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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.: CV2015-00025

14 Appellant

**APPELLEE JAMES PENDLETON'S
RESPONSIVE MEMORANDUM**

15 v.

(Oral argument requested)

16 JAMES PENDLETON,

Judge Avilez

17 Appellee.

18 **INTRODUCTION**

19 Pursuant to Arizona Rule of Superior Court Appellate Civil Procedure 8, Appellee James
20 Pendleton files this memorandum in support of upholding the Court's July 23, 2015 Injunction
21 Against Harassment against Appellant Patrick Fox, a.k.a. Richard Riess. The Court had
22 sufficient evidence that the Appellant directed harassment at Mr. Pendleton.
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STATEMENT OF FACTS

1. Appellee James Pendleton is Desiree Capuano's fiancé. Mr. Pendleton is also Ms. Capuano's landlord, as Ms. Capuano shares Mr. Pendleton's home and pays him rent. (Appellant's Mem., p. 11.)

2. The Appellant created and maintains a website featuring personal details about Ms. Capuano and Mr. Pendleton. (H.R. 17:00.) The Appellant hosts the website at the domain DesireeCapuano.com. (*Id.*) The site contained Mr. Pendleton's name, address, and telephone number, photographs of Mr. Pendleton, and information about his security clearance. (H.R. 34:52; *see also* Ex. 3 at 8.)

3. On July 23, 2015, Mr. Pendleton petitioned this Court for an Injunction Against Harassment. (Appellant's Mem. at 3.) The Court granted the Injunction, and it was served on the Appellant in Canada October 31, 2015. (Appellant's Mem. at 1.) On December 16, 2015 this Court held a hearing during at which the Appellant challenged the Injunction and appeared telephonically.

4. A police officer, Officer Montoya, testified about the Appellant's website. (H.R. 17:00.) Officer Montoya investigated and confirmed that the Appellant controls and maintains DesireeCapuano.com. (*Id.*)

5. Officer Montoya testified that the Appellant posted about Mr. Pendleton on DesireeCapuano.com: "The website also mentions you [Mr. Pendleton] periodically. And in some of the comments. And also has numerous pictures, and if you google ... your pictures it will bring up the website itself. And googling your names brings up the website, linking you to

1 the website.” (H.R. 27:28.) Mr. Pendleton asked Officer Montoya, “Do you feel that that
2 harassment is targeted towards me directly?” (*Id.*) The officer answered, “Yes I do.” (*Id.*)
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4 6. Officer Montoya testified that the Appellant even posted photographs of Mr.
5 Pendleton’s home, along with a Google map of how to get there. (H.R. 22:27.) Officer
6 Montoya also described the Appellant’s attacks on Mr. Pendleton’s livelihood on
7 DesireeCapuano.com. He read from the site’s “General Information” section, written in first
8 person as if he were Ms. Capuano: “James has a Top Secret SCI security clearance, which
9 means he is able to tell me all kinds of juicy, national security secrets while we’re lying in bed at
10 night.” (H.R. 28:18.)
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13 7. Mr. Pendleton understood the Appellant’s posts to be attacks on his employment:
14 “Essentially he has reposted my resume in an effort to discredit me professionally. He has
15 threatened the security clearance that I hold, which is my profession.” (H.R. 36:50.)
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17 8. Mr. Pendleton testified that he believed the Appellant’s web attacks on him were a
18 means of also attacking Ms. Capuano. Mr. Pendleton said, “I believe that his intent is to isolate
19 Ms. Capuano by attacking both myself and others ... to make her feel hopeless and basically de-
20 empower her. So his harassment toward me is a means to an end.” (H.R. 35:15.)
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22 9. The Appellant contacted Mr. Pendleton’s relatives through social media. Wendy
23 Pendleton, Mr. Pendleton’s mother, testified that the most frequent visitor to her profile on
24 linkedin.com, a professional networking website, was “Patrick Fox, Software Engineer, Project
25 Lead.” (H.R. 42:35.) According to Ms. Pendleton, the Appellant had no reason to visit her
26 profile. (*Id.*) After witnessing the Appellant’s actions toward Ms. Capuano and Mr. Pendleton,
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1 Ms. Pendleton was concerned enough to contact an attorney about the Appellant's visits to her
2 profile. (H.R. 43:15.)

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4 10. The Court asked the Appellant to explain the legitimate purpose of his postings
5 aimed at Mr. Pendleton on DesireeCapuano.com. (H.R. 49:10.) The Judge asked the purpose
6 of posting Mr. Pendleton's address and a Google map to his home. (H.R. 50:22.) The Appellant
7 merely replied, "In the event parties such as creditors are trying to locate her [Ms. Capuano],
8 then that would assist them." (H.R. 50:35.)

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10 11. Regarding the security clearance, the Court asked the Appellant, "Would you feel
11 harassed if you had a security clearance and these types of things were posted against you and it
12 could potentially cause you a loss of your job?" (51:30) He answered, "Well, with respect to the
13 security clearance, let me just say the information posted regarding Mr. Pendleton was already
14 posted on the internet." (H.R. 51:40.)

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16 12. After the testimony, the Court stated, "I do find reasonable evidence of harassment of
17 the plaintiff by the Defendant during this preceding year." (H.R. 58:42.) "Mr. Pendleton has
18 met his burden of proof by a preponderance of the evidence." (*Id.*) The Court upheld Mr.
19 Pendleton's Injunction Against Harassment.
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22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **POINT I**

24 **THE APPELLANT'S HARASSMENT WAS DIRECTED AT MR. PENDLETON**

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26 The Appellant claims the Court misapplied the "directed at a specific person"
27 requirement of A.R.S. § 13-2921. The statute prohibits a person from "repeatedly commit[ing]
28 an act or acts that harass another person" "with intent to harass." The harassment must be
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1 “directed at a specific person and that would cause a reasonable person to be seriously alarmed,
2 annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.”

