KITSAP SUPERIOR COURT
IN THE STATE OF WASHINGTON

CLARENCE MORIWAKI **Petitioner-Appellee,** **v.** **RICHARD RYNEARSON,** **Respondent-Appellant.**	**Superior Court No. 17-2-01463-1** **OPENING BRIEF OF APPELLANT**

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ASSIGNMENT OF ERRORS

1. The municipal court's protective order relies on a statute, RCW 9.61.260, that is facially unconstitutional, and the order is unconstitutional as applied because it is based on speech protected by the First Amendment and Article I, Section 5 of the Washington Constitution.

2. The court's findings are legally insufficient to establish stalking or harassment and the order impermissibly relies on evidence about non-parties with no relationship to Petitioner.

3. The relief ordered is not warranted by the facts, unlawfully restricts Respondent's use of his real property, and is an unconstitutional prior restraint.

STATEMENT OF THE CASE

1. Appellee (Petitioner below), Clarence Moriwaki, is the founder, past president, and board member of the public non-profit that administers the Bainbridge Island Japanese-American Exclusion Memorial. Mun. Ct. Findings & Conclusions, Findings ¶ 2; Exs. 5, 9. The Memorial is in the National Park Service, and its "goal is to prevent any future unlawful detention of US citizens and the group motto is 'Let it Not Happen Again.'" Findings ¶ 2. Moriwaki has been featured in the media regarding the Memorial and current issues. Ex. 8; Ex. A ¶ 14. Appellant-Respondent Richard Lee Rynearson learned about Moriwaki through the media. Ex. A ¶ 14.

Beginning in 2011, Rynearson opposed the detention provisions of the National Defense Authorization Act of 2012 ("NDAA"), which purports to authorize military detention of U.S. citizens and residents. Ex. A ¶¶ 3-5, 14. This sparked Rynearson's interest in the Memorial. Ex. A ¶¶ 19-22; Ex. B ¶¶ 12-14. In November 2016, after moving to Bainbridge, Rynearson sent a "friend" request to Moriwaki due to Moriwaki's role with the Memorial. Findings ¶ 4.

Thereafter, Rynearson saw Moriwaki at three events, and crossed paths, with completely normal in-person interactions. Ex. A ¶¶ 20-23; Findings ¶¶ 6-8. Online, Rynearson responded

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to Moriwaki's political posts praising President Obama or Governor Inslee, or criticizing President Trump, with posts criticizing President Obama or Governor Inslee for signing/voting for the NDAA. Findings ¶¶ 5-7; Ex. A ¶¶ 53, 63, 74, 81; Ex. 1 pp. 54-55, 89-94, 117-119, 149.

On January 29, 2017, Moriwaki deleted one of those posts, which criticized Governor Inslee, and Rynearson re-posted it. Findings ¶¶ 10-11; Ex. A ¶ 74; Ex. 1, pp. 117-119. Moriwaki messaged Rynearson and accused him of "trolling, relentless contact that harasses" but stated their message conversation was "To be continued," Findings ¶ 10, Ex. 1, pp. 120-121, and later "liked" Rynearson's post about planning to attend a clean-up at the Memorial, Ex. A ¶ 78.

On February 4, in response to a post by Moriwaki praising Governor Inslee for defending the Constitution, Rynearson made a comment critical of Governor Inslee for his support for the NDAA. Findings ¶ 13. In response to comments by Moriwaki and others, Rynearson made additional posts. Findings ¶ 13; Ex. 1, pp. 148-156. Some of Moriwaki's friends liked Rynearson's comment and said it was "nice to see similar views." Ex. 1, pp. 152-153. The two engaged in a message dispute, Findings ¶ 14, which Moriwaki ended by apologizing and stating "To be continued." Ex. 1, p. 139. The next day, in response to Rynearson re-posting some deleted comments, Moriwaki and Rynearson engaged in messages in which Moriwaki stated that he had asked Rynearson to stop posting on his page, Findings ¶¶ 16-17. He then blocked Rynearson, who never tried to Facebook message him or post on his page again. Ex. A ¶ 34.

That same day, Rynearson texted Moriwaki to give him chance to comment on a blog post about him. Findings ¶ 18. Moriwaki asked Rynearson to leave him alone, and Rynearson responded that he understood. *Id.*; Ex. 1, pp. 144-147. Rynearson did not contact Moriwaki after that, and the only interaction between the two thereafter was at the Memorial clean-up and in passing. Ex. A ¶¶ 22-23. On February 7, a friend of Moriwaki's, Bonnie McBryan, made a

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public post on Facebook praising liberal intolerance. Ex. A ¶ 24. Rynearson responded with a comment about his interaction with Moriwaki as representing such intolerance. Ex. A ¶ 24, Ex. 1, pp. 173-179. Moriwaki made a comment analogizing his Facebook page to a party at his house that Rynearson was asked to leave. Ex. 1, p. 173. Rynearson responded that he was not at Moriwaki's party; rather, "in Clarence's analogy," he was "outside on the street … after Clarence put his hand over my mouth and threw me out," "talking to some of his guests (our mutual neighbors) as they leave his house." Findings ¶ 19; Ex. 1, p. 174. The court found that this public post was a "message [to Moriwaki's friend] implying [Rynearson] was outside Moriwaki's home," Conclusions ¶ 4, but did not find that Rynearson physically went to Moriwaki's home or otherwise engaged in any inappropriate physical conduct. Tr. 53:1-2. The court further found that Rynearson never threatened Moriwaki. Conclusions ¶ 11.

2. In Rynearson's view, Moriwaki's continued support for President Obama and Governor Inslee notwithstanding the NDAA, failure to criticize the NDAA, and unwillingness to permit discussion rendered him unfit to represent the Memorial. Ex. A ¶ 37. Rynearson started a Facebook page as a "neighborly rebuke of Clarence Moriwaki, prominent public face and past president of the … Memorial for his support for politicians who made internment legal again," urging that Moriwaki was "unfit to be President or board member for our memorial." Findings ¶ 20; Ex. 2, p. 2. The page was originally named "Clarence Moriwaki of Bainbridge Island," but was later changed to "Not Clarence Moriwaki of Bainbridge Island." Findings ¶ 20. Rynearson posted memes that criticized Moriwaki for his continued support of politicians who enabled the NDAA. Findings ¶¶ 21-22; Ex. A ¶¶ 84-117; Ex. 2. Rynearson also posted about the NDAA generally. Ex. A ¶¶ 84-117; Ex. 2. To gather support for the campaign to remove Moriwaki, some posts were sponsored. Findings ¶ 23.

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3. More than a month after Rynearson last interacted with him online, Moriwaki filed a petition for an anti-stalking order and received a temporary order. A hearing without testimony was held on July 17, 2017. The court held that Rynearson had stalked Moriwaki by posting publicly on Facebook after being asked to stop, re-posting public posts that Moriwaki had deleted, making a public post that referred to Moriwaki's "party" analogy, sending a text message, creating a public Facebook page that used Moriwaki's name, posting "memes" about Moriwaki, and sponsoring posts. Conclusions ¶ 4. The court found Rynearson intended to harass Moriwaki and to harm his reputation because of the Facebook block. Conclusions ¶ 7. The court rejected First Amendment arguments, holding that Rynearson had "no lawful or free speech purpose" because Moriwaki's "volunteer role has not rendered him a limited purpose public official." Conclusions ¶ 6. The municipal court did not find that Rynearson had physically stalked Moriwaki, Tr. 53:1-2, and concluded that Rynearson had not threatened Moriwaki and that there were no incidents of threats or violence in his past, Conclusions ¶ 11.

The court entered a permanent order prohibiting Rynearson from contacting Moriwaki, requiring him to stay 300 feet away from Moriwaki's residence and workplace, and prohibiting him from attending any public events that Moriwaki attends. Order, p. 2. Rynearson is also specifically barred from using his easement that travels from his condo development to Winslow Way. *Id.* Finally, Rynearson is prohibited from "creating or maintaining internet websites, Facebook pages, blogs, forums, or other online entities that use the name or personal identifying information of [Moriwaki] in the title or domain name," and from using "the photograph of [Moriwaki] to create memes, posters, or other online uses." *Id.* This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

Constitutional issues are reviewed de novo. *In re Marriage of Suggs*, 152 Wn. 2d 74, 79

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(2004). Because speech is at issue, the court must "conduct an independent examination of the entire record to be sure that the speech in question actually falls within the unprotected category." *See State v. Strong*, 167 Wn. App. 206, 217 (Div. III 2012).

II. THE PROTECTIVE ORDER VIOLATES CONSTITUTIONAL FREE SPEECH GUARANTEES BECAUSE IT IS BASED ON PROTECTED SPEECH

Americans have the right to repeatedly criticize others, free of civil liability or injunctions, even if they intend to cause emotional distress (so long as there is no punishable threat or defamation). *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The speech in those precedents was no more political than the speech here, and targeted private figures in two of them; Moriwaki is a limited-purpose public figure.

A. The Order Is Unconstitutionally Based On Protected Speech

The order is unconstitutionally based on the content of protected speech—truthful public criticism of a public figure on a matter of public concern. The basis for the order was not one-to-one contact *with* Moriwaki, but public criticism *about* him. But the First Amendment permits caustic public criticism, even if motivated by "hatred or ill will," *Hustler*, 485 U.S. at 53, so long as the criticism is not defamatory—and there is no allegation nor finding that Rynearson's criticism was false, Conclusions ¶¶ 4, 7. That is all the more true here because Moriwaki is a public figure and the speech addressed a matter of public concern.

1. The order was based on posts *about* Moriwaki to the public and third parties, not communications *to* Moriwaki, thereby violating the Constitution.

While permitting individuals to stop unwanted one-to-one contact, the First Amendment does not permit the state to interfere with speech between someone and third-party listeners. For example, the Supreme Court held that a state could not enjoin individuals from distributing leaflets "critical of [a realtor's] real estate practices" that accused him of being a "panic peddler,"

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requested calls to his home phone number, and were distributed among his neighbors, passed out at a local shopping center, and handed out to persons on their way to or from the realtor's church. *Keefe*, 402 U.S. at 417. In vacating the injunction obtained by the realtor, the Supreme Court noted that the realtor was "not attempting to stop the flow of information into his own household, but to the public." *Id.* at 420. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.* at 419. Likewise, in *Claiborne Hardware*, the Supreme Court held that no civil remedy could be based on the criticism of black residents who did not comply with a store boycott, whose names were listed in leaflets and church speeches, even though some noncomplying shoppers were physically attacked by others for refusing to go along with the boycott. 458 U.S. at 894. "Speech does not lose its protected character … simply because it may embarrass others or coerce them into action." *Id.* at 910.

So too here. The order was based on criticism communicated to the public. The municipal court says Rynearson "contact[ed]" Moriwaki "after being specifically asked to stop," Conclusions ¶ 4, but aside from one text message, the paragraph describes public statements, not one-to-one "contact" with Moriwaki.[1] The "Not Clarence Moriwaki" Facebook page, the memes, and the comments on other people's Facebook pages were public posts—indeed, posts Moriwaki could not see without deliberately circumventing his own Facebook block, Ex. 17.

The posts on the Facebook page assigned to Moriwaki, too, were public. That publicly accessible page is owned by Facebook, whose terms and standards Rynearson did not violate,

[1] The text message itself served a press function because it simply gave Moriwaki a chance to respond to a public story about him, Findings ¶ 18, but in any event, it was a single conversation and thus cannot establish the "repeated" element required for stalking or cyberstalking. *See City of Seattle v. Meah*, 165 Wn. App. 453, 454 (Div. I 2011) ("Repeatedly," as used in the stalking statute, requires "two or more distinct, individual, noncontinuous occurrences.").

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Ex. A ¶ 114. The posts by Moriwaki to which Rynearson replied were made to everyone in the public, not just Moriwaki's "friends," and Rynearson's comments were made to the public, and not to Moriwaki alone. The deleted February 4 posts illustrate the point; Rynearson's criticism of Governor Inslee reached willing listeners who "liked" it, including one who commented "Nice to see similar views." Ex. 1, p. 153. Facebook's software let Moriwaki exclude Rynearson from posting on part of Facebook's public forum; when Moriwaki did this, Rynearson respected the exclusion, without need for a protective order.[2] But it does not follow that the government may restrict Rynearson's liberty on account of speech Rynearson made to the public.

The court held Rynearson had no "right to forcibly converse with Moriwaki on his personal Facebook page." Conclusions ¶ 6. But Rynearson ceased conversing with Moriwaki, on Facebook or otherwise, on February 5, when he requested it and more than a month before he sought the order. Findings ¶¶ 19-23; Ex. A ¶¶ 34-36. Moriwaki does not need, and did not seek, a protective order to stop Rynearson from conversing *with* him. He obtained a protective order because Rynearson was talking *about* him. *See* Conclusions ¶ 4 (basing order on public page, memes, and posts made on other public Facebook pages). That violates the First Amendment.

2. The order was impermissibly based on the content of the posts, not noncommunicative conduct.

The First Amendment prohibits civil remedies for speech based on its supposedly emotionally distressing content or viewpoint. *Snyder v. Phelps*, 131 S. Ct 1207, 1219 (2011). The municipal court's finding that Rynearson had stalked Moriwaki was impermissibly based on

[2] The court erred in concluding that Rynearson posted on the public page assigned to Moriwaki after being asked to stop. Moriwaki complained about a post on January 29, Findings ¶¶ 11-12, and on February 4, he apologized for deleting one of Rynearson's posts, Ex. 1, p. 139, but he did not ask Rynearson to stop posting. Moriwaki first asked Rynearson to stop posting on February 5, Findings ¶ 16, and Rynearson was blocked and did not post again after that. The court also seemed concerned that Moriwaki's friends may have viewed public posts even though they did

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the *content* of Rynearson's speech, not on Rynearson's nonspeech *conduct*.

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 (2015). When application of a law cannot be "justified without reference to the content of the regulated speech," the law is content-based. *Id.* Laws "defining regulated speech by its function or purpose" discriminate based on content. *Id.* So do laws that regulate speech based on its "emotive impact." *Boos v. Barry*, 485 U.S. 312, 321 (1988). The Washington Supreme Court has therefore instructed courts to separate content from conduct when considering a protective order. *See Trummel v. Mitchell*, 156 Wn. 2d 653, 667 (2006) (concluding "the trial court properly focused on the speaker's conduct and not the message, consistent with the constitution" and describing the conduct as "yelling and screaming at staff and residents, threatening residents, spying on residents, and disrupting meetings").

Yet the order here was squarely based on Rynearson's message. First, the court found that creating a website that used Moriwaki's name and posting "memes" that used his picture was harassing. Conclusions ¶ 4; Tr. 50:4-6 ("creating an -- a Facebook page or a webpage that has his name on it is not about discussion, it is about targeting and harassing him"). Use of a picture or a name is part of speech's content. As *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016), held, a restriction on the use of a person's name or image "is a content-based regulation." Moriwaki, too, explained that his request for a protective order was about Rynearson's content. Tr. 24:16-17 ("[H]e's right, it's about content.").

Second, the order was based on a finding that Rynearson's speech had a particular purpose, Conclusions ¶ 4, and purpose-based regulation of speech is content discrimination.

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not "seek out the page," Conclusions ¶ 4, but it is their burden to avert their eyes if they find the

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Reed, 135 S. Ct. at 2227. Finally, the order was plainly based on the viewpoint expressed in Rynearson's speech (negative), "a more blatant and egregious form of content discrimination." *Id.* at 2230. Had Rynearson used Moriwaki's name and picture to praise him, the court would not have found it harassing. But just as "[g]iving offense" is a viewpoint that the government may not discriminate against, *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (plurality), so is causing distress or embarrassment.

3. The order unconstitutionally punishes Rynearson's speech based on intent.

Imposing a restrictive order based on Rynearson's (purported) intent to embarrass runs afoul of the First Amendment not only because it makes the order content-based, but also because 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). The Supreme Court has rejected the idea that States can impose civil remedies for speech because it was made with the "intent to inflict emotional distress." *Hustler*, 485 U.S. at 53; *see also Snyder*, 131 S. Ct. at 1215. States may not make such intent "civilly culpable" for speech, because "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Hustler*, 485 U.S. at 53.

4. The posts are entitled to heightened protection because they truthfully criticized a public figure about matters of public concern.

Although the First Amendment protects outrageous and caustic criticism of even private figures, the protection is enhanced here because Moriwaki is a limited-purpose public figure on issues related to the Memorial and its lessons for modern politics. A person need not be "universally famous," only "well known among those involved in the argument." *Exner v. Am.*

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content distasteful, just as they would have to do, for example, for a political ad they disliked.

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Med. Ass'n, 12 Wn. App. 215, 221 (Div. 1 1974) (limited purpose public figure who had "written books and magazine articles, lectured, and participated in court actions" on a particular subject).

As the founder, past president, and board member of the public non-profit that operates the Memorial (part of the National Park Service), Ex. 5, 9, Moriwaki has deliberately injected himself into public debate. Just since the November election, Moriwaki has been featured in a dozen articles or interviews and two speeches, in which Moriwaki referred to the Memorial in criticizing President Trump. Ex. 8; Ex. 1 p. 171. Moriwaki is a limited purpose public figure. *See, e.g.*, *Camer v. Post-Intelligencer*, 49 Wn. App. 29, 43 (Div. I 1986) (finding that plaintiffs were public figures because they "voluntarily sought to influence the resolution of public issues," through a press release, letters to the editor, and meeting participation).

The issues for which Moriwaki has gained public prominence are the same issues addressed in the speech on which the order was based: criticism of Moriwaki for using the internment to oppose President Trump, but not to criticize President Obama or Governor Inslee. The thrust of the "Not Clarence Moriwaki" page is that one-sided application of the Memorial's lessons make Moriwaki unfit to serve as the public spokesperson of the Memorial. Findings ¶¶ 20-21; Ex. A ¶¶ 83-84, 96, 109, 117; Ex. 2, pp. 2, 11-12, 25-28, 104-109. Public office is not required to be a public figure. *See, e.g.*, *Hustler*, 485 U.S. at 51 (describing "public officials" and "public figures" as distinct categories). Neither is paid service in any position. Moriwaki became a public figure by "thrust[ing himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), through extensive media appearances that the municipal court ignored.[3]

Moreover, the speech here is especially protected because it addresses matters of public

[3] Nor does it matter that Rynearson had not criticized other Memorial board members, Tr. 44:22-

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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). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 1216. Its "arguably inappropriate or controversial character … is irrelevant." *Id*. 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. The application of the NDAA to Americans is a public issue, reflected in state legislation. *See* Ex. 7 (Washington Senate Bill 5176); *cf. White*, 131 Wn. 2d at 11 (speech about public concern where state statute addressed same topic). How the internment's history is applied to the present day is also a matter of public concern. Ex. 8. So, too, is it a matter of at least local concern *who* is the Memorial's spokesperson. It is an entirely legitimate public issue whether having a partisan spokesperson—the critique levied against Moriwaki—blunts the Memorial's symbolic value.

5. The posts do not fall into any category that permits content regulation.

"[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). "[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734 (2011).

"Harassment" is *not* an unprotected category. *Saxe v. State College Area School District*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.) ("There is no categorical 'harassment exception' to

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25; Moriwaki is the one member who is regularly in the press to discuss the internment's lessons.

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the First Amendment's free speech clause."). Indeed, the U.S. Supreme Court has repeatedly stressed that speech is constitutionally protected even when it is "offensive to [its subject] and doubtless gross and repugnant in the eyes of most." *Hustler*, 485 U.S. at 50. "[C]riticism, inevitably, will not always be reasoned or moderate," and "public figures … will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 51. In *Snyder*, the Court made clear that even speech related to private figures could not be regulated based on its intent or emotional impact. *Snyder*, 131 S. Ct. at 1219 (holding the father of a slain soldier, a private figure, "must tolerate insulting, and even outrageous, speech"). The realtor in *Keefe* was a private figure, too; nonetheless, the Supreme Court vacated the protective injunction he obtained, even though the distribution of insulting and highly critical leaflets in his neighborhood was "no doubt offensive." 402 U.S. at 419.

