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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. [redacted] Defendant.	Case No.: [redacted] Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Complaint

I.

Introduction and Summary of Argument

The People claim that the defendant violated Penal Code § 653.2 by sending a litigation-funding request to members of his business community, and by including the name, image, and address of his litigation opponent in that communication.[1] In a prior civil proceeding, a Superior Court judge already ruled that this communication constituted protected speech, and that it was

[1] A copy of the communication is attached as Exhibit A-2 to the Declaration of Timothy A. Scott, attached.

protected by the litigation privilege as well. The communication does not include any threats of violence, and never suggests that anyone take any unlawful action.

The accused, Dr. [redacted] brings this motion to dismiss. The arguments can be summarized as follows:

1. **Litigation privilege**. The communication in question was a request for litigation funding—core speech that is protected by the litigation privilege, Civil Code § 47(b), as a matter of law. A Superior Court judge already dismissed a related civil case on this basis, and the litigation privilege protects Dr. [redacted] from criminal prosecution too. For these reasons, the Court should dismiss this case without even reaching the constitutionality of the charging statute.

2. **Constitutionality of the statute.** Penal Code § 653.2 criminalizes certain written communications and publications. As such, it presumptively violates the First Amendment, unless it fits one of a few narrow exceptions. But none of those exceptions apply here. The statute is not limited to "true threats," nor to actual incitements to violence. It employs undefined phrases like "seriously annoying," "serves no legitimate purpose" and "his or her safety," rendering the statute unconstitutionally vague and overbroad as well. Penal Code § 653.2 is unconstitutional on its face.

3. **Constitutionality as applied.** The Court could also rule that irrespective of the statute's overall constitutionality, it is unconstitutional as applied to this case. Because the Court has an independent duty to protect core speech from criminalization, it could dismiss the case without reaching the merits of the statute in all contexts.

II.

Procedural History

On March 21, 2019, the District Attorney's Office issued a complaint charging [redacted] with one misdemeanor count: violating Penal Code § 653.2(a), "Distribution of Personal Identifying Info by Electronic Communications Device."

The complaint reads as follows:

> On or about October 6, 2018, [redacted] did with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes [sic], publishes [sic], e-mails [sic], hyperlinks [sic], or makes [sic] available for downloading, personal identifying information which would be likely to incite or produce that unlawful action, in violation of PENAL CODE SECTION 653.2(a).

The complaint does not name an alleged victim, nor name an electronic communication that purportedly broke the law. It simply alleges a date and restates the language of the statute.[2]

Mr. [redacted] received actual notice of these charges on April 16, 2019. After attempting to enter a demurrer,[3] [redacted] counsel entered a not-guilty plea on April 17, 2019. Jury trial is presently set for September 16, 2019.

[redacted]

Statement of Facts

A. The Defendant, Dr. [redacted] and his company, Front Sight.

Mr. [redacted] is the founder and director of a business called Front Sight. He is 59 years old, and has no criminal history whatsoever. Front Sight operates the Front Sight Firearms Training Institute and Resort in Pahrump, Nevada.[4] The Front Sight Resort is world-class facility, dedicated exclusively to providing students and members with specialized courses in self-defense training—with or without firearms.[5] Front Sight's students can purchase

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[2] *See* Exhibit D (Complaint). The last portion of the charge, "*which would be likely to incite or produce that unlawful action*" adds an element that simply does not appear in the statute. *Cf.* Penal Code § 653.2 *et seq.* If anything, this addition seems to be a tacit admission that the charging statute presents serious First Amendment problems as written.

[3] *See* Exhibit A, Declaration of Timothy A. Scott, and attached Exhibit A-1. Though the District Attorney's Office mailed a notice to appear to Dr. [redacted] at an address in Watsonville, he did not receive actual notice of the charges until the day before the arraignment, April 16, 2019. *See* Declaration of [redacted] attached as Exhibit B. [redacted] hired undersigned counsel immediately, who sought to preserve the ability to demurrer while entering a timely facsimile arraignment. In any event, the bases of the demurrer are now included in the present motion to dismiss, and this motion goes beyond the bases for a demurrer anyway. *Cf.* Penal Code § 1004 (demurrer limited to face of pleading) with the arguments *infra* (raising litigation-privilege issues, collateral estoppel, and challenging the constitutionality of Penal Code § 653.2 as applied to the facts of this case).

