SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. NICHOLAS AARON ROBINSON, Defendant and Appellant.	Case No.: 1-22-AP-002832 (Misdemeanor Division Case No.: C2201629)

Appeal from the Superior Court of the State of California in and for the County of Santa Clara
Honorable Daniel T. Nishigaya, Judge

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT NICHOLAS AARON ROBINSON

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I. INTRODUCTION

The workplace violence restraining order ("Order") issued in this case unlawfully infringes upon Petitioner Nicholas Robinson's First Amendment rights. The Order is an unconstitutionally overbroad time-place-manner restriction, severely curtailing Mr. Robinson's access to San Jose's public streets and sidewalks—a traditional public forum. Further, the Order reeks of retaliation, penalizing Mr. Robinson for engaging in protected speech critical of the San Jose Police Department ("Department"). Upholding Mr. Robinson's convictions for contempt of this Order would sanction San Jose's weaponization of restraining orders to intimidate, silence, and ultimately incarcerate critical speakers. The First Amendment does not tolerate such behavior. Mr. Robinson's convictions must therefore be overturned.

II. STANDARD OF REVIEW

When First Amendment rights are at stake, reviewing courts must "make an independent examination of the record . . . to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination." (*In re George T.* (2004) 33 Cal. 4th 620, 632.) Thus, unlike in other criminal cases, "[i]n speech cases" reviewing courts do not defer to the factfinder's findings on "the constitutional facts." (*U.S. v. Lincoln* (9th Cir. 2005) 403 F.3d 703, 705-06, internal quotations and citation omitted.) "Constitutional facts are facts—such as whether a statement is a true threat—that determine the core issue of whether the challenged speech is protected by the First Amendment." (*Id.* at p. 706, internal quotations and

citation omitted.)

The Order puts Mr. Robinson's First Amendment rights in jeopardy. This Court must therefore independently review both the questions of law and the core constitutional facts surrounding Mr. Robinson's encounters with police to decide whether the Order unlawfully restricts his freedom of speech. Independent review in this case fulfills this Court's "obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285.)

III. ARGUMENT

For two reasons, the First Amendment demands Mr. Robinson's acquittal. First, the Order imposes unconstitutionally overbroad restrictions on Mr. Robinson's expressive activity. Second, the Order represents unconstitutional retaliation: Mr. Robinson has a First Amendment right to observe and film police in public settings; the Department may not criminalize him for exercising it. Because the Order violates the First Amendment, it was not lawfully issued and can not produce a valid conviction for contempt.[1] Mr. Robinson's convictions must be

[1] A contempt conviction under § 166(a)(4) requires that the order be "lawfully issued by a court." (Cal. Pen. Code § 166, subd. (a)(4).) An order that violates statutory provisions, judicial interpretations, or the constitution is "issued in excess of jurisdiction" and is thus unlawful and void. (*In re Berry* (1968) 68 Cal.2d 137, 147). Unlike in the federal courts, "[i]n this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt." (*Ibid.*) A defendant may challenge the statutory and constitutional validity of an order during contempt proceedings for the first time,

reversed.

A. The Order is an unconstitutionally overbroad restriction on speech in a traditional public forum.

a. The Order is a time-place-manner restriction.

Under the First Amendment, the state may regulate the "time, place, or manner" of speech in a public forum so long as it satisfies the appropriate level of constitutional scrutiny. (See, e.g., *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 803 [upholding city's sound-amplification regulation as "a reasonable regulation of the place and manner of expression"]; *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293 ["Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."].)

The Order here operates as a time-place-manner regulation. It specifically limits the places in which Mr. Robinson may encounter or engage with Department employees: He may not enter the "workplace" of any Department employee, nor may he approach within 100 yards of "[t]he employee's workplace." (*Exhibit 1* to Appellant's Opening Brief (hereafter *Exhibit 1*), pp. 1-2.) He must also "stay at least 100 feet away from employees of the San Jose Police Department, their vehicles, anyone in their custody or acting on their behalf, and any tape lines or other scene

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and on review of any contempt judgement. (*People v. Gonzalez* (1996) 12 Cal.4th 804, 818-19.) This rule serves to "protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt." (*Id.* at p. 818.)

boundaries or barriers they have erected." (*Id.* at p. 7.) Even at this distance, he must "choose one fixed place . . . at which to locate himself" and "remain at that spot until he leaves." (*Ibid*.) These requirements necessarily limit Mr. Robinson's ability to speak with and express himself to Department employees, or to anyone within 100 feet of them.

