3rd Civ. No. **C083588**

IN THE

Court of Appeal

STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

KIMBERLY McCAULEY,
Plaintiff/Respondent,

v.

TODD MATTHEW PHILLIPS,
Defendant/Appellant,

Appeal from the Superior Court of the State of California
for the County of Sacramento
Case No. 34-2016-70000487-CU-HR-GDS
Hon. Raoul M. Thorbourne

RESPONDENT'S BRIEF

[redacted]

Respondent In Pro Per
KIMBERLY McCAULEY
[redacted]

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I.

STATEMENT OF THE CASE

This appeal arises from the denial of a motion for new trial after the Superior Court's grant of a restraining order pursuant to California Code of Civil Procedure § 527.6. On June 16, 2016, Respondent McCauley filed a petition for a civil harassment restraining order against Appellant Phillips, an attorney. A noticed hearing was scheduled for July 1, 2016; it was continued to July 22 after service upon Phillips had not been achieved. On July 22, both parties made appearances at the continued hearing and testified. A second hearing was held on July 29, 2016, at which both parties appeared and were again given the opportunity to testify. Based on Appellant Phillips' dispute of the Court's personal jurisdiction over him, the Court allowed additional briefing to be filed. After the additional briefing, and the testimony and exhibits presented in previous hearings, the Court granted a permanent restraining order against Phillips in a written order dated September 8, 2016 and served by mail that same day. On September 19, 2016, Phillips filed a motion for new trial, which was not granted. On December 5, 2016, 87 days after the grant of McCauley's petition for a civil harassment restraining order, Phillips filed a notice of appeal.

II.

STATEMENT OF FACTS

Respondent Kimberly McCauley (hereinafter "McCauley") is a working mother of three small daughters all under preschool age. She is also an activist who is opposed to California's mandatory vaccination law. Respondent Todd Matthew Phillips (hereinafter "Phillips") is a California attorney who calls himself a "vaccine abolitionist."[1] (1 CT 10:5)

In 2016, McCauley became Phillips' target in a campaign of malicious online harassment and cyber-bullying. Phillips targeted McCauley with harassing Facebook posts and multiple fake Facebook profiles impersonating McCauley, after McCauley challenged Phillips' radical stance and methods, and instead advocated a more moderate vaccine-education agenda.

Phillips created around 50-100 Facebook posts about McCauley, initially ridiculing her and accusing her of failing to support the anti-vaccination cause, but his posts soon turned more serious and bizarre: Phillips began accusing McCauley of being a "pro-vaxxer" in disguise, a pharmaceutical company corporate spy who had infiltrated the anti-vaccination movement, and claimed he

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[1] Phillips is plaintiffs' counsel in *Buck et al. v. State of California*, LASC Case No. BC617766 (challenging the 2015 vaccination law SB277; dismissed without leave to amend Oct. 20, 2016 on demurrer), currently on appeal in the 2nd District (captioned there as *Brown et al. v. State of California*, Case No. B279936).

had proof that she was a spy, that her name was a fake identity, and that her children weren't really her own. Further posts went so far as to publish pictures of two of McCauley's little daughters, with captions suggesting that McCauley was harming her own children and that Phillips intended to take them away from her. McCauley consulted an attorney, who sent Phillips a cease-and-desist letter. Phillips responded by using Facebook to post an image of the letter, which he had defaced by superimposing the typed phrase "All work and no play makes Jack a dull boy" over and over across the letter. This was an unmistakable reference to the Stephen King horror movie "The Shining," in which the main character, a psychotic killer, typed those words over and over, just as Phillips had, before trying to murder his entire family. Phillips created his harassing posts primarily on his personal Facebook page, which has hundreds of followers, many of whom who are fanatical in their support of Phillips and his extreme behavior and accusations. Afraid for her own safety and that of her children, McCauley filed for a civil harassment restraining order (hereinafter "CHRO") to try to make the harassment stop.

