vermont's obscenity statute, in turn, regulates the distribution of "visual representation[s] or image[s]" of sexual conduct—and while it does extend to sound recordings and "any book, pamphlet, [or] magazine," that provision is limited to "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse[.]" 13 V.S.A. § 2802(a)(2). Even assuming the obscenity statute would pass constitutional muster on its own, it is impossible to see how a "request, suggestion, or proposal" could qualify as obscenity within the "regulating state law" as *Miller* requires, particularly in the context of the highly personal communications broadly targeted by § 1027. Any application of that provision, accordingly, would more likely be another application to purely "offensive" speech—and therefore constitute viewpoint discrimination. *See Iancu*, 139 S. Ct. at 2299.

3. Vermont cannot ban electronic communication that "disturbs . . . the peace, quiet, or right of privacy of any person."

Similar issues arise with respect to § 1027's prohibition on any electronic communication that "disturbs, or attempts to disturb . . . the peace, quiet, or right of privacy of any person at the place where the communication or communications are received." That provision, too, is based

on content. In addition to regulating speech based on its function or purpose, application of this provision depends on the sensitivities and views of the complaining individual and law enforcement and inevitably requires unconstitutional discrimination based on content.

The First Amendment protects statements "necessarily likely to disturb the peace," *Johnson*, 491 U.S. at 408, as well as those that "attempt to persuade others to change their views," *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Outside of narrow exceptions not presented here, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.*, 505 U.S. at 134; *see also United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010) ("[W]here the government regulates speech based on its perception that the speech will . . . disturb its audience, such regulation is by definition based on the speech's content."). Indeed, courts have long recognized that core political speech may be at its peak when it seeks to "embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 910 (1982); *see also Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment."); *cf. Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2005) ("A criminal prohibition on communicating in an annoying or alarming way is facially unconstitutional.").

Even viewing "disturb . . . the peace, quiet, or right of privacy" as prohibiting the mere fact of transmitting an electronic communication, Vermont's law nevertheless makes a facial distinction that prohibits communications because of their "function or purpose"—disturbing "any person." *Reed*, 576 U.S. at 163–64 ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the

message a speaker conveys, and, therefore, are subject to strict scrutiny."). Particularly in the absence of any statutory definition, *see infra* Part II, it is difficult to see how prohibiting the transmittal of "electronic communications" that function to "disturb" an individual or an individual's peace and quiet could be anything other than a content-based prohibition on *speech*. Electronic communications, by their nature, are received simultaneously with their content. Unlike a telephone caller who can ring another's hardwired telephone and "disturb" their home, an individual (as opposed to an individual or entity acting for a commercial purpose) cannot "disturb" another's "peace, quiet, or right of privacy" simply by transmitting words via emails, text messages, and direct messages, or by publicly posting comments, blog entries, images, and the like. Instead, whether any specific "electronic communication"—as opposed to the myriad others received every day—will "disturb" an individual's peace and quiet will "depend entirely on its communicative content." *Id.* at 164.

Again, Ms. Vinson's experience exemplifies the statute's infirmities. Her speech—publicizing a local business owner's views on important matters of racial equity and policing—fell within the scope of § 1027 *precisely because* of its protected nature. Her speech was alleged to have disturbed the peace and quiet or right of privacy of a local businessman only because issues about race and policing are so contested in the public sphere. Even if her speech could have been construed as "particularly hurtful to many," it remains protected regardless of its effect on the listener and their peace and quiet. *Snyder*, 562 U.S. at 456.

B. In comparison, § 1027's lawful applications are few.

In all of the above ways, § 1027 "criminalizes a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 297. On the other side of the ledger, "the statute's plainly legitimate sweep," *id.* at 292—that is, its applications to non-speech conduct, or to narrow categories of speech outside the First Amendment's protections—is extremely narrow.

