

SUPREME COURT OF THE STATE OF WASHINGTON

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PAUL TRUMMEL,  
*Petitioner,*

v.

STEPHEN MITCHELL and COUNCIL HOUSE, INC.,  
*Respondents.*

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BRIEF OF AMICI CURIAE

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS  
NATIONAL UNION OF JOURNALISTS/  
LONDON FREELANCE BRANCH

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## **I. IDENTITY AND INTEREST OF AMICUS**

The American Society of Journalists and Authors is the national organization for leading independent non-fiction writers. The Society's mission is the professional welfare of journalists and authors, and a vital part of that mission is the Society's active, long-standing defense of the First Amendment. The National Union of Journalists is a bi-national trade union representing 35,000 journalists working in all media, including about 6000 freelances. The London Freelance Branch of the NUJ is directly interested in this case insofar as one of its members, Paul Trummel, has suffered infringement of his freedom of expression through the trial and appellate court rulings – not to mention imprisonment stemming from exercising his journalistic and personal freedom of expression.

## **II. STATEMENT OF THE CASE**

The relevant facts and procedural history are set forth in the Court of Appeals briefs, Petition for Review, and Supplemental Brief filed by petitioner Paul Trummel.

## **III. ARGUMENT**

The violation of Mr. Trummel's freedom of speech is cause for serious concern among journalists and others who respect the First Amendment and depend on it for their livelihood. The Court of Appeals'

ruling in this case is deeply problematic for many reasons. This Court should reverse the Court of Appeals' opinion and provide in its stead an accurate First Amendment analysis, one that will ensure that citizens and journalists in Washington will once again possess the full range of freedom of speech and press protected by both the federal and Washington Constitutions.

**A. The finding of harassment and resulting anti-harassment order were based on constitutionally protected speech.**

The Court of Appeals decision labors to create the impression that the trial court's finding of harassment and anti-harassment order were based on harassing "conduct" allegedly engaged in by Trummel inside Council House. But a review of the petition filed by respondent Mitchell and the transcript of the hearing on April 19, 2001 clearly shows that the trial court's decision was primarily based on Trummel's constitutionally protected publications. The lower courts' after-the-fact reliance on Trummel's alleged "conduct" cannot change the fact that Trummel was evicted, censored, and incarcerated based on the content of his speech.

The Court of Appeals' analysis of harassment (Op. at 10-13) rests on two fundamental logical fallacies. First, the analysis logically begs the

question.<sup>1</sup> The opinion notes that “Harassment is not protected speech.” Op. at 11.<sup>2</sup> However useful that statement may appear as a truism, it has the effect of logically begging the question here. The question is not whether harassment is protected speech, but rather whether any particular speech falls within the protections of the First Amendment and therefore cannot be considered harassment.

The analysis is also a classic instance of the fallacy of equivocation.<sup>3</sup> The term “harassment” means one thing in everyday language and another thing within the technical framework of First Amendment analysis. The appellate court based its conclusion on the former meaning, not the latter. Consider the difference between the following two arguments.

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<sup>1</sup> See Irving M. Copi, *Introduction to Logic* (7<sup>th</sup> ed. 1986), 101 (“If one assumes as a premise for an argument the very conclusion it is intended to prove, the fallacy committed is that of *petitio principii*, or begging the question.”)

<sup>2</sup> The opinion cites two telephone harassment cases, *Alexander* and *Dyson*, and then blandly analogizes those cases to newsletters. Op. at 11. But both cases emphasize that the telephone is “a unique instrument through which to harass” others. *State v. Alexander*, 76 Wn. App. 830, 837, 888 P.2d 175 (1995) (quoting *State v. Dyson*, 74 Wn. App. 237, 244, 872 P.2d 1115 (1994) (emphasis added)). While telephones may be uniquely intrusive, newsletters are no more intrusive than junk mail.

