

1 November 2018

TO: Bainbridge Island Municipal Court

FROM: Richard Lee Ryneerson III
217 Shepard Way
Bainbridge Island, WA 98110

SUBJECT: Request leave to file letter as Amicus Curiae in support of Houston Wade (46-18 & 47-18)

As an individual against whom an unconstitutional protection order was granted by the Bainbridge Island Municipal Court on the basis of First Amendment protected speech, subsequently reversed and vacated by the Kitsap Superior Court, *Moriwaki v. Ryneerson*, I have an interest in how this Court applies the law regarding the First Amendment in the context of protection orders. I take no position regarding the facts in these cases or the question whether any speech by Houston Wade falls into unprotected categories, but I respectfully request leave to file this letter regarding the legal contours of when speech falls into unprotected categories. I urge this court to acknowledge that a protection order may not be granted based upon content of respondent's speech outside narrow, historically recognized categories of unprotected speech (such as defamation and true threats).

Leaving aside unprotected speech like defamation and threats, Mr. Wade has the right under the First Amendment to the federal Constitution and Article 1, Section 5 of the Washington Constitution to engage in speech critical of others to third parties or to the public. *See, e.g., State v. Noah*, 103 Wn. App. 29, 34-35, 38-39 (Div. I 2000) (concluding that standing with signs outside a therapist's office with slogans like "David Calof, Mr. Windbag! Psychotherapist" and "David Calof Voice of Hatred and Revenge" was "protected speech and picketing" and "cannot

be the basis for an antiharassment order”); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (holding the First Amendment protected the right to distribute leaflets “critical of [a realtor’s] real estate practices” that accused him of being a “panic peddler,” requested calls to his home phone number, and were distributed among his neighbors, passed out at a local shopping center, and handed out to people on their way to or from the realtor’s church); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (criticism of black residents who did not comply with a boycott of white-owned stores, whose names were listed in leaflets and mentioned in church speeches, was protected speech). Such speech to the public *about* someone else stands on a very different constitutional footing than unwanted one-to-one communication *to* an unwilling recipient, who has the right to cut off further communication.

Creating a Facebook page or utilizing other social media technology to express an opinion no more changes underlying speech than the printing press changed the works of Shakespeare and likewise in no way alters the protection afforded the speech transmitted. Our U.S. Supreme Court has put this matter to rest and ruled that the “quintessential forum for the exercise of First Amendment rights” today is in fact “...cyberspace—the ‘vast democratic forums of the Internet’ in general, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997), and social media in particular,” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). The Internet does not provide leeway under our law for violating free speech protections no matter how novel the technology that transmits the speech in question might be.

Mr. Wade further has a right to use the name and image of others in such speech, including in “memes” or posts reflecting his criticism. *See Noah*, 103 Wn. App. at 38 (holding that picketing activity that included signs featuring the name of the petitioner could not form the

basis of an antiharassment protection order); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53-55 (1988) (the “art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided,” but “graphic depictions and satirical cartoons have played a prominent role in public and political debate” and are constitutionally protected). Restricting the use of a picture or a name is a content-based speech restriction. *See Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). And protection orders cannot, “consistent with the constitution,” be based on the “speaker’s ... message.” *Trummel v. Mitchell*, 156 Wn. 2d 653, 667 (2006).

Wade’s speech about Petitioners remains constitutionally protected regardless of whether it was motivated in part by an intent to embarrass, harass, or torment them (as would be required for a finding of cyberstalking under RCW 9.61.260(1)(b)). A “speaker’s motivation” is generally “entirely irrelevant to the question of constitutional protection.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead op.); *id.* at 495 (Scalia, J., concurring in part and concurring in judgment). “Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action.” *NAACP*, 458 U.S. at 910. Thus, the Supreme Court has held that speech expressed with the “intent to inflict emotional distress” remains protected. *Hustler*, 485 U.S. at 53. As the Supreme Court explained in *Hustler*, it held in *Garrison v. Louisiana*, 379 U.S. 64 (1964), that “even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment.” 458 U.S. at 54. Furthermore, purpose-based regulation of speech is content discrimination, and under the First Amendment the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 2227 (2015).

Wade's speech about plaintiffs remains constitutionally protected regardless of whether it caused them to suffer emotional distress (as would be required for a finding of harassment under RCW 10.14.020 or finding of stalking predicated on harassment under RCW 9A.46.110). *See Noah*, 103 Wn. App. at 35 (holding picketing could not be the basis for an antiharassment order even though it caused the subject "emotional distress"). In "public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)) (alteration in original). Supreme Court precedent represents a "longstanding refusal" to allow civil remedies "because the speech in question may have an adverse emotional impact on the audience." *Hustler*, 485 U.S. at 55.

Wade's speech is further protected because it addresses a matter of local public concern. "[S]peech on public issues ... is entitled to special protection," and "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder*, 131 S. Ct. at 1215, 1219 (so holding even in a private-figure-plaintiff case). Its "arguably inappropriate or controversial character ... is irrelevant." *Id.* at 1216. That the "speaker may have had a personal interest" in making the critique "does not diminish the concern the public would have." *White v. State*, 131 Wn. 2d 1, 13 (1997). The speech at issue here addresses matters of public concern as it purports to inform neighbors about potential threats. Regardless of the rightness or wrongness of Wade's opinions on these issues (and *assuming* his statements were either opinion or were true statements and therefore not defamatory), they relate to legitimate public issues.

The First Amendment also protects the right to communicate anonymously. *See, e.g., Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (striking down a ban on anonymous solicitation of ballot access signatures); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down a ban on anonymous leafleting designed to influence voters in an election); *Talley v. California*, 362 U.S. 60 (1960) (striking down a ban on any anonymous leafleting). The Supreme Court has explained:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.

McIntyre, 514 U.S. at 357. *See also id.* at 341-42 (emphasizing the use of anonymous speech by the founders of the American republic).

The First Amendment right to communicate anonymously also extends to the Internet to include using nom de plumes and anonymous social media identities. *See, e.g., Doe v. TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005). “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The ability to speak one’s mind on the Internet without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.” *TheMart.com Inc.*, 140 F. Supp. 2d at 1092.

In conclusion, this amicus brief is in no way a character reference for Mr. Wade nor does it attempt to ascertain whether Mr. Wade’s speech was in fact protected rather than defamatory (or otherwise unprotected). Rather this brief simply makes the point that true statements, even critical or hurtful statements, constitute protected speech and thus cannot lose protection simply because others may not find his speech useful, lofty, appropriate, nice, or of any particular value.

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Should this court choose to grant a protection order restricting the speech of Mr. Wade, such an order would be unconstitutionally overbroad unless it were explicitly limited to unprotected categories of speech such as defamation or true threats. If this court determines that it cannot so limit its order, it should find for Mr. Wade. Petitioners, of course, retain their rights to pursue other remedies for any damages due to unprotected speech (for example, as by a defamation civil suit).

Respectfully Submitted,

A handwritten signature in cursive script that reads "Richard Lee Rynearson III". The signature is written in dark ink and includes a horizontal line at the end.

Richard Lee Rynearson III