IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Case No. C083588

KIMBERLY McCAULEY,
Plaintiff/Respondent

v.

TODD V. PHILLIPS,
Defendant/Appellant,

On Appeal from the Superior Court of Sacramento
Case No. 34201670000487, Honorable Raoul Thorbourne, Judge

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND PROFESSORS AARON CAPLAN AND EUGENE VOLOKH IN SUPPORT OF DEFENDANT/APPELLANT

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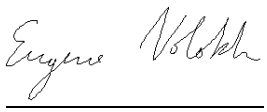
* Counsel would like to thank Jenna Mersereau, Jennifer Milazzo, and Jordan Wolf, UCLA School of Law students who worked on this brief.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Electronic Frontier Foundation is a tax-exempt nonprofit organization headquartered in California. It has no parent corporation and no stock.

Dated: March 22, 2018

Respectfully Submitted,

By: 

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INTRODUCTION

The trial court ordered Todd Phillips not to "post photographs, videos, or information about [Kimberly McCauley] to any internet site and to remove the same from any internet site over which he has access or control." But the First Amendment protects people's right to speak about others, including using others' images and "information about" them. Indeed, such speech is a staple of news reporting, opinion writing, and even casual Facebook conversations.

To be sure, there are some narrow categories of speech that can be restricted, such as libel and true threats of criminal conduct. And unwanted speech *to* a particular person can be restricted, which is why telephone harassment laws, for instance, are constitutional. But there is no general exception for opinions and accurate factual claims *about* a particular person. The injunction is thus an unconstitutional prior restraint.

This would be so even if the injunction simply suppressed purely personal criticisms; but here, the injunction is broad enough to cover a wide range of political advocacy as well, such as:

- Phillips' writing a blog post that criticizes McCauley for her stance on vaccination laws, since any such criticism would necessarily include some "information about" McCauley.

- Phillips' creating a Facebook page for a political campaign that advertises his commitment to anti-vaccination principles by recounting his past exchanges with McCauley.
- Phillips' Tweeting about McCauley as an example of an anti-vaccination activist who has supposedly endangered her family through vaccination.
- Phillips' criticizing McCauley on a Facebook page for seeking this injunction.
- Phillips' criticizing the injunction online for preventing his speaking about McCauley, since such criticism would likewise have to include some information about McCauley.
- Phillips' posting on an anti-vaccination message board that he is subject to this order, and explaining McCauley's rationale for getting the order, as a way of warning others about the possible consequences of their speech.

The injunction therefore violates the First Amendment, and this Court should vacate it. (*Amici* express no opinion on the procedural questions raised in Part IV of McCauley's brief.)

ARGUMENT

I. The Injunction Unconstitutionally Forbids Protected Speech About a Person That Does Not Fall Within One of the Narrow Categories of Restrictable Speech

A. Injunctions May Not Forbid Protected Speech About a Person Said to a Willing Listener

The U.S. Supreme Court has consistently forbidden restrictions on speech that is said to a willing audience and that falls outside

a few narrow, traditionally recognized categories (such as libel or true threats). For example, in *Organization for a Better Austin v. Keefe,* an activist group distributed pamphlets about real estate agent Keefe to people in his neighborhood. ((1971) 402 U.S. 415, 419.) The pamphlets criticized Keefe's real estate practices and urged readers to pressure him to change those practices. The pamphlets also included Keefe's personal telephone number so that people could call him directly with their criticisms. (*Id.* at 417.)

A state court enjoined the distribution of the pamphlets, but the U.S. Supreme Court vacated the order on First Amendment grounds. The Court stressed that the plaintiff was not "attempting to stop the flow of information into his own household, but to the public"; the called this an "important distinction." (*Id.* at p. 420.) And the plaintiff's interests in privacy and avoiding offensive criticism could not justify the injunction (*Id.* at pp. 419-20.) "[S]o long as the means are peaceful," the Court held, "the [pamphlets] need not meet standards of acceptability." (*Id.* at p. 419.)

Likewise, in *NAACP v. Claiborne Hardware Co.*, the Court held that speakers were entitled to publicly criticize even private citizens, and even when such criticism risked stimulating attacks on those citizens. ((1982) 458 U.S. 886.) In *Claiborne Hardware*, the petitioners declared a boycott against white businesses, and enforced this boycott by stationing observers outside white-owned stores and then announcing—on leaflets and orally in local black

churches—the names of those black residents who were seen shopping at the stores. (*Ibid.*) The residents "'were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites.'" (*Id.* at p. 904 (citation omitted).)

