NOS. 15-50138 and 15-50193

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARREN DAVID CHAKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Larry A. Burns, Presiding

APPELLANT'S OPENING BRIEF

SARAH R. WEINMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

State Cases

Miscellaneous

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DARREN DAVID CHAKER, Defendant-Appellant.	U.S.C.A. Nos. 15-50138, 15-50193 U.S.D.C. NO. 15-CR-7012-LAB APPELLANT'S OPENING BRIEF

INTRODUCTION

"Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

In this case, Darren Chaker, an avid blogger, exercised his core political-speech rights in authoring a series of blogposts advocating police accountability. One post called into question the credibility of a Nevada law enforcement official. The post invited "criminal defense or civil rights attorney[s]"to contact him for impeachment

material "concerning…why [the official] was forced out of the Las Vegas Metro Police Department…." ER174.

The district court determined that this statement violated a supervised-release condition, imposed upon Mr. Chaker's conviction for bankruptcy fraud in a different jurisdiction, stating that he "may not stalk and/or harass other individuals, to include, but not limited to, posting personal information of others or defaming a person's character on the internet." ER280. The court sentenced Mr. Chaker to time served and thirty months of supervised release subject to a number of new conditions curtailing speech.

The court's decision was unlawful in several respects. First, the court legally erred in misinterpreting the stalking/harassing/defaming condition to infringe on First-Amendment protected speech, when the original sentencing court expressly stated in imposing the condition that it did not infringe on Mr. Chaker's First Amendment rights. Second, if the court's interpretation of the condition was proper, then the condition is void for vagueness and unconstitutionally overbroad given the original court's assurances that protected speech was exempted under the condition, and given the district court's arbitrary and expansive definition of the condition's terms. Even if the condition is not void for vagueness or substantially overbroad, there was insufficient proof that the "forced out" statement violated it, as the government

failed to offer a shred of evidence that the "forced out" statement was false or otherwise met the court's definition of the condition. Finally, the court added new conditions to Mr. Chaker's sentence that are unconstitutionally vague and overbroad insofar as they restrict government criticism, discriminate based on viewpoint, and discard a tradition older than the nation itself of anonymous political advocacy. As such, the conditions constitute prior restraints that do more than merely infringe on First Amendment rights; they cut to the very core of them. This Court has never upheld conditions restricting pure political speech that so flagrantly violate the narrow-tailoring requirement of the supervised-release statute. It should not do so here.

JURISDICTIONAL STATEMENT

Mr. Chaker appeals the revocation of supervised release and the sentence imposed upon revocation. CR32, 47; ER1, 3.[1] The court had original subject-matter jurisdiction under 18 U.S.C. § 3583(e). The Southern District of California is within this Court's geographical jurisdiction. *See* 28 U.S.C. § 1291.

[1] "CR" refers to the district court's docket. "ER" refers to the Excerpts of Record. "PSR" refers to the presentence report. Pertinent statutes appear in the addendum. *See* 9th Cir. R. 28-2.7.

Mr. Chaker filed timely notices of appeal from the final judgment and the order amending his supervised-release conditions within fourteen days of entry of the orders. *See* CR32, 33; ER3; CR46, 47; ER1; Fed. R. App. P. 4(b)(1).

BAIL STATUS

Mr. Chaker currently is serving his term of supervised release and is not in custody. ER7.

ISSUES PRESENTED

1. Whether the district court legally erred in misinterpreting the condition to infringe on Mr. Chaker's First Amendment rights even though the sentencing court explicitly stated that it did not.

2. Whether the district court's interpretation of the condition is unconstitutionally vague and overbroad.

3. Whether the district court erred in concluding that Mr. Chaker's statement that a public official was "forced out" of a prior law-enforcement post violated the condition, when the government failed to offer any evidence that the statement was false or otherwise satisfied the court's definition of the condition.

4. Whether three conditions imposed upon revocation that freeze pure political speech, including viewpoint-based speech are vague, overbroad, and involve greater deprivation of liberty than is reasonably necessary.

STATEMENT OF THE CASE

I. 2013 Sentencing

In 2013, Mr. Chaker was convicted of bankruptcy fraud and sentenced to fifteen months of prison and three years of supervised release by Judge Atlas, Southern District of Texas. *See* ER259, 270, 277-78.

At sentencing, Judge Atlas said that one of the supervised-release conditions is "you may not stalk or harass others." ER222-23. She explained that this condition did not infringe on Mr. Chaker's First Amendment rights: "[y]ou have the right of first amendment right and a right of free speech." ER223. But, the court cautioned, "there's a difference between" First Amendment rights on the one hand and "harassing or invading the privacy of others" on the other hand. ER222. Thus, Judge Atlas explained, Mr. Chaker would move into unprotected areas of speech—and so violate the stalking/harassing/defaming condition—"when you start threatening to indirectly invade people's privacy or harm them by putting things up on the internet such as home addresses with comments that you are going to – you won't harm someone but you know others who may...." ER223. Judge Atlas further emphasized that in talking about violative conduct, "[w]e're not talking about first amendment." ER224. And when Mr. Chaker requested clarification, Judge Atlas responded that

"I'm not telling you you're not allowed to have your free speech rights or go on the computer. I'm not saying that." ER225.

The condition in the written judgment stated that "[t]he defendant may not stalk and/or har[]ass other individuals, to include, but not limited to, posting personal information of others or defaming a person's character on the internet." ER280. Mr. Chaker wrote to Judge Atlas asking for a modification hearing if the written condition infringed on his First Amendment rights in conflict with the oral pronouncement. ER161-172. No modification hearing was ever held. ER275-76.

Mr. Chaker began serving his term of supervised release on September 19, 2014. ER236. Jurisdiction was later transferred to the Southern District of California. ER241-282.

II. Petition to Revoke

Mr. Chaker's probation officer subsequently filed a petition and amended petition alleging four violations of supervised release. ER230-40.

Allegation 1 stated that Mr. Chaker violated the stalking/harassing/defaming condition when he "defamed Ms. Lessa Fazel's character."[2] ER237. The probation officer explained that Fazal, an investigator with the Nevada Office of the Attorney

[2] The record alternately refers to the official as "Fazel" and "Fazal." Other than quotations, this brief uses the former spelling, which she appeared to use. *See* ER173.

General, "reported to me that Mr. Chaker had...post[ed] harassing and defaming comments on blogs and other places on the Internet...." ER237. According to the petition, the blogposts implied that Mr. Chaker "had personal information about [Fazal], including information about her family members, and about her previous employment with Las Vegas Police Department," and that he "even went so far as to state that he had contacted her neighbors." ER237. Fazal "interpreted the comments Mr. Chaker made about speaking to her neighbors, and that he had personal information about her family members to be implied threats," and "believes Mr. Cha[]ker posted this information on the Google search engine intentionally as [a] way of intimidation[.]" ER237. Fazal "reported" to the probation officer that she "would not want the false statements in the offender's online rants to ever compromise her credibility, or to jeopardize any cases on which she worked," and "requested assistance to stop the offender's behavior from escalating." ER237.

The amended petition further explained that Fazal and Mr. Chaker had come into contact because Fazal "had been assigned to conduct an investigation on the offender." ER231. The petition stated that the probation officer had reviewed a police report prepared by the Las Vegas police department after Fazal reported Mr. Chaker's blogposts, and noted that the police ultimately did not forward any charges for prosecution concerning Fazal's allegations. ER231.

III. Mr. Chaker's Motion to Dismiss

Mr. Chaker filed a motion to dismiss the petition arguing that the condition was limited to stalking and harassing outside the protection of the First Amendment because Judge Atlas explicitly preserved protected speech under the condition. ER213-216. Because the condition did not prohibit Mr. Chaker from "posting criticisms of others that are protected by the First Amendment," the allegations in the petition failed to show violation of the condition. ER216. Alternatively, the motion stated that the condition was unconstitutionally vague, and should be construed narrowly to limit only speech that is criminal in nature. ER217-18.

In its response, the government agreed that the condition was limited to conduct that constituted stalking and harassing, and that "use of the internet to post defamatory accusations and the personal information of private citizens" are "examples of conduct" that would violate the condition *if* they rose to the level of stalking or harassing. ER204. The government also agreed that Judge Atlas "had no intention…to take away any free speech rights to which Chaker was otherwise entitled," and acknowledged that "harassment and stalking are not protected forms of speech under the First Amendment." ER204, 209. Because the condition barred only unprotected speech, the government argued that there was no need to construe the condition any more narrowly than it appeared on its face. ER209. Finally, the

government asserted only that one particular statement in Mr. Chaker's blogpost—the one in which he "claim[ed] to have information regarding [Fazal's] family members"—constituted harassment in violation of the condition. ER208.

