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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ROBERT L. CHAPMAN, Defendant.	Case No. 8TR01472 **NOTICE OF MOTION; MOTION TO DISMISS PURUSANT TO *PEOPLE V. GONZALEZ* SUCH THAT THE UNDERLYING COURT ORDER IS UNLAWFUL; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF** Date: 1/30/19 Time: 8:30 AM Court: Dept. 7

TO THE HONORABLE JUDGE KJEHL JOHANSEN OF THE ABOVE-ENTITLED COURT, DEPUTY DISTRICT ATTORNEY ELICIA STOLLER, AND LOS ANGELES COUNTY DISTRICT ATTORNEY JACKIE LACEY: PLEASE TAKE NOTICE that on January 30, 2019, at 8:30am in the above-entitled court, Defendant Chapman will move for an order dismissing all charges in this case on the ground that the underlying restraining order which serves as the basis for these criminal charges was issued unlawfully. The motion will be based on this notice of motion, on the attached memorandum of points and authorities served and filed herewith, on such supplemental memoranda of points and authorities as may hereafter be filed with the court, on all

the papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: January 28, 2019

Respectfully submitted,

LAW OFFICES OF J. PATRICK CAREY

By:

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J. PATRICK CAREY
Attorney for Defendant Chapman

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19
20
21
22
23
24
25
26
27
28
29
30
31

TABLE OF CONTENTS

TABLE OF CONTENTS 3

SUMMARY OF ARGUMENT 7

STATEMENT OF FACTS 14

A. Cindy's 2007 Diversion of Morphine from her Patients and 2008 Fraudulent Prescriptions for 1,955 Pain Pills for her Personal Use 14

B. Cindy's 2010 Felony Drug Conviction and Loss of Nursing License 14

C. The Chapmans and Dunbars Pre-July 2014 Relationship was Friendly . 15

D. The July 3, 2014 E-mail from Cindy and Bob's July 4, 2014 E-Mail in Response 15

E. The July 4, 2014 Incident 15

F. The August 2014 Incident 16

G. The November 2014 Incident 16

H. Cindy's February 3, 2015 Confrontation of Jennifer and her Newborn Daughter 16

I. The February 3, 2015 E-Mail 16

J. The May 2016 Incident 17

K. The May 5, 2016 E-Mail 17

L. The May 21, 2016 E-Mail 17

M. The September 25, 2016 E-Mail 18

N. The May 31, 2017 Burglary and "Wheelchair" Confrontation Orchestrated by Cindy 18

O. The June 1, 2017 E-Mail 21

P. Bob obtains a TRO against Cindy in June 2017 21

PROCEDURAL BACKGROUND 22

A. Dan Seeks a TRO Against Bob in Retaliation.................................... 22

B. The Hearing on the Two Petitions 23

C. The Criminal Charges are Filed in this Case...................................... 25

MEMORANDUM OF POINTS AND AUTHORITIES 26

I. The CHRO Is Unlawful Such that it Violates the First Amendment Because it Prohibits Speech that has not Been Deemed Defamatory, is Vague as to What Speech is Banned and is Overbroad Because it Restricts Speech About the Dunbars Rather than Speech to the Dunbars 26

A. The CHRO Trial Court was Without Power to Issue a Prior Restraint on Speech that has not been Adjudicated Defamatory................. 26

B. The Undefined Terms "Neighbors" and "Demean" Renders the CHRO Vague Because it did not Apprise Bob of what Conduct Could Subject him to Contempt Proceedings 27

C. The CHRO is Overbroad Because it Punishes Speech Critical *of* the Dunbars Rather than Speech Directed *to* the Dunbars................. 28

D. The CHRO is an Invalid Prior Restraint as Evidenced by this Pending Criminal Prosecution Itself based on Bob's Communication with a Third Party that was "Demeaning" about the Dunbars 30

E. Although Harassing Speech is Not Protected Speech, there is No Evidence of "True Threats" As Required for the Exception 31

1. The *Huntingdon* and *Novartis* Cases Involved Doxing and there was no Doxing Here Further Diminishing the Relevance of those Cases 32

2. The Protestors in *Huntingdon* and *Novartis* had the Specific Intent to Cause Harm and Coerce Corporations to Change Their Animal Test Policies while Bob had the Specific Intent to have No Contact from Cindy, Document Cindy's Harassment of Jennifer and to Defend his Reputation from Cindy's Alleged Defamation 33

3. The argument that the CHRO is Lawful Because it is Based on "Harassment" is Circular 35

F. Dan nor Cindy Never Warned Mr. Chapman that they were Unwilling Recipients of His Speech.. 36

II. The Order Should be Ruled Unlawful Because Judge Tanaka was Unfamiliar With and did not Apply the Correct Statutory Requirements for a CHRO to Issue 39

A. Summary of the Law Applicable to CHRO's 40

B. Without Evidence that Bob was Asked not to E-Mail Dan there can be no Finding that Bob Committed "Knowing and Willful" Actions 41

C. All of Bob's Communications with Dan Served Legitimate Purposes: Requesting that Cindy Stay Away from Bob and Jennifer and that the Dunbars Not Defame Bob and Jennifer 41

D. The Lack of Evidence of Actual or Reasonable Substantial Emotional Distress Suffered by Either Dan or Cindy Makes the CHRO Issuance Unlawful 43

1. Dan Did not Even Claim to Suffer Actual Emotional Distress from Bob's Six E-Mails 43

2. The Criminal Law Judge Hearing the CHRO Petition was Unaware of the Statutory Requirement to Find that Dan Suffered Actual Distress 44

3. There was no Evidence that Dan Actually Suffered Emotional Distress 44

4. Any Purported Emotional Distress Suffered by Dan would not be Objectively Reasonable 44

5. Any Purported Emotional Distress Claimed to have been Suffered by Cindy is not Objectively Reasonable 45

E. There was no Evidence of any Harassment of Dan 46

F. There was no Evidence of any Harassment of Cindy 46

G. The Trial Court Erred in Finding that Dan did not Have to Provide Evidence as to his Actual Suffering of Substantial Emotional Distress 47

H. The Trial Court's Observation of Dan's Demeanor While Testifying without Direct Evidence of Suffering Actual Substantial Emotional Distress Does not Rise to the Dignity of Substantial Evidence 48

I. Evaluation of Whether a Reasonable Person Would Suffer Substantial Emotional Distress Should Include Evaluation of Whether the Challenged Conduct is Avoidable 51

J. Evaluation of Whether a Reasonable Person Would Suffer Substantial Emotional Distress Should Focus on Bob's Conduct and Whether Bob's Conduct Would Cause a Reasonable Person to Incur Substantial Emotional Distress 53

K. The CHRO Should be Ruled Unlawful Because Absent Evidence that Bob was Asked not to Email Dan There can be no Finding that Bob Committed "Knowing and Willful" Actions when Bob was not Warned by Either Dan or Neighbors not to Send the Six Emails... 53

CONCLUSION 55

PROOF OF SERVICE 57

SUMMARY OF ARGUMENT

This is a motion by Defendant Robert L. Chapman ("Bob")[1] for this court to rule that a civil harassment restraining order ("CHRO" or "the Order") issued to his neighbor, Daniel Dunbar ("Dan.") (Record 101.)[2] is unlawful. By finding the Order unlawful, the criminal charges alleged in violation of the Order must be dismissed, as an individual cannot be convicted for violating an unlawful order. *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]. The CHRO was not issued due to any actual or threatened violence by Bob. To the contrary, the CHRO trial court expressly found there was no credible evidence of a threat of violence. (Hearing 92.) Instead, the CHRO trial court issued a CHRO to restrain Bob from speaking the truth to his neighbors in the future. Specifically, the CHRO trial court issued an order to punish Bob for (and restrain him in the future from) informing his neighbors that Dan's wife, Cynthia Dunbar ("Cindy,") has a history of drug addiction and drug convictions.[3] Cindy has been adjudicated a "public safety risk"[4] but per the CHRO and associated direction from Judge Tanaka, Bob cannot inform his neighbors about that risk, even when interacting with the police and neighbors about a recent burglary on his street, without the risk of the police or District Attorney claiming that Bob's doing so is a violation of the CHRO.

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[1] Many of the witnesses and parties in this action bear the same surname. First names are used at times for clarity. No disrespect is intended. (*In re Marriage of Witherspoon* (2007) 155 Cal.App.4th 963, 967.)

+-[2] Citations in this brief take the following form: CHRO Record ("Record [page]"), CHRO Transcript ("Hearing [page]")

[3] On July 30, 2010, Cindy was convicted of a felony in *People v. Dunbar*, Case No. YA078016 for possession of dilaudid, a Schedule II controlled substance. She was convicted in that same case for forging a prescription for hydrocodone. She was sentenced to 30 days in jail, 150 days of home detention and three years of probation. The foregoing facts were recited in an Accusation filed against Cindy before the Board of Registered Nursing, Case No. 2012-64. In a later proceeding to surrender her nursing license, Cynthia Dunbar admitted the truth of all of the facts alleged in the Accusation. Dan testified that the felony count against his wife was dismissed on January 27, 2012. (Hearing 36.) No certified court records were offered to support this assertion. While it is possible that Cindy's felony conviction has since been reduced to a misdemeanor under California's recently relaxed sentencing laws for drug crimes, no evidence was offered during the CHRO trial on this point.

A. The CHRO Trial Court Issued an Unlawful Prior Restraint and is Therefore Unlawful

The Order which serves as the bases for the criminal charges in this case bars Bob from saying anything to Bob's "neighbors" that would "demean the Dunbars." (Hearing 95.) The CHRO trial court threatened Bob with criminal repercussions if he showed any of his neighbors a chain of non-defamatory, First Amendment protected e-mails critical of Dan or Cindy Dunbar. (Hearing 95.) Per the CHRO trial court, Bob sending such an e-mail about Cindy "can't be allowed." (Hearing 94.)

The CHRO violates the First Amendment for at least three reasons:

First, the CHRO constitutes a prior restraint on speech that has not been adjudicated as defamatory. A party cannot be prevented from speaking before the speech is found to be defamatory.[5] (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1168.)

Second, the CHRO is vague because it purports to prohibit Bob from ever informing unnamed "neighbors" of any information that "demeaned" the Dunbars. The CHRO trial court did not specify whether the prohibition was against conduct that the Dunbars found demeaning, that the unnamed neighbors found demeaning, or that was demeaning under an objective standard. Nor did the CHRO trial court spell out what constitutes a "neighbor" – people living on the same street, in the same city or even the same county could all qualify as a "neighbor." Such a broad prohibition against future speech cannot survive constitutional scrutiny because it does not advise Bob of what conduct might violate the CHRO.

Finally, to the extent that the CHRO restricts Bob's right to communicate with third parties about Cindy, the CHRO does not survive constitutional muster. While the First Amendment, in very rare circumstances, allows restrictions of speech *to a* person, critical speech *about a* person is protected. The CHRO here unconstitutionally imposes restrictions on Bob's right to speak critically *about* Cindy. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 420.) The CHRO arguably bars Bob from speaking with his own wife about Cindy. The CHRO purports to bar Bob from ever showing any person a copy of this appellate brief. If Bob

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[5] Tellingly, the Dunbars never filed an action for defamation against Bob to establish that his past statements about Cindy are false. The time to file such an action has now passed. (*Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 76 [holding that the statute of limitations for defamation is one year].)

were, as was the case on May 31, 2017, quietly gardening in his front yard and he wished to tell his wife over his walkie-talkie, "the drug addict is here," the CHRO arguably prohibits that. If the police were to ask Bob about a burglary in the neighborhood, Bob could not — consistent with the comments delivered by the CHRO trial court about the CHRO — tell the police that a person lives nearby who was convicted of a drug crime, forged prescriptions and prevented suffering patients from receiving pain medication. If the Dunbars disparage Bob in the neighborhood, Bob has to stoically accept all such criticism and cannot respond to that disparagement lest the CHRO lead to criminal charges. In enacting Section 527.6, the Legislature was mindful of the risk that the statute could be misused to enjoin constitutional activity. To eliminate that abuse, the text of the statute specifically indicates that "Constitutionally protected activity is not included within the meaning of" the conduct that may be enjoined. (Section 527.6, subd.(b)(1).) The CHRO trial court has gagged Bob with an unlawful prior restraint that must be deemed unlawful.

B. There was no Evidence Presented During the CHRO Trial Satisfying the Statutory Requirements for a CHRO

Beyond the constitutional violations limiting Bob's speech, there are other compelling reasons to find the remainder of the CHRO as an unlawful restriction on Bob's conduct. Even a standard "conduct-only" CHRO should not have been issued because Dan did not demonstrate the type of behavior that Section 527.6 was designed to curb. The type of conduct that Section 527.6 was intended to remedy was best exemplified by the plight of a young student whose story was presented to the California State Senate Committee in 1977 before enacting the CHRO legislation:

> He followed her day after day, she remembers. He pressed his face against the windows of her classrooms and peered at her around bookstacks in the library. He swathed her car in red and white camellia blossoms. He called her 40 times a weekend and sent her gifts such as his sterling-silver baby cup ... When she fled to her parents' home 150 miles away, he would park nearby for hours ... (He) bombarded her, she says, with clippings on parapsychology, letters he had written to President Ford and gifts, including a rock shaped like a phallus.

(*Smith v. Silvey* (1983) 149 Cal.App.3d 400, 405.)

While not every circumstance has to involve such extreme behavior to warrant a CHRO, the foregoing incidents demonstrate unwanted contact that the victim could not escape, even by

driving 150 miles away. She needed the injunction to avoid her stalker. She had no reasonable way to solve this problem on her own without involving the court system. She was in all ways an *unwilling recipient* of the speech or conduct of her stalker.

