COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE

SUPREME JUDICIAL COURT
NO. 2010-10866

NORTHAMPTON DISTRICT
COURT
NO. 2010-45RO-149

ROBERT O'BRIEN
Appellant

v.

ALAN BOROWSKI
Appellee

ON APPEAL FROM THE HARASSMENT PREVENTION ORDER OF THE NORTHAMPTON DISTRICT COURT

BRIEF AND RECORD APPENDIX
OF APPELLANT, ROBERT O'BRIEN

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Dated: January 17, 2011

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I. Whether review pursuant to G.L. c. 211, § 3, is proper for a harassment prevention order.

II. Whether G.L. c. 258E is unconstitutionally overbroad to the extent that it regulates protected speech.

III. Whether the conduct at issue before the trial court constituted protected speech.

IV. Whether the petition is moot because of a criminal indictment.

STATEMENT OF THE CASE

On August 23, 2010, Alan Borowski ("Borowski"), a Patrol Sergeant for the Northampton Police, obtained an ex parte harassment prevention order from the Northampton District Court against Robert O'Brien ("O'Brien") (R.1, 3).[1] Borowski pursued the order pursuant to recently enacted legislation, namely, G.L. c. 258E, § 1 et seq. In support of the order, Borowski claimed that O'Brien had extended his middle finger towards him on three separate occasions (R. 53-54). On September 3, 2010, after a hearing, the order was extended for a year by the Honorable Maureen E. Walsh until September 2, 2011 (R. 4). On September 28, 2010, O'Brien filed a petition pursuant to G.L. c. 211, § 3 (R.42-50). In his petition, O'Brien

[1] References herein are to the attached Record Appendix and are cited as "(R.[Page])."

requested that the restraining order issued on September 3, 2010, be dismissed because: (1) the harassment prevention statute is unconstitutionally overbroad to the extent that it covers protected speech; and (2) the acts complained of in Borowski's application for prevention order constituted protected free speech as applied in this case (R.42-50). On December 2, 2010, the Court (Ireland, J.) reserved and reported the case without decision for determination by the full Court (R.74-77).

STATEMENT OF FACTS

Recently enacted legislation allows a harassment prevention order to be issued against an individual given three acts of harassing conduct. In relevant part, the statute provides as follows:

> (a) A person suffering from harassment may file a complaint in the appropriate court requesting protection from such harassment. A person may petition the court under this chapter for an order that the defendant:
> (i) refrain from abusing or harassing the plaintiff, whether the defendant is an adult or minor;
> (ii) refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor; [and]
> (iii) remain away from the plaintiff's household or workplace, whether the defendant is an adult or minor . . . .
> G.L. c. 258E, § 3.

Chapter 23 of the Acts of 2010 added the relevant provision to the Massachusetts General Laws. The statute 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, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property . . ." G.L. c. 258E, § 1.

Here, the judge could have found the following facts in support of the harassment prevention order. Borowski claimed that on three separate occasions, O'Brien extended his middle finger towards him (R. 53-54). On the first occasion, which occurred on May 15, 2010, Borowski, who had previously charged O'Brien with a crime in 2006 (R.9), claimed that he was with his girlfriend at a tavern when he saw O'Brien and then left (R.10). O'Brien followed Borowski out, stood in the middle of the sidewalk in front of the doors to the tavern (R.28), yelled Borowski's name, then raised both fingers in the air, flipped Borowski off, and told him "F you." (R.10). Borowski then proceeded on his way and O'Brien went back into the tavern (R.28-29). Borowski called O'Brien's probation officer and advised her what had happened (R.10).

On the second occasion, which occurred on August 8, 2010, Borowski claimed that he was at home, which is located near a four-way intersection (R.10-11). Borowski was moving his truck, at which time O'Brien, who was a passenger in his respective truck, flipped Borowski off again while O'Brien's truck was passing on a street (R.10, 16, 23). The truck then proceeded through the intersection and stopped in the middle of the street 75-100 yards from the intersection (R.23). Borowski again observed O'Brien's truck again about ninety minutes later, when Borowski was standing on his deck and he heard a horn beep in front of his house (R. 10). He saw O'Brien leaning forward in his truck, at which time he flipped Borowski off again (R.10). The truck then sped off through the intersection (R.11).

