COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS. NO. 2015-P-0540

CHELSEA VAN VALKERBURG, Plaintiff-Appellee

V.

ERON GJONI, Defendant-Appellant

AMICI CURIAE BRIEF OF PROFESSORS EUGENE VOLOKH AND AARON H. CAPLAN

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ISSUE PRESENTED, STATEMENT OF THE CASE, AND STATEMENT OF THE FACTS

Amici adopt the issue presented, statement of the case, and statement of the facts submitted by Eron Gjoni.

INTEREST OF *AMICI CURIAE*

Professors Volokh and Caplan are both experts on the First Amendment and authors of constitutional law textbooks[1] as well as many articles on free speech, including -- most relevant to this case -- Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 Stan. L. Rev. 1049 (2000); Eugene Volokh, One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws, and "Cyberstalking," 107 Nw. U. L. Rev. 731 (2013); and Aaron Caplan, Free Speech and Civil Harassment Orders, 64 Hastings L.J. 781 (2013). An amicus curiae brief is desirable in this case because of the significant questions of First Amendment law raised by the appeal.

[1] Eugene Volokh, The First Amendment and Related Statutes (5th ed. 2013); Aaron Caplan, An Integrated Approach to Constitutional Law (2015).

ARGUMENT

I. Broad injunctions, such as the one in this case, violate the First Amendment

The injunction in this case, barring the posting of all "information" about Ms. Van Valkerburg, is an unconstitutional prior restraint. "An injunction that forbids speech activities is a classic example of a prior restraint." Care & Protection of Edith, 421 Mass. 703, 705 (1996); see also Organization for Better Austin v. Keefe, 402 U.S. 415 (1971) (striking down an injunction barring leafletting critical of a real estate agent); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 893, 924 n.67 (1982) (striking down an injunction barring "demeaning and obscene" speech about people who refused to participate in a boycott); Aaron H. Caplan, Free Speech and Civil Harassment Orders, 64 Hastings L.J. 781, 817-26 (2013).

Indeed, even criminal punishment of supposedly "harass[ing]" speech about a person is permissible only if the speech fits within a First Amendment exception. Commonwealth v. Johnson, 470 Mass. 300, 310, 311 n.12 (2014); O'Brien v. Borowski, 461 Mass. 415, 422-23

(2012);[2] Eugene Volokh, One-To-One Speech vs. One-To-Many Speech, Criminal Harassment Laws, and "Cyberstalking," 107 Nw. U. L. Rev. 731, 751-62, 773-93 (2013); People v. Bethea, 1 Misc. 3d 909(A), 2004 WL 190054, *1-*2 (N.Y. Crim. Ct. 2004) (rejecting criminal harassment prosecution of woman who had posted leaflets sharply criticizing the allegedly deadbeat father of her child, and relying on the principle that "Americans are, after all, free to criticize one another"). It follows that a prior restraint of speech -- "the most serious and the least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) -- would be unconstitutional, too, at least if (as here) it is not limited to speech that fits within an exception.

Even the narrower restriction on speech that "encourage[s] 'hate mobs,'" if severed from the rest of the injunction, would be unconstitutional. That restriction is not limited to speech that fits within a First Amendment exception, here speech that is intend-

[2] The mootness analysis in O'Brien was modified by Seney v. Morhy, 467 Mass. 58, 61-63 (2014), but the First Amendment holding of O'Brien remains good law, id. at 63-64.

ed to and likely to promote imminent lawless conduct, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Hess v. Indiana, 414 U.S. 105, 108-09 (1973). Indeed, the injunction in Claiborne Hardware involved speech that, according to the plaintiffs in that case, had the potential to lead others to retaliate against the target of the speech, 458 U.S. at 904-05; yet the Court nonetheless overturned the injunction.

Likewise, even an injunction banning only communication of information about Van Valkerburg's "personal life" would likely be unconstitutional. Speech restrictions aimed at protecting privacy, like other restrictions, must comply with the First Amendment. See, e.g., Care & Protection of Edith, 421 Mass. at 705-06.