In stark contrast, in the proceedings during the CHRO trial, the only evidence that Dan, the petitioner, presented as to Bob's alleged harassment of Dan, was six e-mails that Bob sent to Dan over a three-year period. There was no evidence that Dan read all six of them contemporaneously and Dan testified that he was not overly concerned about the e-mails. The record shows Dan only responded to one e-mail and he never asked Bob to stop sending the e-mails. Based on this appellate record, it is quite possible that Dan never opened five of the six e-mails that were sent to him. If Dan wanted to not receive further e-mails from Bob, simply not opening his e-mail (or installing an e-mail filter) was an easy solution. For Dan to have been impacted whatsoever by the *content* of Bob's e-mails, Dan voluntarily would have to be a *willing recipient* of such content by opening the e-mails and reading them, rather than ignoring or deleting them. Moreover, in the sole case within the appellate record of Dan replying to Bob's emails, Dan sent a warm, positive e-mail congratulating Bob for his newborn baby. In another instance, Dan left a voicemail message for Bob using the nickname "Bobby," used only by Bob's closest friends.

In stark contrast to the college student who could not escape her stalker without a restraining order, Dan did not need the assistance of the superior court here. It was objectively unreasonable for Dan to have claimed and for the CHRO trial court to have found that harassment occurred. Dan always had the power to delete or filter out Bob's six e-mails. Or Dan could have simply told Bob to stop e-mailing him. Dan never did so.

The CHRO process is an expedited procedure when compared to the procedure of a normal civil lawsuit and preliminary injunction process. As such, only a narrow category of conduct will qualify for a CHRO. For example, conduct that has any legitimate purpose cannot qualify for a CHRO. (§ 527.6, subd.(b)(3).)[6] Moreover, a restraining order cannot issue absent a finding that the requesting party suffered *actual* and *reasonable* substantial emotional distress.

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[6] Further statutory references are to the Code of Civil Procedure.

(*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) The CHRO trial court disregarded these important limitations when it issued the CHRO against Bob.

For example, the CHRO trial court indicated that it was not required to make a finding that either of the Dunbars suffered *actual* substantial emotional distress. (Hearing 94.) Instead, the CHRO trial court announced that it merely had to find that a reasonable person would find Bob's conduct distressing. (Hearing 94.) Because the CHRO trial court applied the wrong standard, it necessarily did not find the requisite elements for a restraining order.

Nor could the CHRO trial court have concluded there was actual substantial emotional distress suffered by Dan in response to six e-mails sent over three years. Dan testified that he was not concerned about continuing to receive e-mails in the future. (Hearing 37.) The appellate record reflects that Dan received and replied to only one e-mail. In response to one request by Bob to restrain Cindy, Dan e-mailed Bob: "congrats on baby." (Record 41.) In one voicemail message from Dan to Bob on May 27, 2017, Dan referred to Bob as "Bobby," a nickname used only by Bob's closest friends. (Record 80.) Dan never asked Bob to stop sending him e-mails. In fact, in the ten-year period preceding Bob obtaining a TRO against Cindy, Dan testified that he had not actually complained to Bob about Bob. (Hearing 43-44.) Dan is an accomplished attorney versed in the importance of creating written records. However, he determined not to take a few seconds at any time to reply to Bob with a simple e-mail notice requesting, "Please do not contact me at any time in the future." These six e-mails by Bob and Dan's response congratulating Bob for his new baby foreclose any conclusion that Dan suffered actual substantial emotional distress.

Additionally, the statute authorizing CHRO's exempts from harassment conduct that serves a legitimate purpose. (Code Civ. Proc., § 527.6, subd.(b)(3).) All six of the e-mails sent by Bob to Dan served the legitimate purpose of protecting Bob's family and its reputation from Dan and Cindy – a one-time felon with a history of drug addiction and a declared public safety risk.[7] Five e-mails by Bob to Dan made a simple request: keep Cindy away from Bob and his family. A sixth e-mail – in September 2016 – from Bob asked Dan to stop his family from defaming

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[7] [finding that on September 29, 2010, the Board's Registered Nursing Diversion Program determined Cindy to "be a public safety risk;"] [Admitting the truth of all Nursing Board's allegations against Cindy].)

Bob. Because all six e-mails furthered Bob's legitimate purposes, the CHRO could not have issued.

In addition, the evidence presented during the CHRO trial did not constitute substantial evidence of any threat of future harm. An injunction is only proper to restrain threatened future harm. (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 401.) Not only was there no evidence of a past threat by Bob, there was no evidence presented during the CHRO trial of any threatened future harm by Bob.[8]

Each of the foregoing issues separately warrant reversal. Taken together, they demonstrate that the CHRO trial court overstepped its bounds by attempting to solve a neighborhood dispute by imposing a restraining order that the Legislature primarily intended to abate dangerous stalking. One legal commentator observes that the poor structure of California's CHRO law encourages judges "to dispense freewheeling, Solomonic justice according to their visions of proper behavior and the best interests of the parties." (Aaron H. Caplan, *Free Speech and Civil Harassment Orders* (2013) 64 Hastings L.J. 781, 785.) That is precisely what happened here. The CHRO trial court tried to solve a neighborhood dispute at the expense of Bob's First Amendment rights. If this matter had been heard by a judge who regularly hears CHRO petitions, no CHRO would have issued. However, Dan was unwilling to stipulate to the commissioner who regularly hears CHRO petitions. (Record 108.) The judge next assigned to the case was "personally acquainted with the Dunbars" and, therefore, recused himself. (Record 110.) The third judge ultimately assigned to hear the CHRO hearing regularly presides in a criminal courtroom[9] and does not normally hear CHRO petitions. (Record 110; RT 1.)

The California Court of Appeal has ruled in the past that a CHRO is not an appropriate remedy for disputes between property owners. In *Schild v. Rubin*, *supra*, 232 Cal.App.3d, Division Five of this Court held that a lawyer who was unhappy with a neighbor who played loud basketball and used a hose to spray water should not have received a CHRO and dissolved

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[8] At the time of the hearing, Bob owned guns. Yet Dan stipulated during the CHRO hearing that Bob be allowed to keep his guns despite the CHRO. (Hearing 99-100.) No one in actual or reasonable fear of future violence or harassment would agree to that.

[9] CT 110; RT 1. Judge Tanaka reminded the parties several times that it was a "criminal court" not a family law court. (Hearing 5, 86.) He also indicated he had a lot of papers to read in a short time before the hearing commenced. (Hearing 4.)

the injunction. In *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, Division Two of this Court held that a dispute between two neighbors over the parking of cars and an easement was not the proper subject of a CHRO and dissolved the injunction. Parking cars served a legitimate purpose and could not form the basis of a proper CHRO. The underlying CHRO case is similar in many respects to *Schild* and *Byers*. Like, the aggressive lawyer-plaintiff in *Schild*, the lawyer-plaintiff here has misused the legal system for his own personal ends.

The order during the CHRO trial has serious personal and political repercussions for the Chapman family. A recent political controversy existed in the City of Palos Verdes Estates over Measure E: a parcel tax to fund a local police department rather than the Los Angeles Sheriff's Department. On one side of the controversy, the Chapman family members were well-known critics of unnecessary taxation. The Chapmans supported lowering taxes and hiring the Los Angeles Sheriff Department to replace the local police department. On the other side of the controversy, the Dunbars were financial backers of the parcel tax and advocates for retaining the local police department over the competing Sheriff's Department.

In the weeks leading up to the election, the Dunbars used the CHRO as a sword rather than a shield. Cindy openly and furtively waved the existence of the CHRO against Bob in an attempt to diminish Bob's voice and discredit those, like Bob, who supported the Los Angeles Sheriff's services over the local police department. Cindy used the CHRO not to protect herself from stalking or harassment but to silence the speech of a political opponent. The Dunbars stifled the Chapman family's voice and ability to publicly advocate against Measure E.

It worked.

Measure E passed. Now, Bob faces criminal charges based on alleged violations of the CHRO. The local police force, indirectly financially backed by the Dunbars[10] through the Committee to Retain the Palos Verdes Estates Police Department, are the police agency that investigated Bob and recommended criminal charges against Bob for violation of the CHRO: Bob's price for daring to criticize the tax and threatening the existence of the local police

[10] Cindy was perhaps the most openly, publicly active supporter of the local police department during the "Police v. Sheriff" election, at one point posting no fewer than eight social media posts supporting the police department that was investigating Bob within only a few hours on one particular day.

department. The criminal prosecution to enforce the CHRO is the local police department's opportunity to repay Cindy for her financial and vocal support of Measure E.

STATEMENT OF FACTS

A. Cindy's 2007 Diversion of Morphine from her Patients and 2008 Fraudulent Prescriptions for 1,955 Pain Pills for her Personal Use[11]

Cindy was previously a licensed field registry nurse working at Little Company of Mary Hospital in Torrance and San Pedro, California. In an audit of patient records, she was found to have illegally diverted 21 milligrams of dilaudid,[12] a form of morphine, from several of her suffering patients in August and September 2007. Between February 2008 and April 2008, she was found to have illegally prescribed herself controlled substances, 1,955 pills in the three-month period, using eight separately forged prescriptions.

On June 17, 2008, Cindy enrolled in a drug rehabilitation program due to stealing dilaudid from the workplace.[13] In November and December 2008, Cindy tested positive for drug use. Between January 2009 and September 2010, Cindy failed to take required drug tests, concealed her use of drugs from the nursing board overseeing her rehabilitation and was terminated from a drug diversion program.

B. Cindy's 2010 Felony Drug Conviction and Loss of Nursing License

On July 30, 2010, Cindy was convicted of a felony in *People v. Dunbar*, Case No. YA078016 for possession of dilaudid, a controlled substance. She was convicted in that same

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[11] The foregoing facts were recited in an Accusation filed against Cindy before the Board of Registered Nursing, Case No. 2012-64. In a later proceeding to surrender her license, Cindy admitted the truth of all of the facts alleged in the Accusation.

[12] Dilaudid is a Schedule II controlled substance.

[13] Cindy's efforts to treat her addiction are admirable. Although she was kicked out of the 2008 rehabilitation program, Bob hopes that was not the last time she attempted to curb her addiction. No evidence was offered at the hearing on Cindy's present rehabilitation efforts.

case of a misdemeanor for forging a prescription for hydrocodone. She was sentenced to 30 days in jail, 150 days of home detention and three years of probation.[14]

C. The Chapmans and Dunbars Pre-July 2014 Relationship was Friendly

Prior to July 2014, the Chapmans and Dunbars were friendly and greeted each other on the street. (Hearing 30-31.) After July 2014, Bob requested that Cindy not communicate with them anymore. (Hearing 30-31.)

D. The July 3, 2014 E-mail from Cindy and Bob's July 4, 2014 E-Mail in Response

On July 3, 2014, Cindy sent an e-mail to Bob asking why Bob gave Cindy the "cold shoulder" while he was walking down the street past the Dunbars' home. (Record 45-46.) She asked Bob, is "everything good?" (Record 14.) On July 4, 2014, Bob replied. (Record 43.) Everything was not good. (Record 43.) He told Cindy that he was upset that she had engaged in a smear campaign against him in the neighborhood. (Record 43-44.) The e-mail did not contain threats of any kind nor did it mention physical violence. (Record 43-44.) Bob also forwarded a copy of the e-mail to his friend Dan expressing regret that their friendship may necessarily need to end due to Cindy's actions. (Record 43.) Neither Dan nor Cindy requested that Bob not e-mail them further.

E. The July 4, 2014 Incident

On July 4, 2014, Cindy entered the Chapman family property without the Chapman's consent. (Record 24, 60-61.) During her extended trespass, Cindy screamed at the Chapman family through the garage doors. (Record 24.) Instead of leaving the Chapman's property

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[14] Dan testified that the felony count against his wife was dismissed on January 27, 2012. (Hearing 36.) No certified court records were offered to support this assertion. In contrast, the nursing board documents include an express admission of fact by Cindy that the board's allegations of drug use, diversion, forged prescriptions and felony conviction were all true. While it is possible that Cindy's felony conviction has since been reduced to a misdemeanor under California's recently relaxed sentencing laws for drug crimes, no evidence was offered during the CHRO trial on this point.

through the front gate only 100 feet away, she encircled the perimeter of the Chapman family home peering into the Chapman's windows. (Record 60-61.) The incident was sufficiently disturbing that over three years later, Jennifer, Bob's wife, cried while recounting the incident on the witness stand. (Record 24.)

F. The August 2014 Incident

During an early morning walk in August 2014, Cindy made an illegal U-turn, came within three feet of Jennifer and looked at Jennifer "with a crazed look in her eyes." (Hearing 25.) She drove in her car and followed Jennifer at the same pace. (Hearing 25.) Notably, Bob showed reasonable restraint and did not e-mail Dan about this incident.

G. The November 2014 Incident

In November 2014, while Jennifer was out for a walk, Cindy was backing her car out of her driveway, Cindy blocked Jennifer and she was forced to walk around the vehicle. (Hearing 25-26.) Cindy got out of the car and made several comments to Jennifer and Jennifer asked Cindy to leave her alone. (Hearing 26.) Cindy conceded that she chose to confront Jennifer because she was not with Bob. (Hearing 26.) This was Cindy choosing to have contact with the Chapman family. Again, Bob showed reasonable restraint and did not e-mail Dan about this incident (although such an e-mail would have been warranted by the legitimate purpose of Bob protecting Jennifer from Cindy.)

H. Cindy's February 3, 2015 Confrontation of Jennifer and her Newborn Daughter

In February 2015, Jennifer had recently given birth and was walking on the street with her parents. (Hearing 26.) Cindy came out of her home, approached Jennifer and asked to see the baby. (Hearing 26.) Notably, this was Cindy initiating contact with the Chapman family. Jennifer politely informed Cindy that she was not letting anyone see the baby. (Hearing 26.) Cindy, in the presence of an unknown minor, unleashed a torrent of profanity towards Jennifer about Bob. (Hearing 26.)