The judge then asked Borowki specifically what O'Brien did to place Borowski in fear, or to cause intimidation or duress (R.11). Borowski then testified that he knew O'Brien for years, that he was aware that he was a fighter, and that he felt threatened upon seeing O'Brien both at the tavern and at his home (R.11-12). Pressed for details by the judge, Borowski offered no more evidence other than

the fact that he was afraid to see O'Brien in public because of his prior dealings with O'Brien as a police officer (R.12-13).

Through further questioning by the judge, Borowski testified that he was aware through mutual acquaintances that O'Brien disliked him (R.14). Borowski stated that O'Brien had "no business driving by my house" (R.14). Upon the conclusion of Borowski's testimony, counsel for O'Brien moved to dismiss the order based on the issues raised in O'Brien's appeal (R.15-17). The judge denied the motion, noting that the evidence indicated that Borowski was off duty, which the judge felt was an "important issue" (R.17).

Through cross-examination, Borowski conceded that his home is located on a main street four-way intersection in Hatfield (R.20).

ARGUMENT

I.

THE COURT'S REVIEW OF A HARASSMENT PREVENTION ORDER PURSUANT TO G.L. c. 211, § 3, IS PROPER, AS THERE HAS BEEN A VIOLATION OF O'BRIEN'S SUBSTANTIVE RIGHTS AND THERE IS NO AVAILABLE EFFECTIVE REMEDY AT LAW.

O'Brien's substantive rights have been affected, as the District Court has entered a harassment

prevention order in violation of his First Amendment right to free speech under the Massachusetts and United States Constitutions. Additionally, he is now subjected to a restraining order and the accompanying threat of a criminal prosecution pursuant to the relevant statutory scheme. See G.L. c. 258E, § 9. With respect the harassment prevention statute at issue, G.L. c. 258E affords no express appellate remedy from a District Court entering an order. In this regard, prior to the Supreme Judicial Court's ruling in Zullo v. Goguen, 423 Mass. 679, 672 (1996), the Court held that a review of a restraining order pursuant to c. 209A was to be accomplished under its superintendence powers pursuant to G.L. c. 211, § 3. See, e.g., Frizado v. Frizado, 420 Mass. 592, 593 (1995) ("The use of G.L. c. 211, § 3, to challenge an order entered under 209A was proper."); Callahan v. Boston Municipal Court Dep't, 413 Mass. 1009 (1992) (holding that the review of a restraining order was proper under G.L. c. 211, § 3 because "[G.L.] c. 209A has no express appellate remedy from a Municipal or District Court."), abrogated by Zullo v. Goguen, 423 Mass. 679, 672 (1996).

Until the Court announces a rule similar to that decided in Zullo, 423 Mass. at 682, review pursuant to G.L. c. 211, § 3, is proper pursuant to the Court's superintendence power over lower courts. Moreover, the statute here has recently been enacted with no guidance as to the proper venue for an appeal. In this regard, the Supreme Judicial Court "has 'wide discretion in devising various procedures for the course of appeals in different classes of cases.'" In re McDonough, 457 Mass. 512, 521 (2010). Given the substantive issues regarding First Amendment speech, the fact that statute allows speech to be rendered a crime, as well as the fact that there are no cases governing appeals of harassment prevention orders, the Court's review pursuant to G.L. c. 211, § 3, is appropriate. Indeed, Borowski has conceded as much (R.58).

In addition to the fact that c. 258E is silent as to appeals, the Court may provide "directions and rules as may be necessary or desirable for the furtherance of justice" and "the regular execution of the laws." G.L. c. 211, § 3. Accordingly, review on petition is appropriate in this case.

