APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 19 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LATONIA SMITH, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, RENO, Respondent.	No. 23-70092 D.C. No. 3:22-cr-00051-RTB-CSD District of Nevada, Reno ORDER

Before: SCHROEDER, RAWLINSON, and BADE, Circuit Judges.

Petitioner's request to withdraw her motion for an extension of time to obtain exhibits to the petition is granted.

Petitioner has filed a 28 U.S.C. § 2241 habeas corpus petition with exhibits seeking dismissal of her pending criminal case in United States District Court case number 3:22-cr-00051-RTB-CSD, and her immediate release. If a petition for writ of habeas corpus is filed in the court of appeals, "the application must be transferred to the appropriate district court." Fed. R. App. P. 22(a); *see* 28 U.S.C. §§ 1631, 2241(b). We, however, will not transfer the petition because criminal proceedings are ongoing in the district court, and petitioner may seek relief in those proceedings.

The district court's order denying petitioner's motion to dismiss the

indictment may not be relitigated in a § 2241 petition before this court. We therefore will not consider the merits of the petition.

All other pending motions are denied as moot.

No further filings will be entertained in this case.

The Clerk will close this original action.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. LATONIA SMITH, Defendant.	Case No.: 3:22-cr-00051-RTB-CSD **ORDER DENYING DEFENDANT'S MOTION TO DISMISS & GRANTING IN PART DEFENDANT'S MOTION IN ALTERNATIVE** **[ECF No. 31]**

On July 28, 2022, a grand jury returned a five-count indictment against Defendant Latonia Smith ("Defendant") charging her with violation of the federal cyberstalking statute, 18 U.S.C. §§ 2261A(2)(B) and 2261(b)(5). ECF No. 10. Defendant moves this Court to dismiss the indictment as applied to her, arguing the emails she sent, which led to the indictment, amount to pure speech protected under the First Amendment. ECF No. 31 ("Motion"). In the alternative, Defendant requests dismissal of count three, and removal of points one and two from the course of conduct section of the indictment, arguing their inclusion is irrelevant and prejudicial. *Id.* The government argues Defendant's as-applied challenge fails because the emails at issue fall into two potential exceptions to the First Amendment's protection—true threats and speech integral to a course of criminal conduct. ECF No. 35.

For the reasons set forth below, the Motion to Dismiss is **DENIED**. The Motion in Alternative is **GRANTED-IN-PART**.

I. BACKGROUND

For purposes of the motion, the facts in the indictment are presumed to be true.[1] Between June 8, 2022, and June 30, 2022, Defendant sent a series of emails to court staff of District Judges R.B., J.D., and G.N., as well as victim N.B. (the spouse of District Judge R.B.) and S.M. (Defendant's assigned probation officer). Put mildly, these emails express anger towards those she deemed involved in her criminal conviction and supervised release. Several of the emails referenced the children of R.B. and N.B. (listing their names and activities), the neighborhood where J.D. lived, names of various court staff, and other personal information. At issue here, many of the emails contained what the victims allegedly understood to be threatening language, which is listed in detail in the indictment and will not be extensively reproduced in this Order. *See* ECF No. 10. Defendant does not dispute that the indictment lists the emails' content accurately, but Defendant notes the emails are not reproduced in their entirety. For purposes of the motion, only the characterization of the emails is currently in dispute.

II. LEGAL STANDARD

The Rules Federal Rules of Criminal Procedure allow parties to raise any motion, objection, request or defense that the court can decide without a trial on the merits. Fed. R. Crim. P. 12(b)(1). Courts may grant a motion to dismiss an indictment when it seeks to resolve a question of law, not fact. *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987). As in this case, a question of law can be raised when a defendant argues the statute under which they are being prosecuted violates the First Amendment, either facially or as-applied to them. *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir.

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[1] As noted above, Defendant requests removal of points one and two under the course of conduct section; however she does not dispute these facts are true, merely challenges their inclusion.

2010), *aff'd,* 567 U.S. 709, 132 S. Ct. 2537 (2012). As-applied challenges require a court to examine the constitutionality of a statute as applied to the defendant's conduct in the case at hand. *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11, 94 S. Ct. 2727, 2730 (1974)).