Even though the speech was intended to be coercive, and was doubtless seen as such by many of its subjects, the Court held that the First Amendment protected such public naming and shaming: "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." (*Id.* at pp. 909-10.) The Court therefore set aside an injunction against such speech, as well as damages liability for the speech. (*Id.* at pp. 893, 924 n. 67, 934.)

Like the injunctions in *Keefe* and *Claiborne Hardware*, the injunction against Phillips is unconstitutionally overbroad because it tries to stop the flow of information to the public at large. Just as the NAACP's public labeling of those who defected from the boycott as "traitors" was protected speech, so was Phillips' public accusation that McCauley was a traitor to the anti-vaccination movement. That Phillips' speech may have been critical or designed to change McCauley's behavior cannot justify the injunction, as both *Keefe* and *Claiborne Hardware* make clear. Indeed, the injunction against Phillips is even broader than the *Keefe* injunction because

it prevents him from posting to the Internet, which has an even wider audience than leaflets.

Restrictions on unwanted speech *to* a person can be constitutional because speech said specifically to an unwilling listener is less valuable than other speech. This speech is unlikely to persuade or enlighten anyone, precisely because the sole listener does not want to hear it. "[N]o one has the right to press even 'good' ideas on an unwilling recipient." (*Rowan v. U.S. Post Office Dep't* (1970) 397 U.S. 728, 738 [upholding restrictions on direct mailings to people who had asked not to be contacted]; Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"* (2013) 107 Nw. U. L.Rev. 731, 740-51 [arguing that unwanted speech to a person is less protected than speech about a person]; Aaron H. Caplan, *Free Speech and Civil Harassment Orders* (2013) 64 Hastings L.J. 781, 782 [likewise].)

But this rationale for restricting speech to an unwilling listener cannot be extended to restrictions on speech to the public, even when it may include willing listeners; *Keefe* makes that clear, and the Supreme Court has since reaffirmed this. For instance, in upholding a narrow restriction on certain kinds of residential picketing, the U.S. Supreme Court in *Frisby v. Schultz* stressed that the targeted speech was "narrowly directed at the household, not the public"—but "more generally directed means of communication" cannot be similarly banned. ((1988) 487 U.S. 474, 484, 486 (citing *Keefe*, *supra*, 402 U.S. at 420).)

Likewise, in *Hill v. Colorado*, the Court upheld restrictions on approaching patients of a healthcare facility within eight feet without their consent—but it did so only after both stressing that visitors to "health care facilities . . . are often in particularly vulnerable physical and emotional conditions" and "reiterating that only attempts to address unwilling listeners" were affected. ((2000) 530 U.S. 703, 717, 727.) "It is . . . important . . . to recognize the significant difference," the Court in *Hill* wrote, "between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." (*Id.* at pp. 715-16.) The law in *Hill* "deal[t] only with the latter" (*id.*); the injunction here deals with the former, by denying Phillips the right to speak online about McCauley, even to willing readers.

Indeed, the Supreme Court has made clear that even outrageous and highly emotionally distressing speech about a person is fully protected by the First Amendment, at least so long as it is connected to matters of public concern (as the vaccination debate certainly is). In *Snyder v. Phelps*, the U.S. Supreme Court protected the speech of protesters who displayed signs that said "Thank God for Dead Soldiers" at the funeral of a deceased marine. ((2011) 562 U.S. 443, 456.) The Court recognized that, though the speech caused the marine's father "anguish" and "incalculable grief," the First Amendment precluded the father's tort action against the protesters for intentional infliction of emotional distress: "[I]n public debate [we] must tolerate insulting, and even

outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." (*Id.* at p. 458 [citations omitted].) Likewise, Phillips' speech about McCauley is at least as constitutionally protected.

B. State Courts Follow the U.S. Supreme Court in Striking Down Overbroad Harassment Injunctions

Many state courts have applied *Claiborne* and *Keefe*—distinguishing between speech to a person and speech about a person—to strike down overly broad civil harassment injunctions.