Rynearson's speech does not fall within any of the narrow categories of unprotected speech. The true threats exception does not apply here; the court found Rynearson never threatened anyone. Conclusions ¶ 11. Defamation requires a false factual assertion, *Hustler*, 485 U.S. at 52, and Moriwaki did not allege, and the court did not find, any such assertion. Any "damage to Moriwaki's reputation," Conclusions ¶ 4, is thus beside the point; the law cannot protect people from reputational damage due to *true* statements or to expressions of opinion.

The court apparently concluded that the speech fits within the exception for speech integral to criminal conduct, *see* Conclusions ¶ 3, but this was an error. This exception applies only if associated *non-speech* conduct "is a sufficient basis for criminal punishment," *Strong*, 167 Wn. App. at 217, not when the entire "course of conduct" is speech. *See United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (upholding federal statute because "proscribed acts are tethered to the underlying criminal conduct and not to speech").

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The federal case cited by the municipal court shows that the municipal court's application of the criminal-conduct exception was wrong. *See United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015). *Matusiewicz* cited with approval another federal case holding that the cyberstalking statute could *not* constitutionally be applied to public criticism of another person, even caustic criticism causing distress. *Id.* at 371; *see United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011) ("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.").

Neither of the state cases cited by the municipal court support its ruling, either. The first upheld a statute that limited "harassment" to threats, which are absent here, *State v. Smith*, 111 Wn. 2d 1, 2-3 (1988), declined to decide any First Amendment issues, *id.* at 15 n.5, and involved a physical assault, *id.* at 4. The second establishes only that the harassment statute is not facially overbroad because it expressly exempts constitutionally-protected speech from its coverage. *State v. Bradford*, 175 Wn. App. 912, 924-25 (Div. I 2013). It did not decide when allegedly harassing "conduct" was in fact protected free speech. That is the issue here, and no exception puts the truthful public criticism of Moriwaki outside the First Amendment's protection.

6. Article I, Section 5 prohibits the protective order because it regulates speech in a public forum, and it fails strict scrutiny.

Article I, Section 5 is more protective of public forums than the First Amendment is. *See Ino Ino, Inc. v. Bellevue*, 132 Wn. 2d 103, 117 (1997). Under Article I, even content-neutral regulation of a public forum must pass strict scrutiny, by being "narrowly tailored" to serve a "compelling governmental interest." *Seattle v. Huff*, 111 Wn. 2d 923, 926, 928 (1989). Facebook is a public forum, *i.e.*, a "channel[] of communication used by the public at large for assembly and speech." *Id.* at 927. The "most important place[] (in a spatial sense) for the exchange of views … is cyberspace—the vast democratic forums of the Internet in general, and

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social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Even if the order were content-neutral—and it is not—it is still based on public posts in a public forum and therefore must pass strict scrutiny. It cannot. A ban on "profane" telephone harassment with intent to "disturb, embarrass, harass, intimidate, threaten, or torment any other person" did not pass strict scrutiny notwithstanding the interest in "preventing telephone harassment." *Bellevue v. Lorang*, 140 Wn. 2d 19, 22, 26, 29 (2000). The same applies here.

Indeed, the compelling interest identified by the municipal court relates to preventing "unwanted contact." Conclusions ¶ 2. But that interest is not served by imposing a protective order based on speech *about* someone that does not involve contact *with* the person. This case is not about unwanted contact. No contact between Rynearson and Moriwaki was unwanted before February 5—rather, Moriwaki repeatedly stated their message conversations were "[t]o be continued," Ex. 1, p. 121 (Jan. 29), p. 139 (Feb. 4). And after February 5, when Moriwaki made his wishes known, Rynearson made no attempt to contact Moriwaki through email, text, message, Facebook post, or otherwise, long before there was any protective order. Rather, this case is about protecting Moriwaki from truthful speech (or opinions) about himself that he does not want *other people* to see. Moriwaki has no compelling interest in preventing that criticism.

B. The Cyberstalking Statute The Order Relies Upon Is Facially Overbroad

The court found that Rynearson "stalked" Moriwaki based on an act of cyberstalking under RCW 9.61.260(1)(b) due to "repeated" internet posts. Conclusions ¶ 3. That part of the cyberstalking statute, which prohibits anonymous or repeated internet posts to a particular person or to third parties (including the public at large), with a certain intent, is facially overbroad and therefore unconstitutional. Accordingly, it cannot be the basis for a protective order.

A law is overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Bellevue*, 140 Wn. 2d at 27. The statute's prohibition of "anonymous[] or repeated[]"

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posts to third parties with certain intent, RCW 9.61.260(1)(b), fails that test. *Bellingham v. Dodd*, No. CB 93720 (Bellingham Mun. Ct. Sept 30, 2016) (unpublished).[4] "The fact that people may speak repeatedly with the intent to embarrass someone, whether a personal enemy or perhaps a distant politician …, does not render such speech less worthy of protection." *Id.* at 10. The protective order is invalid because it is based on the cyberstalking statute.

III. THE ORDER DOES NOT SATISFY THE STATUTORY REQUIREMENTS

The order is not authorized by the harassment statute, which expressly excludes protected speech. RCW 10.14.020(1). It also fails to satisfy the anti-stalking protection-order statute.

1. If based on a predicate act of repeated harassment or "repeated or continuing contacts," a stalking protection order requires a victim to prove reasonable fear of injury or a reasonable feeling of being threatened or intimidated. *See* RCW 7.92.020(3)(a) (incorporating RCW 9A.46.110); RCW 7.92.020(3)(c). In context, these naturally refer to fear of physical harms.

Yet the court erroneously relied on Moriwaki's fear of "damage [to his] reputation" or of continued public posts. Conclusions ¶ 5. The Petition recites that Moriwaki was afraid "of potential contact [and] upset over impact to [his] reputation" and concerned Rynearson would "be disruptive" at an event. Pet. 4, 7. These speak to reputational damage, not reasonable fear of physical harm. Indeed, the court found that Rynearson had made no "threats implying physical violence towards Mr. Moriwaki," and could not find "any incidents of threats or violence in his past," Conclusions ¶ 11. The statutory requirement of reasonable fear is thus not met.

The court also erred in relying on Rynearson's supposed "history of … aggressive online comments" in interactions with other people to find reasonable fear. *See* Findings ¶¶ 24, 27. That was legally improper because that material ranged from 2009 to 2016, had nothing to do

[4] Rynearson, joined by the Electronic Frontier Foundation and ACLU of Washington as *amici curiae*, has also filed a federal suit arguing that the cyberstalking statute is unconstitutional. *See*

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with Moriwaki, and included many posts that were simply the opinions of anonymous individuals (like "gearpig" and "SPDSNYPR") that Rynearson was a difficult online commenter. *See* Pet. Supp. at 3, 5-6, 25, 27. A court cannot find harassment based on speech that involves only non-parties with no relationship to Moriwaki. *See Trummel*, 156 Wn. 2d at 664-65 (permitting evidence related to non-parties only because as "the administrator in charge of the building," petitioner was responsible for protecting the non-parties).

The reliance on these past posts is also factually unsound, because the people involved in the past internet disputes had no reasonable fear, either (if they had any fear at all), as the court found Rynearson never threatened nor engaged in violence with anyone, Conclusions ¶ 11. What is more, the posts introduced from Rynearson's internet history involve pure speech in public forums that is also protected by the First Amendment.

2. There is also insufficient evidence of stalking based on unwanted *contact* between Moriwaki and Rynearson. *See* RCW 7.92.020(3)(c) (requiring "repeated or continuing contacts"). Other than one text-message conversation, offering Moriwaki an opportunity to comment, Rynearson immediately ceased contact after Moriwaki first requested it, on February 5. For over a month prior to the Petition, and with no order in place, Rynearson did not call, text, email, or message Moriwaki, nor post on the Facebook page assigned to him.

3. Moreover, regarding either a cyberstalking or harassment predicate, the court erred in concluding that Rynearson had no legitimate purpose in criticizing Moriwaki, but did so to harass Moriwaki in retaliation for Moriwaki blocking him, Conclusions ¶ 7. Rynearson's long history of posting about detention-related issues, including starting a separate Facebook page on which he criticized community leaders for insufficient criticism of Democrats, pre-dates his

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Rynearson v. Ferguson, No. 3:17cv5531 (W.D. Wa. filed July 7, 2017).

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interactions with Moriwaki. Ex. A ¶ 14; Ex. 3. Rynearson started the "Not Clarence Moriwaki" page after the block not to retaliate, but because he believed that Moriwaki's unwillingness to debate these issues confirmed that Moriwaki should not be a spokesperson for the Memorial. Rynearson's criticism of Moriwaki's one-sided use of the Memorial platform was not intended to torment Moriwaki personally—there was no personal relationship between the two to speak of, Conclusions ¶ 5—but to call attention to his lack of fitness to speak for the Memorial.

IV. THE TERMS OF THE ORDER ARE UNLAWFUL

1. The order is an unconstitutional prior restraint. Prior restraints "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). They are subject to even closer scrutiny under Article I. *Ino Ino Inc.*, 132 Wn. 2d at 117. Protective orders restricting speech "carry a heavy presumption of unconstitutionality." *Suggs*, 152 Wn. 2d at 81. An order must be "specifically crafted to prohibit only unprotected speech." *In re Marriage of Meredith*, 148 Wn. App. 887, 898 (Div. II 2009).

The order fails these constitutional mandates. It forbids Rynearson from expressing his message using certain content—Moriwaki's name or identifying information (at least if used in a "title") and his image—and does not attempt to limit its reach to unprotected speech. It bars Rynearson from engaging in much protected speech, such a writing a blog post titled "the founder of the Bainbridge Island Japanese-American Exclusion Memorial should resign," or registering a change.org petition seeking "removal of Clarence Moriwaki from his position with the Memorial." It bars Rynearson from creating "memes"— the modern-day equivalent of political cartoons—using Moriwaki's image. *See Hustler*, 485 U.S. at 53-55 (even if "calculated to injure the feelings of the subject," "graphic depictions" are constitutionally protected). And it bars Rynearson from many civic events, including presumably any local event about the internment. That is an unconstitutional prior restraint on Rynearson's First Amendment right of

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association, secured by cases such as *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

The municipal court's other restrictions on Rynearson's physical liberty are also unlawful. The municipal court did not find that Rynearson physically stalked Moriwaki or threatened him, nor that there were any hostile or inappropriate physical encounters between them. Tr. 53:1-2; Conclusions ¶ 11. The court also found that Rynearson had no history of threats or violence against anyone. Conclusions ¶ 11. Yet the court ordered a *permanent* 300-foot stay-away restriction that limits Rynearson's ability to fully access his real property, to travel, and to attend civic events. The order bars Rynearson from ever using his easement to travel to Winslow Way. *See* Order; Ex. 16 (map).[5] It permanently forces Rynearson to use a circuitous walking route to the ferry and excludes him from part of downtown. There is no justification for any restriction, much less such an onerous one. *See Trummel*, 156 Wn. 2d at 668-669 (invalidating part of order that restrained person from contacting nonparties off premises because any protective order relief "must be warranted by the facts" and there were no allegations that the individual "engaged in harassing conduct outside of" the premises). And the permanent deprivation of his easement—which effectively extinguishes Rynearson's entire property right in it—without any factual basis is so arbitrary as to deprive Rynearson of due process. *See Robinson v. City of Seattle*, 119 Wn. 2d 34, 61 (1992) (due process violated if "interference with property rights [is] irrational or arbitrary").

CONCLUSION

For the foregoing reasons, the judgment of the municipal court should be reversed and the protective order should be vacated in its entirety.

[5] The municipal court made no finding that it was an easement, Tr. 53:6-8, but Rynearson's unrebutted affidavit testified that it was. Ex. A ¶ 122. Rynearson would be happy to supplement the record with documents establishing that the pathway is an easement.

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Respectfully submitted,

Dated: September 25, 2017

Alexander Savojni, Bar #37010
Rhodes Legal Group, PLLC

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volokh@law.ucla.edu
Pro hac vice admission pending

Attorneys for Appellant

DECLARATION OF COUNSEL:

I declare under penalty of perjury under the laws of the State of Washington that a true and complete copy of this Opening Brief of Appellant was mailed overnight on 9/25/17 to:

Clarence Moriwaki
155 Madison Ave N
Bainbridge Island, WA 98110

Dated: _____

_____
Alexander Savojni, Bar #37010
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KITSAP SUPERIOR COURT
IN THE STATE OF WASHINGTON

CLARENCE MORIWAKI **Petitioner-Appellee,** **v.** **RICHARD RYNEARSON,** **Respondent-Appellant.**	**Superior Court No. 17-2-01463-1** **APPENDIX TO BRIEF OF APPELLANT**

Alexander Savojni, Bar #37010
Rhodes Legal Group, PLLC

Eugene Volokh (pro hac vice pending)
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BAINBRIDGE ISLAND MUNICIPAL COURT
KITSAP COUNTY, WASHINGTON
I, [signature] do hereby certify that this document is a full, true, and correct copy of the original document on file in the above entitled court.
CERTIFIED on 7-17 20 17

FILED
JUL 17 2017
BAINBRIDGE ISLAND MUNICIPAL COURT

BAINBRIDGE ISLAND MUNICIPAL COURT **Kitsap County, Washington**	**Mail: PO Box 151, Rollingbay, WA 98061** Location: 10255 NE Valley Rd, Bainbridge Island, WA Phone # 206-842-5641 Fax # 206-842-0316 Email: court@bainbridgewa.gov
MORIWAKI, CLARENCE Petitioner, vs. RYNEARSON, RICHARD LEE AKA RICHARD LEE Respondent.	**No.** 12-17 **Order for Protection - Stalking** **(ORPSTK)** (Clerk's action required)

Respondent's Distinguishing Features:

_____

_____

Caution:

Access to weapons: ☒ **yes** ☐ **no** ☐ **unknown**

Respondent Identifiers

Sex	Race	Hair
MALE	**WHITE**	**BROWN**
Height	Weight	Eyes
5'8"	**230**	**BROWN**

Notice of this hearing was served on the respondent by ☒ personal service ☐ service by publication per to court order ☐ service by mail per court order ☐ other_____.

The protected person/s is/are the:

☒ Petitioner who is 16 years of age or older and filed on his or her own behalf.

☐ Petitioner/s who is/are the following minor child/ren on whose behalf the petition was filed:

Name (First, Middle Initial, Last)	Age

☐ The child/ren's parent or guardian filed the petition; or

☐ A person who is not the parent or guardian, with whom the child/ren live/s, filed the petition; and the respondent is not the parent.

☐ Petitioner who is a vulnerable adult as defined in RCW 74.34.020 or 74.34.021, on whose behalf the petition was filed. ☐ An interested person filed the petition.

No contact provisions begin on the next page.

This Order for Protection – Stalking is effective until: NON-EXPIRING

Based upon the petition, testimony, and case record, the court finds that the respondent committed stalking conduct. **It is ordered that**:

☒ **No-Contact**: respondent is ***restrained*** from having any contact, including nonphysical contact, with the protected person/s directly, indirectly, or through third parties regardless of whether those third parties know of the order, except for mailing or service of process of court documents by a 3rd party or contact by respondent's lawyer/s.

☒ **Surveillance**: respondent is ***prohibited*** from keeping the protected person/s under surveillance, including electronic surveillance.

☒ **Excluded from places**: respondent is ***excluded*** from the protected person/s'

☒ residence ☒ workplace ☐ school ☐ day care.

☒ **Stay Away**: respondent is ***prohibited*** from knowingly coming within or knowingly remaining within 300 FEET (distance) of protected person/s' ☒ residence ☒ workplace ☐ school ☐ day care.

☒ other: RESPONDENT IS RESTRAINED FROM KNOWINGLY APPEARING AT ANY PUBLIC EVENTS PETITIONER APPEARS AT. IT IS THE RESPONDENT'S DUTY TO LEAVE SHOULD THE PARTIES INADVERTANTLY APPEAR AT THE SAME LOCATION. THESE STAY AWAY PROVISIONS DO NOT PREVENT RESPONDENT FROM USING HIS REAL PROPERTY LOCATED AT 217 SHEPARD WAY NW, BAINBRIDGE ISLAND, WA, INCLUDING THE DRIVEWAY, GARAGE AND COMMON AREAS OF HIS CONDO COMPLEX. RESPONDENT MAY NOT USE PATHWAY THAT TRAVELS FROM HIS CONDO TO WINSLOW WAY (NEXT TO WINSLOW GREEN).

☐ The address is confidential ☒ Petitioner waives confidentiality of the protected person/s' address which is: 155 MADISON AVENUE NORTH, BAINBRIDGE ISLAND, WA 98110

☒ **OTHER:** RESPONDENT IS PROHIBITED FROM CREATING OR MAINTAINING INTERNET WEBSITES, FACEBOOK PAGES, BLOGS, FORUMS, OR OTHER ONLINE ENTITIES THAT USE THE NAME OR PERSONAL IDENTIFYING INFORMATION OF THE PETITIONER IN THE TITLE OR DOMAIN NAME. RESPONDENT MAY NOT USE THE PHOTOGRAPH OF THE PETITIONER TO CREATE MEMES, POSTERS, OR OTHER ONLINE USES.

☐ **Evaluation:** respondent shall submit to a ☐ mental health ☐ chemical dependency evaluation by _____ at respondent's expense.

☐ **Pay Fees and Costs:** Judgment is granted against respondent in favor of _____ in the amount of $ _____ for costs incurred in bringing the action and $ _____ for attorneys' fees.

Notice: **Petitioner, you must fill out and file a completed form ST 3.030, Judgment Summary**.

The court has granted judgment against the respondent in the amount of $_____ for administrative court costs and service fees. A Judgment Summary, form WPF ST 3.030, must be completed and filed.

☐ **Prohibit Weapons and Order Surrender**

The Respondent must:

- not obtain or possess any firearms, other dangerous weapons, or concealed pistol license; and
- turn in any firearms, other dangerous weapons, and concealed pistol license as stated in the ***Order to Surrender Weapons*** filed separately.

Findings – The court *(check all that apply):*

☐ **must** issue the above orders and an ***Order to Surrender Weapons*** because the court finds by clear and convincing evidence that the respondent has:

- ☐ used, displayed, or threatened to use a firearm or other dangerous weapon in a felony; or
- ☐ previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

☐ **may** issue the above orders and an ***Order to Surrender Weapons*** because the court finds by a preponderance of evidence, the respondent:

- ☐ presents a serious and imminent threat to public health or safety, or the health or safety of any individual by possessing a firearm or other dangerous weapon; or
- ☐ has used, displayed or threatened to use a firearm or other dangerous weapon in a felony; or
- ☐ previously committed an offense making him or her ineligible to possess a firearm under RCW 9.41.040.

Warning to the Respondent: A knowing violation of this stalking protection order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. ***You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions.*** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.

A knowing violation of this order is punishable under RCW 26.50.110.

Full Faith and Credit: The court has jurisdiction over the parties, the minors and the subject matter. This order is issued in accordance with the Full Faith and Credit provisions of VAWA. 18 U.S.C. § 2265.

Washington Crime Information Center (WACIC) Data Entry

It is ordered that the clerk of court shall forward a copy of this order on or before the next judicial day to BAINBRIDGE ISLAND ☐ County Sheriff's Office ☒ Police Department, ***where Petitioner lives*** and shall enter it into WACIC.

Service

☐ The clerk of court ☐ Petitioner shall forward a copy of this order on or before the next judicial day to _____ ☐ County Sheriff's Office ☐ Police Department, ***where Respondent lives*** which shall personally serve the respondent with a copy of this order and shall promptly complete and return to this court proof of service.

Or ☐ Petitioner has made private arrangements for service of this order.

Or ☒ Respondent appeared; further service is not required.

Or ☐ Petitioner shall serve this order by ☐ mail ☐ publication as previously ordered.

This order is in effect until the expiration date on page one.

If the duration of this order exceeds one year, the court finds that Respondent is likely to resume stalking of the petitioner when the order expires.

Other: SEE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Dated: 7/17/17 at 2:15 a.m. (p.m.)

Judge/Court Commissioner

I acknowledge receipt of a copy of this Order:

> _____ Richard L. Rynearson III

Signature of Respondent/ Lawyer WSBA No. Print Name

> _____ CLARENCE MORIWAKI

Signature of Petitioner/ Lawyer WSBA No. Print Name

Petitioner or Petitioner's Lawyer must complete a Law Enforcement Information Sheet (LEIS).

