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11 **IN THE MUNICIPAL COURT**

12 **IN AND FOR THE TOWN OF SAHuarita**

13 PATRICK FOX a.k.a. RICHARD RIESS, Case No.: CV2015-00024

14 v. Appellant

15 DESIREE CAPUANO,

16 **APPELLEE DESIREE CAPUANO'S  
17 RESPONSIVE MEMORANDUM**

18 **(Oral argument requested)**

19 Judge Avilez

20 Appellee.

21 **INTRODUCTION**

22 Pursuant to Arizona Superior Court Rule of Appellate Civil Procedure 8, Appellee  
23 Desiree Capuano files this memorandum in support of upholding the Order of Protection against  
24 Appellant Patrick Fox, a.k.a. Richard Riess. The Court had jurisdiction to issue and uphold the  
25 Order. Based on testimony from Ms. Capuano, a police officer, and the Appellant himself, the  
26 Appellant used his website, DesireeCapuano.com, to commit harassment and domestic violence  
27 against Ms. Capuano. The Appellant's free speech rights were not implicated, because the  
28

1 Court based its findings on the Appellant's illegitimate purpose, not the content of his speech.  
2 The Order should be upheld, not only because the Court's findings were proper, but because the  
3 Appellant continues to harass Ms. Capuano, flouting the Court's Order.  
4

5 **STATEMENT OF FACTS**

6 1. Appellee Desiree Capuano and Appellant Patrick Fox, a.k.a. Richard Riess, have a  
7 child in common, G [REDACTED] Riess. (H.R. 11:40.) On September 29, 2011, the Appellant, then  
8 calling himself Richard Riess, filed a custody action in Los Angeles (L.A.) Superior Court.  
9

10 2. On September 3, 2014, the L.A. Superior Court issued its Findings and Order After  
11 Hearing, granting Ms. Capuano "sole physical and legal custody" of G [REDACTED]. (Ex. 1 at 3.) The  
12 L.A. Superior Court granted Appellant "reasonable visitation." (*Id.*) The court also determined  
13 how visitation would be coordinated: "The extent of communication between G [REDACTED] Riess and  
14 the petitioner will be determined by the respondent [Desiree Capuano], per the request of the  
15 petitioner and the minor child." (*Id.*)  
16

17 3. Ms. Capuano attempted to coordinate visitation for G [REDACTED] with the Appellant, who  
18 was deported to Canada in 2013 (H.R. 12:30; Ex. 2 at 2). Throughout this process, the  
19 Appellant harassed and threatened her. (App. A. to Appellant's Mem., Petition at 1-2.)  
20

21 4. On July 23, 2015, Ms. Capuano petitioned this Court for an Order of Protection,  
22 citing that the Appellant: discussed shooting Ms. Capuano with G [REDACTED]; repeatedly stated to Ms.  
23 Capuano he possessed firearms; created a website on which he posted Ms. Capuano's home  
24 address, email address and employment information; intended to hire someone to have sex with  
25 Ms. Capuano to obtain "intimate" pictures to post online; and told Ms. Capuano his primary  
26 goal in life was for her to experience as much misery as possible. (*Id.*)  
27  
28

1       5. The Appellant also bragged in emails to Mrs. Capuano that he enters the United  
2 States unimpeded: "When I show up at border crossings with my US birth certificate and BC  
3 photo ID US customs and ICE don't even give me a second thought." (Ex. 2 at 4). On May 15,  
4 2015, he sent Ms. Capuano an email titled "The most difficult border in the world to cross!":

5       Have a look at in\_us\_park\_facing\_canada-01.jpg. You see that road? That's in  
6 Canada. Everything on this side is the US. The houses - they're in Canada. You  
7 see that spot I've circled on the far right? That's one of the points where the ditch  
8 is covered over to facilitate movement. Do you see ANYTHING, ANYWHERE  
9 that would make it in any way difficult to simply walk from any one point to any  
10 other point? So why the fuck do you think that if I wanted to be in the US I would  
11 not be?