[4] *See* Exhibit B.

[5] *Id.*

membership packages giving them access Front Sight's "First Family" web content and e-mail forum. Non-members do not have access to this content.

B. Litigation Between Dr. [redacted] and the complaining witness.

Because this motion raises litigation-privilege issues, a brief synopsis of the underlying litigation is necessary for context. In 2012, Front Sight sought to finance a major construction project at its Pahrump facility (the "Resort Project").[6] The complaining witness in this case, Mr. Dziubla, claimed that he had the experience and contacts to raise tens of millions of dollars in financing. He promised up to $75 million in non-recourse loans.[7] An engagement letter was executed accordingly, and Front Sight paid hundreds of thousands of dollars for expenses supposedly incurred by Dziubla and his team.[8]

But Dziubla never delivered anything close to $75 million in financing.[9] Years passed; Dziubla continued spending money. But after Front Sight had paid well over half a million dollars in fees and expenses, Front Sight received a meager $6,375,000 in construction loan disbursements—tens of millions of dollars less than promised.[10]

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6 *Id.*

7 *See id.* and Exhibits B1-B6 attached to [redacted] Declaration.

8 *Id.*

9 *Id.*

10 *Id.*

Civil litigation ensued.[11] In a cynical bid to hide his own fraud, Dzuibla alleged a host of defaults[12] and moved to sell off the Resort. Front Sight responded with a lawsuit against Dziubla in Clark County, Nevada. Dr. [redacted] lawsuit alleged fraud, breach of contract, conversion, and other related claims.[13]

The Nevada court granted injunctive relief.[14] It expunged the Notice of Breach and Default and of Election to Sell, prohibited the Nevada defendants from selling the property, and ordered an accounting of the funds paid by Front Sight to Dziubla's entities.[15] The Nevada litigation continues.

C. Front Sight Engages in Protected Litigation Fundraising—Publications that Become the Subject Matter of this Complaint.

In early October 2018—after Dr. [redacted] had filed suit—he drafted and published a communication to Front Sight's members entitled "Emergency Action Alert."[16] This communication sought financial support from Front Sight members, to conduct the litigation against Dzuibla. It urged Front Sight members to contribute to the "Litigation War Chest" so that Front Sight can "rapidly and aggressively prosecut[e] our lawsuit against him to overwhelming victory!"[17] The communication included an enrollment form. It urged members

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[11] *See* Exhibit C, Declaration of attorney John P. Aldrich, which was submitted in a related civil suit. It authenticates attached true and correct copies of filings in the Nevada litigation. Because the Declaration was submitted in a different case, the exhibits contain the original numbering, unaltered.

[12] Even under Mr. Dzuibla's version of events, these "defaults" were administrative only; there were no allegations of missed or late loan payments. But regardless, Dr. [redacted] has proven that no defaults, administrative or otherwise, ever occurred.

[13] *See* Exhibit C, Declaration of attorney John P. Aldrich, and attached exhibits.

[14] *Id.*

[15] *Id.*

[16] Exhibit A-2, the litigation-funding communication, entitled "Emergency Action Alert."

[17] *Id.*

to lend their moral and financial support to "destroy" Dziubla—through litigation only—to ensure Front Sight's existence "for generations to come." The communication included links to pleadings in the Nevada lawsuit.[18]

The communication admittedly included elevated language about Dziubla and his behavior. It described him as a "lying, two-faced, gun-grabbing Hillary Clinton supporting, con man," among other things. The communication stated a desire to "give him what he deserves" and to "destroy" Dziubla—but again, only in the context of litigation.[19] It stated that "[t]his turncoat needs to be punished," but only "*to the full extent the law will allow*,"[20] And, it described Dziubla as a phony: specifically, that while he claimed to have exhausted all of his funds, he really lived in a million-dollar home in Escondido, California. The communication included pictures of Dziubla, his address, and the brand-new cars parked as his home as proof of Dziubla's wealth and duplicity.[21] Nowhere does the document threaten or solicit violence. It consistently requests only the resources necessary to fight, *legally*, against a litigation opponent.[22]