BAINBRIDGE ISLAND MUNICIPAL COURT Kitsap County, Washington	Mailing Addr: PO Box 151, Rollingbay, WA 98061 Location: 10255 NE Valley Rd, Bainbridge Island, WA Phone # 206-842-5641 Fax # 206-842-0316 www.bainbridgewa.gov/court email: court@bainbridgewa.gov
MORIWAKI, CLARENCE B. Plaintiff, vs. **RYNEARSON, RICHARD LEE** **a.k.a RICHARD LEE** Respondent.	Case No: 12-17 **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STALKING PROTECTION ORDER**

THIS MATTER having come before the undersigned Judge of the above-entitled Court, and the Court having reviewed the records filed and testimony presented, makes the following **FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

I. PROCEDURAL HISTORY

1. On March 10, 2017, Petitioner, Clarence Moriwaki (herein referred to as Petitioner or "Moriwaki"), filed a Petition for Order of Protection, alleging Stalking and Harassment by the Respondent, Richard Rynearson a.k.a. Richard Lee (herein referred to as Respondent or "Lee").

2. On March 13, 2017, the Court held a hearing on the Petition and granted an Ex Parte Stalking Protection Order and set a hearing for March 27, 2017.

3. On March 15, 2017, Respondent was served with the Temporary Stalking Protection Order.

4. On March 27, 2017, the Temporary Order was reissued after the Respondent's attorney requested a continuance.

5. At a hearing on April 24, 2017, Moriwaki filed a "Statement for Petition for a Permanent Protection from Harassment and Stalking and Request for an Immediate Surrender of Weapons." The Court granted the Petitioner's request for Surrender of Weapons and increased the stay-away distance from 100 feet to 300 feet in an order dated 4/24/17. The Court granted a request by the Respondent to continue the case in order to determine whether criminal charges would be filed against the Respondent for the underlying allegations.

6. On April 24, 2017, the Respondent complied with the Order to Surrender through his wife, Hyland Hunt, by surrendering nine firearms.

7. On April 27, 2017, Moriwaki filed a Motion requesting an increase of the stay-away distance to 430 feet. The Court denied the Motion to Reconsider in a written order dated April 28, 2017.

8. On May 12, 2017, Moriwaki filed a motion alleging violations of the Court's order. Petitioner requested that the Respondent be required to "remove any and all mentions of my name, images, memes, or any combination thereof of my identity from any and all webpages of which the respondent has created, participates in or posts to online comments." The Court did not take any action and deferred further discussion to the full order hearing.

9. On May 23, 2017, the case was continued to June 20, 2017 for a status conference.

10. On June 20, 2017, the case was continued to July 17, 2017 for a full order hearing.

11. On July 11, 2017, the Respondent filed a lengthy Response to Petition for Order of Protection and Exhibits (Volume 1 and 2).

II. FINDINGS OF FACT

1. Petitioner, Clarence Moriwaki resides on Bainbridge Island, WA. Respondent, Richard Lee Rynearson, III a.k.a. Richard Lee (herein referred to as "Lee") also lives on Bainbridge Island. (Petition for Order of Protection dated 3/10/17, attachment p. 1; Respondent's Response Brief, dated 7/10/17, Exhibit A) Their homes are in close proximity to one another, with Lee living in a neighborhood located behind Moriwaki's and roughly 300 feet away. (Petitioner's Motion dated 4/27/2017, Map #4.)

2. Moriwaki is a private citizen, not a publically elected official. He is a volunteer director of the Bainbridge Island Japanese-American Exclusion Memorial Association, a non-profit organization that oversees a permanent National Memorial site on Bainbridge Island and promotes education about the internment of Japanese Americans during World War II. The goal is to prevent any future unlawful detention of US citizens and the group motto is "Let it Not Happen Again." (Petition for Order of Protection, attachment p. 1; Respondent's Response Brief, Ex. 6.)

3. Moriwaki's Linked In page says he is the Owner and Principal of a private consulting firm, Forest Edge Communications. He applied, but was not appointed to be a Kitsap County Commissioner in 2011 and ran a unsuccessful Campaign for Washington State Senate in 1992. He has worked for a variety of government agencies over the years, including working for Congressman Jay Inslee and Governor Mike Lowry, but has not been employed by any government organization since 2007. (Response Brief, Ex. 9).

4. On November 20, 2016, Moriwaki accepted a Friend request on his personal Facebook page entitled, "Clarence Moriwaki" from the Respondent using the name of "Richard Lee". It appears the Respondent knew of Moriwaki's volunteer work, but had not personally met him before when he asked to "Friend" Moriwaki on Facebook. Lee told Moriwaki, "Clarence, thanks for the add. I've seen you work with the memorial on the island and I'm grateful (seen via YouTube as I've only lived on the island for 4 months..." (Response Brief, Ex. 1, p. 1.)

5. Over the next couple months, Lee participated on Moriwaki's personal Facebook page about various light hearted topics such as a ferry accident, the Winslow Green where Moriwaki lives, the Boy Scouts, holiday movies, crows, and a few political conversations.

6. On December 14, 2016, Moriwaki commented "Nice to meet you in person Richard Lee!" after he came to a movie screening fundraiser for the Memorial Association. (Response, Exhibit 1, p. 33) Later on the same day, Moriwaki further asked Lee to meet up in person for coffee or beer in a private message via Facebook. They exchanged phone numbers and a few messages but the two did not find a mutually agreeable time to meet up.

7. Lee first mentioned Obama's support for the "National Defense Authorization Act (NDAA) of 2012" on December 14, then again on January 1, January 6, and January 24. It was after this fourth mention, that Moriwaki stated, "Richard Lee, you've made this point many times, often to the point of hijacking a comment thread... now where's your pivot?" and made the suggestion, "Direct it to the person and administration that can do something about it." (Response, Ex. 1, p. 90.) Moriwaki also suggested taking it offline for an in person conversation. Lee suggested numerous days and times to get together, but none worked for Moriwaki.

8. The next day, on January 25, 2017, Lee wrote a review on the Bainbridge Island Japanese American Exclusion Memorial Facebook Page criticizing Moriwaki for supporting Jay Inslee and Obama and for "censoring non-liberal viewpoints on this page." (Response, Ex. 1, p. 103).

9. On January 27, 2017, Moriwaki and Lee got into a contentious discussion on Moriwaki's Facebook page and Moriwaki told him he was offended. (Response, Ex. 1, p. 110).

10. On January 29, 2017, Moriwaki private messaged Lee, telling him, "You have crossed a line... You are not conversing but trolling...my Facebook page is like me hosting a party. Friends are welcome to comment, but as the host I have a responsibility to all my guests to try to keep it civil, and if someone at the party keeps butting in, trying to monopolize conversations, I as the host have the right to ask them please cease and desist. You are clearly a passionate person, but please promote your ideas and attract people to your own wall. Create your own party. Stop the bullying and attempts to hijack my party." (Response, Ex. 1, p. 115-16).

11. Later in the day on January 29, 2017, Lee posted on Moriwaki's page, "Clarence Moriwaki, I think my comment got deleted from your wall even though it's the same question I've asked over the past several days with no reply from you..." What followed is a lengthy post explaining his concerns with the NDAA of 2012 and demanding Moriwaki to explain why he didn't fight against the law and why he isn't working to support proposed Senate Bill 5176, which would counteract the provisions of the NDAA. (Response, Ex. 1, p. 118-19.)

12. Moriwaki responded to this January 29, 2017 post via private Facebook message, where Lee responded, "It is your right to delete posts from your wall, I get that, but why can't we have a debate about the NDAA or the bill to stop Washington resources to being used to comply with it or such things opening on your wall?" Moriwaki responded, "Your post, re-post and this very comment are the definition of trolling, relentless contact that harasses. Along with being insulted and offended, you don't get to define when I feel harassed." (Response, Exhibit 1, p. 120-121).

13. On February 4, 2017, Lee posted a long comment Moriwaki's page about Obama and Inslee's support of the NDAA and mentioning Moriwaki, stating, "just because someone is different than you, Clarence Moriwaki, doesn't make them a "troll" or somebody who "harasses" or a "threat" or a "subversive." Let's celebrate diversity, Clarence." Lee than posted five other comments immediately thereafter complaining about Moriwaki not being interested in Lee's point of view. (Petition, attachment p. 10-16.)

14. Moriwaki responded in private message telling Lee "you are doing real time trolling. Can't you control yourself? You are bullying... you are also a bit of a sociopath..." Lee responded, "Clarence I am not trolling or bullying...now you are about to cross my line. I highly advise you to reconsider. my line is one of diversity and free speech. I promise you with everything that I am, your efforts to stifle free speech will fail you massively." (Response, Ex. 1, p. 139.)

15. The next day, on Feburary 5, 2017, Lee sent Moriwaki a private message complaining that his posts had been deleted, saying, "So you recognize that you censoring the speech of others who are different from yourself is wrong... But then you repeat it by doing it again the next day? If you censor my viewpoint yet again, you will have crossed my line of diversity and mutual respect... I hope that you do not cross that line." (Response, Ex. 1, p. 140.)

16. Moriwaki noticed that Lee began reposting any deleted comments by posting screenshot photos back onto Moriwaki's page. Moriwaki responded in private message to Lee, "Stop trolling. Stop it. You are harassing, bullying and relentless. Stop. Your self-righteous reposting is the definition of harassment... Dude, I am going to report you to Facebook. KNOCK IT OFF!" (Response, Ex. 1, p. 140-41.) The two then argued back and forth, Moriwaki again repeating, "KNOCK IT OFF!" and "I have asked you to stop posting on MY PAGE!" (Petition, attachment p. 1-2; Response, Ex. 1, p. 157, 167).

17. Moriwaki finally stated, "We are done." Lee replied, "Oh, we're not done. What follows next is done with love. You need my help to celebrate diversity. Should you reflect upon your behavior and your fear of those who are different and should you come to celebrate free speech and discourse in the future, please let me know." Moriwaki then blocked Lee from posting on his personal Facebook page.

18. The same day, shortly after blocking Lee, Moriwaki received a text message from Lee stating, "Mr. Moriwaki, I'm doing an initial story for a new up and coming blog (ClarenceMoriwakiBainbridgeIsland.com) about your role as president of the memorial and your support for multiple politicians who expressly voted to make internment happen again. Looking forward to your comment for the story if you are interested. Thanks." Moriwaki responded to the text, "Yeah, and this isn't trolling or harassment. Richard, your obsession is getting disturbing... start respecting me by leaving me alone." (Petition, attachment p. 18, Response, Ex. 1, 143-46.)

19. After being blocked, Lee posted a comment on the Facebook page of Bonnie McBryan, a friend of Moriwaki's, stating, "I'm outside on the street, in Clarence's analogy, after Clarence put his hand over my mouth and threw me out. So I'm out on the public street now in front of his house talking to some of his guests (our mutual neighbors) as they leave his house, some of which appreciated my comments." Ms. McBryan responded, "I am really concerned about your statement that you are outside Clarence Moriwaki's house and talking to his guests and mutual neighbors. I assume that is rhetorical; if not it sounds a bit threatening." (Reponse, Ex. 1, page 173-75). Ms. McBryan then messaged Moriwaki, telling him, "Richard announced he is outside your house. You might unblock him to take a screen shot-- and consider calling the police." (Petition, attachment p. 19).

20. By February 5, 2017, Lee had published a public Facebook page entitled "Clarence Moriwaki of Bainbridge Island", declaring "This page is meant to be a discussion concerning our view that public figure, Clarence Moriwaki, President of the Bainbridge Island Japanese American Exclusion Memorial, is unfit to be President or board member for our memorial." (Petition, attachment p. 22) The page title was later changed to "Not Clarence Moriwaki of Bainbridge Island."

21. On the Facebook pages titled, "Clarence Moriwaki of Bainbridge Island" and "Not Clarence Moriwaki of Bainbridge Island" there are a variety of memes, many bearing Moriwaki's photo. One has his photo with barbed wire and a message that Moriwaki supports "politicians who made indefinite detention without charge or trial "legal"." (Petition, attachment p. 21.; Response, Exhibit 2, page 1).

22. Lee posted on the "Not Clarence Moriwaki of Bainbridge Island" Facebook page almost daily, sometimes numerous times a day, until Lee was served the Stalking Protection Order

on March 15. Lee even posted the private conversation between Lee and Moriwaki where Moriwaki said, "We are done." and Lee said, "Oh, we're not done..." (Ex. 2, p. 51)

23. Lee paid for advertising of the site and those ads for the site appeared in feeds of people who did not sign up to see it. (Ex.2, p. 41, p. 57, 58.)

24. Moriwaki's original petition claims he feels "constant anxiety, sleeplessness, fear of potential contact, upset over impact to my reputation, intimidated." After discovering more information about Lee on the internet, Moriwaki states he is "truly frightened for my physical safety- and life- from Richard Lee Rynearson III" and that he has had "far too many stressful, anxious days, sleepless nights and upsetting nightmares." (Moriwaki Petition dated 3/10/17, p. 4; Motion dated April 20, 2017, p. 12, 15.)

25. Numerous people messaged or posted, asking Lee to stop harassing Moriwaki through the Facebook page: Gregory Wemhoff, "you slander this man just because he is your neighbor and he does not do as you would have him do." (Ex. 2, p. 100) Christine Rolfes: "The name of this page falsely assumes the identity of Clarence. While I don't support your vendetta, I do suggest you rename your page. It may or may not violate identity theft laws." (Ex. 2, p. 177) William Bauer: "I am not sure Clarence is a public figure in this capacity... he appears to be a private citizen leading a private non-profit group." Danny Grever defined Vendetta for Lee, "an often prolonged series of retaliatory, vengeful, or hostile acts or exchanges of such acts." (p. 178). Keith Brofsky: "This is really shameful Rick Rynearson, a.k.a. "Richard Lee"... you're attacking a private person who is respected in the community, who's not an elected official... it strikes me as slanderous and wrong... this is over the top in judgment and vitriol. Take it down voluntarily, or FB will do it for you." (p.186) Shannon Evans: "They are a 501(c)(3) non-profit PRIVATE organization, and as such they can not endorse candidates, campaigns or issues, so all this ranting about going after elected officials is out of bounds." Bob Garrison: "Having a... page devoted to attacking someone seems a bit sketchy... He is a private citizen not a public figure... Having discussions and disagreement are great but that doesn't seem to be your goal." (p. 199). Bonnie McBryan: "Richard its time to stop commenting on Clarence Moriwaki. Dude, this is not cool or fair. The man you attack is gentle, kind, and patriotic... Please move on to another topic." (p. 203)

26. Lee made the "Not Clarence Moriwaki of Bainbridge Island" page non-public after being served with the Stalking Protection Order. (Response, Rynearson Affidavit, p. 19-20.)

27. Lee has a documented history of angry, inappropriate, name-calling, aggressive online comments to the point he has been banned from multiple online discussion forums. Lee also has a history of retaliating against those forum owners who have banned his participation through angry comments, personal attacks, and creating memes to taunt them. (Moriwaki Petition dated April 20, 2017.)

28. Lee admits he has a car that is outfitted with bullet proof windows, armoring, electrified door handles, a smoke screen, cameras, flashing strobes, sirens and a public address system. (Moriwaki Petition dated April 20, 2017, page 10; Hunt Affidavit, p. 7, Rynearson Affidavit, p. 5.)

29. Lee is an admitted gun owner and 2nd amendment advocate. He served in the military for many years and eventually resigned after a disagreement over completing a mission. He has a documented history of being disciplined over disagreeable, argumentative behavior. However, none of those disciplinary actions involved violent or threatening behavior or inappropriate use of his firearms.

30. Lee made online statements about the Judges that ruled against him in his federal case, "I have killed many foreign enemies overseas who were far better men than Judges Reavley and Southwick." He also presented a rant comparing the Judges to tapeworms who destroy America from the inside out and stated, "There isn't enough tar or feathers in this world to sufficiently coat these two worthless deserters.") However, there were no other direct threats to harm these Judges. (Moriwaki Petition dated April 20, 2017.

31. Lee has no criminal history that the court is aware of.

32. The Court further incorporates the exhibits filed by the parties of the websites, Facebook pages, and online conversations. There does not appear to be any dispute about the content of these exhibits and they appear to be correct printed versions of what was contained online.

III. CONCLUSIONS OF LAW

1. The Bainbridge Island Municipal Court has jurisdiction over this matter pursuant to RCW 7.92.050(4), RCW 10.14.150, and Bainbridge Island Municipal Court Local Rules LARLJ 7 and 10.

2. The Government has a compelling interest in preventing Harassment and Stalking. RCW 10.14.010 ("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 7.92.010 ("Stalking is a crime that affects 3.4 million people over the age of eighteen each year in the United States. Almost half of those victims experience at least one unwanted contact per week. Twenty-nine percent of stalking victims fear that the stalking will never stop. The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population.")

3. Prohibitions against harassing and stalking behavior do not infringe on First Amendment free speech rights. See e.g. State v. Smith, 111 Wn.2d 1 (1988); State v. Bradford, 175. Wn.App. 912 (2013); State v. Noah, 103 Wn.App. 29 (2000); US v. Matusiewicz, 84 F.Supp.3d 363 (2015) (speech that is integral to criminal cyberstalking is not protected). The Court finds that the Stalking and Harassment Protection Order laws are not unconstitutional as applied to the Respondent.

3. The Court finds that Lee engaged in a course of conduct directed at Moriwaki, where Lee repeatedly contacted, harassed, stalked, and cyberstalked Moriwaki. The court finds that all the elements of Stalking (RCW 9A.46.110), Cyberstalking (RCW 9.61.260(1)(b)(repeated contacts)), and Unlawful Harassment (RCW 10.14.020) have been proven by a preponderance of the evidence.

4. As described in detail in the findings above: Lee repeated contacted Moriwaki by posting on his Facebook page after being specifically asked to stop; Lee reposted screenshots that had been deleted by Moriwaki; Lee sent a message implying he was outside Moriwaki's home to Moriwaki's friend; Lee sent a text message to the Moriwaki threatening to start a blog about him on a webpage named after Moriwaki; Lee created a public Facebook page bearing a title with Moriwaki's name; Lee created numerous memes with Moriwaki's image without his permission; Lee paid Facebook to advertise the page with Moriwaki's name and image- which then went out to Moriwaki's friends and others that did not seek out the page. The court finds that these acts were done with the intent to harass, embarass, intimidate, torment, and retaliate after being limited and blocked from Morikawi's personal Facebook page. The acts were also done to cause damage to Moriwaki's reputation.

5. The Court finds that Lee's behavior caused Moriwaki to feel threatened, intimidated, and frightened; Moriwaki has experienced extreme stress, anxiety, and fear that Lee will damage his reputation and continue to stalk him. The Court finds these feelings are reasonable under the circumstances given the facts, circumstances, and the extremely brief and limited relationship between Lee and Moriwaki. See State v. Askam, 120 Wn.App. 872 (2004).

6. The Court finds that Lee has no lawful or free speech purpose in carrying out these actions. The Court rejects his claim that these actions cannot be prohibited under the First Amendment right of free speech. The Court rejects his claim that he has a right to attack Moriwaki as a public figure. Moriwaki is not an elected official and his volunteer role has not rendered him a limited purpose public official. Lee has no right to forcibly converse with Moriwaki on his personal Facebook page. Moriwaki has the right to limit contact with any person who he finds offensive.

7. The Court finds that the true purpose of Lee's course of conduct is to harass, intimidate, torment, and embarrass Moriwaki and to cause harm to his community reputation. The Court

finds that Lee began these actions as retaliation after being limited, rejected, and eventually blocked from Moriwaki's personal site.

8. Lee knew or reasonably should have known that his behavior intimidated, frightened, or threatened Moriwaki due to Moriwaki's requests to stop as well as the attempts of numerous community members to get him to stop.

9. Because the Court finds that Lee has stalked Moriwaki by repeatedly contacting, stalking, cyberstalking, and harassing Moriwaki, it is reasonable to place limits on his contact and conduct towards Moriwaki as outlined in the Protection Order.

10. The Court finds that Lee is likely to continue acts of harassment and cyberstalking upon the expiration of a one year order and that a Permanent Stalking Protection Order is appropriate. This is based on Lee's refusal to stop his online harassment of Moriwaki after being told to stop; his stated intent to continue his harassment via a website in Moriwaki's name after being blocked; and his prior harassing behavior on various online forums that resulted in him being banned; his prior retaliatory behavior toward another individuals who banned him online.

