

No. 75977-4

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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PAUL TRUMMEL,

Appellant,

v.

STEPHEN MITCHELL, et al.

Respondents

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**AMICUS CURIAE BRIEF OF  
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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## **IDENTITY AND INTEREST OF AMICUS**

The American Civil Liberties Union of Washington ("ACLU") is a statewide, non-partisan, non-profit organization with over 20,000 members, dedicated to the preservation and expansion of constitutional and civil liberties. The ACLU recognizes that unlawful harassment is a serious social evil, and that narrowly tailored antiharassment orders can be effective tools to keep the peace and protect individual privacy. Unfortunately, the Washington civil antiharassment statute can be misused to punish and even to enjoin constitutionally protected speech. In recent years, the ACLU has received calls from citizens who have faced antiharassment orders for speaking at public meetings, publishing letters to the editor, or reporting misconduct to government oversight agencies.

Properly applied, RCW 10.14 (see Appendix) does not allow these abuses. But trial courts must carefully adhere to the statute's safeguards to avoid curtailing constitutional rights. To help this Court provide the best guidance to trial courts, this amicus brief identifies the areas where misapplication could cause the greatest constitutional concerns.

## **FACTUAL SUMMARY**

Paul Trummel is by all accounts a prickly personality who did many things that aggravated his neighbors in Council House, a federally subsidized apartment building for senior citizens. The evidence against

Trummel described both his conduct and the content of his speech:

(a) Trummel made complaints of misconduct to the US Department of Housing and Urban Development; (b) he published a newsletter and web site containing articles hostile towards Council House residents and staff; (c) he insulted people with epithets like "pygmy" and "disgusting runt"; (d) he made vague threats such as "I will get you" or "I am going to put it in my paper"; (e) he yelled and shouted at close quarters; (f) he pressed his ear against apartment doors to eavesdrop; (g) he blocked people's path as they moved about the building, lecturing them for minutes at a time in an angry tone. The primary complaint of the witnesses was dislike and disagreement with Trummel's writings in his newsletters and web site.

In April 2001, the trial court decided, based on affidavits, that Trummel committed unlawful harassment. It ordered him to move out of Council House, not contact its residents, and not keep them under surveillance. CP 163. The trial court later found Trummel in contempt of the no-surveillance order because he wrote about Council House residents on his web site, causing them "to reasonably feel under surveillance." CP 325. It ordered Trummel to "immediately edit" the web site, id., and to post no personal information about Council House residents without first obtaining written permission from the resident and filing it with the court. CP 326. The court imprisoned Trummel to coerce him to edit the site.

## ARGUMENT

### A. **Anti-harassment Orders Are Significant Deprivations of Liberty**

Anti-harassment orders have many life-changing consequences:

- Antiharassment orders restrict respondents' right of free movement in society, by preventing them from going to certain places or near certain people. Students can be forced to change schools. RCW 10.14.040(7). As happened here, tenants can be forced to vacate their homes.
- Antiharassment orders limit defendants' freedom to associate or make contact with others. They may even bar respondents from seeing their own minor children. RCW 10.14.080(4). Here, the orders prohibited Trummel from initiating contact with anyone connected to Council House, some of whom were Trummel's friends and supporters.
- Under the federal Brady Bill, any persons subject to certain local antiharassment orders are prohibited from owning firearms. 18 U.S.C. § 922(g)(8); see United States v. Kafka, 222 F.3d 1129 (9<sup>th</sup> Cir. 2000).
- The issuance of one antiharassment order is a factor in favor of issuing a subsequent antiharassment order against the same person, making a future order more likely. RCW 10.14.030(6).
- The Court may order the person restrained to pay the petitioner's filing fees, costs, and attorneys' fees. RCW 10.14.090(2).
- Once an antiharassment order is issued, the respondent is entered into law enforcement databases and public records as having engaged in unlawful conduct. RCW 10.14.110. These records are available to the public, including prospective employers and landlords. There can be significant stigma and social consequences for a person found to have violated the statute.

While these deprivation are not as severe as a criminal conviction, they are more severe than the deprivations arising from a typical civil lawsuit seeking only money damages. Hence, courts should not issue antiharassment orders lightly.

