Nos. 2015-50138, -50193

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARREN DAVID CHAKER AKA DARREN DEL NERO, AKA DARRIN SHACKLER,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California, No. 3:15-cr-07012 (Judge Larry A. Burns)

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES, CATO INSTITUTE, MARION B. BRECHNER FIRST AMENDMENT PROJECT, ELECTRONIC FRONTIER FOUNDATION, AND FIRST AMENDMENT COALITION IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for amicus curiae American Civil Liberties Union Foundation of San Diego & Imperial Counties ("ACLU-SDIC") states that it is a California non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

The undersigned counsel for amicus curiae Cato Institute states that it is a Kansas non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

The undersigned counsel for amicus curiae Marion B. Brechner First Amendment Project states that it is a Florida non-profit organization with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

The undersigned counsel for amicus curiae Electronic Frontier Foundation states that it is a Massachusetts non-profit organization with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

The undersigned counsel for amicus curiae First Amendment Coalition ("FAC") states that it is a California non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The American Civil Liberties Union Foundation of San Diego & Imperial Counties ("ACLU-SDIC") is a local affiliate of the American Civil Liberties Union ("ACLU"), which is a nationwide, nonprofit, nonpartisan organization with more than 1,000,000 members, activists, and supporters dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has frequently defended the First Amendment, both as direct counsel and as amicus curiae. In particular, ACLU-SDIC has regularly appeared in free speech cases in this Court.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current cases and controversies affecting freedom of information and access to information, freedom

of speech, freedom of press, freedom of petition, and freedom of thought.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. With close to 23,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at http://www.eff.org. As part of its mission, EFF has served as counsel or amicus curiae in key cases addressing the application of law to the Internet and other new technologies. EFF is particularly interested in the First Amendment rights of Internet users and views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. These rights are of particular significance when they involve an Internet user's right to criticize the conduct of governmental officials.

The First Amendment Coalition ("FAC") is a California-based nonprofit organization dedicated to freedom of speech, freedom of the press and government transparency and accountability. Founded in 1988, FAC provides free legal consultations and information through its "Legal Hotline" service, and educational services and resources through public forums that FAC conducts across California, and through its website and published articles. In addition, FAC files amicus

curiae briefs in important appellate cases in California and around the country. As an advocate for First Amendment freedoms, FAC is committed to increased transparency and attention to free speech rights in the judiciary and criminal justice system. The extent of First Amendment protections for persons in the criminal justice system is a matter of great importance to FAC. This is particularly true regarding persons who, although no longer incarcerated, remain subject to judicially enforced curtailment of liberties under the parole and probation systems.

The above listed organizations ("amici curiae" or "amici") submit this brief to discuss the proper balance between freedom of speech and conditions of supervised release, especially as applied to political speech. The parties have consented to the submission of this brief.

STATEMENT REQUIRED BY RULE 29(C)(5) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

No person other than amici and its counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

This case goes to the core of the First Amendment. The district court punished Darren Chaker because he published a statement concerning the professional history and performance of a public official. Specifically, Mr. Chaker wrote that Ms. Leesa Fazel, an investigator with the Nevada Office of the Attorney General had previously been "forced out" of the Las Vegas Police Department. True or false, that statement is classic political speech subject to the highest level of First Amendment protection.

After his sentencing in Texas, a condition of Mr. Chaker's supervised release was that he "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." ER 268. The California district court found Mr. Chaker violated that condition based on a novel hodgepodge of miscellaneous defamation and harassment elements. *See* Appellant's Opening Brief at 12 (citing ER 104-129). The court then reimposed the original condition against "defaming a person's character on the internet" and added new conditions that Mr. Chaker may not "disparage or defame others on the internet" or send anonymous emails or post false information. ER 8, 277.

