COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-10866

ALAN BOROWSKI
Plaintiff/Appellant

v.

ROBERT O' BRIEN
Defendant/Appellant

ON APPEAL FROM A JUDGMENT OF THE NORTHAMPTON DISTRICT COURT

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Massachusetts (ACLUM), a non-profit membership organization of over twenty thousand members and supporters, is the state affiliate of the American Civil Liberties Union. Its mission is to protect civil rights and civil liberties in the Commonwealth. ACLUM often participates in cases involving freedom of expression, both through direct representation and as amicus curiae. See, e.g., *Rotkiewicz v. Sadowsky*, 431 Mass. 748 (2000); *Pyle v. School Committee of South Hadley*, 423 Mass. 283 (1996); *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701 (1990); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). Often, as in *Rotkiewicz* and *Glik*, the expression involves critical or negative comments directed toward police officers, who are required to "endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik*, 655 F.3d at 84 (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

ACLUM's interest in this case is the constitutionality of G.L. c. 258E, a recent legislative enactment which permits any person--

including those who been excluded from seeking abuse prevention orders under G.L. c. 209A--to seek an order preventing "harassment," as the term is defined in G.L. c. 258E, § 1. ACLUM also works for equal rights and the right to be free from gender-based and other violence, and recognizes that a change in the law may have been necessary to ensure that all victims of harassment, stalking, and sexual assault are eligible for orders of protection. At the same time, however, the First Amendment to the United States Constitution and article 16 of the Massachusetts Declaration of Rights demand that any law susceptible of application to protected speech be carefully crafted so as to restrain only unprotected speech, and that where a statute is properly crafted, it be constitutionally applied in each case. *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Commonwealth v. A Juvenile*, 368 Mass. 580, 586 (1975). ACLUM is concerned that the civil harassment statute at issue in this case, both on its face and as applied, will have a chilling effect on the "verbal criticism and challenge directed at police officers" that is protected by the First Amendment, as well as on other protected expression that may be

impolite, caustic, or offensive. *City of Houston v. Hill*, 482 U.S. at 461.

STATEMENT OF ISSUES

1. Whether G.L. c. 258E, the recently enacted civil harassment prevention order statute, is unconstitutionally overbroad because it is not narrowly crafted to apply exclusively to "fighting words."

2. Whether the lower court unconstitutionally applied G.L. c. 258E in this case by issuing a harassment prevention order against a citizen who displayed his middle finger on three occasions to an off-duty police officer who had previously arrested him.

STATEMENT OF THE CASE

ACLUM adopts the Statement Of The Case in Appellant's Brief.

ARGUMENT

I. CHAPTER 258E, WHICH IS SUSCEPTIBLE OF APPLICATION TO PROTECTED SPEECH, IS NOT SO NARROWLY DRAWN AS TO RESTRAIN ONLY "FIGHTING WORDS" AND BECAUSE ITS REACH EXTENDS TO CONSTITUTIONALLY PROTECTED SPEECH, IS OVERBROAD AND MUST BE STRICKEN.

Chapter 258E of the Massachusetts General Laws (Chapter 258E) allows any person who is the victim of "harassment," as defined in G.L. c. 258E, § 1 (Section 1), to seek a civil harassment prevention order. As relevant here, Section 1 defines "harassment" as "3 or more acts of willful and malicious conduct aimed at a

specific person committed with the intent to cause fear, intimidation, [or] abuse … and that does in fact cause fear, intimidation, abuse … ," G.L. c. 258E, § 1(i); or as "an act that … constitutes a violation of section … 43A of chapter 265[,]" G.L. c. 258E, § 1(ii)(B). Section 43A of Massachusetts General Laws Chapter 265 (Section 43A), in turn, provides in relevant part that "[w]hoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress shall be guilty of the crime of criminal harassment[.]"

Because both Chapter 258E civil harassment and Section 43A criminal harassment are "susceptible of application to protected expression," *Gooding v. Wilson*, 405 U.S. 518, 523 (1972), they "must be carefully drawn or be authoritatively construed to [restrain] only unprotected speech and not be susceptible of application to protected expression." *Id.* More specifically, they must be "so narrowly drawn as to be limited to 'fighting words.'" *Commonwealth v. A Juvenile*, 368 Mass. 580, 589 (1975), quoting

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

The "fighting words" exception was created in *Chaplinsky, supra*, and is narrowly limited to words which are "likely to provoke the average person to retaliation, and thereby cause of breach of the peace." *Chaplinsky*, 315 U.S. at 571-572. The Supreme Court refined the exception even further in *Cohen v. California*, 403 U.S. 15, 20 (1971), to "those personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction."

