National Coalition For Men (NCFM)

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April 25, 2014

Chief Justice Tani Cantil-Sakauye
and the Honorable Associate Justices of the California Supreme Court
350 MacAllister Street
San Francisco, CA 94102

Reference: ***Burquet v. Brumbaugh***
Supreme Court of California No. S217289
Second District Court of Appeal No. B248031
Los Angeles Superior Court No. 039688

To the Chief Justice and the Honorable Associate Justices:

The National Coalition For Men (NCFM) is the oldest and largest organization of its type. For over 35 years NCFM has been dedicated to raising awareness about how sex discrimination adversely affects women and men. We are very concerned that the overreaching consequences of Burquet v. Brumbaugh will do great harm.

The National Coalition For Men (hereafter" NCFM") respectfully submits this amicus curiae letter pursuant to the California Rules of Court, Rule 8.500(g) in support of the Petition for Review filed by Randy Brumbaugh in the case referenced above. NCFM urges this Honorable Court to grant the petition in order to establish a clear definition of disturbing the peace and issue guidance on specific, objective, avoidable actions that constitute domestic violence abuse in this context.

The Opinion published in the above case (*Burquet*) radically expands the definition of disturbing the peace to include any action upsetting to the subjective emotional calm of a partner or ex-partner, regardless of whether the action occurs only once, regardless if the action is itself otherwise legal and acceptable, and regardless of any showing of a threat, or likelihood of repetition or need to prevent future harm. Previous definitions required a course of intentional egregious action conducted over time with a further showing of need for court intervention to prevent recurrence.

Occasional emotional upset is a component of most, if not all, intimate relationships. This precedent appears to justify a restraining order merely upon an application to the court claiming emotional upset.

The expansion of the definition in the above referenced case compels the attention of the court to determine an important question of law.

Statement of Amicus Curiae's Interest in the Subject Case

The *Burquet* case referenced above defines a standard that will be applicable in family law matters concerning domestic violence and prevention. Prevention of violence is of interest to almost everyone, in particular those who practice family law and assist or counsel those involved in situations of relationship conflict or domestic violence.

In California, a large number of DVPA injunctions are sought, and if the published Opinion in *Burquet* is not reviewed, this number will increase, perhaps substantially. Thus this will impact the lives of thousands of Californians who are involved in a relationship or ending a relationship. This case is of great interest to those involved, who may become involved, and those who represent, counsel, or advocate for persons dealing with family law matters.

The referenced case greatly expands upon and alters previous definition of disturbing the peace as an act of domestic violence.

In re Marriage of Nadkarni (2009) 173 Cal.App.4th 197 is often cited in defining disturbance of a person's peace in the context of domestic violence abuse. In *Nadkarni*, defendant had a history of physical abuse; he had spent twenty days in jail for beating his wife. The court found his actions--a course of conduct accessing, reading, and publishing his former wife's emails--were disturbing in the dictionary sense of destroying her emotional and mental calm. But in *Nadkarni*, the disturbance was not merely annoyance and unexpected invasion of privacy. Defendant used his email access to determine and publish petitioner's social plans and location, and he had previously threatened her with violence. Thus, she felt a real threat due to past violence, threats, and his repeated course of action in determining her whereabouts and calendar. His actions comprised a course of behavior that, coupled with past violence towards her, could reasonably culminate in recurrence of violence. This is consistent with the wording in the statute "prevent the recurrence of acts of violence and sexual abuse…" and "apprehension of imminent serious bodily injury."

This is a contrast to *Burquet*, in which there was no history of violence between the parties, and even if there had been, the only incident considered by the court was a single uninvited visit that lasted at most ten minutes and comprised a conversation through a locked door. In *Nadkarni*, each action (unauthorized email access) was in itself egregious and intentionally directed at harassment and additionally was part of a pattern of acts that could reasonably lead to recurrence of violence; in *Burquet* the action was a single visit and brief conversation, which might occur with a door-to-door salesperson.

In *Burquet*, the Trial Court explicitly entered a finding of no violence[1], yet issued a restraining order based on a single uninvited visit, lasting at most ten minutes, in which defendant's actions comprised a knock on plaintiff's door, requesting to talk, conducting a calm conversation through a locked door, being asked to leave, and pausing briefly to consider if plaintiff might change her mind before leaving. The court appeared to find no likelihood of recurrence. The court based the injunction on the plaintiff's claimed emotional state—to "assure the peace and tranquility of the petitioner."

Basing an injunction on a claimed emotional state and a single act is much different than a course of action after a history of violence that may lead to recurrence.