Phillips initially disputed that he had been properly served, but later changed his mind, and indicated that he had accepted service. (1 CT 7:8) In two hearings in the lower court, Phillips did not dispute that he had created the Facebook posts at issue; instead, he argued that McCauley should be held in contempt for saying that Phillips had been properly served. He also argued that he could not be held liable because the photos of McCauley and her children that he harassed

them with were allegedly in the public domain; that any attempt to make him stop harassing McCauley would be a violation of his freedom of speech; and that McCauley was part of a vast conspiracy by pharmaceutical companies to destroy the anti-vaccine movement by planting moderates in their ranks. Phillips further argued that "Kimberly McCauley" was not McCauley's true identity, and that her children were not really her own. Even in his written declaration, Phillips continued his false and paranoid assertions, such as: "Petitioner is a pro-vaccinationist lobbyist who hates my anti-vaccinationist lawsuit!" (1 CT 10:6-7) and "Petitioner...works for the national vaccine lobby. Her job is to spread rumors and lies about my lawsuit." (1 CT 11:3-4)

Based on the exhibits presented by McCauley in her initial petition, the testimony received from the parties, and the written declarations presented, the lower court determined that the standards of CCP § 527.6 had been met. (1 CT 39:15-17). The judge granted McCauley's petition for a permanent civil harassment restraining order, and issued a lengthy written order. (1 CT 38-43) Phillips filed a motion for new trial (1 CT 52-103), which the lower court denied, again issuing a written order. (1 CT 116-117) This appeal followed.

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III.

SUMMARY OF ARGUMENT

This appeal is fatally defective, procedurally and substantively. It must be dismissed for lack of jurisdiction based on non-appealability and untimeliness.

First, Phillips appeals the denial of his motion for new trial, but that denial is not an appealable order. The intermediate appellate courts' jurisdiction is created by statute, and they do not have jurisdiction to hear appeals of orders that are explicitly non-appealable.

Second, even if the Court were to treat this appeal as an appeal of the grant of the restraining order, it would similarly have no jurisdiction because the notice of appeal was untimely filed, 87 days after the entry of that order. (1 CT 129) Further, Phillips' having filed a motion for new trial did not extend the time for filing a notice of appeal, because that extension of time is statutorily limited to *valid* motions for new trial. Courts have determined that a motion for new trial filed after a proceeding that does not qualify as a trial is not valid to extend the time to appeal. A hearing for a CHRO does not qualify as a trial, thus Phillips' motion for new trial was not valid to extend time. Therefore, Phillips' time to appeal expired before he filed his notice of appeal.

Third, Phillips claims that he was denied proper process; however, the record shows that Phillips received more than sufficient

statutory process. Phillips' primary argument appears to come from his misreading of *Schraer v. BPOA* (1989) 207 Cal.App.3d 719, which he believes entitles him to a full trial regarding the CHRO. On the contrary, *Schraer* states that allowing testimony in a hearing for a restraining order is important, because there is *no right* to a full trial later.

Fourth, Philips' main substantive argument is that he cannot be prohibited from creating online posts about other people without that restriction violating his right to free speech. Phillips is wrong. The U.S. Supreme Court, California courts, and the California Legislature have all long held that harassment is unprotected speech. Phillips also argues that all prior restraints on speech are unconstitutional. Phillips is wrong again. A vast body of caselaw supports the principle that prior restraints can be constitutional, despite requiring scrutiny.

Phillips' final argument appears to be that there was insufficient evidence presented in the lower court to meet the statutory requirements for a civil harassment restraining order. Yet in bringing this appeal, Phillips has failed to provide this Court with a Reporter's Transcript or the full Superior Court file, rendering himself incapable of showing this Court the body of evidence presented in the lower court. He cannot simultaneously complain about the evidence while intentionally withholding it from this Court.

Phillips' entire appeal appears to be the result of his failure to understand and observe mandatory legal procedure, combined with a deep misunderstanding of the law. His appeal must be dismissed.

IV.

THE APPEAL IS FATALLY PROCEDURALLY DEFECTIVE

A. Phillips Has Appealed a Non-Appealable Order

1. Standard of Review

The question of whether the appeal was properly made is a procedural one; as such it does not review any action or decision of the lower court. Technically, therefore, there is no standard of review in this section. Because this means that the Court will be making an original determination on the matter, the standard could be classified as independent.