Whether speech falls within the exception's closely drawn parameters can only be judged under an objective standard. "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Chaplinsky*, 315 U.S. at 573, quoting with approval from *State v. Chaplinsky*, 91 N.H. 310 (1941), emphasis added. See also *Cohen*, 403 U.S. at 20 (judging words from perspective of "ordinary citizen"); *Commonwealth v. A Juvenile*, 368 Mass. 580, 591 (1975)(employing objective standard in holding disorderly conduct

statute unconstitutionally overbroad); *Commonwealth v. Welch*, 444 Mass. 80, 98-99 (2005)(recognizing, inter alia, objective standard as critical component of fighting words exception).

This Court had occasion to consider the constitutionality of Section 43A criminal harassment in *Welch, supra*. After considering the requirements of the fighting words exception and looking to the plain language of Section 43A, this Court noted that "the Legislature appears to have had … constitutional limitations in mind," emphasizing that "[r]ather than imposing an unduly broad prohibition on all annoying or offensive speech, the Legislature more narrowly crafted the criminal harassment statute [and limited its reach to] harassment that … "causes "serious[ ] alarm" and "would cause a reasonable person to suffer substantial emotional distress." *Welch*, 444 Mass. at 98, emphasis added.

There is no indication, however, that the Legislature had the fighting words exception in mind when crafting Chapter 258E. Just the opposite, in fact, as Chapter 258E's plain language sweeps far broader. For example, unlike Section 43A, Chapter 258E's unique definition of harassment (1) broadly

includes any cruel, hostile, and/or vengeful speech; (2) lacks an objective standard; and (3) requires only that the target of the speech at issue suffer "fear or intimidation," with no requirement that the fear or intimidation be "serious" or "substantial." See G.L. c. 258E, § 1(i).

Nevertheless, amici Victim Rights Law Center, Boston Area Rape Crisis Center, and Jane Doe, Inc. (collectively, Amici) maintain that Chapter 258E restrains only "fighting words." Amici Br. at 15-16. In support, Amici say the following.

> "Harassment," as defined by Chapter 258E, is functionally indistinguishable, for these purposes, from [criminal harassment] as defined by Chapter 258E, Section 43A. To be sure, Chapter 258E slightly alters the mix of limiting characteristics, omitting the "reasonable person" requirement but adding an equally stringent specific intent restriction that is absent from 43A. Both statutes, however, apply only to (1) repeated conduct, engaged in (2) willfully and maliciously, that is (3) aimed at a specific person and that (4) causes some matter of fear, alarm or intimidation in its intended victim.

Amici Br. at 18-19.

Amici hang their hat on a distinction without a difference. Whether the speaker subjectively holds a general or specific intent is entirely immaterial to

the First Amendment analysis at hand. Indeed, fighting words do not lose their status as protected speech simply because of the thoughts or ideas the speaker intends to express; rather, speech falls within the exception only if the manner of the speech results in potentially violent consequences. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Thus, whether words qualify as "personally abusive epithets," *Cohen*, 303 U.S. at 20, "may not rest on subjective perceptions since an 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.'" *A Juvenile*, 368 Mass. at 591, quoting *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 508 (1969), emphasis added. See also *Norwell v. City of Cincinnati*, 414 U.S. 14, 16(1973)(per curiam)(reversing conviction for disorderly conduct where defendant, intending to be hostile and to annoy, engaged in "loud and boisterous" encounter with police officer, who was in fact "annoyed").

Finally, Chapter 28E's plain language and legislative intent render any limiting construction virtually impossible. Amici suggest that the primary, if not only, legislative intent was to close the

"loophole" created by G.L. c. 209A's limitation to "family or household members."[1] Amici Br. at 4; 5-13. But the plain language of Section 258E strongly suggests that the Legislature intended to accomplish at least one additional, constitutionally significant, goal. Specifically, by distinguishing and differently defining Chapter 258E civil harassment from Section 43A criminal harassment, and by omitting essential hallmarks of the fighting words exception which were included in Section 43A, this Court can only conclude that the Legislature did not intend for Chapter 258E to exclusively proscribe fighting words. Because it is impossible to give effect to the legislative intent behind Chapter 258E and remain within ironclad constitutional bounds, and because allowing a facially invalid statute which restrains speech to stand will no doubt be a substantial deterrent to the exercise of free expression, Chapter 258E must be stricken. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[1] Notably, this goal could have been accomplished by merely amending 209A to allow any person to apply for an abuse prevention order.