"Mere intrusion on a person's alleged privacy interest is not by itself an adequate base on which to predicate a broad prior restraint on another's free speech." Nyer v. Munoz-Mendoza, 385 Mass. 184, 189 (1982). "Designating . . . conduct as an invasion of privacy . . . is not sufficient to support an injunction" against speech, at least when a plaintiff "is not attempting to stop the flow of information into his own household, but to the public." Keefe, 402 U.S. at 419-20.

Indeed, a Georgia appellate case held that, for First Amendment reasons, stalking statutes would not authorize an injunction even against "extremely insensitive" speech "publishing or discussing [an ex-girlfriend's] private medical condition," Collins v. Bazan, 568 S.E. 2d 72, 73-74 (Ga. Ct. App. 2002). It would follow that a broad ban on speech discussing a person's "personal life" would be unconstitutional, too. Even if some very narrow injunctions against speech may sometimes be justified on privacy grounds, a ban on all speech about a person's "personal life" cannot be.

This case is not about whether Mr. Gjoni could be held liable for disclosure of private facts as to some of his statements. It is not about whether some of Mr. Gjoni's readers could be criminally punished, or held civilly liable, for any threats they made against Ms. Van Valkerburg. It is about whether an American court can issue a prior restraint against a person's conveying any "information" about another person. And that is the remedy that the First Amendment most clearly forbids.

II. Restricting speech about an ex-lover's life unconstitutionally restricts people's ability to speak about their own lives

Restricting Gjoni's speech about Van Valkerburg also unconstitutionally restricts Gjoni's speech about himself and his own life. The injunction, for instance, limits Gjoni's ability to publicly discuss this litigation or the injunction itself. Gjoni cannot discuss his case without including some "information about" Van Valkerburg, including about her "personal life" -- such as her name, their past romantic relationship, and the fact that she sought an injunction against him.

Likewise, when people condemn Gjoni online for allegedly acting badly by writing about Van Valkerburg, the injunction limits Gjoni from explaining why he thought his statements were fair and justified. And if Gjoni wants to tell his friends and acquaintances, in an online journal or on his Facebook page, how he feels about romantic relationships or why he is cautious about a new relationship, he cannot do so if the explanation would mention Van Valkerburg.

Courts have recognized that even imposing tort liability for speech about the speaker's relationship with someone else would improperly restrict the speak-

er's ability to describe his or her own life. For instance, in Bonome v. Kaysen, 17 Mass. L. Rptr. 695, 2004 WL 1194731 (Mass. Super. Ct. 2004), author Susana Kaysen wrote a book about her own life, including her relationship with Joseph Bonome. The book included many details, including intimate sexual details, and though it did not mention Bonome's name, people who knew about his relationship with Kaysen recognized him.

Bonome sued for disclosure of private facts, but the court rejected that argument. The court found that even a personal life story can be seen as involving "issues of legitimate public concern," id. at *5, simply because it discusses broader matters such as relationships between the sexes. Likewise, any future posts by Mr. Gjoni that mention Ms. Van Valkerburg in the course of discussing the injunction in this case, Mr. Gjoni's thoughts about the computer gaming business, or relationships between the sexes would similarly involve issues of legitimate public concern.

And, because "it is often difficult, if not impossible, to separate one's intimate and personal experiences from the people with whom those experiences are shared," the court in Bonome held that "the First

Amendment protects Kaysen's ability" to discuss her life, even though "disclosing Bonome's involvement in those experiences is a necessary incident thereto." Id. at *6. Other recent cases, such as Anonsen v. Donahue, 857 S.W.2d 700 (Tex. Ct. App. 2003), take the same view. See also Sonja R. West, The Story of Me: The Underprotection of Autobiographical Speech, 84 Wash. U. L. Rev. 905, 907-11 (2006) (explaining how autobiographical speech must often also mention others).

For the reasons mentioned in Part I, imposing a prior restraint on such speech would be improper as well. And that is especially so when the prior restraint covers not just the narrow category of speech that fits within the disclosure of private facts tort, but instead covers any "information about the [plaintiff] or her personal life."