For instance, in *David v. Textor*, the Florida Court of Appeal struck down an anti-cyberstalking injunction barring a businessman from continuing his pattern of speech sharply criticizing his rival. ((Fla.Dist.Ct.App.2016) 189 So.3d 871, 874.) The court found that the injunction was an unconstitutional "prior restraint" because it prevented "not only communications *to* Textor, but also communications *about* Textor." (*Id.* at p. 876 [emphasis in original].)

Similarly, in *Fox v. Hamptons at Metrowest Condominium Ass'n, Inc.*, the Florida Court of Appeal struck down an injunction barring a condominium owner from continuing his campaign of sharp personal criticism against the condominium association and its officers, employees, and residents. ((Fla.Dist.Ct.App.2017) 223 So.3d 453.) The court expressly relied on *Keefe*, saying "'[n]o prior decisions support the claim that the interest of an individual in

being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." (*Id.* at p. 457 (quoting *Keefe*, 402 U.S. at 419).)

Likewise, in *Van Liew v. Stansfield*, the Massachusetts high court struck down a civil harassment order that ordered a critic of a planning board member not to mention the member's "name in any email, blog, [T]witter or any document." ((2016) 474 Mass. 31, 33-34.) The court held that even a narrower "harassment prevention order"—based in part on the critic's "calling [member Colleen Stansfield] corrupt and a liar"—was unconstitutional, and could form the basis of a malicious prosecution lawsuit by the critic against the politician. (*Ibid.*)

California courts have taken the same view, including in cases where the speech restriction was aimed at protecting privacy. In *Evans v. Evans*, the Fourth District struck down a preliminary injunction prohibiting an ex-wife and her mother from, among other things, posting "false and defamatory statements" and "confidential personal information" about her ex-husband online. ((2008) 162 Cal.App.4th 1157, 1161.) Though the ex-husband argued the speech was harassing and intruded on his privacy, the court held that the injunction was unconstitutionally overbroad. (*Ibid.*)

Similarly, in *R.D. v. P.M.* (2011) 202 Cal.App.4th 181), the Second District upheld an injunction against unwanted speech to a person, but only after stressing that the injunction did not restrain online speech about that person. The injunction in that case barred

only in-person, e-mail, and telephone communications to R.D., or approaches within 100 feet of her and her family. (*Id.* at pp. 184-86.) The court concluded that this injunction did not violate the appellant's First Amendment rights precisely because it "does not prevent P.M. from expressing her opinions about R.D. in any one of many different ways; she is merely prohibited from expressing her message in close proximity to R.D. and her family." (*Id.* at p. 191.) The court highlighted that the injunction was not "content-based" and left appellant open to "distributing flyers about R.D." and "posting derogatory criticisms of R.D. on Internet sites." (*Ibid.*) Yet the injunction issued against Phillips expressly forbids any posting of any "information" about McCauley on "any Internet site," and does so based on the content of speech. (*See, e.g.*, *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 903 (concluding that a restriction on speech that uses information about a person for the speaker's advantage and against the subject's consent "clearly restricts speech based upon its content").)

Indeed, these precedents fit well with the California Supreme Court's reasoning in *Balboa Island Village Inn, Inc. v. Lemen*, which held that an injunction may only cover speech that has been previously determined to fall within one of the narrow categories of restrictable speech, such as defamation. In *Balboa*, the injunction barred the defendant from, among other things, making various accusations about the Balboa Island Inn and its personnel (such as that the inn was a whorehouse, that it served tainted food,

and that the plaintiff owner encouraged lesbianism). ((2007) 40 Cal.4th 1141, 1162.)

The Court upheld only those parts of the injunction limited to forbidding proven libel: "Such an injunction, issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression." (*Id.* at 1156.) And the Court struck down those parts of the injunction that more broadly banned speech to Inn employees, some of whom might have been willing listeners. (*Id.* at 1161.) The injunction against McCauley is invalid under *Balboa Inn* because Phillips' words were not found to be defamatory, or covered by any of the other First Amendment categories of restrictable speech.

These careful distinctions drawn in *Balboa*, with a stress that the injunction must be "issued only following a determination at trial that the enjoined statements are defamatory," would be pointless if a court could just categorically ban all speech by a person that conveys any "information" about another speaker—entirely without regard to whether the information has been determined at trial to be defamatory. Indeed, upholding the injunction in this case would thus allow an end-run around *Keefe*, *Balboa Inn*, and other precedents that protect criticism for suppression. Nor does § 527.6 call for such a result: it carefully describes what should be included in an order, § 527.6(b)(6), and a ban on all "photographs,

videos, or information about" a plaintiff is not listed, likely because, given *Keefe*, *Balboa Inn*, and similar cases, such a ban is unconstitutional.