2. The Denial of a Motion for New Trial Is Not Appealable

The instant appeal is an appeal of the denial of a motion for new trial.[2] California Code of Civil Procedure § 904.1 identifies the orders and judgments from which an appeal may be taken. An order denying a motion for a new trial does not fall within any category listed. Moreover, CCP § 904.1(4) specifically indicates that an order *granting* a new trial is appealable, but explicitly does not include an order *denying* a new trial. Statutory construction requires giving meaning to all language; thus it is clear that the reference to making a *grant* of a motion for new trial appealable, but not making a *denial* of a motion for new trial appealable, is an intentional decision by the Legislature to exclude such an order from the list of appealable orders

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[2]See cover caption of Appellant's Opening Brief: "Appeal by Respondent-Appellant *from an Order Denying a Motion for a New Trial...*" (emphasis added).

and judgments.

The most likely reason that denial of such an order was not made appealable is that the underlying judgment itself is the logical thing to appeal. This is made all the more clear by the Legislature's provision of an extra 30 days to file a notice of appeal for a party who files a valid motion for new trial. The denial of the motion for new trial would be considered an order after judgment. "To be appealable as an order after judgment, the order must either affect the judgment or relate to it by enforcing it or staying its execution." *Olson v. Cory* (Ca.Sup.Ct. 1983) 673 P. 2d 720; *Williams* v. *Thomas,* (1980) 108 Cal. App.3d 81, 84; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal § 81. The lower court's refusal to grant the new-trial motion did not affect the judgment, or relate to it by enforcing or staying its execution. The refusal to grant the motion in fact kept the judgment exactly as it was. For this reason, it is clear that the denial of Phillips' motion for new trial was not appealable as an order after judgment.

Because the instant matter is an attempted appeal of the denial of a motion for new trial, and a motion for new trial is explicitly not appealable, this appeal must be dismissed. "An appeal does not lie from an order denying a motion for a new trial in a civil case; therefore, the purported appeal from the order denying the motions for new trial is dismissed." *La Cava v. Breedlove* (1946) 77 Cal.App.2d 129; *Gray v. Cotton* (1917) 174 Cal.256, 162 P. 1019. Because the question of appealability is a jurisdictional question, it must be considered by the court. *Olson v. Cory* (Ca. Sup. Ct. 1983) 673 P. 2d

720; *Chavez v. Carpenter* (2001) 111 Cal.Rptr.2d 534. Because the appeal raises an issue that is not appealable, this Court does not have jurisdiction to hear the matter, and must dismiss.

Although the non-appealability of the order being appealed divests this Court of jurisdiction--which itself is independently dispositive--Respondent will nonetheless address the other matters raised.

B. The Notice of Appeal Was Not Timely

1. Standard of Review

The question of whether the appeal was properly made is a procedural one; as such it does not review any action or decision of the lower court. Technically, therefore, there is no standard of review in this section. Because this means that the Court will be making an original determination on the matter, the standard could be classified as independent.

2. Phillips Failed to Timely Challenge the Grant of the Civil Harassment Restraining Order

The most likely reason Phillips chose to appeal the denial of his motion for new trial, rather than the judgment granting the restraining order against him, was that he failed to timely file his notice of appeal to challenge that underlying order. Under California Rule of Court 8.104(a)(1)(A), Phillips had 60 days from September 8, 2016, the date of mail service upon him of the judgment regarding the CHRO. (1 CT 38-43) Phillips' time to file his notice of appeal of that judgment thus

expired on November 7, 2016. Phillips himself concedes this point in the first page of his motion for new trial, where he acknowledges the deadline: "[S]ervice of the notice of entry of judgment, which the Clerk indicates was served on Sept. 8, 2016. Respondent calculates the sixty (60) day period will expire on Nov. 7, 2016." (1 CT 52: 26-28). Phillips filed his notice of appeal on December 5, 2016. (1 CT 129)

3. Phillips' Motion for New Trial Was Not Valid to Extend Time to File Notice of Appeal

Phillips might argue that under CRC 8.108(b), the filing of a valid motion for a new trial grants an additional 30 days to file a notice of appeal. That rule, however, is unavailing to Phillips.

