Commonwealth of Massachusetts
Supreme Court

No. SJC-10866

ALAN BOROWSKI,

Plaintiff-Appellee,

– against –

ROBERT O'BRIEN,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE
NORTHAMPTON DISTRICT COURT, No. 2010-45RO-149

PLAINTIFF-APPELLEE ALAN BOROWSKI'S MEMORANDUM IN OPPOSITION TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This appeal arises from the district court's issuance and extension of a no-contact order pursuant to the Commonwealth's recently promulgated civil harassment prevention statute, G.L. c. 258E. Appellant Robert O'Brien claims that the statute is a prior restraint on speech, is unconstitutionally overbroad and is unconstitutional as applied to him.

In reality, G.L. c. 258E is at least as narrowly tailored as this Commonwealth's analogous criminal harassment statute, which this Court upheld as constitutional in Commonwealth v. Welch, 444 Mass. 80 (2005). Further, Mr. O'Brien's harassing conduct came squarely within the purview of the statutory language and was not protected speech. Therefore this appeal should be dismissed.

ISSUES PRESENTED

I. Whether the use of G.L. c. 211, § 3 shall continue as the avenue of review of an order entered pursuant to G.L. c. 258E.

II. Whether the case is moot, and if so, whether it nonetheless should be decided.

III. Whether G.L. c. 258E is constitutional on its face.

IV. Whether G.L. c. 258E is constitutional as applied to Mr. O'Brien's conduct.

STATEMENT OF THE CASE

A. Procedural Posture

On August 23, 2010, Appellee Alan Borowski applied to the District Court (Northampton Division) for an ex parte harassment prevention order against Mr. O'Brien pursuant to G.L. c. 258E, the Commonwealth's recently enacted civil harassment statute. The district court granted a ten-day no-contact order directing Mr. O'Brien not to abuse, harass or contact Mr. Borowski; to stay at least 50 yards from him; and to stay away from his residence. (R.55-56)[1]

At a September 3, 2010 extension hearing, the district court denied Mr. O'Brien's written motion to dismiss (setting forth constitutional overbreadth and as-applied arguments) and extended the no-contact order to September 2, 2011.

On September 28, 2010, Mr. O'Brien filed a Petition with a single justice of this Court pursuant to G.L. c. 211, § 3, seeking to have the harassment prevention order "vacated and dismissed". On December

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[1] References herein to papers in the record are as follows: Brief of Appellant, Robert O'Brien ("O'Brien Brief"); Record Appendix attached to O'Brien Brief ("R.[Page]" or "R.[Page]:[Line]").

2, 2010, the single justice (Ireland, J.) reserved and reported the case without decision for determination by the Full Court.

B. Relevant Facts

Mr. Borowski is a Patrol Sergeant in the Northampton Police Department, where he has worked for the past twelve years. (R.53) He has arrested Mr. O'Brien in the past and knows him as someone who gets into many fights. (R.53; R.9:19, R.12:13-14) Over the years, Mr. O'Brien has repeatedly made his personal contempt for Mr. Borowski clear, e.g., by calling him a "punk" to his face while Mr. Borowski was on duty. (R.14:1-5, R.14:15-17)

On Saturday, May 15, 2010, Mr. Borowski was in downtown Northampton having an evening out with his girlfriend. (R.53; R.9:22-23) He accompanied her to a local nightspot where she wanted to go dancing. (R.53; R.10:2-3) As they entered the bar, Mr. Borowski noticed Mr. O'Brien's presence and saw Mr. O'Brien looking at him. (R.53; R.10:3) Aware of Mr. O'Brien's proclivity for violence and that he was already on probation, Mr. Borowski told his girlfriend he felt uncomfortable and they immediately left. (R.53; R.10:5)

When they were approximately thirty feet away from the bar entrance, Mr. Borowski heard someone yell from behind, "Hey, Borowski!" (R.53; R.10:6-8, R.28:7-9, R.28:19-20) He turned to see Mr. O'Brien standing alone on the sidewalk in front of the entrance. (R.53; R.28:16-17) Mr. O'Brien raised his arms in the air with the middle finger of each hand extended, and yelled, "Fuck you!" (R.53; R.10:9-10, R.28:21) Mr. Borowski remained silent and waited to see what was going to happen. (R.53) Mr. O'Brien stared at Mr. Borowski for a few seconds, then re-entered the bar. (R.53; R.28:22-24) Mr. Borowski was rattled enough by this interaction to contact Mr. O'Brien's probation officer, who spoke with Mr. O'Brien about it. (R.53; R.10:11-12, R.13:11-15, R.39:17-22) Mr. Borowski also reported the incident to the Northampton Police Department. (R.53)

On Sunday, August 8, 2010, Mr. Borowski was at his home in nearby Hatfield with his girlfriend doing yard work. (R.53; R.10:16) Since purchasing his home in 2002, he had never seen Mr. O'Brien in his town. (R.53-54) Needing to make some room in his driveway, he got into his truck and pulled out into the street. (R.53; R.10:17) Before pulling back into his

driveway, he noticed Mr. O'Brien's truck coming down the street toward his house. (R.53; R.10:17-18) Mr. Borowski backed his truck into his driveway and parked it facing the road. (R.53) At this point, Mr. O'Brien's vehicle drove slowly past Mr. Borowski's home. (R.53; R.40:5) Mr. O'Brien was seated in the front passenger seat with the window down. (R.53) As the vehicle rolled past, he stared at Mr. Borowski, extended the middle finger of his right hand, and stuck it out of the window toward Mr. Borowski. (R.53; R.10:18-19, R.23:16-17) The vehicle then drove off with Mr. O'Brien's finger still extended. (R.53)

