KITSAP SUPERIOR COURT
IN THE STATE OF WASHINGTON

CLARENCE MORIWAKI **Petitioner-Appellee,** **v.** **RICHARD RYNEARSON,** **Respondent-Appellant.**	**Superior Court No. 17-2-01463-1** **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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This matter came before the Court on appeal from a judgment entered by the Bainbridge Island Municipal Court. No testimony was taken in this Court or in the Municipal Court, but oral argument was held regarding the appeal on December 14, 2017. The Municipal Court also had before it the parties' pleadings and more than 20 exhibits and attachments.

The Court makes the following findings of fact and conclusions of law regarding the record established in the Municipal Court. To the extent that any finding of fact might or may contain a conclusion of law, or vice versa, the Court adopts the same as such.

I. FINDINGS OF FACT

1. Petitioner Clarence Moriwaki ("Moriwaki") resides on Bainbridge Island, WA. Respondent, Richard Lee Rynearson, III, a.k.a. Richard Lee ("Rynearson") also lives on Bainbridge Island. (Petition for Order of Protection dated 3/10/17, attachment p. 1 (hereafter "Pet. Attach."); Respondent's Response Brief, dated 7/10/17, Exhibit A (all exhibits to Response Brief hereafter "Ex.").) (Bainbridge Island Municipal Court, Findings & Conclusions, dated July 17, 2017 ("Findings," "Procedural History," or "Conclusions," as appropriate) Findings ¶ 1.)[1]

2. Moriwaki's LinkedIn page says he is a "PR expert, community leader and civil rights advocate." He applied, but was not appointed to be a Kitsap County Commissioner in 2011 and ran an unsuccessful Campaign for Washington State Senate in 1992. He has worked for a variety of government agencies and officials over the years, including working for then-

[1] These findings sometimes draw upon parts of the exhibits filed by the parties depicting the websites, Facebook pages, and online messages that were not quoted by the Municipal Court, but the Municipal Court adopted those exhibits in full as part of its findings. (Findings ¶ 32.)

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Congressman (now Governor) Jay lnslee and Governor Mike Lowry, but has not been employed by any government organization since 2007. (Ex. 9.) He is the founder, past president, and current board member of the Bainbridge Island Japanese-American Exclusion Memorial Association, a non-profit organization that oversees a permanent National Historic Site (part of the National Park Service) on Bainbridge Island and promotes education about the internment of Japanese-Americans during World War II. (Ex. 6, 9.) The Memorial's goal is to prevent any future unlawful detention of US citizens; the group motto is "Let it Not Happen Again." (Pet. Attach. p. 1; Ex. 6.) (Findings ¶¶ 2-3.)

3. As part of his volunteer work for the Memorial, Moriwaki regularly gives speeches and appears in the media to discuss the internment and its lessons for modern issues. From January 2017 to April 2017, Moriwaki was featured in at least eleven articles and gave two speeches about the lessons of the internment. (Ex. 1, p. 171; Ex. 8; *see* Response Brief pp. 9-11.) Many of the articles referenced Moriwaki's position as founder or director of the Memorial and quoted Moriwaki as comparing the internment to policies adopted by President Trump. (*E.g.*, Ex. 8 (*Bainbridge Island Review* article titled "Trump travel ban echoes World War II Japanese-Americans' internment order").)

4. Rynearson is a retired Air Force officer who has long been interested in civil liberties issues. (Ex. A ¶¶ 3-5, 14.) Beginning in 2011, Rynearson blogged about and opposed the detention provisions of the National Defense Authorization Act of 2012 ("NDAA"), which, in his opinion, purport to authorize the military detention of U.S. citizens and residents without charge or trial. (*Id*.) Rynearson's interpretation of the NDAA is shared by proposed

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state legislation (Washington Senate Bill 5176) that would blunt the force of the NDAA's detention provisions in Washington. (Ex. 7.) Rynearson's interest in civil liberties and decision to move to Bainbridge Island after retirement sparked Rynearson's interest in the Memorial years before he moved to Bainbridge Island. (Ex. A ¶ 14.) Rynearson learned about Moriwaki and his role with the Memorial from the media, years before moving to Bainbridge Island. (*Id*.) Besides his interest in the Memorial specifically, Rynearson has a history of posting about the internment and detention-related issues more broadly, including starting a separate Facebook page about the lessons of the internment that pre-dates his interactions with Moriwaki. (*Id.*; Ex. 3.)