I. The February 3, 2015 E-Mail

Between July 4, 2014 and February 3, 2015, Bob had not sent any e-mails to Dan. After Cindy accosted Jennifer on February 3, 2015, Bob sent an e-mail to Dan:

> I am sending this message to you purely out of self interest in the hope that you can find a way to restrain your wife from interacting with any member of my family.

(Record 42.)

Dan's response was: "Message received. Congrats on baby." (Record 41.) Neither Dan nor Cindy requested that Bob not e-mail Dan further. If anything, the response by Dan provided Bob with validation that Bob's e-mails were welcome.

J. The May 2016 Incident

In May 2016, Cindy confronted Jennifer in a market. (Hearing 26-27.) Jennifer asked Cindy to leave her alone. (Hearing 26-27.) Cindy indicated that "she could talk to anyone she wanted." (Hearing 26-27.) It was Cindy that initiated this contact with Jennifer. (Hearing 26-27.) As a result of these incidents, Jennifer is in fear and does not wish to walk by the Dunbar residence without Bob there to protect her anymore. (Hearing 27.)

K. The May 5, 2016 E-Mail

On May 5, 2016, Bob e-mailed Dan and asked him to keep Cindy away from the Chapman family. (Record 40.) The e-mail included a clear statement of Bob's legitimate purpose for e-mailing Dan:

> Overall, we desire and again formally demand absolutely no interaction initiated by Cynthia Dunbar with the Chapman family. This is a reasonable neighbor-to-neighbor relationship, as your wife has no legitimate need to engage or otherwise communicate to/about my family in our presence.

(Record 41.)

Dan did not testify at the hearing that he opened or read this e-mail. There is no evidence that Dan received or contemporaneously read this e-mail or that Cindy ever knew of its existence. Neither Dan nor Cindy requested that Bob not e-mail Dan further.

L. The May 21, 2016 E-Mail

On May 21, 2016, Bob e-mailed Dan and asked him to keep Cindy away from the Chapman family. (Record 38.) At 9:45 a.m. that morning, Cindy had harassed Jennifer. (Record

38-39.) The e-mail asked Dan to reply to acknowledge Dan's receipt and stated that the purpose of the e-mail was to document Cindy's harassment of Jennifer. (Record 38-39.)

Dan did not testify at the hearing that he opened or read this May 21, 2016 e-mail. There is no evidence that Dan received or contemporaneously read this e-mail or that Cindy ever knew of its existence. Neither Dan nor Cindy requested that Bob not e-mail Dan further.

M. The September 25, 2016 E-Mail

On September 25, 2016, Bob e-mailed Dan and asked him and Cindy to stop disparaging the Chapman family. (Record 39.) Per the e-mail, Bob's request to Dan was that:

> we all coexist quietly with no overlap whatsoever, which has been my goal since this all turned south two years ago.

(Record 39.)

This e-mail served the legitimate purpose of Bob protecting his family from defamation by the Dunbars. Dan did not respond to the e-mail. There was no evidence during the CHRO trial that Dan received or contemporaneously read this e-mail. Neither Dan nor Cindy requested that Bob not e-mail Dan further.

N. The May 31, 2017 Burglary and "Wheelchair" Confrontation Orchestrated by Cindy

On May 31, 2017, Cindy learned that neighbors living directly across the street from the Chapman family had been burglarized. (Hearing 55.) Cindy walked down the street to visit with the family. (Hearing 55.) The police were present at the burglarized home. (Hearing 56.) As Cindy walked by, Bob was sitting in the dirt gardening in front of his home. Bob communicated to his wife via walkie talkie. (Hearing 56.) Cindy misinterpreted Bob's discussion with his wife over a walkie-talkie about who could have burglarized the home as him saying, "There's the drug addict."[15] The CHRO trial court found this statement was not made by Bob *to* Cindy.

[15] Cindy claims Bob spoke directly to Cindy. (Hearing 56.) Bob testified that he was talking to Jennifer via walkie talkie about who could have committed the burglary. (Hearing 69.) Bob told his wife that the burglary could have been committed by a drug addict getting enough money for the next fix. (Hearing 69.) The CHRO trial court made a finding of fact that Bob was speaking to his wife via walkie talkie, yet it was possible that Cindy heard the words Bob used with Jennifer. (Hearing 88.)

(Hearing 88.) Rather, Bob made the statement *about* Cindy to his wife via walkie talkie. (Hearing 88.) The police were present for this comment. (Hearing 88.) Cindy did not ask the police for help nor did they intervene. Cindy returned to her home. (Record 47.)

Later, after the police had left, Cindy walked 100 yards from her home back to the Chapman property. (Record 47; RT 10.) Bob was quietly gardening, sitting in his front yard when Cindy confronted him. (Record 10.) In a sworn declaration accompanying Dan's petition, Cindy claimed that Bob had threatened to put her in a wheelchair. (Record 48.) No such threat was actually made. Fortuitously, in order to document the truth of the dialog, Bob began audio recording the confrontation mid-way into its procession and played that audio to the CHRO trial court. (Record 81.) In contrast to Cindy's sworn statements, the during the CHRO trial are the words actually used between Bob and Cindy:

> Bob: You look so old. I'm sad for you.
> Cindy: Everybody. Everybody talks about you.
> Bob: Whoooo. That's why everybody came over and said "Hi" to me.
> Cindy: Nooo.
> Bob: Oh yeah sure.
> Cindy: They're afraid because you told people that –
> Bob: Oh yeah. **Go back to your wheelchair.**
> Cindy: Don't ever speak to me again.
> Bob: You come to me. You –
> Cindy: Don't ever speak to me again.
> Bob: You came down to me, you stupid old lady. You came to me. I'm down here on my property. You're disgusting. You drug addict.
> Cindy: Oh yeah, so sure.
> Bob: You're a convicted drug felon Cindy Dunbar. You are a convicted drug felon.
> Cindy: And you have to get help If you can.
> Bob: You're – They kicked you out of rehab.
> Cindy: Oh, you have no idea.
> Bob: I read the file Cindy.
> Cindy: You know that, you don't know.
> Bob: I know everything.
> Cindy: Oh yeah
> Bob: Go back and do some more drugs.
> Cindy: You need to shut the fuck up.

(Record 81-82, 91.)

Neither party comes away from this exchange looking like an ideal neighbor. But neither Bob nor Cindy's likeability should have any bearing on the outcome of this case. As observed by one legal commentator:

> "[F]ree speech lore is famous for its roster of unlikable defendants spouting unlikable expression: radicals, dissenters, heretics, bigots, pornographers, and character assassins. This is to be expected because a democratic government is unlikely to put much energy into suppressing well-liked speech. The respondent's speech in a civil harassment case may well be antisocial or uncivil. The less attractive the respondent, the easier it becomes to reject constitutional arguments as the last refuge of a scoundrel."

(Aaron H. Caplan, *Free Speech and Civil Harassment Orders* (2013) 64 Hastings L.J. 781, 808.)[16]

Notably, although Dan's petition for a CHRO included a declaration by Cindy claiming that she had been threatened by Bob, Cindy did not testify that she felt threatened by this exchange. (Record 48 ¶ 3; RT 63.)[17] When Cindy's lawyer asked her if the wheelchair comment felt like a threat or was she afraid of Bob at that time, she did not answer the question. (Hearing 63.) The recording played in court exposed Cindy's perjury: Bob did not threaten Cindy and the CHRO trial court found there was no credible threat of violence. (Hearing 89 [finding that Bob's statement "doesn't sound like a threat."]; RT 92 [finding no "credible threat of violence."].)

Cindy's self-initiated contact with Bob was an isolated instance of communication between Cindy and Bob. Cindy conceded at the hearing during the CHRO trial that the Chapmans had not telephoned or e-mailed Cindy in a three-year period. (Hearing 68.) Nor could Cindy recall any incident where the Chapmans physically approached Cindy to initiate a conversation. (Hearing 68.) The only contact initiated by Bob to the Dunbars between July 2014 and June 2017 had been six e-mails[18] by Bob. Five of the e-mails to Dan requested that Cindy

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[16] As more succinctly put by a prominent Los Angeles First Amendment attorney and Podcaster, Ken White: "Exceptions to the First Amendment are often built on the backs of the powerless and the despised." Ken White, Fighting Words: Make No Law, the First Amendment Podcast, http: https://legaltalknetwork.com/podcasts/make-no-law/2018/01/fighting-words/ (last visited on May 30, 2018.)

[17] Dan's petition falsely claimed that a threat was made by Bob to put Cindy in a wheelchair. (Record 31, 36, 38.)

[18] Bob sent Dan an e-mail on July 4, 2014 as a reasonable *response* to Cindy's "what's wrong e-mail." Bob sent Dan an e-mail on February 3, 2015 as a reasonable *response* to Cindy accosting Jennifer and her newborn daughter. Bob sent Dan an e-mail on May 5, 2016 as a reasonable *response* to Cindy accosting Jennifer in the supermarket. On

have no contact with the Chapman family. (Record 37-46.) A September 2016 e-mail put Dan on notice that Dan and Cindy were defaming the Chapman family and if they continued to do so, Bob would have no choice but to defend his family's reputation by informing the party to whom the defamatory statements had been made of the entire truth underlying the rift between the two families. (Record 39.)

After Cindy's May 31, 2017 confrontation of Bob, neither Cindy nor Dan went to the police. No police report was filed as to the May 31, 2017 incident. Nor did Cindy or Dan immediately seek a restraining order based on the May 31, 2017 incident. Bob, on the other hand, sought and obtained a restraining order against Cindy, the very next day after the May 31, 2017 incident. It was only after Bob served Cindy with the TRO did Cindy and Dan even consider obtaining relief from the Court, thus belying their claim that either Dan or Cindy suffered actual or reasonable emotional distress from the May 31, 2017 incident.

O. The June 1, 2017 E-Mail

On June 1, 2017 Bob sent an e-mail to Dan. (Record 37.) The purpose of the e-mail was to document Cindy's May 31, 2017 confrontation of Bob. Dan did not respond. Dan did not present evidence during the CHRO trial that he opened or contemporaneously read the e-mail. Dan did not request that Bob not e-mail him further.

P. Bob obtains a TRO against Cindy in June 2017

On June 1, 2017, Bob obtained a temporary restraining order against Cindy, thus initiating *Chapman v. Dunbar*, Case No. 17TRRO00009. (Record 4, 9.) Cindy was served with the restraining order on June 7, 2017. (Record 28.) After the TRO was sought by Bob and issued against Cindy, Jennifer felt relief. (Hearing 28.) She was able to play in her cul de sac with her children without fear of a confrontation from Cindy. (Hearing 28.)

May 21, 2016, Bob sent Dan an e-mail as a reasonable *response* to Cindy's harassment of Jennifer earlier that day. Bob sent Dan an e-mail on September 25, 2016 as a reasonable *response* to the Dunbars reportedly disparaging the Chapman family name to neighbors. Bob sent Dan an e-mail on June 1, 2017 as a reasonable *response* after Cindy confronted Bob while he was quietly gardening on his own property. (Record 37-46.)

PROCEDURAL BACKGROUND

A. Dan Seeks a TRO Against Bob in Retaliation

Cindy was served with Bob's restraining order in *Chapman v. Dunbar* on June 7, 2017. (Record 28.) In retaliation,[19] on June 16, 2017, Dan filed a request for a restraining order against Bob. (Record 29.) Prior to June 16, 2017, Dan had never once voiced any complaint to Bob about e-mails sent by Bob to Dan. (Record 79.) The June 16, 2017 request also sought protection for Cindy Dunbar. (Record 29.) According to Dan, the request was based on an alleged threat by Bob "relating to placing Cynthia Dunbar in a wheelchair." (Record 33.) Dan – who is a trial attorney with Panish Shea & Boyle LLP with "tens of millions of dollars" of personal injury verdicts under his belt on behalf of over 5,000 personal injury clients – requested that the $355.00 court filing fee be waived due to a fabricated threat of violence by Bob. (Record 33.) Dan's declaration in support of his application accused Bob of "continually" sending e-mails to Dan since July 3, 2014 but Dan only attached to his declaration six e-mails from a three-year period. (Record 37.)

Cindy submitted a declaration in support of Dan's petition for a CHRO. (Record 48.) She declared that the May 31, 2017 confrontation that she initiated with Bob concluded with a threat: "you'll be in a wheelchair soon enough." (Record 48, ¶ 3.) That statement was perjurious. The conversation was recorded and played to the CHRO trial court. (Hearing 18.) The statement actually made was related to Cindy's aged appearance: "Oh yeah. Go back to your wheelchair." (Hearing 19.) There was no threat and the CHRO trial court made a finding of fact there was no credible threat of violence. (Record 92.)

Cindy's declaration included a second perjurious statement. Cindy declared that Bob "continually verbally abused me during the last three years." In fact, Cindy conceded on the witness stand that in the three years preceding the restraining order, that neither Bob nor Jennifer had called Cindy, e-mailed Cindy or approached Cindy to initiate a conversation. (Hearing 68.)

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[19] After the May 31, 2017 confrontation initiated by Cindy, she did not file a police report against Bob based on the "threat." Nor did Cindy immediately seek a restraining order against Bob. Instead, it was only after Cindy was served with Bob's restraining order on June 7, 2017 that Dan determined to retaliate by filing his own petition. (Record 28, 29.) Dan explained the delay by saying it took him two weeks to understand the seriousness of Bob's alleged threat to Cindy. (Hearing 46-47.) Perhaps this delay factored into the CHRO trial court's conclusion that there was no credible evidence of threat.

Nonetheless, based on two perjurious statements about a threat that was never made and a three-year history of verbal abuse that did not exist, a TRO was issued for Dan against Bob on an ex parte basis without a hearing on June 16, 2017. (Record 56.) The CHRO trial court that issued the TRO on June 16, 2017 did not have the benefit of hearing the audio recording that flatly refutes Cindy's claim of a threat and the CHRO trial court did not have the benefit of Cindy's testimony in court that in the three years preceding the restraining order, neither Bob nor Jennifer had called, e-mailed or approached Cindy to initiate conversation. (Hearing 68.) Dan included these two demonstrably perjurious statements in his petition because he knew without them, there was no basis for any court to issue the TRO against Bob.