The judgment must be reversed for multiple First Amendment violations. The condition against disparagement is unconstitutional because it threatens

political and other speech of public concern for no legitimate reason related to deterrence and rehabilitation, not least because it is excessively vague. Both the original condition against defamation and the new condition against disparagement are void on their face because they unconstitutionally discriminate based on viewpoint, which the government may not do even when it may restrict the content of speech.

Even assuming that the original condition against defamation was valid when first imposed, the district court improperly applied it. The court did not require any of the stringent proof constitutionally necessary to show defamation of a public official in both civil and criminal cases, such as evidence of a false statement of fact or evidence that Mr. Chaker spoke with reckless disregard of the truth. The court could not avoid these constitutional requirements simply by labeling this a "harassment" case and concocting its own blend of defamation and harassment elements. The strict requirements that protect criticism of public officials apply to any case, regardless of the legal theory used to punish speech. Apart from these constitutional questions, to import the complexity of defamation law into a revocation and resentencing proceeding would undermine judicial economy and effective supervision by requiring in-depth factual and legal analysis of context-dependent considerations.

Finally, the district court abused its discretion by imposing additional overbroad conditions on Mr. Chaker, such as blanket prohibitions against sending anonymous emails or posting "false" or "private" information under any circumstances, which far exceed the legitimate interests of deterrence and rehabilitation. ER 8, 277. This Court should therefore reverse the judgment revoking Mr. Chaker's release and strike or substantially narrow the foregoing conditions to comply with the First Amendment.

ARGUMENT

I. SUPERVISED RELEASE CONDITIONS THAT IMPINGE ON FUNDAMENTAL RIGHTS MUST BE CAREFULLY REVIEWED AND NARROWLY TAILORED, ESPECIALLY WHEN THEY CHILL SPEECH OF PUBLIC CONCERN

A. The Conditions Of Release Prohibiting Mr. Chaker From Making Defamatory or Disparaging Remarks Must Be Scrutinized Due To Their Potential Chilling Effect On Speech

This Court carefully reviews conditions of supervised release "affecting fundamental rights." *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012). The Court recently emphasized the importance of avoiding overbroad restrictions on "speech that is protected by the First Amendment." *United States v. Gnirke*, 775 F.3d 1155, 1158 (9th Cir. 2015); *cf.* 18 U.S.C. § 3583(d)(2) (condition of release must involve "no greater deprivation of liberty than is reasonably necessary . . ."); *United States v. Soltero*, 510 F.3d 858, 867 (9th Cir. 2007)

(condition limiting association with "any known member of any . . . disruptive group" was overbroad for abridging right to strike or protest).

Release conditions restricting speech are "classic examples of prior restraints" because they "actually forbid speech activities" before they occur. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Ordinarily, such prohibitions would be considered "unconstitutional restraint[s] upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 723 (1931). In the supervised release context, however, conditions restricting speech may be valid prior restraints only when narrowly tailored and reasonably related to deterrence and rehabilitation. *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594, 596 (9th Cir. 1974). This Court must ensure that conditions do not impose an "overly broad prior restraint upon speech, lacking plausible justification." *Tory v. Cochran*, 544 U.S. 734, 738 (2005).

By prohibiting Mr. Chaker from "disparag[ing] or defaming others on the internet" and revoking his release for alleged defamation, the district court encroached on his right to engage in speech of public concern, including criticism of public officials. ER 8. This Court must closely scrutinize those conditions and their application to prevent them from casting a "pall of fear and timidity" over those under supervision "who would give voice to public criticism . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964). This issue concerns the

public just as it does Mr. Chaker because the freedom of speech "serves significant societal interests wholly apart from the speaker's interest in self-expression" and "protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) (quotation marks and citation omitted).

B. The Right To Freedom Of Speech Includes The Right To Engage In Harsh Criticism Of Public Officials, Including Police Officers

Under the First Amendment, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Therefore, speech critical of the government is "subject to the highest degree of First Amendment protection." *Wolfson v. Concannon*, 750 F.3d 1145, 1152 (9th Cir. 2014). That protection extends to "[c]riticism of those responsible for government operations . . . lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

In particular, the First Amendment protects criticism of law enforcement officers. *See Rattray v. City of Nat'l City*, 51 F.3d 793, 800 (9th Cir. 1994) (police officer is public official for purposes of the First Amendment). As another court has noted:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.

Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981). The same is true for Ms. Fazel as a state investigator and former local police officer. A statement regarding her professional history and performance is squarely within the core of speech protected by the First Amendment.

Criticism of police officers and other public officials is often pointed and harsh. But "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office," which "will not always be reasoned or moderate." *Hustler Mag. v. Falwell*, 485 U.S. 46, 51 (1988). The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. Therefore, "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quotation marks and citation omitted).

II. THE CONDITION AGAINST DISPARAGEMENT IMPROPERLY DETERS SPEECH OF PUBLIC CONCERN, INCLUDING CRITICISM OF PUBLIC OFFICIALS

If upheld, the sweeping condition against disparagement would unconstitutionally deter speech on matters of public concern "at the heart of the

First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). Speech of public concern may relate to private or public figures as well as public officials. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1197 (9th Cir. 1989). Regardless of outcome, the fear of revocation proceedings arising from a blanket prohibition of disparagement would stifle abundant speech of public concern. *Doe v. Harris*, 772 F.3d 563, 578 (9th Cir. 2014) ("The concern that an overbroad statute deters protected speech is especially strong where . . . the statute imposes criminal sanctions."). A chilling effect on speech can "derive from the fact of the prosecution" for an alleged violation, "unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

The requirement that Mr. Chaker not "disparage . . . others on the internet," ER 8, is so wide-ranging that it could deter him from participating in virtually any public debate online. For instance, it could prevent him from posting negative comments about a San Diego City Council Member who supports water use restrictions, or a state legislator who supports California's new vaccine law, as both could well be seen as disparaging others on the internet.

The district court attempted to reassure Mr. Chaker he could "post opinions, you know, you don't like a candidate . . . go ahead, none of that's prohibited." ER

115. But this caveat provides no comfort. First, it does not protect speech on numerous matters of public concern beyond candidates.

Second, the conditions, as written, are not so caveated. Whatever the district court may have intended, 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." *United States v. Aquino*, 794 F.3d 1033, 2015 WL 4394869, at *3 (9th Cir. July 20, 2015) (quotation marks and citation omitted).

Third, the caveat chills protected speech by requiring Mr. Chaker to "guess at its contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). An individual on supervised release could not be faulted for staying far away from speech that might encroach on vague conditions. *Aquino*, 2015 WL 4394869, at *3 (individuals "should not be forced to guess whether an overzealous probation officer will attempt to revoke [their] supervised release . . ."). Regardless of assurances the government might make about a vague condition, "we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *Doe*, 772 F.3d at 579. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*," and this Court should "not uphold an unconstitutional [condition] merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

That is particularly true where, as here, a condition for release is based on a vague and undefined term. The district court failed to define what a "disparag[ing]" remark might be, nor is there any clear definition of that term for Mr. Chaker to adhere to. The district court's reliance on such a vague term should itself void that condition. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1997) (university code prohibiting "negative" or "offensive" speech was void for vagueness); *cf. Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) ("When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly").

If the condition against disparagement becomes widespread in the future, it could easily stifle valuable speech from activists and others under supervision. For instance, in *Letter from the Birmingham Jail*, Dr. Martin Luther King, Jr. remarked that "[w]e are sadly mistaken if we feel that the election of Albert Boutwell as mayor will bring the millennium to Birmingham. While Mr. Boutwell is a much more gentle person than Mr. Connor, they are both segregationists, dedicated to maintenance of the status quo."[1] Had Dr. King been subject to the same conditions

[1] Martin Luther King, Jr., *Letter from the Birmingham Jail*, Martin Luther King, Jr. Papers Project 4 (1963), *available at* https://swap.stanford.edu/20141218230016/http://mlk-kpp01.stanford.edu/kingweb/popular_requests/frequentdocs/birmingham.pdf.

as Mr. Chaker, he might have been resentenced for some of his most popular writing. Worse still, he might never have published at all.

