

**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SACRAMENTO

CIVIL

TENTATIVE RULINGS - July 09, 2021

EVENT DATE: 07/12/2021

EVENT TIME: 09:00:00 AM

DEPT.: 1

JUDICIAL OFFICER:

CASE NO.: 34-2021-70009184-CU-HR-GDS

CASE TITLE: CITY OF SACRAMENTO VS. MICHEL-EVLETH

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Harassment

EVENT TYPE: Hearing - Other - Civil Harassment

CAUSAL DOCUMENT/DATE FILED: Petition for Workplace Violence Restraining Orders, 06/16/2021

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**NOTICE:**

*To request oral argument on this matter, you must call Department 35 at (916) 874-7885 by 4:00 p.m., the court day before this hearing and notification of oral argument must be made to the opposing party/counsel. If no call is made, the tentative ruling becomes the order of the court. (Local Rule 1.06.)*

*Parties requesting services of a court reporter shall advise the court no later than 4:00 p.m. the court day before the hearing. Please be advised there is a \$30.00 fee for court reporting services, which must be paid at the time of the hearing, for each civil proceeding lasting less than one hour. (Gov. Code § 68086(a)(1)(A).)*

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Teleconference information: (888) 475-4499/ID 8213811592

**Tentative Ruling: Workplace Violence Restraining Order and Anti-SLAPP Motion**

Petitioner, the City of Sacramento, filed a Petition for Workplace Violence Restraining Orders on June 16, 2021 seeking temporary and permanent protection for Sacramento City Manager Howard Chan. The Court issued an order on June 16, 2021 denying the City's request for a temporary restraining order ("TRO") and setting the matter for hearing on July 7, 2021. Respondent Skyler-Michel-Elveth, aka, Skyler Henry responded with a special motion to strike pursuant to Code of Civil Procedure 425.16 on June 18, 2021. On June 24, 2021 the Court issued a minute order continuing the hearing on the Workplace Violence Restraining Order and anti-SLAPP motion to July 12, 2021.

**Alleged Facts in the Petition**

Petitioner, the City of Sacramento, is seeking protection for City Manager Howard Chan and his family against Respondent Henry. The gravamen of the Petition are statements of Henry relating to his

perception of Chan's management of the City of Sacramento and protests outside Chan's home in connection with that opinion. City Manager Chan seeks a stay away order of 100 yards from both his house and his workplace, which happens to be City Hall. Respondent has been hired as a staffer for Sacramento City Councilmember Katie Valenzuela and will be working in City Hall.

City Manager Chan's declaration alleges persons protested outside his house on July 22, 2020 and March 28, 2021. (Declaration of City Manager Chan, p. 2:16-22.) A copy of a flier inviting persons to the protest referred to the protest as a "Sit in/Die in!" (Exhibit 1 to Chan Declaration.) As to the July 22, 2020 protest, Chan's declaration states protestors pounded on his door and caused damage to his garage door and yard. (Declaration of City Manager Chan, p. 2:18-19.) The police report attached to the Petition states the City Manager Chan confirmed that a person named Brazy Liberty was one of the protestors that entered his property and pounded on his door. (Exhibit 1 to Chan Declaration.) The report also states Liberty was following Chan and other co-workers but Chan indicated: "I am not concerned about it at the moment." (*Id.*) Chan's declaration does not indicate Henry was present at this first protest. Henry's declaration in support of his special motion to strike denies that he attended any protest at Chan's house. (Declaration of Henry, p. 3:12-13.)

*[The Court corrects a statement in ruling in the TRO indicating that Henry was present in this first protest. The police report states that Brazy Liberty, not Henry, was present at the first protest.]*

City Manager Chan's declaration references a second protest on March 28, 2021 and states officers of the Sacramento County Police Department were stationed outside his home during this protest. (Declaration of City Manager Chan, p. 2:23-28.) The declaration does not suggest any improper conduct occurred during that protest and the police report states "no vandalism occurred." (Exhibit 2 to Chan Declaration.) There was a flyer for this protest as well, stylized as a "Wanted" poster with Chan's photograph although no direct threats were made on that flyer. (Exhibit 2 to Chan Declaration.) The evidence submitted does not state whether Respondent actually attended the second protest or had anything to do with creating the flyer. Again, Henry denies attending this protest as well. (Declaration of Henry, p. 3:12-13.)