B. The Hearing on the Two Petitions

The CHRO trial court consolidated Bob's request for a CHRO with Dan's and both were heard on July 3, 2017. Dan did not stipulate to a hearing before a commissioner, so the hearing was transferred to a family law judge. (Record 108.) The family law judge that normally hears CHRO hearings recused himself noting that he was personally familiar with the Dunbars. (Record 110.) The matter was then transferred to the criminal courtroom of Judge Gary Tanaka. (Hearing 6.) When calling this matter, Judge Tanaka noted that he only had a "short period of time" to read "a lot" of papers.[20] (Hearing 4.)

At the July 3, 2017, hearing, Bob represented himself. Dan was represented by counsel. Four witnesses testified: Bob, Jennifer, Cindy and Dan. The CHRO trial court concluded that neither side had demonstrated a credible threat of violence. (Record 92.) Bob's application for a CHRO was denied in its entirety. (Record 93.)

As for Dan's application, the CHRO trial court found that "a constant chain of e-mails being broadcast against [Dan's] wife, can't be allowed." (Hearing 94.) The CHRO trial court found that it could issue a CHRO without a claim from Dan, much less any evidence, that he had suffered emotional distress. (Hearing 94.) The CHRO trial court wanted to stop Bob from ever informing the neighborhood of Cindy's drug conviction and used the CHRO as an unlawful prior

[20] The moving papers for Bob and Dan were unusually long. Rather than the normal judicial council forms alone, both Bob and Dan had lengthy attachments to their papers. (Record 4-21 [Bob's petition and attachments]; CT 29-55 [Dan's petition and attachments].)

restraint to achieve that goal. (Hearing 94.) Bob was ordered to stay ten yards away and not contact Cindy or Dan directly or indirectly. (Hearing 95.) The CHRO trial court made a finding that Bob had not intimidated, molested, attacked, struck, stalked, threatened or assaulted the Dunbars. (Hearing 95.) Nonetheless, the CHRO trial court ordered Bob not to intimidate or harass the Dunbars. (Hearing 95.)

The unconstitutionally broad and vague CHRO also prohibited Bob from sending any e-mail, text or other communication that would "demean the Dunbars to the neighbors." (Hearing 95.) The CHRO trial court admonished Bob:

> I'm only telling you that to be careful, because even an e-mail that you think is not harmful by contacting a Dunbar directly or indirectly by telling a neighbor, "look at this chain of e-mails," that could potentially be used against you in a future criminal action if police are notified and the prosecuting agency were to pursue those allegations.
>
> * * *
>
> [I]f you indirectly seek to harm the Dunbars indirectly, … such actions could be perceived as a violation of the order. Whether or not police get involved, whether or not a prosecutorial agency goes with those allegations is neither here nor there. I'm cautioning you that this order is prohibiting you…

(Hearing 95-97.)

Bob tried to clarify the boundaries of the prior restraint. (Hearing 97.) For example, Bob asked whether he could, without violating the CHRO, e-mail a copy of Cindy's criminal record to a neighbor. (Hearing 98.) The CHRO trial court confirmed it was within Bob's First Amendment right to do so but then added menacingly:

> Like anything, just because you have the right to do something does not mean it doesn't have
> consequences.

(Hearing 98.)

Bob raised a First Amendment objection to the scope of the prior restraint and preserved the argument for appeal. (Hearing 95-96.) Bob filed a timely notice of appeal on July 31, 2017. (Record 112.)

C. The Criminal Charges are Filed in this Case

On March 7, 2018, the complaint in this case was filed. An amended criminal complaint was filed on May 1, 2018.

The first count alleges that Bob violated the CHRO because Bob – who was in pro per at the time – served by United States Mail a notice of appeal for this appellate proceeding on the Dunbars rather than their counsel. This count was dismissed by demurrer. Counts 2 and 3 are based on a false allegation that when Bob drove past the Dunbars' home when leaving his own home, he extended his middle finger out the window. Count 4 falsely alleges that Bob was staring at Dan. Count 5 falsely alleges that Bob somehow violated the CHRO when he reported to the social media website, NextDoor.com, that Cindy had violated NextDoor.com's Community Guidelines.[21] Bob had reported Cindy to NextDoor.com for using the website in a dispute between neighbors by disparaging him to his neighbors. No trial has been held on the charges against Bob. Bob disputes the veracity and legitimacy of the charges.

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[21] Count 5's allegation of criminal conduct based on Bob's statements to third parties about Cindy is particularly unconstitutional as set forth in Part I during the CHRO trial. Statements to third parties about Cindy cannot be the subject of a prior restraint absent an adjudication that the statements are defamatory. (*Evans v. Evans*, *supra*, 162 Cal.App.4th at 1168.)

MEMORANDUM OF POINTS AND AUTHORITIES

I. The CHRO Is Unlawful Such that it Violates the First Amendment Because it Prohibits Speech that has not Been Deemed Defamatory, is Vague as to What Speech is Banned and is Overbroad Because it Restricts Speech About the Dunbars Rather than Speech to the Dunbars

The CHRO is unlawful as it is a prior restraint because it precludes Bob from speaking in advance. (*Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1486.) Prior restraints are disfavored and presumptively invalid. (*Ibid*.) They are the "most serious and least tolerable infringement of First Amendment rights." (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 296–297.) They are permitted only "in certain narrow circumstances constituting 'exceptional cases'." (*Ibid*. [citing *Near v. Minnesota* (1931) 283 U.S. 697, 716].) Dan, as the party seeking to enjoin Bob, bears the "heavy burden" of justifying the prior restraint. (*Parris v. Superior Court*, *supra*, 109 Cal.App.4th at 297.) The burden on Dan is to demonstrate a compelling interest supporting the restraint, that the restraint is necessary to promote that interest and that less extreme measures are unavailable. (*Evans v. Evans*, *supra*, 162 Cal.App.4th at p. 1167.) Even when that burden is met, the order must be narrowly tailored to accomplish its objective. (*Ibid*.) Dan did not meet his "easy burden" during the CHRO trial and cannot meet that burden here.

A. The CHRO Trial Court was Without Power to Issue a Prior Restraint on Speech that has not been Adjudicated Defamatory

There has never been a judicial determination that Bob's statements about Cindy's drug use, diversion of pain killers away from patients and conviction are defamatory. Cindy has not filed a defamation lawsuit regarding the comments made in and before May 2017 and the time to do so has expired. (*Schneider v. United Airlines, Inc.*, *supra*, 208 Cal.App.3d at p. 76 [holding that the statute of limitations for defamation is one year].) The Dunbars' failure to file a defamation action is a constitutional bar to the prior restraint issued by the CHRO trial court against Bob. (*Evans v. Evans*, *supra*, 162 Cal.App.4th at 1168.) The First Amendment tolerates a prior restraint of speech only after it has been proven to be defamatory. (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1148.)

In *Balboa Island*, the defendant was found to have videotaped the plaintiff's business customers. She also called the customers "drunks" and "whores." She approached potential

customers more than 100 times and caused many to turn away. She told people that plaintiff sold alcohol and was involved in child pornography. The CHRO trial court found those statements to be defamatory and issued a permanent injunction barring defendant from making those statements in the future about the plaintiff. The California Supreme Court held that a permanent injunction barring defendant from repeating those defamatory comments would be constitutionally proper. (*Balboa Island Village Inn, Inc. v. Lemen*, *supra*, 40 Cal.4th at p. 1148.)

In contrast to the facts and results of *Balboa Island*, prior restraints in advance of a trial of defamation are constitutionally invalid. In *Evans v. Evans*, *supra*, 162 Cal.App.4th at 1168, a deputy sheriff brought an action against his former wife and mother in law for defamation. The plaintiff obtained a preliminary injunction barring defendant from making defamatory statements about him on the internet. The Court of Appeal reversed finding it to be an unconstitutional prior restraint. (*Id*. at 1166.) The *Evans* court began its analysis with a discussion of well settled principles of First Amendment law:

> The right to free speech is one of the cornerstones of our society, and is protected under the First Amendment of the United States Constitution and under an even broader provision of the California Constitution. An injunction that forbids a citizen from speaking in advance of the time the communication is to occur is known as a "prior restraint." A prior restraint is the most serious and the least tolerable infringement on First Amendment rights. Prior restraints are highly disfavored and presumptively violate the First Amendment. This is true even when the speech is expected to be of the type that is not constitutionally protected.

(*Evans v. Evans*, *supra*, 162 Cal.App.4th at pp. 1166–1167 [cleaned up].)

In *Evans* the lack of a defamation trial was fatal to the injunction. (*Id*. at 1166.) The prior restraint here falls squarely within the holding of *Evans*. It is a highly disfavored and presumptively unconstitutional prior restraint. No court has ever ruled that Bob's statements were defamatory and all such claims are now time-barred.

B. The Undefined Terms "Neighbors" and "Demean" Renders the CHRO Vague Because it did not Apprise Bob of what Conduct Could Subject him to Contempt Proceedings

"An injunction is unconstitutionally vague if it does not clearly define the persons protected and the conduct prohibited." (*Evans v. Evans*, *supra*, 162 Cal.App.4th at p. 1167.) The CHRO trial court told Bob that the CHRO purportedly barred Bob from communicating with

"neighbors" in a way that "demeans" the Dunbars. (Hearing 95.) This order leaves Bob to guess who he can speak to (neighbors) and what he can say (demeans). Does "demean" refer to the subjective effect on the third party who hears the statement, the Dunbars' subjective interpretation or an objective determination? What defines a "neighbor" – someone who lives next door, on the same street or lives in the same county? An injunction that forbids a defendant from publishing "any demeaning comments" is constitutionally invalid because it does not delineate which of a defendant's comments in the future may subject the speaker to contempt of court. (*Evans* at 169.) Does Bob have to know the person he is speaking to is a "neighbor" to violate the CHRO or may he unwittingly violate the CHRO by speaking to a person who is unbeknownst to him a neighbor? The bar against demeaning comments is constitutionally vague and must be found unlawful.

C. The CHRO is Overbroad Because it Punishes Speech Critical *of* the Dunbars Rather than Speech Directed *to* the Dunbars

UCLA law professor and frequent First Amendment commentator Eugene Volokh has expressed constitutional concern about legal trends allowing restrictions of critical speech *about* a person rather than limiting restrictions to speech directed *to* a person. (Eugene Volokh, *One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws, and "Cyberstalking"* (2013) 107 N. Ill. U. L. Rev. 731, hereafter "Volokh, One-To-One.") To the extent restraining orders for harassment target speech critical *about* a person, the courts act unconstitutionally. (Volokh, One-To-One 731.) Volokh recommends that courts distinguish between "one-to-one" speech which has less value and is not likely to persuade the listener and "one-to-many" speech which has more value and should not be abated. (Volokh, One-To-One 743.) Volokh's arguments have root in the United States Supreme Court's decision in *Organization for a Better Austin v. Keefe*, *supra*, 402 U.S. In *Keefe*, a lower court issued an injunction banning petitioners from distributing leaflets anywhere in a town. Petitioners wished to inform the community about the illicit tactics of a business. The Supreme Court easily reversed the injunction as an illegal prior restraint. (*Id*. at 420.) In doing so, the Supreme Court recognized the value of public discourse, even when critical about others. (*Ibid*.) The injunction was required to be reversed because the business owner was "not attempting to stop the flow of information into his own household, but to the public." (*Ibid*.)

Here, as in *Keefe*, the CHRO during the CHRO trial was not limited to Bob's communications to Dan and Cindy. The CHRO is an expression of the CHRO trial court that Bob should not be able to communicate to the public –members of his neighborhood – about Cindy's past drug use and criminal record. Cindy's desire to be free of criticism of her past drug use and criminal record is understandable but is not a proper basis for the imposition of a CHRO. (*Ibid*.) While the First Amendment sometimes permits an injunction of speech to a person, criticism directed about a person remains protected by the First Amendment. (*Ibid*.) The Supreme Court has long recognized the rights of speakers to criticize and share those criticisms with the public. (*Ibid*.) The fact that Bob's comments may prove embarrassing is not enough to strip his speech of constitutional protection. (*N. A. A. C. P. v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 909–910.)

> [C]itizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment."

(*Boos v. Barry* (1988) 485 U.S. 312, 322.)

The limitation of restraining orders to restrain only speech made directly to the Dunbars (one-to-one) rather than about the Dunbars to the neighbors (one-to-all) also has root in the text of the CHRO statute. Section 527.6, subdivision (b)(3) defines harassment as including a course of conduct "directed at a specific person." Section 527.6, subdivision (b)(1) defines "course of conduct" to include harassing calls "to an individual" and sending harassing correspondence "to an individual." The statute does not purport to prohibit speech *about* an individual.

In the context of this motion, the distinction between speech *to a* person that is *unavoidable* and speech *about a* person that is *avoidable* is critical. Here, each e-mail sent by Bob to Dan about Cindy had an e-mail subject line that announced the subject matter: "Harassment of Chapman Family" (Record 37-43.) Cindy did not receive the e-mails and Dan had the forewarning of the sender (Bob) and subject line, to delete the e-mail that was critical of Cindy. Under *Keefe* and *Boos v. Barry*, the First Amendment protects Bob's e-mails to Dan because they were merely critical of Cindy, not harassing to Dan, and Dan had the power to avoid reading the "speech" at any time. Dan was a willing recipient of the content within Bob's e-mails. In response to one e-mail, he responded by congratulating Bob on his new baby. Indeed, Dan *never* expressed any desire that he did not wish to receive these e-mails. In this sense, Dan was a *willing* recipient of Bob's e-mail messages. Dan never put Bob on notice that Dan was no

longer willing to receive Bob's e-mails. Even if Dan had notified Bob that he no longer wanted others to receive e-mails about the Dunbars, Dan's legal remedy was not an unlawful prior restraint. If the Dunbars wish to silence Bob, they need to sue him for defamation, get a CHRO trial court to agree that Cindy was never convicted of a felony, never diverted pain killers from her suffering patients, never forged prescriptions for her own use and was never declared a public safety risk by the State of California. (*Evans v. Evans*, *supra*, 162 Cal.App.4th at pp. 1166–1167.)