5. On November 20, 2016, Moriwaki accepted a "friend" request from Rynearson. Rynearson knew of Moriwaki's role with the Memorial, but had not yet personally met him when he asked to "friend" Moriwaki on Facebook. Rynearson told Moriwaki, "Clarence, thanks for the add. I've seen your 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 ...." (Ex. 1, p. 1.) (Findings ¶ 4.)

6. Over the next couple of months, Rynearson commented on Moriwaki's 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 matters. (Ex. 1.) (Findings ¶ 5.)

7. On December 14, 2016, Moriwaki commented "Nice to meet you in person Richard Lee!" after Rynearson came to a movie screening fundraiser related to the Memorial. (Ex. 1,

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p. 34.) Later on the same day, Moriwaki messaged Rynearson and asked to meet up in person for coffee or beer. The two exchanged phone numbers and a few messages but they did not find a mutually agreeable time to meet up. (Ex. 1, pp. 48-49.) (Findings ¶ 6.)

8. In response to Moriwaki's posts to the public (not limited to Facebook "friends") on Moriwaki's Facebook page either criticizing President Trump, praising President Obama, or suggesting that something like the internment was more likely to occur with President Trump in office, Rynearson made comments to the public mentioning President Obama's support for the NDAA and its indefinite-detention provisions. He made four such comments in a six-week period from December 14 to January 24 (on December 14, January 1, January 6, and January 24). (Ex. 1, pp. 33-34, 53-54, 60-61, 89-90.) After the January 24 post, Moriwaki made the public comment, "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, "You have a passion. Follow my lead. Direct it to the person and administration that can do something about it." (Ex. 1, p. 90.) Moriwaki also suggested that the two meet up for an in-person conversation. Rynearson suggested numerous days and times to get together, but none worked for Moriwaki. (Ex. 1, pp. 94-95.) (Findings ¶ 7.)

9. On January 27, 2017, Moriwaki wrote a post to the public on his Facebook page sharing a story about a hate crime against a Muslim with the opening comment "So it begins." (Ex. 1, p. 104.) Rynearson made the public comment, "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." (Ex. 1, p. 105.) Moriwaki told Rynearson

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that he was offended by the comment. (Ex. 1, p. 110). (Findings ¶ 9.)

10. On January 28, Moriwaki shared a public post that he wrote in the name of the Memorial, sharing a *Seattle Times* editorial he wrote not long after September 11 about the danger of euphemisms and loss of liberty because it "[s]eems like a good time to revisit that conversation." (Ex. 1, p. 117 (post); Pet. Attach. p. 1 (indicating Moriwaki authors the Memorial's Facebook posts).) Rynearson publicly posted a comment asking why Moriwaki was not spreading the word about SB 5176, which would block President Trump's ability to use the detention provisions of the NDAA against citizens and lawful residents in Washington; Moriwaki deleted the comment. (Ex. A ¶ 30; Ex. 1, p. 115.)

11. On January 29, 2017, Moriwaki initiated a Facebook message conversation with Rynearson. Moriwaki started by saying "My patience is wearing thin. I waited to see what your response would be when I said that you had offended me." He objected that he had not seen a "mea culpa" or apology. He further said that he agrees with the bill (SB 5176) but stated that he removed Rynearson's public comment because "you see it [(a post)] as an opportunity to promote your POV (of which I usually agree)," the comment was an "argumentative demand," and it reflected a "pious self-righteous audacity to write your bullying demand on My Timeline." He then said "You have crossed a line. You are not conversing but trolling." Moriwaki described his Facebook page as hosting a party, where friends are "welcome to comment," but "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." Moriwaki said "You are clearly a passionate person, but please promote your ideas and

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attract people to your own wall. Create your own party. Stop the bullying and attempts to hijack my party." (Ex. 1, pp. 115-16.) (Findings ¶ 10.)

12. Later that same day, but before reading Moriwaki's message, Rynearson commented publicly on the shared Memorial post about needing to revisit the post-9/11 editorial. He commented that he thought his comment about SB 5176 got deleted from Moriwaki's wall, and then went on to explain his concerns with the NDAA of 2012 and ask Moriwaki why he didn't fight against the NDAA and why he wasn't working to support proposed Senate Bill 5176, which would counteract the provisions of the NDAA. (Ex. 1, pp. 118-119 (public comment); Ex. 1, p. 120 (explaining that he had not seen Moriwaki's Facebook message before he re-posted a comment about SB 5176).) (Findings ¶ 11.)