12 (Ex. 2 at 10. Capitals in original.)

13       6. The Court granted Ms. Capuano the Order of Protection, which was served on the  
14 Appellant in Canada October 31, 2015. (Appellant's Mem. at 1.) The Order prohibited the  
15 Appellant from contacting Ms. Capuano and also required him to transfer to law enforcement  
16 any firearms he possessed. (H.R. 2:52.) The Order also stated Mr. Fox "shall not commit any  
17 crimes, including but not limited to harassment, stalking, or conduct involving the use,  
18 attempted use, or threatened use of physical force" against Ms. Capuano. (App. B. to  
19 Appellant's Mem., Orders at 1.)

20       7. In mid-November 2015—two weeks after the Appellant received the Order of  
21 Protection and two weeks before the hearing at issue—the Appellant filed a request to modify  
22 custody. (H.R. 6:11.)

23       8. On December 16, 2015, this Court held a hearing during which the Appellant  
24 challenged the Order of Protection. He appeared telephonically from Canada.

1       9. When the Court asked the Appellant why he was contesting the Order, he replied,  
2 “Primarily the firearms.” (H.R. 3:30.) The Court asked whether the Appellant requested to  
3 modify custody after receiving the Order. (H.R. 6:45.) He said, “Um, I assume—I don’t  
4 recall.” (*Id.*)

5       10. A police officer, Officer Montoya, testified about the Appellant’s website,  
6 DesireeCapuano.com. (H.R. 17:00.) Officer Montoya confirmed that the Appellant controls the  
7 domain and maintains the website. (*Id.*) He testified, “The content of that website in my  
8 experience shows a real intending to harass and harm Ms. Capuano’s reputation.” (H.R. 18:05.)  
9 And, “In my experience this extent of harassing someone is, in my opinion, scary and weird.”  
10 (H.R. 24:07.)

11       11. Officer Montoya described how the Appellant posts in first person, as if he were Ms.  
12 Capuano: “On the Desiree Capuano website, he does speak in first person, acting as Desiree,  
13 saying, ‘I do drugs while I’m at work.’ ‘I regularly get high before going to work … had sexual  
14 relations with my co-workers.’ ” (H.R. 18:55.)

15       12. The Appellant also posted a white supremacist logo under Desiree’s picture on the  
16 website. (H.R. 19:28.) “He’s associating that with her in order to harass and make people think  
17 that she is part of a white supremacist group,” Officer Montoya testified. (*Id.*) The officer  
18 researched this allegation and said he “didn’t find anything linking her to any white supremacist  
19 group” (H.R. 19:56.)

20       13. Officer Montoya described other posts the Appellant wrote impersonating Ms.  
21 Capuano, including “Of Anal Sex and Cooking Oil” and “An Open Letter to All Prospective  
22 Employers.” (H.R. 23:15.)

1           14. Ms. Capuano testified that the Appellant repeatedly threatened her:

2           He has told our child that if the risk of jail time were not there that he would shoot  
3           me. Physically shoot me. He has—I have no less than three emails where he tells  
4           me that he has guns and he shoots guns and he has a gun license. He was deported  
5           from the United States under the name Richard Riess, and the gun license is under  
6           the name Patrick Fox. And I also have documentation where he shows me a park  
7           in Canada and tells me that he crosses the border with no legal authorities present  
8           constantly. So, I am concerned that at any point he could enter the United States  
9           with his guns that he shoots without any legal authority knowing. And clearly the  
10           obsession and hatred that he has for me. If nothing else will get me to commit  
11           suicide or destroy me, as he said he is trying to do, he would shoot me.

12           (H.R. 11:20.)

13           15. The Appellant sent Ms. Capuano the email stating he would shoot her in January  
14           2015. (H.R. 14:30; *see also* Ex. 2 at p. 6.)