3 A.R.S. § 13-2921(E).
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5 *LaFaro v. Cahill*, which the Appellant cites in his memorandum, does not apply to Mr.
6 Pendleton’s case. The Appellant claims *LaFaro* stands for the proposition that an overheard
7 conversation is not “directed at” a harassment victim. But that is not the holding of *LaFaro*.
8 Indeed, there was evidence in *LaFaro* of direct communication from the harasser to the victim:
9 “A witness testified that on that day, he heard Cahill say directly to LaFaro, “You’re a bigot,
10 LaFaro.” ” *LaFaro v. Cahill*, 203 Ariz. 482, 486, ¶ 14, 56 P.3d 56, 60 (App. 2002).
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13 The Court did not decide whether the statement itself constituted harassment. *Id.*
14 Instead, the actual holding of *LaFaro* is that harassment is a series of acts: “Even assuming
15 Cahill’s statements to LaFaro constituted “harassment” under the statute (an issue we do not
16 reach), this conversation was only one act directed at LaFaro, not the “series of acts” required
17 for injunctive relief under A.R.S. § 12-1809(R).” *Id.*
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19 During the hearing, Mr. Pendleton and Officer Montoya testified to a series of harassing
20 acts by the Appellant “targeted at [Mr. Pendleton] directly.” (SOF ¶ 5 at 2.) The Appellant
21 posted about Mr. Pendleton and attacked his professional credentials. (SOF ¶ 7 at 13-16.) But
22 he also went further and posted pictures of Mr. Pendleton’s home with a map of how to get
23 there. (SOF ¶ 6.)
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25 As a software engineer (SOF ¶ 9 at 25), the Appellant had the knowledge and skills to
26 direct his attacks at Mr. Pendleton. And he did so. The Appellant designed
27 DesireeCapuano.com to attract web hits from anyone searching online for Mr. Pendleton’s name
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1 or picture. (SOF ¶ 5 at 26-28.) The Appellant's website was not just about Mr. Pendleton. It
2 was directed at harassing him.

3 4 POINT II

5 **THE COURT PROPERLY FOUND HARASSMENT BASED ON THE DEFENDANT'S WEBSITE,** 6 **BECAUSE A.R.S. § 13-2921 DOES NOT IMPLICATE THE FIRST AMENDMENT** 7 **OR FREE SPEECH RIGHTS**

8 *State v. Brown* does not support the Appellant's claim that "[t]he focus of the offense of
9 harassment is on the contact between particularized people, not on the character of the speech
10 necessarily." 207 Ariz. 231, 234, ¶ 6, 85 P.3d 109, 112 (App. 2004) That snippet of dicta, which
11 the Appellant misapplies, continues: "*although certainly that can be an element*" *Id.* (italics
12 added).

14 The Arizona Supreme Court's holding in *Brown*, however, is that A.R.S. § 13-2921, does
15 not implicate the First Amendment or free speech protections at all. 207 Ariz. at 236, ¶ 14, 85
16 P.3d at 114. Instead, liability under A.R.S. § 13-2921 "is based on the "manner" in which
17 certain communication is conveyed and the underlying purpose for the communication."
18 *Brown*, 207 Ariz. at 235, ¶ 10, 85 P.3d at 113. "Because the statute only criminalizes
19 communications made with a specific, deliberate purpose, the statute does not apply to pure First
20 Amendment speech and instead regulates, at most, a blend of speech and conduct." *Id.*

23 This Court found the Appellant harassed Mr. Pendleton based on the purpose of his
24 communications, not their content. The Court questioned the Appellant about the purpose of
25 posting Mr. Pendleton's home address with a Google map to his house. (SOF ¶ 10 at 5-6.) The
26 Appellant could manage no better answer than that the information would assist creditors to
27 locate Ms. Capuano. (SOF ¶ 10 at 6-9.)
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1 The Court ascertained the Appellant's true purpose behind posts about Mr. Pendleton's
2 security clearance—harming Mr. Pendleton's career. The Judge asked the Appellant whether he
3 would feel harassed if he had a security clearance and someone posted things against him "and it
4 could potentially cause you a loss of your job" (SOF ¶ 11 at 10-13.) The Appellant skirted the
5 question and merely said the information he posted (writing as if he were Ms. Capuano) was
6 publicly available on the internet. (SOF ¶ 11 at 13-16.) The Appellant could not name a
7 legitimate purpose, because he had none.

10 As A.R.S. § 13-2921 requires, the Court based its finding that the Appellant harassed Mr.
11 Pendleton on the manner of the communications and their underlying purpose. Mr. Pendleton
12 summed up the Appellant's motivation: "I believe that his intent is to isolate Ms. Capuano by
13 attacking both myself and others ... to make her feel hopeless and basically de-empower her.
14 So his harassment toward me is a means to an end." (SOF ¶ 8 at 18-21.)

17 CONCLUSION

18 The Court based the Injunction on sufficient evidence that the Appellant harassed Mr.
19 Pendleton. The Appellant had no legitimate purpose for posting pictures of the inside of Mr.
20 Pendleton's house but to harass him specifically. Nor was there a legitimate purpose for
21 suggesting, without basis, that Mr. Pendleton would compromise national security. The
22 Appellant's harassing remarks were directed at Mr. Pendleton as if directed by his Google map.
23 The Court should uphold Mr. Pendleton's Injunction Against Harassment against Patrick Fox.

27 Dated March 29th, 2016.

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