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Sept. 29, 2023

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

Re: *Hansen v. Volkov*, No. B311524

Dear Presiding Justice Perluss and Associate Justices Segal and Martinez:

We write this to ask that the Court order publication of the opinion in this case. We teach First Amendment law, and we have written on protective orders that restrict speech. (See Aaron Caplan, *Free Speech and Civil Harassment Orders* (2013) 64 Hastings L.J. 781; Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)* (2022) 45 Harv. J. L. & Pub. Pol'y 147; Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"* (2013) 107 Nw. U. L. Rev. 731 [discussing such protective orders alongside criminal harassment statutes].)

* * *

In recent years, protective orders have morphed considerably from their original role. They no longer just forbid assaults, or approaching the petitioner too closely, or unwanted personal calls or messages to the petitioners that lack any legitimate purpose. Instead, they sometimes become backdoor attempts to forbid First-Amendment-protected behavior, including public commentary or litigation activity.

As this Court's opinion in this case shows, the Superior Court fell into this error; and other California trial courts have done as well. And the litigation process, with the tensions it creates—and, regrettably, the incentives for procedural gamesmanship—is likely to produce more such errors, unless a precedential decision precludes them.

This Court's opinion in this case offers a helpful corrective to this tendency. In particular, the opinion makes clear that:

1. Litigation-related e-mails, even when they are "argumentative and self-serving and entirely unnecessary" (in the words of the Superior Court) and "maybe also seriously annoying" (in the words of this Court), remain protected against a § 527.6 restraining order.

2. An isolated instance of incivility and annoyance by opposing counsel should likewise not justify a § 527.6 order, in the absence of evidence that counsel's conduct, "however offensive or annoying it may have been, caused [the lawyer petitioner] . . . to suffer intense, enduring and nontrivial emotional distress."

We are unaware of past cases that articulate these points so clearly. The opinion may thus be seen as "[e]stablish[ing] a new rule of law." (Cal. Rules of Court, rule 8.1105(c)(1).) Or to the extent that these points stem from well-established legal principles, as we believe they do, the opinion "explains . . . an existing rule of law" in a helpful way, and also "reaffirms a principle of law not applied in a recently reported decision." (Cal. Rules of Court, rule 8.1105(c)(3), (8).) And because of the regrettable frequency of often uncivil conflict between lawyers, the opinion "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).)

Moreover, even setting aside the clear principles this opinion announces, it is valuable because of the benchmark that it sets. Legal tests such as whether "a reasonable person in [petitioner's] position would have suffered, substantial emotional distress" are not self-defining. As with terms such as "actual malice," they are "given meaning through the evolutionary process of common-law adjudication." (*Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 502.)

The *Bose* Court noted this in explaining the significance of appellate decisionmaking in helping define First Amendment law—but the same principle should apply in defining terms in a statute that sometimes bears sharply on First Amendment rights. In this respect, the opinion ought to be published because it "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, rule 8.1105(c)(2).)

This Court's opinion in this case should thus be published, so that it can chart a better path for lower courts, lawyers, and lawyer-litigants.

Sincerely Yours,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is UCLA School of Law, 385 Charles E. Young Dr. E, Los Angeles, CA 90095. On Sept. 29, 2023, I served true copies of this letter via TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on Sept. 29, 2023, at Los Angeles, California.

s/ Eugene Volokh