II.
GENERAL LAWS CHAPTER 258E IS UNCONSTITUTIONALLY OVERBROAD TO THE EXTENT THAT IT REGULATES PROTECTED SPEECH.

As an initial matter, G.L. c. 258E is not entitled to a presumption of validity, as the statute is a civil statute that constitutes a prior restraint on speech. In this regard, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Unlike the Supreme Judicial Court's determination in Commonwealth v. Welch, 444 Mass. 80, 89 (2005), the current appeal does not address a statute that codifies a crime. Rather, c. 258E creates a scheme for restraining speech, by way of a harassment prevention order that makes it a crime to further contact or harass an individual. G.L. c. 258E, § 1, 9.

In this respect, Chapter 23 of the Acts of 2010 added the relevant provision to the General Laws and 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, abuse or damage to property and that does in fact cause fear,

intimidation, abuse or damage to property . . ." To the extent that the statute attempts to define "malicious", it sweeps even broader, as it covers any words or acts "characterized by cruelty, hostility or revenge." G.L. c. 258E, § 1. Accordingly, it follows that c. 258E by its terms prohibits cruel, hostile or vengeful speech, provided that the speech causes fear.

As such, the Legislature has enacted G.L. 258E in violation of the Supreme Judicial Court's precepts regarding regulation of offensive speech enunciated in Commonwealth v. Welch, 444 Mass. 80, 89 (2005), as the statute is not limited to fighting words, nor does the statute create an objective standard of reasonableness in prohibiting various forms of speech. As demonstrated by the Court's issuance of a temporary restraining order in this case, the new harassment prevention statute, G.L. c. 258E, regulates protected speech, in this case extending the middle finger. See Welch, 444 Mass. at 89 (2005) (holding that statute proscribing harassing "conduct" encompasses speech).

The United States Supreme Court has held unconstitutional diverse laws prohibiting conduct that might include speech, where those laws were not limited to "fighting words" or other forms of

unprotected speech. See Madsen v. Women's Health Ctr., 512 U.S. 753, 773-774 (1994) (holding unconstitutional provision of injunction creating health clinic buffer zone that prohibited petitioners from physically approaching persons seeking services "unless such person indicates a desire to communicate," as it limited speech beyond "fighting words" or threats); Houston v. Hill, 482 U.S. 451, 462-463, 107 S.Ct. 2502 (1987) (holding unconstitutional municipal ordinance that made it unlawful to interrupt a police officer in the performance of his or her duties overbroad, as ordinance was not limited to "fighting words"); Lewis v. New Orleans, 415 U.S. 130, 131-132 (1974) (holding unconstitutional city ordinance that proscribed "wantonly ... curs[ing,] revil[ing,] or us[ing] obscene or opprobrious language ... to any member of the city police"); Gooding v. Wilson, 405 U.S. 518, 519, 528, 92 S. Ct. 1103 (1972) (holding unconstitutional statute that prohibited "opprobrious words or abusive language, tending to cause a breach of the peace" because not sufficiently narrowed by State courts and not limited to "fighting words").

Given the foregoing, the Supreme Judicial Court has recognized that "a statute seeking to regulate what [the Court has] broadly termed offensive speech will stand only if that statute . . . is so narrowly drawn as to be limited to 'fighting words.'" Commonwealth v. A Juvenile, 368 Mass. 580, 589 (1975). Accordingly, to the extent that the statute regulates speech, the facial validity of c. 258E depends on whether the statute unconstitutionally impinges the right to free speech. In this respect, "(i)t matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute." A Juvenile, 368 Mass. at 585, quoting Gooding v. Wilson, 405 U.S. 518, 520 (1972). Rather, "if a law is found deficient as unconstitutionally overbroad in its potential application to protected speech, it may not be applied even to the person raising the challenge though that person's speech is arguably unprotected by the First Amendment." A Juvenile, 368 Mass. at 585. If the statute encompasses protected speech in its breadth, "(t)he statute, in effect, is stricken down on its face." Id., quoting Coates v. Cincinnati, 402 U.S. 611, 620 (1971) (White, J., dissenting).