<sup>3</sup> See Copi, *Introduction to Logic*, 113 (Noting that most words have more than one meaning, but that words cannot shift meaning within a valid argument. “When we keep these different meanings apart, no difficulty arises. But when we confuse the different meanings a single word or phrase may have, using it in different senses in the same context, we ... commit the Fallacy of Equivocation.”)

No harassment is constitutionally protected.  
This speech was harassment.  
Therefore this speech is not constitutionally protected.

Constitutionally protected speech can never be harassment.  
This speech was not constitutionally protected.  
Therefore this speech can be harassment.

The second premise of the first argument invites a free-floating and conclusory assessment of whether particular speech is “harassment,” where the term “harassment” means anything that seems sufficiently annoying or detrimental. Under that analysis, if particular speech fits the ordinary meaning of harassment, then one may summarily conclude it is not constitutionally protected. This is the analysis the Court of Appeals engaged in. The second premise of the second argument, in contrast, requires that one engage in an analysis of the law governing what kinds of speech are constitutionally protected before proceeding to a conclusion about whether any particular speech can be legally characterized as harassment. That is the analysis required by any recognized First Amendment jurisprudence.<sup>4</sup>

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<sup>4</sup> The same analysis is required by the harassment statute itself. “Unlawful harassment” is expressly defined in terms of a course of conduct. RCW 10.14.020(1). “Course of conduct,” in turn, expressly excludes “constitutionally protected activity.” RCW 10.14.020(2). Even under the statute, one must determine the scope of constitutionally protected speech first before proceeding to characterize speech as harassing.

Under ordinary First Amendment jurisprudence, one cannot start from the premise that particular speech is harassment and conclude that therefore it is not protected. That puts the cart before the horse, because whether speech is harassment to begin with depends on whether it is protected, not vice versa. One has to start with an analysis of whether the speech is protected by the First Amendment. If it is, it cannot be considered harassment, regardless of whether it descriptively seems annoying or alarming. Here, instead of engaging in a First Amendment analysis of whether Trummel’s speech was protected, the Court summarily concluded it was harassment and therefore not protected under the First Amendment.

This Court expressly recognized the difference in *Suggs*. “Labeling certain types of speech ‘unprotected’ is easy. Determining whether specific instances of speech actually fall within ‘unprotected’ areas of speech is much more difficult.” *In re Marriage of Suggs*, 152 Wn.2d 74, 82, 93 P.3d 161 (2004). Here, the Court of Appeals shirked the more difficult task and settled for conclusory labeling.

The Court of Appeals opinion emphasizes the “vitriolic” quality of some of Mr. Trummel’s newsletters. *Op.* at 11. But there is no “vitriol” exception to the rule against content-based limitations on free speech. Vitriol in a newsletter is just as protected under the First Amendment as

the dispassionate analysis of Kant in his *Critique of Pure Reason*. Screeds and philosophical treatises are protected alike. Similarly, the court emphasizes Mr. Trummel’s “repeated inflammatory rhetoric” coupled with posting names and addresses on his website. Op. at 19 (quoting the trial court’s written findings on the contempt motion). Under that analysis, the inflammatory pamphlets of Thomas Paine or the articles of H.L. Mencken would be legitimately subject to prior restraint. But the First Amendment unquestionably protects inflammatory rhetoric. And publishing identifying information, including names, has been expressly protected under the First Amendment at the very least since the Supreme Court’s decision in *Florida Star*. *Florida Star v. B.J.F.*, 491 U.S. 524, 541, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

Finally, the Court of Appeals opinion slides easily and unconsciously between speech and conduct. Of the four examples the court gives of Trummel’s “alarming behavior” (Op., at 4-5 [emphasis added]), two involve nothing more than verbal name-calling, and the other two involve spoken insults combined with Trummel allegedly being too close to the persons he was insulting.

The Court of Appeals’ First Amendment analysis is more than merely defective. It rests on fundamental fallacies, and its First Amendment analysis is vitiated by those fallacies. This Court should

reverse the Court of Appeals and restore correct First Amendment jurisprudence in this state.

