December 9, 2024

Via TrueFiling

Chief Justice Patricia Guerrero
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *E.G. v. M.L.* (2024) 105 Cal.App.5th 688
Opposition to Depublication Request (Case No. S288099)

Dear Chief Justice Guerrero and Associate Justices:

On behalf of the Association of Certified Family Law Specialists (ACFLS), we write to oppose the request filed by Professor Volokh, the First Amendment Coalition, and the Foundation for Individual Rights and Expression (Requestors) seeking to depublish *E.G. v. M.L.* (2024) 105 Cal.App.5th 688.

Requestors' warning of a "dangerous precedent on the freedom of speech," if *E.G.* remains published is misplaced. Requestors confuse the distinction between orders made before trial and orders made after trial. There is a key difference between the two, as discussed in this letter. *E.G.* dealt with orders made after trial; case law holds such post-trial orders may restrict harassing and abusive speech.

E.G. is the latest in a line of California restraining order precedent that has consistently held that (1) the First Amendment does not guarantee the right to harassment of another, and (2) restricting speech that has been found at trial by a court to be harassment or abuse does not amount to a prohibited restraint of protected speech. In *E.G.*, the Sixth District Court of Appeal correctly affirmed a trial court's proper exercise of discretion in issuing a restraining order based on conduct that was found *at trial* to be harassment and therefore unprotected. (*E.G.* at pp. 13-17.) The depublication request should therefore be denied.

1. **Requestor's argument for depublication fails because *E.G.* involves a prior adjudication of speech as harassment, not an unlawful pre-trial restraint.**

In support of their depublication request, Requestors contend *E.G.* is inconsistent with the principles set forth in *Evans v. Evans* (2008) 162 Cal.App.4th 1157—a decision they refer to as the "closest precedent on the matter." *Evans* is a defamation case in which the court issued a preliminary injunction that enjoined publication of false and defamatory statements or confidential personal information about a deputy sheriff. The court also prohibited his ex-wife from contacting the sheriff's department regarding him except to report criminal conduct in an emergency. (*Id.* at p. 1167.) The reviewing court held that the order was unconstitutional under U.S. Const., 1st Amend., and Cal. Const., art. I, § 2, subd. (a), because it was overbroad, vague, and a prior restraint. (*Id.* at p. 1166.) The guiding principle in *Evans* was that the trial court could not prohibit the ex-wife from making false and defamatory statements *before* the court had found the statements defamatory at trial. (*Id.* at p. 1166 [finding order was "overbroad, vague, and an unconstitutional prior restraint *before trial*"], emphasis added.)

But a closer precedent applies to *E.G.*'s facts. *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, involved a similar First Amendment argument brought by the restrained party in a domestic violence restraining order proceeding. In *Evilsizor, supra,* 237 Cal.App.4th at page 1420, a husband downloaded "tens of thousands" of his wife's text messages and notes she kept on her cell phone, which she used as a diary. He then went uninvited to the home of his wife's parents and disclosed private and sensitive information about her to them. (*Ibid.*) He filed copies of some of the messages during the dissolution proceedings. (*Ibid.*) He also hacked into his wife's Facebook account, changed her password, and changed the e-mail address associated with the account to his own. (*Id.* at pp. 1420–1421.) The trial court concluded, and the Court of Appeal agreed, that husband disturbed wife's peace "'because [he was] going around either disclosing or threatening to disclose to third parties for no particular reason intimate details of [their] lives.'" (*Id.* at p. 1425.)

Upholding the restraining order against husband, the First District Court of Appeal reasoned that the First Amendment's protections did not apply to the injunction in question because the trial court determined that husband's actions amounted to abuse under the DVPA *after* a contested hearing. (*Evilsizor, supra,* 237 Cal.App.4th at p. 1429.) This distinguished the case from those in which trial courts enjoined speech *before* a determination was made that the speech was unprotected. (*Ibid.*)

As is key to this depublication request, in arriving at its decision, the *Evilsizor* court actually discussed and distinguished *Evans* from restraining order cases such as these.