Given the constitutional limitations on free speech, the Supreme Judicial Court has previously held that the criminal harassment statute, G.L. c. 265, § 43A, is constitutional only because it was limited to fighting words. See Welch, 444 Mass. at 98. In so holding, the Court noted that the criminal harassment statute by its terms was limited to harassment that (1) is "willful" and "malicious", (2) constitutes a "pattern" or "series", (3) is "directed at a specific person", (4) causes "serious alarm to that person"; and (5) "would cause a reasonable person to suffer substantial emotional distress." Welch, 444 Mass. at 98 (emphasis added). Given the narrow language used in § 43A, the Supreme Judicial Court held the statute was constitutional, as it was narrowly tailored to encompass fighting words. Id. at 98-99.

Here, by contrast, the statute in question requires only willful and malicious conduct that causes fear or intimidation. See G.L. c. 258E, § 1. There is no requirement that the fear or intimidation be objectively reasonable given the circumstance. As such, c. 258E lacks the crucial limitation of an objectively reasonable standard and regulates any conduct, however, slight or commonplace, albeit

offensive, so long as such conduct is willful and malicious, as that term is defined in c. 258E, and causes an individual to experience fear or intimidation.

As stated above, the statute's definition of malice only exacerbates the prior restraint at issue here, as speech "characterized by cruelty, hostility or revenge", G.L. c. 258E, § 1, encompasses speech that constitutes much of the jurisprudence governing protected speech, whether it be hostile picketers carrying the cruelest of images on signs in front of an abortion clinic, see Madsen, 512 U.S. at 773, or foul-mouthed dissidents gesturing at police officers. See infra, at III. It goes without saying that the speech at issue in those cases is "characterized by cruelty, hostility or revenge."

Accordingly, the definitions of "harassment" found in c. 258E do nothing to narrowly tailor a prior restraint on speech, as intent is largely irrelevant in determining whether speech constitutes fighting words excluded from First Amendment protection. In this regard, fighting words are regulated due to their proclivity to incite violence, which is evaluated wholly apart from the speaker's intent. See

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as words which by their very utterance tend to incite an immediate breach of the peace, noting that "any benefit from them is clearly outweighed by the social interest in order and morality."). As currently written, any speech could fall within the purview of G.L. c. 258E, § 1, so long as it causes fear or intimidation, even if that fear is individual to the person seeking a harassment order in the sense that it is not a reasonable fear.

In addition to the fact that it lacks an objective standard, c. 258E is markedly different than c. 265, § 43A in several other respects. Specifically c. 258E does not require that the speech cause "serious" alarm, fear, or other response, nor does it require "substantial" emotional distress, as does c. 265, § 43A. The foregoing deficiencies are fatal, as the Supreme Judicial Court focused on these criteria in upholding § 43A, reasoning that criminal harassment statutes affirmed in other jurisdictions shared the common trait of narrowly tailored language limited to fighting words. Welch, 444 Mass. at 98-99.

Even though § 43A was not expressly limited to "fighting words" by its terms, the Court held that the

limitation was implicit by virtue of the definitions of harassment found in § 43A, which regulated fighting words that were not constitutionally protected. General Laws c. 258E lacks similar limitations, and as written c. 258E broadly regulates offensive words, as opposed to "fighting words", which renders the statute unconstitutional on its face. See Cohen v. California, 403 U.S. 15, 20 (1971). For the foregoing reasons, the statute is constitutionally deficient on its face and operates as a prior restraint on speech. Accordingly, it must be held to be unconstitutional by the Court, and the order by the District Court must be vacated.