IV. The Consolidated Motion, Evidentiary, and Sentencing Hearings

The court on March 23, 2015, held a consolidated hearing at which it denied Mr. Chaker's motion to dismiss, considered evidence regarding the allegation, and revoked supervised release and sentenced him to time served and a new term of thirty months of supervised release subject to a number of special conditions. ER35-160.

A. Denial of the Motion to Dismiss

The court agreed with both parties that the provision of the condition concerning "posting personal information of others or defaming a person's character on the internet" was a subset of stalking and/or harassing. ER41. Accordingly, the court ruled that a statement that "was defamation without falling into the definition of harassment…could not be the basis of a violation." ER44.

The court also agreed that the legal definitions of stalking and harassing must apply to avoid vagueness problems. ER43, 44, 53, 63. Specifically, the court ruled that the legal definitions and elements of stalking and harassing discussed in *United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014), applied here. ER43.

But the court disagreed with both parties that the condition as imposed by Judge Atlas fully preserved Mr. Chaker's First Amendment rights. The court instead decided that Judge Atlas had "set[] some limits on the extent of restriction of First Amendment rights...." ER48; *see also* ER114-15. Putting itself in the position of a reviewing court, the court stated that it was applying "close scrutiny" to its own interpretation of the condition. ER74. The court then determined that the condition was reasonably related to the supervised-release goals and did not deprive Mr. Chaker of more liberty than necessary, and "in that regard complies fully with the guidance in the recent case of *United States v. Wolf Child*, 699 F.3d 1082, 1099 (9th Cir. 2012)." ER85. Accordingly, the court denied the motion to dismiss. ER85.

B. Evidentiary Hearing

After the court denied the motion to dismiss, the parties stipulated to proceed only on Allegation 1, and the court dismissed the other three allegations. ER81, 92, 94-95. Mr. Chaker admitted to posting the blog statements alleged in Allegation 1, but contested whether the statements constituted a violation of the stalking/harassing/defaming condition. ER80, 94-95.

The government then submitted a print-out of a January 22, 2015, email from Fazal to Mr. Chaker's probation officer, ER96, which stated in pertinent part that "Chaker is furious that I was a witness at his federal bail revocation hearing and that

is why he is making statements that I committed perjury at that hearing and others lander about me." ER173. Fazal explained that her "very last involvement in any of Chaker's cases was when I testified as a witness in the federal case in Texas in November 2013 yet he continues to harass me till this day. As you know at sentencing the Judge specifically ordered him not to stalk or harass anyone yet an entire year later upon his immediate release he revered to exactly that." ER174. To support this claim, Fazal said that she was providing "some of the post that I have found on Google that Chaker has posted about me. As you can see he is illustrating yet another pattern of obsession and I am in fear given his extensive history of stalking that it will only progress especially considering I have had no involvement in any of his cases in any way for well over a year." ER174. The email then included snippets from alleged posts, including a statement in quotes that Fazal "'is well known for making false statements in federal court,'"[3] had brought a firearm into a California courthouse in violation of a state law but was "'let go,'" a claim that "'information concerning Leesa Fazal . . . will soon be available here,'" and the statement at issue here:

> "If you are a criminal defense or civil rights attorney, material may be shared with you concerning false statements made by Fazel including court transcript, public records requests, Interviews with former

[3] Presumably, the "false statements" post was the basis for Fazal's claim that Mr. Chaker had accused her of perjury, as no such accusation actually appears in the quotes in her email. But perjury is not coextensive with false statements in court. *See United States v. Alvarez*, 132 S. Ct. 2537, 2540 (2012).

> neighbors, why Fazel was forced out of the Las Vegas Metro Police Department, along with Interesting background of family, and other credible material for Impeachment. In my opinion, she exaggerates and thinks court is a soap opera, and believes her false statements will be forgotten[.]"

ER174.

After reviewing this evidence, the court narrowed the universe of its inquiry to this portion of Fazal's email: "If you are a criminal defense or civil rights attorney, material may be shared with you concerning…why Fazel was forced out of the Las Vegas Metro Police Department…." ER101-04, 125-26. At no point did the probation officer or government contend that the blogposts constituted stalking under the condition, nor did the court make any findings as to stalking. Instead, the focus was on whether the statement was harassment and defamation.

The court came up with several essential elements of harassment and defamation under its interpretation of the condition: 1) falsity, ER101-05, 111-12; (2) factual or opinion statement, ER98; (3) vindictive motive, ER98; (4) coercive intent, ER126; and (5) impact on public official's professional reputation, ER104, 107, 118, 129. The court then conducted a lengthy interrogation of defense counsel to determine whether the "forced out" statement satisfied these elements. ER101-22.

With regard to falsity, the government did not offer any evidence that Fazal had not been forced out of the police department or make any argument to that effect.

Yet the court repeatedly asked defense counsel for "proof," "background," "evidence," "support[ing] information," facts that "suggest[]," and "specific facts" that Fazal was "forced out" of the Las Vegas police department. ER101-05, 111-12. Initially, counsel responded by referencing Fazal's departure from the police department after four years. ER103. Later, after conferring with Mr. Chaker, counsel clarified that the basis of the "forced out" statement was information that "came from" "Googling and seeing other blogs about Ms. Fazel," ER111, and was "a conclusion that [Mr. Chaker] came to based on his own research," ER122, and Mr. Chaker confirmed that he thought he "had evidence behind" the statement, and had "some genuine belief that the materials that I was posting had some – had some merit to it." ER134-35. But the court nonetheless "f[ou]nd that...he posted a false statement...." ER128-29.

As to the next element, the court stated that "[Mr. Chaker] doesn't say in my opinion, she was forced out; he just said 'she was forced out.'" ER104. Accordingly, the court determined that the statement was one of fact, not opinion. ER104.

The court next considered the damage the statement caused Fazal's professional reputation. The court suggested that because Fazal was a government official, she had a heightened interest in protecting her public reputation. ER104, 118. The court further determined that "in the case of a law enforcement officer, [the 'forced out' statement] implies wrongdoing and moral turpitude, and it's – you know, no law

enforcement officer would want that kind of information disseminated on them." ER104. The court therefore concluded that "I think that's harassment," ER107, "particularly if I'm concerned about my public reputation as a...law enforcement officer would be...." ER118.

As to the fourth element, vindictive motive, the court first stated that under *Osinger* it would "infer a requirement of scienter here, that [Mr. Chaker] did it with the intent to harass," ER107, then suggested that the "gist" of the scienter requirement was whether there was a vindictive *motive* behind the statements. ER117-18. Thus determining that motive proves intent, the court asked defense counsel to explain whether Mr. Chaker made the "forced out" statement "for the public good or because he's mad at" Fazal. ER112. Counsel responded that the posting was "about police accountability;" "[t]his is essentially an individual who's writing about concerns about someone who's working for the government, inviting others to do their own investigation...." ER112-13. The court rejected this explanation after falling back on its prior conclusion that the statement was false: "It's not like he's trying to get the word out to people because, as [defense counsel] explained it there's no basis in fact for that allegation...." ER119-120. The court determined that (1) Mr. Chaker was "mad at" Fazal, ER115, and (2) therefore must have been "intending to harass her by putting this stuff on there," ER112.

Finally, the court considered whether the statement was used to coerce Fazal to take some action. ER107 ("I think [posting information about another is] harassment, particularly if it's used – being used as a wedge."). Referencing the Texas PSR, the court determined that Mr. Chaker had a propensity for trying to coerce people to act by posting threatening information about them. ER126. On that basis, the court found that the "forced out" statement was an attempt "to get [Fazal] to back off or do what he wants. And that's the gist of this is that it's using information as a lever, a wedge against people and threatening in an extortionate way." ER126. Defense counsel contested that "this is one independent blog from someone who has had a bad experience with [a public official]. I don't think that rises to the level of harassment here." ER122. The court overruled the objection. ER126.

After the court reached its conclusion, the government spoke only to argue that an entirely different statement in the blog—one that the court explicitly had said it was discounting—was harassment. ER127. The government then stated that "it's the government position that it doesn't matter whether [any of the blog statements were] true or not" so long as a reasonable person might believe them. ER128.

The court rejected the government's argument, clarifying that it was "focusing only on that portion of the one exhibit that I've talked about"—i.e., the "forced out" statement—and affirming its findings of falsity and vindictive motive. ER128-29.

Because the court concluded that the statement constituted harassment and defamation as it defined these terms, the court concluded that "I do find he's in violation of [Allegation] 1 based on that proof," and revoked supervised release. ER130.