Exhibit 3 to the petition contains media documents making reference to a statement made by Respondent regarding Democratic Senator Kyrsten Sinema that "You should be terrified for the rest of your life" and "You should never be able to leave your house if that is how you're going to use your position to govern." Respondent added "the same thing sort of applies with the mayor and city manager of this city (Sacramento)...." Mr. Henry indicates this statement was recorded for a March 30, 2021 podcast, which occurred after the two protests at Mr. Chan's residence. (Supplemental Declaration of Henry, p. 2:23-26.)

A declaration was submitted by Sacramento Mayor Darrell Steinberg. Mayor Steinberg indicates he spoke to Respondent and asked him "whether the statements he made [to the media] now reflected his current point of view." According to Mayor Steinberg, Respondent stated that: "he opposes physical violence against any person." (Declaration of Mayor Steinberg, p. 2:17.) Henry testified in his moving papers that in this conversation he "unequivocally stated I was against physical violence of any nature against people." (Declaration of Henry, p. 4:13-14.)

### **The Timeliness of the Motion**

The City correctly points out that the Henry served this motion on June 18, 2021, which was less than 16 court days from the hearing. (Code Civ. Proc., §1005, subd. (b).) However, via minute order dated June 24, 2021, the Court continued the hearing on this motion from July 7, 2021 to July 12, 2021 and gave the City an opportunity to file an amended opposition. Moreover, under Rule of Court 3.1300(b), "[t]he court, on its own motion or on application for an order shortening time supported by a declaration showing good cause, may prescribe shorter times for the filing and service of papers than the times specified in Code of Civil Procedure section 1005."

Here, on its own motion, the Court continued the hearing five days and granted a hearing on this motion on shortened time of one day. There is good cause for hearing this special motion to strike on one-day's shortened time since a petition under Code of Civil Procedure 527.8 must be heard, at the latest (upon a showing of good cause) within 25 days of granting or denying a TRO. (Code Civ. Proc., § 527.8, subd. (h).) The Court denied the TRO on June 16, 2021, so July 12, 2021 is the last possible date for hearing the Petition under the timeline provided by the statute. (Code Civ. Proc., §§ 12a and 527.8, subd. (h).) At the same time, hearing the Petition *before* the anti-SLAPP motion would defeat the purpose of the anti-SLAPP statute which is to provide "an efficient means of dispatching, early on in a lawsuit, a plaintiff's meritless claims, and thus encourages, to use the Legislature's words, 'continued participation in matters of public significance.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) The Court has accommodated both these interests by setting the hearings on both motions on the same day and will first rule on the anti-SLAPP motion. (See *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 649 [the Court can use "well-known case management tools" to accommodate the interests of the anti-SLAPP statute and §527.8].)

### **The Attorney-Client Privilege Objection**

The City contends that paragraphs 10 and 12 of the declaration of Councilmember Katie Valenzuela contain attorney-client privileged communications and asks the Court "not to rely upon this testimony in any way when considering the merits of the motion." The Court has not in any way considered this testimony in ruling upon this motion.

As to the merits of the objection, "[t]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) The initial showing can be made from declarations (*D. I. Chadbourne, Inc. v. Superior Court of San Francisco* (1964) 60 Cal.2d 723, 729) or inferred where the parties do not dispute the applicability of the privilege (*Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 123).

The Court agrees with the City that "[u]nless otherwise specified, it is the client who holds the privilege and controls disclosure of the confidential communication." (*Chubb & Son v. Superior Court* (2014) 228 Cal.App.4th 1094, 1103.) Assuming the communications at issue were privileged, Councilmember Valenzuela did not have authority to waive the privilege. Unfortunately, aside from Valenzuela's declaration itself, no evidence has been presented by the parties on whether these communications were indeed privileged. However, the Court finds it need not determine whether the communications were privileged at this time, as those portions of Valenzuela's declaration are immaterial to the Court's decision and were not considered by the Court. The parties can further meet and confer on this issue, and discuss it at the hearing, if further action is needed on the part of the Court.