**B. Unlawful Harassment May Be Found Only When Six Statutory Elements Are Proven**

This court has not yet outlined the elements of civil harassment under RCW 10.14. A careful reading of the statute reveals six elements.

**1. Course of Conduct Not Including Constitutionally Protected Activity**

To award relief under the statute, a court must find that the respondent has engaged in "unlawful harassment" of the petitioner, which is a specifically defined "course of conduct." RCW 10.14.020(1), .080. The Legislature explicitly provided that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct'." RCW 10.14.020(2). The importance of this limitation is emphasized by the Legislature's repetition of it later in the statute:

Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly.

RCW 10.14.190. Together, these sections mean that unlawful harassment occurs only when the defendant pursues an unprotected course of *conduct*. Constitutionally protected *speech* -- even if it is unkind or unwelcome -- will not itself make a person liable for harassment. See In re Marriage of Suggs, 152 Wn.2d 74, 80, 93 P.3d 161 (2004); State v. Noah, 103 Wn.App. 29, 38-39, 9 P.3d 858 (2000).

While the statute says constitutionally protected activity cannot be counted within a course of conduct, it also says "communication" may be

counted. RCW 10.14.020(2). In practice, most harassing courses of conduct will be accompanied by some speech from the harasser, and in most antiharassment trials the petitioner will introduce evidence of the respondent's statements. How should a trial court reconcile the two adjacent sentences of RCW 10.14.020(2) when considering such a record?

Courts may include true threats of violence within a course of content because true threats lack constitutional protection. Virginia v. Black, 538 U.S. 343 (2003). The concerns underlying the true threat doctrine parallel the interests in personal safety and privacy that underlie RCW 10.14. Of course, courts must take care to consider only statements meeting the strict legal definition of a "true threat," which excludes mere rhetoric that uses violent imagery, Watts v. United States, 394 U.S. 705 (1969); statements that a reasonable person would consider jokes, even if in bad taste, State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004); threats to do lawful things to further a plausible claim of right, State v. Pauling, 149 Wn.2d 381, 69 P.3d 331 (2001); and threats to do things that merely cause mental dissatisfaction in the victim, State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001).

Unlike true threats, most other speech enjoys constitutional protection. "There is no categorical 'harassment exception' to the First Amendment's free speech clause." Saxe v. State College Area School

District, 240 F.3d 200, 204 (3<sup>rd</sup> Cir. 2001). To be regulated by the state, harassment must be a form of conduct, not a form of speech. Thus, when a defendant's protected speech is put into evidence, Amicus believes that it should be viewed through a "veil of ignorance"<sup>1</sup> that considers conduct but disregards the content of the speech.

For example, the constitution protects speech communicated over the telephone, Sable Communications v. FCC, 492 U.S. 115 (1989), but a person who places dozens of unwanted phone calls a day to a victim over an extended period of time has engaged in harassment, State v. Alexander, 76 Wn.App. 830, 832-33, 888 P.2d 175 (1995). The timing, frequency, duration, and manner of the calls make the difference, not their content. A respondent's communications may be considered part of a course of conduct only if their harassing nature can be determined without regard to content. A court could find a course of conduct without knowing the content of the defendant's speech if, for example, the petitioner introduced evidence that the respondent made dozens of unwanted telephone calls daily after the petitioner made a clear request to stop, or that the respondent routinely came to the petitioner's place of work to shout loudly

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<sup>1</sup> Philosopher John Rawls suggested that lawmakers should test the validity of proposed rules by adopting a "veil of ignorance" as to how the law would affect them personally. John Rawls, Toward a Theory of Justice (1971).

and not conduct any business. Harassment would be present on these facts whether the content of respondent's speech was "profession of love, screams of hate or anything in between." Noah, 103 Wn.App. at 41.

The veil of ignorance approach finds support in First Amendment cases mandating content neutrality in speech regulation. Compare Arkansas Writer's Project v. Ragland, 481 U.S. 221 (1987) (taxation cannot be based on governmental judgments about a magazine's content) with Leathers v. Medlock, 499 U.S. 439 (1991) (taxation may be based on medium of expression without regard to content). See also Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814, 820 (9<sup>th</sup> Cir. 1996) (billboard ordinance improperly "required examination of the content of those signs"); National Advertising Co. v. City of Orange, 861 F.2d 246, 249 (9<sup>th</sup> Cir. 1988) ("the City cannot analyze the content of outdoor noncommercial messages to determine whether they are allowed").