A current example, among many, is a recent essay by a parolee about electronic monitoring. *Living with an Ankle Bracelet*, https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet. As the author describes his parole officer's reaction to arguments against imposing a monitoring requirement, "[t]he more I spoke, the more hostile he became." *Id.* If the author had been subject to a condition against disparagement, his remarks could have brought him back before a court.

Individuals on probation, parole, or supervised release are uniquely qualified to "critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld." *Keenan v. Superior Ct.*, 27 Cal. 4th 413, 433 (2002). Because they are "likely to have informed and definite opinions" on those subjects and others, "it is essential that they be able to speak out freely on such questions without fear" of revocation proceedings. *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968). Yet a condition against disparagement, if imposed on others in the future, could deter contributions to public dialogue on issues of importance.

Thus, the condition of release against making disparaging remarks violates the First Amendment on its face. The Court should strike that condition entirely.

III. THE CONDITION AGAINST DEFAMING OR DISPARAGING ANYONE, INCLUDING PUBLIC OFFICIALS, IS VOID ON ITS FACE BECAUSE IT UNCONSTITUTIONALLY DISCRIMINATES BASED ON THE VIEWPOINT OF SPEECH

The district court's conditions against defamation and disparagement are void on their face because they discriminate based on viewpoint by prohibiting criticism, but not praise, of public officials and others. The First Amendment prohibits above all else discrimination based on the viewpoint of speech, especially in the political context. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Even in the limited circumstances where the government may restrict the content of speech, it may not discriminate based on viewpoint. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

The conditions against defamation and disparagement prevent Mr. Chaker from criticizing public officials, but do not prohibit him from praising them. Accordingly, the district court's judgment "impermissibly regulates speech on the basis of a speaker's viewpoint." *Chaker v. Crogan*, 428 F.3d 1215, 1228 (9th Cir.

2005). The district court's ability to impose conditions of release does not extend to viewpoint-based conditions, especially when they may encroach on political speech. *See Best v. Nurse*, No. CV 99-3727 (JBW), 1999 WL 1243055, at *5 (E.D.N.Y. Dec. 16, 1999) (parole officer violated First Amendment if he "acted against [parolee] because he disapproved of the literature he was distributing"); *Sobell v. Reed*, 327 F. Supp. 1294, 1304 (S.D.N.Y. 1971) (denying "others the hearing of [parolee's] views on prison conditions . . . violate[s] the First Amendment"); *Hyland v. Procunier*, 311 F. Supp. 749, 751 (N.D. Cal. 1970) (state may not prohibit parolees "from addressing lawful public assemblies . . . because of the expected content of the speech"); *People v. Warren*, 89 A.D.2d 501, 502 (N.Y. App. Div. 1982) (court could not require "a contribution that would advance one side of [the gun control] controversy").

This case differs from those where courts upheld narrow restrictions on certain forms of political conduct or association closely related to the circumstances of the underlying offense. *See United States v. Schiff*, 876 F.2d 272, 276-77 (2d Cir. 1989) (restricting a person convicted of attempted tax evasion from associating "with people who encourage tax evasion" or participating in meetings advocating for "such unlawful activity"); *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974) (defendant convicted of unlawfully exporting firearms prohibited from associating with certain groups because "the crime stemmed from

high emotional involvement with Irish Republic sympathizers"). These courts upheld only closely tailored conditions against particular conduct or association directly connected to the conviction, not broad restrictions on pure speech, political and otherwise. As a result, the defendants remained free to voice their opinions and criticize public officials.