### **Objections to the City's Opposition**

Henry's objections number 1-2, 8, and 18-19 are OVERRULED. The Court finds the statements are relevant to the declarant's state of mind, are rationally based on the perception of the witnesses, and are helpful to a clear understanding of his testimony. (Evid., § 800.)

Henry's objections number 3 -4, 10-17, and 20-23 are OVERRULED. The Court finds the reasons for the objection go to the weight of the evidence, not its admissibility. Further, some of these objections are overbroad and cover pages of documents rather than specific statements.

Henry's objection number 6, 7 and 24 are SUSTAINED based on lack of personal knowledge, foundation, and as impermissible legal conclusions.

Henry's objections number 9 is SUSTAINED as hearsay, conclusory, and lacking in foundation. Hearsay evidence of a person's state of mind or emotions is admissible only when the person's state of mind or emotions are at issue or when offered to prove or explain the declarant's conduct. (Evid., § 1250.) Here, the state of mind, emotions and conduct of unidentified employees at City Hall, written in a conclusory format, are not admissible.

The Court notes that after the June 29, 2021 deadline for an amended opposition had passed, the City of Sacramento filed and served additional argument and supporting evidence on July 6, 2021. The Court finds the new materials largely supplement the arguments previously made. Accordingly, the Court finds there is no prejudice to Henry in considering the late-filed material.

### **The Anti-SLAPP Statute**

"[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) "[P]etitions brought pursuant to section 527.6 are subject to attack by a special motion to strike under section 425.16." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 652.)

#### Prong One

"The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The defendant need only make a "prima facie showing" that the plaintiff's suit arises from an act in furtherance of defendant's right of petition or free speech as defined by the statute. (*Fox Searchlight Pictures v. Paladino* (2001) 89 Cal.App.4th 294, 306; *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) The statute does not require a defendant to show that their actions "are constitutionally protected under the First Amendment as a matter of law." (*Id.* at 305.)

The scope of the Anti-SLAPP statute is set out in § 425.16(e) which identifies the following categories as being protected by the Anti-SLAPP statute:

"(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16, subd. (e).)

Henry argues subsections (e)(3) and (e)(4) apply to the City's Petition. (Moving papers, p. 7:6-7.)

"In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 289.) The focus of this determination is naturally the operative pleading. (*Brill Media Co., LLC v. TCW Group, Inc.*, (2005) 132 Cal.App.4th 324, 330, overruled in other grounds as stated in *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25, fn. 3.) The plaintiff may likewise submit evidence to contest this point and show that "as a matter of law that the defendant's acts do not fall under section 425.16's protection...." (*Governor Gray Davis Com. v. American Taxpayers Alliance*, (2002) 102 Cal.App.4th 449, 459.) However, a plaintiff cannot contradict their pleading if the

pleading concedes the claim arose from protected conduct. (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942 ["In short, it is Comstock's allegation that Aber complained to the police that brings his cross-complaint within the SLAPP statute. Comstock cannot defeat that allegation by claiming that Aber did not do what he alleges she did."].)

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) In other words, the focus is on the conduct the plaintiff's complaint alleges is unlawful.

*(e)(3) "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"*

When proceeding under subsection (e)(3), the statement must be made in a public forum. One court has defined a public forum as "a place open to the use of the general public 'for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1130.) Another Court has similarly defined a public forum as "a place that is open to the public where information is freely exchanged." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1006.) A public forum includes those traditionally associated with the First Amendment, such as "the streets, the parks, and other public places....." (*Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1125-1126, overruled on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) However, "a public forum is not limited to a physical setting, but also includes other forms of public communication." (*Damon v. Ocean Hills Journalism Club*, (2000) 85 Cal.App.4th 468, 476.) Thus, the Supreme Court has held that "[w]eb sites accessible to the public, [such as online] 'newsgroups' ... are 'public forums' for purposes of the anti-SLAPP statute." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.)

There is no dispute that any acts related to the protests in the street in front of City Manager Chan's house are statements and actions in a public forum. (*Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1125-1126.) Likewise, the statements made by Henry during his podcasts also qualify as speech in a public forum for purposes of an anti-SLAPP statute. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252 ["Mayweather's postings on his Facebook page and Instagram account and his comments about Jackson during a radio broadcast were all made "in a place open to the public or a public forum" within the meaning of section 425.16, subdivision (e)(3)."].) The City's opposition does not contend otherwise.

