



District Attorney Jeffrey Rosen
Santa Clara County District Attorney's Office
70 West Hedding Street, West Wing
San Jose, CA 95110

Via Email and First-Class Mail

Re: Threatened Complaint Against Sajid Khan

Dear Mr. Rosen,

I represent Sajid Khan, a Santa Clara County Alternate Public Defender.¹ I understand that you have threatened to file a complaint with the County against Mr. Khan because he posted a blog entry suggesting that people honk their car horns in front of your office in peaceful protest. Your threat violates the First Amendment. We demand that you immediately withdraw your threat and publicly apologize to Mr. Khan. We would genuinely rather not waste our time (and your money, *see* 42 U.S.C. § 1988) in court, but if you persist in your campaign of retaliation against Khan, we may be forced to do so.

I. Background

Last week, Khan, who has served as a public defender in Santa Clara County for 12 years, posted [an entry](#) on his [blog](#). Khan has maintained the blog for about ten years. On it, he is described as “Sajid A. Khan, J.D., Public Defender, Co-Host [of] The Aider & Abettor Podcast.” The blog lists his personal email address and Twitter handle as his contact information. Over the years, the blog has been a forum for Khan to express his views about the criminal system, which often reflect his deep frustration with the injustice that system visits on his clients.

The entry Khan posted last week is titled “meet you at the DA’s office.”² It begins with a map showing a route through downtown San Jose. On the right-hand side of the map,

¹ Two administrative clarifications: First, I have no reason to believe that you are represented by counsel in this matter, but if you are I will communicate with her or him exclusively in the future. Second, I write this letter under the good-faith impression that, if necessary, I will seek and be granted admission to the Bar of the U.S. District Court for the Northern District of California.

² After some people mistakenly took the entry to be a literal invitation to meet at the D.A.’s office, Khan changed the title to “be mad at the police, but be even madder at the DA’s offices that

“honk spots” are listed next to numbers that correspond to positions on the map. One of those positions is your office.

The blog entry continues by explaining that because district attorneys across the country “are the umbrella organization tasked with enforcement of laws and the prosecution of crimes,” people who are outraged by the systematic oppression of Black people in the United States, and particularly the recent murder of George Floyd, should “fire our very righteous outrage, fury and ire at District Attorney’s offices.” The entry ends by saying:

So yes, let’s rally today at city hall and at the local police station. But tomorrow, walk over to the DA’s office and let’s make it loud and clear that black lives matter. I’ll meet you there. Better yet, I’ll meet you at the polling station to vote them out next time they’re up for election.

The entry does not mention you specifically (other than listing your office as a “honk spot”); does not mention—let alone incite, or even encourage—violence of any kind; and does not contain any instructions to do anything at all other than “honk.” “Honk,” as in (obviously) “to honk a car horn.”

On Monday, June 8, you wrote a letter to your staff to threaten Khan and to falsely accuse him of misconduct. Your letter starts off by claiming that the blog entry “aimed to incite anger and destruction” towards your office. This is false. The blog post obviously aimed to direct “anger” (“outrage, fury[,] and ire,” in Khan’s words), but nowhere did it say anything about “destruction,” and nowhere did it “incite” anyone to do anything. That is, of course, unless you count encouraging someone to honk a car horn as “incit[ing] . . . destruction.” Noise makes for effective protest because it’s unpleasant and difficult to ignore. But “destruction” it is not.

The letter goes on. You write that Khan “endangered the safety of everyone” working in your office; the entry, you wrote, was a “threat”; and you “will never stand by while anyone threatens our staff.” Accordingly, you threatened, “[a]s your District Attorney, I shall file a formal complaint concerning this threat to the safety of county employees.” This formal complaint, you helpfully point out—in case there were any doubt that it is a threat of formal legal action—“will initiate a formal county investigation into [Khan’s] misconduct.”

Your letter predictably reached a large audience. Since then, Khan has had to explain to his friends and colleagues that he did not, in fact, threaten your office. This is particularly

perpetuate and protect them.” He also changed the last paragraph of the post to remove a reference to meeting at the D.A.’s office “tomorrow.” Because there’s nothing wrong with Khan in fact calling for a peaceful protest at your office, which he never intended to do in the first place, I’ll refer only to the original entry. Since the entry was amended, it was published as an op-ed in *San Jose Inside*.

distressing for Khan because of the way your threat interacts with his religious and ethnic identity. As Indian-American Muslim man, Khan is painfully aware that his identity leads people to falsely fear that he will threaten them with violence.