The same is not true here where conditions restrict pure speech based on viewpoint, not just conduct or limited association rights. Even in the context of supervised release, the government has no legitimate interest in imposing a viewpoint-based restriction on pure political speech. As a result, the conditions against defamation and disparagement are unconstitutional on their face.

IV. ASSUMING THE DEFAMATION CONDITION WAS VALID, THE DISTRICT COURT FAILED TO ENFORCE THE CONSTITUTIONAL BURDEN OF PROOF FOR DEFAMATION OF A PUBLIC OFFICIAL

Much of the district court's discussion at the resentencing hearing focused on whether Mr. Chaker's blog post constituted "defamation" as prohibited by the condition of his release invoked by the court. But even assuming the condition against defamation was valid as originally imposed, Mr. Chaker's blog post was not necessarily defamatory, and the district court failed to enforce (or even fully consider) the First Amendment's strict limits on what constitutes defamation of a public official in either a civil or criminal context. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 14 (1990) (The First Amendment imposes strict "limits on the

application of the . . . law of defamation."); *Garrison*, 379 U.S. at 67 ("Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations"); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 66 (1st Cir. 2003) ("[C]riminal libel statutes share the constitutional limitations of civil libel law.").

The Constitution requires, at the very least, that any charge of defamation concern an assertion of fact and not one of pure opinion. *See Milkovich*, 497 U.S. at 20. The Constitution also requires the party claiming defamation (here, the government) to demonstrate actual malice on the part of a defendant by clear and convincing evidence when the speech at issue concerns a public official. *Rattray*, 51 F.3d 800.

Neither constitutionally required threshold was met in this case. The district court found that Mr. Chaker violated the condition prohibiting defamatory remarks when he wrote on his personal blog that an investigator with the Nevada Office of the Attorney General had been "forced out" of the Las Vegas Police Department. ER 125; ER 5. Mr. Chaker based his statement on internet sources. ER 111. That evidence, which is ***all*** of the evidence about Mr. Chaker's statement presented to the district court, is constitutionally insufficient to prove defamation of a public official.

The district court could not evade the First Amendment's restrictions on defamation by crudely cobbling together elements of defamation and harassment. Regardless of labels or legal theories, the First Amendment prohibits any punishment for speech criticizing public officials unless the strict requirements for proving defamation are met. *See Hustler Mag.*, 485 U.S. at 56. The government thus "cannot avoid the obstacles involved in a defamation claim" involving a public official "by simply relabeling it as a claim for intentional infliction of emotional distress" or, here, harassment. *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1034 (2d Cir. 1997).

A. The Government Did Not Offer Sufficient Evidence To Prove That Mr. Chaker Made An Assertion of Fact Instead of Opinion

A party claiming defamation of a public official bears the constitutional burden to prove that the speaker uttered a false statement of fact. *Philadelphia Newspapers, Inc.*, 475 U.S. at 775; *Rattray*, 51 F.3d at 801. Only an assertion of fact may constitute defamation under the First Amendment; pure opinion cannot. *Milkovich*, 497 U.S. at 20; *Standing Comm. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) ("statements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact'") (citations omitted).

To prove falsity, at a minimum, the party claiming defamation must submit evidence of the full context in which the statement was made because whether a statement is fact or opinion depends heavily on its context. *See Underwager v.*

Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995). "In evaluating the context in which the statement appeared, we must take into account all parts of the communication that are ordinarily heard or read with it," because "the reasonable interpretation of a word can change depending on the context in which it appears." *Knievel v. ESPN*, 393 F.3d 1068, 1075-76 (9th Cir. 2005) (citation and quotation marks omitted).

Here, the court considered Mr. Chaker's statement out of context, because the government produced only Ms. Fazel's selected excerpts of Mr. Chaker's blog posts. Without the complete context, it is impossible to determine whether Mr. Chaker's claim about Ms. Fazel being "forced out" of a prior job was "based on assumed or expressly stated facts" or "implied, undisclosed facts." *Yagman*, 55 F.3d at 1439. An opinion "based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning." *Id.* If the underlying facts are true, "readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts," and "the Constitution protects that opinion from liability for defamation." *Id.* at 1439-40.