11. Pursuant to RCW 9.41.800(5), this Court must find that possession of a firearm or dangerous weapon presents a serious and imminent threat to public health and safety or the health and safety of Mr. Moriwaki. The Petitioner has informed the court that he is fearful for his safety and life due to his harassment by Lee and the information he discovered online about him. However, the Petitioner has not proven by a preponderance of the evidence that the Respondent presents a serious and imminent threat to public health and safety or Moriwaki's health and safety by his possession of a firearm.

Although the Respondent has engaged in cyberstalking and harassing conduct towards the Petitioner, there must be more threatening, violent, or assaultive behavior for the Court to remove the Respondent's firearms. The Respondent has no criminal history and has not made any threats implying physical violence towards Mr. Moriwaki. Further, this Court cannot find any incidents of threats or violence in his past. This Court cannot find that his mere possession of an armored car, prior military repremands, and prior argumentative, obnoxious, and harassing online behavior are sufficient to prove his firearm possession poses a serious and imminent threat.

12. The Court further incorporates its oral findings of fact and conclusions of law.

Dated: **July 17, 2017**

Judge Sara McCulloch

BAINBRIDGE ISLAND MUNICIPAL COURT
KITSAP COUNTY, WA

CLARENCE MORIWAKI Petitioner, v. RICHARD RYNEARSON Respondent.	**No. 12-17** **Declaration of Richard Lee Rynearson, III**

This declaration is made by:

Name: **Richard Lee Rynearson, III**

Age: 43

Relationship to the parties in this action: Respondent

I Declare:

General Background

1. My wife and I purchased our condo on Bainbridge Island in 2011 as a post military retirement home.

2. Prior to moving to Bainbridge Island, I completed twenty years of service as an Air Force officer. Clarence Moriwaki, in his supplemental statement dated April 20, 2017 ("Pet. Supp."), has directed the court's attention to portions of my military career. *See* Pet. Supp. at 8-9. Because he has criticized my past actions in the military, I would like the court to have a fuller picture of my military service. My time in the service was spent mostly in the special operations command as an attack pilot and in the training command as an instructor pilot. Air Force pilot training requires mandatory psychological evaluation and Special Operations Command (SOCOM) provided specially trained psychologists with security clearances, a service I never needed to utilize. In the service, I held various security clearances including Top Secret. My awards include the Distinguished Flying Cross for heroism, three Meritorious Service Medals, seven Air Medals, and six Aerial Achievement Medals, among other awards. Upon retiring from the military, my wife and I moved to our retirement condo on Bainbridge Island. We moved in the summer of 2016 and my retirement from the military became effective on October 1, 2016.

3. While in the military, I was very vocal about my oath to support and defend the Constitution. I was particularly vocal in protest of violations of the Fifth Amendment through both the passage of the National Defense Authorization Act ("NDAA") of 2012 legalizing indefinite detention and the targeted killing of American citizens in drone strikes outside of war zones. I was also very vocal about violations of the Constitution by law enforcement.

4. The NDAA of 2012 purported to authorize the president to use the military to arrest American citizens without charge or trial and hold them in military prison camps indefinitely. This power was, according to Senator Carl Levin, specifically requested by President Obama. Senator Levin stated, "The language which precluded the application of section 1031 to American citizens was in the bill that we originally approved in the Armed Services Committee, and the Administration asked us to remove the language which says that U.S. citizens and lawful residents would not be subject to this section." Amendments were offered in Congress to exempt American citizens from the provisions of Section 1021 of the NDAA but all amendments were defeated. While section 1022 of the bill stated that section would not be used against American citizens, section 1021 had no such exception in listing who could be indefinitely detained without charge or trial by the President. S. Floyd Mori, executive director of the Japanese American Citizens League, publicly warned of this bill and of it being principally the same as the internment of Japanese Americans under presidential executive order 9066, stating:

> A bill on the Senate floor raises the question of whether the Senate has forgotten our history. S. 1253, the National Defense Authorization Act, has a provision in it, unfortunately drafted by Sens. Carl Levin, D-Mich., and John McCain, R-Ariz., that would let any U.S. president use the military to arrest and imprison without charge or trial anyone suspected of having any relationship with a terrorist organization.

President Obama signed this final version of the bill into law while issuing a non-binding signing statement that acknowledged the bill authorized the president to use its powers against American citizens.

5. President Obama was far from the only person to acknowledge that the law provided authority against American citizens. New York Times Pulitzer Prize winning journalist, Chris Hedges, along with Dr. Cornel West, Noam Chomsky and Daniel Ellsberg, among others, sued the Obama administration over the NDAA provision to arrest and indefinitely detain American citizens without charge or trial. During the litigation at the federal district court, Judge Katherine Forrest asked the government's lawyers if they could provide assurance that the law would not be used to detain Chris Hedges specifically were he to have journalistic contact with terrorists or associated forces. The administration's lawyers refused to provide that assurance and Judge Forrest issued an injunction blocking this section of the law. The Obama administration immediately asked the appeals court to stay the injunction, which the appeals court did. That same court then dismissed the lawsuit on grounds of lack of standing. The Supreme Court declined to hear the case, leaving the unconstitutional provisions intact. In an ACLU press release, ACLU executive director Anthony Romero stated, "President Obama's action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law…" Washington Senate Bill 5176 (and its companion House measure) recognizes the overreach of the NDAA of 2012 and seeks to make it a crime for Washington State officials to cooperate with federal agents attempting to use NDAA powers against American citizens or permanent legal residents.

6. Beyond my advocacy in opposition to the NDAA, I also advocated against police abuse while I was in the military. Because Mr. Moriwaki has submitted incomplete records of certain administrative actions by the military, *see* Pet. Supp. at 24, 34-36, I provide this fuller explanation of events. In 2009, I was subject to an unlawful arrest in San Antonio, Texas, allegedly for failing to signal a lane change. The arrest was unlawful because the officer had no probable cause to make the stop and told me during the stop that he had pulled me over to check my license and registration because I had out-of-state tags, which is an unconstitutional basis for a traffic stop. The "failure to signal" charge was dismissed by the Texas court. Prior to that dismissal, my commander issued me a letter of reprimand based on the arresting officer's narrative of the events, along with the assertion that I had concealed the existence of my blog from public affairs when the *Air Force Times* was considering doing a story about issues within my

command and contacted me. As documented in the response to that letter of reprimand, many of the statements by the police officer were false. For example, I never threatened the officer. I did tell the officer that I had been shot at, killed people, and watched far better men die to protect the Constitution that he had just trampled on. I did not say this to boast, brag, or express "unrepentant" bravado about killing people, as Mr. Moriwaki asserts, Pet. Supp. at 1, 12, 14, but rather because I have been called to take the most serious action a man can take—taking another person's life—as well as watched too many people die in the service of the Constitution that I believe is far too often disregarded at home, and that experience cannot help but inform the seriousness with which I approach constitutional violations. Moreover, I fully informed public affairs about my blog. See Exhibit 10, p. 2 (describing letter of reprimand and response). After I changed commands, my new wing commander removed the letter early from my Officer Selection Record, *i.e.*, prior to the time that it would ordinarily "expire." However, because I did not have video of the encounter, I could not conclusively prove that the officer pulled me over with no cause, which is unconstitutional.

7. Mr. Moriwaki also submitted to the court a letter of reprimand that I received for refusing to obey an order, as well as the documentation of an attempt to suspend/revoke my security clearance, Pet. Supp. at 35-36, without any mention of the fact—included within the same document package that he downloaded from my blog—that the Air Force rejected my command's attempt to revoke my security clearance. The fuller story is this: At approximately fifteen years into my career, in 2011, I was given an order to conduct a mission which would violate the Fifth Amendment rights of an American citizen. I refused the order and tendered my resignation, explaining that "I have been ordered to use lethal force against certain persons, in certain circumstances, in clear violation of the Fifth Amendment to the U.S. Constitution. I cannot with good conscience perform the actions that are ordered of me. I have no choice but to tender my resignation." I further explained that "War is not pretty, but what I am being ordered to do now, in a classified setting, is so clearly illegal, that I believe the words of Judge Quinn are appropriate: 'Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here.'" Mr. Moriwaki apparently believes my refusing the order reflects contempt for authority, Pet. Supp. at 8, but it represents fealty to the highest authority to which I was sworn—the Constitution. As a result of my refusing the order, my command suspended my security clearances and started an investigation, ultimately resulting in a letter of reprimand, although the command did not accept my resignation of my commission. The Air Force level agency that reviews security clearance determinations reversed my command's decision on my clearance and restored all of my security clearances. The adjudicating officer stated:

> On the surface, it would appear that receipt of multiple letters of counseling and reprimands would indicate questionable judgment and an unwillingness to comply with rules and regulations. However, when each incident is reviewed on its own merit, it would appear [Rynearson] is fully aware of the U.S. Constitution and has openly challenged what he perceives to be a violation of either his own rights or those or other American citizens. … The most recent [Letter of Reprimand] for failing to obey a lawful order is the most significant of all given the nature of the circumstances. However, it is noted in both the [Security Information File] documents and the [Personnel Security Investigation], that [Rynearson] had previously objected to the particular activity and was previously assigned to other duties because of his objection. The [Security Information File] documents included some information that was classified and was reviewed for its relevance to this adjudication. Those documents give a better understanding of the gravity of the operation and provide insight to the reason [Rynearson] disobeyed the order.

> …It is the opinion of this adjudicator that [Rynearson's] objections to what he believes are violations of the U.S. Constitution, as reflected in the documents associated with the [Security Information File] and [Personnel Security Investigation], do not represent a security concern.

See Exhibit 10, p. 3.

8. Around 2012, I challenged the length of my detention by Border Patrol agents at an interior suspicionless checkpoint. I was not arrested during this encounter (contrary to Petitioner's assertion, Pet. Supp. at 9). My suit was supported by the Texas Civil Rights Project and the National Immigration Project of the National Lawyers Guild as *amici curiae*, and I was interviewed by John Stossel about my experiences at the checkpoints in a Fox News show called *Policing America: Security Versus Liberty*. My checkpoint experiences were also covered by *Reason* magazine and *Slate*. I lost my suit at the Court of Appeals for the Fifth Circuit on qualified immunity grounds (meaning the question whether the stop violated the Constitution was not decided, contrary to Petitioner's description, Pet. Supp. at 9). The vote was two to one, and the Supreme Court declined to hear the case, although it did call for the government to respond to my petition after the government initially waived its response. Judge Jennifer Elrod of the U.S. Court of Appeals for the Fifth Circuit dissented in my favor and wrote, "standing on one's rights is a venerable American tradition." I wrote a blog post that was highly critical of the two judges who dismissed the suit, because in my opinion the failure to recognize the constitutional violation in my border patrol stop was unworthy of their judicial commissions. But I did not, and never have, threatened or harassed those judges or anyone else involved in my legal cases. I do not disdain the judicial system; if I did, I probably would not be married to an attorney and I would not have continued to pursue the border patrol case, or even have filed it in the first instance. Some, including Mr. Moriwaki, *see* Pet. Supp. at 9, have criticized me for filing a suit that ultimately did not succeed. But it is my belief that people who care about civil rights must continue to bring these sorts of lawsuits, despite the cost and the difficulty of succeeding in claims against the government, particularly with the existing immunity doctrines that shield much government conduct. If people had been unwilling to bring lawsuits that were uphill battles, a great many civil rights victories of the past century would never have occurred.

9. I am an activist with the goal of raising awareness of threats against our Constitution. My activism focuses in particular on two areas: police/law enforcement abuse and the threat to liberty from the national security state, including the indefinite detention provisions of the bipartisan NDAA of 2012 and the Obama administration's use of drone strikes to target American citizens outside of war zones. I am also a very active Facebook user, and have long used Facebook as a platform for advocacy of issues that I care about.

10. I ramped up my activism regarding police abuse following the unlawful arrest in 2009 described above. I founded an organization called Veterans Against Police Abuse, and supported many others, especially those focused on decreasing police abuse through the increased videotaping of police officers, including Photography Is Not A Crime, Cop Block, and the Peaceful Streets Project (although I subsequently withdrew support from the Peaceful Streets Project, as discussed below). After my unlawful arrest, which I was unable to record (and for which no dashboard video was ever released to me), I decided that outfitting a car with extensive cameras was the best way to deter police abuse and to secure accountability if it did occur. I used my car as a "testbed" for a number of different camera systems. In addition, because I then lived in a border town in Texas, I had to travel regularly through a border patrol checkpoint where I had been stopped and searched repeatedly, for increasingly long periods of time (culminating in an incident leading to the lawsuit discussed above). I had also seen several videos of Border Patrol officers forcibly and violently busting the windows of American citizens at the checkpoints and removing them from their vehicles, despite having no authority under the relevant court decisions to order

individuals stopped without probable cause from their cars. And I was concerned about reports that terrorist groups were targeting military members within the United States by following them on social media (and, indeed, there later were attacks by terrorists on military members within the United States, as in Chattanooga).

11. I decided to armor my car for a variety of reasons, but primarily I thought that armoring would increase interest in my message that individuals should start installing video systems in their cars. The armoring company in Texas suggested some additional "gee whiz" additions that I thought would also increase interest in the car, including the smoke screen. I consider these to be "marketing" features that get people talking about the car, but as I explain in the videos from which Mr. Moriwaki provided screen captures, Pet. Supp. at 38, 49, the important message is for people to install video cameras, not these gadgets, which I explained that I did not use. *See* WeAreChange.Org Video, https://www.youtube.com/watch?v=guWdt7oRLAo (March 31, 2014) (in which I told the interviewer that "I never plan on using the smokescreen, it's really just a toy to make the car more interesting, to get people talking about it, so that I can direct their attention to the cameras, because the cameras are what matter."); Cop Block Video, https://youtu.be/VoWTd8TlaeU (July 24, 2012) (describing smokescreen as "really just a toy… I don't know what I would ever use it for"). One of the gadgets is a small strip inside the door handles that generates an unpleasant but not painful or injurious sensation if it is activated. It is intended to startle someone who is trying to open the car door without permission, not to hurt anyone. It can only be activated if someone is inside the car and turns it on to deter someone from opening the door, for example to prevent a car-jacking. I installed that feature, but have never used it other than to test it on myself or if other people requested to feel the amount of the charge, which is minimal. *See* WeAreChange.Org Video (interviewer repeatedly touching the door handles, laughing and smiling, and stating it "does feel weird. That's awesome"). It does not reflect a "premeditated and sociopathic intent that has only one offensive, use of force function—to intentionally cause pain, injury or worse for the person who may touch the door handle," as Mr. Moriwaki claims, Pet. Supp. at 12. Not only does it not cause pain or injury, but it is not "offensive" in nature—it is defensive. The "armored" or "batman" car type features did, in fact, increase interest in the car and my message about the need to video police. The car was featured on We Are Change, an online media organization with a YouTube channel that has over 440,000 subscribers, and Cop Block, which has a Facebook page with 1.69 million likes, among other online outlets. Cop Block interviewed me at an exhibition of my car at the first Peaceful Streets Project ("PSP") Police Accountability Summit, and created and provided the headline for the video "Spy Car Protects Against Unscrupulous Cops," including the text in the video stating "Bow down to no one." See Pet. Supp. at 38. I did not create that video or write those statements, but the video has more than 600,000 views. All of the features that I installed are lawful, but I uninstalled some of the car's features prior to moving to Bainbridge Island.

12. I do not have "contempt for … law enforcement," as Mr. Moriwaki claims, Pet. Supp. at 1, 8, nor do I have a "vendetta against law enforcement," *id.* at 10. I am anti-*bad*-police, which is an important distinction, and my concern for this issue is shared by millions of Americans. I have often condemned violence against police and reminded others in the police accountability movement that it is important not to demonize police officers. See Exhibit 18. I also blocked people who advocated violence against police officers from posting on the Veterans Against Police Abuse ("VAPA") page, and have donated to funds supporting slain officers' families. Indeed, many in the anti-police-abuse community have accused me of being insufficiently anti-police and too peaceful in my outlook. As discussed above, I and the VAPA organization provided substantial support to the Peaceful Streets Project ("PSP"), initially. VAPA was the top sponsor of PSP's second Police Accountability Summit, for example, which included presentations by Radley Balko, of the *Washington Post*, and Bobby Seale, founder of the Black Panther Party, among others. PSP started in Austin, Texas and involves organizing groups of individuals to fan out and record police encounters throughout the city, especially at times with a greater possibility of encounters,

such as when the bars close. I was once friends with the founder and leader of PSP, Antonio Buehler. But I decided I had to break ties with PSP, and Antonio, and denounce his comments after his rhetoric escalated to the point that he repeatedly expressed his view that there are no good cops, and tweeted about the death of a Harris County Sheriff, "Pig executed in Houston. Probably shouldn't have joined a criminal gang. His bad decisions caught up with him. Blame his parents." Exhibit 12, p. 3. I wrote an op-ed, headlined "Peaceful Streets Founder Antonio Buehler Is Wrong, Should Apologize or Resign" for Photography Is Not A Crime. Exhibit 12. In that op-ed, I denounced Antonio's comments and explained how his narrowing of the PSP group—frequently expelling and de-friending people who challenged his statements or leadership—had unfortunately allowed his prejudiced, group-based hate of all police officers to flourish and harden. Exhibit 12, p. 2. I flatly "reject[ed] this assertion," made by Antonio, that "Cops are bad. There is no such thing as a good cop." Exhibit 12, p. 2. As I wrote then, and still believe now, "While de-humanization of an entire group based simply on group association is a good way to build numbers and organize, as history has most certainly shown, it is not a good way to secure justice. It is wrong, and based on hate, and ignorance. It is part of the problem, not part of the solution." Exhibit 12, p. 3. I acknowledged all of the good work that Antonio had done for the police accountability movement, and that he had been abused by the Austin Police Department, while nonetheless calling for his removal from the helm of PSP, because his statements risked "squander[ing] the gains made by the many courageous people who have worked so hard in the Peaceful Streets Project—including [Photography Is Not A Crime] correspondents—to document police abuse." Exhibit 12, pp. 2, 4. As this op-ed demonstrates, I am not anti-police, and I have long been concerned with ensuring that the leadership of the causes I care about reflects the true values of the movement.

13. When I published that op-ed, many activists in the police accountability community attacked me for being too peaceful and insufficiently attuned to the danger posed by police. For example, one commenter said "Veterans against police abuse are pretty much useless. They want to fight this battle as if it's high school debate. Force is what is necessary and they clearly aren't willing to step up to the plate. If calling cops cowards and pigs is too much for them, maybe they need to go to work for the Boy Scouts." See Exhibit 12, p. 5. Some accused me of a personal attack, as Mr. Moriwaki does, for saying, among other things, that Antonio's rhetoric was destructive to the cause, hateful, and irresponsible. See Exhibit 12, p. 13. Many accused me of being a "troll" and a "sociopath," as Mr. Moriwaki does. See Exhibit 12, pp. 8-10. It does not make them right, and the PSP co-founder, John Bush, shared my sentiments and also withdrew from PSP. Exhibit 12, p. 25-26. I responded to the comments, defending my position that we should not demonize police officers or treat them as a monolithic group, that there are good police officers, that we should refrain from violence, and that Antonio's speech should not be restricted, but he should be challenged about it. See Exhibit 12, pp. 11, 12, 14, 17-24, 27-28. I also defended good, democratic government, and the legitimate purpose of hiring police to protect the commons, using the analogy to a homeowners' association. See Exhibit 12, pp. 15-16. These examples further demonstrate that I am not an anti-government activist, as Mr. Moriwaki claims.