Mr. Borowski exited his vehicle and looked to see where Mr. O'Brien was going. (R.53) Approximately 100 yards past the house, Mr. O'Brien's truck stopped in the middle of the road, remained stationary for several seconds, then drove off. (R.53; R. 22:11-12) Mr. Borowski went to his girlfriend, who was outside working on the deck, and told her what had just happened. (R.54) He felt threatened by this incident and fearful for his safety, now realizing Mr. O'Brien knew where he lived. (R.10:20, R.11:3-5, R.39:23-40:1, 40:3-9)

Later that day, Mr. Borowski was outside standing on his deck when he heard a vehicle approaching down the street, then a loud truck horn sounding in front of his house. (R.54; R.10:21-23, 25:14-15) His girlfriend, now inside the house vacuuming, told him she had looked out the window when she heard the sound of a horn. (R.54) Looking to the road, they saw Mr. O'Brien's truck rolling slowly past the house, now going in the opposite direction, with the horn blaring. (R.54; R.10:23-24, 25:16-19)

Through the open driver's side window, Mr. Borowski also saw Mr. O'Brien leaning over from the passenger side with his middle finger extended toward Mr. Borowski. (R.54; R.10:23-11:1, R.13:5, R.25:19-20, R.27:2-7) The driver then revved the engine and sped off, driving straight through an intersection without stopping at the posted stop sign. (R.54; R.11:1-2, R.25:20)

Collectively, these incidents left Mr. Borowski feeling extremely threatened.[2] (R.54; R.11:3-9, R.15:8-13, R.39:23-40:9) He felt Mr. O'Brien had violated the sanctuary of his home with behavior that was intimidating to him. (R.54; R.11:3-9, R.14:18-22, R.40:3-9) The interactions left Mr. Borowski fearful that Mr. O'Brien might attempt to come after him at home. (R.12:13-19, R.14:18-22, R.40:12, R.40:14-17)

Mr. Borowski called his local Hatfield police department for help but there was nobody on duty, so he contacted the Northampton Police Department. (R.54) An officer came to his home to document the two incidents on that day. (R.54) Thereafter Mr. Borowski applied for and obtained the harassment prevention order at issue here. (R.51-52)

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[2] On this point in particular, we strongly object to Mr. O'Brien's misstatement in his brief to the effect that "pressed for details by the judge," Mr. Borowski "offered no more evidence than the fact that he was afraid to see O'Brien in public...." (O'Brien Brief at 4-5.) This is flatly untrue; Mr. O'Brien spoke at length and in detail about the nature of his fear. (R.12:13-19; R.13:11-15; R.14:15-21; R.39:14-R.40:17)

SUMMARY OF ARGUMENT

This Court has instructed the parties to brief two threshold issues: (i) availability of review under G.L. c. 211, § 3, and (ii) *mootness*. As G.L. c. 258E does not provide for an alternate means of appeal, we do not contest Mr. O'Brien's recourse to this Court under G.L. c. 211, § 3. (p. 9.) Nor do we contend these proceedings are moot. (pp. 9-10.)

Turning to the substance of this dispute, Mr. O'Brien's new argument that G.L. c. 258E is a prior restraint on speech is waived as he failed to raise it below or in single justice practice. In any event the provisions at issue here do not implicate the doctrine of prior restraint. (pp. 10-14.)

Moreover, G.L. c. 258E is on its face narrowly tailored to address the Commonwealth's strong interest in protecting its citizens from harassment. As the statute does not impinge on protected expression, the overbreadth doctrine is inapplicable. (pp. 15-24.)

Nor is the statute unconstitutional as applied to Mr. O'Brien. He engaged in a pattern of harassing conduct specifically directed at and intended to intimidate Mr. Borowski. This conduct clearly met the

statute's commonsensical definition of harassment and relief was wholly appropriate. That a portion of Mr. O'Brien's conduct involved giving Mr. Borowski "the finger" does not change the result. (pp. 24-39.)

ARGUMENT

A. Threshold Matters

1. Mr. Borowski Does Not Dispute G.L. c. 211, § 3 Is the Proper Avenue of Review in This Case

Mr. Borowski does not contest Mr. O'Brien's recourse to this Court pursuant to G.L. c. 211, § 3. To the extent Mr. O'Brien challenges the constitutionality of G.L. c. 258E, his claims implicate his substantive rights. We also concur that the statute itself provides no alternate means of appeal. See, e.g., Zullo v. Goguen, 423 Mass. 679, 672 (1996).