III.
EVEN IF THE COURT RULES THAT G.L. c. 258E IS CONSTITUTIONAL, THE CONDUCT COMPLAINED OF CLEARLY CONSTITUTES PROTECTED SPEECH

Even if the Court rejects the defendant's argument that c. 258E is unconstitutional on its face, the specific conduct complained of here clearly constitutes protected speech. In this respect, appellate courts have consistently recognized that the gesture of raising the middle finger is protected speech. See generally Note, DIGITUS IMPUDICUS, 83 U.C. Davis L. Rev. 1403 (1970). More particularly, a

number of Courts have held that raising the middle finger toward a police officer is protected speech. See, e.g., Sandul v. Larion, 119 F.3d 1250, 1255 (6th Cir. 1997); Duran v. City of Douglas, 904 F.2d 1378 (9th Cir. 1990); Nichols v. Chacon, 110 F. Supp.2d 1099, 1102 (W.D.Ark. 2000); Cook v. Bd. of County Comm'rs, 966 F. Supp. 1049, 1051 (1997); Brockway v. Shepherd, 942 F. Supp. 1012, 1015 (M.D.Pa. 1996). See also Commonwealth v. Kelly, 758 A.2d 1284, 1288 (Pa.Super.Ct. 2000); State v. Anonymous, 377 A.2d 1342, 1343 (Conn.Super.Ct. 1977).

In this regard, all of the alleged incidents entail Mr. Borowski's claim that the defendant raised his middle finger at him, and in one instance, raised his arms and stated "F you" (R.10). Virtually the exact same profanity, and profane gesture, has been held to be protected speech in Sandul, 119 F. 3d 1250, wherein the Court held that shouting "f—k you" and extending the middle finger was protected speech. In this regard, "[t]he fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence." Id. at 1255. With regard to the gesture of extending the middle finger, or

fingers for that matter, the conduct entails speech that is too commonplace a gesture of insult in the United States to be regulated. As was recognized in Sandul, "while the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric .... [and] largely because governmental officials cannot make principled distinctions in this area [,] the Constitution leaves matters of taste and style so largely to the individual." Id. at 1254-55 (quoting Cohen, 403 U.S. at 25).

As such, raising the middle finger repeatedly has been upheld as protected expression. See, e.g., Cook v. Bd. of County Comm'rs, 966 F. Supp. at 1051; State v. Anonymous, 377 A.2d at 1343 (officer arrested defendant high school student under disorderly conduct statute prohibiting use of obscene gestures); Brockway, 942 F. Supp. at 1015 (arrest pursuant to Pennsylvania statute that prohibited use of obscene gestures). In Cook, the court went so far as to reject the State's argument as an "unprincipled assertion" that one who gives the finger to a police officer automatically forfeits First Amendment

protection. Cook, 966 F. Supp at 1052. Here, all of the events complained of occurred on a public sidewalk or a public street, so the speech is all the more entitled to protection under the governing precedent. Moreover, at least one of the three incidents, namely the second, entailed the isolated incident of raising the middle finger with no more, and the statute at issue here requires three separate instances of harassment for an order to enter. G.L. c. 258E, § 1. To the extent that the judge relied on the fact that Borowski was off duty, that fact is truly a distinction without a difference. The police are entitled to no more or less protection under the law based on whether they are in uniform, nor can speech be limited in this regard.

For the foregoing reasons, even if the Court were to rule that the c. 258E is constitutional, the acts that are the subject of the harassment prevention order constitute protected speech, and as such, cannot constitute a basis for issuing the harassment prevention order.

IV.

THE HARRASSMENT PREVENTION ORDER IS NOT MOOT AS A RESULT OF A CRIMINAL INDICTMENT

In his opposition to O'Brien's petition, Borowski contends that the issue "may soon become moot as Petitioner was recently indicted by a grand jury" in Hampshire County (R.58). As an initial matter, "an indictment is merely an accusation or charge of crime", DeGolyer v. Commonwealth, 314 Mass. 626, 631 (1943), and as such, does not constitute any evidence, much less evidence of any import to this appeal. There currently exists until September 2, 2011, a no contact and stay away order restraining O'Brien at the risk of criminal prosecution (R.3). For the reasons stated above, the order was issued under an unconstitutional statute, and was based on speech that is constitutionally protected. Accordingly, a live controversy certainly exists.