The CHRO trial court found no credible threat of violence. The conduct that the CHRO trial court found objectionable during the CHRO trial was Bob's e-mails to third parties *about* Cindy. (Hearing 92-93.) The CHRO trial court commented that it was primarily concerned with Bob e-mailing the "neighborhood" about Cindy. (Hearing 97-98.) Because these comments to third parties about Cindy were unquestionably protected by the First Amendment, the CHRO could not, as a matter of law, issue. The plain text of Section 527.6 exempts "constitutionally protected activity" from CHRO's based on harassment.[22] (Section 527.6, subd.(b)(1).)

D. The CHRO is an Invalid Prior Restraint as Evidenced by this Pending Criminal Prosecution Itself based on Bob's Communication with a Third Party that was "Demeaning" about the Dunbars

If Bob speaks with his "neighbors" about the Dunbars in a way that the Dunbars (or the District Attorney's office) later finds "demeaning," Bob faces criminal charges for violating the CHRO, as evidenced by this very complaint. If Bob wants to email a third party a copy of Cindy's Nursing Board records reciting her history of drug use, the only way Bob could do so without Bob facing criminal charges. Prior to the issuance of the CHRO, Bob had the ability to communicate with his neighbors about the declared safety risk Cindy presented. (*Smith*, 407;

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[22] Section 527.6, subdivision (b)(1) defines "course of conduct" an element of harassment. It's definition states:

> (1) "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, facsimile, or email. **Constitutionally protected activity is not included within the meaning of "course of conduct."**

(Emphasis added.)

V*an Nuys Pub*. 819.) The trial court took Bob's First Amendment right away with the threat of criminal charges.

This threat of criminal charges is not hypothetical, obviously. In the People's November 5, 2018 brief filed in opposition to Bob's *Trombetta* motion, they confirm that Bob is being prosecuted in Count 5 of the criminal complaint for 1) disparaging Cindy to Brian Cochran, a "lead" of the social media website, NextDoor; and 2) forwarding court documents about Cindy to that lead, Mr. Cochran. The District Attorney argues in that brief that Bob contacting a third party violated the order "despite being cautioned by Judge Tanaka about that conduct." The People have used the written CHRO *together* with the trial court's comments from the bench to prosecute Bob. Their position on Count 5 of the criminal complaint underscores the need for this Court's action to confirm the invalidity of the CHRO as an unlawful prior restraint. The District Attorney's prosecution of Count 5 of this complaint constitutes prejudice to Chapman from the continued viability of the CHRO.

E. Although Harassing Speech is Not Protected Speech, there is No Evidence of "True Threats" As Required for the Exception

Huntingdon and *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1301 ("*Norvatis*") stand for the proposition that "harassing speech is not constitutionally protected speech." *Huntingdon* was a case involving actual and threatened property damage, actual and threatened personal injuries and threats of murder. The CHRO issued against animal rights protesters in *Huntingdon* was held to be properly issued notwithstanding the First Amendment because of the "true threats" exception to the First Amendment. (*Huntingdon* at 1250.)

The *Novartis* case reached the same result. In *Novartis*, animal rights protestors targeted a corporation, Chiron, that did business with Huntingdon Life Sciences. The conduct that formed the basis for the CHRO petition included:

- Protestors visited the home of Chiron's chairman of the board of directors on multiple occasions. They set of a loud siren and poured a noxious smelling substance on his doorstep;
- Protestors posted Chiron's chairman's home address and number on their website;
- Chiron's chairman, his wife and his daughter received harassing phone calls;

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- Another Chiron employee had protestors driving back and forth in front of her home while screaming through bullhorns;
- One protester pounded on a Chiron employee's home door at 2 a.m. and said, "Open the door you fucking bitch.";
- One protestor smeared animal feces on a Chiron employee's home, threw mangled stuffed animals in her yard and spray painted "puppy killer" at her home and etched that slogan in her front and back windshield;
- Two bombs were detonated at Chiron's headquarters. The protestors published a statement that they shared the passion of the bombers and that Chiron and its employees should be "very worried.";
- The protestors shared on their website a statement by the bombers: "you might be able to protect your buildings, but can you protect the homes of every employee?"; and
- The protestors shared on their website a second statement by the bombers: "how are you sleeping? You never know when your house, your car even, might go boom. Who knows, that new car in the parking lot may be packed with explosives. Or maybe it will be a shot in the dark."

(*Novartis* at 1289-1291.)

Based on those facts, a CHRO was issued against the protestors and that CHRO was upheld on appeal. The protestors invoked the First Amendment and the *Novartis* court, agreeing with the *Huntingdon* court, ruled that the protestors' activities constituted "true threats" not protected by the First Amendment. (*Novartis* at 1301.) The factual distinctions of true threats of violence in *Huntingdon* and *Novartis*, render those two cases little use to this Court in evaluating whether Bob's six emails to Dan are protected by the First Amendment.

1. <u>The *Huntingdon* and *Novartis* Cases Involved Doxing and there was no Doxing Here Further Diminishing the Relevance of those Cases</u>

A secondary distinction of the *Novartis* and *Huntingdon* cases concerns "doxing" – the publication on the internet of private contact information (email addresses, mailing addresses and phone numbers). The protestor defendants in *Novartis* and *Huntingdon* used the Internet (via

website, Craigslist and other social media) to dox – widely publicize contact information for targeted employees. In the dispute between the Dunbar and Chapman families, there was no doxing of any kind presented in the record. No social media was employed. No websites were used. The most generous reading of the record is that Bob advised Dan that if Bob heard that he or his wife were defamed by Cindy or Dan to any individual neighbor, Bob committed to send only to that specific neighbor a copy of Bob and Cindy's past email exchanges. The absence of any evidence of doxing by Bob is another basis to distinguish *Huntingdon* and *Novartis*.

2. The Protestors in *Huntingdon* and *Novartis* had the Specific Intent to Cause Harm and Coerce Corporations to Change Their Animal Test Policies while Bob had the Specific Intent to have No Contact from Cindy, Document Cindy's Harassment of Jennifer and to Defend his Reputation from Cindy's Alleged Defamation

Yet another distinction between the *Huntingdon* and *Novartis* cases on the one hand and the Chapman and Dunbar family dispute on the other is the specific intent of the parties sending communications. In *Huntingdon* and *Novartis*, it is beyond cavil that the protesters there specifically intended the results achieved by their communications: the infliction of distress and panic among employees of animal testing firms. In contrast, in the underlying CHRO case, the specific intent of Bob's emails is evident on the face of each email: to request that Cindy have no contact with Bob, his wife Jennifer or their young daughter, Trinity, document each time Cindy made unwanted contact with Jennifer or to defend the Chapman family from the Dunbars' alleged defamation. Each of the emails to Dan sent between 2014 and 2017 was sent following Cindy's unwanted contact with Bob, his wife or his daughter, or in one case in September 2016, to protest Cindy's reported defamation of Bob.

For example, the February 3, 2015 email followed Cindy approaching Jennifer on the street to see Jennifer's new baby daughter. (Record 43.) While the parties during the CHRO trial had varying accounts of what happened *during* the encounter, there is no dispute that Cindy *initiated* the contact and Bob and Jennifer did not want the contact. (Hearing 25 [Jennifer's testimony re Cindy initiating contact that was unwanted]; RT 58 [Cindy attempted to speak with Jennifer and Jennifer declined to have conversation].) The February 3, 2015 email reflects an effort by Bob to document the unwanted contact from Cindy and Bob's requests that Cindy not bother Jennifer or Bob's daughter anymore.

Similarly, emails in 2016, followed unwanted contact by Cindy while Jennifer was shopping at a grocery store. (Record 39-40.) Although the parties differ on what happened at the grocery store, there was no dispute that contact was initiated by Cindy and that contact was unwelcome. (Hearing 57 [Cindy's testimony that she spoke to Jennifer in a grocery store and Jennifer told Cindy: "Don't speak to me. We told you we don't want you to talk to us"]; RT 26 [Jennifer's testimony that Cindy approached her in a grocery store and Jennifer told Cindy "don't speak with me."]

In May 2017, Cindy approached Bob while Bob was sitting quietly gardening on his property. (Hearing 64-66.) Cindy walked 100 meters from her home down the street to confront Bob. (Hearing 64-66.) That confrontation resulted in a June 1, 2017 email by Bob to Dan. (Record 37.) That email stated it was Bob's intent to document Cindy's confrontation of Bob.

The specific intent of Bob's emails is evident from the face of each email. In Bob's July 4, 2014 email he stated he was writing an email to avoid any misunderstanding or misreporting by Cindy of Bob's intent. (Record 44.) Bob did not want to have further contact with Cindy in person. (Record 44.) On February 3, 2015, Bob wrote an email asking Dan to ensure that Cindy has no more contact with Bob:

> I am sending this message to you *purely out of self interest in the hope that you can find a way to restrain your wife from interacting with any member of my family*.
>
> * * *
>
> This is the last time *I beseech you to find a means of restraining your wife from any interaction with my family*.

(Record 42, emphasis added)

On May 5, 2015, Bob wrote to Dan an email with the subject matter: "Harassment of Chapman Family: Restraint of Cynthia Dunbar." (Record 40.) Bob's email stated:

> Overall, we desire and again formally demand absolutely no interaction initiated by Cynthia Dunbar with the Chapman family. *This is a reasonable neighbor-to-neighbor relationship, as your wife has no legitimate need to engage or otherwise communicate to/about my family in our presence*.

(Record 41, emphasis added.)

Bob's six emails each served a legitimate purpose: documenting unwanted contact from Cindy and requesting that Dan intercede on Bob and Jennifer's behalf, or requesting an end to

the alleged defamation. If Dan suffered some annoyance at the emails, that was never communicated to Bob and it was only incidental to the legal, legitimate, non-harassing purposes of the emails.

3. <u>The argument that the CHRO is Lawful Because it is Based on "Harassment" is Circular</u>

The People will likely contend that harassing speech is not protected by the First Amendment and, therefore, the CHRO is not a prior restraint. But the conclusion that Bob's speech is harassment is a conclusion – not a legal analysis. Under *Smith* and *Van Nuys Pub*., no CHRO could lawfully issue absent some evidence that any of the recipients of Bob's emails (Dan or the neighbors) warned Bob that they did not want to receive Bob's emails.

It is a correct statement of the law that in California, speech that constitutes "harassment" within the meaning of Section 527.6 has no First Amendment protection and may be lawfully enjoined.[23] Bob's challenge to the CHRO here is consistent with *Huntingdon*: statements that have been properly adjudicated harassment within the statutory meaning of Section 527.6 should be properly enjoined. However, the CHRO trial court here took the extraordinary steps of:

1) relieving Dan of his evidentiary burdens of proving actual emotional distress;

2) basing the CHRO on Bob's past communications with neighbors who were "uncommitted" and never voiced any warning to Bob;

3) expanding the scope of a normal CHRO to include banning Bob from communicating in the future with third parties about the Dunbars; and

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[23] Although that is a correct recitation of a statement from *Huntingdon*, that statement of law is arguably wrong and unconstitutional to the extent *Huntingdon* holds in *dicta* that harassing speech is an exception to the First Amendment. See Aaron H. Caplan, Free Speech and Civil Harassment Orders (2013) 64 Hastings L.J. 781, 809:

> Some courts have tried to avoid the unavoidable free speech questions through creative labeling. One approach is to imply that harassing speech constitutes its own proscribable category, like true threats, criminal solicitation, or obscenity.147 This approach assumes its own conclusion. Moreover, it is legally incorrect.

(*Ibid*. [citing to *U.S. v. Alvarez* (2012) 567 U.S. 709, 722 [rejecting false speech as exception to First Amendment]; *Brown v. Entertainment Merchants Ass'n* (2011) 564 U.S. 786, 792 [rejecting violent speech as exception to First Amendment]; *U.S. v. Stevens* (2010) 559 U.S. 460, 469 [rejecting speech depicting animal cruelty as exception to First Amendment].)

Given that *Huntingdon* is distinguishable on its facts – based on extreme threats of violence – this Court need not resolve the conflict between *Huntingdon*, on the one hand, and *Alvarez*, *Brown* and *Stevens*, on the other.

4) finding that a CHRO could issue without evidence that Dan warned Bob that he did not wish to receive any of Bob's six emails.

In light of the above the First Amendment was violated. It is not a proper defense of the CHRO to argue that the First Amendment allows injunctions of "harassment" if the finding of "harassment" did not comply with the statute and the standard CHRO language is expanded to cover conduct and speech in the future that is not "harassment."

F. Dan nor Cindy Never Warned Mr. Chapman that they were Unwilling Recipients of His Speech

A CHRO may not issue to restrict speech when the speaker has never been warned or advised by the recipient that speech is unwelcome. (*Smith v. Silvey* (1983) 149 Cal.App.3d 400, 406–407 ("*Smith*").) A warning by the listener is a constitutional prerequisite to a governmental restriction on speech whether that restriction takes the form of a CHRO or a widely-applicable ordinance. (*Smith*, 507; *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal.3d 817, 819 ("*Van Nuys Pub*").) In the underlying CHRO case, the Dunbars failured to voice any objection to receiving six emails from Mr. Chapman.

In *Smith*, a CHRO was issued to forbid a former resident of a mobile home park from communicating with his former neighbors. In *Smith*, as was the case here, none of the neighbors testified that they did not want to receive the communications. In *Smith*, the absence of any warning or indication that the neighbors were unwilling to be contacted was dispositive:

> no governmentally imposed restriction should occur until after the caller has been warned by the householder that the latter does not want to be disturbed.