2. Mootness

In a footnote to Mr. Borowski's brief to the single justice, we noted that this litigation could become moot as Mr. O'Brien had been recently indicted by a grand jury under G.L. 265, § 43A (the Commonwealth's criminal harassment statute) for the same conduct at issue here. (R.58 at n. 1); Metros v. Sec'y of the Commonwealth, 396 Mass. 156, 159 (1985)

(noting general rule that courts decide only actual controversies and stating that "normally we do not decide moot cases"). A harassment protection order pursuant to G.L. c. 258E may issue based on a single instance of certain predicate offenses, including G.L. 265, § 43A. Thus, should Mr. O'Brien be convicted of criminal harassment, an alternative basis for the harassment order would clearly exist and Mr. O'Brien's constitutional claims under the prong of G.L. c. 258E at issue here would arguably be mooted. Commonwealth v. Vinton V., 458 Mass. 1017 (2010) ("Particularly where [issues] are constitutional in nature, we decline to decide them in a moot case.").

As the footnote indicates, Mr. Borowski does not contend that Mr. O'Brien's indictment per se has rendered this appeal moot.

B. Contrary to Mr. O'Brien's Contentions, G.L. c. 258E Is Constitutional On Its Face

Mr. O'Brien argues G.L. c. 258E is a prior restraint on speech, is facially overbroad, and is thus constitutionally infirm.[3] According to Mr.

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[3] Mr. O'Brien makes a single fleeting reference to the Massachusetts Constitution. (O'Brien Brief at 6.) As he does not follow up on this reference, we focus on the federal constitutional issues he has raised.

O'Brien, the statute "is not limited to fighting words" and does not "create an objective standard of reasonableness." (O'Brien Brief at 9.) In reality, as discussed infra, G.L. c. 258E evinces careful draftsmanship that is at least as narrowly tailored as the Commonwealth's analogous criminal harassment statute, which this Court has upheld as constitutional.

1. Mr. O'Brien's "Prior Restraint" Argument Is Waived and In Any Event Fails

In his second round of briefing before this Court, Mr. O'Brien argues for the first time that G.L. c. 258E "constitutes a prior restraint on speech." Having failed to raise this issue below and before the single justice, he is barred from raising it now.

Waiver aside, there is no prior restraint to speak of here. G.L. c. 258E neither seeks to nor has the effect of limiting legitimate expressive activity. The statute does nothing more than offer a person whose privacy rights have been violated by persistent harassing conduct a content-neutral avenue of relief.

a. Waiver

An issue not raised or argued below may not be raised for the first time on appeal. See, e.g., Century Fire & Marine Ins., Co. v. Bank of New England-Bristol Co., 405 Mass. 420, 421 (1989) (citing Revocation of a Judgment for Adoption of a Minor, 393 Mass. 556, 563 (1984)); Trustees of Stigmatine Fathers, Inc. v. Sec'y of Admin. & Fin., 369 Mass. 562, 565 (1976). In these proceedings, Mr. O'Brien has had multiple opportunities to raise a "prior restraint" argument. Yet he failed to do so below (during oral argument and in a written motion to dismiss), and again in his brief before the single justice of this Court. The argument makes its appearance only now, in this second round of appellate briefing. Under these circumstances, we respectfully submit that Mr. O'Brien is not entitled to be heard on this issue.

b. There Is No Prior Restraint

In any event, Mr. O'Brien's naked assertions that G.L. c. 258E is a "prior restraint on speech" or

"creates a scheme for restraining speech" are unfounded.[4]

As the Supreme Court has noted, "concerns about 'prior restraints' relate to restrictions imposed by official censorship". Hill v. Colorado, 530 U.S. 703, 734-35 (2000). No such restrictions are even arguably at issue here. Indeed, the language of G.L. c. 258E evinces no aim to regulate speech, let alone any particular type of speech. The statute seeks only to prevent the abuse and harassment of individuals in the Commonwealth -- which is not protected expression -- in a content-neutral fashion. Thus relief (in the form of a protective order) depends upon a showing of three instances of past harassing conduct.[5] G.L. c. 258E, § 3. To the extent any arguably protected expressive activity might fall within the statute's reach, it would be purely incidental and no more than necessary to accomplish the Commonwealth's compelling

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[4] Mr. O'Brien cites to Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) for the black letter proposition that prior restraints bear a heavy presumption against constitutional validity. But he supplies no authority whatsoever for his underlying claim that G.L. c. 258E is a prior restraint.

[5] For a more detailed exposition of the statutory requirements, please see infra at pp. 17-20. As previously noted, relief under the statute is also available on the basis of a single instance of certain predicate offenses.

interest in protecting its citizens' privacy and safety rights. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764 (1994) (content-neutral injunction is not a "prior restraint" merely because it incidentally affects expressive activity).

To the extent Mr. O'Brien argues the harassment prevention order itself (as distinct from the underlying statute) is a prior restraint because it affects future conduct, he is also mistaken. See Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 716 (1990) (prospective nature of injunction "does not render it an impermissible prior restraint" as "government may impose reasonable restrictions which have prospective effect on the time, place, and manner of expressive conduct if [they] can be shown to further a sufficiently important governmental interest in regulating" the conduct at issue so as to "justif[y] incidental limitations on First Amendment freedoms.")

In short, nothing about this case has anything to do with prior restraints.