II. THE LOWER COURT UNCONSTITUTIONALLY APPLIED CHAPTER 258E BY GRANTING A REQUEST FOR A RESTRAINING ORDER BY AN OFF-DUTY POLICE OFFICER AGAINST A CITIZEN BASED SOLELY ON THREE ACTS OF PROTECTED SPEECH.

If this Court finds that Chapter 258E is not facially invalid or applies a limiting construction so as to limit its reach to only unprotected speech, it must then consider whether Chapter 258E was unconstitutionally applied in this case. ACLUM agrees with Appellant that it was, see Appellant's Br. at 15-18, and adds the following for this Court's consideration.

Plaintiff's status, training, and experience as a police officer is highly relevant to the "as applied" analysis because "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). This is so for several reasons, most fundamentally because "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. A police officer's training and the nature of his official duties also factor heavily into the First

Amendment equation. As Justice Powell suggested in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), the First Amendment might very well require an even narrower construction of the fighting words exception when offensive speech is directed at a police officer because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" *Id.* at 135 (Powell, J., concurring). Moreover, under Massachusetts law, "because the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility within and impact on a community," even low-ranking patrol officers are "public officials" for purposes of the First Amendment. *Rotkiewicz v. Sadowsky*, 431 Mass. 748, 752 (2000). As such, police officers must expect that speech about their qualifications and official actions will be "sometimes ... rough and personal." *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657, 687 (1989), citation omitted.

The ordinary meaning of the speech at issue here--extending the middle finger in a police's officer

direction, accompanied, on one occasion, by the corresponding expletive--is also critical.

> [T]he middle finger gesture serves a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, discomfort, or even excitement at finding a pair of shoes. The gesture has appeared on streets and highways, in schools, shopping malls, concert venues, stadiums, courts and execution chambers, in advertisements and on magazine covers, and even on the hallowed floor of legislatures. Although its meaning has remained relatively constant over time, the middle finger gesture--like the f-word--has become part of the American vernacular and, in the process, shed its "taboo status."

Ira P. Robinson, *Digitus Impudicus: The Middle Finger And The Law*, 41 U.C. Davis L. Rev. 1403, 1408-1409 (April, 2008), citing cases and other sources. See also *Brockway v. Shepherd*, 942 F.Supp. 1012 (M.D. Pa. 1996)(ordinary intent of displaying middle finger is to show disrespect).

Although a police officer on the receiving end of "the finger" or other offensive gestures/words may very well be offended, insulted, annoyed, or feel disrespected, these expressions, without more, are protected under the First Amendment. See Appellant's Br. at 15-16, citing cases. See also *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990)("use of the word `asshole' could not reasonably have prompted a

reasonable response from the arresting officers" and therefore does not constitute fighting words); *B.E.S. v. State*, 629 So.2d 761, 75 (Ala. Crim. App. 1993)("F - [you]" directed at police officer did not constitute fighting words); *Diehl v. State*, 451 A.2d 116, 120-122 (Md. 1982)(reversing conviction of disorderly conduct where defendant "loudly assert[ed] that he has a right to leave the scene (punctuating the assertions with a four letter expletive) after being told by the officer to get back into the car" because defendant's speech did not constitute fighting words); *People v. Stephen*, 581 N.Y.S. 2d 981, 985-986 (N.Y. Crim. Ct. 1992)(fighting words exception does not apply where defendant "grabbed his crotch" and made "loud, derisive, taunting comments" directed to police officer).

CONCLUSION

For the foregoing reasons, ACLUM urges this Court to find G.L. c. 258E unconstitutionally overbroad or, in the alternative, vacate the harassment prevention order because Chapter 258E was unconstitutionally applied to protected speech.

Respectfully submitted,
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Dated: November 3, 2011

MRAP RULE 16 CERTIFICATION

I certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure:

Sarah Wunsch
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CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that two copies of the foregoing brief were served this 3rd day of November, 2011 by email and by first class mail on each of the following counsel:

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