**B. Trummel was denied due process at the hearing where his publications were found to constitute harassment.**

This case also raises important and disturbing due process questions. There is something more than a little scandalous about a 68-year old journalist spending four months in jail for contempt, in solitary confinement, after the trial court denied him the benefit of an attorney at the original hearing on an anti-harassment order.

The court's refusal to grant a short continuance of the hearing meant that Mr. Trummel could not obtain an attorney. Without an attorney, Mr. Trummel could not object to the introduction of large amounts of inadmissible evidence.

Mr. Trummel was inundated with over 40 declarations only one week before the hearing. CP 139. He had no meaningful opportunity to respond to the allegations filed so near to the April 19<sup>th</sup> hearing. In addition, the anti-harassment petition never even requested the summary eviction imposed by the trial court.

At a minimum due process requires that Trummel be given notice that he risked being deprived of a protected property right in his public housing. As to his right to a meaningful pre-deprivation hearing, even the

Court of Appeals conceded that this right includes an opportunity to confront and cross-examine adverse witnesses. Op. at 16.

The Court of Appeals brushed aside the trial court's refusal to continue the hearing so that Mr. Trummel could obtain an attorney, claiming that the court "had a tenable basis to go ahead with the hearing despite Mr. Trummel's lack of representation." Op. at 15. Yet in the very next paragraph the court noted that even though much of the evidence at the hearing may have been "technically inadmissible," the court need not consider that issue because Mr. Trummel "waived the right to argue its admissibility" by not objecting to the evidence at the time. Op. at 16.

In short, the Court of Appeals simply conjured away the due process issue by making an unsupportable finding that Mr. Trummel "waived any right" to a trial-type hearing required by due process. But black-letter law requires that any waiver of a constitutional right must be knowing, intelligent, and voluntary. Even a cursory review of the materials filed by Mr. Trummel *pro se* and the transcript of the hearing on April 19, 2001 show that Mr. Trummel did not knowingly, intelligently and voluntarily waive his due process rights. On the contrary, Trummel clearly stated that he was unprepared to respond to the allegations and needed the assistance of an attorney to defend his First Amendment rights.

The Court of Appeals also refused to consider the inadmissibility of the evidence because Mr. Trummel “waived” any objection by failing to act like a trained attorney. This is patently absurd. As this Court insisted in another context, “The court is part of the proceeding and is not a potted-palm functionary, with only the attorneys having a defined purpose.” *State v. Ford*, 125 Wn.2d 919, 924-25, 891 P.2d 712 (1995). Here, the trial court should have allowed Mr. Trummel the benefit of an attorney. Its failure to do so is abuse of discretion, and the resulting introduction of large amounts of inadmissible evidence – evidence which formed the basis for the original anti-harassment order – makes that all the more apparent and transparent.

**C. The content-based restrictions on Mr. Trummel’s website are unconstitutional prior restraint.**

The Washington Constitution provides greater protection for speech than even the First Amendment. “Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances.” *O’Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988) (citation omitted) (emphases added); *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984) (noting that the Washington Constitution “absolutely forbids prior restraints against the publication or broadcast of constitutionally protected

speech” where “the information sought to be restrained was lawfully obtained, true, and a matter of public record”).<sup>5</sup> *See also Suggs*, 152 Wn.2d at 81 (“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.” [quoting *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)]).