When a course of action is legally required or forbidden, due process and fairness require that the action be defined in terms of objective, testable standards, rather than in terms of another party's reported or remembered subjective emotional reaction. Emotional reactions vary widely among people and additionally vary for each individual person with time, circumstance and experience.

A legal definition of a course of action (required or forbidden to avoid an injunction) in terms of another individual's subjective reported emotional state does not satisfy the requirement of due process: that an intelligent individual can clearly understand what actions are and are not allowed. Further, no evidentiary test can be applied to such a subjective claim without involving a specialized psychologist.

In People v. McClelland, 42 Cal. App. 4th 144 - Cal: Court of Appeal, 2nd Appellate Dist., 4th Div. 1996, 151 requirements of due process are discussed:

[1] The Appellate Court Opinion in *Burquet* appears to ignore and in some aspects, contradict findings of the Trial Court. Opinion as written thus violates the established rule "where the court in addition to a general finding makes a specific finding as to a particular fact, the latter controls in case of an inconsistency." (*Staub v. Miller*, 7 Cal.2d 221, 226[5], 60 P.2d 283; *Turner v. Turner* , 187 Cal. 632, 635[4], 203 P. 109, see plethora of cases listed in 43 West's California Digest (1951), Trial, k398, p.138.)" (*Howard v. Howard* (1954) 129 Cal.App.2nd 180.)

> Due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. [Citations.]"' (*People* v. *Martin* (1989) 211 Cal. App.3d 699, 705 [259 Cal. Rptr. 700, 86 A.L.R.4th 383].) `"`[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential element of due process of law.' [Citation.]"' (*Ibid.*) [¶] `"A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." [Citation.]' (*Walker* v. *Superior Court* (1988) 47 Cal.3d 112, 143 [253 Cal. Rptr. 1, 763 P.2d 892].)" (*People* v. *Heilman, supra,* 25 Cal. App.4th at p. 400.)

In *Burquet* the Trial Court explicitly agreed with Appellant's contention he had never been violent. Court issued an emphatic finding of no violence, emphasizing this point to the defendant and advising him to keep a copy of the transcript to show he had a "clear record" with no violence. Court appeared to find no threat or likelihood of recurrence. A reasonable person would therefore believe that he had conducted himself in a manner not subject to a restraining order or any other court injunction.

The burden on the restrained party of an injunction should be considered. There is no lightweight version or shades of distinction in a Domestic Violence Restraining Order, yet there are a wide range of conditions that may cause a court to issue the order.

A Domestic Violence Restraining Order has severe consequences for the restrained party. These include difficulties in career, relationships, housing, loss of Constitutional rights (2nd Amendment), and these effects often persist long after the order itself expires, even for life. The record of the order persists indefinitely. In cases where the restrained party has committed a serious act of violence, these consequences may be merited. But where the action is merely a phone call or attempt to communicate, the consequences seem overly severe.

Because a Domestic Violence Protection Act (DVPA) restraining order must be based on a finding that the party being restrained committed one or more acts of domestic abuse, a finding of domestic abuse sufficient to support a DVPA restraining order necessarily triggers the presumption in Family code section 3044. Section 3044 establishes a "rebuttable presumption" that award of sole or joint child custody "is detrimental to the best interest of the child." This presumption persists past the expiration of the injunction, for five years.

A person who has once been subject to a restraining order will always, even after the order expires, have a public record indicating issuance of a "Domestic Violence Restraining Order." In the present case, the Trial Court explicitly found no violence and added a statement to this effect

into the record transcript. Yet Appellant's public record will show "Domestic Violence Restraining Order," with no indication there was no act of violence involved.

One person commits an act of violence or sexual assault. A second person makes a single phone call or brief uninvited visit to an ex-girlfriend that is perceived as upsetting. Should both receive the same injunction? In both cases the same permanent public record is created. Both are presumed to be unfit for child custody under section 3044.

Not all upsetting interactions warrant involvement of the court and law enforcement. Occasional subjective emotional upset is a component of most, if not all, intimate relationships.

Occasional subjective emotional upset is a component of most, if not all, intimate relationships, dissolving relationships, and in many cases of life after a relationship. For example often child visitation and support issues must be discussed after a divorce. Under a literal reading of the statute and the *Burquet* Opinion, nearly everyone who is or has been in a relationship has committed an act of domestic violence. Given this definition, a restraining order is available to anyone upon application to the court.

In particular in a relationship ending, emotions are triggered and conduct is not always exemplary. In *Burquet*, perhaps defendant overstepped and perhaps petitioner overreacted. However, such situations are commonplace and rarely escalate to actual violence. However, when the court steps into a situation, its visibility and resources are very limited. The toolkit of the Court is constrained and not subtle, and not tailored to all the nuances and variations found between two persons ending a love affair. Thus the court should not be involved in psychological assessment or therapy, but can provide greatest value in issuing orders of protection only when protection is truly needed and beneficial, as when there is a pattern of abuse, credible threat, or need to prevent recurrence or escalation. Otherwise, the Court may do much more harm than good.