Nor does it matter that plaintiff may not be a general-purpose public figure for libel law purposes. True statements, and expressions of opinion about people, are fully protected regardless of whether the subjects are private figures. Even in intentional infliction of emotional distress cases, the First Amendment applies to speech related to private figures as

much as to speech related to public figures. See Snyder v. Phelps, 562 U.S. 443, 451, 458 (2011) (applying the reasoning of Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), which involved a public figure plaintiff, to a case where the plaintiff and the subject of the speech were both private figures).

Likewise, the losing plaintiffs in Bonome and Anonsen were private figures, too. So was the losing plaintiff in Keefe, and the subjects of the speech in Claiborne Hardware. The U.S. Supreme Court has recognized a plaintiff's private figure status as relevant in only one area: whether compensatory damages in libel cases can be based on a showing of mere negligence, rather than "actual malice." See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-50 (1974). That status is not relevant to attempts to suppress nonlibelous speech about the person, including truthful statements and expressions of opinion.

III. Allowing such broad injunctions would open the door to suppressing a broad range of speech

Any order affirming the trial court decision in this case would also affect many cases beyond this one, and many cases beyond those arising from disputes among ex-lovers.

The trial court decision in this case is an instance of a broader problem. In recent years, some trial courts throughout the country -- including in Massachusetts -- have entered strikingly broad injunctions that bar a wide range of speech about particular people. These injunctions, like the one in this case, are not limited to unprotected speech, such as proven libel, "fighting words," threats, or speech intended to and likely to incite imminent illegal conduct. Nor are they limited to unwanted speech to a person. Rather, they restrict a wide range of speech to the public about the person.

Thus, for instance, in Chan v. Ellis, 770 S.E.2d 851 (Ga. 2015), the Georgia Supreme Court reversed an injunction that ordered a web site operator, Matthew Chan, to delete "all posts relating to [Linda] Ellis" from his web site, and likely forbade the posting of future posts as well. The Georgia Supreme Court concluded that the injunction was not authorized by Georgia law, largely because the injunction covered speech about a person and not just speech to her. The court therefore did not need to reach the serious First Amendment objections to the injunction.

Likewise, in Kleem v. Hamrick, a local gadfly and past local candidate, blogged offensive things about the sister of a town's mayor, who was also a local civic figure. An Ohio Court of Common Pleas judge responded by ordering that the blogger "is prohibited from posting any information/comments/threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family . . . on any site," including both her own blog and the Cleveland.com news site.[3]

In Kimberlin v. Walker, a Maryland court similarly enjoined a blogger from blogging about a political activist who was also a convicted criminal.[4] That order, too, was later vacated -- though not for a month a half, time during which the blogger's First Amendment

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[3] Order of Protection at 3, Kleem v. Hamrick, No. CV 11 761954 (Ohio Ct. Com. Pl. Aug. 15, 2011), http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf. The order was modified a week later, allowing speech about members of the petitioner's "extended family," but not about the petitioner herself. Journal Entry, Kleem, No. CV 11 761954, http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf, at 5.

[4] Final Peace Order, Kimberlin v. Walker, No. 0601SP019792012 (Md. Montgomery County Dist. Ct. May 19, 2012), http://www.law.ucla.edu/volokh/crimharass/AaronWorthing-order.jpg; Hearing at 59-60, Kimberlin, No. 0601SP019792012 (Md. Montgomery County Dist. Ct. May 29, 2012) ("Respondent shall not contact the person in person, by telephone, in writing, or any other means. And 'any other means' is putting it on a blog, a Tweet, a megaphone, a smoke signals -- what else is out there -- sonar, radar, laser. Nothing ....").

rights were suppressed.[5] And in Nilan v. Valenti, a Massachusetts court ordered a blogger (and former professional journalist) to remove his blog posts about a woman -- as it happens, a local judge's daughter -- who had been accused of criminal negligence and leaving the scene of an accident after hitting a pedestrian with her car.[6] Again, that order was later vacated.[7]

Trial courts in other states have likewise enjoined people from saying anything at all online about ex-lovers[8] or ex-spouses' lawyers.[9] Courts have enjoined

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[5] Order of Denial of Petition for Peace Order, Kimberlin v. Walker, No. 8526D (Md. Montgomery County Cir. Ct. July 5, 2012), http://www.law.ucla.edu/volokh/crimharass/99246349-Peace-Order-Vacated-7-5-12.pdf.