It is undisputed that the trial court permanently restrained Mr. Trummel from “Posting to the Internet or his web site, directly or indirectly, any personal identifying information including, but not limited to the name, address, phone number, social security number, or photograph of any current, former or future staff member, resident, Board member, or agent, including attorneys, of Council House.” CP II, at 7 (emphasis added). Council House has never contended that the

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<sup>5</sup> While parties attempting to establish new and broader protections under the Washington State Constitution must engage in a *Gunwall* analysis, no such analysis is necessary where the relevant broader protection has already been established by this Court. *E.g.*, *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 352 n.5, 96 P.3d 979 (2004); *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001) (noting that “no *Gunwall* analysis is necessary” where it is “well established” that a Washington constitutional provision “provides greater protection” than the federal constitution); *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (noting that “no *Gunwall* analysis is necessary in this case because we apply established principles of state constitutional jurisprudence”); *id.* at n.4 (citing numerous pre-*Gunwall* cases for the proposition that article 1, section 7 of the Washington Constitution provides broader protections than the Fourth Amendment). Here, *Coe* and other cases establish that the Washington Constitution, article 1, section 5, categorically prohibits restraining orders or injunctions imposing prior restraint on constitutionally protected speech.

information posted by Mr. Trummel on his website was somehow illegally obtained, untrue, or not publicly available.

In addition, it is undisputed that such information is protected speech under *Florida Star*. *Florida Star v. B.J.F.*, 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L.Ed.2d 443 (1989). Moreover, a citizen’s “website, a vehicle of mass communication, is analytically indistinguishable from a newspaper.” *Sheehan v. Gregoire*, 272 F.Supp. 2d 1135, 1145 (W. Dist. Wash. 2003). Because the trial court’s order permanently restrained Mr. Trummel from posting that protected content on his website regarding “any current, former or future staff member, resident, Board member, or agent, including attorneys, of Council House,” CP II, at 7 (emphasis added), it committed unconstitutional prior restraint of constitutionally protected speech.

Finally, the trial court below unquestionably engaged in content-based restrictions on Mr. Trummel’s speech. With the exception of limited categories not relevant here, content-based regulation of speech is presumptively constitutionally invalid. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992.)

While the Court of Appeals opinion strenuously attempted to shoe-horn Mr. Trummel’s speech into the category of alleged harassing “conduct,” the fact remains that Mr. Trummel was sent to jail for violating

content-based restrictions on his website. The record is absolutely clear—the trial court imposed explicit restrictions on the content of Mr. Trummel’s website. Such restrictions on pure speech amount to unconstitutional “prior restraint” even if they are imposed after a finding that a party has committed harassment. *Suggs*, 152 Wn.2d at 84. These unconstitutional restrictions on the Internet are still in effect today.

**D. A journalist must never be found in contempt for violating an unconstitutional prior restraint.**

The most egregious and disturbing violation of free speech in this case was the trial court’s decision to jail Mr. Trummel when he refused to comply with the trial court’s unconstitutional censorship. This Court has recognized a First Amendment exception to the collateral bar rule. A finding of contempt cannot be based on a court order that amounts to unconstitutional prior restraint. *State v. Coe*, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984); *Bering v. SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986); Karl Tegland 15 Wash. Prac. § 43.21, “Contempt Proceedings” (2004) (“A finding of contempt will ... be reversed if the underlying order or decree was void due to a constitutional violation.” [citing *Coe*]).

The “prior restraint” exception to the collateral bar rule is essential to the prohibition on prior restraint itself. Journalists, newspapers, and all other persons who print, publish, or post materials on the Internet must

never be forced to choose between waiting for an appellate court to vacate an unconstitutional order and incurring a finding of contempt that cannot be vacated later.

The Court of Appeals seized on the dubious notion that the forward-looking restrictions on Mr. Trummel's speech in the October 26, 2001 permanent anti-harassment order were somehow retrospective "post-publication" punishments for Mr. Trummel's alleged violation of the April 19, 2001 CP II, at 1-8. That confused notion is mistaken for a number of reasons.

First, the Court of Appeals' failure to correctly apply this exception to the collateral bar rule was based on that court's mistaken conclusion that the restrictions on Mr. Trummel's website were not prior restraints. Op. at 24-25. Once one accepts that the restrictions were prior restraints, the Court of Appeals' analysis collapses.