The *Evilsizor* court reasoned as follows:

> [I]n *Evans v. Evans* (2008) 162 Cal.App.4th 1157 [76 Cal. Rptr. 3d 859] the appellate court reversed the issuance of a preliminary injunction that prohibited a party from publishing certain statements about her former husband, because the injunction was overbroad and amounted to an invalid prior restraint before trial. (Id. at pp. 1161–1162; see *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, 1145–1146 [51 Cal. Rptr. 2d 91] [preliminary injunction entered before trial that prohibited ex-husband from discussing allegedly defamatory comments about his former spouse, a famous actress, amounted to invalid prior restraint].) The *Evans* court emphasized, however, that a court may prohibit a party from repeating statements determined at trial to be defamatory, because defamatory statements are not subject to protection under the First Amendment. (*Evans*, at p. 1162.) Here, the trial court entered an order *after* a contested hearing where it determined Sweeney committed abuse under the DVPA.

(*Evilsizor, supra*, 237 Cal.App.4th at pp. 1429.)

The Court of Appeal also analogized restraining order cases such as these to *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 (*Lemen*), a case from which Requestors incorrectly argue *E.G.* detracts:

> This approach is consistent with well-settled First Amendment jurisprudence. "[A]n injunctive order prohibiting the repetition of expression that ha[s] been judicially determined to be unlawful d[oes] not constitute a prohibited prior restraint of speech." (*Lemen, supra,* 40 Cal.4th at p. 1153.) For example, following a court trial in *Lemen*, the trial court determined that the defendant had defamed a restaurant and bar, and it entered a permanent injunction prohibiting the defendant from repeating the defamatory statements. (Id. at pp. 1144–1146.) The Supreme Court held that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (Id. at p. 1148.)

(*Evilsizor, supra*, 237 Cal.App.4th at pp. 1429-1430.)

On these points, *E.G.* tracks *Evilsizor* in distinguishing itself from *Evans*. In *E.G.*, a former romantic partner of the restrained minor's mother, sought the restraining order after the minor posted the romantic partner's personal information on social media and alleged the partner was supporting the minor's mother in abusive conduct against the minor and her younger brother. (*E.G.* at pp. 1-2.) The restraining order prohibited the

minor from publishing the romantic partner's personal or professional contact information online and from defaming or harassing her. (*Id.* at p. 2.) Crucially, this restraining order issued *after* a contested hearing in which the trial court found that the minor child's "doxing" of her mother's former romantic partner was a course of conduct causing the partner to be threatened and harassed, which conduct was likely to continue absent a restraining order. (*Id.* at p. 8.) In this case, such a decision is not akin to *Evans*, because the trial court properly adjudicated the conduct as harassment *after* a contested hearing, thereby stripping the restrained party's conduct of First Amendment protections it may have otherwise enjoyed.

Requestors nevertheless argue *E.G.* detracts from *Evans* because the poor briefing of self-represented litigants in the case resulted in an erroneous decision by the Court of Appeal. Not so. *E.G.* detracts from *Evans*, because the conduct in *E.G.* was previously adjudicated harassment, not an unlawful prior restraint. The *E.G.* court recognized this in rejecting the restrained party's same constitutional argument because "speech that constitutes 'harassment' within the meaning of section 527.6 is not constitutionally protected, and the victim of the harassment may obtain injunctive relief." (*E.G.* at p. 13.) This same logic dooms Requestor's argument that *E.G.* detracts from *Lemen* because only "determinations at trial that the enjoined statements are defamatory" are permissible. At trial, the *E.G.* court *did* determine that the restrained party's conduct was harassment, and therefore properly enjoined such further conduct.

2. *E.G.* should remain published because it contributes to a line of California restraining order precedent that has consistently held that the First Amendment does not guarantee the right to harassment of another.

In addition to *Evilsizor*, *E.G.* adds a helpful decision to the body of published case law in the area of California civil harassment and domestic violence restraining order law which carves out clear exceptions to the application of the First Amendment in cases where the conduct in question is adjudicated as harassment or abuse. For example, the argument Requestors make in support of depublication was also more recently dealt with—and rejected again—in another domestic violence restraining order case, *Jan F. v. Natalie F.* (2023) 96 Cal.App.5th 583, 594-595. *Jan F.* involved the question of whether the father had a First Amendment right to petition the government (by making reports to local authorities) despite such conduct constituting abuse of the mother. On this point, the *Jan. F* Court held:

