

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 270 South Tejon Street Colorado Springs, Colorado 80903		DATE FILED December 12, 2023 3:59 PM FILING ID: EF175D2B99652 CASE NUMBER: 2022CR3360 σ COURT USE ONLY σ
PEOPLE OF THE STATE OF COLORADO, Plaintiff  v.  <b>DESIREE GONZALEZ,</b> Defendant		
MEGAN A. RING, Colorado State Public Defender Chelsea Lauwereins, No. 55011 Deputy Public Defender 560 Golden Ridge Road, #100, Golden, CO 80401 Phone: (303) 279-7841; Fax: (303) 279-3082 Email: chelsea.lauwereins@coloradodefenders.us	Case No. 22CR3360       Division 7	
<b>MOTION TO DISMISS CHARGES 1, 2, 3, 16, 18, 19, 20, AND 21 DUE TO A VIOLATION OF MS. GONZALEZ'S FIRST AMENDMENT RIGHTS</b>		

Ms. Desiree Gonzalez, by and through counsel, respectfully requests that this Court dismiss the above labeled charges as her conduct is protected under the First Amendment of the United States Constitution as well as its counterpart, Article II, Section 10 of the Colorado Constitution. In support of this motion, she states the following:

### FACTS

1. Ms. Gonzalez is charged in each of these counts with Retaliation Against an Elected Official, in violation of C.R.S. 18-8-615(1.5)
2. The elements of the charge are:
  - a. that the defendant,
  - b. in the State of Colorado,
  - c. on or about the date and place charged,
  - d. knowingly,
  - e. made a credible threat,
  - f. as retaliation or retribution against an elected official or arising out of the status of the person as an elected official, and
  - g. the threat was directed or committed upon,
  - h. an elected official.
3. "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his immediate family or of someone with whom the person has or has had a continuing relationship. The

threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear. (COJI F:77.)

4. The charges stem from emails Ms. Gonzalez sent to the Lakewood City Council on December 7, 2022 which three the Lakewood City Council members have stated never understood to be threatening, resulting in the dismissal of charges related to such individuals.
5. Messages did not contain any direct threats or specific details about the threats and were largely unintelligible and seemingly taken out of context. *See Affidavit*. While pictures of weapons were included with some messages, FBI Agent Love informed police officers that some if not all of the pictures in the messages were related to an investigation Ms. Gonzalez was involved with and that he did not believe she had such materials in her possession at the time.

### **LAW AND ANALYSIS**

1. The First Amendment states that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.
2. It's Colorado counterpart states that no law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact. Colo. Const. Art. II. Sec. 10. Section 24.
3. Equal Protection demands that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV
4. The Supreme Court has made clear that the First Amendment protects the right to freedom of speech, a fundamental right that may only be abridged in the narrowest of circumstances. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
5. The chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).
6. The government cannot avoid First Amendment scrutiny simply by claiming that they were acting pursuant to an otherwise valid criminal law. *Gehl Grp. v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995).

7. The First Amendment contemplates that ideas will be tested in the marketplace, and not scrutinized by government censors. *Hill v. Thomas*, 973 P.2d 1246, 1252 (Colo. 1999), *aff'd sub nom. Hill v. Colorado*, 530 U.S. 703 (2000).
8. Because the government cannot favor one idea over another, its regulation of speech must be content-neutral. *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 95, 92 (1972).
9. If, however, a statute is content-based, rather than content-neutral, the statute is presumptively unconstitutional. Content-based laws are those that target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests (strict scrutiny). *Reed v. Town of Gilbert, Ariz.* 576 U.S. 155, 163 (2015).
10. While one method of determining whether a statute is content-based is simply to determine whether the law cannot be justified without reference to the content of the speech, another way is to determine whether or not it was adopted by the government because of disagreement with a message that the speech conveys. *Id.*
11. A statute is content-neutral when it is justified without reference to the content of the regulated speech, it cannot be applied because of disagreement with the message presented. *Clark v. Cmty. For Creative Non-Violence*, 486 U.S. 288, 295 (1984). In other words, a restriction is content neutral if the government makes no attempt to control the content of the speech protected and regulated thereby. *Hill, Id.*
12. If the court finds the statute to be content-neutral, the applicable test is whether the statute is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication (intermediate scrutiny). *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).
13. Certain limited categories of speech are unprotected by the First Amendment's guarantees, including so called "true threats." *Virginia V. Black*, 538 U.S. 343, 359 (2003). In *Black*, the Supreme Court explained that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* Colorado courts have defined a threat as "a statement of purpose or intent to cause injury or harm to the person, property, or rights of another, by committing an unlawful act." *People v. McIntier*, 134 P.3d 467, 472 (Colo. App. 2005) (citing *People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999)); see also *U.S. v. Heineman*, 767 F.3d 970, 976 (10<sup>th</sup> Cir. 2014). The Supreme Court in *Black* further defined true threats, stating, "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360.
14. The Supreme Court established the true threat doctrine in *Watts v. United States*. In that case, a young man was convicted for violating a statute prohibiting threats against the life