Second, the confused notion that the October 26<sup>th</sup> order is "post publication punishment" rather than prior restraint is based on the assumption that Mr. Trummel violated the original anti-harassment order's provision prohibiting Mr. Trummel from "Making any attempts to keep the petitioner under surveillance." CP II, at 1. That, in turn, depends on the assumption that Mr. Trummel conducted "surveillance" by engaging in what can only be described as unquestionably protected speech. *Supra* at

10-12. This assumption, of course, flies in the face of the express provisions of the anti-harassment statute itself. Under it, “unlawful harassment” is expressly defined in terms of a course of conduct. RCW 10.14.020(1). “Course of conduct,” in turn, expressly excludes “constitutionally protected activity.” RCW 10.14.020(2). Because Mr. Trummel’s website was “constitutionally protected activity” under the statute, it is expressly excluded from the definition of “course of conduct.” And because it cannot legally constitute any “course of conduct” under the statute, it cannot legally constitute that particular species of course of conduct proscribed by the April 19<sup>th</sup> order under the rubric of “surveillance.” Logically and legally, his protected speech cannot, and could not, amount to “surveillance.”

Second, that means that the October 26<sup>th</sup> order cannot possibly amount to a “post-publication restriction[] imposed after a showing of abuse of the right to speak.” Op. at 25. To put the matter quite simply, engaging in undisputedly protected speech cannot simultaneously be engaging in an “abuse of the right to speak.”<sup>6</sup> Op. at 25. If there was any

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<sup>6</sup> See Copi, *Introduction to Logic*, 306-07 (noting that the principle of contradiction is one of the laws of thought, and noting that under it, a thing cannot both be and not be at the same time and in the same respect.)

“abuse of the right to speak,” it was committed by the trial court when it attempted to censor Mr. Trummel’s website.

Third, the Court of Appeals’ reliance on *Bering*’s analysis is strained, to say the least. *Bering* involved an injunction imposing a content restriction and a place restriction. But those charged with contempt “were not charged with violation of the content restriction, but rather with violation of the place restriction.” *Bering v. SHARE*, 106 Wn.2d 212, 246, 721 P.2d 918 (1986). As the Court went on to note, “Because the contempt orders **only** relate to the violation of the place restriction, which we conclude was valid under both the First Amendment and Const. art. 1, § 5, we affirm the trial court’s findings of contempt.” *Id.* (emphases added). In other words, if the contempt orders related to the content restriction as well, the Court would not have affirmed the findings of contempt on that issue. Here, prohibiting protected speech on the web, which is “analytically indistinguishable from a newspaper,” *Sheehan*, 272 F.Supp. 2d at 1145, is not merely a place restriction.

Fourth, the trial court’s October 26<sup>th</sup> ruling is predicated on the novel and unusual idea that “surveillance” is determined by a subjective standard – “whatever causes the victim to reasonably feel under surveillance by Mr. Trummel [is] contrary to the specific [surveillance] restriction of section 1.1b of the order.” CP II, at 325. But the trial court

failed to inquire what result would follow if the very thing that made the victim feel under surveillance was speech fully protected by the First Amendment and the Washington Constitution. Nor did the trial court consider whether the meaning of the adverb “reasonably” must in part be a function of what the First Amendment or article 1, section 5 of the Washington Constitution, require.

This Court should reverse the Court of Appeals and reaffirm the holdings in *Coe* and *Bering* that the collateral bar rule does not apply to prior restraint of speech. This Court cannot go back in time and release Trummel from jail. But it can and must vacate the unconstitutional finding of contempt that sent Mr. Trummel to jail.

#### **IV. CONCLUSION**

The trial court’s actions in this case manifest a profound and troubling disregard for Mr. Trummel’s freedom of speech. And the Court of Appeals’ reasoning represents a real and direct threat to the freedom of thought and expression on which journalism depends. A free press, in

turn, forms an integral part of the very foundation of democratic institutions. For these reasons, this Court should reverse the decision of the Court of Appeals and vacate the findings of contempt.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of May, 2005.

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