

Instead, the People pursued and filed a complaint for three counts of Retaliation Against a Judge or Elected Official, C.R.S. § 18-6-615(1.5) for seven emails dated December 6, 2022 between 10:47 a.m. and 11:40 a.m. sent to the Lakewood City Council email group after two members of the Lakewood City Council complained to the police. Later, the People then moved to amend the Complaint with another nineteen counts including another six counts of Retaliation Against an Elected Official, a class six felony. These new charges of Retaliation Against an Elected Official named the rest of the City Council—even those who did not report feeling threatened at all. As this case has progressed, the People have moved to dismiss counts 7, 9, 13, 15, 17, and 22 at the request of three of the Lakewood City Council members who have stated they never understood those emails to be threatening.

Legal Standard

“[A] statute is facially overbroad if it sweeps so comprehensively as to substantially include within its proscriptions constitutionally protected speech.” *Boles v. People*, 189 Colo. 394, 541 P.2d 80, 82 (1975). A litigant challenging the validity of a statute must prove the statute is unconstitutional beyond a reasonable doubt. *People v. Moreno*, 506 P.3d 849, 852 (2022).

Argument

C.R.S. § 18-8-616(1.5) is unconstitutional as applied in this case specifically and is overbroad as it prohibits constitutionally protected speech on its face. C.R.S. §18-8-615(1.5)(a)(I) states in its entirety, “[a]n individual commits retaliation against an elected official if the individual knowingly makes a credible threat as retaliation or retribution against the elected official or arising out of the status of the person as an elected official and is directed against or committed upon: an elected official.” Further C.R.S. §18-8-615(1.5)(b)(I) defines a “credible threat” as follows: (I)

“‘Credible threat’ means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.”

As only two of the member of the Lakewood City Council complained to the police that the emails were threatening, counsel requests the Court take judicial notice of the Affidavit in Support of Warrantless Arrest (Affidavit) including in its file, notably the emails and attached pictures in question listed on pages one through three that have been deemed to “credible threats.” *Id.* However, these emails that reportedly came from Desiree Gonzalez’s email account very clearly report actions of *other people* who are reportedly engaging in illicit behavior:

The email dated December 6, 2022 at 10:47 a.m. reports in part, “[t]his is evidence against the people who want y’all dead. Those are illegal magazines, they cost \$8. Don’t worry they are not mine. I went inactive . . .” *See* Affidavit P. 1. This email has pictures attached of 1) a bottle labeled Pyrodex, 2) a picture of four magazines, and 3) a picture containing what appears to an AR-15 or similar rifle. Ms. Gonzalez denied ownership or possession of those items.

The email dated December 6, 2022 at 11:21 a.m. reports in part, “Now please report what happens in an executive session that requires my when I am out there risking my life every second, or was until last night” *See* Affidavit P. 2.

The email dated December 6, 2022 at 11:23 does not include any language counsel could construe as possibly threatening.

The email dated December 6, 2022 at 11:35 a.m. states in part, “Those bomb kits—they are spread out everywhere. I was getting all the locations. Guess like we won’t get them all. Oh well. You can’t win them all.” *See* Affidavit P. 2.

The email dated December 6, 2022, at 11:39 a.m. states “I was talking to Councilors I was, to be reminded there is good and there is a good reason to die for this. Thank you for letting me know that’s absolutely not true. Die on.” *See* Affidavit P. 3.

Finally, the email dated December 6, 2022 at 11:40 refers to someone as a child predator. *See* Affidavit P. 3.

Not one of these emails specifically threatens the health and well-being of any elected official or family member of an elected official. Instead counsel believes the prosecution will try to assert that the totality of the conduct would cause “a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship.” C.R.S. § 18-8-615(1.5)(b)(I). However, please note there is no other reported conduct than these emails sent electronically to the City Council in the span of less than an hour.

In fact, the Affidavit states that the Federal Bureau of Investigation (FBI) was using Ms. Gonzalez as an informant eight months prior to the filing of the Affidavit in question. *See* Affidavit P. 4-5. Detective Saville was aware that at least two of the photographs included in the first email sent to the City Council on December 6, 2022 in the Affidavit were sent approximately eight months prior to the FBI. The FBI did not charge her and continued to work with her until they decided they could not verify her complaints according to the Affidavit.

In *Counterman v. Colorado*, 600 U.S. 66 (2023), the Supreme Court of the United States interpreted that the First Amendment requires the People show that a “true threat” requires that the State prove both at least a reckless *mens rea* standard as well that the recipient of the true threat was actually threatened:

A speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats. Insistence on a subjective element in unprotected-speech cases, no doubt, has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. But a subjective standard is still required for true threats, lest prosecutions chill too much protected, non-threatening expression. Pp. 2113 - 211. *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 2109, 216 L. Ed. 2d 775 (2023).

