FIRST AMENDMENT COALITION

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Via TrueFiling

California Court of Appeal, Second District
Ronald Reagan State Building
300 S. Spring St. B-228
Los Angeles, CA 90013

Re: *Luo v. Volokh*, No. B323878

Dear Presiding Justice Rothschild and Associate Justices Bendix and Chaney:

I write on behalf of the First Amendment Coalition ("FAC") to ask that this Court order publication of the introduction, background, disposition, and part A of the discussion in the opinion in *Luo v. Volokh*. FAC is a nonpartisan public interest nonprofit dedicated to protecting and promoting a free press, freedom of expression, and the people's right to know.

FAC respectfully submits that the foregoing parts of this Court's decision should be published to provide clear guidance on the proper application of the First Amendment to prevent anti-harassment restraining orders from being used to silence protected speech. That issue has not been thoroughly addressed in the case law, and trial courts would benefit from this Court's cogent analysis.

In recent years, restraining orders have suffered significant mission creep beyond their intended role. In too many cases, they no longer just forbid assaults, or approaching the petitioner too closely, or unwanted calls or messages to the petitioners. Instead, they sometimes become backdoor attempts to forbid alleged libel, infliction of emotional distress or interference with business relations—but without sufficient heed to important constitutional protections for freedom of speech. These issues have been repeatedly addressed in unpublished decisions, making clear the need for a published opinion to guide trial courts in this important area. *See, e.g.*, *Kozlova v. Doubson*, No. H047759, 2022 Cal. App. Unpub. LEXIS 497, at *26–27 (Jan. 27, 2022) (reversing denial of anti-SLAPP motion and striking references to protected activities from civil-harassment petition, including emails, a Yelp review, complaints to agencies, filing of small claims actions, and response to a cease-and-desist letter); *Mejia v. Hopkins*, Nos. C093485, C093486, 2022 Cal. App. Unpub. LEXIS 3765, at *16 (June 17, 2022) (reversing denial of anti-SLAPP motion because respondent's "postings enjoy anti-SLAPP protection at the first step even though they may ultimately be proven untrue, stem from a personal dispute, and include abusive personal comments" and petitioners "provided no factual or legal authority" to show their probability of prevailing on civil-harassment claim); *Santsche v. Hopkins*, Nos. A154559, A154734, 2019 Cal. App. Unpub. LEXIS 2090, at *10, *16 (Mar. 26, 2019) (reversing denial of anti-SLAPP motion where petitioner sought civil-harassment restraining order based on respondent's protected conduct, including "postings on consumer and social-media websites expressing his dissatisfaction with the services he received" from petitioner); *Williams v. Hefflin*, No. D082235, 2023 Cal. App. Unpub. LEXIS 7161, at *15–18 (Nov. 30, 2023) (reversing denial of anti-SLAPP motion where "attorney's letter [that] dealt with his client's claimed grievances"

and ways to redress them and "did not contain any threats of violence" was not harassment but "constitutionally protected litigation activity").[1]

The First Amendment protects a wide variety of pointed, controversial, or offensive speech that cannot be constitutionally deemed "harassment." *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (setting aside a damages verdict for intentional infliction of severe emotional distress based on offensive political protest); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (holding that speech that uses "social pressure and the 'threat' of social ostracism" to "coerce" private citizens is constitutionally protected); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that leafletting that accuses a small businessman of unethical behavior and thus threatens his livelihood is constitutionally protected and cannot be enjoined).

Nor does speech lose First Amendment protection simply because it "disturb[s] the peace" because of its content, at least when it does not involve face-to-face personal insults. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 16 n.1 (1971); *Hess v. Indiana*, 414 U.S. 105, 105 n.1 (1973); *Edwards v. South Carolina*, 372 U.S. 229, 234–37 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 2 n.1, 3 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The First Amendment does not shield people from all criticism, and anti-harassment restraining orders should not be misused to circumvent constitutional protections.

However, overburdened and understaffed superior courts that routinely hear motions for such orders may not be well apprised of the trend of seeking to employ them to chill speech or the constitutional considerations in interpreting and applying the civil-harassment statute to. Civ. Proc. Code § 527.6.[2] Few if any published cases provide guidance into those constitutional issues beyond the text of the statute, which only states "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct,'" without articulating what types of activities are "constitutionally protected." § 527.6(b)(1).

Additionally, "it is well known that, in reality, few people appearing at hearings on civil harassment petitions are represented by counsel." *Thomas v. Quintero*, 126 Cal. App. 4th 635, 651 (2005); *see also* Aaron H. Caplan, *Free Speech and Civil Harassment Order*s, 64 Hastings J.L. 781, 798 (2013) ("Overwhelmingly, the parties in civil harassment litigation represent themselves. In one Missouri courtroom, 91% of the petitioners were pro se, as were 85% of respondents."). It can be difficult for superior courts to wade through inexperienced pro se litigants' arguments without clear guardrails from case law in analogous factual contexts.

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[1] Mindful of Rule 8.1115's limitation on citing unpublished opinions, Cal. R. Ct. 8.1115(a), these citations are offered only to demonstrate the lack of published precedents in this area and the need for clear guidance to prevent trial courts from allowing restraining orders to become a backdoor to unconstitutional censorship of protected speech. *See Mangini v. J.G. Durand Int'l*, 31 Cal. App. 4th 214, 219 (1994) (citing depublished opinions "simply to illustrate" that a "recurring issue remains unresolved").

[2] Further undesignated statutory citations are to the California Code of Civil Procedure.

This Court's *Luo* decision offers a helpful corrective to these gaps. In particular, the decision makes clear that:

1. When "writings served a legitimate purpose," and "[t]here was no evidence that [the respondent] stalked [the petitioner], made harassing phone calls, or sent her harassing correspondence," the petitioner has not shown that the respondent "harassed her within the meaning of section [527.6]." Op. at 14.

2. A meritorious petition for injunctive relief under section 527.6 must request to enjoin the respondent only from "proscribed activities" described in section 527.6(b)(6)(A). *Id.* at 15.

3. "Nothing in the statute precludes [the respondent's] identification of [the petitioner] by name" in his constitutionally protected speech, and such relief "is not available under section 527.6." *Id.* at 15.

4. An argument that a respondent's speech "embolden[ed] others to engage in harassing behavior" is insufficient to enjoin such speech under section 527.6 where there is no evidence that the speech "encouraged harassment or violence against" the petitioner. *Id.* at 15.

We are unaware of past published opinions that articulate these points so clearly, and the decision does not cite any such cases. Indeed, the primary case law this Court relied upon to support these holdings was the reasoning in *Olson v. Doe*, 12 Cal. 5th 669, 674 (2022), which turned on contractual interpretation of whether "the nondisparagement clause in the parties mediation agreement" of a civil-harassment claim would prevent a future suit. *Luo* presents a different context than *Olson* and makes clearer these key points about the writings' legitimate purpose, the scope of "proscribed activities," and more.

The opinion thus "explains . . . an existing rule of law" in a helpful way, "reaffirms a principle of law not applied in a recently reported decision," and "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." Cal. R. Ct. 8.1105(c)(2), (3), (8). Because of the frequency with which these issues arise, the opinion also "[i]nvolves a legal issue of continuing public interest." Cal. R. Ct. 8.1105(c)(6). Therefore, FAC respectfully requests that this Court's opinion in *Luo* should be published to provide concrete guidance on the proper application of the civil-harassment statute to prevent it from being misused to violate First Amendment rights.

Very truly yours,

FIRST AMENDMENT COALITION

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cc: All Counsel [via TrueFiling]