The statute validly proscribes certain repeated telephone calls—and may criminalize pure conduct in the form of repeatedly sending blank emails or messages. But those instances of potentially content-neutral applications of the law are few and far between compared to the tens or hundreds of thousands of "electronic communications" Vermonters send every day that fall within § 1027's prohibitive scope. As described earlier, § 1027 applies overwhelmingly to pure protected speech, not conduct.

The statute's application to speech outside the First Amendment is likewise limited. Categories of unprotected speech are "well-defined and narrowly limited classes of speech"—namely, "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," *Friend v. Gasparino*, 61 F.4th 77, 87 (2d Cir. 2023), or "true threats," *Counterman*, 143 S. Ct. at 2111. Beyond these, "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011).

As explained above, § 1027's lengthy list of prohibitions extends far beyond these narrow categories. It restricts any "request, suggestion, or proposal" that is "obscene, lewd, lascivious, or indecent," as well as electronic communications that "disturb[]" the peace, quiet, and right of privacy. As noted *supra*, § 1027 does not define its use of the term "obscene" in the context of a "request, suggestion, or proposal" and, therefore, the term does not regulate unprotected "obscenity" within the "regulating state law" as *Miller* requires. Moreover, none of these parts of § 1027(a) encompass unprotected "true threats" because the statute already includes a specific prohibition on communications that "threaten[] to inflict injury or physical harm to the person or property of any person." *See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 130 n.17 (2d Cir. 2009) (It is "[a] basic tenet of statutory construction . . . that a text should be

construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" (quoting *APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003))). While the restriction on threats may be valid, a single lawful prohibition cannot compensate for the law's expansive criminalization of protected speech.

Indeed, even putting aside that § 1027(a) overwhelmingly prohibits protected speech, subsection (b) renders its facially permissible applications unconstitutional. As explained above, the First Amendment "demand[s] a subjective mental-state requirement" even for *unprotected* speech like true threats. *Counterman*, 143 S. Ct. at 2114–15. Accordingly, even if § 1027 reached *only* unprotected speech like "true threats"—and, as explained above, it extends far beyond—subsection (b)'s prima facie "shortcut" would render its applications unconstitutional, whatever the speech at issue.

C. Section 1027's chill is more severe than other telephonic harassment statutes.

Section 1027's plain text thus criminalizes a vast swath of commonplace, protected communications without regard to intent; and—within those prohibitions—the statute distinguishes between categories of speech based on their content and viewpoint. Either of these constitutional infirmities, alone, demonstrates that "a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988). Together, they render the sweep of § 1027's unlawful applications overwhelming.

These characteristics, moreover, make § 1027 fundamentally different from arguably similar statutes that have passed constitutional muster. Some courts—including the Second Circuit—have upheld pure telephonic harassment statutes as regulations of conduct, not speech. *See, e.g.*, *Gormley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 941–42 (2d Cir. 1980) ("[T]he Connecticut statute regulates conduct, not mere speech. What is proscribed is the making

of a telephone call, with the requisite intent and in the specified manner."); *United States v. Waggy*, 936 F.3d 1014, 1019 (9th Cir. 2019) ("We hold therefore that, as applied to Defendant, section 9.61.230(1)(a) regulates nonexpressive conduct and does not implicate First Amendment concerns."). The Supreme Court of Vermont, too, has suggested that § 1027, when applied to threats, regulates conduct. *See State v. Wilcox*, 160 Vt. 271, 274 (1993) (surveying cases and, as a result, applying § 1027's intent to threaten at the time the call was initiated rather than when the threat was made). But when taken as a whole, the current version § 1027 is far broader than a pure telephonic harassment statute because it: (1) explicitly targets content- and viewpoint-based categories of speech, (2) nullifies its own intent requirement, and (3) targets speech to one or more individuals across a multitude of electronic mediums.