C. Sentencing Hearing

Upon revocation, the court imposed a sentence of time served and thirty months of supervised release. ER148, 152. The court imposed conditions that Mr. Chaker not stalk or harass; post personal information, defined as "nonpublic [information] and information that tends to put somebody in a bad light…that you have not verified" because that makes "it look[] like you're being vindictive again;" post false information to threaten people, disparage or defame people "to try to get them to change their behavior;" or send emails from "bogus" email accounts. ER137-38, 152, 156-57. The court concluded, "Don't do [all of those things] because all of those…things constitute harassment." ER138. The court said that Mr. Chaker *was* permitted to "opine on matters of public opinion" and "post[]" and "repost[] truthful information; you can do all that." ER131, 138. "That concludes the hearing," the court stated. ER158.

The court subsequently issued a written judgment that included the following special conditions of supervised release:

> 5. The defendant may not stalk and/or harass other individuals, to include, but not limited to, posting personal information of others or defaming a person's character on the internet.
> 11. The defendant may not reveal private information of others or threaten others by posting false information, disparage or defame others on the internet.

ER8.

The original judgment also included Condition 13 prohibiting sending "bogus emails using a different email address." ER8. At a subsequent hearing, the court clarified that Mr. Chaker could not engage in "spoofing," that is, sending emails purporting to be from another actual person. ER25, 27. The court also said that "[a]ny emails [Mr. Chaker] sends ought to identify him as the sender...." ER25. The court explained that it was "concerned" about Mr. Chaker "anonymously sending emails too, that someone can't say okay, this came from – ." ER27-28. Anonymous online posts were acceptable, the court explained, but "I don't want him to...send [emails]...anonymously." ER28. A minute order reflected the condition as modified:

> 13. The defendant shall not send anonymous emails/no spoofing allowed.

CR46; ER289.

SUMMARY OF THE ARGUMENT

This Court should reverse the revocation order because the district court misinterpreted the scope of the stalking/harassing/defaming condition. The original sentencing court expressly preserved Mr. Chaker's First Amendment rights. Yet the

court here determined that the condition imposed did infringe on his First Amendment rights. In so finding, the district court directly contravened the judgment imposed by the sentencing court. This legal error is significant because the "forced out" statement is clearly protected by the First Amendment—it touches on a matter of public concern concerning a government official, and does not fall within any of the recognized exception to First-Amendment protected speech. Because the district court's conclusion that the statement nonetheless warranted revocation was based on its erroneous interpretation of the condition, this Court should reverse.

Alternatively, the scope and meaning of the condition as interpreted by the district court are unconstitutionally vague and overbroad. If the condition did infringe on First Amendment rights, the original court's assurances that it did not failed to put Mr. Chaker on notice as to what statements could be sanctioned under the condition. Moreover, the district court's *sui generis* definitions of defamation and harassment under the condition were arbitrary, internally inconsistent, and unmoored from established law, and swept in far more protected speech than reasonable even allowing for some infringement of First-Amendment rights under the condition. For these reasons, too, the court's interpretation of the condition calls for reversal.

Even if this Court holds that the district court's properly interpreted the condition, it should reverse because there was insufficient evidence to prove that Mr. Chaker's statement that a public official was "forced out" of a previous position constituted defamation or harassment. The government offered one piece of evidence of the violation: Fazal's own excerpts of Mr. Chaker's blog, emailed to his probation officer in an effort to have him violated. The email does not show (or even allege) that the statement was false or otherwise satisfied harassment and defamation as defined by the court. The court also considered the Texas PSR as proof of the violation, but the PSR was never introduced as evidence and thus could not be relied upon to establish proof by a preponderance. Even if it was properly considered as "evidence," the PSR failed to prove that the "forced out" statement was defamation or harassment. Given the absence of evidence showing by a preponderance that the "forced out" statement met the court's definition of the condition, its finding of a violation was reversible error.

Finally, this Court should strike three of the conditions that the court imposed as part of Mr. Chaker's new sentence—prohibiting (1) stalking/harassing/defaming as defined by the court, (2) posting nonthreatening personal information and disparaging comments, and (3) sending anonymous emails—because they are

impermissibly vague and substantially overbroad, and as such are not narrowly tailored to the goals of supervised release.

ARGUMENT

I. Standard of Review

"[T]he interpretation of a [supervised release] condition...[is] essentially [a] matter of law, and therefore, give[s] rise to *de novo* review on appeal." *United States v. Gallo*, 20 F.3d 7, 11 (9th Cir. 1994).

Whether a supervised-release condition violates the Constitution is reviewed *de novo*. *See United States v. Aquino*, -- F.3d --, 2015 WL 4394869, at *2 (9th Cir. Jul. 20, 2015).

A district court's decision to revoke a term of supervised release is reviewed for abuse of discretion. *See United States v. Musa*, 220 F.3d 1096 (9th Cir. 2000). "On a sufficiency-of-the-evidence challenge to a supervised-release revocation," this Court must ask "whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of a violation by a preponderance of the evidence." *Aquino*, 2015 WL 5394869, at *2 (quotations and citation omitted).

II. The District Court Misinterpreted the Condition to Cover Speech that the Original Sentencing Court Expressly Precluded from the Condition's Reach

In imposing the original sentence, Judge Atlas explained that the stalking/harassing/defaming condition enforced by the district court here applied only if Mr. Chaker "start[ed] threatening to indirectly invade people's privacy or harm them," consistent with stalking or harassing. ER223-24. Judge Atlas clarified that the condition did not infringe on First Amendment rights, stating that in talking about stalking and harassing, "we're not talking about first amendment." ER223-24. She continued, "You [Mr. Chaker] have the right of first amendment right and a right of frees speech," ER223, and "I'm not telling you you're not allowed to have your free speech rights…I'm not saying that," ER225. In other words, the condition was never intended to apply to statements protected by the First Amendment.

The district court here failed to enforce the condition imposed. The district court misinterpreted the condition in stating that because Judge Atlas "didn't want [Mr. Chaker] to harass other people," she must have intended the condition to "impair First Amendment rights." ER66-67. But this misinterpretation directly contravenes Judge Atlas's pronouncement of the condition, in which she recognized the distinction between protected speech and stalking, harassing, and defaming, and in which she made clear that the stalking/harassing/defaming condition did not sweep in First-Amendment protected speech.

The district court's legal error in misinterpreting the condition and failing to enforce the judgment imposed is especially significant here, since the "forced out" statement at issue in this case is speech protected by the First Amendment. The statement touches on a matter of public concern regarding a government official, and does not fall in any of the limited areas of speech outside the reach of the First Amendment. Thus, under the condition originally imposed, it should not have constituted a violation.

A. First Amendment principles

Under the First Amendment, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quotations omitted). Thus, as a general rule, pure speech is afforded First Amendment protection, and content-based restrictions on pure speech are strictly scrutinized. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

Within "the hierarchy of First Amendment values," speech on public issues—including criticism of government officials—"occupies the highest rung...and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotations and citation omitted). Thus, restrictions that target political speech are especially

suspect. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring).

There are a few limited categories of content-based regulations that do not register in the First Amendment hierarchy at all. Specifically, obscenity, *see Miller v. California*, 413 U.S. 15 (1973); fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), incitement, *see Brandenburg v. Ohio*, 395 U.S. 44 (1969) (per curiam), true threats, *see Virginia v. Black*, 538 U.S. 343, 360 (2003), defamation, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and speech integral to criminal conduct, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), are unprotected by the First Amendment and thus may be regulated based on their content. *See Alvarez*, 132 S. Ct. at 2544. Notably, "there is no categorical exception to the First Amendment for harassing or offensive speech;" such speech becomes unprotected only to the extent that it "rise[s] to the level of 'true threats,'...speech integral to criminal conduct," or another of the identified limited exceptions. *Osinger*, 753 F.3d at 953 (Watford, J., concurring).

These basic principles of protected and unprotected speech have been extended to statements written online. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997); *Anonymous Online Speakers v. U.S. Dist. Court*, 661 F.3d 1168, 1173 (9th Cir. 2011); *see also Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 7010 (9th

Cir. 2010) (holding that statements made on a website and in emails "were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot."). Thus, blogposts and emails criticizing government officials receive the highest level of First Amendment protection, while online statements falling into one of the narrow exceptions to protected speech may be regulated.

B. The "forced out" statement is political speech touching on a matter of public concern

The "forced out" statement is political speech, touching on a matter of public concern, and thus is "at the heart of the First Amendment's protection." *Snyder*, 562 U.S. at 451-52.

A matter is of public concern when it is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of the publication." *San Diego. v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiama0. Negative comments about a public official made publicly or privately address matters of public concern. *See id.* at 84. Whether speech addresses a matter of public concern is determined by looking at the expression's "content, form, and context...." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

Here, Fazal, a law enforcement officer, is a public official. *See Rattray v. Nat'l City*, 51 F.3d 793, 800 (9th Cir.1994) (police officer is public official). As such, her

credibility and professionalism are the subject of legitimate news interest to civil plaintiffs, criminal defendants, and community members interested in the effective delivery of law-enforcement services. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013) (en banc). In fact, this Court has held that reporting police misconduct "is quintessentially a matter of public concern." *Id.*

Moreover, the content, form, and context of Mr. Chaker's blog show that the "forced out" statement was made to address a matter of public concern. The content of the statement suggested that Fazal's credibility may be impeachable. The form of the statement was an invitation to attorneys with cases in which Fazal might appear as a hostile witness to obtain potential impeachment material. And the context of the statement was made to encourage police accountability. ER113.