2. G.L. c. 258E Is Narrowly Tailored And the Overbreadth Doctrine Is Not Applicable

Mr. O'Brien also argues G.L. c. 258E is overbroad. However, none of the statute's provisions regulate legitimate expressive activity. Speech that fits within the strictures of G.L. c. 258E is not constitutionally protected, and therefore the statute passes constitutional muster.

a. The Statute Benefits From a Presumption of Constitutionality

Initially (and Mr. O'Brien's misplaced "prior restraint" claim to the contrary notwithstanding), we note that G.L. c. 258E benefits from a strong presumption of constitutionality. See Welch, 444 Mass. at 100 (stating that "our canons of statutory interpretation [] require we presume statutes to be constitutional"); Commonwealth v. Abramms, 66 Mass.App.Ct. 576, 581 (2006) (a statute benefits from "every rational presumption" in favor of its constitutional validity absent language "so clear and explicit as to render impossible any other reasonable construction") (quoting Commonwealth v. Lammi, 386 Mass. 299, 301 (1982) and Commonwealth v. O'Neil, 233 Mass. 535, 540-41 (1919)).

b. The Statute Is Narrowly Tailored

The overbreadth doctrine applies only where a statute's deterrent effect on constitutionally protected speech is "both real and substantial" in relation to the statute's legitimate sweep, and the statute is not "readily subject to a narrowing construction." Abramms, 66 Mass.App.Ct. at 580 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (1976)). The doctrine is "strong medicine" to be employed only sparingly. New York v. Ferber, 458 U.S. 747, 769 (1982); DiGiambattista v. Doherty, 897 F. Supp. 649, 654-55 (D.Mass. 1995).

Courts' reluctance to invalidate statutes on overbreadth grounds reflects the doctrine's purpose. The goal is not to test the legislature's ability to foresee every conceivable fact pattern that might come within the scope of the statute, but to prevent a "chilling effect" on speech that might result if unduly broad statutory language were allowed to stand. See, e.g., DiGiambattista, 897 F. Supp. at 654 (discussing overbreadth doctrine); Shackelford v. Shirley, 948 F.2d 935, 941 (5th Cir. 1991) (noting several states and Congress have enacted telephone

harassment statutes proscribing "harassing, abusive and threatening language" and that existence of any "hypothetical unconstitutional applications" one might conjure up is insufficient to invalidate such statutes as overbroad).

Turning to the instant case, a party seeking a harassment prevention order under G.L. c. 258E must demonstrate that the defendant committed three or more acts of "willful and malicious"[6] conduct specifically directed at the complainant; that the acts were committed with intent to cause the complainant to suffer "fear, intimidation [or] abuse"; and that the complainant did, as a result, suffer "fear,

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[6] As an aside, Mr. O'Brien makes the counterintuitive argument that G.L. c. 258E's requirement of "malicious conduct" (defined as an act "characterized by cruelty, hostility or revenge", c. 258E, § 1) deepens the statute's purported infirmity. According to Mr. O'Brien, protected speech can sometimes be malicious; because G.L. c. 258E requires malice, he reasons, the provision must be unconstitutional. This is a flawed syllogism. Moreover, it is disputable whether the examples of unsavory speech he cites are "malicious" within the meaning of G.L. c. 258E. And in any event, Mr. O'Brien's argument simply ignores G.L. 258E's numerous additional requirements (e.g. that the conduct be intended to and actually cause "fear, intimidation [or] abuse").

intimidation [or] abuse."[7] G.L. c. 258E, § 1. When (and only when) each of these elements is established, there has been "harassment" within the meaning of the statute and a no-contact order may issue.

G.L. c. 258E, § 3.

Contrary to Mr. O'Brien's contentions, nothing about this carefully drawn language "sweep[s] unnecessarily broadly" or "invades the area of [First Amendment] freedoms." Abramms, 66 Mass.App.Ct. at 579 (citations omitted). Might there be some conceivable set of circumstances under which the provision could be applied unconstitutionally? Perhaps -- although we have difficulty imagining a pattern of expressive activity directed at a specific person with both the intent and effect of subjecting its target to "fear, intimidation [or] abuse" (as required by the statute) that would amount to anything other than unprotected speech. See, e.g., Shackelford, 948 F.2d at 941. More to the point, a fair reading of G.L. c. 258E shows that, like its criminal counterpart, G.L. c. 265, § 43A, the statute is clearly directed at "fighting words", or similar conduct with no

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[7] The statute also contemplates relief where damage to property is involved, but that is not at issue here.

legitimate communicative value, that the Commonwealth has a compelling interest in prohibiting or regulating. See, e.g., Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988) (harassment is prohibited conduct, not protected speech and the state has a "strong and legitimate interest in preventing" it).

Indeed, in its definition of harassment, G.L. c. 258E is largely identical to its criminal analogue, G.L. c. 265, § 43A, which this Court has upheld as constitutional. Welch, 444 Mass. at 101. Just like the criminal harassment statute as construed in Welch, G.L. c. 258E requires that a defendant's conduct consist of a pattern of "three or more" acts; be "willful and malicious"; and be directed at a specific person (the complainant). Compare G.L. c. 258E, § 1 with G.L. c. 265, § 43A. And though using different (and arguably narrower) language than the criminal harassment statute's express reasonable person standard, G.L. c. 258E requires that the acts complained of be carried out with both the intent and actual effect of causing "fear, intimidation [or] abuse." Id. To suggest language of this sort risks an unconstitutional "chilling effect" on protected expression amounts to a claim that the Commonwealth is

powerless to regulate virtually any conduct, so long as the conduct has an arguably expressive component. This Court's jurisprudence rejects such a result. See Welch, 444 Mass. at 100 ("The Legislature drafted the criminal harassment statute to extend protections to victims of harassment ... before 'nonthreatening' harassment escalates into life-threatening assault. Our statutory interpretation ... effectuates this intent by protecting victims from harassment that may begin with words, but tragically end with violence.").