(*Smith* at 407.)

The CHRO was overturned in *Smith* based on the constitutional principle that speakers have a First Amendment right to contact and convince "uncommitted" listeners. (*Smith* at 407.) The law distinguishes between unwilling recipients and those who have stated no preference, the "uncommitted." (*Smith* at 407.) Here, not one of Mr. Chapman and Dan's neighbors testified that Mr. Chapman's emails were unwelcome. Nor did Dan testify that he had warned or informed Mr. Chapman that his six emails were unwelcome. To the contrary, Dan left friendly messages for Mr. Chapman congratulating Mr. Chapman on his new baby, utilizing Mr. Chapman's childhood nickname and even speaking on the phone a year before the CHRO issued to agree to take steps

to prevent Cindy from contacting Mr. Chapman, his wife or his young daughter.[24] Cindy received only one email from Mr. Chapman on July 4, 2014; moreover, that email was a direct, immediate response to Cindy's contact-initiating email inquiry to Mr. Chapman in July 2014 asking for Mr. Chapman to reply: "hey everything good?" (Record 45-46.) As Cindy testified at the hearing during the CHRO trial, Mr. Chapman never initiated contact with Cindy by email, phone or face to face after July 4, 2014. (Transcript 67-68.) Not only did Cindy not issue any objection to Mr. Chapman regarding contact, but she initiated all contact with Mr. and Mrs. Chapman throughout this entire conflict. (Transcript 67-68.)

The sole testimony on the issue of whether Mr. Chapman ever learned that his emails were not welcome was Cindy's statement that she told Mr. Chapman that she did not want Mr. Chapman in the future to ever forward the unflattering Nursing Board documents to any of Mr. Chapman's neighbors. (Transcript 59.) Under the First Amendment's analysis of "unwilling" versus "uncommitted" listeners in *Smith*, Cindy's desire to prevent neighbors from hearing criticism *about* Cindy was not relevant. (*Smith* at 407.) Cindy's wishes did not strip Mr. Chapman of his First Amendment right to defend his reputation in the neighborhood, to win over the "uncommitted" listeners in his neighborhood and to share the true facts about Cindy. (*Smith* at 407.) After all, Cindy had a history of drug use, Cindy had been convicted of a felony and Cindy had been declared a public safety risk.[25] Mr. Chapman did not want his wife and young daughter to be contacted by Cindy. (Record 37-46.) Cindy ignored Mr. Chapman's wishes and continued to contact Mr. Chapman, Jennifer and their daughter. (Record 37-46; RT 29-34.) When Cindy initiated these contacts with the Chapman family, Mr. Chapman never surrendered his First Amendment right to inform his neighbors about Cindy's past and the true facts pertaining to the dispute between the Chapman and Dunbar families. (*Smith* at 407; *Van Nuys Pub*. at 819.) Cindy's desire to keep those facts from being learned by anyone is understandable. But Cindy's desire for secrecy does not trump Mr. Chapman's First Amendment right to speak with his neighbors. (*Smith* at 407; *Van Nuys Pub*. at 819.)

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[24] In response to one request by Bob to restrain Cindy, Dan e-mailed Bob: "congrats on baby." (Record 41.) In one voicemail message from Dan to Bob on May 27, 2017, Dan referred to Bob as "Bobby," a nickname used only by Bob's closest friends. (Record 80.) In May 2016, Dan and Bob spoke on the phone and Dan agreed to intercede to prevent Cindy from "interacting" with the Chapman family. (Record 41.)

[25] [finding that on September 29, 2010, the Board's Registered Nursing Diversion Program determined Cindy to "be a public safety risk;"] [Admitting the truth of all Nursing Board's allegations against Cindy].)

The during the CHRO trial, the court found that this was not a case involving any credible threat of violence. (Hearing 91.) Therefore, the starting point for any court evaluating a CHRO issued between two neighbors should not be the extreme "true threats" CHRO cases of *Ensworth* or *Huntingdon*. Rather, for a case such as this, any analysis should begin with the Appellate Court's thorough discussion and conclusion in *Schild v. Rubin* (1991) 232 Cal.App.3d 755. In that case, the Appellate Court held that:

> The noise from a ball and the verbal chatter by several people engaged in recreational basketball play in the residential backyard described herein, playing at reasonable times of the day for less than 30 minutes at a time and no more than five times per week, does not constitute unlawful harassment under section 527.6.

(*Schild* at 761.)

Before reaching that conclusion, the *Schild* court reviewed the legislative history behind and the Legislature's purpose in enacting Section 527.6:

> The legislative history reveals that the impetus for the statute was the *intimidating* experience suffered by a woman who was *hounded day after day* by a male admirer who *constantly* followed the woman, telephoned her *incessantly* and *bombarded* her with letters, clippings on parapsychology and strange, *unwanted* gifts.

(*Id*. at 762, emphasis added.)

The words and phrases chosen by the Appellate Court to describe the type of conduct that the Legislature intended to be enjoined by a CHRO were:

"intimidating,"

"hounded,"

"day after day,"

"constantly,"

"incessantly,"

"bombarded" and

"unwanted."

(*Schild* at 762.)

While that list was not intended by the Appellate Court to be an exclusive list of conduct subject to the statute, the list is illustrative of the type of conduct that the Legislature intended to constitute "harassment." The list stands in contrast to the conduct here: six emails sent over three

years, all six of which were in direct and immediate reaction to Dan or Cindy's allegedly harassing or defamatory actions that Bob found objectionable.

The *Schild* court also reviewed the six distinct elements required by the statute to obtain a CHRO:

> (1) "a knowing and willful course of conduct" entailing a "pattern" of "a series of acts over a period of time, however short, evidencing a continuity of purpose"; (2) "directed at a specific person"; (3) "which seriously alarms, annoys, or harasses the person"; (4) "which serves no legitimate purpose"; (5) which "would cause a reasonable person to suffer substantial emotional distress" and "actually cause[s] substantial emotional distress to the plaintiff"; and (6) which is not a "[c]onstitutionally protected activity."

(*Id*. at 762.)

The *Schild* court separately analyzed – as required by Section 527.6 – whether the petitioners suffered actual and reasonable emotional distress. A separate analysis was offered as to the "actual" and "reasonable" requirements for emotional distress:

> At the heart of the present substantial evidence question are the related issues of whether the Schilds' conduct, in the language of section 527.6, "seriously" alarmed, annoyed or harassed the Rubins to the extent that the conduct "actually cause[d] substantial emotional distress" to the Rubins, and "would cause a reasonable person to suffer substantial emotional distress."

(*Id*. at 762.)

Both elements for a CHRO must be separately satisfied: that the petitioner suffered actual substantial emotional distress and that claimed distress is reasonable under an objective standard. After reviewing the evidence presented to the trial court on the question of either actual or reasonable substantial emotional distress, the *Schild* Court reversed the CHRO. (*Id*. at 765.) The *Schild* case is directly on point here.

II. The Order Should be Ruled Unlawful Because Judge Tanaka was Unfamiliar With and did not Apply the Correct Statutory Requirements for a CHRO to Issue

A. Summary of the Law Applicable to CHRO's

CHRO's are authorized by Section 527.6. That section was enacted to address stalking. (*Byers*, at 810.)

> The legislative history reveals that the impetus for the statute was the intimidating experience suffered by a woman who was hounded day after day by a male admirer who constantly followed the woman, telephoned her incessantly and bombarded her with letters, clippings on parapsychology and strange, unwanted gifts.

(*Schild*, at 762.)

There are six required elements to obtain a CHRO:

> (1) "a knowing and willful course of conduct" entailing a "pattern" of "a series of acts over a period of time, however short, evidencing a continuity of purpose"; (2) "directed at a specific person"; (3) "which seriously alarms, annoys, or harasses the person"; (4) "which serves no legitimate purpose"; (5) which "would cause a reasonable person to suffer substantial emotional distress" and "actually cause[s] substantial emotional distress to the plaintiff"; and (6) which is not a "[c]onstitutionally protected activity."

(*Ibid.*)

A restraining order is only available to prevent threatened future harm. (*Russell v. Douvan*, *supra*, 112 Cal.App.4th at 401.) The party seeking an injunction must prove the existence of harassment by "clear and convincing evidence." (§ 527.6, subd.(i).) Clear and convincing evidence requires that "evidence be such as to command the unhesitating assent of every reasonable mind." (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274.)

Because of the expedited process to obtain a CHRO, the Legislature has strictly narrowed the category of conduct that can be enjoined. (*Byers v. Cathcart*, *supra*, 57 Cal.App.4th at pp. 811–812.) If the conduct does not meet the strict definition of "harassment" by statute,[26] it cannot be enjoined even if such conduct could be enjoined according to normal injunction procedures in an ordinary civil lawsuit. (*Ibid.*) Moreover, no matter how annoying some conduct may be, if the defendant has a legitimate purpose, the conduct may not be enjoined. (*Ibid.*)

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[26] In contrast to the narrow statutory definition of harassment, the CHRO trial court took an expansive view of harassment when it concluded that Bob e-mailing neighbors about Cindy cannot be allowed. The CHRO trial court disregarded the statutory definition when it concluded: "If that's not harassment I don't know what is." (Hearing 93.) Indeed, it appears that the CHRO trial court did not know what illegal harassment is.

B. Without Evidence that Bob was Asked not to E-Mail Dan there can be no Finding that Bob Committed "Knowing and Willful" Actions

The first time that Bob learned that his e-mails were unwelcomed was when Dan served Bob with the CHRO papers. Dan had never asked Bob to stop e-mailing him in the three years that Bob had sent the six e-mails. Bob's e-mails were welcomed by Dan as evidenced by Dan responding once by reply e-mailing Bob: "congrats on baby." (Record 41.) In a voicemail message from Dan to Bob on May 27, 2017, merely a few weeks before Cindy was served with the TRO against her, Dan referred to Bob as "Bobby," a nickname used only by Bob's closest friends. (Record 80.) Dan's message said:

> "Hey Bobby, It's Dan Dunbar. I got your message. I'm out of town. I'll be back Thursday ... touring the middle of the country [chuckle]. Bye."

(Record 80.)

Dan never asked Bob to stop sending him e-mails. More importantly, this friendly message of May 27, 2017 was left only four days before the May 31, 2017 confrontation initiated by Cindy and only three weeks before Dan petitioned the Court falsely claiming that Bob had threatened Cindy and a restraining order was needed.

By statute, the harassment to be enjoined must be "knowing and willful." (§ 527.6.) No such finding could have been made on this record absent some evidence that Dan asked Bob to stop and certainly cannot be affirmed in light of Dan's positive response to Bob's e-mails. (Record 41, 80.)

C. All of Bob's Communications with Dan Served Legitimate Purposes: Requesting that Cindy Stay Away from Bob and Jennifer and that the Dunbars Not Defame Bob and Jennifer

"Harassment" is a term defined by Section 527.6 in a specific and narrow way at variance with the broader, everyday sense of the word. (*Byers v. Cathcart*, *supra*, 57 Cal.App.4th at pp. 811–812.) Only a narrow category of conduct can be enjoined. (*Ibid*.) If the conduct does not meet the statutory definition of "harassment" it cannot be enjoined. (*Ibid*.) Conduct can constitute harassment only if that conduct "serves no legitimate purpose." (§ 527.6, subd.(b)(3).)

If Bob's conduct towards the Dunbars served *any* legitimate purpose, no CHRO could properly issue. (§ 527.6, subd.(b)(3).)

The evidence offered during the CHRO trial was that Bob e-mailed Dan six times in a three-year period. Five of the six e-mails to Dan were instigated after an offensive contact initiated by Cindy to Jennifer. One e-mail was to request that the Dunbars stop defaming the Chapman family. (Record 39.) Each e-mail served multiple legitimate purposes: Bob wished to protect his family from any contact from Cindy and to stop the Dunbars from defaming the Chapman family. (Record 37-46.) Cindy has been declared a public safety risk. She has a history of drug addiction and is a one-time felon. She had repeatedly confronted Jennifer despite requests for no contact. (Record 40-45.)[27] Bob had a legitimate purpose in asking Dan to keep Cindy away from his wife and young children.

Bob sent Dan an e-mail on July 4, 2014 as a reasonable *response* to Cindy's "what's wrong e-mail." (Record 11.) Bob sent Dan an e-mail on February 3, 2015 as a reasonable *response* to Cindy accosting Jennifer and her newborn daughter. (Record 42-43.) Bob sent Dan an e-mail on May 5, 2016 as a reasonable *response* to Cindy accosting Jennifer in the supermarket. (Record 40.) Bob sent Dan an e-mail on May 21, 2016 as a reasonable *response* to Cindy's harassment of Jennifer earlier that morning. (Record 38-39.) Bob sent Dan an e-mail on September 25, 2016 as a reasonable *response* after Cindy and Dan were reportedly disparaging the Chapman family name to neighbors. (Record 39.) Bob sent Dan an e-mail on June 1, 2017 as a reasonable *response* to Cindy confronting Bob while he was quietly gardening on his own property. (Record 37.)

Five of the six times that Bob e-mailed Dan, it was for the purpose of asking Dan to keep Cindy away from Bob's family. A sixth e-mail from Bob was to keep the Dunbars from defaming the Chapman family. These were legitimate purposes for Bob to communicate with Dan. The existence of at least one legitimate purpose for the e-mails renders the CHRO statute unavailable to enjoin Bob.

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[27] In contrast to Dan who was a willing recipient to Bob's e-mail, congratulated Bob on his baby and stated, "message received," Jennifer made it clear to Cindy that Jennifer was an unwilling recipient of Cindy's speech. After Cindy hunted Jennifer down one of the aisles in a local supermarket, Cindy smugly informed Jennifer that Cindy could talk to whoever she wants. (Record 40; RT 27.)