The Order further prescribes the manner of Mr. Robinson's engagement and expression. He may not "flank or circle" department employees, nor may he "shine a flashlight in the eyes or at the body of employees." (*Exhibit 1*, *supra*, p. 7.) He is also prohibited from "mak[ing] a diversion or other act which disturbs or tends to disturb the work of the employees of the San Jose Police Department." (*Ibid.*) Most peculiarly, as detailed in the Opening Brief (see Appellant's Opening Brief, p. 29), the Order also requires Mr. Robinson to inform department employees of the existence of the Order and of its terms. (*Exhibit 1,* p. 8.)

Because it regulates the place and manner of Mr. Robinson's expressive activity, the Order must be analyzed as a time-place-manner restriction. That is, to uphold the Order, this Court must conclude that it survives intermediate scrutiny.

b. The Order fails intermediate scrutiny.

Time-place-manner regulations are analyzed under a three-prong test. The restrictions must (1) be "justified without reference to the content of the regulated speech," (2) be "narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.) There is no dispute about the first prong. Because the Order "serves purposes unrelated to

the content of expression"—allegedly, preventing violence at the workplace—it is facially content-neutral. (*Ward v. Rock Against Racism*, *supra*, 491 U.S. at p. 791.) But it fails the remaining two prongs. The Order is therefore unconstitutional.

i. The Order is not narrowly tailored.

The Order's primary deficiency is its lack of narrow tailoring. To satisfy the First Amendment, a time-place-manner regulation "'need not be the least restrictive or least intrusive means of' achieving the government's goals, but it may not 'burden substantially more speech than is necessary.'" (*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (2011) 657 F.3d 936, 947, quoting *Ward v. Rock Against Racism, supra,* 491 U.S. at pp. 798-99.) [2] Although the Order here may serve an otherwise legitimate government interest—keeping police department employees safe at work—it does so by imposing egregious and expansive burdens on Mr. Robinson's expressive activity.

The Order prohibits Mr. Robinson from approaching or entering the "workplace" of all 1700 Department employees. (*Exhibit 1*, *supra*, pp. 1-2) It bars him not only from the Department's administrative offices but also from any area of

[2] The Supreme Court has applied this standard to evaluate time-place-manner legislation, but has announced an even "more stringent" test for evaluating injunctions. (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765.) Because injunctions apply only to specific parties, they "carry greater risks of censorship and discriminatory application than do general ordinances" and therefore merit a higher degree of scrutiny. (*Id.* at p. 764.) Rather than asking whether the injunction burdens *substantially more* speech than necessary, the Court instead asks "whether the challenged provisions of the injunction burden *no more* speech than necessary to serve a significant government interest. (*Id.* at p. 765, emphasis added.) The Order fails under either standard, but it is worth noting that, like an injunction, the Order targets an individual party. By the same token, it too ostensibly warrants elevated scrutiny.

the city "where employees of the San Jose Police Department are performing their duties." (*Id.* at p. 7.) Mr. Robinson's Opening Brief ably illustrates the conundrum he faces in interpreting these prohibitions—raising issues of unconstitutional vagueness, (see Appellant's Opening Brief, pp. 42-45)—but even the narrowest reading of the Order remains unconstitutionally overbroad, because granting protection to *all 1700* Department employees simply goes beyond the pale.

The sheer number of protected employees bespeaks the Order's overbreadth. Mr. Robinson has encountered a handful of Department employees over the course of several years. While those encounters might justify limiting his interactions with those particular employees, they cannot justify restricting his access to *thousands* more. A blanket prohibition on interacting with every employee in the workforce—from patrolling officer to front desk agent—does not represent the "precision of regulation" demanded by the First Amendment. (See *N.A.A.C.P. v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 916 ["When [sanctionable] conduct occurs in the context of constitutionally protected activity, . . . 'precision of regulation' is demanded."], quoting *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 438.)

Moreover, these 1700 employees frequently work in public spaces, including in San Jose's public streets, parks, and sidewalks, which are "the archetype of a traditional public forum." (*Frisby v. Schultz* (1988) 487 U.S. 474, 480.) In restricting Mr. Robinson's access to their "workplace," the Order effectively bars him from large swaths of the city. Indeed, the Order creates personal, portable buffer zones for each employee, prohibiting Mr. Robinson from coming within 100 feet while they are performing their duties. (*Exhibit 1*, p. 7.) This cannot be squared

with the First Amendment's protections.