## **2. Invasion of Privacy Through Contact Directed At a Specific Person**

To be unlawful harassment, the course of conduct must involve contact "directed at a specific person." RCW 10.14.020(1). Unpleasant or misanthropic behavior directed towards the world at large is not enough; the respondent must have singled out a victim or victims for harassing treatment. "The statute is not designed to penalize people who are

overbearing, obnoxious or rude. Rather, it is geared to protect those victims to whom objectionable behavior is directed." Burchell v. Thibault, 74 Wn.App. 517, 522, 874 P.2d 196 (1994).

The plain language of RCW 10.14 indicates that unlawful harassment must involve unwanted contact. The legislative purpose is to prevent "serious, personal harassment through repeated *invasions of a person's privacy*." RCW 10.14.010. Victims may obtain "civil antiharassment protection orders preventing all further unwanted *contact* between the victim and the perpetrator." Id. A course of conduct includes any "form of ... *contact*." RCW 10.14.020(2). The court considers who initiated "any current *contact* between the parties," RCW 10.14.030(1); whether there was "clear notice that all further *contact* ... is unwanted," RCW 10.14.030(2); whether the course of conduct "unreasonably interfer[es] with the petitioner's *privacy*," RCW 10.14.030 (5); and whether "*contact* by the respondent with the petitioner" has been previously limited by court order, RCW 10.14.030(6). A presumptive remedy is an order prohibiting actual contact within a buffer zone and barring "any attempts to *contact* the petitioner." RCW 10.14.080(6).

The statute's pervasive focus on invasions of privacy through unwanted contact has two corollaries of potential importance here. First, evidence that a respondent defamed a petitioner will not satisfy this

element, because statements to third parties do not involve invasion of privacy through unwanted contact. Restatement (Second) of Torts § 577, comment b ("it is necessary that the defamatory matter be communicated to someone other than the person defamed"). Protection of the petitioner's reputation is the subject of defamation law, not antiharassment law.

Second, publications disseminated to the world at large, as in books, leaflets, newspapers, broadcasting, or the World Wide Web, will almost never be contact directed at a specific person. Slipping a poison pen letter under a victim's door or e-mailing it to a victim's known e-mail address would involve contact directed at a victim. By contrast, a web page does not foist itself on unwilling viewers; it will be seen only by those who seek it out. Reno v. ACLU, 521 U.S. 844, 854 (1997). Also, an alleged harasser has a constitutionally protected interest in conveying her opinions to persons other than the victim, including on the internet.

One could imagine facts (not present in this record) where a harasser uses communications to third parties to visit unwanted contact upon a victim. For example, a harasser could impersonate the victim through a web page inviting people to a nonexistent party at the victim's house. In theory, such conduct could be viewed as the harasser invading the privacy of the victim through unwanted contact, albeit by third parties. The key would be the extent to which the harasser intended to create, and

pursued means that were likely to create, the kind of unwanted contact that would be actionable under RCW 10.14 if done by the harasser personally. The First Amendment places significant limits on the government's ability to regulate speech that supposedly incites people to (even unlawful) action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), and speech to the public encouraging others to make lawful contact with a third party could not be counted as part of a harassing course of conduct, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (court may not enjoin leaflets encouraging readers to contact a business person at home).

**3. Knowing and Willful Conduct**

There is usually little difficulty surrounding this element.

**4. Absence of Legitimate or Lawful Purpose, In Light of the Factors Identified in RCW 10.14.030**

RCW 10.14.020(1) asks whether the course of conduct "serves no legitimate or lawful purpose." If this language stood alone, it would be unconstitutionally vague, because it is a "highly subjective standard" that does not give adequate notice of what conduct is forbidden. City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (invalidating an ordinance criminalizing phone calls made "without purpose of legitimate communication"). Lorang requires "statutory, objective standards giving guidance" before an element of this sort can ever be constitutionally acceptable. Id. at 31. Fortunately, RCW 10.14.030

provides objective standards courts should use when considering "legitimate or lawful purpose" under RCW 10.14.020(1). These factors evaluate the nature of the contact between the parties without regard to the content of speech, thus giving meaningful guidance to trial courts.