Thus, the "forced out" statement was the "quintessen[ce]" of First-Amendment protected speech. *Dahlia*, 735 F.3d at 1067. As such, it was the type of statement that Judge Atlas explicitly told Mr. Chaker the condition would *not* restrict.

C. The statement does not fall within any of the limited exceptions to protected speech

Even if this Court determines that the "forced out" statement did not touch on a matter of public concern, it fails to fit any of the narrow exceptions to protected speech, and thus still fits comfortably in the hierarchy of the First Amendment.

The statement does not "appeal[] to the prurient interest" such that it qualifies as obscenity, *Miller*, 413 U.S. at 24, advocate violence in a way that is directed to inciting or is likely to incite imminent lawless action such that it qualifies as incitement, *Brandenburg*, 395 U.S. at 447, or "plainly tend[] to excite [Fazal] to a breach of peace" such that it constitutes "fighting words," *Chaplinsky*, 315 U.S. at 573. Nor can the statement fairly be deemed a "true threat," because the statement did not "communicate a very serious expression of an intent to commit an act of unlawful violence to [Fazal]" that placed her "in fear of bodily harm or death." *Black*, 538 U.S. at 359-60; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992).

The defamation exception also is inapplicable. *New York Times* defined defamation as a false statement of fact which, if relating to public officials, was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," as well as damages. 376 U.S. at 279-80; *see also Garrison v. Louisiana*, 379 U.S. 64 (1964) (applying *New York Times* actual-malice standard to criminal libel statutes). The actual-malice element applies in this case, as Fazal, a law enforcement officer, is a public official, and "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," *Houston v. Hill*, 482 U.S. 451, 461 (1987).

Here, as discussed *infra* in Section IV, not even the threshold questions of fact and falsity were proven. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"). Even assuming that the "forced out" statement was one of fact and was false, nothing in the record suggests actual malice. In fact, Mr. Chaker repeatedly told the court that he believed the "forced out" statement was accurate based on information he had read online: "I did things I think that were proper that I had evidence behind," ER134; "I have some genuine belief that the materials that I was posting had some – had some merit to it…I did have some belief that I had meritorious things to have said on the Internet," ER135. Without actual malice, the speech is protected by the First Amendment—even if false and damaging to Fazal's reputation. *See Alvarez*, 132 S. Ct. at 2550-51 (stating that when a false statement is made without actual malice, the best remedy is not "handcuffs" but publication of "the simple truth"). Thus, the defamation exception does not exclude the "forced out" statement from the reach of the First Amendment.

Finally, the statement fails the definition of speech integral to criminal conduct. This exception applies when speech is "used as an integral part of conduct in violation of a criminal statute" and its "sole immediate object" is to facilitate commission of the

offense. *Giboney*, 336 U.S. at 498; *see also United States v. Meredith*, 685 F.3d 814, 818, 821-22 (9th Cir. 2012). When only pure speech is involved, "the exception for speech integral to criminal conduct shouldn't apply. Instead,... the Court has suggested that the government's ability 'to shut off discourse solely to protect others from hearing it' depends on 'a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Osinger*, 753 F.3d at 954 (Watford, J., concurring) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

The "forced out" statement does not fall within the "speech integral to criminal conduct" exception because the "sole immediate object" of the statement was not to facilitate criminal harassment of Fazal. Moreover, the statement involved pure speech about a matter of public concern regarding a public official; accordingly, there could be no plausible showing that substantial privacy interests were intolerably invaded by the statement. The statement thus cannot be considered integral to criminal conduct.

D. Conclusion

In sum, the condition imposed by Judge Atlas expressly preserved Mr. Chaker's full First Amendment rights, and the "forced out" statement falls squarely within these rights. Accordingly, under the condition as originally intended and imposed, the statement cannot be a violation. By misinterpreting the condition to permit restriction of Mr. Chaker's First Amendment rights, and then finding that the "forced

out" statement violated the condition, the court sanctioned Mr. Chaker for speech that was not sanctionable. This requires reversal and remand with instructions to reinstate the original term of supervised release.

III. The District Court's Interpretation of the Condition Is Unconstitutionally Vague and Overbroad

If the district court's interpretation of the condition was not contrary to the condition as established by Judge Atlas, then it is void for vagueness and substantially overbroad. Accordingly, this Court should still reverse the revocation.

"A supervised release condition violates due process of law if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010) (quotations and citation omitted). In the First Amendment context, "[v]ague statutes are invalidated for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms...." *United States v. Kilbride*, 584 F.3d 1240, 1256 (9th Cir. 2009). When First Amendment rights are implicated in "[v]ague laws in any area[, courts] look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v.*

Kentucky, 384 U.S. 195, 200 (1966). In addition, "[f]or statutes . . . involving criminal sanctions the requirement for clarity is enhanced'" to survive a vagueness challenge. *Kilbride*, 584 F.3d at 1257.

Here, the district court's interpretation of the stalking/harassing/defaming condition is unconstitutionally vague for two reasons. First, if the court was correct in interpreting the condition to infringe on protected speech, then the condition failed to put Mr. Chaker on notice given Judge Atlas's assurances to the contrary. Second, the court's definition of the condition was internally inconsistent and inconsistent with binding law. The resulting interpretation of the condition is "so standardless" that it fails to provide proper notice, authorizes "seriously discriminatory enforcement," and chills speech. *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2012). Therefore, the condition is unconstitutionally vague on its face and as applied, and must be reversed.

Even if this Court determines that the condition is not void for vagueness, it should find it substantially overbroad. Given the court's failure to impose minimum constitutional requirements such as *mens rea* and materiality to its definition of the condition's terms, the condition sweeps in too much protected speech to pass constitutional muster. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

A. The scope of the condition is unconstitutionally vague

As stated *supra* in Section II, Judge Atlas repeatedly emphasized at sentencing that the stalking/harassing/defaming condition would not infringe on Mr. Chaker's First Amendment rights. After reviewing the written judgment, Mr. Chaker in an abundance of caution sent a *pro se* letter to Judge Atlas requesting a modification hearing if the written condition differed from the oral pronouncement by sweeping in protected speech. ER161, 167. No modification hearing was ever held. ER275-76. Mr. Chaker thus was placed on notice that the written condition was consistent with the condition orally imposed and did not include a restriction on protected speech. To the extent that the district court's misinterpretation of the condition to restrict protected speech is deemed correct, the condition failed to provide clarity—let alone enhanced clarity—that Mr. Chaker could be sanctioned for engaging in protected political speech. *See Kilbride*, 584 F.3d at 1257. Accordingly, the condition is unconstitutionally vague.

B. The court's definitions of harassment and defamation make the condition void for vagueness

The court's interpretation of the condition is unconstitutionally vague for a second reason. The court purported to rely on "commonly understood" definitions of "defamation [and] harassment." The court further stated that its interpretation of these terms would be guided by the legal analysis employed in *Osinger*, ER43-44, 75,

but that the defamation standard set forth in *New York Times* would not apply. ER107. Ultimately, however, the court drew piecemeal from both cases. The result was a hybrid definition of the condition that had the head of *Osinger* and body of *New York Times*, plus wings to power the court's flight of fancy with regard to its motive, falsity, and inverted public-official requirements. No reasonable person could have been on notice regarding this creature of the court's creation, and Mr. Chaker certainly was not.

The court also defined the condition by reference to allegations in the Texas PSR that Mr. Chaker had engaged in harassing conduct involving only private individuals and private matters—allegations, in other words, that were of a different order altogether than the political speech here. This definition, too, made the condition impermissibly vague and violated Mr. Chaker's due-process rights.

1. The court's interpretation of harassment and defamation

a. This Court's decision in Osinger

Given the court's ostensible reliance on *Osinger*, a summary of the case is useful. The defendant in *Osinger* was convicted under the federal stalking statute after making repeated verbal threats to an ex-girlfriend, creating a Facebook page in a name close to hers and posting sexually explicit pictures of her on it, and sending emails to her coworkers and friends containing explicit photos. 753 F.3d at 941, 943. The

defendant appealed the conviction on grounds that the statute was vague and overbroad facially and as applied. *See id.* at 943-46.