Even if the order is somehow vacated prior to argument, as noted in the Reservation and Report (R.76), the current appeal raises an issue "of public importance, capable of repetition, yet evading review." Aime v. Commonwealth, 414 Mass. 667, 670 (1993). Although this case has been reported directly

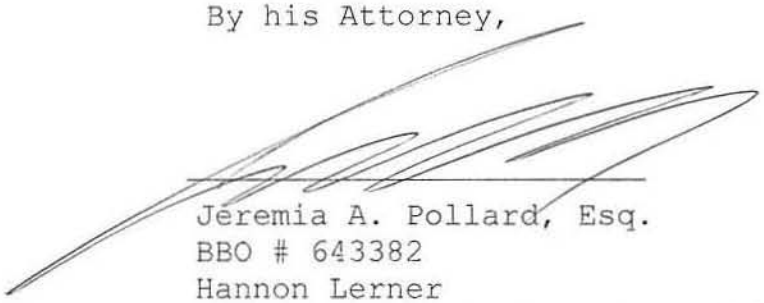
to the Supreme Judicial Court while the order is still active, the reality is that temporary harassment prevention orders issued under G.L. 258E, similarly to restraining orders, will often be vacated by the time they reach the appellate courts. Notwithstanding that fact, such orders concern issues of statewide importance that warrant review. See Uttaro v. Uttaro, 54 Mass. App. Ct. 871, 873 (2002) ("the proper issuance of mutual restraining orders is an issue of statewide legal significance that warrants a decision in this case despite its mootness"), citing Larkin v. Ayer Div. of Dist. Ct. Dept., 425 Mass. 1020, 1020 (1997); Frizado v. Frizado, 420 Mass. 592, 593-594 (1995); Cobb v. Cobb, 406 Mass. 21, 23-24 (1989).

Lastly, the assertion that an indictment renders this appeal moot is wholly unsupported by any evidence properly in the record, as to make such a determination would require more than a representation in a footnote. It would require an examination of not only the transcript of the indictment, but the disposition of the criminal case, which has not yet occurred. Accordingly, O'Brien's appeal is not moot.

CONCLUSION

For the reasons discussed above, the harassment prevention order of the Northampton District Court entered on September 3, 2010, must be vacated and dismissed.

Respectfully Submitted,
ROBERT O'BRIEN,
By his Attorney,



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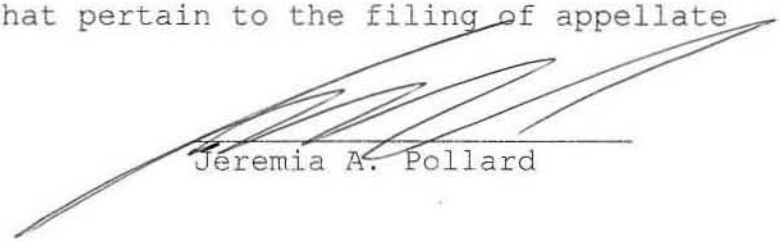
Dated: January 17, 2011

Certification Under Massachusetts Rules of Appellate Procedure 16(k)

Undersigned counsel hereby certifies that the foregoing brief complies with the Massachusetts Rules of Court that pertain to the filing of appellate briefs.



Jeremia A. Pollard

Dated: January 17, 2011

ADDENDUM

A.1

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

CHAPTER 258E HARASSMENT PREVENTION ORDERS

Section 1 Definitions

[Text of section added by 2010, 23 effective May 10, 2010.]

Section 1. As used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Abuse", attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm.

"Harassment", (i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) an act that: (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.

"Court", the district or Boston municipal court, the superior court or the juvenile court departments of the trial court.

"Law officer", any officer authorized to serve criminal process.

"Malicious", characterized by cruelty, hostility or revenge.