The Court should take this opportunity to clarify that under Lorang, recourse to the .030 standards must be mandatory, not optional. Without them, the antiharassment statute becomes a vehicle for standardless, ad hoc injunctions. The factors also provide a valuable reality check with regard to the other elements, because they ensure content neutrality and highlight the requirement of invasion of privacy through unwanted contact. A trial court's explicit findings regarding the .030 factors will be "helpful on review." Suggs 152 Wn.2d at 84 n.5.

**5. Capacity to Inflict Substantial Emotional Distress on a Reasonable Person**

This element invokes an objective standard to determine whether a reasonable person would be substantially damaged. This means that antiharassment orders should not be issued to protect overly sensitive psyches. A reasonable person in our society is presumed to understand our nation's commitment to freedom of speech, and to know that "expressive conduct that causes only hurt feelings, offense or resentment ... is protected by the First Amendment." R.A.V. v. City of St. Paul, 505 U.S. at 414 (White, J., concurring).

Guidance for this element can be found in the common law tort of outrage. E.g., Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). "In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration." Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Restatement (Second) of Torts § 46, comment d.

Washington's tort law reflects First Amendment principles.

Hustler Magazine v. Falwell, 485 U.S. 46 (1988), barred a public figure's ability to sue for outrage in connection with an unflattering magazine article. The Court noted how a contrary holding would violate "our longstanding refusal to allow damages to be awarded [merely] because the speech in question may have an adverse emotional impact on the audience." Id. at 55. While there are differences between the tort of outrage and RCW 10.14 (e.g, the latter does not require outrageous conduct), their analysis of objective substantial distress should be similar.

**6. Causation of Actual Substantial Emotional Distress**

RCW 10.14.020(1) requires proof of harm and causation by requiring that the respondent's course of conduct "shall actually cause substantial emotional distress to the petitioner." As with the tort of outrage, there must be actual harm and it must be substantial:

[Outrage occurs] only where the emotional distress has in fact resulted, and where it is severe. ... Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

Restatement (Second) of Torts § 46, comment j. This element also requires evidence that the actual substantial emotional distress be caused by the harassing course of conduct, rather than by any constitutionally protected speech of the respondent. Here, petitioner Mitchell asserts that he suffered actual emotional distress as a result of investigations triggered by Trummel's complaints to HUD and other government agencies.

CP 230. Even if substantial, this emotional distress is not cognizable because it was caused by protected speech, and not by harassing conduct.

(Statements made to government agencies are immune by statute,

RCW 4.24.510, and also enjoy qualified constitutional privilege,

Richmond v. Thompson, 130 Wn.2d 368, 378, 922 P.2d 1343 (1996).)

**C. Trial Courts Deciding Antiharassment Petitions Must Provide Procedural Due Process in Full Hearings**

Amicus is unsure which due process objections are still at issue at this stage of appeal. If properly preserved and appealed, they merit discussion by the Court. As described above, an antiharassment order works a significant deprivation of liberty. For this reason, final orders may be issued only after a "full hearing," RCW 10.14.080(2), at which the petitioner has the burden of proof, RCW 10.14.080(3). This "full hearing" must comport with constitutional due process.

In the Court of Appeals, Mitchell relied on cases holding that an evidentiary hearing is not required in informal administrative settings. Mitchell's Brief on Civil Issues at 40-43. These cases do not justify due process shortcuts under RCW 10.14, which expressly calls for a "full hearing." The less formal procedures that may be suitable in some administrative contexts do not translate to antiharassment trials, which after all occur in a court of law. The process that is due under RCW 10.14 is best decided under the familiar three-part test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

**1. Significant Private Liberty Interests Are At Stake**

As described above, the private interests affected are greater than those in the typical tort suit, while less than in a criminal prosecution.