15           16. The Court asked Ms. Capuano if she felt the Appellant's postings had any purpose  
16           beyond harassment. (H.R.15:36.) "None," she said. (H.R.15:36.) The Judge then questioned  
17           the Appellant: "To give credit to her [Ms. Capuano] as writing these blogs on this website—to  
18           give her credit as if these were words coming from her—how does that serve a legitimate  
19           purpose?" (H.R. 49:39.) The Appellant answered that writing in first person "is intended more  
20           for entertainment value." (H.R. 49:48.)

21           17. He also pointed to a "disclaimer" "clarifying that the content of the site is not created  
22           by Ms. Capuano." (*Id.*) The Appellant's "disclaimer" appears in small font (roughly half the  
23           size of the regular text), in gray against a gray background at the very bottom of the post. (Ex. 4  
24           at 1.) The "disclaimer" begins: "Comment from the Editor: As always, everything in this post is  
25           100% completely true." (*Id.*)

1       18. During the hearing, the Appellant challenged Ms. Capuano to engage with him about  
2 the website:

3           I have made it clear to Desiree and anybody else who might be involved that if any  
4 such information is incorrect and they inform me of it, then I will, uh, remove it  
5 and correct it. And I've also made sure that they were aware that they do have  
6 legal recourse if some false information is published on the website in the form of  
7 a civil suit for libel or such."

8 (H.R. 47:30.)

9       19. After the Court concluded questioning, the Appellant—without prompting—  
10 reminded Ms. Capuano that he had firearms:

11           I guess I should state, just as a matter of record, because I am in Canada. Now I  
12 understand that the order required me to surrender my firearms, but I've  
13 discussed it with the RCMP [Royal Canadian Mounted Police] already, and they  
14 advised me that the current order or any order of protection issued in the United  
15 States has no legal effect in Canada, so I have not in fact surrendered my  
16 firearms, because I have not been legally required to do so.

17 (H.R. 52:43.)

18       20. After the testimony, the Court found "clear evidence of acts of domestic violence  
19 during this preceding year." (H.R. 58:42.) "Formally," the Judge said, "I will say harassment.  
20 Domestic violence harassment aimed at Ms. Capuano from Mr. Fox with no legitimate purpose  
21 other than to harass." (*Id.*) The Court upheld the Order of Protection. (*Id.*)

23           **MEMORANDUM OF POINTS AND AUTHORITIES**

24           **POINT I**

25           **THIS COURT HAD JURISDICTION TO ISSUE THE ORDER AND TO UPHOLD IT**

27           Arizona law allows persons to petition for orders of protection "as in civil actions, with a  
28 magistrate, justice of the peace or superior court." A.R.S. § 13-3602(A). Arizona's Superior  
29

1 Court has exclusive jurisdiction only “if it appears from the petition that an action for maternity  
2 or paternity, annulment, legal separation or dissolution of marriage is pending between the  
3 parties.” A.R.S. § 13-3602(P).

5 The Sahuarita Municipal Court had jurisdiction to issue and uphold Ms. Capuano’s Order  
6 of Protection. There was no matter pending between Ms. Capuano and the Appellant when this  
7 Court issued the July 23, 2015 Order. (SOF ¶ 2.) The Appellant filed his request to modify  
8 after he received the Order. (SOF ¶ 7.) Nor was there a matter pending during the December  
9 16, 2015 hearing. (*Id.*) On December 16, a finalized, valid custody order was still in place.  
10 (SOF ¶ 2.) Thus, this Court had the authority to grant Ms. Capuano an Order of Protection and  
11 to uphold it after the December 16 hearing.

14 **POINT II**  
15

16 **THE APPELLANT’S HARASSMENT WAS DIRECTED AT MS. CAPUANO**

17 The Court had sufficient evidence to conclude the Appellant directed his harassment at  
18 Ms. Capuano, as required by A.R.S. § 13-2921. Under A.R.S. § 13-3601, domestic violence  
19 includes any offense prescribed by A.R.S. § 13-2921. A.R.S. § 13-3601(A). Section § 13-2921,  
20 A.R.S., prohibits a person from “repeatedly commit[ing] an act or acts that harass another  
21 person” “with intent to harass.” The harassment must be “directed at a specific person and that  
22 would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct  
23 would in fact seriously alarms, annoys or harasses the person.” A.R.S. § 13-2921(E).