Importantly, *this website was not available to the public.* The top of the document asserts "Extremely Confidential" and "Front Sight Members Only." The website was not accessible

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Simultaneously, Dr. [redacted] sent an email to Front Sight members containing a private hyperlink to the Emergency Action Alert, and also mailed a hard copy notice providing the web address to view the Emergency Action Alert. *See* Exhibit A-3. The notice urged members to go to the website and view the Alert so they could see "how you can join with us to defeat [Dziubla] and give him the *legal* justice he deserves." *Id.* (emphasis provided).

even if one used Google or another search engine to search for it. Members required a specific link to access the site, and it was intended for those members' eyes only.[23]

D. The police acknowledge that the communication describes only legal action, "*and did not make threats towards physical violence.*"

Despite the confidential nature of the message, a former business partner alerted Dziubla of its existence. Dziubla contacted the police.[24] The police investigation confirmed, repeatedly, that the document contained no threats of violence against Dziubla or his family. For example, the initial responding officer concluded: "There have been no overt threats against Dziubia; however, the email certainly has many angry statements against Dziubia."[25] The assigned detective also confirmed that there were no threats—and pointedly denied Dziubla's claims to the contrary. She wrote: "Dziubla stated, [redacted] is a vindictive, evil person who published that hit piece on me and my family that he sent out to 200,000 people, basically saying, 'Please kill Dziubla.' *I corrected Mr. Dziubla, stating that* [redacted] *is planning to 'destroy' Dziubla through legal action and did not make threats towards physical violence.*"[26]

E. The San Diego Superior Court rules that Dzuibla's allegations of unlawful threats are meritless; Dzuibla faces felonies in Nevada for defrauding Front Sight and Dr. [redacted]

After learning about Dr. [redacted] litigation-funding communication, Dziubla filed a civil lawsuit, claiming *inter alia* that publishing his address and information constituted criminal

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[23] Exhibit B, Declaration of Dr. [redacted]

[24] Dzuibla had already contacted the police due to an earlier incident where private investigators entered his property to interview him and take photographs. Those incidents pre-dated the letter and could not have stemmed from it. *See* Exhibits A-4, A-5, and dates set forth within.

[25] Exhibit A-4, police report dated November 3, 2018.

[26] Exhibit A-5, Detective's follow-up report dated February 5, 2019.

threats, violated the Ralph Act, and constituted the tortious infliction of emotional distress. Dr. [redacted] responded with an anti-SLAPP motion under Code of Civil Procedure § 425.16.[27]

As this Court is aware, a party bringing an anti-SLAPP motion must show that the claim against him *arises from the exercise of the constitutional right to free speech or petitioning activity.*[28] If the moving party satisfies that burden, the opposing party must demonstrate a reasonable probability of prevailing on the merits of the claim.[29]

The anti-SLAPP motion therefore directly addressed the communication at the heart of this criminal complaint—and it was resolved overwhelmingly in Dr. [redacted] favor. The Court first found that that the alert "*contains protected activity to the extent that seeks litigation funding.*"[30] Dziubla argued exactly what the criminal complaint in this case argues—that [redacted] engaged in criminal conduct that the Constitution does not protect. But the Court rejected that claim, and concluded that Dziubla's "claim of criminal threats *arises out of protected activity.* Accordingly, the burden shifts to [Dziubla] to establish that [his] claims have 'minimal merit.'"[31]

The Court then found even "minimal merit" to be lacking for every claim related to the litigation-funding communication. It held that whether analyzing alleged "criminal threats" or defamation, "both stem from the same document – the mass mailing that was sent out in order to seek funding for litigation." And "to the extent that the assertions in that document are

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[27] Section 425.16 permits a "special motion to strike" causes of action "arising from any act . . . in furtherance of the person's right of *petition or free speech* under the United States or California Constitution in connection with a public issue . . . unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *See also Equilon Enters. v. Consumer Cause, Inc.*, (2002) 29 Cal. 4th 53, 58.

[28] *See Equilon*, 29 Cal.4th at 68; *see also* Code of Civil Procedure § 425.16.

[29] (Code of Civil Procedure § 425.16(b)(1); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.

[30] Exhibit A-6, Order at 7.