When considering a motion to dismiss, the court does not consider whether the government can prove its case. *U.S. v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (quoting *United States v. Sampson*, 371 U.S. 75, 78–79, 83 S. Ct. 173 (1962)). The court may not make determinations about the sufficiency or weight of the evidence, *see U.S. v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (citation omitted), nor make impermissible determinations of fact that are best left to the jury. *Melugin v. Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994). In this analysis, the court is bound to the "four corners of the indictment" and may not consider evidence not listed on the face of such. *U.S. v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017) (citations omitted). If the categorization of speech is unclear and proper categorization requires factual determinations, then the issue is best left for a jury. *U.S. v. Hanna*, 293 F.3d 1080, 1087 (9th Cir. 2002) citing *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1073 (9th Cir. 2022).

III. ANALYSIS

Defendant first seeks dismissal of all five counts in the indictment, arguing 18 U.S.C. § 2261A is unconstitutional as applied to her emails because they constitute speech afforded special protection by the First Amendment due to their contents relating to public concern, or at the very least, the emails should be categorized as "pure speech" and therefore protected. Defendant also challenges the statue as creating impermissible "content-based restriction(s)" on speech and contends the statute would not survive strict scrutiny. Finally, Defendant argues that should the court determine her emails consist of

a mixture of speech and conduct, the test formulated in *United States v. O'Brien*[2] should be used in analyzing whether the statute is constitutionally applied to her emails. The government argues that Defendant's emails constitute conduct under the meaning of 18 U.S.C. § 2261A, and any speech elements of the emails would fall under an exception to the First Amendment, either as "true threat(s)" or "speech integral to course of criminal conduct." The government further argues that the *O'Brien* test need not be used if the court finds that the emails at issue fall under one of the exceptions to the First Amendment.

A. Constitutional Challenges to 18 U.S.C. § 2261A and Content-Based Restriction Argument

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. 1. The right to free speech, however, "is not absolute." *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S.Ct. 1700 (2002). Laws or policies that target conduct, not speech, may be valid, or speech may fall into a narrow list of "exceptions" to First Amendment protection. *U.S. v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010).

The Ninth Circuit has already addressed several constitutional challenges to 18 U.S.C. § 2261A, including a facial challenge to the statute in *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014). In *Osinger*, the court reviewed First Amendment challenges to 18 U.S.C. § 2261A from other circuits, ultimately agreeing with the Eighth Circuit's rationale in *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012). In *Petrovic*, the court noted that because the statute "proscribes harassing and intimidating conduct" and "requires both malicious intent on the part of the defendant and substantial harm to the victim, it is difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions." *Osinger*, 753 F.3d at 944 (quoting *Petrovic*, 701 F.3d

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[2] *See U.S. v O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673 (1968).

at 856) (alterations and internal quotation marks omitted). The Ninth Circuit ultimately upheld the statute as constitutional on its face because it targets conduct, not speech. *Id.* at 943-45.

Although Defendant does not make a facial challenge to the statue, she does argue that the statute creates an impermissible "content-based restriction" on speech in her emails and therefore, strict scrutiny should be applied to the statute as-applied to her. However, this argument is foreclosed by the Ninth Circuit's understanding of the statute's reach. See also *United States v. Waggy*, 936 F.3d 1014, 1018 (2019). In *Waggy*, a disgruntled veteran made regular, abusive phone calls to his local Veterans Affairs center[3] and was charged under Washington state's telephone harassment statute. *Waggy*, 936 F.3d at 1016–18. The Ninth Circuit determined the language of the Washington state statute, analogous to the federal cyberstalking statute, "primarily regulates conduct with minimal impact on speech." *Id.* at 1018 (citing *Osinger*, 753 F.3d at 944). Specifically, the court noted, "In other words, the convictions are not for obscene speech, but for placing calls with the specific intent to harass." *Id* at 1019.

Following the reasoning laid out by *Waggy* and *Osinger*, the key to the analysis is the separation of the *act* of making the communication (whether phone calls in *Waggy* or emails in *Osinger*) from the *contents* of the communication. It is the *act* of sending communications with the requisite intent that is criminalized under the statute. Accordingly, this Court rejects Defendant's argument that the statute creates an impermissible content-based restriction on her speech. Additionally, although Defendant extols the Third Circuit case *U.S. v. Yung* for its "deep dive" into the constitutionality of 18 U.S.C. § 2261A, *Yung* explicitly rejects the position that the statute targets conduct, which directly contradicts *Osinger*'s binding Ninth Circuit precedent. *Yung*, 37 F.4th 70,

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[3] The defendant in *Waggy* also claimed he "just wanted to talk about his medical care", a characterization which the jury found unconvincing and which he did not challenge on appeal.

77 (3rd Cir. 2022).