[6] Harassment Prevention Order, Nilan v. Valenti, No. 12 27RO 235 (Mass. Pittsfield Dist. Ct. June 27, 2012), http://www.volokh.com/wp-content/uploads/2012/07/nilanorder.png; Andrew Amelinckx, Judge Gives Nilan Harassment Protection from Valenti, Orders Him to Redact Blog, Berkshire Eagle, June 27, 2012.

[7] Modification, Extension or Termination of Harassment Prevention Order, Nilan v. Valenti, No. 12 27RO 235 (Mass. Pittsfield Dist. Ct. July 9, 2012), www.law.ucla.edu/volokh/crimharass/NilanOrderTermination.pdf.

[8] Morelli v. Morelli, No. A06-04-60750-C, at 9 (Pa. Ct. Com. Pl. June 6, 2011), http://www.law.ucla.edu/volokh/crimharass/MorelliTranscript.pdf ("Father shall take down that website and shall never on any public media make any reference to mother at all, nor any reference to the relationship between mother and children, nor shall he make any reference to his children other than 'happy birthday' or other significant school events."); Injunction at 2, Schmidt v. Ferguson, No. 10CV1611 (Wis. Cir. Ct. Apr. 22, 2010), http://www.volokh.com/wp/wp-content/uploads/2010/09/ferguson-schmidt-order.pdf ("Respondent may NOT use internet in any manner to communicate about Petitioner ever again."); see also Flash v. Holtsclaw, 789 N.E.2d 955, 957-58 (Ind. Ct. App. 2003) (discussing court order banning an

people from criticizing those with whom the people have had business dealings.[10] One court has issued a restraining order based on a defendant's repeatedly (and accurately) publicizing the fact that the plaintiff had been suspended from practicing law for defrauding a client.[11]

Most of these cases have been trial court orders, which were either unappealed or reversed on appeal. They may have been entered without adequate First Amendment briefing -- such inadequate briefing is not uncommon in state trial courts, especially in civil injunction cases, where the defendant speaker may not be represented by counsel. And many trial court judges may generally not be familiar with First Amendment

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ex-boyfriend from sending letters about his ex-girlfriend to local bars, asking that they not serve alcohol to her).

[9] Injunction at 3, Martin v. Ferguson, No. 10CV2326 (Wis. Cir. Ct. June 22, 2010), available at http://www.volokh.com/wp/wp-content/uploads/2010/09/ferguson-martin-order.pdf ("Respondent may not use the internet in any manner to communicate about petitioner [respondent's ex-husband's lawyer] or her law firm while the injunction is in place."); id. ("Respondent shall immediately remove website www.lisamartin-attorney.com from the internet and shall make no future websites or postings to other websites, or on Yahoo, regarding petitioner or her law firm while the injunction is in place.").

[10] See, e.g., Lamont v. Gilday, No. 07-2-37030-7SEA, 2008 WL 4448652, at *3-4 (Wash. Super. Ct. Mar. 5, 2008) (enjoining defendant from making any statements about defendant's ex-employer "and/or [this] lawsuit or anyone who testified in the trial, either directly by name, or indirectly by reference, via . . . any . . . form of communication").

[11] Welytok v. Ziolkowski, 752 N.W.2d 359 (Wis. Ct. App. 2008).

doctrine, which only rarely arises in their courts. This is why it is especially important for appellate courts, such as this Court, to clearly indicate to trial courts that broad injunctions such as the one in this case violate the First Amendment.

CONCLUSION

For these reasons, amici ask the Court to hold that the restraining order violates the First Amendment.

Respectfully submitted,

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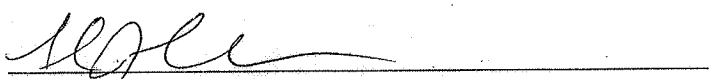
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs.



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