14. My concern about the erosion of civil liberties in America was increased after the attacks of September 11th as I witnessed increased emphasis on so-called security over liberty. The NDAA of 2012 was a particularly concerning development and I, while an active duty military officer sworn to support and defend the constitutional right of Americans, publicly spoke out against this modern harbinger of the Japanese Internment. Back in November of 2011, I wrote an article on a blog describing the NDAA and relating it to the history of the Japanese American internment while describing a visit I made to Bainbridge Island, the Bainbridge Island Japanese-American Exclusion Memorial ("BIJAE memorial"), and my viewing of the Ansel Adams' exhibit. After that experience I began studying more about the island and the internment and I made many posts about the camps and the work of Clarence Moriwaki. For example, in November of 2014, I blogged about the death of Fumiko Hayashida. In that blog post I linked

to a story from the *Seattle Post-Intelligencer* featuring Mr. Moriwaki and elsewhere in that post I linked to a video about the BIJAE memorial which featured footage of Mr. Moriwaki as the memorial's founder and president. In November 2015, I shared a video featuring Mr. Moriwaki discussing the internment with the description "Excellent discussion on American soldiers forcing American citizens onto trains and taking them to concentration camps here in America. Incredibly important stuff, especially today." As another example, in December 2015, I shared a post by Mr. Moriwaki about a petition responding to politicians referencing the internment as a precedent. I stated, "There has been too much talk of bringing concentration camps back in America and fortunately the Japanese-American community is sounding the alarm." Mr. Moriwaki posts many articles about the Japanese American internment, gives many speeches and lectures on the topic, and was readily recognizable as Bainbridge Island's leading spokesperson on the BIJAE memorial and the topic of Japanese American internment. I was well aware of Mr. Moriwaki as the face of the public non-profit overseeing the Island's memorial long before I moved to Bainbridge Island and well before I had any interaction with Mr. Moriwaki digitally or personally. I did not "troll" Mr. Moriwaki in November or December 2015 (or ever), as he claims, Pet. Supp. at 2, 20-21; I simply shared relevant content that I found, due to his public role as the founder and spokesperson of the memorial, that he had created or that featured him. I started the Facebook group "WWIII Japanese-American Internment" to provide a place to discuss the lessons of the internment for the modern era on October 27, 2016.

15. I have continued my advocacy about the NDAA of 2012, and related issues, since moving to Bainbridge Island. For example, with my wife, I created the Facebook group "SB 5176 - Block Indefinite Detention." We have both attempted to raise awareness online and also in person while holding signs and handing out pamphlets of the text of SB 5176. I made a conscious decision to change my communication style upon my retirement from the military and move to Washington, however. When I was in the military, I often engaged in a more "rough-and-tumble," direct communication style in online forums and Facebook pages/blogs focused on a military audience, including the blog of Tony Carr ("John Q. Public"), Baseops.net, and Martial Matters. As I explained on my blog in November 2014, I deliberately engaged in communications during that time in two different styles, because I "adjust my communication style to my audience," using the blog more often "to comment in a civil fashion for civil discussions," and using Martial Matters "when the discourse is less civil," because my audience is known for "lofty more academic discussions at times, and crude swagger-filled, machismo infested back and forth in other instances." As I explained then, "I speak both languages, and I endeavor to be a part of the discussion on either level." *See* Exhibit 15 (blog post). Accordingly, I sometimes used insulting speech, in keeping with the general tenor and style of the communications in those forums, but I did not threaten, advocate violence, or harass. Mr. Moriwaki submits a handful of examples across several years, and notes that I was banned from some forums, *see* Pet. Supp. at 3-5—but he does not provide the full context of those bans. For example, the moderators at Baseops.net were hostile to me from the very beginning because, as part of a master's thesis that examined Air Force cultural challenges for the Air Command and Staff College master's degree program, I commissioned an anthropological study of Baseops.net. That study found, among other conclusions, that people were very assertive on the forum, and often "combative and abrasive," using phrases like "choke yourself." Exhibit 13, p. 108-109. When one forum member commented that he was "astounded by the lack of respect and utter contempt towards our fellow servicemembers posting comments on this forum, by the "Good 'Ol Boys" on the forum, another member asked whether B-52s are "now being crewed by Care Bears?" because he knows "if I screw up I expect to be heckled and verbally bashed … it's what we do." Exhibit 13, p. 109. These posts are emblematic of the culture on Baseops.net, as are posts including "sexist remarks," "numerous times the word gay is used to describe something in a derogatory fashion," and "anything liberal in nature gay being just one example, [being] generally chastised on this forum." Exhibit 13, pp. 114-15. The moderators invited me to join the forum once they learned of the study, and I was banned after I repeatedly criticized the culture on the forum.

16. Similarly, although involving more of a law enforcement audience than a military one, I joined the forum "Glock Talk" only after I learned they were already talking about me. Mr. Moriwaki makes much of the fact that I was banned there, and quotes extensively from the opinions of unnamed individuals on that forum about me, Pet. Supp. at 3, 10-11, but I was banned by the forum's founder, who stated—in language Mr. Moriwaki quotes—he did not start the forum "to question the morality or legality of law enforcement practices," which I had done in my posts. It was often my experience that any criticism of a forum's founder or moderators would result in a ban.

17. In another example highlighted by Mr. Moriwaki, Tony Carr, author of the blog "John Q. Public," owned by publicly-traded media company Bright Mountain Media, Inc., barred me from posting on the "John Q. Public" Facebook page at one time. But, as reflected in part of Tony's March 5, 2015 thread that Mr. Moriwaki does not quote or screen capture (although he captures other portions of the thread, *see* Pet. Supp. at 26), Tony explained then that "Rick hasn't been banned from here for a long time. We keep to our separate corners of the internet for various reasons. But he's dead-on about some things, especially this." See Exhibit 14 (March 2015 post). Moreover, the original Facebook post supported my lawsuit about the Border Patrol checkpoint stop, commenting that "One USAF pilot is pushing back against a suspicionless stop with a lawsuit," and stating that "For the uninitiated, our federal courts will stretch to the point of absurdity to avoid confronting a Constitutional question." *Id.* And Mr. Moriwaki misrepresents the comment on the October 22, 2014 comment about "eleven anonymous handles" as being about me, adding "(Rynearson)" as if it were part of the quote, Pet. Supp. at 4, when in fact it was about a commenter from Air Force Personnel Center. See Exhibit 14 (October 2014 post) ("John Q. Public" responding to someone asking about him outing a commenter, "What in the son of liberty are you blathering about, sir? Who said anything about IP addresses or facebook? There was an AFPC troll here. He was snitched out to me by one of his pals. ... Two people banned about 1.1 million visitors and this is what you guys want to talk about?" and "What guy are you talking about? Do you even know one of his eleven anonymous handles? He's been banned for awhile, so no one has 'outed' anyone. Are you simple?"). In addition, even when I was banned from his Facebook page, Tony also told me directly that I was welcome to comment on his blog, which I did much later. Mr. Moriwaki wrongly represents that as me "unwelcomingly resurfac[ing]" on the blog, *see* Pet. Supp. at 4. And months after the March 2015 post described above, Tony linked to my blog while acknowledging that we remained at loggerheads, stating:

> To say that Rick Rynearson and I don't get along all that well is a sizable understatement. It would be like saying the captain of the Titanic should get a "Q-" for iceberg avoidance. By posting this link and sending you to his blog, I'm basically chain-feeding someone who has dedicated considerable effort to throwing huge, flaming rocks in my general direction. I cringe at the idea. But that's part of how I know it's the right thing to do. He's talking about important stuff while most are chewing bubble gum. Commitment to essential truth requires this sort of thing sometimes, and frankly the world would be a better place if we got past ourselves more often and found common ground standing on the essential truth of important issues instead of looking for reasons to bicker about the irrelevant scenery obscuring what matters.

See Exhibit 14 (November 2015 post). Tony Carr and I still do not get along, but he recognized the importance of vibrant debate. He also did not shrink from the "rough-and-tumble" communication style common to these military-focused forums and pages, that Mr. Moriwaki criticizes as "vitriol," Pet. Supp. at 6. *See, e.g.*, Exhibit 14 ("John Q. Public" comment on his Facebook page stating, "You out-dumbed yourself on that one. Sort of a failed attempt to masturbate your own limp brain.").

18. When I retired from the military and moved to Bainbridge Island, I decided to shift to a more civilian communication style to go with my new civilian life. I also retired my blog, as I long stated

that I would. As part of the effort to begin a new chapter with a new communication style, I created a new Facebook profile using my first and middle names ("Richard Lee") in order to start a new chapter in my life with my retirement that would focus on building local relationships and engaging in the local community. I followed through on this intention; none of the tone or occasional insults used in the past on military-focused forums/pages can be found in my interactions with Mr. Moriwaki or in my posts about his leadership of the Memorial, and Mr. Moriwaki provides no examples to the contrary.

In-Person Interactions with Clarence Moriwaki

19. As described above, I was aware of Mr. Moriwaki's work prior to moving to Bainbridge Island due to my long interest in the unconstitutional executive order and actions resulting in the indefinite detention without due process of Japanese Americans. I strongly supported, and still strongly support, the establishment and work of the BIJAE memorial.

20. The first time I met Mr. Moriwaki in person was on December 13, 2016 at the showing of Allegiance at Bainbridge Cinema. Allegiance was a Broadway musical that dramatized the events of the Japanese-American internment; I had seen it on Broadway in November 2015. My wife Hyland Hunt and I passed by Mr. Moriwaki and exchanged greetings as we took our seats.

21. The second time I interacted with Mr. Moriwaki in person was on January 8, 2017 at the Mochi Tsuki festival at IslandWood. Hyland and I had just purchased the book "In Defense of our Neighbors" and were walking toward the cafeteria when we ran into Mr. Moriwaki posing with other guests for a requested picture. He recognized us and said that he would talk to us later.

22. The third time I saw Mr. Moriwaki in person was at the Memorial for a community service clean-up day on February 19, 2017. Mr. Moriwaki was directing the activities of volunteers when we arrived. My wife and I asked Mr. Moriwaki how we could help. He asked us if we had brought any garden tools and we said we did not own any. He then directed us to do some pruning and found a spare set of shears for me. Later in the day he noticed I was lost while trying to find a place to dump a wheelbarrow and he gave me directions to the proper place to dump the refuse and was friendly. Hyland and I helped with landscaping at the Memorial for about an hour before we had to leave to go to a different event. This was more than three weeks before I was served with the temporary protective order.

23. Due to the proximity of our condo unit and our condo's easement which is located next to the condo units where Mr. Moriwaki lives, I have seen Mr. Moriwaki at a distance on occasion while traveling to town or to the ferry. The only occasion that we interacted was when my wife and I were leaving the ferry and walking toward Winslow and Mr. Moriwaki was headed to the ferry sometime in February 2017. We exchanged a greeting and Mr. Moriwaki in passing told us he was going to Seattle for an event. These are all of the in-person interactions I have had with Mr. Moriwaki.

24. On February 7, 2017 in a public Facebook discussion post by Mr. Moriwaki's friend Bonnie McBryan (also known as Bonnie Anisoglu, according to the police report), I commented in a discussion about tolerance and being liberal. In this discussion, Mr. Moriwaki posted that I had "trolled and harassed" him for "several months" while "myopically laser focused on his single issue." He then posted an analogy about his Facebook page being like a party. I posted in response that for Mr. Moriwaki's "analogy … to be accurate," it "must include … Clarence inviting somebody over to his place for a party and a discussion of politics and then Clarence walking over to people who have a differing view and then placing his hand over their mouths to silence them." I further responded that "I'm outside on the street, in Clarence's analogy, after Clarence put his hand over my mouth and threw me out. So I'm out on the public

street now in front of his house talking to some of his guests (our mutual neighbors) as they leave his house, some of which appreciated my comments…." In response to this, Bonnie McBryan posted, "Thank you Richard. I am really concerned about your statement that you are outside Clarence Moriwaki's house and talking to his guests and mutual neighbors. I assume that is rhetorical; if not it sounds a bit threatening. I appreciate your respect." I responded immediately, "Bonnie McBryan Now that is just silly." McBryan responded, "Thank you – and you see how easy it is for one to misunderstand a reference or misinterpret your actual intentions." This post and discussion was subsequently deleted or made non-public. See Exhibit 1, pp. 173-179.

25. I have never followed, surveilled, monitored, tracked or otherwise intentionally placed myself in proximity to Mr. Moriwaki or his residence for the purpose of stalking him, contacting him, or interacting with him.

Online Communications with Clarence Moriwaki

26. On November 20, 2016, I Facebook messaged Mr. Moriwaki to thank him for accepting my Facebook friend request and telling him I would be happy to assist with the memorial. See Exhibit 1, p. 1.

27. On December 4, 2016, I Facebook messaged Mr. Moriwaki sharing comments I had recently read from James Olsen. Mr. Moriwaki responded about Olsen's racist trolls and letters and invited me to like the public Facebook page "Character Counts – Defeat James Olsen" and to tell the administrators that he had sent me should they ask. Mr. Moriwaki also asked me to please like the Memorial Facebook page. I told Mr. Moriwaki I would look forward to responding to Olsen given any opportunity and Mr. Moriwaki thanked me. See Exhibit 1, pp. 16,17.

28. On December 14, 2016, Mr. Moriwaki messaged me through Facebook, inviting me to meet for beer or coffee and giving me his phone number. I accepted his invite and suggested a time. He said he was busy but suggested the following week. Mr. Moriwaki asked for my phone number and I provided it. See Exhibit 1, p. 48.

29. On December 23, 2016, I messaged Mr. Moriwaki on Facebook suggesting another time to meet in person per his request and said I was looking forward to chatting about how we could help out with the memorial. I also told Mr. Moriwaki that my wife and I had signed up to help clean up the Memorial. Mr. Moriwaki responded that he was skiing and suggested the following week. I returned Mr. Moriwaki's seasons greetings. Later in the day I messaged Mr. Moriwaki to point out a discussion that was occurring on the "WWIII Japanese American Internment" Facebook page with his friend Tim Jones on a post shared by a member of "People Against the NDAA." See Exhibit 1, pp. 48,49.

30. On January 29, 2017, Mr. Moriwaki messaged me through Facebook to tell me that his "patience is wearing thin" and that he was waiting for an apology in response to him telling me that I had offended him by asking what he meant by saying "So it begins" in a Facebook post about hate crimes. See ¶ 72, *infra*. He stated, "Again, you don't get to determine what I find offensive or insulting." He referred to my posts about SB 5176 as an "argumentative demand" and said that while he agrees with that bill, he removed posts about the bill on his wall because of my "pious self-righteous audacity" to post a "bullying demand" on his timeline. He stated "you have crossed a line" and "you are not conversing but trolling." He provided his "party analogy" and said his Facebook page is like a party. In that analogy, he said he as the host has to "to keep it civil" but if somebody there keeps "butting in" or trying to "monopolize" conversations he has the right to ask them to "cease and desist." Mr. Moriwaki then told me to "…please

promote your ideas and attract people to your own wall. Create your own party." He told me to "stop the bullying and attempts to hijack my party." See Exhibit 1, pp. 115, 116.

31. On January 29, 2017, my wife responded, in my account, to Mr. Moriwaki's Facebook message referenced above about Mr. Moriwaki's patience wearing thin. My wife suggested I try a different communication style in the face of Mr. Moriwaki's demand for an apology for him being offended. She typed a response (in my account) beginning with, "Clarence, I did not see this before…" and sent the message explaining that Mr. Moriwaki is "the most prominent spokesperson on this issue on Bainbridge Island" and that I did not intend personal offense in asking why he hasn't publicly supported SB 5176. Mr. Moriwaki responded that I had still not "acknowledged" that I had offended him. Mr. Moriwaki cut the conversation short stating, "to be continued, I am late meeting a friend for breakfast, otherwise known as having a life." My wife responded, typing in my account, that I appreciated his feedback and stated that I did not deny that he felt offended or harassed as his feelings were his own, but that I had not said something worthy of giving offense and that was not my intent and "I hope you have a good breakfast." See Exhibit 1, pp. 120, 121.

32. On February 4, 2017, Mr. Moriwaki messaged me on Facebook, after deleting comments of mine that were critical of Governor Inslee that had been liked by some of his friends, *see* ¶ 81, *infra*. Mr. Moriwaki told me that he had to be in Tacoma by 9AM and claimed that I was "trolling" and "bullying" and "a bit of a sociopath – my feelings ARE my feelings, and your grandiose insensitivity that you don't think you 'said something worthy of offense?' is the definition of sociopathy." I responded that "I am not trolling or bullying" and that people who are different are not a threat. I also stated, "calling somebody mentally defective because they have a differing view? Come on Clarence, you're better than that. Surely you are." In response to Mr. Moriwaki deleting the posts discussed above, I told him that he was about to cross my line of diversity and free speech and I promised him that his efforts to stifle free speech would fail him, conveying that I would continue to speak on these important topics. Mr. Moriwaki responded by apologizing and saying he did not yet have his coffee, ending with "To be continued." See Exhibit 1, p. 139.

33. On February 5th, 2017 after Mr. Moriwaki had again deleted a post of mine from the discussion on Governor Inslee, I messaged him and told him that if he continued to censor my contributions I would know that he does "not actually value discourse or conversation" and that he does "not respect other people who are different" from himself and that he instead shuns and demonizes diversity. Mr. Moriwaki continued to delete my posts, as well as my posts about him deleting posts. He messaged me claiming I was "trolling" and "harassing" and "bullying" and then asked me what my wife would say if I had responded to her as I did to him if she told me I had offended her? He then quoted the response he thought was troublesome (the response that my wife actually wrote to him) and told me to ask my wife if such a response would be acceptable. I informed Mr. Moriwaki that my wife had written that in her attempt to demonstrate a different communication style. Mr. Moriwaki repeated his "party analogy" several times along with his request for me to "please promote your ideas and attract people to your own wall. Create your own party." I responded that a "differing view is not trolling or harassing or bullying" and told Mr. Moriwaki that he was not a "victim." Mr. Moriwaki again repeated his party analogy and his request for me to create my own Facebook page to discuss these ideas. I repeated that "A differing view isn't a hijacking. It's diversity." Mr. Moriwaki responded that I was trying to "hijack" his page with my "single issue obsession." I responded that I would endeavor to teach Mr. Moriwaki about mutual respect and diversity because people like Mr. Moriwaki and James Olsen do not celebrate diversity and so need to hear from others. My goal was to show Mr. Moriwaki, and others who similarly shun and try to censor different viewpoints, that it is counterproductive to the issues they support to try to suppress differing views. Mr. Moriwaki responded that he had asked me to stop posting on his page. Responding to his third offered

"party analogy," I stated that "if we were at an event with a variety of our neighbors, you would try to put your hand over my mouth because you don't want me to question your viewpoints or to bring up facts that you find uncomfortable." Mr. Moriwaki responded, "We are done." I responded that we were not done and what follows next would be done with love to help Mr. Moriwaki celebrate diversity and that should Mr. Moriwaki come to value diversity and free speech and discourse in the future to let me know. "What follows next" was a reference to public criticism of his leadership of the memorial and his willingness, in that role, to block and delete opinions critical of President Obama and Governor Inslee. Mr. Moriwaki then defriended and blocked me. See Exhibit 1, pp. 140-143.

34. Although it would be technologically possible, I have never attempted to use any Facebook account to post or comment on Mr. Moriwaki's Facebook wall, or to Facebook message him, since he defriended and blocked me.

35. On February 5, 2017, immediately after being defriended, I text messaged Mr. Moriwaki from the phone number that I had previously given him at his request, to the phone number that he had given me. I asked if he had a comment for my initial story that I intended to put up on a new blog to discuss his role with our public memorial as it relates to his support for politicians who made internment legal again. The particular blog referenced in the text message was not created; instead, I created the Facebook page discussed below. Mr. Moriwaki responded, "Of course, but first would you please ID yourself?" I responded, "This is Richard of course" and "you have my number." Mr. Moriwaki replied, "Yeah, and this isn't trolling or harassment. Richard, your obsession is getting disturbing." I replied that I was obsessed with making sure the camps did not happen again, and with celebrating diversity and respectful discourse and stated "this is not harassment or bullying." Mr. Moriwaki said to start by leaving him alone. I acknowledged Mr. Moriwaki did not want me to contact him at the number he gave me and said goodnight. See Exhibit 1, pp. 144-147. This was more than five weeks before I was served with the temporary protective order.

36. I have never attempted to contact Mr. Moriwaki by phone or text message, or by any other means, since he told me he wanted me to leave him alone. The only time I have communicated with him after that was when, at the public clean-up event at the BIJAE memorial discussed above, I asked what tasks he wanted me to do, because he was organizing the activities of volunteers.