**2. Lack of Procedural Protections Would Create Unacceptable Risk of Erroneous Deprivation of Liberty**

The risk of an erroneous antiharassment order is, unfortunately, quite high. In most cases there is no documentary evidence of the defendant's course of conduct. The hearings are classic "he-said, she said" contests where credibility determinations will determine the outcome. The petitioners are usually angry at the respondents (with or without good cause). Most petitioners are pro se, so their declarations may not distinguish admissible evidence from hearsay or conclusory statements. The respondents are typically pro se as well, unskilled at identifying legitimate objections or exculpatory evidence. The accusation of harassment has prejudicial overtones that may sway a fact finder.

With these risk factors, the full hearing must allow for genuine fact-finding, credibility judgments, and weighing of competing interests. A hearing will not satisfy due process if it does not, at a minimum, provide timely and adequate notice and opportunities for a personal appearance, confrontation and cross-examination of accusers and privately retained counsel if desired. Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970). "Particularly where credibility and veracity are at issue ... written submissions are a wholly unsatisfactory basis for decision." Id. at 269.

**3. Adequate Procedural Protections Are Not Unduly Burdensome for Government**

Unlike a welfare or licensing bureaucracy that has other non-judicial functions to perform, courts exist for the purpose of deciding adversarial hearings. There are no additional costs of hiring judicial officers or creating a quasi-judicial process from scratch. The legislature contemplated that courts would hear evidence and make findings, RCW 10.14.080(3), so the costs of affording judicial procedures were already figured into the equation. Furthermore, unlike the administrative situation where the government seeks to deprive someone of property, here the government is acting as a referee between two private parties. There is no state interest in favoring one side over another by taking procedural shortcuts.

**D. To Avoid Prior Restraints, the Relief Granted Must Be Narrowly Tailored to Prohibit Unlawful Harassment, Not Prevent Speech**

The standard antiharassment order directs the defendant to keep away from and initiate no contact with the petitioner. RCW 10.14.080(6). On a proper record, such an order is constitutional, even though it impacts the respondent's ability to communicate with the petitioner. Noah, 103 Wn. App. at 41-44. But the order must be narrowly tailored to the statutory purpose of eliminating the harassing contact with the victim, and not directed at suppressing the harasser's speech to others. In crafting the

relief, the trial court must ensure that the order does not "infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly." RCW 10.14.190. It will always be a red flag if the relief limits speech instead of contact.

Here, the initial antiharassment order of April 19, 2001 tracked standard court forms and incorporated language from RCW 10.14.080(6). Unfortunately, the no-surveillance portion of this order was given an unconstitutional interpretation in the October 1, 2001 hearing that found contempt based solely on the content of speech to the general public on a web page. To be sure, a defendant's speech could be evidence of surveillance, as on a web site that reads, "Here is what I saw while following the petitioner home from work." But this is not what happened below: the trial court said that speech about Council House residents was itself surveillance, because "it causes the victims to reasonably feel under surveillance by Mr. Trummel." CP 325. An order saying "do not place petitioner under surveillance" does not mean "do not say anything about petitioner." If the original order could be interpreted in this manner, it would be unconstitutional. A speaker's liberty cannot hinge solely on the subjective responses of others. Hustler, 485 U.S. at 56; Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). "Listeners' reaction to speech is not

a content-neutral basis for regulation." Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (citations omitted).

The order that followed the contempt finding dealt exclusively with the content of Trummel's internet speech, ordering him to edit his web site and to present information about Council House residents only with their written permission submitted to the Court. CP 325-26. Mitchell argues that an order forbidding Trummel from saying certain things is not a prior restraint because the order was issued after a trial. Supplemental Brief at 16. This position directly contradicts the definition of prior restraint in Suggs, which stated that a permanent injunction (i.e., an injunction issued after trial) is a "classic example" of a prior restraint. 152 Wn.2d at 81, quoting Alexander v. United States, 509 U.S. 544, 550 (1993). A requirement to obtain a third party's permission before speaking is the purest form of censorship. E.g., Sheehan v. Gregoire, 272 F.Supp.2d 1135 (W.D. Wash. 2003) (law allowing publication of police addresses only with written permission is invalid); Fine Arts Guild, Inc. v. City of Seattle, 74 Wn.2d 503, 445 P.2d 602 (1968) (ordinance mandating government previews of films is invalid).