Aside from being made in a public forum, protected statements must relate to an "issue of public interest." The definition of "public interest" within the meaning of the anti-SLAPP statute "has been broadly construed...." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476; *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 464.) Such a phrase includes "not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (*Id.*) Another court has similarly defined the phrase by adding that "[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115.) Summarizing prior case law, one court noted that a matter of public interest typically included situations where (1) "the subject statements either concerned a person or entity in the public eye;" (2) "conduct that could directly affect a large number of people beyond the direct participants;" or (3) "a topic of widespread, public interest." (*Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.)

Respondent Henry's alleged threats were made in connection with his role actions as a co-host on the podcast titled "Voices: River City." Based on the evidence submitted by the City, such statements include "governmental matters" and topics of "widespread, public interest" such as a politician's vote

against raising the minimum wage to \$15 an hour (Petitioner's Exhibit 3) and Black Lives Matter (Report on Exhibit 1 to Sergeant Morse Declaration; Declaration of Henry, p. 2:18-22). Indeed, a declaration submitted by the City, the declaration of Sergeant Kristin Morse, states that, as to Henry's podcast, "the topics of their conversations focus primarily on local government issues here in Sacramento." (Dec. of Sergeant Morse, p. 2: 22-25.) Again, the City does not argue that Henry's conduct is not a matter of public interest.

*(e)(4) "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest"*

Subdivision (e)(4) is broader than (e)(3) in a couple of ways. First, it protects "conduct" while (e)(3) protects only a "written or oral statement or writing." Second, there is no public forum requirement in (e)(4). (*Wilbanks v. Wolk* (2004)121 Cal.App.4th 897 ["subdivision (e)(4) includes conduct in furtherance of free speech rights, regardless whether that conduct occurs in a place where ideas are freely exchanged."]) As discussed above, the conduct attributed to Henry (statements in a podcast and protests) are conduct in furtherance of the right to free speech and relate to "with a public issue or an issue of public interest."

As to prong one, the City ultimately concedes "at best Mr. Henry's conduct involves a mix of protected and unprotected activity as much of it involves his incitement of violence potentially in violation of Penal Code §404.6." (Moving Papers, p. 6:22-23.) Thus, the City does not appear to dispute that the alleged conduct that gave rise to the Petition implicates the anti-SLAPP statute.

The City does contend that the form of speech utilized by Mr. Henry is not constitutionally protected. Although the City does not cite any authority in support of its argument as it relates to prong one, it appears to be asserting the argument "that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317.) Courts have clarified that "[c]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage ... simply because it is *alleged* to have been unlawful or unethical." (*Birkner v. Lam*, (2007) 156 Cal.App.4th 275, 285 [emphasis original].) The illegality exception only applies where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law...." (*Flatley, supra*, 39 Cal.4th at 320; *Cohen v. Brown*, (2009) 173 Cal.App.4th 302 [extortive litigation related letter not protected]; *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, (2006) 143 Cal.App.4th 1284, 1296 ["SHAC USA has conceded that the attacks on Chiron employees were unlawful" and evidence from organization's website established that animal rights protest, that included detonating two "explosive devices," was unlawful conduct as a matter of law].)

Henry does not concede the statements and actions attributed to him were illegal. (See Dec. of Henry, ¶¶ 5-7.) Moreover, the City makes no effort to develop this argument in its brief as to prong one and "conclusively establish" that Henry engaged in illegal conduct. The City concedes Henry engaged in "a mix of protected and unprotected activity." Thus, the Court finds that the evidence does not support a *Flatley* argument.

In conclusion, the Court finds that Henry has met his prong one burden to show that the Petition is "arising from" conduct protected by the anti-SLAPP statute.

### *Prong Two*

If the court finds that a defendant has met its initial burden that a cause of action is arising from protected conduct, the burden shifts to the plaintiff to demonstrated a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence

submitted by the plaintiff is credited." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) Although, "the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*) "The process the court uses in determining the merits of the motion is similar to the process used in approaching summary judgment motions." (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188.) As to the nature of the required evidence, "the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 527; also see *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 ["documents submitted without the proper foundation are not to be considered."]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1498 [averments on information and belief insufficient].)