B. Any Speech Incidentally Burdened in Defendant's Emails Is Not Specially Protected as Speech Regarding a Matter of Public Concern

This Court is mindful of intrusions into First Amendment protections and does not consider the issue of infringement of free speech lightly. However, for reasons set forth below it is not convinced the Defendants' emails reasonably relate to a matter of public concern.

Defendant correctly notes that the Supreme Court has consistently read as broadly as possible the First Amendment's protection of speech, no matter how distasteful or potentially upsetting the speech is. *See Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780 (1971) (jacket with "fuck the draft" upheld as protected speech); *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011) (picketing of soldier's funeral was upheld as expressive speech regarding matters of public importance); *U.S. v. Stevens*, 559 U.S. 460 (statute barring depictions of animal cruelty struck down as unconstitutionally overbroad). Although there is a short, well-known list of exceptions to the First Amendment's protection, this list is narrow. *Stevens*, 559 U.S. at 468–69.

Defendant asserts that her emails should be afforded special protection because they relate to a matter of public import and are directed to public figures. The Defendant cites *U.S. v. Cassidy*, 814 F. Supp. 2d 574, 583 (D. Md. 2011) and *U.S. v. Cook*, 472 F. Supp. 3d 326, 335–37 (N.D. Miss. 2020) to support her position.

First, Defendant's emails were privately communicated and personally targeted at the judges, rather than publicly distributed to a wide audience in a public forum. *Cf. U.S. v. Weiss*, 2021 U.S. App. LEXIS 38136, *4, (9th Cir. 2021) (email threat privately communicated to and personally targeted at U.S. Senator). Both *Cassidy* and *Cook*'s defendants were charged under the same federal cyberstalking statute at issue in this case. However, both cases involve speech on a public forum, which was a critical part of both courts' analysis concerning the speech's protected status.

In *Cassidy*, the defendant used twitter and a blog to broadcast disapproval of a

religious leader. *Cassidy*, 814 F. Supp. 2d., at 579 n.80. The court noted the distinction between public and private forums, acknowledging that preventing internet harassment inflicting emotional distress serves an important government interest.

> "However, it is questionable whether the same interest exists in the context of the use of the Internet alleged in this case because harassing telephone calls 'are targeted towards a particular victim and are received outside a public forum. Twitter and Blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim."

Id. at 585-86 (citations omitted). In *Cook* as well, the defendant's posts were made on another public forum (Facebook) and extensively outlined events which the defendant considered a pattern of local corruption. *Cook*, 472 F. Supp. 3d at 328-32. The court ruled this fell squarely within the realm of a matter of public concern. *Id.* at 336. Both *Cook* and *Cassidy* are directly distinguishable from the present case where the Defendant's messages were sent privately via email to court staff involved in her prior criminal case (and a spouse, in case of R.B.) and not broadcast publicly.

Second, the mere mention of a topic that could be construed as a matter of public concern cannot fundamentally change the nature of the speech at issue. The court found this especially true in *United States v. Fleury*, where the Eleventh Circuit held that messages addressed to surviving family and friends of school shooting victims were not protected commentary on a matter of public concern. 20 F.4th 1353, 1364 (11th Cir. 2021). Specifically, the court reasoned:

> "Of course, the MSD shooting itself is a matter of public concern that kick-started a debate on multiple political and social issues, including mental health, gun control, and school safety. However, Fleury's messages did not address any of these topics, attempt to engage in a dialogue concerns these issues, or provide any other relevant information. Instead, as the district court noted, the messages threatened and intimidated the victims by gloating over the death of their loved ones..."

Fleury, 20 F.4th at 1364. The Court in *Fleury* ultimately found the messages to contain true threats. *Id.*

This Court finds the present case is more akin to *Fleury* than to *Cassidy* or *Cook*. Similar to *Fleury*, the emails allegedly sent by Defendant here do nothing to address, engage in dialogue, or provide relevant information regarding the claimed corruption which led to her criminal conviction. Instead, the messages focus on listing personal information about the *recipient victims*, combined with ominous proclamations about the consequences of incurring her anger. Indeed, the children of R.B. and N.B. have arguably nothing to do with corruption related to Defendant's criminal conviction and listing their names and knowledge of their activities only serves to push Defendant's emails further from their alleged purpose.

C. Defendant's Emails Could Fall Into the "True Threat" Exception to First Amendment Protection – However the Categorization Is Unclear

Defendant essentially argues that the content of her emails does not rise to the level of "true threat" because the emails do not contain any "direct threats," nor do they contain the requisite specificity to be legally construed as a threat. This Court is inclined to disagree but acknowledges that at the very least this is a close call.