**E. Appellate Courts Must Give Independent Appellate Review to Antiharassment Cases Premised in Part on Speech**

A majority of the witness declarations introduced against Trummel complained mostly about constitutionally protected speech in his

newsletter and web site. The trial court expressly relied on the content of Trummel's speech in reaching its decision. E.g., CP 323 (trial court condemns Trummel's "vicious verbal exhibitionism"). The Court of Appeals held in effect that this was harmless error, because after excluding Trummel's constitutionally protected activity from consideration, substantial evidence remained to support a finding of unlawful harassment and hence the trial court did not abuse its discretion.

This approach to appellate review underestimates how disapproval of Trummel's speech skewed the fact-finding process and affected the trial court's weighing of the equities. Proceedings under RCW 10.14 are actions in equity. Hough v. Stockbridge, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). When a judge has plainly been swayed by impermissible considerations, an appellate court should not assume that the same result would have been reached in the absence of the errors. Instead, review for abuse of equitable discretion must consider "whether the decision maker failed to consider a relevant factor, whether he or she relied on an improper factor, and whether the reasons given reasonably support the conclusion." Kickapoo Tribe of Indians v Babbitt, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (citations and punctuation omitted). In cases implicating speech rights, "it is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial

court's findings. The First Amendment demands more." Kilburn, 151 Wn.2d at 48. The appellate court "must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. at 50 (citations and punctuation omitted).

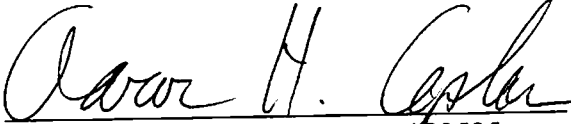
If a reviewing court cannot be certain from the record that the trial court verdict was free of First Amendment violations, the proper course is to reverse and remand for new trial. Stromberg v. California, 283 U.S. 359 (1931). In many circumstances, an appellate court may affirm on any ground supported by the record, but some records are too tainted by constitutional error to allow this approach.

### **CONCLUSION**

"The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting). Hurtful and thoughtless speech by rude people certainly qualifies as rubbish. But in the absence of harassing conduct that can be identified separate and apart from constitutionally protected speech, society must tolerate it. Antiharassment orders may be entered only upon proof all elements of RCW 10.14, properly construed; even then, the orders must be narrowly tailored to redress conduct and not to prohibit disfavored speech.

Respectfully submitted this 23<sup>rd</sup> day of May, 2005.

AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON



By: Aaron H. Caplan, WSBA #22525

## APPENDIX

### Excerpts from RCW 10.14

#### **RCW 10.14.010**

##### **Legislative finding, intent.**

The legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator.

#### **RCW 10.14.020**

##### **Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

#### **RCW 10.14.030**

##### **Course of conduct -- Determination of purpose.**

In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether:

- (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
- (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
- (3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;
- (4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:
  - (a) Protect property or liberty interests;
  - (b) Enforce the law; or
  - (c) Meet specific statutory duties or requirements;
- (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
- (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

**RCW 10.14.080**

**Antiharassment protection orders -- Ex parte temporary -- Hearing -- Longer term, renewal.**

- (1) Upon filing a petition for a civil antiharassment protection order under this chapter, the petitioner may obtain an ex parte temporary antiharassment protection order. An ex parte temporary antiharassment protection order may be granted with or without notice upon the filing of an affidavit which, to the satisfaction of the court, shows reasonable proof of unlawful harassment of the petitioner by the respondent and that great or irreparable harm will result to the petitioner if the temporary antiharassment protection order is not granted.
- (2) An ex parte temporary antiharassment protection order shall be effective for a fixed period not to exceed fourteen days or twenty-four days if the court has permitted service by publication under RCW 10.14.085. The ex parte order may be reissued. A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order or not later than twenty-four days if service by publication is permitted. Except as provided in RCW

10.14.070 and 10.14.085, the respondent shall be personally served with a copy of the ex parte order along with a copy of the petition and notice of the date set for the hearing. The ex parte order and notice of hearing shall include at a minimum the date and time of the hearing set by the court to determine if the temporary order should be made effective for one year or more, and notice that if the respondent should fail to appear or otherwise not respond, an order for protection will be issued against the respondent pursuant to the provisions of this chapter, for a minimum of one year from the date of the hearing. The notice shall also include a brief statement of the provisions of the ex parte order and notify the respondent that a copy of the ex parte order and notice of hearing has been filed with the clerk of the court.