Narrow tailoring is also reflected in G.L. c. 258E's strict content-neutrality. The statute seeks only to limit conduct that harasses -- as opposed to communication of any particular point of view. See Thorne, 846 F.2d at 244; Shackelford, 948 F.2d at 938.

In sum, nothing about G.L. c. 258E suggests overbreadth. To the extent the statute incidentally regulates speech, it regulates only harassing speech, or speech incidental to a pattern of harassing conduct. "[E]xpression has value only in the context of 'dialogue'.... It is not plausible to uphold the right to use words as projectiles where no exchange of

views is involved." Laurence Tribe, American Constitutional Law, § 12-8 at 836-37 (2d ed. 1988).

Conduct that fits within the definition supplied by G.L. c. 258E has no legitimate expressive purpose and its regulation does not violate the First Amendment. The appeal should be dismissed.

c. Notwithstanding Mr. O'Brien's Contentions, the Statute Does Not Need An Express "Reasonable Person" Standard

Mr. O'Brien also contends G.L. c. 258E is deficient because, unlike the criminal harassment statute, it lacks a "reasonable person" standard. This argument ignores important differences in the statutory language that render inclusion of a reasonable person standard under G.L. c. 258E unnecessary.

Specifically, in contrast to the provisions at issue here, conduct captured under G.L. c. 265, § 43A need only "seriously alarm[]" its victim, and that statute does not require a finding of intent to cause such harm. Without a reasonable person qualifier, therefore, the criminal harassment statute would arguably capture a wide range of conduct turning only on the victim's sensitivity -- however exaggerated or

unreasonable. Any number of innocuous activities might then be subject to punishment as supposed harassment, raising obvious overbreadth concerns. See Welch, 444 Mass. at 96 (noting courts' wariness of statutes that use broad terms like "alarming" to define harassing conduct or speech).

Here, by contrast, the portion of G.L. c. 258E describing the nature of the requisite harm is significantly more narrowly tailored. As the statute makes clear, the Legislature sought to prevent willful and malicious conduct that is specifically intended to cause "fear, intimidation [or] abuse," and that actually produces the intended effect. Consequently, there was no need for the Legislature to include "reasonable person" language.

Mr. O'Brien's assertion that "any speech could fall within the purview of G.L. c. 258E, § 1, so long as it causes fear or intimidation" (O'Brien Brief at 14) completely ignores this crucial element of intent and effect.[8] Indeed, it is precisely the statute's

[8] Mr. O'Brien's argument also fails to consider that this Court can easily imply a narrowing construction if necessary to save the statute from any constitutional infirmity. Welch, 444 Mass. at 100 ("Should the Commonwealth attempt to prosecute an individual for speech that is constitutionally

explicit requirement of intent to cause harm that permits the regulation of speech captured by its language. Commonwealth v. A Juvenile, 368 Mass. 580, 597-98 (1975) (noting importance of determining whether "conduct was engaged in with intent to exercise a First Amendment right and whether the interest to be advanced is insignificant in comparison" to the harm caused).

Mr. O'Brien's further contention that G.L. c. 258E fails because it lacks adjectives like "serious" or "substantial" (O'Brien Brief at 14) is equally meritless and serves only to muddy the waters. Those adjectives modify "alarm" and "emotional distress", respectively, in G.L. c. 265, § 43A. However, unlike that statute, G.L. c. 258E does not employ terms like "alarm" or "emotional distress". It deals with "fear, intimidation [or] abuse".

Moreover, Mr. O'Brien ignores the plain meaning of fear and intimidation. Words in a statute should be interpreted in accordance with their "ordinary and approved usage" with due regard for "the cause of [the

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protected, we would have no hesitation in reading into the statute such a narrowing construction to ensure its application only to speech that is accorded no constitutional protection.")

statute's] enactment." Hanlon v. Rollins, 286 Mass. 444, 447 (1934). The goal is to effectuate the legislature's intent, and words not defined in the statute should be given their usual and accepted meaning, consistent with that intent. Id.; Seideman v. City of Newton, 452 Mass. 472, 477-78 (2008).

In selecting isolated terms like "serious" and "substantial" from the criminal harassment statute and urging this Court to find that their absence from G.L. c. 258E renders it constitutionally infirm, Mr. O'Brien disregards the obvious: that -- unlike "alarm" -- words like "fear" and "intimidation," without qualification, are plainly understood to be serious, and being the intentional target of either one would of course be a cause for substantial emotional distress.