CRC 8.108 is limited to *valid* motions for new trial; California courts have clarified that an invalid motion does not serve to grant any additional time. "An attempted motion for new trial in a case where none is authorized does not extend the time within which an appeal can be taken." *Bice v. Stevens* (1954) 277 P. 2d 106, quoting *Hotel Park Cent.* v. *Security-First Bank* (1936) 5 Cal.App.2d 293. In defining a motion for new trial, CCP § 656 states: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision… ." However, the underlying matter was not a trial. Phillips acknowledges this in his opening brief: "Appellant moved for a new trial because, of course, there was no trial in the first place." (Appellant's Opening Brief [hereinafter "AOB"], p.12). In this, at least, Phillips is correct: the proceeding at issue was not a trial, but a

hearing on a petition for a CHRO. Phillips' oft-cited case of *Schraer v. Berkeley Property Owners' Assoc.* (1989) 207 Cal.App.3d 719, explains that the reason for the different procedural standards in a hearing on a motion for a preliminary injunction, versus a hearing for a restraining order under CCP § 527.6, is that "*[t]here is no full trial on the merits* to follow the issuance of the injunction after the hearing provided by Code of Civil Procedure section 527.6, subdivision (d)." (Id. (emphasis added)). This decision makes clear that under California law, a CCP § 527.6 hearing is not a trial. California law is clear that a hearing on a motion cannot be considered a trial for the purposes of CCP § 656. "It is also settled law that an order ruling on a motion may not be reviewed on a motion for a new trial." *Allen v. California Mutual B. & L. Assn.*, (1940) 40 Cal. App. 2d 374, 377; 20 Cal.Jur. 19, New Trial, sec. 7. Therefore, Phillips is correct that he was not afforded a full trial; he was not entitled to one. Phillips' own cited caselaw demonstrates that the underlying CHRO was outside the scope of a motion for new trial under CCP § 656, and his motion for new trial was thus invalid to extend his time to file a notice of appeal.

4. Without a Valid Motion for New Trial Extending Time, the Notice of Appeal Was Not Timely

In *Hotel Park Central*, as in the instant case, the appellant had filed a notice of appeal more than 60 days after the judgment, but less than 30 days after the ruling on a motion for a new trial. *Hotel Park Central* (1936) 5 Cal.App.2d 293. The court in *Hotel Park Central*

concluded that, like the facts here, the motion for new trial was not valid because the underlying matter had not qualified as a trial within the meaning of CCP § 656. The court ruled that the motion for new trial was not valid and did not extend time to file the appeal. As a result, the appeal was dismissed. California Rule of Court 8.104(b) states, "If a notice of appeal is filed late, the reviewing court ***must*** dismiss the appeal." (Id., emphasis added). The word "must" makes it clear that dismissal of the appeal is mandatory. The untimely filing deprives the appellate court of jurisdiction to hear the appeal. This appeal must be dismissed.

C. Issuance of a Civil Harassment Restraining Order Does Not Require a Full Trial

1. Standard of Review

The question of the process required before granting a civil harassment restraining order is a question of law, requiring interpretation of both caselaw and statutory construction. Pure questions of law are reviewed *de novo* or independently. With regard to contested factual issues, the appellate court applies "the deferential substantial-evidence standard." *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.

2. Phillips' Insistence on a Right to a Trial Is Wrong

In his Opening Brief, Phillips offers a clearly mistaken understanding of *Schraer v. Berkeley Property Owners' Assoc.* (1989)

207 Cal.App.3d 719. Rather than standing for the proposition that a CHRO requires a full trial, as Phillips argues, the *Schraer* decision held just the opposite. There the court ruled that because a CHRO *does not* require a full trial later (whereas a preliminary injunction *does* have a full trial later), it is important that both parties have the opportunity to be heard at the CHRO hearing. *Id.* at 732-33. Code of Civil Procedure § 527.6(g-i) states precisely the process required for the issuance of a CHRO:

> (g) Within 21 days, or, if good cause appears to the court, 25 days from the date that a petition for a temporary order is granted or denied, a hearing shall be held on the petition.
> (h) The respondent may file a response that explains, excuses, justifies, or denies the alleged harassment, or may file a cross-petition under this section.
> (i) At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an order shall issue prohibiting the harassment.