First, even assuming that the initiation of a harassing telephone call is conduct, not expression—which is questionable[6]—§ 1027 overwhelmingly targets speech. As described above, § 1027 does not proscribe merely the ringing of another's telephone; instead, it bans "requests, suggestions, or proposals" that are "obscene, lewd, lascivious, or indecent." Unlike many telephonic harassment statutes, there is simply no reading of § 1027 that limits its core proscriptions to acts or conduct; instead, it specifically proscribes particular types of speech

[6] Except for a small subset of cases involving silent telephone calls, the vast majority of prosecutions under telephonic harassment statutes will—like *Waggy*, *Gormley*, or even *Wilcox*—involve a defendant's speech. The Supreme Court has repeatedly explained that where "'speech' and 'nonspeech' elements are combined in the same course of conduct," a government regulation must survive intermediate scrutiny to ensure it does not infringe on First Amendment freedoms, *United States v. O'Brien*, 391 U.S. 367, 376 (1968)—a conclusion in considerable tension with *Waggy* and *Gormley*'s holdings that telephonic harassment does not implicate the First Amendment at all. Properly construed, even content-neutral telephonic harassment statutes plainly implicate free speech—and often may not survive intermediate scrutiny. *See, e.g.*, *United States v. Popa*, 187 F.3d 672, 676 (D.C. Cir. 1999) (concluding that a federal statute prohibiting making anonymous phone calls "with intent to annoy, abuse, threaten, or harass" was unconstitutional as applied).

based on their content and viewpoint. Whatever the wisdom of viewing telephone calls as pure acts, any telephonic harassment statute would be unconstitutional if it also expressly regulated the content of those calls based on the protected speech at issue. Section 1027 does so.

Second, even where courts have upheld convictions under telephonic harassment statutes, they have consistently relied on "[t]he requirement of a specific intent." *Waggy*, 936 F.3d at 1020 (listing decisions in the federal courts of appeal and state supreme courts); *see Gormley*, 632 F.2d at 942 ("The asserted overbreadth of the Connecticut statute is circumscribed by the elements of the offense it proscribes."). That is not unusual; when faced with a potentially overbroad criminal statute, courts may look to the law's *mens rea* provisions to potentially narrow its reach. *See, e.g.*, *United States v. Hansen*, 143 S. Ct. 1932, 1947 (2023) (concluding that a statute prohibiting "encourag[ing] or induc[ing]" illegal immigration "does not have the scope [plaintiff] claims" or "produce the horribles he parades" because of, "most importantly, the requirement (which we again repeat) that a defendant *intend* to bring about a specific result" (emphasis in original)). Subsection (b) of § 1027, however, does the opposite: it vitiates any requirement of proof of intent, significantly expanding—rather than limiting—the unconstitutional applications of the statute. *See, e.g.*, *State v. Dugan*, 303 P.3d 755, 772 (Mont. 2013) (invalidating a similar prima facie provision of Montana's Privacy in Communications statute).[7]

Third, and perhaps most intuitively, § 1027 is no longer limited to 1:1 telephone calls, but now reaches speech across the full range of contemporary communication technologies—including text, social media, email, and video channels—whether those communications are

[7] Indeed, even the *Wilcox* court relied on § 1027's intent requirement to narrow the statute's scope. *See Wilcox*, 160 Vt. at 274–75. But *Wilcox* predates the U.S. Supreme Court's decision in *Virginia v. Black* and does not discuss subsection (b)'s inference. As explained, *Black* makes clear that subsection (b) expands, rather than limits, the statute's unconstitutional applications.

directed at a particular individual, a large group, or the general public. Criminal laws like § 1027 are therefore different in kind from telephone harassment statutes based on the sheer amount of protected communication that falls within their sweep. Fundamentally unlike a telephone, online platforms are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); *see id.* at 104 ("It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular," (citation omitted) that constitutes "the most important place[] (in a spatial sense) for the exchange of views." (quoting *Reno*, 521 U.S. at 868)). Conclusions like the *Gormley* panel's—that "[t]he possible chilling effect on free speech of the Connecticut [telephone harassment] statute strikes us as minor compared with the all-too-prevalent and widespread misuse of the telephone to hurt others," 632 F.2d at 942—simply do not translate from the privacy of a phone call to the public participatory spaces of the internet. *Cf. Reno*, 521 U.S. at 869 ("[T]he Internet is not as 'invasive' as radio or television," because it does not "'invade' an individual's home or appear on one's computer screen unbidden.").