The concept behind this requirement is lodged in recognizing the fundamental concept that free speech is often frictitious and uncomfortable—especially in the public/political forum. “Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects.” *Id.* (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)). But as the *Bolles* court aptly observed, if such speech could be restricted, “the protection of the First Amendment would be a mere shadow.” *Id.* *People v. Moreno*, 2022 CO 15, ¶ 30, 506 P.3d 849, 857. Again, in *Moreno*, “people often legitimately communicate in a manner ‘intended to harass’ by persistently annoying or alarming others to emphasize an idea or prompt a desired response. *Id.* at 1255–56. For example, subsection (1)(e)¹ could prohibit communications made by email or social media about the need to combat a public

¹ In *People v. Moreno*, the Supreme Court of the United States was interpreting C.R.S. § 18-9-111(1)(e) when finding its provision to “intend to harass” in electronic communications overbroad and unconstitutional. *Moreno* at 855.

health threat, or to seek shelter from an imminent tornado, **or to respond to an active-shooter situation.**” *People v. Moreno*, at 855 (*emphasis added*).

Here, the emails reportedly from Ms. Gonzalez’s account reported conduct of other people. If she had in fact penned those emails, she was informing the Lakewood City Council of the existence of other people who may wish harm to the City Council. In fact, only two City Council members reported this as a threat. Three of the City Council members actively requested to be removed from this criminal case as they never felt threatened. The emails reported to the council members that she had been trying to help other law enforcement to prevent any possible illicit activities of these other people. In fact, the emails are informing the City of a public threat—no different than reporting a possible active shooter. As such, this speech is protected under the 1st Amend. of the U.S. Const. as both free speech and the right to redress the government. Both of these categories are traditionally recognized as classically protected speech and as such cannot be prohibited by the language of a “credible threat” in C.R.S. § 18-8-615(1.5).

Finally, even if the Court finds that the language in the emails are not protected speech as argued, the Court can still find that the language of the definition of a “credible threat” is overly broad in and of itself:

The prosecution contends that Moreno lacks standing to bring this facial challenge because his conduct is clearly regulated by the statute, and therefore, he should not be able to attack the statute on the ground that prosecution of another defendant under the statute would be unconstitutional. But “this rule of standing is changed when the statute in question regulates speech. In such cases, a defendant is granted standing to assert the First Amendment rights of others.” *People v. Weeks*, 197 Colo. 175, 591 P.2d 91, 94 (1979). Thus, regardless of whether a litigant’s speech is constitutionally protected, he may challenge a law as overbroad. *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999). This departure from typical standing rules recognizes that “the very existence of an overly broad statute may deter others from exercising their First Amendment rights.” *Graves*,

13, 368 P.3d at 323. Allowing litigants to challenge a statute as facially overbroad thus protects the rights of us all. *Id.*; *Hickman*, 988 P.2d at 634 n.4. *People v. Moreno*, at 853-854.

The language contained within the definition of “credible threat” as defined in C.R.S. § 18-8-615(1.5)(b)(I) only focuses on what a person could interpret as “a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.” Although counsel believes this is what has happened in this case, the definition allows a recipient to interpret the actions and or language as to whether that person believes is threatening. This in a political forum is all the more dangerous. Traditional exceptions to free speech and the right to redress the government have always been jealously guarded by the Courts. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)(finding a higher requirement of reckless disregard of the truth for defamation lawsuits for public figures), *Brandenburg v. Ohio*, 395 U.S. 444, (1964)(holding the Ohio Criminal Syndicate Act unlawfully failed to discriminate between advocating for lawless actions and engaging in such activity), and *Cohen v. California*, 403 U.S. 15, (1971)(holding the state could not prohibit Mr. Cohen from wearing jacket stating “fuck the draft” in a courthouse corridor.). Even if this Court does not find that the warnings and complaints contained within the emails are protected and finds that they constitute “true threats,” this definition of a “credible threat” still prohibits frictitious, annoying or challenging speech and such is invalid as overbroad on its face.

WHEREFORE, Ms. Gonzalez respectfully requests the court to dismiss counts 1, 2, 3, 16, 18, 19, 20, and 21 of the Complaint on the basis that C.R.S. § 18-8-615(1.5) is unconstitutionally overbroad.

Dated this 26th day of September, 2023.

Respectfully submitted,

BAUMGARTNER LAW, LLC

/s/ Daniel C. Mossinghoff

Daniel C. Mossinghoff, #31923

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, a true and correct copy of the foregoing **MOTION TO DISMISS** was served upon all parties of record by filing the same through via Colorado Courts E-Filing System:

s/ Carly C. Kelley
Carly C. Kelley