13. Rynearson then saw and responded to Moriwaki's message, saying that he would read it and respond. Moriwaki replied by objecting to Rynearson publicly commenting again about Moriwaki's lack of support for SB 5176. (Ex. 1, p. 120.) Rynearson's wife then responded, using Rynearson's account. (Ex. A ¶ 31; Ex. B ¶ 20.) She explained that Moriwaki appeared to be "the most prominent spokesperson on this issue [(unlawful detention)] on Bainbridge Island," so if he "truly support[s] this bill or oppose[s] the NDAA (etc.), then [he has] a platform to take a stand, and she did not "see [him] speaking out strongly on this." She added (still typing as Rynearson) that "At the least, my hope was that you would allow others (i.e., me) to speak about these things to people who presumably care about them, given that they are in your circle on Facebook." She concluded that she understood that Moriwaki had the right to delete posts from his wall, but asked why the two

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could not "have a debate about the NDAA or the bill to stop Washington resources from being used to comply with it or such things openly on your wall?" and stated "I did not mean personal offense in asking why you haven't supported the bill publicly, but as I just learned about it recently, I really don't understand why supporting that bill isn't the #1 issue for people who (like us, I believe) want it to never happen again." (Ex. 1, p. 120.) Moriwaki responded that he was waiting to see Rynearson's response to Moriwaki being offended as "a test of [Rynearson's] character and sincerity," and objected that Rynearson had not acknowledged that he offended Moriwaki. He stated, "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." He ended with "To be continued, I am late meeting a friend for breakfast ...." Rynearson's wife (still typing in Rynearson's account) responded that Rynearson did not think he said anything to give offense and certainly did not intend offense, and hoped that the conversation would continue because he valued feedback. (Ex. 1, p. 121.) (Findings ¶ 12.)

14. From January 30 to February 4, Rynearson commented on four of Moriwaki's public posts. Moriwaki "liked" one of the comments and did not delete or object to any of the others. (Ex. 1, pp. 124-136.)

15. On February 3, Moriwaki made a public post praising Washington's lawsuit challenging the travel ban. Morwaki added a public comment in which he tagged both the official Governor Inslee Facebook page and Governor Inslee's personal Facebook page, stating that Governor Inslee had shamed President Trump, and that Moriwaki and everyone

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who loves the Constitution were proud of Governor Inslee. (Ex. 1, pp. 148-149.) On February 4, 2017, Rynearson commented on Moriwaki's post that Governor Inslee voted for the NDAA when he was in Congress and therefore was not "the go to guy when it comes to shaming anybody on Constitutional matters." (Ex. 1, p. 149.) Rynearson replied to comments from two other people who praised Governor Inslee with a similar post noting Governor Inslee's support for the NDAA. (Ex. 1, pp. 151, 159.) Moriwaki responded to most of these comments with comments of his own stating that Rynearson's comments were trolling and/or harassment, and that when he had time, Moriwaki wanted to continue their Facebook message conversation. (Ex. 1, pp. 150-152.) Some of Moriwaki's friends, however, liked Rynearson's comments about Governor Inslee, with one of them commenting (even after Moriwaki's comment that Rynearson was "trolling") that it was "Nice to see similar views." (Ex. 1, pp. 152-153.) Moriwaki's accusation that Rynearson was trolling prompted Rynearson to respond that expressing a different view was not trolling or harassment. Rynearson made similar comments in each place where Moriwaki had commented that Rynearson was trolling. (Ex. 1, pp. 153-156 (comments in context, including the comments by Moriwaki); Pet. Attach. pp. 10-16 (comments in isolation).) One of those comments, too, was liked by one of Moriwaki's friends. (Ex. 1, p. 156.) (Findings ¶ 13.) In total, there were about five comments by Moriwaki claiming Rynearson was trolling and about eight comments from Rynearson in response. (Ex. 1, pp. 153-156.)