Because the court below did not require the government to produce the full context of the challenged statement, the court could not properly determine whether the statement was fact or opinion. *See Knievel*, 393 F.3d at 1075 ("The context in which the statement appears is paramount in our analysis, and in some

cases it can be dispositive."). Without that determination, the district court could not properly find defamation.

The district court also failed to consider "the knowledge and understanding of the audience targeted by the publication." *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 701 (2007). For example, courts "have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 697 (2012). Without requiring the government to prove exactly how and where the allegedly defamatory statements were made and what the likely audience would have understood, the district court could not properly find that Mr. Chaker communicated a false statement of fact as opposed to an opinion.

B. Even If Mr. Chaker Made A False Assertion Of Fact, The Government Did Not Prove By Clear And Convincing Evidence That He Knew His Statements Were False Or Spoke With Reckless Disregard Of The Truth

Even if Mr. Chaker were deemed to have made a false factual assertion, the district court nevertheless failed to adhere to the well-settled First Amendment requirement that a party claiming defamation of a public official must "prove by clear and convincing evidence that [the speaker] acted with 'actual malice' when he made the statements in question." *Rattray*, 51 F.3d at 800. Although in other revocation proceedings the government may only need to prove a violation by a

preponderance of the evidence, 18 U.S.C. § 3583(e)(3), that rule must give way to the First Amendment's heightened standard of clear and convincing evidence when actual malice is required to prove defamation because "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

To show actual malice, the party claiming defamation must prove "that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Rattray*, 51 F.3d at 800 (citation and quotation marks omitted); *see also New York Times*, 376 U.S. at 279-280 (First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

"Actual malice consistently has been deemed subjective in nature," separate from the objective question of whether a statement is false. *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 668 (9th Cir. 1990) (citation and quotation marks omitted). It "requires more than a departure from reasonably prudent conduct," and mere "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *see also Dodds v. Am.*

Broad. Co., 145 F.3d 1053, 1063 (9th Cir. 1998) ("Mere negligence . . . is insufficient to demonstrate actual malice."). Instead, the First Amendment requires actual knowledge of falsehood or "purposeful avoidance of the truth." *Harte-Hanks*, 491 U.S. at 692. The government made no such showing here, and certainly not by clear and convincing evidence.

Evidence of hostility or vindictiveness on Mr. Chaker's part toward Ms. Fazel, if any, would not prove "actual malice" under the First Amendment. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred[.]" *Garrison*, 379 U.S. at 73. Therefore, "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term," nor may it "be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer." *Harte-Hanks*, 491 U.S. at 666 & n.7; *see also Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice . . . should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."). The issue is "the defendant's attitude toward the truth or falsity of the material published[,] . . . [not] the defendant's attitude toward the plaintiff." *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 114 (2007) (brackets in original, citations and quotation marks omitted).

To the extent Mr. Chaker's statement that Ms. Fazel was "forced out" of her prior job was based on information he researched on the internet, that evidence is insufficient to show knowledge of falsehood or reckless disregard, even if he failed to verify a rumor. Under the First Amendment, the mere "failure to investigate" information from a "rumor mill," online or otherwise, "is insufficient to establish reckless disregard for the truth." *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013).

Nor is it relevant whether Mr. Chaker's statement affected Ms. Fazel's reputation as the First Amendment protects such criticism of a public official. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation," and the First Amendment "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed," given "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison*, 379 U.S. at 77.

This principle requires close scrutiny of any defamation claim concerning a public official. "[B]ecause critical discussion of government ordinarily involves attacks on individual officials as well as impersonal criticisms of government policy, all defamation claims of aggrieved public officials must be examined closely in order to close what would otherwise be a back door to official

censorship." *Andrews v. Stallings*, 892 P.2d 611, 617 (N.M. Ct. App. 1995) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-12, at 863 (2d ed. 1988)).