CCP § 527.6 explicitly describes the hearing procedure and makes no reference to a trial and its accompanying procedural requirements. Further, all of the 527.6 hearing process was afforded to Phillips. The Superior Court docket shows that McCauley's original petition for a restraining order was filed on June 16, 2016, and a TRO was issued. A noticed hearing was scheduled for July 1, 2016. That hearing was continued to July 22, because service upon Phillips had not yet been

achieved. The continued hearing was held on July 22, and Phillips both appeared and testified. A second hearing was held on July 29, 2016, and Phillips appeared and testified. (1 CT 3) A third hearing was scheduled for August 26, 2016. (1 CT 3) At both the July 22 and July 29 hearings, Phillips was given the opportunity to speak and argue his case. In addition, Phillips also filed a 13-page declaration in which he again argued his position. (1 CT 6-22) After that filing, the court took the matter under submission. (1 CT 5) The lower court judge thus received the relevant testimony from both parties at the hearings, and even allowed both sides additional briefing before making a decision. In his discretion, the judge found clear and convincing evidence of harassment, and ruled accordingly in granting the permanent restraining order. (1 CT 38-43) The process granted to Phillips was 100% of the process to which he was entitled under CCP § 527.6.

D. None of Phillips' Claimed Deficiencies of Process Is Valid

1. Standard of Review

The determination of whether the evidence presented in the lower court was sufficient for the court to reach its conclusion involves a review of both the lower court's findings of fact and the way in which the lower court applied those findings to the law. "The trial court's findings of facts is reviewed for substantial evidence . . . and its application of the law to the facts is reversible only if arbitrary

and capricious." *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712. A court acts within its discretion whenever there is an "'absence of arbitrary determination, capricious disposition or whimsical thinking.'" *People v. Preyer*, 164 Cal.App.3d 568, 573 (1985). As long as the court acts within the "bounds of reason," the court does not abuse its discretion. (Ibid.)

2. Phillips Was Served

In his Declaration filed on August 19, 2016, Phillips admitted that he accepted service: " On July 29, 2016, I acquiesced to service of process" (1 CT 7:8). In addition, Phillips fully participated in the two hearings, and argued substantive issues well beyond simply making a special appearance to contest service. Having conceded in writing that he acquiesced to service, he cannot now claim that there was no service upon him.

3. Phillips Made A General Appearance

At both hearings, Phillips offered arguments about service of process, about whether the Court had personal jurisdiction over him, about the restraining order infringing upon his freedom of speech, and about McCauley's specific allegations against him of harassment, cyber-bullying, and threatening McCauley and her children. By accepting service and by arguing substantive matters of the case at both hearings, Phillips waived any later claim that he was merely making a special appearance.

> On general principles, a statement that a defendant or party makes a special appearance is of no consequence whatever.... [I]f he appears and asks for any relief which

> could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance, no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance. *Syznalski v. Superior Court* (2009) 172 Cal. App. 4th 1, 90 Cal. Rptr. 3d; *In re Clarke* (1899) 125 Cal. 388, 392, 58 P. 22; see generally, 2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 207, pp. 815-17.

4. Phillips Had Ample Opportunity to be Heard

Although the statute requires that he be given one hearing at which he is allowed to testify, as well as file a written response, Phillips was allowed two hearings in which to testify and argue his case, as well as a written response, plus two supplemental briefings. This was far in excess of what the statute requires. In addition, contrary to Phillips' assertion, both his and McCauley's supplemental briefs showed that neither believed that service of process was still a contested issue. If Phillips had wished to now dispute the substance of the lower court hearings themselves, he should have obtained the Reporter's Transcripts and provided them to this Court so that all parties and the Court could see such evidence. He did not.

5. Phillips' Motion for New Trial Was Correctly Rejected

As indicated above, Phillips' motion for new trial was invalid, since the CHRO hearing was not a trial under the meaning of the statute, thus a "motion for new trial" could not have been granted.

Further, as discussed above, the denial of that motion is a non-appealable order.