* * * * *

A statute is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (citation omitted). By its express terms, 13 V.S.A. § 1027 is such a statute. Ms. Vinson is therefore entitled to summary judgment on her First Amendment overbreadth claim.

II. 13 V.S.A. § 1027 Is Unconstitutionally Vague.

Isabel Vinson is also entitled to summary judgment on Count II of the Complaint because § 1027 fails to define the conduct proscribed by the statute with adequate clarity, and it is thus unconstitutionally vague. To be sure, there is significant overlap here with the statute's overbreadth infirmities under the First Amendment: § 1027's imprecision compounds the

severity of its overbreadth and deepens the extent of its chill. *See Vill. Of Hoffman Ests. V. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 495 n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964))). The statute's failure to define its key terms, however, constitutes an independent constitutional violation.

Vague statutes violate the Fourteenth Amendment's Due Process Clause because they require the public to "speculate" on the meaning of their prohibitions and "what the State commands or forbids." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Importantly, where a prohibition is "capable of reaching expression sheltered by the First Amendment," as in this case, "the vagueness doctrine demands a greater degree of specificity than in other contexts." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012) (internal quotation marks and brackets omitted)); *see also Reno*, 521 U.S. at 871–72 (vagueness is "a matter of special concern" in the context of a criminal law that regulates speech).

"A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. Multiple parts of § 1027 are unconstitutionally vague under both rationales.

The statute's prohibitions on speech intended to "harass" or "annoy," or that is "obscene, lewd, lascivious, or indecent," or that "disturbs, or attempts to disturb . . . the peace, quiet, or right of privacy of any person at the place where the communication or communications are

received" lack any objective benchmark—these qualities are "so vague and standardless that [they] leave[] the public uncertain as to the conduct [the law] prohibits[.]" *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). These terms are undefined in the statute, open-ended, and highly subjective, and thus fall short of the "narrow specificity" required of laws that burden speech. *Button*, 371 U.S. at 433. And "[w]hile it is true that there are readily accessible dictionary definitions of those words, the law does not define what type of 'conduct' or 'speech' could be encapsulated by them." *Volokh v. James*, -- F. Supp. 3d --, No. 22-CV-10195 (ALC), 2023 WL 1991435, at *10 (S.D.N.Y. Feb. 14, 2023).

Because these phrases turn on subjective characterizations, § 1027 also "authorizes or even encourages arbitrary and discriminatory enforcement," *Hill*, 530 U.S. at 732, and allows "policemen, prosecutors, and juries to pursue their personal predilections" in deciding how the statute will be applied, *Smith v. Goguen*, 415 U.S. 566, 575 (1974). For that reason, the Supreme Court has repeatedly "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010) (quoting *Williams*, 553 U.S. at 306); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (striking down a ban on "annoying" loitering as "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens"); *cf. Volokh*, 2023 WL 1991435, at *10 (finding that a New York statute regulating internet speech that could "vilify" or "humiliate" was overbroad and void for vagueness because the undefined and inherently subjective terms did not put speakers "on notice of what kinds of speech or content is now the target of government regulation").

Other parts of the statute are so opaquely worded that they fail to give Vermont residents or law enforcement "a reasonable opportunity to understand" what is prohibited and what is allowed. *Hill*, 530 U.S. at 732. For example, the statute makes it a crime when a person "makes contact . . . with another" and violates any of § 1027's three operative provisions. But it is thoroughly unclear what constitutes "mak[ing] contact" by means of an "electronic communication." 13 V.S.A. § 1027(a). While the statute, read as a whole, demonstrates a likely application to messages directed from one to another specific individual, such communications are the exception, not the rule, in the world of modern online interactions. Instead, many electronic communications tend to go to sizeable, but closed, groups (like a user's Facebook friends) or to the general public (like a public tweet or blog post). Faced with the threat of criminal penalties, Vermonters are left to wonder what it means to "make contact" in a decentralized ecosystem like social media. For example: must they send a direct message to "another," or would it suffice to post a comment on Facebook that "another" sees at some point? Does a public post "make contact" with every individual viewer? What about a message directed to one particular person or group, but later algorithmically suggested to another person's feed? As the Court will recall, Ms. Vinson was cited for a public Facebook discussion with others about a local businessman's political speech and *mentioning* him in a Facebook group.