> [W]e observe "the First Amendment does not guarantee the right to harassment of another." (*Doe v. McLaughlin* (2022) 83 Cal.App.5th 640, 656 [299 Cal. Rptr. 3d 673].) Nor does restricting speech that is abusive under the DVPA "amount to a prohibited restraint of protected speech." (*In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, 1428 [189 Cal. Rptr. 3d 1]; see also *Altafulla v. Ervin* (2015) 238

> Cal.App.4th 571, 581 [189 Cal. Rptr. 3d 316] [holding § 6320 is not unconstitutional because "'[t]he "protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives," is … a compelling interest'" for which the First Amendment must "'"give way"'"].) Thus, to the extent Father called the police to conduct welfare checks without a legitimate basis for the purpose of harassing Mother, he had no First Amendment right to do so.

(*Jan F., supra,* 96 Cal.App.5th at pp. 594-595.)

The logic in this line of cases extends to California authority outside the civil harassment and domestic violence restraining order context as well. "Although stated in broad terms, the right to free speech is not absolute [. . .] [l]iberty of speech and of the press is also not an absolute right, and the state may punish its abuse." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134 (overruled in part on unrelated grounds in *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal. 5th 611, 631, fn. 6.) Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection. (*Aguilar, supra,* 21 Cal.4th at p. 134.) "Once specific expressional acts are properly determined to be unprotected by the First Amendment, there can be no objection to their subsequent suppression or prosecution." (*Lemen, supra,* 40 Cal.4th at p. 1156.)

In conclusion, The "ability to continue to engage in activity that has been determined after a hearing to constitute abuse is not the type of 'speech' afforded constitutional protection." (*Evilsizor, supra,* 237 Cal.App.4th at p. 1427.) And an injunction may "deprive the enjoined parties of rights others enjoy precisely because the enjoined parties have abused those rights in the past." (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 352.) *E.G.* is properly included in the body of published case law that consistently upholds these precedents. Because *E.G.* distinguishes itself from the constitutional concerns raised by Requestors, the depublication request should be denied.

3. ***E.G.* should also remain published because of its guidance on court discretion to select a restraining order termination date that is predicated on when the abuse is no longer likely to recur.**

On a final note, although Requestors do not address this, ACFLS wishes to point out that it originally sought publication of *E.G.* on the grounds that it was the first known opinion to establish the propriety of the trial court setting a restraining order's end date based on a future date or event at which it was likely the harassment or abuse would not recur. In *E.G.*, that date was the restrained minor's 18th birthday when she would no longer be subject to the child custody orders that had spurred the acrimonious litigation.

E.G. is a bellwether case demonstrating that trial courts may exercise their discretion to set durations and end dates of restraining orders that are rooted in the matter at hand—when the harassment or abuse is likely not to recur—rather than an arbitrary three- or five-year period as is most common. The case should remain published for this additional purpose.

1. Interest of Persons Opposed to Depublication

ACFLS is an independent non-profit bar association, currently composed of 605 family law specialists certified by the State Bar. Since 1980, ACFLS has been dedicated to promoting and preserving the practice of family law in California. ACFLS members actively practice family law in California family courts and appellate courts. Our members also serve as court-appointed minors' counsel, mediators, private judges, judges pro tempore, and expert witnesses in child custody proceedings.

Since its founding at the inception of family law specialist certification by the State Bar, ACFLS has played an active public policy role, including regularly weighing in when the Courts of Appeal, Legislature, and Judicial Council consider matters of significance to family courts, family court populations, or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the Court of Appeal invited the organization's participation.

ACFLS has an active all-volunteer amicus committee currently with 24 members who review cases and make recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or de-publication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs. ACFLS's amicus committee includes all known California attorneys who hold dual certification as family law and appellate specialists, and other leaders in the family law community including Hon. Thomas Trent Lewis (ret.) and Garrett C. Dailey.

ACFLS's board of directors and amicus committee have no direct ties to or interest in the litigants or their attorneys in this matter. Committee member, Leslie Ellen Shear had a conflict of interest in this matter and did not participate. ACFLS is solely concerned with the development of the law for children and families in California.

Sincerely,
Association of Certified Family Law Specialists

John T. Sylvester, CALS, CFLS[1]
Amicus Committee

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