This Court rejected the facial challenge, holding that "'[b]ecause the statute requires both malicious intent on the part of the defendant and substantial harm to the victim, it is difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions.'" *Osinger*, 753 F.3d at 944 (quoting *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012)). Similarly, *Osinger* rejected the as-applied challenge after concluding that the statute's requirements of scienter and a pattern of conduct that actually caused substantial emotional distress worked to limit the reach of the statute only to criminal conduct. *See id.* at 947.

In rejecting the overbreadth challenge, *Osinger* found it significant that the victim was a "private individual" and that the defendant's "'communications revealed intensely private information'" about and photographs of the victim that "'were never in the public domain before [the defendant] began his campaign to humiliate [the victim].'" 753 F.3d at 948 (quoting *Petrovic*, 701 F.3d at 856) (brackets in original). *Osinger* observed that "'the public has no legitimate interest in the private sexual activities of [the victim] or in the embarrassing facts revealed about her life,' and 'the information [the defendant] publicized to the community was highly offensive.'" *Id.* (quoting *Petrovic*, 701 F.3d at 856) (brackets in original); *see also id.* at 953 (Watford,

J., concurring) (noting that speech directed only to a private, unwilling listener and speech on matters of purely private concern may not be entitled to constitutional protection).

Finally, *Osinger* determined that the statute was not vague because "'[w]hatever…definitions one might hypothesize for the meaning of harass or intimidate, there can be little doubt that [the defendant's] stalking falls within the conduct the statute is intended to proscribe. [The defendant's] own words evince his intent to cause substantial emotional distress….'" 753 F.3d at 945 (quoting *United States v. Shrader*, 675 F.3d 300, 312 (4th Cir. 2012) (brackets in original)). *Osinger* thus again reiterated that the statute's scienter requirement mitigated any constitutional challenge because it meant that the defendant could not claim ignorance that his conduct was illegal. *Id.* (quoting 18 U.S.C. § 2261A(2)).

b. The court's misinterpretation of Osinger

The court purported to hew to *Osinger* in adopting a "commonly understood" definition of harassment as well as a scienter requirement. ER43-44. But the court's interpretation of *Osinger* was fundamentally flawed, and its application of the decision to Mr. Chaker's case was haphazard.

To begin with, the whole premise of the court's application of *Osinger* to the condition in this case rests on a fallacy. On the one hand, the court said that the

condition was limited to stalking and harassing and that it was adopting *Osinger*'s definitions of those terms, which definitions make clear that stalking and harassing are unprotected by the First Amendment. 753 F.3d at 944, 946. On the other hand, the court said that the condition *also* covers speech that *is* protected by the First Amendment. But if stalking and harassing as *Osinger* (and thus the court) defined them involve only unprotected speech, what is the additional protected speech that the court believed the condition covers?

This vagary extends to the court's interpretation of *Osinger* itself. Most troubling, the court found that having a vindictive motive alone established the scienter required by *Osinger*. The court purported to adopt the same scienter that *Osinger* identified as an element of § 2261A: "intent to harass, intimidate, or cause substantial emotional distress." 753 F.3d at 945 (citing 18 U.S.C. § 2261A(2)(A)); ER44, 107. But the court then determined that a finding of vindictive motive would satisfy that element. For example, the court stated that "the definition that *Osinger* embraces,...they refer to Black's Dictionary, and they say look, it's words or conduct or actions that are directed at a specific person that annoy...but the gist of it is don't be vindictive by making up stuff about people that you're crossways with, don't do that." *See* ER117-18. From that point forward, the court supplanted its inquiry about

intent with an inquiry about whether Mr. Chaker was motivated by feelings of vindictiveness or being "mad at" Fazal. ER119, 125, 128.

But motive was irrelevant in *Osinger* and is irrelevant generally to questions of liability based on speech, because motive does not prove intent. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988) ("in the world of debate over public affairs, many things are done with motives that are less than admirable, and they do not for that reason alone forfeit First Amendment protection"). This is because, as defense counsel pointed out to the court, one may be motivated to speak out against a public official based on a past negative interaction without intending to harass them. Here, for example, the blog "is about police accountability." ER113. Although "[t]he fact that [Mr. Chaker] had personal experience [with Fazal] in her capacity as a public official may have made him focus his attention on her,...that doesn't change the fact that she's a public official, [his experiences] do relate to issues of the public interest[,]...and she's subject to this kind of scrutiny and should expect it." ER113. Thus, even if Mr. Chaker was *motivated* by a gripe with Fazal, his *intent* was to promote police accountability. ER115.

Given the centrality of scienter to each prong of the analysis in *Osinger*, the court's purported adoption of *Osinger*'s scienter standard, and the irrelevance of motive to a speaker's liability, the court's determination that vindictive motive sufficed

to establish intent to harass would leave a reasonable person grasping to understand the condition. This is the definition of a vague condition.

c. The court's "defamation-lite" analysis

After misconstruing *Osinger*, the court attempted a defamation analysis within the larger harassment analysis. In so doing, the court added suggestions of *New York Times* by requiring that the statement be false and that it be factual. ER107. But the court's defamation analysis was muddled at best.

For example, the court required falsity without any accompanying *mens rea* requirement. But actual malice has been required to prove defamation in cases involving public officials since *New York Times*. *See* 376 US. at 285-86. Often, it is only the minimum requirement. *See Alvarez*, 132 S. Ct. at 2554-55 (Breyer, J., concurring) (observing that knowing and intentional falsity is a threshold element of most false-statements statutes, and that many involve further "narrow[ing]" requirements beyond that).

Moreover, at least some *mens rea* is required to hold an individual liable for prohibited acts. *See Staples v. United States*, 511 U.S. 600, 604 (1994) ("the requirement of some *mens rea* for a crime is firmly embedded"); *Elonis v. United States*, -- S. Ct. ---, 2015 WL2464051, at *9 (Jun. 1, 2015) (presumption in favor of scienter requirement applies to each element of act); *United States v. Napulou*, 593 F.3d 1041,

1056 (9th Cir. 2010) ("[c]onditions of supervised release . . . must be interpreted consistently with the well-established jurisprudence under which we presume prohibited criminal acts require an element of *mens rea*.") (quotations and citation omitted). Thus, even if the court was correct in believing that the condition infringed on Mr. Chaker's First Amendment rights and that a full *New York Times* analysis need not apply, the court's failure to apply any *mens rea* requirement under any standard of proof was wholly divergent from bedrock principles of constitutional law. As such, the court's definition of the condition punished Mr. Chaker for actions that he could not have anticipated would be illegal. *See Kilbride*, 584 F.3d at 1256.

The court next took *New York Times*'s public-official rationale and flipped it on its head. *New York Times* required a showing of actual malice when a public official was involved *because* "it is of the utmost consequence that the people should discuss the character and qualifications of [public officials]," 376 U.S. at 281 (quotations marks and citation omitted), and held that "[c]riticism of [public actors'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations," *id.* at 273.

But here, the court held that the "forced out" statement made Mr. Chaker liable *because* "no law enforcement officer would want that kind of information [implying wrongdoing and moral turpitude] disseminated on them," ER104, and because Fazal

would be "concerned about [her] public reputation," ER118. The court thus inverted the analysis such that public officials have a heightened, not a lowered, expectation of keeping their official reputation clean of criticism. Even accepting some degree of infringement on First Amendment rights under the condition, the court's determination that a statement's potential for "[i]njury to official reputation" could make the statement harassment is contrary to the very core of the free-speech concept. *New York Times*, 376 U.S. at 272, 276. This makes the condition as defined by the court impermissibly vague. *See King*, 68 F.3d at 1128.

d. The court's "that kind of thing" standard

Finally, abandoning even lip service to *Osinger* and defamation law, the court attempted to define the condition by reference to "the kind of thing" that the Texas PSR alleged that Mr. Chaker had done in the past. *See* ER75-76 ("at least according to the probation report, [Mr. Chaker] engaged in this kind of conduct."); ER85 ("[Judge Atlas] was aware of the defendant's proclivity to resort to this kind of conduct."); ER116 ("[the condition] has to be understood in the context of what he'd done before, what the judge knew he'd done before"); ER136 (court "looked back at that history of you doing this type of thing"); ER136 ("I don't want you to do that type of thing") ER157 ("Judge Atlas was trying to stem [things] based on this history of

doing that kind of thing."). But even the court was squishy as to what "that kind of thing" even was.

First, the particular PSR allegation that the court focused on—that Mr. Chaker was suspected to have sent nude photos of an ex-girlfriend to her workplace five years ago—even *if* it had been proven, is a far cry from the "forced out" statement here. ER45, 71, 76, 113-14, 116, 136, 148. If, as the court claimed, this allegation set the bar for what constitutes harassment, one would not expect that telling criminal defense and civil rights attorneys that "material may be shared . . . concerning why Fazal was forced out" of the police department also qualified.