24  
25 *LaFaro v. Cahill*, cited by the Appellant, does not support his position. Rather, *LaFaro*  
26 supports the Court’s finding that the Appellant harassed Ms. Capuano. The Appellant cites  
27 *LaFaro* for the proposition that an overheard conversation cannot be directed at the harassment  
28

1 victim. But this is not what *LaFaro* holds. To the contrary, *LaFaro* involved direct  
2 communication by the harasser to the victim: “A witness testified that on that day, he heard  
3 Cahill say directly to LaFaro, “You’re a bigot, LaFaro.”” *LaFaro v. Cahill*, 203 Ariz. 482, 486,  
4 ¶ 14, 56 P.3d 56, 60 (App. 2002).

5 The true holding of *LaFaro* is that harassment is a series of acts: “Even assuming Cahill’s  
6 statements to LaFaro constituted “harassment” under the statute (an issue we do not reach), this  
7 conversation was only one act directed at LaFaro, not the “series of acts” required for injunctive  
8 relief under A.R.S. § 12-1809(R). A series of acts requires at least two incidents.” *Id.*

9  
10  
11 The Appellant committed a series of acts harassing Ms. Capuano. She testified to a series  
12 of Appellants’ harassing communications. (SOF ¶ 14.) Officer Montoya testified about many  
13 posts on DesireeCapuano.com aimed at harassing and harming Ms. Capuano. (SOF ¶ 13.) He  
14 also testified that, in his experience, the website showed the Appellant was “intending to harass”  
15 Ms. Capuano. (SOF ¶ 10 at 9-11.)

16  
17  
18 DesireeCapuano.com is directed harassing Ms. Capuano. It is named after her. (SOF ¶  
19 10.) It contains posts purported to have been written by her. (SOF ¶ 11.) Its sole purpose is to  
20 harass Ms. Capuano by communicating to her the Appellant’s hatred and dislike for her. The  
21 site contains a letter, presented as if penned by Ms. Capuano, to her prospective employers.  
22 (SOF ¶ 13.) It also features her home address, email address and employment information.  
23 (SOF ¶ 4 at 25-27.) Any reasonable person experiencing this treatment would be seriously  
24 alarmed, annoyed or harassed. Even a seasoned police officer said, “In my experience this  
25 extent of harassing someone is, in my opinion, scary and weird.” (SOF ¶ 10 at 11-13.)

1 Moreover, the Court established that Ms. Capuano did in fact feel seriously alarmed, annoyed,  
2 and harassed. (SOF ¶ 16 at 13-15.)  
3

4 During the hearing, the Appellant himself betrayed the site's true purpose: to attract Ms.  
5 Capuano's attention and to bait her into engaging with him. He said, "I have made it clear to  
6 Desiree and anybody else who might be involved that if any such information is incorrect and  
7 they inform me of it, then I will, uh, remove it and correct it." (SOF ¶ 18.) The Appellant  
8 designed DesireeCapuano.com with Ms. Capuano in mind, to provoke and disgust her, forcing  
9 her to engage with him. DesireeCapuano.com is harassment—targeted at its namesake.  
10

11

### **POINT III**

12

13 **THE COURT PROPERLY FOUND HARASSMENT BASED ON THE DEFENDANT'S WEBSITE,**  
14 **BECAUSE A.R.S. § 13-2921 DOES NOT IMPLICATE THE FIRST AMENDMENT**  
15 **OR FREE SPEECH RIGHTS**

16 The Court found the Appellant harassed Ms. Capuano based on the manner and purpose  
17 of his actions. The Appellant misstates the holding of *State v. Brown*. *Brown* supports this  
18 Court upholding the Order of Protection. The lower court in *Brown* reasoned that "[t]he focus  
19 of the offense of harassment is on the contact between particularized people, not on the character  
20 of the speech necessarily, *although certainly that can be an element*." *Brown*, 207 Ariz. 231,  
21 234, ¶ 6, 85 P.3d 109, 112 (App. 2004) (italics added).  
22