[31] *Id.* at 9 (emphasis provided) (citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

tangential to – or supportive of – the effort to raise funds for litigation, it is 'protected activity.'"[32]

After finding that the communications were protected speech, (the first prong of the anti-SLAPP test); and that not even "minimal merit" existed because of the litigation privilege (the second prong), the Court dismissed the following counts:

- Criminal threats;
- Defamation;
- Privacy—false light;
- Negligent infliction of emotional distress;
- Injunctive relief;
- Ralph Act (in part).[33]

The Court then granted attorneys' fees in [redacted] favor and against Dzuibla.[34]

Mr. Dziubla has since been charged with felony fraud in Nevada, based on the malfeasance involving Front Sight.[35]

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[32] *Id.* at 10. *See also id.* at 11 ("Defendants have shown that that cause of action falls under the litigation privilege of Civil Code § 47(b) and Plaintiffs have not rebutted that argument.").

[33] *Id.* at 12. As to the Ralph Act, the Court carved out and dismissed any allegations relating to the litigation-funding alert, specifically the allegations stating that [redacted] violated constitutional rights: "by publishing the Emergency Action Alert," "namely the Emergency Action Alert written by [redacted] and "and that one of the members of Front Sight will act on the threats made and 'give [Dziubla] what [he] deserve[s].'" *Id.* at 12-13.

[34] Exhibit A-7, Order Granting Attorneys' Fees.

[35] Exhibit A-8, Felony Complaint versus Dziubla.

IV.

Discussion

A. The complaint should be dismissed because it is premised on communications that the Superior Court has already found to be protected by the litigation privilege.

1. The litigation privilege is "absolute," broadly construed, and it protects against criminal prosecutions.

"For well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from tort liability by the privilege codified as [Civil Code] section 47(b)." *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193. This privilege enjoys "an expansive reach." *Id.* at 1193-94. Any doubts must be resolved in its favor. *Wang v. Heck* (2012) 203 Cal. App. 4th 677, 684. Indeed, "[t]he absolute privilege attaches to any publication that has any reasonable relation to the action and is made to achieve the objects of the litigation, *even though published outside the courtroom and no function of the court or its officers is involved.*" *Rosenthal v. Irell & Manella* (1982) 135 Cal. App. 3d 121, 126.[36]

The privilege protects against criminal cases too. There is no general exception to the litigation privilege for criminal offenses. *See Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal. 4th 1232, 1246. Rather, criminal prosecution overcomes the privilege only when the criminal statute "is more specific than the litigation privilege *and* would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege." *Id.* (emphasis provided; collecting case law.)

Finally, non-parties to the underlying litigation—like the District Attorney here—are still barred by the privilege. *See Action Apartment Ass'n*, 41 Cal.4th at 1247 ("we decline to

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[36] *See also Huy Thanh Vo v. Nelson & Kennard*, 931 F. Supp. 2d 1080, 1096 (E.D. Cal. 2013) (the litigation privilege even "extends to post-judgment collection activity—even attempts to enforce invalid judgments."); *La Jolla Grp. [redacted] v. Bruce*, (2012) 211 Cal. App. 4th 461, 472 (privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.") (internal quotations omitted).

recognize a broad exception to the litigation privilege for any party who did not participate in the underlying litigation.") Indeed, "[a]n exception to the litigation privilege for all suits brought by parties who were not involved in the underlying litigation would be antithetical to the privilege's purposes." *Id.*

As discussed *infra*, this complaint is barred by the litigation privilege.

2. Collateral estoppel could bar this prosecution, because the San Diego Superior Court has already ruled against the complaining witness, holding that litigation privilege covered Dr. [redacted] communications.

This Court could hold that the litigation privilege applies simply because the Superior Court has already said so. As documented above, the Superior Court already determined, over the complaining witness's objection, that the litigation-funding communication was protected speech. It held that any cause of action stemming from it was barred.[37] As such, this Court could comfortably rule that the District Attorney is collaterally estopped from challenging that ruling.

There are five threshold requirements to issue preclusion in this context: 1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. *See People v. Garcia*, (2006) 39 Cal. 4th 1070, 1077. The first four prongs are relatively easy: the issue, whether the Alert is protected by litigation privilege, is the same question that this motion raises. It was actually litigated; it was necessarily (and explicitly) decided; and was decided finally and on the merits.