"Protection order issued by another jurisdiction", an injunction or other order issued by a court of another state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or a tribal court that is issued for the purpose of preventing violent or threatening acts, abuse or harassment against, or contact or communication with or physical proximity to another person, including temporary and final orders issued by civil and criminal courts filed by or on behalf of a person seeking protection.

A.2

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

CHAPTER 258E HARASSMENT PREVENTION ORDERS

Section 3 Filing of complaint; impounding of case record information; filing fee; expiration of order; modification of order; time for filing; nonexclusivity of remedy

[Text of section added by 2010, 23 effective May 10, 2010.]

Section 3. (a) A person suffering from harassment may file a complaint in the appropriate court requesting protection from such harassment. A person may petition the court under this chapter for an order that the defendant:

(i) refrain from abusing or harassing the plaintiff, whether the defendant is an adult or minor;

(ii) refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor;

(iii) remain away from the plaintiff's household or workplace, whether the defendant is an adult or minor; and

(iv) pay the plaintiff monetary compensation for the losses suffered as a direct result of the harassment; provided, however, that compensatory damages shall include, but shall not be limited to, loss of earnings, out-of-pocket losses for injuries sustained or property damaged, cost of replacement of locks, medical expenses, cost for obtaining an unlisted phone number and reasonable attorney's fees.

(b) The court may order that information in the case record be impounded in accordance with court rule.

(c) No filing fee shall be charged for the filing of the complaint. The plaintiff shall not be charged for certified copies of any orders entered by the court, or any copies of the file reasonably required for future court action or as a result of the loss or destruction of plaintiff's copies.

(d) Any relief granted by the court shall not extend for a period exceeding 1 year. Every order shall, on its face, state the time and date the order is to expire and shall include the date and time that the matter will again be heard. If the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order. When the expiration date stated on the order is on a date when the court is closed to business, the order shall not expire until the next date that the court is open to business. The plaintiff may appear on such next court business day at the time designated by the order to request that the order be extended. The court may also extend the order upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from harassment. The fact that harassment has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, or allowing an order to expire or be vacated or for refusing to issue a new order.

(e) The court may modify its order at any subsequent time upon motion by either party; provided, however, that the non-moving party shall receive sufficient notice and opportunity to be heard on said modification. When the plaintiff's address is inaccessible to the defendant as provided in section 10 and the defendant has filed a motion to modify the court's order, the court shall be responsible for notifying the plaintiff. In no event shall the court disclose any such inaccessible address.

(f) The court shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of harassment.

A.3

[Subsection (g) effective until May 22, 2010. For text effective May 22, 2010, see below.]

(g) An action commenced under this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties.

[Subsection (g) as amended by 2010, 112, Sec. 30 effective May 22, 2010. For text effective until May 22, 2010, see above.]

(g) An action commenced under this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties; including, but not limited to, court actions, administrative proceedings and disciplinary proceedings.

A.4

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

CHAPTER 258E HARASSMENT PREVENTION ORDERS

Section 9 Review and filing of records within court activity record information system and statewide domestic violence recordkeeping system; execution of outstanding warrants; service upon defendant; order for payment of damages

[Text of section added by 2010, 23 effective May 10, 2010.]

Section 9. When considering a complaint filed under this chapter, the court shall order a review of the records contained within the court activity record information system and the statewide domestic violence recordkeeping system, as provided in chapter 188 of the acts of 1992 and maintained by the commissioner of probation, and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving violent crimes or abuse. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances in which an outstanding warrant exists, the court shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances in which such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Whenever the court orders that the defendant refrain from harassing the plaintiff or have no contact with the plaintiff under section 3, 5 or 6, the clerk or clerk-magistrate shall transmit: (i) to the office of the commissioner of probation information for filing in the court activity record information system or the statewide domestic violence recordkeeping system as provided in said chapter 188 of the acts of 1992 or in a recordkeeping system created by the commissioner of probation to record the issuance of, or violation of, prevention orders issued pursuant to this chapter; and (ii) 2 certified copies of each such order and 1 copy of the complaint and summons forthwith to the appropriate law enforcement agency which, unless otherwise ordered by the court, shall serve 1 copy of each order upon the defendant, together with a copy of the complaint and order and summons. The law enforcement agency shall promptly make its return of service to the court. The commissioner of probation may develop and implement a statewide harassment prevention order recordkeeping system.