"[T]o obtain a permanent injunction under section 527.8, subdivision (f), a plaintiff must establish by clear and convincing evidence not only that a defendant engaged in unlawful violence or made credible threats of violence, but also that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 335.) If a cause of action has a higher burden of proof (such as requiring clear and convincing evidence), then the plaintiff must meet the heightened standard to show they are likely to succeed on the merits for purposes of an anti-SLAPP motion. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 662.)

Accordingly, the City must establish by clear and convincing evidence that (1) Henry "engaged in unlawful violence or made credible threats of violence" and (2) "that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future." The Court resolves this matter on the second prong and need not rule on whether Henry "engaged in unlawful violence or made credible threats of violence."

"[I]njunctive relief lies only to prevent threatened injury and has no application to wrongs that have been completed." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332.) "It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future." (*Ibid.*) "Thus, to authorize the issuance of an injunction, it must appear with reasonable certainty that the wrongful acts will be continued or repeated." (*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 372.)

"Unlike demurrers or motions to strike, which are designed to eliminate sham or facially meritless allegations, at the pleading stage a SLAPP motion, like a summary judgment motion, *pierces the pleadings and requires an evidentiary showing.*" (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073, emphasis added.)

As previously determined on ruling in the TRO, the evidence presented with the Petition does not meet this standard. The most aggravated incident occurred during the July 22, 2020 protest. The Court is not unconcerned with the conduct the Petition alleges occurred on that date and does not condone it. (*Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists* (2002) 290 F.3d 1058, 1073 ["[V]iolent conduct is beyond the pale of constitutional protection."].) However, this occurred almost a year ago. Moreover, the evidence submitted by the City does not indicate Henry was even present at this event. Indeed, Henry denies attending any of the protests at Chan's house. (Declaration of Henry, p. 3:12-13.) Also, despite being the most concerning incident, no restraining order was filed at that time. The day *after* the incident, Chan stated he was "not concerned" with the persons were following him (Henry was not identified as one of these persons). Thus, this protest cannot support the City's petition against Henry since no evidence was presented sufficiently connecting Henry to the violent conduct of the protestors.

No evidence was presented that any acts of violence, threats, or vandalism occurred during the March

2021 protest. Furthermore, the evidence submitted by the City does not state whether Respondent even attended that protest or whether he was responsible for making the flyer for that protest. Again, Henry denies attending this protest at Chan's house. (Declaration of Henry, p. 3:12-13.) Therefore, the second protest also does not support the City's cause.

As to the March 30, 2021 statements in the podcast ("You should be terrified for the rest of your life"/"You should never be able to leave your house if that is how you're going to use your position to govern"), they were expressly targeted at Senator Sinema based on her political decisions, with the addition that the same thing "sort of" applies to Mayor Steinberg and City Manager Chan (also based on their political decisions). Code of Civil Procedure § 527.8(c) provides: "This section does not permit a court to issue a temporary restraining order or order after hearing prohibiting speech or other activities that are constitutionally protected, or otherwise protected by Section 527.3 or any other provision of law." "The First Amendment permits 'restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " (*Virginia v. Black* (2003) 538 U.S. 343, 358–359 [155 L. Ed. 2d 535, 123 S. Ct. 1536].) "These categories include defamatory speech, fighting words, incitement to riot or imminent lawless action, obscenity and child pornography." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1249.) "As speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression." (*In re M.S.* (1995) 10 Cal.4th 698, 710.)

While the statements made in the podcast are not condonable, from a legal perspective the Supreme Court "explicitly distinguished between political hyperbole, which is protected, and true threats, which are not." (*Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists* (9th Cir. 2002) 290 F.3d 1058, 1072.) The Court is not convinced this statement was a "true threat." Indeed, the City's passive voice characterization of Henry's alleged threats ("Respondent's threats regarding how Mr. Chan needs to continue to suffer terror for doing his job" - Submission of Argument, p. 12:8-10) suggests the statements were not threats of violence from Henry to Chan, but Henry's approval of violent protest tactics of others. "*Brandenburg v. Ohio* [], makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action." (*Id.* at p. 1071; *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 927 ["This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." – italics original].) But, in the end, the Court does not decide this motion on whether the statements in the podcast constituted a "credible threat of violence."