The closer question is the fifth prong: whether privity exists between the litigant in the prior case and the People here, where the prior litigant is also the alleged victim in this case. It is true that "[a] party cannot assert a prior adjudication against another who was not a party or in

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[37] Exhibit A-6, citing Civil Code § 47(b).

privity with a party to the prior action." *Lynch v. Glass* (1975) 44 Cal. App. 3d 943, 947. But "[p]rivity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity." *Id*. "Thus, the question of privity has been restated in terms of whether a nonparty was 'sufficiently close' to an unsuccessful party in a prior action as to justify the application of collateral estoppel against the nonparty." *Id.* at 948. "In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal. App. 4th 82, 90-91.

It would be fair to do so here. The alleged victim is also the prior litigant. This criminal prosecution is designed to protect Dziubla's rights as a supposed victim—which is exactly what his civil case purported to do. Mr. Dziubla and his attorneys were a fair proxy for the District Attorney in their motivation and zeal to represent this alleged victim, and it would simply be unfair to allow Dr. [redacted] to be subjected to continued, vexatious litigation after having prevailed on the underlying civil matter. For all of these reasons, privity should be said to exist, and collateral estoppel applied.

3. This Court need not rely on collateral estoppel, because the litigation privilege applies regardless.

But the Court could also hold that litigation privilege applies on the merits. The law is clear: attempts to acquire litigation funding fall squarely within the litigation privilege. *See Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 826 ("If the defendant's financing of a lawsuit is constitutionally protected it follows that speech exhorting others to do the same is also protected."). In *Wilcox*, the court explained that if a party to litigation sends a communication soliciting contributions to fund the litigation, that party "enjoy[s] an absolute immunity from suit under the litigation privilege of Civil Code section 47, subdivision (b)." 27 Cal. App. 4th at 826.

The communication here "exhort[s] others" to finance the lawsuit within the meaning of *Wilcox*. It was drafted after the lawsuit was filed. Under *Rosenthal*, it was a "publication that has any reasonable relation to the action"; and it was "made to achieve the objects of the

litigation"—winning the case and saving Front Sight. And again, the litigation privilege covers criminal actions like this one. Whether this Court relies upon the findings of the prior civil court, or looks at the litigation-privilege issue with fresh eyes, the result should be the same: the litigation privilege applies, and the complaint is barred.

B. The complaint should also be dismissed because it is facially unconstitutional.

1. Penal Code § 653.2 violates the First Amendment because it targets speech, and does not fit one of the "narrow exceptions" that would render it constitutional.

As a relatively new statute,[38] Penal Code § 653.2's constitutionality has not been tested.[39] But a review of constitutional case law shows that this statute violates the First Amendment (both facially and as applied); that it is overbroad; and that it is unconstitutionally vague as well.

a. Penal Code § 653.2 targets speech, and thus is presumptively unconstitutional under the First Amendment.

The First Amendment prohibits any law "abridging the freedom of speech, or of the press." This freedom of speech is a fundamental right applicable to the states through the due process clause of the Fourteenth Amendment. *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 133. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, (2002) 535 U.S. 564, 573. As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that

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[38] There are no model CALCRIMs for this offense. *See* CALCRIM, Table of Statutes. Section 653.2 resides in the Penal Code between § 653.1, which criminalizes "release of balloons constructed of electrically conductive material" and the since-repealed § 653.5, "compensation by an estate appraiser" (repealed 1988).

[39] There is one published case evaluating the statute, *People v. Shivers*, (2015) 235 Cal. App. 4th Supp. 8, 12. The opinion did not address any First Amendment concerns, overbreadth, or vagueness challenges to the statute. It was a sufficiency and jury-instructions challenge only.

the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union*, (2004) 542 U.S. 656, 660.

There is no question that the statute specifically targets speech. Setting aside for a moment the *mens rea* required, the *activity* being punished includes "electronically distribut[ing], publish[ing], e-mails, hyperlinks . . . electronic message[s]" and "electronic communication[s]." The title of the statute is "use of electronic *communication* to instill fear or to harass." Whether proscribing "publishing" "messages" or "communications," the statute unquestionably infringes on *speech*. The question becomes whether the speech that is prohibited fits into one of the "narrow exceptions" defined by law. For the reasons set forth below, it does not.

b. The statute is not limited to "true threats" because it criminalizes speech far beyond intentions to commit actual violence.