Without proof by clear and convincing evidence that Mr. Chaker subjectively knew his statement was false or acted with reckless disregard as to its truth, the district court could not properly find that Mr. Chaker defamed a public official, such as Ms. Fazel. Therefore, the district court violated the First Amendment by revoking Mr. Chaker's release.

V. TO IMPOSE AND ENFORCE A CONDITION AGAINST DEFAMATION WOULD EMBROIL THE COURT IN COMPLEX ISSUES AND UNDERMINE JUDICIAL ECONOMY AND EFFECTIVE SUPERVISION

As a practical matter, adjudicating the issues involved in determining whether a statement satisfies the tort of defamation would defeat judicial economy and effective supervision. The constitutional and other requirements for imposing liability or penalties for defamation would force the district court to wade through a swamp of issues beyond the scope of an ordinary revocation hearing.

In addition to demanding proof of falsehood and actual malice, the "First Amendment requires a plaintiff to establish that the statement on which the defamation claim is based is 'of and concerning' the plaintiff." *D.A.R.E America v. Rolling Stone Mag.*, 101 F. Supp. 2d 1270, 1289 (C.D. Cal. 2000) (citing cases), *aff'd*, 270 F.3d 793 (9th Cir. 2001). That issue becomes complicated when the

statement does not "specifically refer" to an individual. *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986). The court must ensure that a charge of defamation is not mere cover for attacking "libel of government," which is "constitutionally insufficient" to justify liability. *Rosenblatt*, 383 U.S. at 83.

Apart from the First Amendment, defamation claims ensnare courts in state law issues. Because "there is no general federal common law of torts," *Roemer v. C.I.R.*, 716 F.2d 693, 697 (9th Cir. 1983), a court "must necessarily look to state law in determining whether defamation occurred," *Crowe v. County of San Diego*, 242 F. Supp. 2d 740, 746 (S.D. Cal. 2003). State laws impose multiple hurdles to a finding of defamation. For example, California grants absolute or qualified immunity to statements related to actual or potential litigation, statements on matters of common interest, and fair reports of official proceedings. *See* Cal. Civil Code § 47; *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 361-362 (2004); *Kashian v. Harriman*, 98 Cal. App. 4th 892, 914 (2002); *McClatchy Newspapers, Inc. v. Superior Ct.*, 189 Cal. App. 3d 961, 974-975 (1987).

When state laws differ on "privileges and immunities which might bar" a defamation claim, the court must perform a choice of law analysis. *Matter of Yagman*, 796 F.2d 1165, 1170 (9th Cir. 1986). Given differences in state law, defendants may need to guess at whether online statements are defamatory depending on where they occur, where they are seen, and what law the court might

apply. To the extent that compliance depends on such differences, a condition against defamation may violate due process by requiring reasonable persons to "guess at its meaning and differ as to its application." *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004).

This very issue arose in Mr. Chaker's resentencing hearing. Considerable confusion existed regarding what state law should apply to the condition preventing harassment and defamation—whether it be California or Nevada law—or whether the condition was tied to a "particular state law" at all. *See* ER 120-121. It would be difficult, if not impossible, for Mr. Chaker to know whether a statement he might make meets the legal requirements of "defamation" or harassment when neither Mr. Chaker, nor the district court, knew what law should apply to his speech.

Resolving any of these issues could require lengthy and costly briefing, argument, and testimony beyond the scope of an ordinary revocation hearing. Courts' interests in judicial economy and efficient supervision of individuals on supervised release therefore disfavor conditions against defamation.

VI. THE CONDITION AGAINST ANONYMOUS EMAILS IS OVERBROAD BECAUSE IT UNJUSTIFIABLY VIOLATES THE RIGHT TO ANONYMOUS POLITICAL SPEECH

The district court further erred in directing that Mr. Chaker "shall not send anonymous emails" of any kind. *See* ER 277 (Docket Entry 46). While perhaps

the district court might have discretion to narrowly regulate certain forms of anonymous speech for certain purposes, the sweeping prohibition of any anonymous email grossly encroaches on a wide spectrum of political speech, including but not limited to online activism and letters to the editor.