It is clear that procedurally, Phillips has no right to an appeal at all, much less to winning one. He is attempting to appeal the non-appealable order denying his motion for new trial. Further, even if the Court were to somehow treat the appeal as challenging the underlying judgment, Phillips' notice of appeal was untimely. Both issues are jurisdictional and require mandatory dismissal of this appeal. Nonetheless, out of an abundance of caution, McCauley will address Phillips' substantive arguments.

V.

THE APPEAL IS FATALLY SUBSTANTIVELY DEFECTIVE

A. Phillips' Harassment is Not Protected Speech Under the First Amendment

Phillips' Opening Brief demonstrates a deeply flawed understanding of the First Amendment and the law surrounding it. Phillips' issues seem to originate from his mistaken belief that all prior restraints on speech are unconstitutional (AOB p.11), that communication can never be considered conduct (AOB p.11), and that conduct that is not illegal in isolation cannot be considered to be harassment (AOB p.17). These misconceptions form the entire basis of Phillips' First Amendment argument, and each is incorrect.

1. Harassment, including harassment through communication, is not protected speech

i. Standard of Review

The determination of whether speech is protected by the First Amendment is necessarily a constitutional question. Constitutional issues are generally reviewed independently. *People v. Cromer* (2001) 24 Cal.4th 889, 894. With regard to contested factual issues, the appellate court applies "the deferential substantial-evidence standard." *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.

ii. When speech becomes harassment, it loses constitutional protection

Online posts can indeed be considered protected speech. However, when the purpose of the posts becomes harassment and cyber-bullying rather than the expression of ideas, they can lose First Amendment protection. California courts, as well as the U.S. Supreme Court, have consistently held that once speech crosses the line into harassment, it loses its constitutional protections. The California Supreme Court recognized this nearly two decades ago:

> [T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, 'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's

beliefs... .' (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134).

The entire jurisprudence of workplace and sexual harassment law is based upon this proposition. Although most workplace and sexual harassment consists of words, the Supreme Court has repeatedly held restrictions upon such harassment to be constitutional. Moreover, the California Legislature explicitly made harassment subject to the CHRO process when it enacted CCP § 527.6. In *Aguilar*, the California Supreme Court addressed an argument nearly identical to Phillips', holding that "a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment." *Id.* at 121. Although *Aguilar* dealt with workplace harassment, the issue presented was the same: whether a court could constitutionally prohibit future speech by a party who had already been found to have committed harassment against the victim seeking protection. The Court there clearly stated that such a prohibition does not run afoul of the First Amendment. Just as in *Aguilar*, here Phillips has already been found by judicial determination to have committed harassment against McCauley, and he has been enjoined via the CHRO from harassing her and her children further. This restraint, like in *Aguilar*, was made only after the judicial determination, and applies only with regard to speech

targeting McCauley and her children.

California courts have already ruled specifically on whether CCP § 527.6 can be used for injunctive relief against speech. In *Huntingdon Life Sciences v. SHAC USA* (2005) 129 Cal.App.4th 1228, the court ruled that "in California, speech that constitutes 'harassment' within the meaning of section 527.6 is not constitutionally protected, and the victim of the harassment may obtain injunctive relief." Id. at 1240.

2. Prior Restraints Are Not Prohibited by the First Amendment

i. Standard of Review

The determination of whether speech is protected by the First Amendment is necessarily a constitutional question. Constitutional issues are generally reviewed independently. *People v. Cromer* (2001) 24 Cal.4th 889, 894. With regard to contested factual issues, the appellate court applies "the deferential substantial-evidence standard." *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.

ii. Not all prior restraint is unconstitutional

Phillips argues that the First Amendment creates a blanket prohibition upon all prior restraints on speech. For this proposition he cites *Near v. Minnesota,* 283 U.S. 697, 716, 51 S.Ct. 625. Phillips is wrong. Even the *Near* decision, involving significantly different facts, stated that "the protection even as to previous restraint is not absolutely unlimited." The Supreme Court went further in *Kingsley Books, Inc. v. Brown*, stating, "The phrase 'prior restraint' is not a