Second, the court itself said that "I'm dubious that the kind of things – kinds of things that he did before, if that's what's alleged here, that [if] he did those again, [it would] amount to a threat to do injury to someone," ER77, "but [sending nude pictures] was certainly humiliating . . . ." ER71. Thus, even the court's most egregious example of "this kind of conduct" failed its own test for what would constitute a violation under the condition. This "standard" thus provides no standard at all. *See Harris*, 705 F.3d at 932.

2. The court's interpretation makes the condition unconstitutionally vague

The court's definition of harassment and defamation makes the condition void for vagueness because it failed to provide adequate notice, risked arbitrary

enforcement, and risked chilling speech. As set out above, no reasonable person could have anticipated the court's motley definition of the condition, skewed understanding of scienter, and variance from the most fundamental principles of *New York Times*, and Mr. Chaker, for one, did not. *See Kilbride*, 584 F.3d at 1256.

Moreover, the court's interpretation put Mr. Chaker at risk of arbitrary and discriminatory enforcement by probation. *See Kilbride*, 584 F.3d at 1256. As defense counsel explained to the court, "the probation officer is not equipped to evaluate whether [the condition has] been violated" absent application of definitions firmly grounded in law. ER52-53, 66. Given that the court here applied unprecedented definitions to the legal terms of the condition, the condition "poses a problem…for probation officers, who must decide what constitutes a violation…." *United States v. Gnirke*, 775 F.3d 1155, 1162 (9th Cir. 2015). This, in turn, poses a problem for Mr. Chaker, who "should not be forced to guess whether an overzealous probation officer will attempt to revoke [his] supervised release" for making a humiliating, irksome, slighting, or unkind remark about someone. *Aquino*, 2015 WL 4394869, at *3 (citing *United States v. Siegel*, 753 F.3d 705, 710-13 (7th Cir. 2014), which notes that that the constitutional infirmity of a vague and overbroad supervised-release condition is aggravated by the fact that it will be enforced by probation officers who have little training, are overworked, and have enormous discretion).

Finally, because the condition as interpreted by the court creates "the threat of prison for making a false statement [that] can inhibit [Mr. Chaker] from making true statements, [it] thereby 'chill[s]' a kind of speech that lies at the First Amendment's heart." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring). Indeed, because the condition constitutes a prior restraint on speech, which is "the most serious and the least tolerable infringement on First Amendment rights"—it does more than "'chill[]' speech,...[it] 'freezes' it at least for a time." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Of particular concern here, the condition "burdens blogging about political topics and posting comments to online news articles," *Doe v. Harris*, 772 F.3d 563, 573 (9th Cir. 2014), especially since the court's definition lacks the type of *mens rea* requirement "that [would] provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking," *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring). In effect, this condition "compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of [prison]—leads to a comparable 'self-censorship.'" *New York Times*, 376 U.S. at 279. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in

court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone." *Id.*

Because the court's interpretation of harassment and defamation leaves too much for the imagination and too much at risk of being silenced, the condition is unconstitutionally vague and requires reversal.

C. The condition is substantially overbroad

The condition as interpreted by the court also is substantially overbroad because it threatens to criminalize substantially more speech than is constitutionally permissible. *Hicks*, 539 U.S. at 118-19. Without strict *mens rea*, materiality, or causation requirements like those discussed in *Osinger* and *New York Times*, Mr. Chaker could face criminal punishment for a sweeping array of protected speech. For example, if Mr. Chaker were the victim of police brutality by a particular officer, and posted a complaint about the incident to a police-brutality message board but unwittingly got some of the facts wrong, he could be found to have made a false statement to "try to get back" at the officer and be revoked and resentenced. Or if Mr. Chaker received poor service at a restaurant and posted a negative review on Yelp.com in which he conflated the server's name with another's, the court could determine that he was being vindictive by reviewing the server, falsely, and violate him. *Cf. Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1991) (law of defamation

"overlooks minor inaccuracies…[because they] do not amount to falsity so long as 'the substance, the gist, the sting'" of the statement is true).

Nor is the condition readily susceptible to a narrowing construction, since the court *explicitly* rejected application of an actual-malice standard, insisted on the relevance of motive over intent, and inverted the well-established public-official analysis in defamation and harassment cases. In any case, even if "[t]he district court surely never intended to deprive" Mr. Chaker of the freedom to engage in such speech, this court must "review the language of the condition as it is written and cannot assume…that it will be interpreted contrary to its plain language." *Aquino*, 2015 WL 4394869, at *3. Because the plain language of this condition sweeps in a substantial amount of protected speech, it is substantially overbroad, and cannot survive.

In sum, the court's interpretation of the condition was internally inconsistent, unmoored from established law, and swept in core protected speech. Therefore, it is void for vagueness and unconstitutionally overbroad. This Court should reverse the judgment and remand with instructions to reimpose the original term of supervised release.

IV. The District Court Erred Because the Evidence Did Not Support Its Finding that the "Forced Out" Statement Constituted a Violation

Even if this Court determines that the district court's interpretation of the condition is correct and not void for vagueness or overbreadth, it should reverse the

revocation because, viewing the evidence in the light most favorable to the government, no rational trier of fact could have found a violation by a preponderance of the evidence. *See King*, 608 F.3d at 1129; 18 U.S.C. § 3583(e)(3) (government bears burden of proving violation of condition by a preponderance). Although the court determined that the "forced out" statement met its definitions of harassment and defamation, the record is devoid of the minimum evidentiary support for the court's conclusion.

A. The evidence before the court

Only one piece of evidence was offered to prove the violation: an email in which Fazal provided incomplete excerpts of Mr. Chaker's blog for the express purpose of having him violated under the stalking/harassing/defaming condition. ER173-74. On the basis of this document, the court should have asked: "is this email enough to show by a preponderance that the 'forced out' statement meets the criteria I set for harassment and defamation?" Instead, the court assumed that the statement met the criteria, asked Mr. Chaker for proof to the contrary, and then ignored the evidence he offered. In addition, although the Texas PSR was not introduced as evidence, the court considered it as evidence that proved the violation in this case. Reliance on the facially insufficient email, unadmitted propensity evidence, and

improper burden-shifting to conclude that the allegation had "been proven against you" was an abuse of discretion. ER130.

B. The government failed to prove falsity

The record was completely devoid of any proof of falsity, which the court determined was an essential element of the condition. Fazal's email does not contain a denial of being forced out of the police department or otherwise explain the circumstances of her departure. Thus, the government failed to offer a scintilla of evidence that would tend to show that Fazal more likely than not had not been forced out.

Nonetheless, the court assumed falsity and shifted the burden to defense counsel to *dis*prove it. The court then ignored the evidence offered by the defense in concluding that the statement must be false. ER125. But viewed in the light most favorable to the government, no rational trier of fact could have found falsity here. *See King*, 608 F.3d at 1129.

The court began the evidentiary portion of the proceeding by asking defense counsel, "what do you have to say about the allegations that…[Mr. Chaker] has other information on…she was forced out[?]" ER98. That marked the first question in a serial interrogation of the defense to disprove falsity:

- "[W]here is the proof [that she was forced out]? …[W]here's the background for that?" ER101;

- "What evidence is there that she was forced out[?]" ER102;
- "I'm asking you what evidence is there." ER103;
- "What evidence did he have that she was forced out[?]" ER104;
- "[W]hat information supports that statement?" ER105;
- "So what evidence is [there] that she was forced out? ...I mean what suggest she was forced out?" ER111;
- "No specific facts [supporting that]?" ER112.

Although defense counsel initially connected the statement to the fact that Fazal left the department after four years, ER103, she later conferred with Mr. Chaker and clarified that he had deduced it "from Googling and seeing other blogs about Ms. Fazel, so it was independent," ER111, which Mr. Chaker then confirmed. ER134. *Accord Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (holding "Internet intermediaries" exempt from defamation liability for republication under federal law).

But, after shifting the burden of proof to Mr. Chaker, the court flatly ignored the evidence he offered. The court repeatedly stated that "there's no basis in fact...[if] you say, oh, she was only there four years," ER120; "[the statement] was false; it's not even a reasonable inference as far as I'm concerned if the basis for this was that he thought because she left after four years she was forced out," ER128; "if...the basis for your accusation against the investigator was because she left after four years, she was forced out, that's totally irrational, and a smart guy like you is not going to reach an irrational conclusion like that, which is why I conclude you did it to be vindictive and to try to get your way and to try to influence her." ER130-31. In other words, the

court utterly disregarded the plausible republication explanation offered by Mr. Chaker and simply reverted to an earlier, retracted explanation to find that falsity had not been disproved.