The same ambiguity plagues the statute's ban on any electronic communication that "disturbs or attempts to disturb. . . the peace, quiet, or *right of privacy* of *any* person at the place where the communication or communications are received." *Id*. § 1027(a) (emphasis added). Does the scope of the "right of privacy" depend on the individual at issue—i.e., do public figures have a lesser right than private individuals? Does the violation depend on the setting so that an individual's work email account is subject to a lesser right of "peace, quiet, and . . . privacy" than

their personal email or text messages on their cell phone? Similarly, are public social media posts, viewable by millions of people, "communications" "received" by every person that sees them such that the poster can be subject to § 1027? And does a real-time conversation over instant messaging constitute a single "contact"—or "repeated" communications? The statute provides no guidance.

Nor is it apparent what sorts of electronic communications would "disturb" or "attempt[] to disturb . . . the peace, quiet, or right of privacy of any person." Of course, the statute can be interpreted, at least in part, to lawfully prohibit an individual from repeatedly calling someone when that is unwanted. But the statute provides no indication of how it applies to any other mode of electronic communication. Unlike a telephone call, an individual can easily avoid receiving such communications by using standard blocking features, turning off notifications, leaving emails unread, or ignoring text messages until the following morning—or even week. Even for repeated communications like a flurry of emails, an attempt to "disturb" is very much in the eye of the beholder.

That indeterminacy is particularly chilling of protected speech when filtered through subsection (b) since it criminalizes speaking alone. As described earlier, subsection (b) directs that the requisite intent "may be inferred . . . from . . . the making of a threat or statement or repeated telephone calls or other electronic communications as set forth in this section." 13 V.S.A. § 1027(b). In other words, by simply making a disturbing electronic communication, a defendant is presumed to have *meant* for their speech to terrify, threaten, harass, or annoy. But it is far from clear what, precisely, that prima facie evidence consists of. For example, an individual sending an explicit video to a partner or spouse—as an expression of intimacy—could be criminally liable simply for accidentally sending that video to the wrong address. By

circumventing the need for an actual finding of subjective intent, the statute invites arbitrary and discriminatory abuse. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884–85 (1991) (noting that overbroad statutes also create opportunities for discriminatory enforcement against speakers who challenge the status quo, providing "an excessively capacious cloak of administrative or prosecutorial discretion").

Every day, Vermonters "make contact" through "electronic communications." Yet it remains unclear to a reasonable person of ordinary intelligence whether—and how—those commonplace interactions might subject them to criminal liability under 13 V.S.A. § 1027. Instead, the vague terms of the statute invite the State to pursue its penalties according to the whims, sensibilities, or best-guesses of its law enforcement officers, who themselves lack clarity about what the law does and does not cover. Indeed, Ms. Vinson's own experience—where she was cited for merely posting on Facebook about a local business—exemplifies the statute's risk of arbitrary enforcement. There can be little question that the statute is unconstitutionally vague.

III. Isabel Vinson Has Standing to Pursue Her Claims Because the Statute's Overbreadth and Vagueness Led Directly to the Discriminatory and Arbitrary Enforcement Against Her.

In light of all of the constitutional harms described above, Plaintiff Isabel Vinson plainly has Article III standing to challenge § 1027, especially "under [the] somewhat relaxed standing and ripeness rules" that apply in First Amendment challenges. *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Ms. Vinson is a prolific online communicator who has already faced an arbitrary criminal citation under § 1027. Particularly given that it remains unclear what conduct might subject her to future enforcement, Ms. Vinson plainly satisfies the "low" threshold for a pre-enforcement challenge. *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016).