C. G.L. c. 258E Is Constitutional As Applied to Mr. O'Brien's Harassing Conduct

Aside from his flawed overbreadth arguments, Mr. O'Brien advances what amounts to a blanket claim that "raising the middle finger is protected speech" so that his gestures in this case were automatically protected (and apparently even immunized the balance of his harassing conduct). Unsurprisingly, no

authority Mr. O'Brien cites supports this proposition. Viewed (as it must be) in its entirety and in context, his pattern of conduct, intentionally directed at Mr. Borowski, came squarely within G.L. c. 258E's commonsensical definition of harassment. And any expressive activity involved was not constitutionally protected speech.

Mr. O'Brien concedes three instances of conduct are at issue here, as the statute contemplates. (O'Brien Brief at 18.) And he does not dispute that he possessed the requisite statutory intent. Nor, for that matter, does he assign error to the district court's factual findings. G.L. c. 258E was constitutional as applied to Mr. O'Brien and the appeal should be dismissed.

1. Mr. O'Brien's Harassment Was Not Protected Speech

As Mr. O'Brien acknowledges, the right to free speech is not absolute. (O'Brien Brief at 14); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In particular, states may proscribe so-called "fighting words" and similar potentially expressive activities which do not contribute to the free exchange of ideas. Any conceivable social value they

may provide is outweighed by the social interest in order and morality. Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection."). Thus, in considering a given application of a facially valid statute to expressive activity, it is essential to consider the context of that activity. That is, "one must look at the circumstances in which [the speech was] uttered" and "not solely at the words themselves." DiGiambattista, 897 F. Supp. at 657-58.

Like fighting words, harassment is not protected speech -- and for the same reason: its primary tendency is not to exchange information or a point of view, but to cause harm (such as fear or intimidation) that is distinct from any arguable communicative impact. Commonwealth v. Robicheau, 421 Mass. 176, 183 (1995) ("Clearly, the First Amendment does not protect conduct that threatens another."); Thorne, 846 F.2d at 242 (harassment is "conduct and not protected speech" and state has "a strong and legitimate interest in preventing the harassment of individuals"). Nor does

harassment become protected expression simply because it involved the use of words, or because an individual, such as Mr. O'Brien, decided to label his harassing conduct "speech". Thorne, 846 F.2d at 243.

Here, one component of Mr. O'Brien's pattern of harassing conduct happened to be the extension of his middle finger. That gesture has on occasion benefitted from constitutional protection under circumstances very different from those at issue here. But that does not mean that by giving Mr. Borowski the finger, Mr. O'Brien triggered some kind of automatic protected status. See, e.g., id. (rejecting notion that "[b]ecause the telephone is normally used for communication" it cannot be "use[d] in a harassing course of conduct").

Much less so could Mr. O'Brien's use of his middle finger somehow immunize the entirety of his unlawful conduct, as Mr. O'Brien appears to suggest. That conduct also included following Mr. Borowski out of a public venue after he entered and immediately left; calling after him in order to insult him; and, on two other occasions, making the gesture in menacing fashion while his truck crawled past Mr. Borowski's home -- horn blazing -- with Mr. Borowski in the yard

(and his girlfriend in the house). See Commonwealth v. Thompson, 45 Mass.App.Ct. 523, 525 (1998) (G.L. c. 209A case, noting that listeners may "walk away" from harmful speech in public forum not directed at any single person, but free speech rights do not extend to "unwanted communications" directed at a particular person who "cannot walk away").

2. Each of Mr. O'Brien's "Middle Finger" Cases Is Readily Distinguishable

Mr. O'Brien cites to a number of "middle finger" cases. (O'Brien Brief at 15 18.) Not one of them deals with what is at issue here -- a course of harassing conduct which happened to include giving the finger. Nor do any of those cases support Mr. O'Brien's apparent contention that this gesture enjoys blanket constitutional protection. In particular, Mr. O'Brien is incorrect that giving the finger to a police officer is always protected,[9] regardless of the broader pattern of behavior the gesture may form a part of (and even where, as here, the officer is off-

[9] Mr. O'Brien's assertion that "a number of [c]ourts have held that raising the middle finger toward a police officer is protected speech" mischaracterizes the actual holdings in the cases he cites, all of which depend on a fact-specific analysis.

duty, out of uniform, and peacefully minding his own business).

For example, in Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997), the court determined only that the middle finger gesture combined with an obscenity did not amount to "fighting words" on the facts before it. And the circumstances of that case were not even remotely similar to the repeated harassing conduct at issue here. In Sandul, the plaintiff was driving past the intended target of the speech in the opposite lane at a high rate of speed, and the target was not even aware of what the plaintiff had done. And the court specifically observed that while "the use of the 'f-word' in and of itself is not criminal conduct," the use of such profanity combined with other actions can be "fighting words." Sandul, 119 F.3d at 1255 (emphasis supplied).

Four of the cases cited by Mr. O'Brien are inapposite 42 U.S.C. § 1983 actions in which the First Amendment issues were tightly interwoven with Fourth Amendment probable cause analysis. Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990); Nichols v. Chacon, 110 F. Supp. 2d 1099 (W.D. Ark. 2000); Cook v. Bd. of County Comm'rs, 966 F. Supp. 1049, 1051 (D.Kan.