The People may argue that this statute protects against unconstitutional "threats," and thus is a valid regulation of speech. But under the First Amendment, speech is only an unprotected "true threat" if it "is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *People v. Bolin* (1998) 18 Cal. 4th 297, 338. Case law shows how high a bar this is. In *Watts v. United States* (1969) 394 U.S. 705, a speaker at a political rally said that he had just received a draft notice to report for military service, adding that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J.'" 394 U.S. at 706. He was charged and convicted for threatening the President. The United States Supreme Court reversed, deeming the statement to be mere "political hyperbole," *id.* at 708, and, as such, not supporting the conviction for threatening to harm the President. *Id.* at 706–707. *See also Virginia v. Black* (2003) 538 U.S. 343, 359-364 (striking down state criminal statute that made it unlawful "for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.'")

In light of this Supreme Court authority, California courts construe criminal statutes "as applying only to those threatening statements that a reasonable listener would understand, in

light of the context and surrounding circumstances, to constitute a true threat, namely, 'a serious expression of an intent to commit an *act of unlawful violence*' rather than an expression of jest or frustration." *People v. Lowery*, 52 Cal. 4th 419, 427 (2011) (internal citations omitted). "The latter category carries First Amendment protection; the former does not." *Id.*

The statute here criminalizes substantially more than stated intentions to commit "an act of *unlawful violence*." On its face, it also prohibits statements made "for the purpose of . . . causing . . . unwanted physical contact, injury, or harassment." And "harassment" includes conduct deemed "seriously annoying." While it is anyone's guess what "seriously annoying" *is*, what it is *not* is an "act of violence." Because the statute is not restricted to threatened acts of violence, it is not saved by the "true threats" exception.

c. The statute does not fit within the Brandenburg exception for "imminent lawless action" either.

The People may also argue that this statute fits into the First Amendment's "inciting unlawful action" exception. That argument does not save this statute either. The initial "incitement" case was *Brandenburg v. Ohio*, (1969) 395 U.S. 444, 445. Reversing convictions of Ku Klux Klan members under an Ohio statute, the Supreme Court held that even the advocacy of violence may not be proscribed "except where such advocacy is directed to inciting or producing *imminent* lawless action *and is likely to incite or produce such action.*" *Id.* at 433-34 (emphasis provided). Thus an "incitement" statute, to be constitutional, must be limited to action that is 1) *imminent*; and 2) *likely* to produce the unlawful action. California law today reaffirms *Brandenburg*'s teachings. *See e.g. In re M.S.*, (1995) 10 Cal. 4th 698, 714 (discussing "the rule in *Brandenburg* . . . that to forfeit constitutional protection the speech must be 'directed to inciting . . . *imminent* lawless action' *and* must be *likely* to do so.") (emphasis provided).

Penal Code § 653.2 goes far beyond *Brandenburg* and its progeny. The statute tries to build in the "imminence" requirement, but fails. It lists as an element "the purpose of imminently causing . . . unwanted physical contact, injury, or harassment" but the defendant's

purpose is not the same thing as actual, objective imminence, which is what the law requires. And even more glaringly, there is no "likely to produce" element in the statute at all. Because speech remains constitutionally protected unless it is both 1) directed to imminent lawless action *and* 2) likely to do so, this statute is unconstitutional. Dismissal should result.

2. Section 653.2 is also void for vagueness.

"A facial vagueness challenge is based on the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and on article I, section 7 of the California Constitution." *In re Jorge G.*, (2004) 117 Cal. App. 4th 931, 938 (citing *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567). Under both the federal and the state Constitutions, vagueness invalidates a criminal statute if the statute "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or if it "may authorize and even encourage arbitrary and discriminatory enforcement." *People v. Castenada* (2000) 23 Cal.4th 743, 751 (internal punctuation and citations omitted).