23 But the actual holding of *Brown* is that A.R.S. § 13-2921 does not implicate the First  
24 Amendment or free speech protections at all. 207 Ariz. at 236, ¶ 14, 85 P.3d at 114. Instead,  
25 liability under A.R.S. § 13-2921 "is based on the "manner" in which certain communication is  
26 conveyed and the underlying purpose for the communication." *Brown*, 207 Ariz. at 235, ¶ 10,  
27 85 P.3d at 113. "Because the statute only criminalizes communications made with a specific,  
28

1 deliberate purpose, the statute does not apply to pure First Amendment speech and instead  
2 regulates, at most, a blend of speech and conduct.” *Id.*

3  
4 This Court did not find harassment based purely on the content of the Appellant’s  
5 website. Rather, the Court found harassment based on the site’s underlying purpose, as  
6 evidenced by its content. The purpose of DesireCapuano.com is to harass Ms. Capuano. In  
7 addition to sending Ms. Capuano a January 2015 email in which he discussed shooting her (SOF  
8 ¶ 14 at 2-3; SOF ¶ 15.), the Appellant also repeatedly harassed her through  
9 DesireCapuano.com. (SOF ¶ 10.) Officer Montoya testified the Appellant wrote posts in which  
10 he impersonated Ms. Capuano, saying she had sex with her co-workers and got high at work.  
11 (SOF ¶ 11.) He wrote a post in Ms. Capuano’s name titled “Of Anal Sex and Cooking Oil.”  
12 (SOF ¶ 13.) The content of Appellant’s site demonstrated his clear intention to harass Ms.  
13 Capuano. (SOF ¶ 10 at 9-11.) This conduct constitutes harassment under A.R.S. § 13-2921.  
14  
15

16 **POINT IV**

17  
18 **THE APPELLANT POSES A CREDIBLE THREAT TO MS. CAPUANO’S SAFETY,  
19 WARRANTING THE COURT’S BRADY NOTICE**

20 A court issuing a protective order is permitted to “prohibit the defendant from possessing  
21 or purchasing a firearm for the duration of the order” if the court determines “the defendant is a  
22 credible threat to the physical safety of the plaintiff.” A.R.S. § 13-3602(G)(4); *Michaelson v.*  
23 *Garr*, 234 Ariz. 542, 545, ¶ 12, 323 P.3d 1193, 1196 (App. 2014). “In the absence of the  
24 record, an appellate court will presume that the evidence at a trial was sufficient to sustain a  
25 finding, the verdict, or a charge to the jury.” *Michaelson*, 234 Ariz. at 546, ¶ 13, 323 P.3d at  
26 1197 (affirming a firearms prohibition accompanying a protective order where the trial court  
27  
28  
29

1 scrolled through the petitioner's text messages but did not enter the content into the record  
2 (citing *Bryant v. Thunderbird Acad.*, 103 Ariz. 247, 249, 439 P.2d 818, 820 (1968); *accord*  
3 *Duckstein v. Wolf*, 230 Ariz. 227, 233, ¶ 15, 282 P.3d 428, 434 (App. 2012) ).  
4

5 *Mahar v. Acuna*, which the Appellant cites, is nothing like Ms. Capuano's case. 230  
6 Ariz. 530, 287 P.3d 824 (App. 2012). The record in *Mahar*, was "devoid of any evidence" that  
7 the defendant threatened the petitioner of the protective order. 230 Ariz. at 535, ¶ 17, 287 P.3d  
8 at 829. Ms. Capuano's case is replete with evidence.  
9