When the court finally asked a question of government counsel, counsel stated that "it's the government's position [as to another blog statement that the court expressly said it was not considering] that it doesn't matter whether it's true or not...." ER127. Thus, even given the opportunity to make a showing of falsity—an element that the court had made very clear was essential to its harassment inquiry—the government effectively dodged the issue. This is hardly proof by a preponderance permitting the court to conclude that Mr. Chaker "suggest[ed], I find, falsely that Ms. Fazal was dismissed." ER115, 125.

C. The government failed to prove that the statement was not opinion

The evidence also failed to show that the statement was of fact and not opinion. The court ruled that it would not find statements of opinion to constitute a violation. ER98, 119. The court then determined on the basis of Fazal's exerpts that the "forced out" statement was a "statement[] of fact" because the statement "doesn't say in my opinion." ER101, 104.

But the statement at least as likely could be read as an assertion of opinion as fact. For starters, there is no talismanic significance to the phrase "in my opinion."

See Milkovich, 497 U.S. at 18-19 (holding that fact/opinion distinction does not depend on use of "in my opinion"). Moreover, the excerpt provided includes indicia of opinion. For example, the "why" nature of the question indicates an implicit opinion—"*why* Fazel was forced out" suggests why *I believe* she was forced out. The more natural rhetoric for a factual assertion would be "*that* Fazel was forced out."

The sentence immediately following—"In my opinion, she exaggerates and thinks court is a soap opera, and believes her false statements will be forgotten"—further supports this reading, as it hints at the answer to the "why she was forced out" statement. Read in context, a plausible reading of the entire statement would be "in my opinion, she was forced out because she exaggerates." *See Demers v. Austin*, 746 F.3d 402, 415 (9th Cir. 2014) ("content, form, and context of a given statement" must be considered in analyzing speech touching on First Amendment rights) Thus, the blog reader would understand that the "material" promised would provide support for Mr. Chaker's opinion that she was forced out. *See Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144-45 (D.C. Cir. 1994) ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable . . . ."). Thus, there was insufficient evidence that the "forced out" statement was not opinion.

D. The government failed to prove vindictive motive

Even accepting that a defendant's motive may make his statements actionable under the court's standard, *see supra*, 35-37, there was no support for the court's finding that Mr. Chaker lacked a public-interest motive for making the statement. The court concluded that Fazal's email provided insufficient proof of motive, and its alternative reliance on the PSR to prove it was misplaced.

The court made clear that Fazal's email was not sufficient to prove vindictive motive. The email alleged that "Chaker is furious that I was a witness at his federal bail revocation hearing and this is why he is making statements that I committed perjury at that hearing and other slander about me." ER173. But the court made two comments indicating that it did not credit Fazal's personal conclusions about Mr. Chaker's motive. First, the court expressly discredited Fazal's editorializing as too subjective to be reliable. ER58 ("this is all coming through the filter of the investigator. She[] says I took it that way. Well, that's great, but…I think it's an objective analysis" for criminal harassment). Second, the court implicitly discounted Fazal's theory when it put the question of motive to defense counsel (once more improperly shifting the burden of proof): "Why did he do this? …I mean for the public good or because he's mad at — at Ms. Fazel on her, you know, pursuing investigation different from the one he wanted or reaching conclusions that he didn't agree with?"

ER112. The court thus showed that it did not find the allegations in the email sufficient to support a finding of motive.

Having determined that the only evidence offered in the case was insufficient to prove this element, the court stated that it relied on the PSR to do so:

- "[I]t has to be understood in the context of what he's done before, ... this kind of vindictive behavior[,] ...and that's what I think is going on here with Ms. Fazel," ER116;
- "[This is] a fellow...with a history of being vindictive toward people... He's [making the "forced out" statement] because he's mad at her and vindictive," ER119-20;
- "What I've focused on is a posting that I find to be vindictive.... In the context of all the other harassment he does of people or had a history of doing things to people, he shouldn't have done this...." ER125;

But an old probation report from a different jurisdiction that the court here—without the benefit of testimony from the authoring probation officer—interpreted as alleging "a history of being vindictive toward people" cannot substantiate by a preponderance of the evidence that Mr. Chaker had a vindictive motive in *this* particular case. While propensity evidence may be used to support imposition of a condition of supervised release, *see* 18 U.S.C. § 3553(a)(1) (condition must "reasonably relate" to defendant's history and characteristics), it cannot meet the preponderance standard that a defendant violated a condition in a specific instance. *See United States v. Simtob*, 485 F.3d 1058, 1062 (9th Cir. 2007).

Because the court discredited Fazal's conclusions in the email for bias and then improperly relied on propensity evidence to prove motive in this instance, its finding that Mr. Chaker had a vindictive motive was against the weight of the evidence.

E. The government failed to prove extortionate aim or damage to reputation

The court concluded that Mr. Chaker's aim in making the "forced out" statement was to force Fazal's hand in some way—to use the allegation as a "wedge," a "lever," or to "try[] to extort [Fazal] into action you want by threatening or making up stuff." ER126, 130. But the evidence fails to show that the statement was extortionate.

Fazal's email acknowledged that her "very last involvement in any of Chaker's cases was when I testified as a witness in the federal case in Texas" fifteen months before. ER174. She stated that "I have had no involvement in any of his cases in any way for well over a year." ER174. Because Fazal's role in Mr. Chaker's cases had long since come to a close, it is difficult to see what action Mr. Chaker might have sought from her in making the "forced out" statement. Moreover, the only evidence before the court as to the intended effect of the statement was to encourage police accountability. ER113. Thus, the government failed to show by a preponderance that the court's "extortion" element had been met.

Finally, the court concluded that the statement was a violation because it damaged Fazal's reputation as a public official. ER107. Even if the court's inverted public-official analysis withstands scrutiny, the evidence fails to support the conclusion of the court's analysis. Fazal's email did not state that the blogpost had affected her reputation. And although the court found that a law enforcement officer hypothetically might be concerned about her public reputation, it never found actual damage here. ER118.

F. Conclusion

Based on the evidence introduced—Fazal's email—as well as on the Texas PSR, the court concluded that a preponderance of the evidence proved that the "forced out" statement violated the condition. ER130. But viewed in the light most favorable to the government, it was irrational to conclude that the statement met the court's interpretation of the condition. *See King*, 608 F.3d at 1129. Even if this Court "appreciate[]s the district court's concern with [other allegations about Mr. Chaker] . . . [it] is limited to the allegation that the probation officer made" and to the evidence offered to prove that specific allegation. *Aquino*, 2015 WL 4394869, at *3. "[A]nd as to that allegation, there was insufficient evidence to uphold the violation." *Id.* Accordingly, this Court must vacate the sentence and remand for Mr. Chaker to continue on his original term of supervised release.

V. The New Conditions Imposed Are Unconstitutionally Vague and Overbroad, and Thus Not Narrowly Tailored

After revoking supervised release, the court sentenced Mr. Chaker to three conditions that constitute prior restraints on pure speech and are statutorily and constitutionally invalid:

- Condition 5, the stalking/harassing/defaming condition as interpreted by the court;
- Condition 11, do not "reveal private information of others or threaten others by posting false information, disparage or defame others on the internet;" and
- Condition 13, do not "send anonymous emails."

ER8, 289. The first two conditions are void for vagueness and substantial overbreadth, and the third is unconstitutionally overbroad. As a result, all three conditions violate the narrow-tailoring requirement of the supervised-release statute, making them substantively unreasonable. *See Aquino*, 2015 WL 4394869, at *4 (stating that condition that was void for vagueness necessarily violated statutory narrow-tailoring requirement).

A. Condition 5 is unconstitutionally vague and overbroad

As explained *supra* in Section III, the court's interpretation of the stalking/harassing/defaming condition originally imposed is void for vagueness and substantial overbreadth. The same condition imposed upon sentencing here is unconstitutional for the same reasons. Even though the court now has explained its definitions of harassment and defamation, the court's internal inconsistency in

drawing the contours of the condition deprives Mr. Chaker and the probation office of adequate guidance and threatens to chill speech. And, even allowing for some infringement of First Amendment rights under the condition, the lack of *mens rea*, materiality, and causation requirements means that the condition sweeps in far too much protected speech to pass constitutional muster.

B. Condition 11 is unconstitutionally vague and overbroad

Condition 11, preventing "reveal[ing] private information of others or threaten[ing] others by posting false information, disparag[ing] or defam[ing] others on the internet," is riddled with constitutional infirmities.

With regard to "revealing private information," the court defined "private information" as "nonpublic [information] and information that tends to put somebody in a bad light, I mean particularly something that you have not verified," because that makes "it look[] like you're being vindictive again...." ER156-57. Thus, the condition seems to cover disclosure of public information that Mr. Chaker believes to be truthful but is unable to verify, disclosure of public information that "looks like" it is motivated by vindictiveness (whether or not it actually is), truthful public information that sheds a "bad light" on someone, as well as truthful, nonpublic information that does not necessarily put somebody in a bad light. But the court then proceeded to state that Mr. Chaker *was* permitted to "opine on matters of public

opinion," ER131, and "post[]" and "repost[] truthful information," ER138, apparently regardless of verification, appearance of vindictiveness, or any "bad light"-shedding qualities. The court never explained the significant discrepancies in its oral explanation or the foggy contours of the condition as written.