Unsurprisingly, no California precedent authorizes injunctions as broad as the one in this case, at least when the injunctions are broad enough to cover speech related to matters of public concern. The injunction in *In re Marriage of Evilsizor & Sweeney* for instance, was limited to Sweeney's disseminating material on matters of purely private concern that he had downloaded from his ex-wife's phone. (2015) 237 Cal.App.4th 1416, 1428. Here, the injunction covers all "information," including in the context of a debate on a matter of public concern—the safety of vaccination, and hence the credibility of anti-vaccination activists—and including information derived from legitimate sources.

In *Phillips v. Campbell,* the Second District did say that, "[i]f the issue were properly before us, we would reject [Campbell's First Amendment] argument" challenging an order barring "post[ing] photographs, videos, or information about [Phillips] to any internet site." ((2016) 2 Cal.App.5th 844, 853 (internal quotation marks and citation omitted).) But that case arose in a very different context: the breakup of a dating relationship, with nothing to suggest that the photographs or information had anything to do with any political debate or any other issue of public concern. Moreover, Campbell had "forfeited the issue because he has failed to present meaningful legal and factual analysis, with supporting

citations to pertinent authority and the record, on why his first amendment rights were violated" (*id.)*; the court's brief substantive response to the argument was thus dictum. And it was indeed dictum offered without the benefit of careful adversarial argument in that case: Defendant Campbell, who was acting *pro se* in that case, cited no First Amendment precedents in his briefs.[1]

McCauley claims that the injunction against Phillips "was as narrow, or even more so, than those approved by" *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, *Huntington Life Sciences v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, and *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121. (McCauley's Br. 32.) But each of those cases simply illustrates how overbroad the injunction against Phillips is.

1. *Kingsley* upheld a statute that authorized injunctions against distributing material found by a court to be obscene (coupled with the possibility of a pre-trial injunction lasting for a few days).[2] In

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[1] *See* Appellant's Opening Brief, *Phillips*, at 44-48, http://www.law.ucla.edu/volokh/Amiciclinic/mccauley/phillipsvcampbell1.pdf; Appellant's Response [Reply] Brief, *id.*, at 46-48, http://www.law.ucla.edu/volokh/Amiciclinic/mccauley/phillipsvcampbell3.pdf.

[2] The statute provided that a defendant was "'entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.'" 354 U.S. at 439 (citation omitted).

its closing paragraph, the majority opinion stressed that the statute "is concerned solely with obscenity and . . . studiously withholds restraint upon matters not already published and not yet found to be offensive" (meaning, in this context, obscene). (*Id.* at p. 445.) The injunction against Phillips is not concerned solely with libel or any other category of unprotected speech, but restrains all future speech about McCauley, libelous or otherwise.

Indeed, the injunction against Phillips is precisely the sort of speech restriction that *Kingsley* condemned. *Kingsley* described the law struck down in *Near v. Minnesota ex rel. Olson* (1931) 283 U.S. 697, as allowing "courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," which was " '. . . of the essence of censorship.' " (354 U.S. at 445 (quoting *Near*, 283 U.S. at 713)). "This was enough to condemn the statute [in *Near*]." (*Id.*) The injunction against *Phillips* likewise enjoins the dissemination of future speech by Phillips because his past speech had been found offensive.

2. *Huntingdon* actually held that the injunction in that case was unconstitutionally overbroad. The injunction barred defendants from "posting or maintaining on any Web site any information regarding" Huntingdon employees or family members (*id.* at pp. 550, 551-52); the Fourth District held that this went too far, because defendants had to remain free to say various things about Huntingdon employees, such as noting if those employees are ever convicted of animal cruelty, or republishing news stories that mention

Huntingdon employees. And even the narrower restriction that *Huntingdon* authorized was justified only because defendants were found to have published "credible threat[s] of violence" against Huntingdon employees. (*Id.* at p. 544.) Here, the injunction bars publication of all "information" about McCauley, with no exception, and with no finding of "credible threat[s] of violence."