The Domestic Violence Prevention Act was not intended to address all causes of discord between former spouses or cohabitants, or those who have been in dating relationships, or to create an alternative forum for the resolution of all disputes between such people. For instance, someone might find a former spouse's success in business or romance to be highly upsetting. Or, a former spouse might be very disturbed by something which could be resolved in a family law proceeding, such as a former spouse's chronic tardiness with respect to visits or support payments.

To prevent misuse of law and manipulation of the court, well-defined standards are required. It must be recognized that not every person seeking a restraining order is acting in good faith with a sincere desire to prevent violence.

A Domestic Violence Restraining Order is easy to obtain. A petitioner who desires such an injunction receives assistance at every turn. He or she is assisted by court employees in completing and filing forms with proper phrases. Filing fees and court fees are waived. Defendant is served papers by the Sheriff at no cost to petitioner. When the petitioner appears at a hearing, she or he may provide testimony that is inconsistent or untrue with no fear of consequence—the courts rarely if ever penalize this. Most petitioners do not obtain an attorney. The standards of evidence are low and judges usually sympathize with the petitioner and an injunction is often issued without regard to defendant's testimony or evidence. Thus a person seeking an injunction incurs essentially no cost and no risk, yet as noted above the consequences to a defendant when an order issues are severe, long lasting, and potentially life ending.

A recent article in the *Family Law News*, the official publication of the State Bar of California Family Law Section, explains that the bar is concerned that "protective orders are increasingly being used in family law cases to help one side jockey for an advantage in child custody." The authors note that protective orders are "almost routinely issued by the court in family law proceedings even when there is relatively meager evidence and usually without notice to the restrained person....it is troubling that they appear to be sought more and more frequently for retaliation and litigation purposes."

This creates a system that inherently attracts and invites abuse. Those familiar with family law will know stories where a divorce attorney encourages a client to seek a restraining order as a tactical maneuver in a child custody dispute. Petitioners are encouraged to fabricate a story or scour the relationship history for any event that may be paired with claimed emotional distress. Other known forms of abuse occur when a person seeks an order as retribution, harassment, or as a misguided attempt to communicate with a partner or former partner.

Another sort of misuse occurs when a petitioner is mentally ill, paranoid, a victim of past trauma, abuse, or under severe stress. Sadly in today's violent and stress-filled society, this is not uncommon. People with such conditions are hyper-sensitized to violence and perceive or project fear and threats when none exist, often fearing those in closest relationships. Further, a person will often provide apparently credible testimony that is fictional—he or she may sincerely believe their stories and may be genuinely afraid, even when that fear is irrational. Since judges often issue DV injunctions based on credible testimony and emotional state, such a person will often succeed in obtaining an injunction against an innocent defendant.

The referenced *Burquet* case, if not reviewed by the Supreme Court, will expand the basis for abuse and create an environment even more attractive to those who would misuse the system. The already overburdened family court system thus will deal with even greater workload, further interfering with prevention of actual violence. Providing solid guidelines that are objective and testable will significantly reduce the potential for abuse and manipulation of the courts.

The subject case provides a rare and unique opportunity for the Supreme Court to provide needed guidance on this aspect of law.

Very few Domestic Violence injunctions are appealed, yet this should not be taken to mean that they are all fair and have no grounds for appeal. A typical situation is that a person is dissolving a marriage or relationship, is dealing with emotionally taxing situations in ending the relationship and often negotiating visitation and custody of children. Then a restraining order forces him (or her) to leave the family home and find new lodging and furnishings, adding additional emotional and financial burden. The order may also cause difficulties in earning a living at a time when there are severe financial demands-- deposits, legal fees, paying for separate residences. Appealing an order is a long and expensive process, requiring a specialist attorney in most cases. Often the duration of the appeal process would not complete until the order was nearly expired. Few parties have financial and emotional resources to contest an unfair or flawed order given these circumstances. The subject case is therefore rare; as noted the circumstances are atypical.

Burquet is also distinctive in that there is a finding of no violence by the Trial Court, so the definition of disturbing the peace is clear and isolated. This case provides an opportunity for the Supreme Court to define disturbing the peace, absent complicating issues of physical or sexual abuse or threats of the same.

Based on the forgoing, we respectfully request that the Court grant full review of the above referenced case to determine and define disturbance of peace in the context of domestic violence abuse.

Thank you for your consideration of this request.

Respectfully,

President