Law officers shall use every reasonable means to enforce such harassment prevention orders. Law enforcement agencies shall establish procedures adequate to ensure that an officer on the scene of an alleged violation of such order may be informed of the existence and terms of such order. The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated and shall direct the agency to destroy all record of such vacated order and such agency shall comply with that directive.

Each harassment prevention order issued shall contain the following statement:

VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any violation of such order or a protection order issued by another jurisdiction shall be punishable by a fine of not more than $5,000, or by imprisonment for not more than 21/2 years in a house of correction, or both. In addition to, but not in lieu of, the foregoing penalties and any other sentence, fee or assessment, including the victim witness assessment in section 8 of chapter 258B, the court shall order persons convicted of a violation of such an order to pay a fine of $25 that shall be transmitted to the treasurer for deposit into the General Fund. For any violation of such order, the court may order the defendant to complete an appropriate treatment program based on the offense.

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In each instance in which there is a violation of a harassment prevention order or a protection order issued by another jurisdiction, the court may order the defendant to pay the plaintiff for all damages including, but not limited to, loss of earnings, out-of-pocket losses for injuries sustained or property damaged, cost of replacement locks, medical expenses, cost for obtaining an unlisted telephone number and reasonable attorney's fees.

Any such violation may be enforced by the court. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The court may enforce by civil contempt procedure a violation of its own court order.

Section 8 of chapter 136 shall not apply to any order, complaint or summons issued pursuant to this section.

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE I COURTS AND JUDICIAL OFFICERS

CHAPTER 265 CRIMES AGAINST THE PERSON

Section 43 Stalking; punishment

[Subsection (a) effective until May 3, 2010. For text effective May 3, 2010, see below.]

Section 43. (a) Whoever (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both. Such conduct, acts or threats described in this paragraph shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device including, but not limited to, electronic mail, internet communications and facsimile communications.

[Subsection (a) as amended by 2010, 92, Sec. 9 effective May 3, 2010. For text effective until May 3, 2010, see above.]

(a) Whoever (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $1,000, or imprisonment in the house of correction for not more than 2 1/2 years or by both such fine and imprisonment. The conduct, acts or threats described in this subsection shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

(b) Whoever commits the crime of stalking in violation of a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to sections eighteen, thirty-four B, or thirty-four C of chapter two hundred and eight; or section thirty-two of chapter two hundred and nine; or sections three, four, or five of chapter two hundred and nine A; or sections fifteen or twenty of chapter two hundred and nine C or a protection order issued by another jurisdiction; or a temporary restraining order or preliminary or permanent injunction issued by the superior court, shall be punished by imprisonment in a jail or the state prison for not less than one year and not more than five years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of one year.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and

twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of this subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this subsection.

(c) Whoever, after having been convicted of the crime of stalking, commits a second or subsequent such crime shall be punished by imprisonment in a jail or the state prison for not less than two years and not more than ten years. No sentence imposed under the provisions of this subsection shall be less than a mandatory minimum term of imprisonment of two years.

A prosecution commenced hereunder shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of this subsection shall not be reduced to less than the mandatory minimum term of imprisonment as established herein, nor shall said sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory term of imprisonment.

A person convicted of violating any provision of this subsection shall not, until he shall have served the mandatory minimum term of imprisonment established herein, be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct under sections one hundred and twenty-nine, one hundred and twenty-nine C and one hundred and twenty-nine D of chapter one hundred and twenty-seven; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of this subsection. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provision of this section.

RECORD APPENDIX

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