The California Court of Appeal has found that parking a car is a legitimate activity that cannot form the basis of a CHRO. (*Byers v. Cathcart*, *supra*, 57 Cal.App.4th at 812.) Similarly, when Bob only communicated to Dan on those occasions where Cindy accosted Jennifer or the Dunbars had made defamatory commentary about the Chapman family, Bob had a legitimate purpose for each communication. For example, the February 3, 2015 e-mail began by stating he sent the e-mail "in the hope that you (Dan) can find a way to restrain your wife from interacting with any member of my family." (Record 42.) The other e-mails by Bob to Dan include similar requests that Cindy leave Bob and Jennifer alone and cease in defaming them. (Record 37-42.) Because these requests served a legitimate purpose, the statutory requirements for a CHRO were never met.

D. The Lack of Evidence of Actual or Reasonable Substantial Emotional Distress Suffered by Either Dan or Cindy Makes the CHRO Issuance Unlawful

The level of claimed distress that will warrant the imposition of a restraining order is necessarily high:

> Section 527.6 does not define the phrase "substantial emotional distress." However, in the analogous context of the tort of intentional infliction of emotional distress, the similar phrase "severe emotional distress" means highly unpleasant mental suffering or anguish from socially unacceptable conduct, which entails such intense, enduring and nontrivial emotional distress that no reasonable person in a civilized society should be expected to endure it.

(*Schild* at pp. 762–763 [cleaned up].)

Neither Dan nor Cindy met this high standard as set forth during the CHRO trial.

1. <u>Dan Did not Even Claim to Suffer Actual Emotional Distress from Bob's Six E-Mails</u>

During the hearing on the CHRO, Dan did not claim to suffer emotional distress from Bob's six e-mails. (Hearing 37.) He testified that as to those six e-mails, he was unconcerned about them. (Hearing 37.) The CHRO trial court even noted that in contrast to Cindy's claim of emotional distress, Dan "is pretty much taking a different position on all this." (Hearing 94.) If a petitioner does not even claim to suffer actual emotional distress, no CHRO on the basis of harassment can issue. (*Schild*, at 762.)

2. The Criminal Law Judge Hearing the CHRO Petition was Unaware of the Statutory Requirement to Find that Dan Suffered Actual Distress

The CHRO trial court indicated in its ruling that Dan was not required to provide direct testimony of his emotional distress. The CHRO trial court stated: "I don't need, at least in my opinion, a quote, direct statement that he has suffered emotional distress." (Hearing 94.) That is an incorrect statement of the law. The California Court of Appeal has previously held that the absence of "medical, psychological or other evidence in the record" as to a plaintiff's claimed "substantial emotional distress" claim can be fatal to sustaining the order on appeal. (*Schild* at 763.) In the underlying CHRO case, there was no medical, psychological or other evidence offered by Dan that he had actually suffered any distress much less the "intense, enduring and nontrivial emotional distress" caused by "socially unacceptable conduct." (*Schild*, at 762-63.) When asked about distress, he indicated that the e-mails from Bob did not concern him. (Hearing 37.)

3. There was no Evidence that Dan Actually Suffered Emotional Distress

There was no evidence offered during the CHRO trial that Dan suffered any actual emotional distress. Dan thought if he ignored Bob's six e-mails they would "go away with time." (Hearing 37.) That statement alone precludes a finding that Dan actually suffered emotional distress. At the hearing, Dan's lawyer asked him if he was concerned about getting e-mails from Bob. Dan testified: "the e-mail not as much, the statement that culminated in the interaction on the 31st of May, I am." (Hearing 37.) Dan's lack of "concern" is wholly inconsistent with any finding that he suffered any actual emotional distress.

4. Any Purported Emotional Distress Suffered by Dan would not be Objectively Reasonable

Even assuming arguendo that Dan had claimed to have suffered emotional distress and presented evidence of actual emotional distress, that would not be sufficient. A CHRO may only issue if the conduct to be enjoined would cause a reasonable person to suffer substantial emotional distress. (*Schild*, at 762-63.) In other words, the claim of actual distress is viewed through an objective standard.

1 Dan was not present for the May 31, 2017 confrontation initiated by Cindy. Dan's sole contact with Bob was six e-mails sent over a three-year period. Moreover, Dan had the power to delete those e-mails unread or set up an e-mail filter to avoid seeing them altogether. Under an objective standard, receiving six immediately avoidable (by deletion or non-reading) e-mails over a three-year period cannot be deemed sufficient to establish substantial emotional distress:

> A reasonable person must realize that complete emotional tranquility is seldom attainable, and some degree of transitory emotional distress is the natural consequence of living among other people in an urban or suburban environment.

(*Schild*, at 763 [citing *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397].)

Given that Dan never requested that Bob stop e-mailing him and also in light of Dan's well wishes to Bob about his new baby in response to one e-mail, Dan's sudden claim of emotional distress (and only after Bob petitioned for and obtained a TRO against Dan's wife) is not objectively reasonable. The average, reasonable person logically would have taken less than one minute to reply to Bob with an e-mail asking him to stop sending the e-mails if they were truly causing any distress, much less substantial emotional distress.

5. Any Purported Emotional Distress Claimed to have been Suffered by Cindy is not Objectively Reasonable

A CHRO may only issue if the conduct to be enjoined would cause a reasonable person to suffer substantial emotional distress. (*Schild*, at 762-63.) Cindy does not like being called a drug addict and a felon. But she could have avoided that by not approaching Bob. In a three-year period, Bob and Jennifer did not e-mail, telephone or initiate a conversation with Cindy. All of the interactions between Bob and Cindy since July 4, 2014 were initiated by Cindy. To avoid the claimed harassment, Cindy could have (and should have) avoided Bob. Moreover, although she did not like being called a drug addict, it is not the place of our courts to ensure emotional health to all citizens. (*Schild*, at 763 [citing *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397].) Also, under *Schild*, Cindy needed to present to the CHRO trial court medical, psychological or other evidence that Bob's conduct caused "substantial emotional distress." No such evidence was offered during the CHRO trial.

E. There was no Evidence of any Harassment of Dan

Dan was not present for the May 31, 2017 confrontation orchestrated by Cindy about a wheelchair. The only contact initiated by Bob was the six e-mails sent over the three-year period: July 2014 and June 2017.[28] Dan's receipt of six e-mails do not constitute the type of substantial emotional harm required for a CHRO.

In *Schild*, the California Court of Appeal dissolved a CHRO issued to solve a neighborhood dispute over loud basketball noise. The *Schild* court found that the CHRO should be dissolved due to the absence of any medical, psychological or other evidence causing "substantial emotional distress" within the meaning of section 527.6. Here, because Dan did not offer any medical, psychological or other evidence causing Dan "substantial emotional distress," the CHRO must be ruled unlawful.

F. There was no Evidence of any Harassment of Cindy

Cindy did not file a TRO petition against Bob. Rather, she was merely listed as an additional protected person. (Record 29.) The time for Cindy to file such a petition based on conduct in May 2017 is now time barred. To the extent that the CHRO issued to Dan fails, any protections in favor of Cindy likewise fail. In reviewing the evidence presented at the CHRO trial of harassment of Cindy, the Court will find no "course of conduct" and no conduct meeting the statutory term of "harassment."

It was undisputed at the hearing that neither Jennifer nor Bob had telephoned, e-mailed or initiated a conversation with Cindy since July 3, 2014. As such, as to Cindy, the only incident that could possibly form the basis of a CHRO was a single May 31, 2017 confrontation initiated by Cindy when she walked 100 yards from her property to confront Bob while he was quietly gardening. Cindy left her home and chose to accost and criticize Bob while he was gardening in front of his home. If a CHRO is affirmed in this matter, it will likely be the first occasion that a homeowner is enjoined for sitting in the dirt, on his property and gardening. The purpose of a CHRO is to provide protection to a victim of harassment who cannot protect themselves from

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[28] While Jennifer did have contact with Cindy at a local supermarket, that contact was initiated by Cindy against Jennifer's wishes. (Hearing 18.)

unwanted contact without the intervention of the Superior Court. Here, Cindy could easily avoid Bob if she chose not to interact with him. When Cindy seeks Bob out, she forfeits the right to complain about the truthful words that Bob says about and to her.

Moreover, that single incident alone on May 31, 2017 – no matter how upset Cindy was – is legally insufficient for the imposition of a CHRO. (*Leydon v. Alexander* (1989) 212 Cal.App.3d 1, 4 [holding that a single incident is insufficient to constitute a course of conduct].)

Finally, Bob was present when the police were investigating a burglary in a residential neighborhood. According to Cindy's testimony, Bob alerted those present, including the police, to the presence of a known drug user and convicted criminal. Bob had a legitimate reason to communicate this information to the police and neighbors in light of the recent burglary.

G. The Trial Court Erred in Finding that Dan did not Have to Provide Evidence as to his Actual Suffering of Substantial Emotional Distress

The trial court ruled that to obtain a CHRO, Dan did not have to provide direct testimony that he suffered actual substantial emotional distress. (Hearing 93.) That statement was an incorrect (or at least incomplete) statement of the law. Section 527.6 on its face requires evidence of actual emotional distress. A more accurate statement of the standard is that when the trial court is provided with sufficient indirect evidence that the petitioner has suffered actual emotional distress, at that point in the hearing, additional direct testimony of emotional distress is redundant and unnecessary. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110–11.)

In *Ensworth*, the extreme stalking by the former patient of a psychologist was undisputed. The psychologist testified without contradiction about

> being followed and spied upon, and of receiving repeated phone calls and threatening letters from Mullvain, one of which alluded to committing suicide in Ensworth's presence.

(*Ensworth* at 1111.)

On that record of undisputed facts, the *Ensworth* court found additional evidence of direct testimony of the psychologist was unnecessary. It was "reasonably probable" that the patient's conduct would cause anyone distress. (*Ensworth* at 1112.)

The dispute between the Dunbars and the Chapmans did not involve stalking. No one spied on anyone. No one physically stalked anyone. There were no threats of suicide. Cindy

testified that in the preceding three years, Bob had never called, emailed or initiated contact with Cindy. (Hearing 68.) The claimed harassment was six emails that Bob sent to Dan about Cindy.

On an evidentiary record consisting of six emails by Bob to Dan and Bob exercising his constitutional right to contact neighbors, it was an error for the trial court to conclude that direct testimony of emotional distress from Dan was not required. Instead, as was required of the petitioner in *Schild* at p. 763, Dan should have been required to provide "medical, psychological or other evidence" to establish the requisite substantial emotional distress. (*Ibid.*)

H. The Trial Court's Observation of Dan's Demeanor While Testifying without Direct Evidence of Suffering Actual Substantial Emotional Distress Does not Rise to the Dignity of Substantial Evidence

A CHRO may only issue where the petitioner actually suffers substantial emotional distress. The Court in *Schild* described the requisite level of evidence to meet the statutory requirement. Such distress:

> means highly unpleasant mental suffering or anguish "from socially unacceptable conduct" (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 648, 257 Cal.Rptr. 865, 771 P.2d 814), which entails such intense, enduring and nontrivial emotional distress that "no reasonable [person] in a civilized society should be expected to endure it." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397, 89 Cal.Rptr. 78; see BAJI No. 12.73.)

(*Schild* at pp. 762-63.)

The opening brief established that Dan's evidence that he suffered substantial emotional distress did not rise to the level of emotional distress. (AOB 64.) There is nothing in the appellate record that can credibly be described as causing "unpleasant mental suffering" or "anguish." (*Ibid.*) Nor could Dan's feelings from receiving six emails over three years be aptly described as "intense, enduring and nontrivial emotional distress." (*Ibid.*) Indeed, Dan testified that his practice was to delete emails, he did not testify that he read the emails at the time they were received and he had to testify to Bob's emails from memory. (Hearing 47.)

Dan thought if he ignored Bob's six emails they would "go away." (Hearing 36.) Dan's lawyer asked him if he was concerned about getting emails from Bob. Dan testified: "the email not as much, the statement that culminated in the interaction on the 31st of May, I am." (Hearing

36.) The May 31, 2017 interaction did not involve Dan. The May 31, 2017 interaction was solely between Cindy and Bob.

Dan's demeanor might be relevant if Dan had also offered direct testimony that Dan had suffered emotional distress, lost sleep, missed work, suffered weight loss, seen a physician or therapist or exhibited other manifestations commonly associated with substantial emotional distress. Dan's demeanor might also have been relevant had he offered the type of "medical, psychological or other evidence" that the Court described was necessary for a CHRO to issue in *Schild*. (*Id*. at 763.) But absent Dan's direct testimony that he had suffered emotional distress, the trial court's observation of Dan's demeanor does not rise to the level of substantial evidence that Dan actually suffered emotional distress. On substantial evidence review, the Appellate Court need not defer entirely to the trial court. (*Melissa G. v. Raymond M.* (2018) 27 Cal.App.5th 360, 374.) Substantial evidence means more than "any" evidence and requires that it be "reasonable in nature, credible, and of solid value." (*Ibid*.) The trial court's observation of Dan's demeanor in court – alone without more does not rise to this standard.

In *Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1226, an elderly man used a mechanical device designed to transfer his disabled wife from a wheelchair to her bed. When the device failed, he sued the manufacturer for, among other things, emotional distress damages from watching his wife fall to the ground. The trial court found against the man at trial. On appeal, the defense judgment was affirmed:

> Not one word was placed in evidence as to the existence of any damage from witnessing the event. All Mr. Mealy testified to was that he saw the fall, that he was concerned that his wife would suffocate in the wastebasket, that he turned her head to avoid that possibility, that he helped reposition her, and that he called 911. … Not one iota of evidence was offered as to an emotional response to witnessing the event; e.g., any nightmares or 'visions' of the event, any health care of any kind or character being required as a result of witnessing the event, etc."

(*Mealy v. B-Mobile, Inc.*, *supra*, 195 Cal.App.4th at p. 1226.)