It is true that "a court may reform—i.e., 'rewrite'— a statute in order to preserve it against invalidation under the Constitution," but only when it "can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and ([redacted] the enacting body would have preferred the reformed construction to invalidation of the statute." *In re Jorge G.*, 117 Cal. App. 4th at 941 (holding the word "gang" void for vagueness, but adopting the definition of "criminal street gang" set forth in section 186.22 based on the apparent intent of the voters to employ that definition).

There are several facets of the statute that fail to provide constitutionally adequate notice.

First, it does not define "safety" in the element of "intent to place another person in reasonable fear of his or her safety." Merriam-Webster defines "safety" as "the condition of being safe from undergoing or causing hurt, injury, or loss."[40] Dictionary.com defines it as "the

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[40] https://www.merriam-webster.com/dictionary/safety, last visited August 11, 2019.

state of being safe; freedom from the occurrence or risk of injury, danger, or loss" and alternatively, "the quality of averting or not causing injury, danger, or loss."[41] Even assuming that "hurt" and "injury" means physical hurt and injury, does the statute intend to fear of financial "loss"? Professional "danger"? Property "loss"? Other unnamed dangers?

A different element requires that the communication be done "for the purpose of imminently causing . . . unwanted physical contact, injury, or harassment." These definitions are not self-explanatory, and to the extent that the statute goes on to define "harassment," it makes matters worse. Under § 653.2(c)(1), "'Harassment' means a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose." What does "seriously annoying" mean? Who can guess how, if at all, "serves no legitimate purpose" narrows the statute's reach? Who decides whether a purpose is legitimate or not? And by what standard? Ultimately, the statute raises more questions than it answers, and leaves too much discretion to prosecutors and police to enforce its terms.

Because the statute provides no meaningful guidance on "safety," "harassment," "seriously annoying," and "serves no legitimate purpose," among other omissions, the statute is void for vagueness. The complaint should be dismissed for this reason too.

3. Section 653.2 is Overbroad.

Under the overbreadth doctrine, "litigants may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression." *In re*

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[41] https://www.dictionary.com/browse/safety, last visited August 11, 2019. Both dictionaries also alternatively define "safety" as the defender in American football furthest from the line of scrimmage. While admittedly, it is unlikely that the statute concerns itself with football teams' secondaries, the fact remains that it does not define the sort of "safety" fears that can trigger criminal punishment.

M.S. (1995) 10 Cal.4th 698, 709. In order to avoid overbreadth, "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611–612. *See also People v. Astalis*, (2014) 226 Cal. App. 4th Supp. 1, 6-7.

Mr. [redacted] own speech would be punished by the application of this statute, as discussed in the section below. But the fact remains that the statute is overbroad on its face too. One can envision a host of unconstitutional applications of this law, threatening speech far beyond the case at bar. Because Penal Code § 653.2 is overbroad, this statute should be deemed unconstitutional.

C. The statute is unconstitutional as applied to Dr. [redacted] Action Alert.

Though Penal Code § 653.2 is unconstitutional on its face, it would not be necessary to fashion a holding that broad in order to grant this motion. "It hardly needs repeating that the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" *Hess v. Indiana*, (1973) 414 U.S. 105, 107. To safeguard these constitutional principles, trial and appellate courts both have an independent duty to evaluate whether speech is protected by the First Amendment. *See Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485.[42]

That independent evaluation should lead to dismissal. The facts of this case largely boil down to the communication set forth in Exhibit A-2. The Court is on solid footing to hold that *these* words, in the context of litigation, and without any hint of resulting violence to Mr.

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[42] *See also In re George T.*, (2004) 33 Cal. 4th 620, 632 ("we conclude that a reviewing court should make an independent examination of the record in a section 422 case when a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat.").

Dzuibla, cannot constitutionally be punished under § 653.2. It could do so without reaching the question of whether § 653.2 might be re-interpreted in a constitutional manner in a different case.

In *this* case, Dr. [redacted] made an impassioned plea to fellow members of the Front Sight community. He sought to drum up support for his litigation against Mr. Dzuibla, both financial and otherwise. This is core protected speech, and there is no First-Amendment exception—"true threats," "incitement", or otherwise—that allows it to be suppressed. The statute is unconstitutional as applied.

IV.

Conclusion

For all of these reasons, Dr. [redacted] respectfully requests that this complaint be dismissed with prejudice.

Dated: August 13, 2019

Respectfully submitted,

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