10 She testified the Appellant said he would shoot her if it would not entail jail time. (SOF ¶  
11 14 at 2-3.) He told Ms. Capuano repeatedly that he had guns. (SOF ¶ 14 at 3-5.) And he told her  
12 he crosses the U.S.-Canada border illegally. (SOF ¶ 5; SOF ¶ 14 at 5-6.) The Appellant even  
13 sent Ms. Capuano pictures of where he crosses. (SOF ¶ 5.) Ms. Capuano testified to all of these  
14 facts during the hearing. (SOF ¶ 14.) Moreover, without being asked to do so, during the  
15 hearing the Appellant reminded Ms. Capuano that he still possesses firearms. (SOF ¶ 19.) At  
16 the outset of the hearing, he said his primary purpose for contesting the Order was to be able to  
17 possess firearms. (SOF ¶ 9 at 2-4.) Presumably, the Appellant wishes to possess firearms in the  
18 United States, since he is currently able to possess them in Canada. (SOF ¶ 19.)  
19

20 Thus, *Watts v. United States*, cited in the Appellant's Memorandum, bears no relation to  
21 Ms. Capuano's case. 394 U.S. 705 (1969). Robert Watts, who did not wish to be drafted into  
22 the U.S. armed forces, said, "If they ever make me carry a rifle the first man I want to get in my  
23 sights is L.B.J." *Watts*, 394 U.S. at 706. He also said, "They are not going to make me kill my  
24 black brothers." *Id.* This "political hyperbole," the Supreme Court held, did not amount to a  
25 "true threat" against the President's life. *Watts*, 394 U.S. at 708.  
26  
27  
28  
29

The Appellant, on the other hand, made credible, detailed, and repeated threats to Ms. Capuano. And, during the hearing, he made sure Ms. Capuano knew he could carry them out.

## **POINT V**

## **THE APPELLANT CONTINUES TO VIOLATE THIS COURT'S ORDER OF PROTECTION**

The Order of Protection should be upheld. This Court based the Order on sufficient evidence that the Appellant directed his internet attacks at Ms. Capuano and that he intended to harass her.

The Order should also be upheld, because the Appellant continually defies the Order through his dogged harassment on DesireeCapuano.com. For example, on March 22, 2016, the Appellant posted the most vile, disturbing material imaginable. He wrote a blog post called, "The Time I Tried to Induce a Miscarriage." Writing as if he were Ms. Capuano, he wrote,

So there I am. Locked in the bathroom. Richard [the Appellant] was doing who knows what in the other room. Well, fuck him then! He doesn't want children then fine! Fuck him! I'm only 5 months in. I can do this! A few sharp blows to the abdomen will show him! I just started punching... over and over. I was numb. I didn't care. I kept punching myself in the stomach, as hard as I could.

(Ex. 4 at 1.) The Appellant's post continues in graphic, gory but false detail. (*Id.*) The text of A.R.S. § 13-2921—"seriously alarmed," "annoyed," and "harassed"—is insufficient to describe the effect of the Appellant's website on a reasonable person. Ms. Capuano was beyond alarmed, harassed, and annoyed. She was horrified. Any reasonable person would be.

## CONCLUSION

Patrick Fox wanted to make Desiree Capuano miserable. Being a software engineer, he knew how to do it. He created [DesireeCapuano.com](http://DesireeCapuano.com) to attack Ms. Capuano from afar. Through email and his website, the Appellant hurled targeted volleys of harassment at Ms. Capuano. In

1 his Memorandum, the Appellant tries to hide behind the internet, claiming to be running a  
2 "public forum." During the hearing, the Court recognized Mr. Fox's true purpose: to harass and  
3 harm. The Court had the jurisdiction and the evidence to find Mr. Fox committed harassment  
4 and domestic violence. Because of this, and because Mr. Fox continues to harass Ms. Capuano,  
5 the Order should be upheld.

6  
7 The Court should also uphold the Brady Notice. The Court based the Notice on sufficient  
8 evidence that Mr. Fox poses a credible threat to Ms. Capuano. Even during the hearing, he  
9 reminded her that he is still armed. Again, he tried to hide behind procedure, saying he  
10 mentioned his guns "just as a matter of record." The prohibition on Patrick Fox possessing  
11 firearms should be upheld.

12  
13 Dated March 29, 2016.

14  
15  
16 HARALSON, MILLER, PITT, FELDMAN &  
17 McANALLY, P.L.C.

18  
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