To bring a pre-enforcement challenge, Ms. Vinson need only demonstrate (1) "'an intention to engage in a course of conduct arguably affected with a constitutional interest,'" (2) that the intended conduct is "arguably proscribed" by a statute, and (3) there is "a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Far from merely "arguably affected with a constitutional interest," Ms. Vinson's speech on "public issues occupies the highest rung of the heirarchy [sic] of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). She would continue speaking about the speech and conduct of local businesspeople absent the statute and undoubtedly has a First Amendment interest in doing so.

Nor can there be any question that Ms. Vinson's intended conduct falls within the scope of 13 V.S.A. § 1027. The prohibition "sweeps broadly" by its express terms and, plainly "covers the subject matter of petitioners' intended speech." *Susan B. Anthony List*, 573 U.S. at 162. Ms. Vinson's concern that § 1027 applies to her speech, moreover, need not necessarily prove correct: her intended conduct need only be "arguably proscribed," *id.*—or, in the words of the Second Circuit, her reading of the statute be "reasonable enough," *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). Ms. Vinson's expectation that § 1027 applies to her speech is clearly "reasonable enough" given the statute's expansive, indefinite scope and "that a police officer did in fact [cite her] for violating it." *Picard v. Magliano*, 42 F.4th 89, 99 (2d Cir. 2022). And as the Court will recall, Officer Law advised her: "try and be careful with what you post." SUMF ¶ 34.

Finally, the threat of enforcement is credible. It is well established that "actual threats of [enforcement] made against a specific plaintiff are generally enough to support standing as long

as circumstances haven't dramatically changed." *Seegars v. Gonzalez*, 396 F.3d 1248, 1252 (D.C. Cir. 2005). Ms. Vinson has not just been threatened with enforcement; she already faced criminal process under the challenged statute. The Brattleboro Police Department issued her a citation—and only dropped the charges after the ACLU of Vermont contacted the department. If mere threats of process may establish a credible threat of enforcement, an actual citation should be more than sufficient. *See Susan B. Anthony List*, 573 U.S. at 164 ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'"); *Picard*, 42 F.4th at 100 ("Indeed, perhaps the most significant piece of evidence in Picard's favor . . . is that he has *already* been arrested[.]"). Nothing more is required to satisfy Article III.

IV. An Injunction Is Warranted.

Because the threat of 13 V.S.A. § 1027 chills Vermonters' protected speech on an ongoing basis, a permanent injunction is warranted to prevent the further deprivation of their First Amendment rights. "The party requesting permanent injunctive relief must demonstrate (1) irreparable harm" (here, First and Fourteenth Amendment violations) "and (2) actual success on the merits." *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and, on the merits, Ms. Vinson has shown that 13 V.S.A. § 1027 infringes on Vermonters' free speech rights, including her own. An injunction should therefore issue.

Plaintiff acknowledges, however, that 13 V.S.A. § 1027—while facially invalid as overbroad—may have some limited constitutional application, like in the limited (and now less common) circumstance of repeatedly ringing an individual's hardwired telephone. Since "the scope of injunctive relief is dictated by the extent of the violation established," *Califano v. Yamaski*, 442 U.S. 682, 702 (1979), and "[i]n a suit against the government, balancing of the

equities merges into [the] consideration of the public interest," *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 278 (2d Cir. 2021), the Court may fashion an injunction as to the statute's unconstitutional terms and applications, to the extent the statute is severable, *see* 1 V.S.A. § 215. Nonetheless, the statute should be enjoined.

CONCLUSION

Because there is no genuine dispute of material fact and Ms. Vinson is entitled to judgment as a matter of law, the Court should issue summary judgment in Plaintiff's favor and grant the declaratory and injunctive relief requested in the Complaint.

Respectfully submitted,

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