On Wednesday, June 10, the local chapter of the NAACP sent you a letter criticizing your threats to Khan and informing you that they “reflect[] a culture filled with negative portrayals . . . Muslim Americans as violent, as dangerous, as terrorist, as less than human.” The next day, you wrote back to the NAACP. This time, you appear to accuse Khan of calling for your office to be “burn[ed] down.” This too is false. You may be (this is not clear) referencing a blog entry Khan had posted five days before his call for “honk[ing]” in which he expressed his view that the American criminal system is rotten to its core, and that those interested in reforming it should “tear and shut this shit down and start over” or “let it just fuckin burn.”³ To suggest, as you appear to be doing, that “it” refers to *your office* is obviously wrong. This entry contains no reference whatever to you, your office, or your staff, and “tear[ing]” and “burn[ing]” here are transparently references to concepts, not places. No reasonable person could read these entries—even combining them as you unreasonably have—as a threat.

II. Legal Claim

Your threat to initiate a formal investigation against Khan violates the First Amendment, and further retaliation will too.

Under Ninth Circuit law, “[a] First Amendment retaliation claim turns on a sequential five-step series of questions:

- (1) whether the plaintiff spoke on a matter of public concern;
- (2) whether the plaintiff spoke as a private citizen or public employee;
- (3) whether the plaintiff’s protected⁴ speech was a substantial or motivating factor in the

³ Khan has since removed these references as well, the better to make clear what was already clear: that he is criticizing systems of oppression, not describing physical locations. Again, because no reasonable person could have interpreted the original posts as threats, I will reference only the originals in this letter.

⁴ “Protected” here could mean two things: “protected” under the First Amendment full stop, or “protected from retaliation.” See *Lynch v. Ackley*, 811 F.3d 569, 578 n.8 (2d Cir. 2016) (“Moreover, as a prerequisite to th[e] whole [retaliation] analysis, the speech must come within the protection of the First Amendment to begin with. This element is rarely in dispute, as practically all speech enjoys some First Amendment protection—with rare exceptions for such things as obscenity, fighting words, and yelling ‘fire’ in a movie theater. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). There is no question whatever that Khan’s speech was “protected” under the First Amendment. Not only was it not a “true threat,” see *Watts v. United States*, 394 U.S. 705, 708 (1969); it was not a threat at all. And not only was it not “directed to inciting or producing imminent lawless

adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Greisen v. Hanken, 925 F.3d 1097, 1108 (9th Cir. 2019) (quoting *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)). Questions (1), (2), (4), (5), and the part of (3) regarding defendant’s motivation are beyond reasonable dispute: You threatened Khan with a formal investigation explicitly because he, in his personal capacity, posted on his blog about the scourge of oppression against Black people across this country, and you have no justification whatever for threatening him other than his constitutionally protected speech. The only potential question is whether Khan can *already* allege an adverse employment action based on the threats you have *already* made. Even that is pretty easy here.

Here, the retaliatory action is, itself, speech. Under Ninth Circuit law, “retaliatory speech may serve as the basis for a First Amendment retaliation claim when it ‘intimat[es] that some form of punishment or adverse regulatory action would follow.’” *Greisen v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019) (quoting *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (alterations omitted), and citing *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016); *Okweedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003); *Goldstein v. Galvin*, 719 F.3d 16, 30–31 (1st Cir. 2013); *Hutchins v. Clarke*, 661 F.3d 947, 956 (7th Cir. 2011); *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417 (4th Cir. 2006); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999)).

You didn’t “intimate” that adverse regulatory action would follow; you promised that it would. That adverse action would, you threatened, trigger a “formal county investigation.” If this isn’t speech threatening adverse regulatory action, it’s hard to imagine what would be. Accordingly, if we wanted to, we could sue you for this right now. And if you indeed proceed to file a complaint against Khan, your actions will unquestionably constitute an adverse action under clearly established law. You will be liable for any harm that results.

III. Conclusion

Khan did not “threaten” your staff or “incite . . . destruction.” He criticized district attorneys across the country for systematic oppression of Black people, a criticism that is supported by statistical evidence. *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123

action and [] likely to incite or produce such action,” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); it was not directing or inciting anyone to do anything at all.

Yale L.J. 2, 28–29 (2013) (“After controlling for the [other relevant] variables . . . , we found black men were still nearly twice as likely to be charged with an offense carrying a mandatory minimum sentence.”). He (at worst) called on people to make noise in front of your office, as is surely his right. In response, you threatened him. We ask that you publicly apologize and not threaten him any further.

We all have better things to do with our time right now than fight about this in court. As I write this, protests across the country—including in Santa Clara County—are calling for a fundamental reevaluation of the relationship between the police, prosecutors, courts, and society. Instead of threatening public defenders who dare to criticize you, we suggest that you listen to the people in the streets. For decades, your office has jailed people just because they cannot pay money, consigned people to die in a cage through life-without-parole sentences, and subjected children to the adult criminal system. Black people represent 12% of those whom you send to prison while representing 2% of the population of your County; White people represent 21% of the people whom you send to prison while representing 34% of your County. In other words, you jail Black people at six *times* their proportion of the population, and you jail White people at six *tenths* of their proportion of the population. These are moral scandals. Khan has devoted his life to remedying them, and he’s eager to get back to work and end this distraction. Please do not continue it any further.

/s/ Charlie Gerstein

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