"True threats" in the constitutional sense have been defined has "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence..." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536 (2003). Historically, courts have not required direct, violent verbiage in order to find a message threatening. Instead, courts examine the context, content, and forum of the communication to make this determination. *See, e.g.*, *Virginia v. Black*, *supra* at 363 (burning of a cross considered a particularly virulent form of intimidation given historical context); *Planned Parenthood of Columbia/Willamette*, 290 F.3d at 1058 (finding "Wanted" and "unWanted" posters distributed by pro-life activists constituted a true threat due to their history and context and not the plain text on the face of the posters); *City of Los Angeles v. Herman*, 54 Cal.App.5th 97, 104 (2020) (restraining order did not contravene First Amendment where frequent attendee at city council meetings repeatedly disclosed home address of city attorney and shouted "I'm going to go back to Pasadena

and fuck with you," constituted a true threat).

Defendant attempts to draw a parallel between her case and a Fifth Circuit case, *U.S. v. O'Dwyer*, 443 F. App'x 18, 20 (5th Cir. 2011). In *O'Dwyer*, a bankruptcy court debtor in the Eastern District of Louisiana sent an email to an employee working for the judge who was presiding over his case. *O'Dwyer*, 443 F. App'x at 19. The email contained, nestled among complaints regarding his medication refill, the following sentences:

> "Maybe my creditors would benefit from my suicide, but suppose I become 'homicidal'? Given the recent 'security breach' at 500 Poydras Street, a number of scoundrels might be at risk if I DO become homicidal..."

Id. The Fifth Circuit found that this did not rise to the level of a "true threat" because the statement was hypothetical and conditional, and did not threaten bodily harm to any particular individual. *Id.* at 20. In addition, the Court pointed out O'Dwyer's history of using "coarse and hyperbolic language in prior court proceedings" as evidence that these sentences did not constitute a true threat. *Id.*

Defendant's reliance on *O'Dwyer* is unavailing for several reasons. First, use of conditional language has not been determinative in finding that speech is not a true threat, as many unprotected threats are conditional. *See U.S. v. Sutcliffe*, 505 F.3d 944, 961 (9th Cir. 2007) (citation omitted); *U.S. v. Ackell*, 907 F.3d 67 (1st Cir. 2018) (defendant threatened release of explicit photos if underage victim tried to end relationship, but the action was not carried out). Second, Defendant in this case uses more explicit, future-specific language in her emails than the defendant in *O'Dwyer*. Specifically, in an email to S.M. Defendant states: "Plus if I was going to do anything, none of you would be able to do anything because you wouldn't know anything before it's too late and I'd kill myself so." (Email to S.M) (ECF No. 10, pg 7, ll.4-7). Likewise, Defendant allegedly wrote in an email to G.M.: "And *when* the day comes and the mission has been completed [G.N.'s first name] I'll be dying that day." (Email to G.N.) (ECF No. 10, pg 7, ll. 8-10) (emphasis added). Third, unlike the defendant in *O'Dwyer*, the instant

Defendant's history is not of "coarse and hyperbolic language" but of explicit, direct threats that led to a prior criminal conviction.

However, Defendant's argument that the contents of the emails do not amount to true threats is not wildly off the mark. In *U.S. v. Weiss*, the district court found that the defendant's communications did not rise to the level of true threat, despite several inclusions of graphic language describing the victim's desired death at the hands of a third party. 475 F. Supp. 3d 1015, 1033 (N.D. Cal. 2020). On appeal, the Ninth Circuit reversed this determination as to only one of the messages, noting the statement at issue was at the very least ambiguous and left to the jury's determination. *U.S. v. Weiss*, 2021 WL 6116629, *2 (9th Cir. 2021).

This Court reaches the same conclusion in this case. Where categorization of speech is unclear as a matter of law and proper categorization requires factual determinations, then the issue is best left for a jury. *U.S. v. Hannah*, 293 F.3d at 1087.

D. Defendant's Emails and "Speech Integral to Course of Criminal Conduct" Exception

In many cases addressing the "speech integral to criminal course of conduct" exception as applied to the federal stalking statute, there are two distinct categories, the communication with the victim (which defendants attempt to characterize as "speech") and some other conduct that followed therefrom (often the action threatened in the communication with victim). This was the case in *Osinger,* where defendant sent text messages to the victim indicating she would "be sorry after this weekend", and distribution of explicit photographs of her to co-workers via email followed. *Osinger,* 753 F.3d at 941-43. As Defendant points out, the concurring opinion by Judge Watford in *Osinger* touched on this issue, noting "[c]ases in which the defendant's harassing 'course of conduct' consists entirely of speech that would otherwise be entitled to First Amendment protection are less straightforward." *Id.* at 954. This is the thread Defendant is attempting to pull out when she states her emails are "only speech" with no other overt criminal action.