Books, Inc. v. Brown (1957) 354 U.S. 436, 437, 77 S.Ct. 1325. The Court in *Aguilar* explained why a prior restraint, so disfavored in *Near*, would be appropriate in cases like the instant one: "The special vice of a prior restraint is that communication will be suppressed...before an adequate determination that it is unprotected by the First Amendment." *Aguilar v. Avis Rent A Car System, Inc.*, *supra,* 21 Cal.4th 121. The lack of this "special vice" is what distinguishes the instant case. Here, the only communication being suppressed is occurring *after* there has been a judicial determination that it is unprotected speech. Moreover, the restraint has been narrowly tailored to online speech about one person and her two minor children. The CHRO is thus clearly not a prohibited prior restraint.

B. The Superior Court Acted Within Its Discretion In Finding Sufficient Evidence to Support Its Grant of the CHRO

1. Standard of Review

The determination of whether the evidence presented in the lower court was sufficient for the court to reach its conclusion involves a review of both the lower court's findings of fact and the way in which the lower court applied those findings to the law. "The trial court's findings of fact are reviewed for substantial evidence . . . and its application of the law to the facts is reversible only if arbitrary and capricious." *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-12. A court acts within its discretion whenever there is an

"'absence of arbitrary determination, capricious disposition or whimsical thinking.'" *People v. Preyer* (1985) 164 Cal.App.3d 568, 573. As long as the court acts within the "bounds of reason," the court does not abuse its discretion. (Ibid.). The purpose of the deferential treatment in the abuse-of-discretion standard is based on the lower court's "superior ability to consider and weigh the myriad factors that are relevant to the decision at hand. A trial court will not be found to have abused its discretion unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice." *People v. Roldan* (2005) 110 P. 3d 289 (internal quotes omitted); quoting *People v. Lawley* (2002) 27 Cal.4th 102, 158.

2. The Superior Court In Its Order Specifically Noted the Sufficiency of the Evidence to Support a CHRO

Phillips argues that "no evidence was submitted" against him (AOB p.12:8), and that McCauley failed to provide evidence of emotional distress or irreparable harm (AOB p.13:25-27). This is incorrect. McCauley provided the lower court with 25 pages of examples of Phillips' harassing Facebook posts and communications from Phillips, as well as sworn testimony in her original petition for the CHRO. In addition, she provided sworn testimony at both hearings on the matter. In the judge's written order granting the CHRO, he stated that "the Court credits Petitioner's testimony, as well

as the documentation she submitted in support of her application for the restraining order ... [I]t was the Court's conclusion that Petitioner had met the requirement for the issuance of the civil restraining order under Code of Civil Procedure section 527.6." (1 CT 39:10-17)

At no time did Phillips deny that he had created the harassing Facebook posts, nor did he ever deny that the posts referred specifically to McCauley and her preschooler and toddler daughters. From this record alone we know that there was physical uncontroverted evidence of Phillips making around 50-100 posts about McCauley, including accusations that she was a corporate spy within the anti-vaccination movement; that implied threats of violence typed over the cease-and-desist letter sent to him by her attorney;[3] posts that suggested Phillips had secretly observed McCauley in her personal life; and posts with photos of her children, falsely accusing McCauley of having harmed them and suggesting that Phillips would come take them away from their mother, among other things. Taken together with Phillips' unbalanced and paranoid harangues in the courtroom, the lower court judge had ample evidence to conclude that Phillips' conduct met the requirements of CCP § 527.6 to justify granting the restraining order.

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[3]After receiving a cease-and-desist letter from McCauley's attorney, Phillips defaced the letter by typing "All work and no play makes Jack a dull boy" repeatedly on the face of letter, then posted that image on Facebook. This is a direct reference to the Stephen King movie "The Shining," in which the psychotic main character obsessively types pages and pages of that single, identical phrase right before he tries to murder his wife and child.

More importantly, in order for Phillips to successfully claim insufficiency of evidence in the lower court, he must show this Court the evidence that was presented. This he has failed to do. As shown on his Notice of Appeal, Phillips intentionally chose to not order the Reporter's Transcript for this appeal. The Court in *Aguilar* addressed the same issue:

> In order to prevail on this claim, defendants must show that this finding is not supported by substantial evidence. But, as noted above, defendants elected not to provide a reporter's transcript of the trial proceedings. Accordingly, they have no basis upon which to argue that the evidence adduced at trial was insufficient to support the trial court's finding that injunctive relief was necessary to prevent a continuation of defendants' unlawful conduct. (*Aguilar, supra,* 21 Cal. 4th at 132.)