37. I have never used profanity, obscenity, lewd conversation, or personal insults in my interactions with Mr. Moriwaki, or in my public posts about him or in my public posts on the Facebook page assigned to him. I have also never threatened Mr. Moriwaki in any way, shape, or form. I made my posts during normal hours, as well. My stated desire was always to express my opinion in a civil manner to enable a full discussion on a topic rather than allow an echo chamber to continue. This desire was never designed or driven by an intent to harass, intimidate, torment, or embarrass. Expressing a differing opinion in a civil manner does not equate to harassment. I intended to express my view that no discussion of the relevance of the internment to modern politics, and no discussion of any threat to liberty from President Trump, was complete without a critique of President Obama and Governor Inslee for signing or voting for the NDAA of 2012, and that anyone who did not criticize them for those actions was not a credible or appropriate spokesperson for, or leader of, the memorial.

<u>Posts to the Public on the Facebook Page Assigned to Mr. Moriwaki and Other Pages Related to Him</u>

38. On November 27, 2016, I commented on Mr. Moriwaki's post about Allegiance. I stated, "See you guys there. We were fortunate enough to see the show during its first week on Broadway and it

was outstanding. Very important American history lesson." The "Bainbridge Island Japanese American Exclusion Memorial" Facebook handle liked my comment. See Exhibit 1, pp. 3,4.

39. On November 28, 2016, I commented on Mr. Moriwaki's page about the ferry shaking and Mr. Moriwaki liked my comment. See Exhibit 1, pp. 6-8.

40. On December 5, 2016 Mr. Moriwaki's friend Tim Jones commented to me on the "Character Counts – Defeat James Olsen" public Facebook page where he told me to "inform myself or shut the hell up." Mr. Moriwaki liked Jones' comment to me and I replied to Jones and Mr. Moriwaki in a civil manner. The handle "Laura BG" posted "…thanks for illustrating how a difference of opinion can be the basis for a conversation, instead of a fight." See Exhibit 1, pp. 9-15.

41. On December 4, 2016, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 18,19.

42. On December 6, 2016, I commented on a Facebook post from Mr. Moriwaki about a ferry mishap. Mr. Moriwaki liked my comment. See Exhibit 1, pp. 20-24.

43. On December 6, 2016, I liked a post from Mr. Moriwaki about him being invited to speak and being honored to be "among such thoughtful community leaders." See Exhibit 1, pp. 25, 26.

44. On December 9, 2016, I commented on Mr. Moriwaki's photo of Winslow Green. See Exhibit 1, pp. 27, 28.

45. On December 13, 2016, I commented on a story posted by Mr. Moriwaki about the electoral college. I defended Mr. Moriwaki's position from another commenter. Mr. Moriwaki's friend Tim Jones commented that "civil discourse is over rated" and Mr. Moriwaki liked Mr. Jones' comment but I maintained that I would stay with my more civil discourse. See Exhibit 1, pp. 29-32.

46. On December 13, 2016, I commented on Mr. Moriwaki's post about Allegiance saying that the show was well worth the watch. Mr. Moriwaki liked my comment. The following day after viewing the made-for-movie version of the musical, I commented to offer Mr. Moriwaki some constructive criticism over the introduction he gave in the movie theater, correcting him on his comment to the audience that Donald Trump said the internment camps were a precedent. Mr. Moriwaki then responded to me using the "Bainbridge Island Japanese American Exclusion Memorial" Facebook handle to tell me it was nice to meet me in person and thanking me for coming to the screening along with other remarks. See Exhibit 1, pp. 33-36.

47. On December 17, 2016, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 37, 38.

48. On December 20, 2016, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 39,40.

49. On December 21, 2016, I commented on a post from Mr. Moriwaki discussing how he made Eagle Scout. I stated that it was a very cool accomplishment for both him and Tim Jones. Mr. Moriwaki liked my comment. See Exhibit 1, pp. 41-44.

50. On December 23, 2016, I commented on a post from Mr. Moriwaki about how, as president of the BIJAC, he was able to bottle whiskey. I commented, "That's awesome!" and Mr. Moriwaki liked my comment. See Exhibit 1, pp. 45-47.

51. On December 25, 2016, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 50, 51.

52. On January 1, 2017, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 52, 53.

53. On January 1, 2017, I commented on a post from Mr. Moriwaki about President Trump, stating that President Obama assassinated Americans without charge or trial and signed the NDAA allowing the camps under FDR to be repeated. See Exhibit 1, pp. 54, 55.

54. On January 3, 2017, I expressed the "sad" icon on a photo Mr. Moriwaki posted. See Exhibit 1, pp. 56, 57.

55. On January 3, 2017, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 58, 59.

56. On January 6, 2017, I commented on an article posted by Mr. Moriwaki about the internment of Japanese Americans, expressing my view that we are in real danger of it happening again and sharing an article from the ACLU about Obama signing indefinite detention into law. See Exhibit 1, pp. 60, 61.

57. On January 7, 2017, I commented on an article Mr. Moriwaki posted which he wrote for the *Kitsap Military Times*. I said it was an "awesome article" and "very informative and well written" and then provided my opinion that the use of the term "constitutionally challenging" was soft. Mr. Moriwaki liked my comment. This began a long discussion on the Constitution and the role of the judiciary and my wife sent Mr. Moriwaki a friend request, which he accepted, to join in the conversation. See Exhibit 1, pp. 62-74.

58. On January 9, 2017, I commented on a post from Mr. Moriwaki about the Mochi Tsuki festival which Mr. Moriwaki liked. See Exhibit 1, pp. 78, 79.

59. On January 13, 2017, I commented on a post from Mr. Moriwaki about crows, sharing videos of crows as intelligent animals. Mr. Moriwaki liked my comment. See Exhibit 1, pp. 81-84.

60. On January 13, 2017, I commented about the NDAA on a post from Mr. Moriwaki. Mr. Moriwaki responded that his post was supposed to be lighthearted and fun and not every post was political. I responded, "You're right, I was wrong, I apologize. Thanks for correcting me Clarence. I'm not nearly as good as communicating as I sometimes think I am." Mr. Moriwaki later deleted this post or made it non-public. See Exhibit 1, p. 99.

61. On January 16, 2017, I liked a post from Mr. Moriwaki explaining that he was chosen to be the "featured speaker" at a college in Port Angeles. See Exhibit 1, pp. 85, 86.

62. On January 20, 2017, I liked a post from Mr. Moriwaki about Trump's minor children not being judged based on their parents. See Exhibit 1, pp. 87, 88.

63. On January 24, 2017, I commented on a post from Mr. Moriwaki about how the camps are happening again today. I mentioned both Obama and Trump and provided a link to the ACLU article on the NDAA indefinite detention provision. Mr. Moriwaki responded with the claim that I had made that point many times, "often to the point of hijacking a comment thread," and telling me to follow his lead. I responded that it's important to not whitewash history if we wish to avoid bad history. I expressed my appreciation for his work with the memorial and said I would like to follow his lead when it made sense and shared my view that "diversity and dialogue rather than silence and conformity is an important part of making" "Let it not happen again" a reality. See Exhibit 1, pp. 89-91.

64. On January 24, 2017, Mr. Moriwaki responded to me on his Facebook post to explain his view of journalism. He stated, "I don't know if you've ever written published articles and stories, but I've done a bunch, including the one that you've found I wrote years ago for YES! Magazine." I responded to Mr. Moriwaki thanking him for his clarification and offering my own views of journalism. See Exhibit 1, pp. 74-77.

65. On January 24, 2017 Mr. Moriwaki commented in the above thread saying that we should meet up for beer or coffee soon and we discussed scheduling that meeting. See Exhibit 1, p. 95.

66. On January 24, 2017, Mr. Moriwaki commented on the "WWIII Japanese American Internment" public Facebook page to inform me and others of an error published in the *Peninsula Daily News* about a story. See Exhibit 1, pp. 96-98.

67. On January 25, 2017, I commented on Mr. Moriwaki's post above asking Mr. Moriwaki if he was aware of SB 5176 from Senator Hasegawa, which would use the Tenth Amendment authority of Washington to forestall any attempt by President Trump to use the NDAA to indefinitely detain Washingtonians. Mr. Moriwaki responded that although Senator Hasegawa was a friend, he did not know about the bill and offered me advice on a call for action. He stated that he "would rather talk in person" about the topic. I asked Mr. Moriwaki if he thought mobilizing people to support this bill was worthwhile. See Exhibit 1, pp. 92-93.

68. On January 25, 2017, I liked a post Mr. Moriwaki made about Mary Tyler Moore. See Exhibit 1, pp. 100, 101.

69. On January 25, 2017, I rated the Memorial Facebook page 5 out of 5 stars. I later edited my review to reflect my opinion of Mr. Moriwaki's leadership. See Exhibit 1, pp. 102, 103.

70. On January 26, 2017, I commented again in the thread above asking Mr. Moriwaki, as he has considerable time in local politics, if SB 5176 was worth supporting. I noted that many had expressed a concern about President Trump rounding up our Muslim neighbors and so was surprised that I did not see more people getting the word out about SB 5176. See Exhibit 1, pp. 93, 94.

71. On January 27, 2017 I commented again in the thread above asking, "Any updates Clarence Moriwaki? Surely this is something you'd be interested in right?" See Exhibit 1, p. 94.

72. On January 27, 2017, I commented on a post from Mr. Moriwaki that began "So it begins" and then discussed an attack on a Muslim American. I commented by asking a question, "So what begins? You're not suggesting that attacks on Muslims are just beginning, or that bigotry against Muslim Americans is just beginning are you? Surely not." I included with my comment a story of a Muslim American being attacked years prior in Queens. Mr. Moriwaki responded that he was insulted by my question and posted a letter he wrote on behalf of the Memorial that was "signed and unanimously endorsed by the City of Bainbridge Island, Washington and more than 450 elected officials, groups, business, civic and community leaders and citizens." I responded, "…I don't think your response was in proportion to my question." Mr. Moriwaki responded that my "post was a direct call out to me asking for - or more like challenging and demanding – a response." Mr. Moriwaki claimed my question was "offensive" and said that it was not "up to you to determine if I'm offended." I responded that I can only know what Mr. Moriwaki means by his words and my question was asking for clarification on what he meant. I said that I appreciate "the great work you've done" and said it was "truly outstanding work and I want to say thank you for what you have

done." I expressed, "Looking forward to working with you as there is still a great deal more work to be done." See Exhibit 1, pp. 104-112.

73. On January 27, 2017, I liked a photo Mr. Moriwaki posted. See Exhibit 1, pp. 113, 114.

74. On January 29, 2017, I commented on Mr. Moriwaki's post about worries that Muslim Americans today might suffer as Japanese Americans suffered in the 1940s. I commented that my previous comment got deleted from his wall. I asked why he did not share information about SB 5176, which would make it a felony for Washington officials to cooperate with President Trump's federal effort to try to exercise NDAA detention powers, if he was concerned as I was about Muslims being indefinitely detained without due process. I asked if his failure to promote SB 5176 was because he worked for and supported Governor Jay Inslee, and therefore he did not want to get the word out about a bill that would block the NDAA of 2012 that Governor Inslee voted for. I shared a quote from the ACLU executive director and an article from the ACLU about the NDAA. See Exhibit 1, pp. 117-119.

75. On January 30, 2017, I liked a post Mr. Moriwaki posted. See Exhibit 1, pp. 122, 123.

76. On January 30, 2017, I commented on a post from Mr. Moriwaki about the "early warning signs of fascism" and his comment "This is not my America." I commented asking where the list came from. Mr. Moriwaki told me to do a web search and that it was a famous study. After reading about it I critiqued the list and pointed out that it is attributed to a doctor who was not a doctor, but rather a corporate executive. I then shared a link to Naomi Wolf's video "End of America" on the topic of fascism. See Exhibit 1, pp. 124-127.

77. On January 31, 2017, I commented on a post from Mr. Moriwaki about the "hypocrisy" of Attorney General nominee Jeff Sessions. See Exhibit 1, pp. 128, 129.

78. On February 1, 2017, I commented on a post from Mr. Moriwaki about a cleanup effort at the Memorial, stating, "See ya there, ready to work." The Memorial Facebook handle liked my comment. See Exhibit 1, pp. 130-134.

79. On February 4, 2017, I commented on a post from Mr. Moriwaki about him having food and drink with the author of "Defending Our Neighbors" with the comment, "Bought her book a few weeks ago at the Mochi Tsuki festival. Have fun!" See Exhibit 1, pp. 135, 136.

80. On February 4, 2017, I liked a post Mr. Moriwaki posted. See Exhibit 1, pp. 137, 138.

81. On February 4, 2017, I commented on a post Mr. Moriwaki made about Governor Inslee "shaming" President Trump over immigration rules. I stated that Governor Inslee did not have a leg to stand on as he had voted for the NDAA of 2012 giving presidents the ability to have the military secretly arrest any citizen or permanent legal resident without charge or trial, and hold them indefinitely, depriving Governor Inslee of credibility on the Constitution. After my comment gathered two likes from two of Mr. Moriwaki's friends, and after one of his friends remarked to me that it was "nice to see similar views" on Mr. Moriwaki's page, Mr. Moriwaki began deleting my posts and Facebook messaging me as discussed above. This thread was then deleted or made non-public subsequently. See Exhibit 1, pp. 148-169.

82. In addition to my public posts on the Facebook page assigned to Mr. Moriwaki, I posted on the BIJAE memorial page, which Mr. Moriwaki administers for the memorial, infrequently—perhaps five or six times. One of those comments was thanking Norman Vance, a friend of Mr. Moriwaki's, for

posting on the memorial's page his (Mr. Vance's) view that the page was partisan. Norman Vance was told not to post on the memorial's page again sometime after making that post. Due to Mr. Moriwaki sometimes responding to me in threads on his personal page using the BIJAE memorial "handle," I understand him to be the person who creates and controls the content of the BIJAE memorial on Facebook.

Other Online, Public Communications About Clarence Moriwaki

83. On February 5, 2017, I posted on the "Bainbridge Island Open Community" closed group page explaining to fellow Islanders my concern about Mr. Moriwaki as a president or board member of our memorial and providing insight into experiences that helped form my concern about Fifth Amendment due process violations—notably, the order I refused, discussed above. I posted that my conversation about the matter would be forthcoming. My post was "liked" by nine people, and one commenter called it well written and a few thanked me for bringing these issues to their attention. In the ensuing conversation, I mentioned that "my intent is not to demonize Clarence" and "I do not think him all bad or a demon and I recognize that many people from across the political spectrum have real respect for him." In another comment, I acknowledged that "I'm sure that many feel as you do and many people have great affection for Clarence. In my view, Clarence is a public figure with a history of running for political office, being in political office, or working for those in public office and he is a public face of our community representing the issue of indefinite detention here on Bainbridge Island…" See Exhibit 20. This thread was later deleted by a moderator, Wade Houston, who is friends with Mr. Moriwaki.

84. On February 5, 2017, I created the public Facebook page "Not Clarence Moriwaki of Bainbridge Island" with the description, "A neighborly rebuke of Clarence Moriwaki, prominent public face and past president of the Bainbridge Island Japanese American Exclusion Memorial for his support for politicians who made internment legal again...." The page was originally called "Clarence Moriwaki of Bainbridge Island," but the name was subsequently changed to "Not Clarence Moriwaki of Bainbridge Island." See Exhibit 2, pp. 1-2.

85. On February 6, 2017, I posted an introduction to our page and the reason behind it to "discuss serious issues of public interest, and to be challenging and honest." The thread commentary included a comment from Senator Christine Rolfes, a friend of Mr. Moriwaki's, who suggested we change the name of our page. We did, although we did not think our page violated "identity theft laws." See Exhibit 2, pp. 144-197.

86. On February 23, 2017, I posted Mr. Moriwaki's LinkedIn Profile with a discussion of Mr. Moriwaki's lengthy history with public office in one form or fashion. See Exhibit 2, pp. 142, 143.

87. On February 23, 2017, I posted a photo of Mr. Moriwaki with the text, "Clarence Moriwaki Claims 'Let It Not Happen Again'… Yet Vocally Supports Jay Inslee (Who Voted For The 2012 NDAA Which Legalized It Happening Again) & Supports President Obama Who Signed The Bill Into Law And Drew Criticism From the Executive Director of the ACLU For Legalizing Indefinite Detention." See Exhibit 2, pp. 133-141.

88. On February 23, 2017, I posted a video about the NDAA. See Exhibit 2, pp. 131, 132.

89. On February 23, 2017, I posted an ACLU article. See Exhibit 2, pp. 127-130.

90. On February 23, 2017, I posted a photo of Mr. Moriwaki with the text "Clarence Moriwaki Accepts Honor & Has No Shame Despite Vocally Supporting & Even Working For Politicians Who Expressly Made It Legal to Repeat What FDR Did To His Own Family..." See Exhibit 2, pp. 125, 126.

91. On February 23, 2017, I posted a photo of President Obama and Governor Inslee with the text, "Jay Inslee Voted For The NDAA of 2012 Which Gave Presidents The Power to Use the Military to Indefinitely Detain Americans Without Charge or Trial – Obama Signed It Into Law and Defended That Power In Court – If This Is Your View of 'Never Again' Then You're Doing It Wrong…" See Exhibit 2, pp. 123, 124.

92. On February 25, 2017, I posted a link to the SB 5176 Facebook page. See Exhibit 2, p. 122.

93. On February 25, 2017, I posted a photo of James Olsen and Mr. Moriwaki with the text, "Olsen Supports FDR & Moriwaki Supports Obama – Both Run For Office & Both Support Politicians Who Made Indefinite Detention Without Charge or Trial 'Legal'." See Exhibit 2, pp. 115-121.

94. On February 26, 2017, I posted a screen capture from Mr. Moriwaki's public Facebook page showing that he likes the Facebook group, "I love it when I wake up in the morning and Barack Obama is President" along with a quote from the ACLU executive director, "President Obama's action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law." See Exhibit 2, pp. 113, 114.

95. On February 26, 2017, I posted a screen capture of Senator Rolfes' comment on our page referring to our activism as a "vendetta" with the text, "Senator Rolfes Stopped By To Offer A Suggestion For Our Page… Perhaps Stop By And Also Share Any Suggestions You Might Have For A Politically Connected Public Figure?" See Exhibit 2, pp. 110-112.

96. On February 26, 2017, I posted a photo of Mr. Moriwaki with the text "You Know Who Refuses To Support Politicians Who Claim The Power To Indefinitely Detain Citizens and Legal Residents In Military Prison Camps Without Due Process? NOT Clarence Moriwaki…" See Exhibit 2, pp. 104-109.

97. On February 26, 2017, I posted a video from Chris Hedges about the NDAA. See Exhibit 2, pp. 96-103.

98. On February 26, 2017, I shared a link to a Bainbridge Island Review story about Mr. Moriwaki. See Exhibit 2, p. 95.

99. On February 27, 2017, I posted a discussion of SB 5176 and Mr. Moriwaki's decision to not get the word out about the bill. See Exhibit 2, p. 94.

100. On February 27, 2017, I posted an image of President Obama, Governor Inslee, and Mr. Moriwaki with the text "Anybody Else Tired of Public Figures Accepting Praise For Things They Say, While They Do The Opposite?" See Exhibit 2, pp. 67-93.

101. On February 27, 2017, I posted a video of Dr. Cornel West discussing how Dr. Martin Luther King could be taken to jail today under the NDAA, a video of Chris Hedges and other plaintiffs discussing their lawsuit against the NDAA, and a video from Daniel Ellsberg discussing the NDAA as an assault on our Constitution. See Exhibit 2, pp. 55-56, 66.

102. On February 27, 2017, I posted a screen capture of one of Mr. Moriwaki's friends asking others to report our page to Facebook. See Exhibit 2, pp. 57-65.

103. On February 28, 2017, I posted an image of part of one of my Facebook messages with Mr. Moriwaki and implored my neighbors to start living the ideals they professed. See Exhibit 2, pp. 50-54.

104. On February 28, 2017, I posted a photo of Mr. Moriwaki with the text, "When You Invite Clarence Moriwaki To Give His Next Speech About 'Let It Not Happen Again' – Ask Him Why He Supported Politicians Who Made It Legal To Repeat The Camps." The commentary included Mr. Moriwaki's friend, Tim Jones, telling me to "go somewhere peaceful … and put a round through the roof of your mouth." See Exhibit 2, pp. 46-49.

105. On February 28, 2017, I posted a link to a poll I started in 2012 on a military forum, polling how many service members today would obey the order to send Japanese Americans into concentration camps if given the order. See Exhibit 2, pp. 32-45. At the time of the poll, I created the poll to share my view that with the NDAA, we were heading down a similar path to the Japanese-American internment, and that military members should be ready to disobey unlawful orders.