1997); Brockway v. Shepherd, 942 F. Supp. 1012 (M.D. Pa. 1996). In sharp contrast to the pattern of harassing conduct at issue here, each of those cases involved an on-duty police officer arresting an individual in retaliation for a one-off instance of perceived disrespectful or offensive behavior toward the officer.[10]

Moreover, in three of Mr. O'Brien's § 1983 cases, the courts explicitly tied their findings that the conduct at issue was protected expression to the right of citizens to "oppose or challenge police action verbally without thereby risking arrest."[11] Duran, 904 F.2d at 1378; Nichols, 110 F. Supp.2d at 1104; Cook, 966 F. Supp. at 1051. Here there is no evidence that Mr. O'Brien was exercising any such right. His

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[10] Duran, 904 F.2d at 1374-75 (inebriated man arrested for disorderly conduct after yelling obscenities and gesturing from vehicle following police officer's ejecting him from a bar); Nichols, 110 F. Supp. 2d at 1101-02 (vehicle passenger issued ticket for disorderly conduct after giving police officer middle finger gesture as he rode past on highway in opposite direction); Cook, 966 F. Supp. at 1051. (vehicle passenger riding past gave middle finger gesture to policeman in parked vehicle); Brockway, 942 F. Supp. at 1014 (passenger in vehicle arrested for disorderly conduct after giving the finger to police officer).

[11] The fourth case was concerned with whether the conduct at issue was "obscene." Brockway, 942 F. Supp. at 1015 16.

conduct expressed only his decidedly personal animus and hostility toward Mr. Borowski as an individual. Thus, beyond the superficial fact that they involve "middle finger" scenarios, Mr. O'Brien's § 1983 cases simply are not analogous.

The last two "middle finger" cases cited by Mr. O'Brien, Commonwealth v. Kelly, 758 A.2d 1284 (Pa. Super. Ct. 2000) and State v. Anonymous, 377 A.2d 1342 (Conn. Super. 1977), involve fact-specific inquiries as to whether the use of profanity and the middle finger gesture were "obscene". Kelly, 758 A.2d at 1286; Anonymous, 377 A.2d at 1343. Obscenity analysis has no relevance to this case.

Neither Kelly nor Anonymous supports Mr. O'Brien's blunderbuss contention that giving the finger is "too commonplace a gesture of insult ... to be regulated" and must inevitably be countenanced as protected speech. (O'Brien Brief at 17.) Thus, a concurrence in Kelly expresses the view that the use of profanity and the middle finger gesture can indeed be considered "fighting words." Kelly, 758 A.2d at 1289. The concurrence also characterizes such behavior as "abusive", and urges a broadening of the

state's disorderly conduct statute to encompass just such behavior. Id.

The court in Anonymous also went out of its way to emphasize that the middle finger gesture is not protected expression under any and all circumstances: "When addressed to an ordinary citizen in a face-to-face confrontation [extending one's middle finger] might be inherently likely to provoke violence. As an expression directed against a particular individual ... it might be beyond the pale of constitutionally protected speech." Anonymous, 377 A.2d at 1343.

Mr. O'Brien's conduct did not merit any constitutional protection and not one case he cites supports a contrary conclusion.

3. Mr. O'Brien's Newly Raised As-Applied Arguments Find No Support in the Law or the Record

In his brief to this Court, Mr. O'Brien also presents (for the first time) a grab bag of additional claims bereft of factual or decisional support. Thus, he nakedly asserts that: (i) an individual is entitled to engage in any kind of speech so long as it takes place on a public sidewalk or public street; (ii) the second incident complained of by Mr. Borowski

was nothing but an "isolated incident of raising the middle finger with no more" and so cannot be harassment for purposes of G.L. c. 258E, § 1; and (iii) the fact the conduct Mr. Borowski complained of occurred while he was off duty is "a distinction without a difference." (O'Brien Brief at 18.)

Mr. O'Brien did not raise any of these issues below, or before the single justice, and he should not be heard on them now. Trustees of Stigmatine Fathers, Inc., 369 Mass. at 563. In any case, each of these arguments is meritless.

a. Mr. O'Brien's Conduct Was Not Confined To Public Sidewalks and Streets

In an apparent allusion to the First Amendment's public forum doctrine, Mr. O'Brien effectively contends that all conduct -- including clearly unprotected speech -- is entitled to heightened protection under unspecified "governing precedent," so long as the conduct takes place on a public way. He is incorrect. See, e.g., Frisby v. Schultz, 487 U.S. 474, 486 (1988) (upholding ordinance prohibiting picketing on street in front of an individual residence on grounds, inter alia, that it intrudes upon residential privacy and is not intended to

disseminate a message to the general public); Chaplinsky, 315 U.S. at 569 (conduct deemed "fighting words" occurred on public sidewalk); Madsen, 512 U.S. at 776 (upholding provision of injunction creating buffer zone on a public street from which demonstrators were excluded); DiGiambattista, 897 F. Supp. at 657 (profanity uttered on public street not protected speech); Planned Parenthood League of Mass., Inc. v. Bell, 424 Mass. 573, 582-83 (1997) (noting that abortion protester's right to use public forum did not include right to engage in objectionable conduct infringing on legitimate rights of other citizens). The law is clear that one cannot shield unprotected conduct simply by stepping onto a public street or sidewalk.