Determinations by the Superior Court in matters under CCP § 527.6 necessarily give wide discretion to the judge who hears the testimony and sees the evidence. The evidence makes clear that such a finding is justified. Further, Phillips also chose not to provide this Court with the full Superior Court file. He cannot now complain of insufficiency of evidence that he fails to show this Court.

It is clear from the available record that the decision of the Superior Court was justified on sufficient evidence, and the discretion of the lower court--with its "superior ability to consider and weigh the myriad factors that are relevant to the decision at hand"--should not be second-guessed. *People v. Roldan* (2005) 110 P. 3d 289 (internal

quotes omitted); quoting *People v. Lawley* (2002) 27 Cal.4th 102, 158).

C. The CHRO Is Not Unconstitutionally Overbroad

1. Standard of Review

The determination of whether speech is protected by the First Amendment is necessarily a constitutional question. Constitutional issues are generally reviewed independently. *People v. Cromer* (2001) 24 Cal.4th 889, 894. With regard to contested factual issues, the appellate court applies "the deferential substantial-evidence standard." *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145. However, when determining whether language is unconstitutionally overbroad, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (*Saxe v. State College Area School District* (1999) 240 F. 3d 200; quoting *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania* (3d. Cir. 1991) 944 F.2d 137, 144).

2. The CHRO Is Narrowly Tailored to Phillips' Specific Pattern of Unlawful Speech

The order in the instant case was as narrow, or even more so, than those approved by courts in *Kingsley Books, Inc. v. Brown*, (1957) 354 U.S. 436, *Huntingdon Life Sciences v. SHAC USA* (2005) 129 Cal.App.4th 1228, 29 Cal. Rptr. 3D 521, and *Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal. 4th 121. Here, the restraining order was limited to posts made by one individual, who had already been

determined to have committed harassment; it was limited to preventing posts solely about one individual and her minor children; and it was limited to online posts. "[O]nce a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech. *Aguilar*, *supra,* 21 Cal.4th at 140, quoting *Kramer v. Thompson* (3d Cir. 1991) 947 F.2d 666, 675.

3. Phillips' Claim That The CHRO Proscribes Electronic Legal Filings Is Not Reasonable

Although Phillips tries to argue that the order prohibits him from electronically filing legal documents, that interpretation is unreasonable. First, the existence of the instant appeal--electronically filed by Phillips--demonstrates that the order has not actually prevented him from electronically filing legal documents referencing McCauley. More importantly, constitutional guidelines require that language must first be given its most reasonable and constitutional interpretation before judging whether it violates the First Amendment. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Saxe v. State College Area School District*, 240 F. 3d 200; quoting *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania,* 944 F.2d 137, 144 (3d Cir.1991). In this case, there is an obvious difference between "posting" publicly on social media and electronically "filing" a legal document within a court's online document system. The Merriam-Webster Dictionary defines the verb "post" as "to publish,

announce, or advertise by or as if by use of a placard...to affix to a usual place (such as a wall) for public notices...to publish (something, such as a message) in an online forum (such as an electronic message board)." It is not hard to see that read narrowly, as is required, the order's limitation about creating online posts about McCauley would not prevent Phillips from being able to electronically file legal documents with her name in them, such as this appeal. Apart from this fatuous argument, Phillips provides no other example of protected speech that would be infringed upon by the order.

VI.

CONCLUSION

The instant appeal is fatally flawed, procedurally and substantively. This Court must dismiss this appeal for lack of jurisdiction, both for its status as an appeal of a non-appealable order and for its untimely filing. Phillips' substantive claims also fail, as they are based on a deep misunderstanding of First Amendment law and a strategy of intentionally ignoring all inconvenient facts and evidence. As an attorney, Phillips should know better. For all the reasons stated above, Phillips' appeal must be dismissed.