In *McCullen v. Coakley*, the Supreme Court struck down a statute creating 35-foot buffer zones around abortion clinic entrances. These buffer zones were much smaller in size and fewer in number than those the Order creates, yet the Court admonished the state for taking "the *extreme step* of closing a *substantial portion* of a traditional public forum to all speakers." (*McCullen v. Coakley* (2014) 573 U.S. 464, 497, emphases added.) *McCullen*'s concerns have even more force here. The Order applies to one speaker—Mr. Robinson—and its impact on him is perhaps more extreme. The Order closes a great portion of the traditional public forum, imposing a roving web of 100-foot buffer zones across the city. At the same time, it accosts some of our most treasured and traditional free speech activity. For Mr. Robinson, even "normal conversation . . . on a public sidewalk" is not permitted if it happens in the vicinity of a police officer. (See *id.* at p. 488.) "When the government makes it more difficult to engage in these [traditional] modes of communication, it imposes an especially significant First Amendment burden." (*Ibid.*)

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." (*McCullen v. Coakley*, *supra*, 573 U.S. at p. 495.) The Department may find it easier or more efficient to preemptively prohibit Mr. Robinson from coming within 100 feet of any of its employees, but this is a heavy-handed solution where adequate alternatives exist. Most obviously, the department could have pursued an

order with a more reasonable scope, tailored to the particular people or places in need of the Court's protection. If Mr. Robinson poses a security risk at Police Headquarters, the Order could have limited his access to Police Headquarters, rather than to *every* Department workplace. To the degree that he has ever genuinely threatened violence against any Department employee, the Order could have bestowed protection directly on that employee, rather than on *every* employee. These alternatives underscore the Order's excessive overbreadth. Here, the government "has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." (*Id.* at p. 494.)

"Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" (*McCullen v. Coakley*, *supra*, 573 U.S. at p. 486, quoting *Riley v. National Federation of Blind of N. C., Inc.* (1988) 487 U.S. 781, 795.) The Order makes this unlawful sacrifice when it restricts Mr. Robinson's access to every Department employee. It burdens substantially more speech, and a substantially greater portion of the public forum, than is necessary to ensure the safety of Department employees, thereby failing the narrow tailoring requirement.

ii. The Order does not leave open ample alternative channels for communication.

The Order also fails the test's third prong because it does not leave open ample alternative channels of communication for Mr. Robinson to pursue. Largely

due to its overbreadth, the Order leaves little to no room for Mr. Robinson to engage in his constitutionally protected watchdog activities or dialogue in the public forum.

Again, the Order creates a dynamic web of 100-foot buffer zones overlaying the city of San Jose. To reliably avoid all Department employees, Mr. Robinson would have to avoid San Jose's parks, streets, and sidewalks. Even beyond these most traditional public forums, he must also stay away from other heavily trafficked spaces like shopping malls, concert venues, or sports stadiums, all of which regularly host police as a public safety measure. Without access to such vast areas of the city, it is not clear how Mr. Robinson is meant to conduct his daily affairs, let alone engage in traditional First Amendment activity.

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" (*Heffron v. Internat. Society for Krishna Consciousness* (1981) 452 U.S. 640, 655, quoting *Kovacs v. Cooper* (1949) 336 U.S. 77, 87.) The Order deprives Mr. Robinson of this vital opportunity. He cannot observe, film, and hold police accountable if he cannot physically be in the presence of police. There are not alternative channels—certainly not "ample" ones—by which Mr. Robinson can continue this constitutionally protected activity. By curtailing his access to the traditional public forum and prohibiting encounters with police, the Order effectively eliminates his ability to act as a police watchdog and agitator—a role that, while perhaps inconvenient or obnoxious, comes clothed in constitutional armor.

B. The Order unlawfully retaliates against Mr. Robinson's exercise of his First Amendment rights.

The Order is unconstitutional for an additional and independent reason: It constitutes unlawful retaliation. The government may not purposefully chill constitutionally protected speech. In fact, the government incurs liability for retaliation where, in response to an individual's exercise of protected activity, it takes action that "would chill a person of ordinary firmness from continuing to engage in the protected activity." (*Index Newspapers LLC v. U.S. Marshals Service* (9th Cir. 2020) 977 F.3d 817, 827.) That is what happened here: The Order was clearly issued in response to Mr. Robinson's repeated critical interactions with San Jose police. Those encounters represent protected free speech activity; the government may not criminalize them.

a. Mr. Robinson has a right to film police.

"The First Amendment protects the right to photograph and record matters of public interest." (*Askins v. U.S. Dept. of Homeland Security* (9th Cir. 2018) 899 F.3d 1035, 1044.) "This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places." (*Ibid.*) Mr. Robinson's interactions with Department employees thus constitute protected First Amendment activity.

Numerous federal courts of appeals have all held that the First Amendment protects a right to film police officers performing their duties in public. (See *Irizarry v. Yehia* (10th Cir. 2022) 38 F.4th 1282, 1290-94 [citing cases to hold that right to film police is "clearly established" for purposes of sovereign immunity analysis].)