106. On February 28, 2017, I posted a link to our "SB 5176 – Block Indefinite Detention" public Facebook page and a video of U.S. propaganda about the Japanese-American internment. See Exhibit 2, pp. 29-31.

107. On February 28, 2017, I posted a photo of Mr. Moriwaki with the text "The Bainbridge Island Japanese American Exclusion Memorial Says 'Let It Not Happen Again' Clarence Moriwaki, On The Other Hand, Passionately Supported and Defended Two Politicians Who Literally Made It Legal To Happen Again." See Exhibit 2, p. 28.

108. On February 28, 2017, a moderator for the Bainbridge Island Open Community Facebook group, Mr. Moriwaki's friend Houston Wade, banned me from the group, claiming that I posted a link to the "Not Clarence Moriwaki of Bainbridge Island" Facebook page. I did not post such a link to the page and did not reference that Facebook page in the "Bainbridge Island Open Community" closed group. Houston Wade banned me while I was engaged in a discussion about Bainbridge Island electrical power and Puget Sound Energy.

109. On March 1, 2017, on the "Not Clarence Moriwaki of Bainbridge Island" page, I posted a video about how politicians say one thing and do another, and a post about how civil liberty organizations like the NRA fall prey to corruption. See Exhibit 2, pp. 25-27.

110. On March 3, 2017, I posted a comment in the comments section of the *Peninsula Daily News* in response to an article that discussed Mr. Moriwaki. I asked whether Mr. Moriwaki had made any public comments condemning the NDAA of 2012 or condemning President Obama's violation of the Fifth Amendment by assassinating Americans without due process. See Exhibit 1, p. 172.

111. On March 3, 2017, I posted on "Not Clarence Moriwaki of Bainbridge Island" about a comment another person posted in the *Peninsula Daily News* article about Mr. Moriwaki, where the other person brought up the importance of the NDAA. See Exhibit 2, pp. 23, 24.

112. On March 4, 2017, I posted a video based on a *New York Times* best-selling book about the importance of speaking out to avoid fascism. See Exhibit 2, pp. 19, 20.

113. On March 7, 2017, I posted a video about the NDAA. See Exhibit 2, p. 15.

114. On March 7, 2017, I posted to congratulate Facebook for repeatedly upholding free speech by responding to Mr. Moriwaki's requests for people to report the page with the response that our page does not violate community standards. See Exhibit 2, pp. 16-18.

115. On March 10, 2017, I posted a Stanford article about whether pointing out hypocrisy helps to advance civil rights. See Exhibit 2, pp. 2-9.

116. On March 11, 2017, I posted a picture of Fred Korematsu's quote "If you have the feeling that something is wrong, don't be afraid to speak up." See Exhibit 2, p. 10.

117. On March 11, 2017, I posted about Mr. Moriwaki's good work with the memorial, and the importance of symbols, explaining that the importance of symbols demonstrated why Mr. Moriwaki was not a good spokesperson for the Memorial. See Exhibit 2, pp. 11-14.

118. On the night of March 15, 2017, I was served with the temporary protective order, and I made the "Not Clarence Moriwaki of Bainbridge Island" page unpublished so it would no longer be visible. I also made the Facebook group "WWIII Japanese-American Internment" into a closed group that was non-public.

119. Prior to the time that I made the "Not Clarence Moriwaki of Bainbridge Island" page unpublished, Mr. Moriwaki and his friends repeatedly reported the page to Facebook. Facebook's community standards prohibit, among other things, threats and bullying and harassment, including content that purposefully targets private individuals with the intention of degrading or shaming them. *See* Exhibit 4. Facebook repeatedly determined that my page and posts did not violate those community standards.

120. I support the Second Amendment rights of all Americans to keep and bear arms, and sometimes post on those topics. In light of that constitutional guarantee, and on policy grounds, I disagree with most gun control measures. I am not certain what qualifies activism on these measures as "provocative," in Mr. Moriwaki's view, *see* Pet. Supp. at 1, 13, but I do not write "bellicose, rabble-rousing calls to arm and the use of weapons," Pet. Supp. at 13, nor advocate the "unlimited use" of firearms, Pet. Supp. at 1. Mr. Moriwaki submits excerpts from a post I made in the wake of the Orlando nightclub shooting and the renewed discussion of gun control that resulted. *See* Pet. Supp. at 13, 43. In that post, I stated, as the opening to a longer post, "Those afraid of tyranny of government, or tyranny of a lunatic in a public place, all have the same remedy. Arm yourself and protect yourself!" I was connecting the modern-day threat to the wisdom of the founding generation to protect the right to bear arms. I believe that people are safer from mass shootings if they arm themselves, which was the point I was making—in support of self-defense, not the "unlimited use" of firearms (Pet. Supp. at 1), whatever that means. And, in response to a court decision upholding Connecticut and New York laws newly passed to prohibit the possession of semi-automatic rifles, I stated, in the context of a more than 1800-word post discussing the decision and its context within a country where the President claimed the power to indefinitely detain and kill American citizens based on the Executive Branch's decision alone, without due process, that the "effort of government to disarm Americans is real." Pet. Supp. at 43. A new law making unlawful arms that used to be lawful is, in fact, disarmament, and I think judges who uphold such laws are ignoring the plain text and meaning of

the Second Amendment. Mr. Moriwaki evidently supports such disarmament, but only 36% of Americans support a ban on semi-automatic rifles in an October 2016 Gallup poll.

121. The fact that I share the views of the majority of Americans on this issue hardly makes me "bellicose" or "rabble-rousing." I have shared memes created by gun rights advocates that make salient points about gun rights or gun control in interesting ways that garner attention to the issue, including, for example, the meme describing Martin Luther King, Jr. as a gun owner who was on a watch list, *see* Pet. Supp. at 48, which is a true but unusual description. These sorts of memes are shared by millions of people and are effective at raising awareness. And I have praised states that allow permit-less carry of firearms (open or concealed), see Pet. at 13. At least 15 states have some form of permit-less carry, including Washington, so this is hardly a fringe view. Contrary to Mr. Moriwaki's assertions, Pet. Supp. at 1, 13. I have never advocated for the use of firearms or violence to overthrow government or for any purpose other than self-defense. Indeed, I have often advocated against such violence, and particularly against violence against American citizens. For example, I have written posts criticizing members of the military who make comments about using violence against American protesters or other Americans whose speech they disagree with, and discussed my pleasure that I heard no discussion of violence at the first Peaceful Streets Project Police Accountability Summit (prior to my years-later break with the group). See Exhibit 15 (blog posts). The posts submitted by Mr. Moriwaki do not reflect a "call to arms," as Mr. Moriwaki asserts, Pet. Supp. at 13. They are simply examples of my advocacy for gun rights and descriptions of my opinions regarding the Second Amendment. Such speech presents no threat to Mr. Moriwaki, nor anyone else. Indeed, Mr. Moriwaki cannot, and does not, point to a single statement I've ever made that threatened him with violence, because there are none and I pose no such threat. Indeed, to my knowledge, the only mention of violence throughout our entire encounter was Mr. Moriwaki's friend, Tim Jones, posting to me that I should "go somewhere peaceful … and put a round through the roof of [my] mouth," a post shared on Mr. Moriwaki's Facebook page that Mr. Moriwaki publicly liked, as documented in a screen capture by my attorney. Exhibit 17. I risked my career, and my liberty, to defend the rights of American citizens to be free of violence, even government-approved violence. I would never engage, and have never engaged, in unlawful violence. If Mr. Moriwaki is afraid of me to the point where he seeks a surrender of weapons simply because I have written posts supportive of the Second Amendment, then he must be in fear of millions of Americans.

122. Following the April hearing, the stay-away distance under the temporary order was increased to 300 feet. This permitted me to be inside my home, which I own outright. But it prohibits me from using the majority of the common areas owned by me as a member of the condo association, including all of the parking spaces or other community features like the clubhouse and pool. It also prohibits me from using my easement that provides easy access to Winslow Way and downtown Winslow, which was one of the primary features that attracted me to purchasing this residence. Exhibit 16. I am also barred from using the blocks of Winslow Way or Madison Avenue—driving or on the sidewalk—adjacent to the north and west side of the Winslow Way and Madison Avenue intersection. *Id.* This cuts me off from the primary route to downtown and the ferry. *Id.* Moreover, I do not think there is any way to avoid inadvertently coming within 300 feet of Mr. Moriwaki at some point if I were to travel in and around those parts of downtown Winslow that remain open to me. Mr. Moriwaki claimed to the police and the Court that I physically stalked him based on a single Facebook post that plainly stated, on its face, that it was continuing his analogy, even though he knew at the time that the post discussing talking to guests of his party was purely metaphorical. Given that false claim, I have a reasonable concern that Mr. Moriwaki would characterize any viewing of me in downtown Winslow or on the ferry, at any distance, as not inadvertent, and a violation of any protective order, even though any such proximity would be nothing but a matter of chance and the nature of downtown Winslow. I have no desire to interact with Mr. Moriwaki, in-person or online. I have not interacted with him online since February 5, more than five weeks before I was served

with the temporary protective order, and have not interacted with him in person since the Memorial clean-up event on February 19, more than three weeks before I was served with the order. Given the difficulty of using my residence without parking, as well as the likelihood that walking anywhere in downtown Winslow would result at some point in inadvertently coming within 300 feet of Mr. Moriwaki and him claiming a violation, my wife and I withdrew from full course loads at Central Seattle College and vacated my residence when I was served with the protective order. I have not spent the night there in the four months since.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at BREMERTON, Washington on July 9, 2017.

Richard L. Rynearson III
Signature of Declarant

Richard Lee Rynearson, III
Print or Type Name

IN THE MUNICIPAL COURT OF THE CITY OF BELLINGHAM
WHATCOM COUNTY, WASHINGTON

CITY OF BELLINGHAM,	)	CB 93720
	)	
Plaintiff	)	
	)	
v.	)	
	)	
KAMI RAE DODD,	)	**RULING RE:**
	)	**MOTION TO DISMISS**
Defendant.	)	

The Defendant, Kami Rae Dodd, is charged with two counts of Cyberstalking in violation of RCW 9.61.260. The Defendant moved to dismiss, alleging that (1) RCW 9.61.260 does not apply to electronic communications posted publicly, (2) RCW 9.61.260 is facially overbroad, and (3) RCW 9.61.260 is void for vagueness.

FACTUAL AND PROCEDURAL SUMMARY

RCW 9.61.260 provides:

Cyberstalking.

(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

(b) Anonymously or repeatedly whether or not conversation occurs; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.

(2) Cyberstalking is a gross misdemeanor, except as provided in subsection (3) of this section.

(3) Cyberstalking is a class C felony if either of the following applies:

(a) The perpetrator has previously been convicted of the crime of harassment, as defined in RCW 9A.46.060, with the same victim or a member of the victim's family or household or any person specifically named in a no-contact order or no-harassment order in this or any other state; or

(b) The perpetrator engages in the behavior prohibited under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.
(5) For purposes of this section, "electronic communication" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. "Electronic communication" includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

The charging document in this case is a citation. The citation does not specify which subsection of RCW 9.61.260(1) applies to this case. However, it is clear that the Court is not considering challenges to RCW 9.61.260(1)(c) because none of the alleged criminal behavior included threats. The City of Bellingham ("City") summarized the alleged unlawful behavior as follows:

> On or about October 16, 2015, the Defendant, Kami Dodd, allegedly posted two ads on Craigslist, a website that provides local classifieds for jobs, housing, things for sale, personals, service, etc. The first posting shows a picture of the alleged victim, [redacted], with her little sister (the face of her sister is covered) and the ad reads: "Beware of this girl. She has chlamydia and is giving it to everyone in whatcom county. The health department has been notified that she has it and she still denies it. The girl is dirty." In the second ad the Defendant allegedly posted a nude image of Ms. [redacted] from the waist up. The ad reads, "My name is [redacted]. Anyone want to hang out?" Ms. [redacted]s personal phone number and home address are superimposed on the image. Ms. [redacted] was very frightened as the second post resulted in numerous phone calls and text messages from strange men seeking sex. Several strange men had come to her home as well. Craigslist subsequently confirmed, through a search warrant, that the two ads originated from an email address belonging to the Defendant.

Memorandum in Opposition To Defendant's Motion to Dismiss (hereinafter "Memorandum in Opposition") at 1-2.

The Defendant moved to dismiss on three alternative grounds which she later conceded at oral argument may be inconsistent with each other. First, the Defendant asserted that RCW 9.61.260 does not apply to "communication posted publicly." Defense Motion to Dismiss (hereinafter "Defense Motion") at 2-4. Second, the Defendant claimed that RCW 9.61.260 is "facially overbroad." Defense Motion at 4-7. Third, the Defendant argued that RCW 9.61.260 is "Void for Vagueness." Finally, although not an independent basis for relief, the defense sought to distinguish the cyberstalking statute, RCW 9.61.260, from the telephone harassment statute, RCW 9.61.230, such that prior case law upholding the constitutionality of the telephone harassment statute cannot be applied to the Defendant's challenge to the constitutionality of the cyberstalking statute.

After initial verbal arguments, the Court requested additional briefing. The defense then argued that Craigslist is a "public forum," citing a number of cases from California related to that state's "anti-SLAPP" laws. The defense argued that the cyberstalking statute does not meet the exacting test for restrictions on speech in a public forum. The defense, at least initially, argued that the Court should sever those portions of the cyberstalking statute that include defendant's behavior, including "indecent" images and "anonymous" communications. Later, citing a concurring opinion in a new Washington Supreme Court case, City of Lakewood v. Willis, the defense argued that severance is not available in a facial overbreadth challenge. See generally, "Defense Motion to Dismiss-Supplimental" (sic) and "Defense Motion to Dismiss-Second Supplimental." (sic)

The City argued that the statute is constitutional and severance is unnecessary because the cyberstalking statute regulates conduct implicating speech, not speech itself. Further, the type of speech involved, the City argued, should receive little protection because it contains "indecent" and other less-protected speech only used with the intent to harass, torment and embarrass. Finally, the City argued for common definitions of "lewd" and "obscene" speech rather than those cited by the defense from another statute, RCW 7.48A. See generally Memorandum in Opposition.

ANALYSIS

A. CRAIGSLIST IS A "THIRD PARTY"

A potentially dispositive issue raised by the Defendant was her claim that Craigslist, the public website where the Defendant allegedly posted information about the alleged victim, is not a "third party." The defense correctly pointed out that statutes are interpreted first according to their plain meaning, and, when a term such as "third party" is undefined in a statute, as is the case in RCW 9.61.260, the plain meaning (ordinary definition) of the term applies. Defense Motion at 3. The City agreed with the defense's recitation of the statutory construction rules, noting that, in the absence of ambiguity, the plain language controls. Memorandum in Opposition at 3 (citing State v. Evans, 177 Wn.2d 186, 192 (2013)). The Court agrees with both parties' understanding of the statutory construction rules.

Both parties, albeit citing different authorities, also agreed on the definition of a "third party." The City, citing a dictionary, and the defense, citing Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274 (2013), defined the term as a "person other than the principals." Defense Motion at 3, Memorandum in Opposition at 3.

While presenting a clear definition, the defense next argued that a third party must be a "specific person or party, not to the public generally." This argument lacks any logical or legal foundation. Craigslist is a specific "party," or corporate "person." The fact that Craigslist's website is observable to the general public does not make it a principal (perpetrator or victim), it just means that there are many potential third parties in addition to Craigslist who may receive the information via Craigslist. There is nothing in the definition which says a third party must be singular, private or "specific." To the contrary, the definition suggests that there are often many third parties. The internet is a means by which

information may be rapidly disseminated to nearly unlimited numbers of people by electronic means. With the exception of the perpetrator and victim, every person is a potential "third party." In summary, unless an electronic communication were sent only to the alleged victim, the communication has been sent to a "third party." Therefore, there is no grounds to dismiss charges based upon this untenably narrow interpretation of the statute.

B. **CRAIGSLIST IS A "PUBLIC FORUM"**

A "critical" "threshold inquiry" in a case involving a First Amendment challenge to an ordinance is whether the ordinance regulates speech in a "public forum." City of Seattle v. Huff, 111 Wn.2d 923, 926 (1989) (citations omitted). Huff, 111 Wn.2d at 927 (emphasis supplied herein, parallel citations omitted) explained the test in a case involving telephone harassment:

> Public forums are (1) those places which "by long tradition or by government fiat have been devoted to assembly and debate", Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45...(1983), or (2) channels of communication used by the public at large for assembly and speech, used by certain speakers, or the discussion of certain topics. Cornelius, 473 U.S. at 802....Although the telephone may be used by the public at large, the private nature of discussion over the telephone precludes it from being a public forum for open debate.

Unlike the telephone harassment statute, the cyberstalking statute regulates a wide variety of communication methods, including television ("wire" or "optical cable"), "radio," "electronic mail." "internet-based communications," and text-messaging. RCW 9.61.260(5). The statute is broad enough to regulate both traditional forms of communication such as radio to more recent inventions such as emails. These forms of communication are often broadcast or available to anyone with a television, radio, smartphone or computer with internet access. The statute regulates both private and public communications, as previously discussed. The statute is written broadly enough to include forms of communication ranging from a radio talk show to comments on a blog or postings on Craigslist. Many of the forms of communication regulated by RCW 9.61.260 are thus "channels of communication used by the public at large for assembly and speech, used by certain speakers, or the discussion of certain topics," better known as public forums. Huff, 111 Wn.2d at 927.

While this is a facial challenge to the statute, the specific conduct alleged in this case also involves a public forum. One of the many internet websites regulated by the statute is Craigslist. Craigslist is an internet site used primarily by the public to buy and sell goods, what many would consider commercial speech. However, a brief observation of the site demonstrates that it also provides a "Discussion Forums" section with topics listed from "apple" to "yoga," and a wide variety of subjects (including "haiku" and "politics") in between. It has a "Personals" section for those posting information in order to seek all manner of companionship and communication. While the Court is unfamiliar with many of the specific events related to the Defendant's alleged posting of materials on Craigslist,

including which section contained the posts, it is clear that posts to the site are governed by the cyberstalking statute and that the site is a public forum. As a forum that provides a variety of services, both of a commercial and personal nature, it is comparable to a traditional newspaper, which includes classifieds including personal advertisements, news, and opinion. Given that many newspapers, including the Bellingham Herald, are now available online, the cyberstalking statute would also regulate online newspapers and readers' online comments to those newspapers.

As the defense discussed in detail, a number of recent decisions have found that Craigslist and other similar sites are public forums. In Summit Bank v. Rogers, 206 Cal.App.4th 669 (2012), a California court found that defamatory messages posted on the "rants and raves" section of Craigslist implicated the "public forum" definition of that state's "anti-SLAPP" statute. A federal court, construing the same statute, found a real estate investment blog operated by a private person but open to the public free of charge to be a "public forum." Piping Rock Partners v. David Lerner Assoc., 946 F.Supp.2d 957 (2013); see also ComputerXpress v. Jackson, 93 Cal.App.4th 993 (2001). While the various courts were focused upon a statute rather than the constitutional term of art "public forum," it is clear that a website available to the public at large to post their views, thoughts, and advertisements meets the definition of both the California law and the constitutional term. Craigslist is one such site.[1]

C. OVERBREADTH CHALLENGE

Defendant's second argument was that "The cyberstalking statute is overbroad, in that it criminalizes several types of protected speech, specifically: speech intended to embarrass, anonymous speech, indecent speech, and repeated speech." Defense Motion at 3. The City responded initially by arguing that, like the telephone harassment statute, the cyberstalking statute "regulates conduct implicating speech, not speech itself." Memorandum in Opposition at 7 (citing State v. Dyson, 74 Wn.App. 237, 244 (1994)).

1. STANDARDS FOR AN "OVERBREADTH" CHALLENGE

The First Amendment to the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S. v. Stevens, 559 U.S. 460, 468 (2010) (citation omitted).