of the President of the United States. *Watts v. U.S.*, 394 U.S. 705, 706 (1969). The defendant allegedly stated that if he was ever made to carry a rifle the first person he wanted in his sights was “L.B.J.,” referring to then President, Lyndon B. Johnson. *Id.* The Supreme Court overturned Watts’ conviction, holding that the statute itself was constitutional. The Court found the statements to be “political hyperbole” and stated that the statute must be interpreted against a national commitment to open debate, especially regarding public officials. *Id.* at 708. The Court stated that “[t]he language of the political arena...is often vituperative, abusive, and inexact.” *Id.* the Court emphasized that the defendant’s statements must be interpreted within the context in which they were spoken. *Id.*

15. *Elonis v. U.S.* affirmed the 10<sup>th</sup> Circuit’s interpretation of the true threats doctrine: the government must establish that the defendant intended to issue threats or knew that his communications would be viewed as threats. *Elonis v. U.S.*, 135 S.Ct. 2001, 2012 (2015). In *Elonis*, the defendant, was convicted for posting frequent “crude, degrading, and violent material,” about his ex-wife, law enforcement, and others in the community under a statute prohibiting threatening communications. *Elonis*, 135 S.Ct. at 2005. The statute in question did not specify a mental state. The Supreme Court held that criminal liability must consider Mr. Elonis’ mental state. In reversing the conviction, Chief Justice Roberts, writing for the majority, stated, “There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.” *Id.* at 2012.
16. The statements made by Ms. Gonzalez in emails to city council members do not rise to the level of “true threats” and instead should be equated to the statements in *Watts*, and *Elonis*, *supra*. Pursuant to the First Amendment of the United States Constitution and the Colorado Constitution, as well as Due Process and Equal Protection under both respective Constitutions, Ms. Avion respectfully requests that this court dismiss the charges against her.

**C.R.S. 18-8-615(1.5) AS APPLIED TO MS. GONZALEZ IS UNCONSTITUTIONAL AND  
THE COURT MUST DISMISS SUCH CHARGES.**

1. Ms. Gonzalez’s written statements in emails were not true threats and do not fall within any alternative exception to First Amendment protection. Applying C.R.S. 18-8-615(1.5) to Ms. Gonzalez’s conduct thus violates her First Amendment rights.
2. Because Ms. Gonzalez’s statements are protected speech under the First Amendment and Article II Section 10 of the Colorado Constitution she has not engaged in any illegal activity and the statute is unconstitutional as applied. Thus the court must dismiss the charges against her.

WHEREFORE, Ms. Gonzalez respectfully moves this Court to grant this motion and for any other relief which this Court deems just and proper pursuant to the First and Fourteenth Amendments to the United States Constitution and Article II, Section 10 of the Colorado Constitution.

MEGAN A. RING

COLORADO STATE PUBLIC DEFENDER

//s// Chelsea Lauwereins

Chelsea Lauwereins, No. 55011

Deputy State Public Defender

Dated: December 12, 2023

**Certificate of Service**

I certify that on 12/12/23, I served the foregoing document by efilng same to all opposing counsel.

/s/ Chelsea Lauwereins