Despite these clear legal precedents, the Order punishes Mr. Robinson for engaging in exactly this conduct.

As his Opening Brief explains, Mr. Robinson is an agitator and a watchdog. He holds police officers accountable by observing and recording them in the course of their duties. He films police during traffic stops and calls out to others nearby to raise public awareness of police activity. These actions fall "squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power." (*Irizarry v. Yehia*, *supra*, 38 F.4th at p. 1295.)

Granted, the right to film police is not unlimited. Like all expressive activity, it may be subject to reasonable time-place-manner restrictions, including restrictions prohibiting interference with the performance of officers' duties. (See *Glik v. Cunniffe* (1st Cir. 2011) 655 F.3d 78, 84.) Still, interference means more than causing annoyance or offense. "In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." (*Ibid.*) Mr. Robinson's filming may therefore impose some burden on police and yet maintain its First Amendment protection.

The value of public accountability is particularly prominent in the context of "law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties." (*Glik v. Cunniffe*, *supra*, 655 F.3d at p. 82.) Mr. Robinson prizes this accountability and ensures it at every opportunity. His actions documenting police activity are protected by the First Amendment.

b. Mr. Robinson has not made true threats against the Department or its employees.

"True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection." (*Counterman v. Colorado* (2023) 600 U.S. 66, 72.) A true threat is a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black* (2003) 538 U.S. 343, 359.) "The 'true' in that term distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not covey a real possibility that violence will follow." (*Counterman*, *supra*, at p. 74.)

Mr. Robinson has spoken to Department employees in unkind and sometimes offensive ways, but he has not seriously expressed an intent to commit violence that would render his speech unprotected. He has cursed at officers and shouted his complaints at them, but cursing and shouting do not transform protected speech into threat. "The language of the political arena . . . is often vituperative, abusive, and inexact." (*Watts v. United States* (1969) 394 U.S. 705, 708.) *Watts v. United States* is the seminal case on this issue. There, the defendant stated, "If they ever make me carry a rifle, the first man I want to get in my sights is [the President]." (*Id.* at p. 706.) Despite its expressly violent imagery, the Court understood this language not as a threat to shoot the President, but as "a kind of very crude offensive method of stating a political opposition to the President." (*Id.* at p. 708.) Mr. Robinson's statements, similarly crude and offensive, are likewise protected. They do not rise to the level of true threats, so cannot justify the imposition of the Order.

Mr. Robinson has never committed an act of physical violence against a

Department employee. The police officers familiar with him report that he films them, yells at them, accuses them of corruption, reports them for misconduct, asks them questions, and generally calls attention to their conduct in public spaces. They do not cite any acts of physical violence. This context matters because it confirms that Mr. Robinson's statements and actions "do not convey a real possibility that violence will follow." (*Counterman*, *supra*, 600 U.S. at p. 74.) His activities maybe irksome, and sometimes bait officers to act violently towards *him*, but they do not themselves convey a serious intent to commit violence. He is an agitator, not a fighter.

The Order was issued in response to Mr. Robinson's constitutionally protected activity, and issuance of the Order would obviously dissuade an ordinary person from continuing to engage in that activity. The Order thus constitutes government retaliation against Mr. Robinson's exercise of free speech. It cannot serve as the basis for his criminal liability and must be struck down.

IV. CONCLUSION

"'When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" (*Askins v. U.S. Dept. of Homeland Security*, *supra*, 899 F.3d at p. 1045, quoting *United States v. Playboy Entertainment Group., Inc.* (2000) 529 U.S. 803, 816-17.) The government has not carried that burden here. Because the Order was issued in violation of the Constitution, and thus in excess of the Court's jurisdiction, Mr. Robinson's contempt convictions must be overturned.

Dated: May 8, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.883(b)(1) of the California Rules of Court, I hereby certify that this brief contains 3,818 words, including footnotes, based on the word count provided by Microsoft Word immediately prior to filing of the brief. Pursuant to Rule 8.883(c), the brief has been formatted in a minimum of one-and-a-half line spacing and at least a 13-point font size.

Dated: May 8, 2024

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, am a citizen of the United States, over 18 years of age, and not a party to the above-entitled action. I hereby certify that. On or before this day, I caused a true and accurate copy of the foregoing APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT NICHOLAS AARON ROBINSON to be served upon each of the following, either by electronic service with the consent of the person served, or placement with the United States Postal Service in a sealed envelope with postage prepaid, as indicated below:

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A copy of the foregoing brief has been served upon the Appellant.

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