The absence of direct testimony by Mealy regarding nightmares, visions or healthcare treatment was found to be a bar to recovery of emotional distress damages. (*Ibid*.) Here too, the absence of testimony by Dan or Cindy of any of Dan's symptoms of distress or even an articulation of: "I was afraid" or "I felt disturbed" bars relief. Dan did not offer "one iota of evidence" that when he received Bob's six emails he suffered distress.

A similar result was reached in *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1163. In that case a number of elderly clients sued for insurance bad faith. Some plaintiffs testified as to emotional distress damages, some spouses testified on behalf of and about plaintiffs who were unable to testify and some plaintiffs neither testified nor had a spouse testify about their emotional distress damages. When a jury awarded emotional distress damages for all plaintiffs, the court of appeal reversed as to the latter group of plaintiffs who did not testify. (*Id*. at 1163.) On the other hand, an award of emotional distress damages could be upheld on appeal based solely on a plaintiff's testimony of "anxiety, pressure, betrayal, shock and fear." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099.)

Under *Mealy*, *McLaughlin* and *Knutson*, testimony is required to establish emotional distress. No testimony was offered during the CHRO trial and the claim that Dan suffered actual emotional distress lacks evidentiary support.

In addition to the lack of direct testimony from Dan about his claimed substantial emotional distress, there were other missing pieces of evidence that demonstrate that neither Dan nor Cindy suffered "intense, enduring and nontrivial emotional distress":[29]

a) Dan did not send Bob a reply email asking, "do not email me anymore." Nor did Dan provide an alternate email address beyond Dan's work email address that Bob used for all six emails.

b) Neither Dan nor Cindy emailed Bob that, "Cindy is not a convicted felon; please stop making that false claim."

c) Dan did not file a police report about Bob's emails nor did he file a police report about the (now discredited) wheelchair threat.

d) Dan did not file a CHRO petition immediately after the alleged wheelchair threat on May 31, 2017. Instead, he waited 17 days (and after Cindy was served with Bob's TRO petition) to seek any relief.

e) Neither Dan nor Cindy sought or obtained psychiatric or other therapy.

[29] *Schild* at 763.

f) No third-party witness (such as a friend or family member of Cindy or Dan's) testified that Cindy or Dan suffered emotional distress or exhibited symptoms of emotional distress.

g) Neither Cindy nor Dan testified that the other suffered emotional distress or exhibited symptoms of emotional distress.

In sum, there was insufficient evidence during the CHRO trial of Dan's actual emotional distress to affirm the CHRO.

I. Evaluation of Whether a Reasonable Person Would Suffer Substantial Emotional Distress Should Include Evaluation of Whether the Challenged Conduct is Avoidable

Section 527.6 requires that a petitioner prove that a claim of substantial emotional distress was reasonable under an objective standard. (*Schild* at pp. 762-763.) As described by the Appellate Court:

> A reasonable person must realize that complete emotional tranquility is seldom attainable, and some degree of transitory emotional distress is the natural consequence of living among other people in an urban or suburban environment.

(*Schild* at p. 763.)

One factor that the Court should consider in evaluating the reasonableness of Dan's claim of distress from receiving six emails is whether the conduct to be enjoined is avoidable. Focusing on whether conduct is avoidable has roots in the Appellate Court's description of the types of conduct the Legislature intended to be enjoined by a CHRO: "intimidating," "hounded," "day after day," "constantly," "incessantly," "bombarded" and "unwanted." (*Schild* at 762.)

In contrast to the conduct at issue here, contact with the former patient stalker in *Ensworth* was unavoidable for the psychologist. She literally could not escape him. The petitioner's former patient was a stalker. Here, the six emails by Bob were easily avoidable: the only thing Dan had to do to avoid contact with Bob was to not open his emails (or reply that no more emails should be sent). All of the emails by Bob to Dan had a prominent subject line identifying the subject matter of the emails. (Record 37-46.) In contrast to face to face interactions, phone calls, faxes and printed literature, emails are the easiest of communications to ignore or delete. There is no testimony that Dan did not do exactly that: ignore or delete Bob's

six emails. In fact, Dan testified that he tended to not save emails and deleted them instead. (Hearing 47, li. 13-17.) Dan had to testify from memory as to Bob's prior emails going back three years because of Dan's practice of email deletion:

> "Whether – my best recollection is – there are things that I don't save, I delete them, but my best recollection is with every new email from Mr. Chapman there is attached a preceding emails (sic) that have been sent."

(Hearing 47, li. 13-17.)

Dan deftly testified at the CHRO hearing that he "received" the emails from Bob (Hearing 49) but he never testified that he actually read Bob's emails contemporaneously when he received them between 2014 and 2017. (Hearing 49.) The state of his testimony is that Dan did read Bob's six emails "collectively" *after* the CHRO proceedings were initiated by Bob following the May 31, 2017 incident. (Hearing 46, li. 3-6.) Because of Dan's practice of deleting emails, the only reason Dan had a copy of Bob's emails to read "collectively" was because of Bob's CHRO petition against Cindy with the emails attached to Bob's petition.

Dan's policy of deleting emails demonstrates that contact with Bob was not only potentially avoidable but that Dan did actually avoid the emails through deletion. Moreover, the absence of any testimony that he read them contemporaneously (i.e. when the emails were received between 2014 and 2017) precludes a finding that his claim of substantial emotional distress was reasonable.

The foregoing is not to say that a finding of unavoidability always allows for a CHRO to be imposed. Notably, the bouncing basketball in *Schild* was unavoidable, the sound was literally next door. *Schild* could not avoid that irritating loud sound of ball bouncing every other day. That conduct – as irritating as a bouncing ball can be – was found in *Schild* not to be sufficiently irritating to inflict emotional distress on any reasonable person.

Unlike the unavoidable irritating basketball in *Schild* that the petitioners heard every other day, all Dan had to do was hit delete, or put up an email filter or ask Bob to not email him anymore. And the undisputed evidence during the CHRO trial was Dan in fact deleted Bob's emails, did not save Bob's emails and Dan never once asked Bob not to email him anymore. On this record, Dan's claim to have suffered substantial emotional distress from six emails he deleted is not reasonable and does not meet the standards for reasonableness of a claim of emotional distress articulated in *Schild*.

J. Evaluation of Whether a Reasonable Person Would Suffer Substantial Emotional Distress Should Focus on Bob's Conduct and Whether Bob's Conduct Would Cause a Reasonable Person to Incur Substantial Emotional Distress

Section 527.6 requires separate proof by clear and convincing evidence that: 1) a petitioner suffered actual substantial emotional distress; and 2) that distress is reasonable under the circumstances. (*Schild* at 762-63.) One useful distinction between the two requirements is to view the petitioner's testimony and evidence as to whether actual substantial emotional distress is proven (focusing on the petitioner's own testimony) and separately focus on the enjoined party's conduct to evaluate whether that conduct would cause a reasonable person to suffer substantial emotional distress on an objective basis. Applying that methodology here as to Bob's conduct, demonstrates that Dan's claim to have suffered emotional distress is not reasonable. Bob's conduct consists of sending Dan six emails over three years. (Record 37-46.) Bob also committed to Dan that if Bob learned that he was being defamed by Cindy or Dan to any individuals in the neighborhood, Bob would send that individual neighbor a copy of the past email exchanges to inform that person of the true facts pertaining to the dispute between the Chapman and Dunbar families. Neither the six emails nor the commitment to send emails in the future to any individual neighbors constitutes such extreme conduct that a reasonable person would suffer substantial emotional distress.

K. The CHRO Should be Ruled Unlawful Because Absent Evidence that Bob was Asked not to Email Dan There can be no Finding that Bob Committed "Knowing and Willful" Actions when Bob was not Warned by Either Dan or Neighbors not to Send the Six Emails

In the opening brief, Bob established that a distinct requirement for a CHRO is that the harassment to be enjoined must be "knowing and willful." (§ 527.6.) No such finding could have been made on this record absent some evidence that Dan asked Bob to stop sending emails and certainly cannot be affirmed in light of Dan's positive response to Bob's e-mails. (Record 41, 80.) Dan testified that he never asked Bob to stop sending the emails. (Hearing 43-44.) Bob and Dan both testified to the friendly voicemail left by Dan referring to Bob's childhood name of "Bobby." (Hearing 44.) As recently as May 2016, Bob and Dan had a telephone conversation

where Dan agreed to intercede and keep Cindy away from Bob's wife and daughters. (Record 41.) Given the evidence during the CHRO trial, the evidence is insufficient to establish that Bob "knowing and willfully" harassed Dan. A warning by Dan to Bob to not send emails is a statutory prerequisite of Section 527.6.

Cindy's request concerned hypothetical emails that Bob committed to send in the future with Bob's specific intent of informing of the truth those third parties who had been misinformed by Cindy or Dan. (Hearing 59.) At no time did Cindy (or Dan) actually ask Bob to stop sending Dan emails.

Dan's argument is essentially that Bob should have known his emails were unwelcome and Dan was not required to ask Bob to stop emailing him. Dan's argument runs counter to *Smith v. Silvey*, *supra*, 149 Cal.App.3d at 406-07 and *Van Nuys Pub*. The government may not restrict Bob's ability to email without some warning that his emails were not welcome. (*Smith v. Silvey*, *supra*, 149 Cal.App.3d at 406-07.) Dan never provided the "warning" required by *Smith* and *Van Nuys Pub*. Nor is there any First Amendment case that embraces The argument that some emails are so facially offensive that a warning to stop is unnecessary.

Moreover, a review of the content of the actual emails sent by Bob undercuts Dan's argument. The first email to Dan, dated July 4, 2014 states:

> Out of respect for you, I am forwarding this E-mail to you and (outside Jenn) only to you. You should be aware of the self-restraint I have exhibited for years now, but can no longer tolerate.
>
> I have little doubt that matrimonial ties are stronger than any I could have built with you over the past seven years. As such, I understand if we no longer interact beyond the occasional wave and smile; Though not my preference, I cannot imagine the pain and suffering you would endure should you be deemed to be friends with "the enemy."
>
> Sorry, my friend, but Feller's comments were the final straw. There is only so much pity and understanding one man can have.

(Record 43.)

Eight months later, Bob wrote to Dan:

> Dan,
> Though you either disregarded or disrespected my July 4, 2014 E-mail message to you during the CHRO trial (based on not even a perfunctory response from you), I am sending this message to you purely out of self interest in the hope that you can

find a way to restrain your wife from interacting with any member of my family. I recommend that you, at a minimum, show me the smallest sign of regard for my status a victim to some extent of your wife's apparent mental instability, and at least reply to this E-mail. Though it would be entirely appropriate for you to apologize on behalf of your wife, it seems that does not match either your character or desire to survive what may be the unfathomable matrimonial wrath you could endure should you do so.

* * *

This is the last time I beseech you to find a means of restraining your wife from any interaction with my
family. Moreover, I encourage you to guide her to the wisdom of not mentioning my name in a slanderous manner to another person. The consequences of her taking either of these actions shall be serious.

(Record 43.)

Dan's response to the foregoing email four minutes after it was sent? "Message received. Congrats on baby." (Record 41.) Bob's final reply to Dan was:

> Thanks, Dan. Trinity is a blessing beyond my highest hopes and expectations. I am a lucky man to have these two girls in my life.
>
> I am sorry to have to be so formal with you regarding your wife (in addition to having no longer a friendship with you). Cindy truly is an unpredictable risk that I just cannot allow to play any part, however small, in my family's life. I appreciate all you can do to eliminate her apparent desire to engage us in any way.

(Record 41.)

The argument that the foregoing emails "were so offensive no reasonable person would assume that Daniel welcomed the e-mails" is without merit in light of the actual content of the emails.

CONCLUSION

A fair reading of the reporter's transcript is that the CHRO trial judge was pressed for time to read the papers here and simply wanted to solve a neighborhood dispute. In doing so, the CHRO trial court violated the First Amendment with an invalid prior restraint. The CHRO trial court also issued a CHRO despite receiving evidence that Bob's communications were for a legitimate purpose. The complete lack of evidence of any actual emotional distress suffered

coupled with the CHRO trial court's lack of familiarity with the correct standard for CHRO's led to an erroneous result.

This farce should have ended when the under oath claim of a threat to put Cindy in a wheelchair was exposed as perjury based on the recording of Bob and Cindy's conversation. Instead, the CHRO trial court went overboard in issuing a CHRO without having the evidence of harassment necessary to support a CHRO. Bob now faces criminal charges based on this inequitable result and the conduct of an emotionally unstable, one-time convicted drug felon who has been exposed in court as willing to fabricate false allegations against Bob in retaliation for Bob taking reasonable steps to protect his wife and young children from a known public safety risk.

Based on the foregoing, Bob respectfully requests that the CHRO issued on July 3, 2017 be ruled an unlawful order and that all charges in this case be dismissed pursuant to Penal Code Section 166(a)(1) and *People vs. Gonzales, supra.*

Dated: January 28, 2019

Respectfully submitted,

LAW OFFICES OF J. PATRICK CAREY

By:

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J. PATRICK CAREY
Attorney for Defendant Chapman

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PROOF OF SERVICE

People vs. Robert L. Chapman

I, J. Patrick Carey, declare that I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 1500 Rosecrans Avenue, Suite 500, Manhattan Beach, CA 90274. On **January 28, 2019**, I served the foregoing: **NOTICE OF MOTION; MOTION TO DISMISS PURUSANT TO *PEOPLE V. GONZALEZ* SUCH THAT THE UNDERLYING COURT ORDER IS UNLAWFUL; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by placing ☐ the original ☒ a true copy thereof, enclosed in a sealed envelope with postage pre-paid, addressed as follows:

☒ BY ELECTRONIC SERVICE. I served the foregoing document(s) on interested parties via electronic mail.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 28, 2019**, in Manhattan Beach, California

Dated: January 28, 2019

Respectfully submitted,

LAW OFFICES OF J. PATRICK CAREY

By:

____

J. PATRICK CAREY
Attorney for Defendant Chapman