(3) At the hearing, if the court finds by a preponderance of the evidence that unlawful harassment exists, a civil antiharassment protection order shall issue prohibiting such unlawful harassment.

(4) An order issued under this chapter shall be effective for not more than one year unless the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the order expires. If so, the court may enter an order for a fixed time exceeding one year or may enter a permanent antiharassment protection order. The court shall not enter an order that is effective for more than one year if the order restrains the respondent from contacting the respondent's minor children. This limitation is not applicable to civil antiharassment protection orders issued under chapter 26.09, 26.10, or 26.26 RCW. If the petitioner seeks relief for a period longer than one year on behalf of the respondent's minor children, the court shall advise the petitioner that the petitioner may apply for renewal of the order as provided in this chapter or if appropriate may seek relief pursuant to chapter 26.09 or 26.10 RCW.

(5) At any time within the three months before the expiration of the order, the petitioner may apply for a renewal of the order by filing a petition for renewal. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. Upon receipt of the petition for renewal, the court shall order a hearing which shall be not later than fourteen days from the date of the order. Except as provided in RCW 10.14.085, personal service shall be made upon the respondent not less than five days before the hearing. If timely service cannot be made the court shall set a new hearing date and shall either require additional attempts at obtaining personal service or permit service by publication as provided by RCW 10.14.085. If the court permits service by publication, the court shall set the new hearing date not later than twenty-four days

from the date of the order. If the order expires because timely service cannot be made the court shall grant an ex parte order of protection as provided in this section. The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume harassment of the petitioner when the order expires. The court may renew the protection order for another fixed time period or may enter a permanent order as provided in subsection (4) of this section.

(6) The court, in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order, shall have broad discretion to grant such relief as the court deems proper, including an order:

- (a) Restraining the respondent from making any attempts to contact the petitioner;
- (b) Restraining the respondent from making any attempts to keep the petitioner under surveillance;
- (c) Requiring the respondent to stay a stated distance from the petitioner's residence and workplace; and
- (d) Considering the provisions of RCW 9.41.800.

(7) A petitioner may not obtain an ex parte temporary antiharassment protection order against a respondent if the petitioner has previously obtained two such ex parte orders against the same respondent but has failed to obtain the issuance of a civil antiharassment protection order unless good cause for such failure can be shown.

(8) The court order shall specify the date an order issued pursuant to subsections (4) and (5) of this section expires if any. The court order shall also state whether the court issued the protection order following personal service or service by publication and whether the court has approved service by publication of an order issued under this section.

#### **RCW 10.14.190**

#### **Constitutional rights.**

Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly.

**PROOF OF SERVICE**

I hereby certify that on this date I caused a copy of the following

documents:

1. Motion for Leave to File Amicus Curiae Brief
2. Amicus Curiae Brief of American Civil Liberties Union of Washington

to be delivered to the following people, in the manner listed below:

Richard A. DuBey Short, Cressman & Burgess 999 Third Avenue, Suite 3000 Seattle, WA 98104  Counsel for Mitchell & Council House  Via e-mail (per agreement) and U.S. Mail	William J. Crittenden Elena Luisa Garella 927 Northlake Way, Suite 301 Seattle, WA 98103  Eric Broman Nielsen, Broman & Koch 1908 E. Madison St. Seattle, WA 98122  Counsel for Trummel  Via e-mail (per agreement) and U.S. Mail
Michele Earl-Hubbard Davis Wright Tremaine 1501 Fourth Avenue, Suite 2600 Seattle, WA 98101  Counsel for Amicus Seattle Weekly  Via e-mail (per agreement) and U.S. Mail	Patrick D. Brown 6112 - 24 <sup>th</sup> Ave NE Seattle, WA 98115  Counsel for Amicus American Society of Journalists and Authors  Via e-mail (per agreement) and U.S. Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of May, 2005, at Seattle, Washington.

  
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Kristina Armenakis