The City argues the denial of the TRO was based on "incorrect facts" (Submission of Argument, p. 11:4) because it was Brazy Liberty, rather than Henry, who was at the violent protest at Chan's house. The Court agrees that particular point was an oversight, but that point was an error in the City's favor and correcting it does not help the City. The protests were a significant part of the City's Petition and the only evidence of actual violence against City Manager Chan. The City further disavows the importance of the protests at Chan's house and adds: "Therefore, Respondent's threats regarding how Mr. Chan needs to continue to suffer terror for doing his job, or simply being at his workplace, is what constitutes the credible threat of violence." (Submission of Argument, p. 12:8-10) This argument clarifies the gravamen of the complaint is Henry's political speech.

Mayor Steinberg testified he met with Respondent after the protests and after Henry's podcast statement and Henry stated to him that he "opposes physical violence against any person." (Declaration of Mayor Steinberg, p. 2:17.) Henry confirmed in his declaration that he "unequivocally stated I was against physical violence of any nature against people." (Declaration of Henry, p. 4:13-14.) Moreover, no evidence was presented that Respondent has ever physically harmed any person, including the other persons mentioned in his statements such as Senator Sinema and Mayor Steinberg. Indeed, Mayor Steinberg testified he met with Respondent in person (apparently without incident) although Mayor Steinberg was also named in the March 2021 podcast along with Chan. (Declaration of Mayor Steinberg,



p. 2:11-20.)

In issuing this ruling, the Court is cognizant of the concerns raised by the City regarding violence against politicians. The Court agrees that such concerns should be taken very seriously and that courts have an important role in protecting persons subjected to credible threats of violence. The Court also agrees that the Chan family had a reasonable basis to fear for their safety. But the Petition was not filed against Brazy Liberty or any of the protestors that vandalized City Manager Chan's home. The Petition was filed against Henry. The undisputed evidence is that Henry was not at these protests. It is also undisputed that Henry's podcast comments were made *after* both protests so the podcast comments could not have incited either protest. (Supplemental Declaration of Henry, p. 2:23-26.) No evidence was produced that the podcast incited any *additional* protests. No evidence was presented that Henry has a history of violence against politicians. Henry has testified under oath that he does not support the use of physical violence. Further, Henry's supplemental declaration indicates he has been working at City Hall since June 19, 2021 without incident. (Supplemental Declaration of Henry, p. 2:27-28.) "[A]ny such theory fails for the simple reason that there is no evidence -- apart from the speeches themselves -- that Evers authorized, ratified, or directly threatened acts of violence." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 929 [Comment from NAACP organizer that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" protected under the First Amendment when there was no nexus between that comment and any violence or threat of violence].)

Essentially, the City seeks to hold Henry responsible for events that caused the Chan family to reasonably fear for their safety because Henry made comments in a podcast approving of the protests and retweeted comments of others that spoke favorably of using violent protest tactics. However, no evidence was presented to show that Henry incited or participated in the events relating to City Manager Chan's house, incited violence against anyone else, or has any history of engaging in violence himself. "Context is everything in threat jurisprudence." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1250.) The City failed to provide context relevant to Henry's podcast comments to demonstrate that a workplace violence restraining order against Henry is justified.

In summary, the evidence presented by the City does not show by clear and convincing evidence "that great or irreparable harm would result to an employee if a prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future." In other words, the City has failed to present clear and convincing evidence that there is a "reasonable probability" that Henry is a threat of future physical harm to Chan. Since the City cannot establish one of the required elements of its Workplace Violence Restraining Order, it has not proven its cause of action has merit. Accordingly, the Court GRANTS Henry's special motion to strike as to the City's Petition for Workplace Violence Restraining Orders.

[*The Court makes the following disclosure: Judge Acero is acquainted with City Manager Chan and worked with him on a community task force designed to increase diversity in hiring in the City of Sacramento. This occurred in approximately 2018- 2019.*]