3. The injunction in *Aguilar* banned only the repeated use of "derogatory racial or ethnic epithets" said to or about Hispanic coworkers. (21 Cal.4th at 128.) The injunction against Phillips bars all online speech conveying any "information" about McCauley, not limited to epithets.

Moreover, Justice Werdegar's concurrence in the judgment in *Aguilar*—which provided the necessary fourth vote for the result—stressed that the reasoning of *Aguilar* was limited to "modest time and place restrictions" (*id.* at p. 169 (conc. opn. of Werdegar, J.)) focused on speech in the special context of the workplace, where employees constitute a "captive audience" (*id.* at pp. 159-61, 169). The concurrence expressly said that the injunction was constitutional "if sufficiently narrowed on remand to apply to the workplace only." (*Id.* at p. 166.) The injunction against Phillips is of course not limited to workplace speech.

II. The Injunction Is Not Justified by Phillips' Mention of McCauley's Daughter

Speech does not lose its First Amendment protection because it is about a minor. Sexually themed photographs of minors can be

banned as child pornography. (*Ferber v. New York* (1982) 458 U.S. 747.) Likewise, some sexually themed speech to a minor may be forbidden as obscene as to minors. (*Ginsberg v. New York* (1968) 390 U.S. 629, 673.) But the U.S. Supreme Court has rejected attempts to expand these narrow exceptions beyond the context of sexual depictions. (*See Brown v. Entm't Merchants Ass'n* (2011) 564 U.S. 786, 793 [expressly refusing to extend the obscene-as-to-minors exception to cover nonsexual depictions of violence].) Speech about minors continues to be protected; for instance, the U.S. Supreme Court has rejected prohibitions on publishing the names of minors involved in juvenile court proceedings. (*See Oklahoma Publishing Co. v. Oklahoma County District Court* (1977) 430 U.S. 308; *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97.)

Indeed, state courts have struck down even those laws that are limited to speech intended to "harass" or "torment" minors. The New York high court held an ordinance that banned cyberbullying "with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" was unconstitutional, even if the ordinance were read as limited to minors. (*People v. Marquan M.* (2014) 24 N.Y.3d 1, 10-11.) "[T]he First Amendment protects annoying and embarrassing speech, even if a child may be exposed to it." (*Id.* at p. 11.)

Likewise, the North Carolina Supreme Court recently struck down a ban on speech that intentionally "torment[s]" a minor, even though the ban was limited to speech that reveals "private, personal, or sexual information pertaining to a minor." (*State v. Bishop* (2016) 368 N.C. 869, 872.) "[H]owever laudable the State's interest in protecting minors from the dangers of online bullying may be, North Carolina's cyberbullying statute 'create[s] a criminal prohibition of alarming breadth,'" which was unconstitutional. (*Id.* at pp. 879-80 (citation omitted).)

The injunction in this case is even more extreme than these criminal prohibitions. The injunction is not limited to speech about minors. It is not limited to speech that conveyed a minor's "private, personal, or sexual information." It is not limited to speech intended to "harass," "torment," and the like. And, being an injunction, it is a prior restraint on speech, "the most serious and the least tolerable infringement on First Amendment rights." (*Evans*, 162 Cal.App.4th at 1166-67.) Given that narrower criminal prohibitions limited to speech about minors were found to be unconstitutionally overbroad, this injunction is certainly invalid.

CONCLUSION

The injunction in this case bars Phillips from talking about McCauley, his political adversary, in the context of a heated debate on a public matter. It limits his ability to publicly explain his disagreement with her. It limits his ability to argue that she ought

not be trusted. Indeed, it even limits his ability to condemn the injunction itself and her role in asking for this injunction.

Speech can be restricted when it is threatening, defamatory, or fits within any other narrow category of unprotected speech. Speech *to* an unwilling listener can also be restricted. But this injunction goes far beyond that, restricting a wide range of speech *about* a person. That is inconsistent with U.S. Supreme Court precedent, California precedent, and many considered decisions from other courts. The injunction should therefore be vacated.

DATED: March 22, 2018

Respectfully Submitted,

By: s/ Eugene Volokh

Eugene Volokh

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Century Schoolbook font including footnotes and contains 3,796 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of Word 365, the computer program used to prepare this brief.

Dated: March 22, 2018

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