However, not all such cases deal with defendants who acted on their threats. See *U.S. v. Ackell, supra*; *U.S. v. Moreland*, 207 F.Supp.3d 1222, (N.D. Okla. 2016)(defendant sent hundreds of emails to a reporter which eventually escalated into threatening language); and *Cardozo, supra* (defendant left threatening comments on victims' online article relating to a past sexual encounter).

This Court finds the emails do not constitute speech that would "otherwise be protected by the First Amendment" (such as speech regarding matters of public concern, addressed above) as conceived by the *Osinger* concurrence. Instead, this Court holds that any speech in defendant's emails can fairly be considered speech integral to criminal conduct within the Ninth Circuit's conception of "conduct" as outlined in *Osinger* and *Waggy*. Again, it is not the content of the defendant's emails that is criminal; it is the act of sending those emails with the requisite intent that runs afoul of the federal cyberstalking statute. For the purposes of the instant motion to dismiss, this Court finds any expressive speech contained in the emails charged under the indictment would fall under this exception. Accordingly, this Court does not reach the question of the *O'Brien* analysis as applied to 18 U.S.C. § 2261A.

E. Point One under Course of Conduct in the Indictment is Proper; Point Two Should be Stricken

Despite Defendant's claims that her prior conviction detailed in point one had "nothing to do with the alleged victims in this case," this Court disagrees. It is worth noting that this assertion is in direct contravention to her argument that her emails were complaints regarding the alleged corruption in her prior criminal case, and directly contradicts the plain text of the first email to R.B., where Defendant stated "[I] had to go to jail because of decisions your husband made during my trial." ECF No. 10 at 4. This Court finds the course of conduct described in point one is directly related to the present case and relevant to the reason the present victims were chosen as targets for Defendant's emails.

Although Defendant concedes that evidence regarding her still-open criminal case

involving the alleged assault of an attorney at his home may be introduced at trial, she argues that its inclusion in the indictment is prejudicial. This Court agrees. Although her alleged assault of the attorney referenced in point two is certainly relevant, knowledge of this case by the victims is not referenced anywhere in the indictment. Though the victims' knowledge of her prior conviction can be safely assumed given their direct involvement in such, knowledge of the assault case in point two cannot.

F. Count Three of the Indictment Shall Stand

Finally, Defendant requests that count three of the indictment be stricken as it fails to allege the requisite number of acts towards victim R.B. because allegedly she only sent one email to R.B.'s court administrator. This Court is unpersuaded by this argument for the same reasons the government succinctly laid out in its opposition. First, most of the alleged emails at issue were sent to staff of the District Judge victims, with the explicit request and/or assumption by Defendant that the emails would be forwarded or shown to the Judges. Second, in Defendant's second alleged email to N.B., the spouse of victim R.B., she explicitly directs N.B. to "Again, tell [R.B.'s first name] I said hello!!!!!!" which strengthens the proposition that Defendant wrote the email to R.B. with both audiences (R.B. and N.B.) in mind. As such, the Court rejects Defendant's argument.

IV. CONCLUSION

This Court has carefully considered Defendant's arguments regarding the protected status of her speech and is mindful of minimization of the First Amendment's broad protection. However, there is a difference between protected, free speech and speech intended to harass and intimidate, and that is the issue here. Because Defendant's emails fit squarely into the meaning of "conduct" as outlined by the Ninth Circuit in *Osinger*, and any speech incidental thereto would fall into an exception to First Amendment protection, her as-applied constitutional challenge fails as a matter of law.

For the foregoing reasons, the Court ORDERS as follows:

1. Defendant's Motion to Dismiss the Indictment is DENIED.

2. Defendant's Motion in the Alternative, to Dismiss Count Three of the Indictment is DENIED.
3. Defendant's Motion in the Alternative, to Remove Point One from the Indictment is DENIED.
4. Defendant's Request to Remove Point Two from the Indictment is GRANTED.

IT IS SO ORDERED.

Dated: October 17th, 2022

HON. ROGER T. BENITEZ
United States District Judge

Additional material from this filing is available in the Clerk's Office.