The Supreme Court has strongly affirmed the right to engage in anonymous political speech. An "author's decision to remain anonymous, 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" and consistent with "a respected tradition of anonymity in the advocacy of political causes." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-343 (1995). As the Court noted, "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* at 357 (citation omitted).

That principle is especially important for persons convicted of crimes, who may have important messages to convey, but fear identifying their past mistakes. "As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express

themselves freely without 'fear of economic or official retaliation . . . [or] concern about social ostracism.'" *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *McIntyre*, 514 U.S. at 341-42). This Court has recognized that "offenders' fear of disclosure in and of itself chills their speech. If their identity is exposed, their speech, even on topics of public importance, could subject them to harassment, retaliation, and intimidation." *Doe*, 772 F.3d at 581; *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1162 (2008) ("[B]y concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention."). Therefore, the condition against anonymous emails must be stricken or narrowed to remove improper restrictions on political speech.

VII. THE DISTRICT COURT IMPOSED OVERBROAD CONDITIONS AGAINST THE POSTING OF "PRIVATE" OR "FALSE" INFORMATION ONLINE

The conditions imposed on Mr. Chaker against "reveal[ing] private information of others or . . . posting false information . . . on the internet" are overbroad because they improperly chill political speech on matters of public concern. *See* ER 8. Although conditions might be narrowed to comply with the First Amendment, as written they reach far beyond any legitimate interests in deterrence and rehabilitation.

The mere invocation of "privacy," without more, does not defeat First Amendment rights. The First Amendment allows liability "for an invasion of privacy only if the matter publicized is of a kind which . . . is not of legitimate concern to the public." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (citation and quotation marks omitted). In addition, the government may not generally punish the publication of "truthful information" once "lawfully obtained." *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989). The condition imposed on Mr. Chaker against revealing private information must therefore be narrowed to allow disclosure of information that is of legitimate public concern and obtained by Mr. Chaker through lawful means. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

Similarly, the condition against posting false information must be narrowed to prevent infringement of protected speech unrelated to deterrence and rehabilitation. As this Court has confirmed, "constitutional protection is afforded some false statements" because an "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Johnson v. Multnomah Cty.*, 48 F.3d 420, 424 (9th Cir. 1995) (quoting *New York Times Co.*, 376 U.S. at 271-272). Although the government may punish certain "false claims . . . made to effect a fraud or secure moneys or other valuable considerations," false speech is not

"presumptively unprotected" by the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2547-48 (2012) (plurality opinion).

Indeed, "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id.* at 2553 (Breyer, J., concurring). "In the political arena . . . criminal prosecution" for false statements "is particularly dangerous . . . and consequently can more easily result in censorship of speakers and their ideas." *Id.* at 2556 (Breyer, J., concurring). The Supreme Court therefore "emphasizes *mens rea* requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Id.* at 2553 (Breyer, J., concurring).

Without evidence that false "speech was used to gain a material advantage" or otherwise cause specific harm through knowing deceit or reckless disregard for truth, a mere prohibition on falsehood "would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." *Id.* at 2548 (plurality opinion).

For these reasons, the condition against posting false information must be eliminated or substantially narrowed to comply with the First Amendment.

CONCLUSION

Mr. Chaker posted on his personal blog a statement regarding the professional history and performance of a public official that was derived from other internet sources. And for that, he was improperly punished. The condition of release that the district court enforced against Mr. Chaker, and many of the conditions subsequently imposed—such as prohibiting the posting of disparaging, anonymous, or false information—do not comport with the First Amendment. The judgment below should be reversed, and the conditions stricken or substantially narrowed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d), and 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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