[1] The potential scope of the cyberstalking statute is immense. Not only does it apply to virtually all methods of electronic communication made in Washington, except telephones, by its plain terms it applies to events where an electronic communication is "received" in this State, even if both the defendant and victim are located elsewhere. A blogger in Russia, a presidential candidate "tweeting" in Ohio, or a person posting an online comment from the Philippines could be charged if their communications met the requirements of RCW 9.61.260(1), so long as their comments or blog was "received" by a "third party" in Washington. RCW 9.61.260(4). Given the widespread availability of the internet in Washington, a tremendous amount of communication could be subject to this law, even by those who are entirely unfamiliar with this State.

A statute is facially overbroad in violation of the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Stevens, 559 U.S. at 473 (citation omitted). "The concern with an overbroad statute stems...from the possibility that the threat of its application may deter others from engaging in otherwise protected expression." Dyson, 74 Wn.App. at 242 (citation omitted, ellipse in Dyson). The "key determination" in an overbreadth analysis is "whether the enactment reaches a substantial amount of constitutionally protected conduct." Id. (citing Huff, Supra). In this determination, "[c]riminal statutes must be scrutinized with particular care...those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." City of Houston, TX v. Hill, 482 U.S. 451, 459 (1987) (citations omitted, holding that ordinance making it unlawful to interrupt police officers was unconstitutionally overbroad). An overbreadth challenge is facial, and may prevail even if the statute could constitutionally be applied to a litigant. State v. Motherwell, 114 Wn.2d 353, 370-71 (1990).

2. CASES INVOLVING TELEPHONE HARRASSMENT ARE NOT DISPOSITIVE BECAUSE A TELEPHONE CALL IS NOT A PUBLIC FORUM

The City's primary argument regarding the overbreadth challenge was that the cyberstalking law, like the telephone harassment statute, only indirectly impacts speech. Memorandum in Opposition at 6-7 (citing Dyson and other cases). Dyson upheld the telephone harassment statute, RCW 9.61.230, against an overbreadth challenge. However, the test applied in Dyson is one for a "nonpublic forum," not a public forum. Dyson, 74 Wn.App. at 242 (citations omitted, emphasis supplied) explained:

> When analyzing a statute for overbreadth, the key determination is "whether the enactment reaches a substantial amount of constitutionally protected conduct."...However, even if the statute does proscribe a substantial amount of protected conduct, speech in nonpublic forums, including speech over the telephone, may be restricted if it is found that " 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'

As the defense observed, the telephone harassment law governs private communications between two parties, not communications to the public:

> Because telephone communication occurs in a nonpublic forum, it receives substantially less protection than expression in a public forum...Telephone communication intrudes into normally private preserves such as the home, thereby invoking privacy considerations. In contrast to communication broadcast on the television and radio, which an unwilling recipient can choose to ignore, "[a] ringing telephone is an imperative which ... must be obeyed with a prompt answer."...Typically, the recipient of a telephone call does not know who is calling, and "[o]nce the telephone has been answered, the victim is at the mercy of the caller until the call can be terminated by hanging up."

State v. Alexander, 76 Wn.App. 830, 836 (1995) (citations omitted, ellipses within quotations in Alexander, emphasis supplied herein); Sable Communications v. FCC, 492 U.S. 115, 127-28 (1989).

Electronic communication takes many forms. Some of these forms, such as emails between two individuals, are logically analogous to telephone calls, and could be deemed a nonpublic forum. Ordinarily, access to one's emails requires a password and emails are thus not open to the public. An email recipient, like a telephone call recipient, is likely to open an email and view the hostile content, but can choose to ignore or not seek out information posted to the public in general. See Id.

However, the cyberstalking law is distinctly different from the telephone harassment statute because it regulates communications to any "third party," not just the victim. The third party could be a single individual receiving an email, a website like Craigslist, an internet user "surfing the web," or a radio listener. Thus, an email to a third party with the requisite intent and content about a victim would be a crime, even though the intended victim may never even know about the email, and, unlike the telephone harassment law, the communication was never directed to the victim's attention. A radio broadcast or a post on Craigslist that is accessible by the public at large would both be regulated by the cyberstalking law regardless of the victim's awareness of the communication. This law targets objectionable content of speech, at least in RCW 9.61.260(1)(a) and (c), in contrast to the telephone harassment law that focusses on the act of harassment and only indirectly effects speech.

The courts' focus in an overbreadth challenge is not upon the factual details of the cases before them. Similarly, the fact that many of the communications regulated could arguably be a non-public forum and thus trigger a less strenuous constitutional analysis is not dispositive if the statute also reaches a substantial number of cases where a stricter standard of scrutiny applies. Thus, the fact that private communications between individuals, analogous to telephone calls, are governed by the cyberstalking law, is not dispositive. Instead, the Court must examine the entire range of communications governed by the statute, including tweets, emails, blogs, radio broadcasts, posts on a wide variety of internet sites, comments on online media, and so on. City of Houston, 482 U.S. at 459. It is clear that much, and perhaps most, of the communications governed by the cyberstalking law involves a public forum, not just private communications.

It is important to understand that Dyson and similar cases are non-public forum cases. Had the cyberstalking statute been confined to private two-party communication between perpetrator and victim, the analysis found in Dyson could apply and the same result might occur as in the telephone cases. The addition of the "third party" provision of that law, however, means that much larger numbers of potential recipients of the information conveyed by the sender and much larger numbers of messages could be subject to regulation under the statute. If a statute prevents one person from calling another, it stops one phone call and possibly conversation thereafter. If a statute stops a blogger from posting a message

that would have been viewed by millions, it prevents speech to millions and is hard to consider such restrictions on communications to be merely incidental.

3. STANDARDS FOR REGULATING SPEECH IN A PUBLIC FORUM

The standards for laws governing a public forum are strongly weighted in favor of the freedom of speech:

> [T]he extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985)(emphasis supplied). Given that criminal statutes require particular scrutiny, "this standard is very high and speech will be protected...unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." City of Houston v. Hill, 482 U.S. 451, 461 (1987).

4. A SUBSTANTIAL NUMBER OF THE CYBERSTALKING STATUTE'S POTENTIAL APPLICATIONS ARE UNCONSTITUTIONAL

There are undoubtedly applications of the cyberstalking statute that could withstand constitutional scrutiny. The same privacy interests discussed in the telephone harassment cases apply to some of the potential applications of the cyberstalking statute, including charges similar to that filed in the case at bar. However, this is a facial challenge to a statute whose potential applications greatly exceed those of the telephone harassment law. Where the higher standard protecting the freedom of speech in a public forum applies, the Court cannot fulfill its constitutional duty by analyzing only those facts and precedents that uphold the statute's constitutional applications. "An overbreadth challenge is facial, and will prevail even if the statute could constitutionally be applied to a litigant." City of Bellevue v. Lorang, 140 Wn.2d 19, 26 (2000) (citation omitted).

The privacy interests protected by the cyberstalking statute are significant, and the Court is mindful of the terrible psychological harm that can be done by online bullies, trolls, and other nefarious individuals whose conduct could be addressed by the statute. However, the statute goes far beyond addressing only those cases. Further, the fact that speech may embarrass or harm does not render it unprotected. As the defense noted, "[C]itizens must tolerate insulting, and even outrageous speech, in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988). Accordingly, "speech does not lose its protected character...simply because it may embarrass others." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

One aspect of the statute, challenged by the Defendant, that is particularly troubling is found in RCW 9.61.260(1)(b), which prohibits a speaker with the required mens rea from

making electronic communications "anonymously or repeatedly whether or not conversation occurs." An electronic communication that doesn't violate RCW 9.61.260(1)(a) or RCW 9.61.260(1)(c) may be rendered criminal merely because it is repeated or made anonymously. An intentionally embarrassing online comment is legal if made once but illegal if made twice, regardless of whether the comment even reaches the victim. The same comment would be legal if the author acknowledges his or her identity but not if the comment is made anonymously, again without regard to the victim's receipt of the comment or the actual content of the message. It is difficult to imagine what compelling state interest is served by these distinctions.

As the defense observed, anonymous speech is protected by the First Amendment. Talley v. California, 362 U.S. 60 (1960)(striking down a ban on anonymous leafleting). The Supreme Court recognized that the decision to remain anonymous itself is an aspect of the freedom of speech:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Talley v. California, 362 U.S., at 64, 80 S.Ct. at 538. Great works of literature have frequently been produced by authors writing under assumed names...Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry...Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 341-42 (1995) (footnotes omitted). This right to publish anonymously "extends beyond the literary realm" and protects persecuted groups who might otherwise be unable to communicate their ideas at all. Id. at 342.

While the defense was unable to identify a specific case related to repetitive speech, the City provided no authority establishing that prohibitions on repetitive speech are lawful. Repeated speech is not among the "classes of speech not entitled to first amendment protection" discussed by the City. See Memorandum in Opposition at 7 (citing Huff). Repeated phone calls intended to harass an individual are conduct which indirectly involve speech, but repeated messages online, on the radio, or to the general public clearly involve speech. Speech which is repeated in multiple forums, on multiple types of media, or even multiple times in the same place should not lose its constitutional protection just because it is repeated. The internet is full of "tweets," "retweets" and other reproductions of original content that allow readers to repeatedly share their comments, opinions, jokes, videos, and

other materials from others with their friends, family or others. Radio and television programs are often repeated in reruns and/or made available on publicly-viewable websites to encourage multiple viewers to view the content. The fact that people may speak repeatedly with the intent to embarrass someone, whether a personal enemy or perhaps a distant politician whose candidacy they oppose, does not render such speech less worthy of protection. If anything, prohibiting repeated speech increases the burden on freedom of expression because more speech is restricted than a single comment. A whole community's right to make and receive communications is burdened, not just the communicator's.

The defense challenged the regulation of "indecent" speech as well. Defense Motion at 6. The defense conceded that "obscene" speech may be regulated, but noted that "obscene" speech is more broadly defined and "sexual expression which is indecent but not obscene is protected by the first amendment." Sable Communications, 492 U.S. at 126. RCW 9.61.260(1)(a) regulates any "indecent" "words, images or language" so long as the communication is electronic and the communicator has the requisite mens rea. While the City might be able to establish that one of the Defendant's alleged posts is "obscene," in this facial challenge the legislation must survive challenges to regulations of both indecent speech and obscene speech. See Lorang, 140 Wn.2d at 26. In a public forum analysis, unlike the telephone cases, such broad regulation of protected indecent speech clearly offends the First Amendment. See Sable Communications, Supra.

Under the standard for a public forum, the Court must also address whether the law is narrowly tailored to protect the government's interests. Cornelius, 473 U.S. at 800. One aspect of the statute that is troubling is its lack of a strong nexus requirement. The State of Washington has an interest in protecting its citizens from harmful speech and protecting their privacy. However, the statute reaches well beyond legitimate state interests because it applies whenever the communication was made or received in Washington. RCW 9.61.260(4). The victim and perpetrator need not be residents of Washington so long as somebody in Washington, including third parties, makes or receives the communication in this state. Id. However, it is hard to discern any state interest in preventing people in this or other states from embarrassing public figures or fellow citizens far from the Evergreen State.

This criminal statute contains no provisions narrowing the statute to a "clear and present danger" of a "serious public evil." See Hill, 482 U.S. at 461. Instead, the application of the statute regulating speech turns upon the intent of the communicator and criminalizes, depending upon the speaker's intent, broad categories of protected speech, including indecent, repetitive, and anonymous speech. While many cases of serious harm are addressed by the statute, such as the threats provision in RCW 9.61.260(1)(c), the statute is not narrowly tailored to address those concerns. Further, the State already prohibits threats in its harassment statute, RCW 9A.46.020, so even the need for the RCW 9.61.260(1)(c) is unclear.

The City's efforts to defend the cyberstalking statute are unpersuasive. As discussed above, regulation of communication to third parties in a traditional public forum is vastly different from regulation of harassing private telephone calls to victims. The City's arguments assumed that the cyberstalking statute is analogous to the telephone harassment

cases, where there was no public forum and no regulation of communications to the public at large. The City correctly noted that the test for regulation of protected speech depends upon whether it effects a public forum or not. Memorandum in Opposition at 6. However, having concluded that the cyberstalking statute regulates speech in a public forum, the Court must find that City's suggested rational-basis test and the deferential standards found in Dyson and similar cases are not applicable in this facial challenge to the statute.

While many applications of the cyberstalking statute are constitutionally defensible, the statute casts a broad net over both protected and unprotected speech. Regulation of both public and private electronic communications, not just to victims but also to any "third party," goes far beyond the telephone harassment statute. This statute regulates speech intended to embarrass, but embarrassment alone is not sufficient to justify regulating protected speech. It protects legitimate interests of Washington residents' privacy, but also exceeds those interests by applying to individuals beyond the State's borders. It regulates anonymous and repetitive speech to third parties without any justification. Finally, the statute is not narrowly drawn to protect the government's legitimate interests.

In summary, the cyberstalking statute includes a substantial number of potential applications which are not necessary to serve compelling state interests, including regulation of speech intended to embarrass as well as indecent, repetitive and anonymous speech, and it is not narrowly tailored to achieve those interests because it applies to third party communications and regulates conduct largely unrelated to the State of Washington. It is a criminal statute that goes far beyond what is required to protect society from a "clear and present danger" that presents a "serious substantial evil." The cyberstalking statute is, in other words, overbroad.

5. THE COURT CANNOT SEVER UNCONSTITUTIONAL PROVISIONS OF THE CYBERSTALKING STATUTE TO RENDER IT CONSTITUTIONAL.

Earlier state appellate cases such as State v. Dyson, 74 Wn.App. 237, 242 (1994) (citations omitted, emphasis supplied) sometimes include a severance prong in their recitations of the test for facial overbreadth in a First Amendment context:

> In the First Amendment context, a statute is void as overbroad if it sweeps constitutionally protected free speech activities within its prohibitions and no means exist by which to sever its unconstitutional applications.

Under this test, the courts would be required to sever the potential applications of a law where possible, and thus transform an otherwise overbroad statute into one that survives constitutional scrutiny. This Court was initially inclined to consider possible severance in order to render the statute constitutional, which even the defense recommended ab initio. However, the defense later argued that very recent case law indicates that severance is no longer permitted when the courts are faced with an overbreadth challenge. Defendant's Motion to Dismiss-Second Supplimental (sic).

The defense cited the concurring opinion of Justice Stephens in City of Lakewood v. Willis, __ Wn.2d __, 375 P.3d 1056 (July 21, 2016), which was decided while this Motion was pending. Justice Stephens concurred in the majority's decision that the Lakewood anti-begging ordinance was facially overbroad. His concurrence, joined by Justice Fairhurst, reasoned that severance was inappropriate in the context of a First Amendment challenge alleging that a law was overbroad:

> Because a facial overbreadth challenge under the First Amendment to the federal constitution and article I, section 5 of the Washington State Constitution is primarily concerned with the chilling effect of sweeping speech restrictions, we may not "sever" portions of statutes or ordinances prior to considering whether they make "'unlawful a substantial amount of constitutionally protected conduct ... even if they also have legitimate application.'" City of Seattle v. Huff, 111 Wn.2d 923, 295...(1989) (quoting City of Houston v. Hill, 482 U.S. 451, 459...(1987); see also Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (stating test is whether overbreadth is real and substantial in relation to law's plainly legitimate sweep); see generally David H. Gans, Strategic Facial Challenges, 85 B.U.L. Rev. 133, 1342-45 (2005)...Indeed, restricting our analysis of a facial overbreadth challenge to the "face" of one or two subsections of an ordinance effectively rewrites the ordinance, treating its subsections as if they were separate enactments. Moreover, it fundamentally changes the analysis of the law's chilling effect in relation to its permissible reach by foreclosing consideration of the full sweep of the law. Many overbroad speech restrictions might very well elude constitutional scrutiny based on the charging authority's decision to "let go" of particularly problematic subsections when challenged. I would analyze Willis's First Amendment challenge in relation to the facial overbreadth of LMC 9A.04.020A as written.

Willis, 375 P.3d at 1064-65 (Stephens, J., concurring, parallel citations and footnotes omitted herein).

While Justice Stephens' opinion is only considered persuasive and not binding because it is not a majority opinion, the majority decision in Willis at least implies that severance is inappropriate in the context of a facial challenge. The Willis Court criticized the lower courts' statutory construction that confined the ordinance's applicability to areas which were not a traditional public forum, and thus triggered a more deferential review. Willis, 375 P.3d at 1060 (citing United States v. Stevens, 559 U.S. 460, 481 (2010)), noted that while "the court may construe an ambiguous law so as to avoid a constitutional infirmity...separation of powers principles bar the court from rewriting the law's plain terms." Willis, 375 P.3d at 1060 (quoting Bigelow v. Virginia, 421 U.S. 809, 815 (1975)) also reasoned that in a facial challenge a defendant's standing is not dependent upon whether his own conduct was constitutionally prohibited, and therefore "we may not dispose of Willis' First Amendment challenge solely on the ground that 'his own conduct could [have been] regulated by a statute drawn with the requisite narrow specificity.'" Not only did Willis not explore possible severance of objectionable applications of the Lakewood ordinance, it

criticized lower courts that construed the ordinance to avoid a finding that the ordinance was facially overbroad.

One federal case cited in Willis, United State v. Stevens, 559 U.S. 460 (2010), indicated that courts should not construe statutes to avoid a finding that they were unconstitutionally overbroad. In Stevens, 130 S.Ct. at 1591-92 (citations omitted in ellipses), the U.S. Supreme Court declined to use statutory construction to render an unconstitutionally overbroad statute (regulating commercial depictions of animal cruelty) into a constitutional statute, citing separation of powers concerns:

> Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts."...."[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction."....We " 'will not rewrite a ... law to conform it to constitutional requirements,'...for doing so would constitute a " serious invasion of the legislative domain,"...and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place,"...To read [Sect.] 48 as the Government desires requires rewriting, not just reinterpretation.

Thus, both state and federal cases appear to reject the courts' practice of shielding facially overbroad statutes and ordinances from findings that they are overbroad through means of statutory construction, such as severance. After reviewing both state and federal cases, this Court finds that severance is no longer permitted in such cases.

Even if severance was somehow permitted, it is difficult to see how the Court could render the cyberstalking statute constitutional through severance. The most glaring concerns with the statute are that, unlike the telephone harassment law, it applies to public communications and to those made to a "third party." If the Court were to try to save this statute by severance, the most logical place to start would be to remove those provisions. Restricting the cyberstalking law to two-party private communications, such as emails, would greatly reduce the number of unconstitutional applications of the law, but it would also require dismissal of both charges because, as discussed above, Craigslist is a third party. Other changes would likely be necessary in order to ensure that the law does not violate the First Amendment, but the Court need not consider those changes here. As the Supreme Court of the United States essentially observed in Stephens, 130 S.Ct. at 1591-92, it is the legislative branch's duty to write constitutional laws, and the courts should not intrude upon that important responsibility.

D. VAGUENESS CHALLENGE

Having determined that the cyberstalking statute is unconstitutionally overbroad in violation of the First Amendment, the Court need not determine whether it is also "void for vagueness." The Court will not decide this moot issue herein.

CONCLUSION

The charges in this case are quite serious, and nothing in the Court's decision should be misunderstood as denying, minimizing, or condoning the serious consequences of the Defendant's alleged misbehavior or its impact on the alleged victim. It is possible that the alleged behavior resulting in these charges might form the factual basis for civil actions such as libel and perhaps other criminal charges. However, this Court's legal obligation when presented with a facial challenge under the First Amendment overbreadth doctrine is to determine whether the statute as written, not as applied to the Defendant's alleged misconduct, is constitutional. Having determined that a "substantial number of" the statute's applications are unconstitutional, the Court is required to find the cyberstalking law unconstitutional on its face and therefore unenforceable. The Court cannot render that facially overbroad law constitutional by severance. Therefore, the Defendant's Motion to Dismiss must be granted.

ORDERS

1. Both charges in the above-entitled case are hereby DISMISSED WITH PREJUDICE.
2. The Anti-Harrassment Order issued in this case shall be RESCINDED.
3. Nothing in this decision should be misconstrued to deny the alleged victim the opportunity to request a civil anti-harrasment order in its place nor to pursue other civil remedies nor to prevent the City from filing other charges that may apply.

DATED this 30th day of September, 2016.

COMMISSIONER PETE SMILEY

DECLARATION OF COUNSEL:

I declare under penalty of perjury under the laws of the State of Washington that a true and complete copy of this Appendix to Brief of Appellant was mailed overnight on 9/25/17 to:

Clarence Moriwaki
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Dated: _____

_____
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