Given the court's mixed messages as to what type of speech is actually covered here, the "revealing private information," disparagement, and defamation restrictions are impermissibly vague. The vagueness is compounded by the overlap of Conditions 5 and 11. The conditions must be read to avoid redundancy, *see United States v. Soltero*, 510 F.3d 858, 867 n.10 (9th Cir. 2007), but this would require two different definitions to apply to the term "defaming," used in both conditions. Moreover, the restrictions are unquestionably overbroad since the court failed to impose *mens rea* and other limiting elements.

The clause prohibiting "threaten[ing] others by posting false information" similarly suffers from the lack of a *knowing* falsity requirement because it prohibits even trivial inaccuracies that fail to result in any harm. *See Masson*, 501 U.S. at 517; *Alvarez*, 132 S. Ct. at 2545 (striking statute that punished mere falsehood without harm). And the court's emphasis on the "looks like vindictiveness" standard raises serious concerns about what would constitute a "threat" here. *See* RODNEY A. SMOLLA AND MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10:42

(updated 2015) (hereafter, "SMOLLA") (to survive an overbreadth challenge, restriction of defendant's "fiery rhetoric [must be] conjoined with *specific identifying or instructional detail*" to constitute threat) (emphasis original).

Finally, Condition 11 is problematic because the restrictions on making "disparaging" comments and publishing or republishing even truthful information that "tends to put someone in a bad light" amount to viewpoint discrimination. *See* SMOLLA § 3:9 (viewpoint-based law "regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express."); *see also Reed v. Gilbert*, 135 S. Ct. 2218, 2230 (2015) (viewpoint discrimination is "a more blatant and egregious form of content discrimination") (quotations and citation omitted). A viewpoint-based law's "sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (2004). Because of this the Supreme Court has made viewpoint-based laws all but *per se* unconstitutional, or at a minimum levied an extremely heavy presumption against such discrimination. *R.A.V.*, 505 U.S. at 388; *see also* SMOLLA 3:10; *see also Chaker v. Crogran*, 428 F.3d 1215, 1226-28 (9th Cir. 2005) (law criminalizing knowingly false speech critical of peace-officer conduct without also criminalizing knowingly false speech supportive of peace-officer conduct unconstitutionally discriminates based on viewpoint). The heavy presumption against

a viewpoint-based law cannot be overcome here. Condition 11's threat to imprison Mr. Chaker for making a "disparag[ing]" comment on the internet or making a truthful statement that puts someone in a "bad light" is an egregious form of content discrimination completely untethered from any constitutional safeguards.

In sum, all of Condition 11's restrictions are vague and overbroad. The condition therefore must be stricken.

C. Condition 13 is unconstitutionally overbroad

Condition 13's prohibition on sending anonymous emails also must be stricken as substantially overbroad. The Supreme Court, harkening back to "a respected tradition of anonymity in the advocacy of political causes," has established that the First Amendment protects anonymous speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995) (discussing *Talley v. California*, 362 U.S. 60, 64-65 (1960)). This protection extends to online statements. *See Anonymous Online Speakers*, 661 F.3d at 1173. Thus, "an author's decision to remain anonymous" in sending an email, "like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342. The right to speak anonymously is most stringently protected when the speaker addresses a matter of political importance. *See id.* at 346-47.

Here, the court provided no explanation for its decision to bar anonymous emails. Indeed, the court explicitly told Mr. Chaker that he had a right to post other online statements anonymously. ER28. The court made clear that the harm that it sought to prevent was Mr. Chaker sending emails using the name of another actual person. ER25. But these harms adequately were captured by the condition's restriction on "spoofing," making the inclusion of anonymous emails in the condition overbroad. Even if the court permissibly believed that anonymous emails (if not anonymous blogposts) posed some additional type of harm, it failed to constitutionally narrow the condition by restricting it to, for example, anonymous emails not involving a matter of public concern. This is a core infringement on First Amendment rights, and therefore should be stricken.

D. All three conditions violate the statutory narrow-tailoring requirement and thus are substantively unreasonable

A supervised-release condition is substantively unreasonable if it "is not reasonably related to the goal[s] of deterrence, protection of the public, or rehabilitation of the offender," *United States v. Collins*, 684 F.3d 873, 892 (9th Cir. 2012), or if it infringes on the defendant's liberty more than is "reasonably necessary" to accomplish these goals, *Wolf Child*, 699 F.3d at 1090. *See also* 18 § U.S.C. § 3583(d). The court here justified the sweep of the three conditions imposed by claiming that they satisfied this narrow-tailoring requirement. The court was wrong.

Unconstitutionally vague or overbroad conditions by definition are not narrowly tailored. *See Aquino*, 2015 WL 4394869, at *4. Here, the conditions' vagueness and overbreadth mean that they are not reasonably related to, and involve a far greater deprivation of liberty than reasonably necessary to accomplish, the goals of supervised release because they restrict government criticism, discriminate based on viewpoint, and discard the "respected tradition of anonymity in the advocacy of political causes." *McIntyre*, 514 U.S. at 343. Indeed, because the conditions constitute "Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government," they do more than merely encroach on the margins of protected speech—they cut to the very "heart of the First Amendment." *Turner Broad. Sys.*, 512 U.S. at 641 (quotations and citation omitted). Notably, "[p]lacing unduly harsh conditions on supervised release would, instead of facilitating an offender's transition back into the everyday life of the community be a significant barrier to a full reentry into society." *United States v. Goodwin*, 717 F.3d 511, 522 (7th Cir. 2013) (quotations and citation omitted).

Here, the goals of supervised release arguably are served by other conditions, including participation in anger-management and mental-health counseling programs, and prohibition on committing crimes. ER7-8; *see Aquino*, 2015 WL 4394869, at *4. These conditions would afford ample prophylaxis against the harms the court sought

to prevent. To the extent that additional conditions are deemed necessary, the type of unambiguous, easily enforceable time-place-and-manner restrictions on association that the court imposed for Mr. Chaker's bond in this case and that this Court has upheld in other cases arguably would better suit the narrow-tailoring requirement. *See* ER189-90; *United States v. Lowe*, 654 F.2d 562, 567-58 (9th Cir. 1981) (upholding condition creating buffer zone between defendant-activists and protest site because it safeguarded against "the particular offense [the judge] intended to prevent"—trespass—without "forbid[ding] participation in the anti-nuclear movement [or]...speech"); *see also Malone v. United States*, 502 F.2d 554, 555-57 (9th Cir. 1974) (restricting freedom of association with certain groups after finding nexus with crime of conviction); *United States v. Bolinger*, 940 F.2d 478, 480-81 (9th Cir. 1991) (same); *United States v. Ross*, 476 F.3d 719, 722 (9th Cir. 2007) (same). To the extent that the court can justify imposition of content-based restrictions, it must narrowly tailor them by including *mens rea*, materiality, and other requirements ensuring their constitutionality.

In short, these conditions must be stricken. Doing so will not "leave the district court with an empty cupboard," as the supervised-release goals would be adequately served by remaining conditions or, at most, by constitutionally compliant conditions imposed on remand. *Aquino*, 2015 WL 4394869, at *4.

CONCLUSION

For the foregoing reasons, this Court should reverse the revocation of Mr. Chaker's supervised release and remand with instructions to reimpose the original term and conditions of supervised release. Alternatively, this Court should vacate Conditions 5, 11, and 13, and remand for resentencing.

August 31, 2015

Respectfully submitted,

s/ Sarah R. Weinman

Sarah R. Weinman
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Sarah_Weinman@fd.org

Attorneys for Defendant-Appellant

CERTIFICATE OF RELATED CASES

Undersigned counsel is unaware of any appeals related to this case pending before this Court.

August 31, 2015

s/ Sarah R. Weinman

Sarah R. Weinman
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Sarah_Weinman@fd.org

Atorneys for Defendant-Appellan

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening appeal brief is proportionately spaced, has a typeface of 14 points or more and contains 13,783 words, which does not exceed the 14,000 words allowed by the rules.

August 31, 2015

s/ Sarah R. Weinman

Sarah R. Weinman
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Sarah_Weinman@fd.org

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on August 31, 2015, I electronically filed the foregoing opening brief and excerpts of record with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sarah R. Weinman

Sarah R. Weinman
Federal Defenders of San Diego, Inc.
225 Broadway Street, #900
San Diego, California 92101
619.234.8467
Sarah_Weinman@fd.org

Attorneys for Defendant-Appellant