Moreover, Mr. O'Brien is incorrect when he states that "all of the events complained of occurred on a public sidewalk and a public street." The record shows that two of the three "events" in question occurred directly in front of Mr. Borowski's home and were purposefully directed at him while he was on the premises. See Frisby, 487 U.S. at 487 (noting state's significant interest in protecting individual right to "residential privacy"). Mr. O'Brien did not confine

his conduct to a public way; he deliberately projected it onto private property.

Finally, nobody is attempting to prevent Mr. O'Brien from expressing himself in public by giving the finger or yelling profanities. The district court simply instructed him to stay away from Mr. Borowski because it found that the totality of his conduct directed at Mr. Borowski amounted to harassment. (See, e.g., R.31:14-R.32:1; R.37:5-10, 16-19) From this perspective, even assuming arguendo that Mr. O'Brien's conduct encompassed some legitimate expressive component (which it did not), the order at issue in this case would burden no more speech than necessary to achieve the Commonwealth's compelling interest in protecting Mr. Borowski from harassment. Madsen, 512 U.S. at 765.

b. Mr. O'Brien's Claim that the Second Incident Was an "Isolated Incident of Raising the Middle Finger" Grossly Mischaracterizes the Facts

Mr. O'Brien is also seriously off the mark when he asserts that the second of the three episodes in question "entailed the isolated incident of raising the middle finger with no more...." (O'Brien Brief at

18.) This gross mischaracterization of the facts is of a part with his general effort to disaggregate his conduct in this case in order to focus myopically on a "middle finger" argument divorced of any larger context. Only in this manner can Mr. O'Brien argue, as he does, that what he did to Mr. Borowski was no worse than the conduct of the motorist in Sandul, who zipped past an unaware target with his finger raised. Sandul, 119 F.3d at 1255.

What Mr. O'Brien fails to acknowledge is that none of his behavior was "isolated" -- and all of it consisted of more than merely giving the finger. It involved a series of episodes during which Mr. Borowski was made to endure Mr. O'Brien's unwanted and intimidating attentions. Those episodes were collectively characterized by the same ongoing personal animus.

For example, the second of the three episodes - the one Mr. O'Brien describes as "the middle finger with no more" -- actually involved his driving slowly past Mr. Borowski's home while Mr. Borowski was in the yard, staring and extending his middle finger toward Mr. Borowski as the vehicle rolled away, then

pointedly stopping 100 yards from the house before finally pulling away. (R.53-54)

The importance of context was obvious to the district court. Indeed, in extending the no-contact order, the district court expressly considered and rejected Mr. O'Brien's attempt to repackage his conduct into fragmented instances of protected expression:

> I would agree with you if this was a situation that solely had an allegation of a person giving the middle finger, and that's it. ... That's the easy decision. Okay? ... There would be insufficient evidence, as a matter of law, to have a harassment prevention order ... in the first place or extended. But the more difficult decision ... is in a situation where the fact are different .... I'm going to take into consideration all the facts and circumstances as to why this particular plaintiff may feel fearful.

(R.30:25-R.31:9; R.31:20-22) (emphasis supplied).

Mr. O'Brien is also incorrect when he states that G.L. c. 258E "requires three separate instances of harassment for an order to enter." (O'Brien Brief at 18.) At the risk of splitting hairs, the statute does not require "three separate instances of harassment." Rather, a person suffering from "harassment" may seek a protective order, and "harassment" is defined as

"three or more acts of willful or malicious conduct...." G.L. 258E, § 1.

c. That the Harassment Occurred While Mr. Borowski Was Off Duty Is Clearly Relevant

The Supreme Court has explained why the First Amendment shields criticism directed at police officers. It is because "[t]he freedom of individuals to oppose or challenge police action verbally without thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state." Houston v. Hill, 482 U.S. 451, 462-63 (1987). The fear is that the police might use "the awesome power at their disposal" to punish legitimate conduct directed at them that they find distasteful. Duran, 904 F.2d at 1378.[12]

No such concern is present here. Indeed, and tellingly, Mr. O'Brien does not even allege that he intended his conduct to be a criticism or challenge of the police. Each of the three instances of conduct was unquestionably directed at Mr. Borowski

[12] In view of this purpose, it is no surprise that each of the cases Mr. O'Brien cites involving the middle finger gesture as directed to a police officer implicated a resulting arrest.

individually, while he was simply trying to go about his affairs as a private individual.

According to Mr. O'Brien, though, none of these facts matter, because Mr. Borowski is a police officer. Specifically, Mr. O'Brien asserts (again without support) that whether Mr. Borowski was on- or off-duty at the time of the events complained of is "a distinction without a difference" because "[t]he police are entitled to no more or less protection under the law based on whether they are in uniform." (O'Brien Brief at 18.) In other words, as Mr. O'Brien would have it, an off-duty police officer relaxing at home should be prepared to endure intrusions of personally intimidating conduct in the same way his on-duty colleague working a public protest detail must stoically tolerate the jeers of demonstrators.

Contrary to Mr. O'Brien's view, a citizen of the Commonwealth does not forgo the same rights his neighbor has to walk the streets undisturbed on his private time, and live peaceably in his home, simply because he works in law enforcement. Mr. Borowski's employment as a police officer (rather than as a plumber, a lawyer, or a judge) should not change the outcome of this case in any respect.

CONCLUSION

For the above reasons, this Court should dismiss the appeal and grant such other and further relief as may be just.

Respectfully submitted,

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