16. Moriwaki initiated a Facebook-message conversation with Rynearson about the Governor Inslee comments, telling Rynearson "[Y]ou are doing real time trolling. Can't you

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control yourself? You are bullying. By the way, you are also a bit of a sociopath." Rynearson responded that he was "not trolling or bullying" and that someone with a different view is not a threat. He also objected to Moriwaki calling him mentally ill. He added "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." Moriwaki replied "I'm going to do something that I gave [up] hoping that you would do. I am sorry. I didn't have my coffee and my phone lit up with multiple notifications from you. I'm sorry, and I didn't mean to hurt you. However, please reflect. I am going to be late. To be continued." (Ex. 1, p.139.) (Findings ¶ 14.)

17. The next day, on February 5, Moriwaki deleted Rynearson's comments from the thread about Governor Inslee. Rynearson sent a message to Moriwaki objecting to the deletions and stating "So you recognize that you censoring the speech of others who are different from yourself is wrong and so you apologized for it. 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, and I will know that you do not actually value discourse or conversation and I will know that you do not respect other people who are different than yourself. I will know that you do not celebrate diversity but rather you shun it and seek to demonize it. I hope that you do not cross that line." (Ex. 1, p. 140.) (Findings ¶ 15.)

18. Moriwaki noticed that Rynearson began reposting some deleted comments by posting screenshot photos back onto Moriwaki's page, in conjunction with comments about Moriwaki deleting the previous comments. (Ex. 1, pp. 157-158, 168.) Moriwaki responded

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by Facebook message to Rynearson, "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!" (Ex. 1, pp. 140-41.) The two then argued back and forth, with Moriwaki twice describing his "party" analogy for Facebook, claiming that Rynearson was trying to "hijack [Moriwaki's] page with [his] single-issue obsession," Rynearson explaining his view that "a differing view is not trolling or harassing or bullying," and Moriwaki again repeating, "KNOCK IT OFF!" (Ex. 1, pp. 141-142.) Moriwaki said "I have asked you to stop posting on MY PAGE!" (Ex. 1, p. 142.). (Findings ¶ 16.)

19. Moriwaki finally stated, "We are done." Rynearson 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 Rynearson on Facebook. (Ex. 1, p. 143.) (Findings ¶ 17.)

20. This conversation was the first time that Moriwaki asked Rynearson to stop posting on his page, and Moriwaki blocked Rynearson at virtually the same time. Rynearson stopped posting on Moriwaki's Facebook page the same day that Moriwaki requested it (and implemented the block); he did not post on Moriwaki's page after being asked to stop posting on the page. (*See generally* Ex. 1.)

21. The same day, shortly after blocking Rynearson, Moriwaki received a text message from Rynearson stating, "Mr. Moriwaki, I'm doing an initial story for a new up and coming

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blog (ClarenceMoriwakiBainbridgelsland.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 "Of course, but first would you please ID yourself?" Rynearson identified himself and there was a short text exchange in which Moriwaki said, "Yeah, and this isn't trolling or harassment. Richard, your obsession is getting disturbing," Rynearson stated that he was obsessed with preventing internment from happening again, and Moriwaki said "Then start respecting me by leaving me alone." Rynearson replied "I understand you do not want me to contact you at this number you gave me. If you change your mind about a comment you know how to reach me. Goodnight." (Ex. 1, 144-147.) (Findings ¶ 18.)

22. Rynearson did not Facebook message, text message, email, telephone, or otherwise contact Moriwaki after February 5. Rynearson also did not post or attempt to post on Moriwaki's Facebook page. The two crossed paths inadvertently at public events or on their way to and from the ferry in January and February 2017, but nothing odd or noteworthy transpired during any of those interactions. (Ex. A ¶¶ 20-23, 34, 36.) Moriwaki applied for a protective order on March 10, about five weeks after the February 5 block and text message. (Procedural History ¶ 1.)

23. On February 7, a friend of Moriwaki's, Bonnie McBryan, made a public post on her Facebook page, open to public comments, sharing an article about liberal intolerance. (Ex. A ¶ 24.) Rynearson made some comments on McBryan's post (on her page) and mentioned Moriwaki censoring him as an example of liberal intolerance. (*Id.*) Moriwaki could not see

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Rynearson's comments due to his Facebook block, but responded with a post repeating his analogy that his Facebook page is like a party. (Ex. 1, p. 173.) To make the point that he was not commenting on Moriwaki's Facebook page, but rather on the public pages of others, Rynearson commented, "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." (Ex. 1, p. 174.) 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." (Ex.1, page 176). Rynearson responded "Bonnie McBryan Now that is just silly." (*Id.*) McBryan replied "Thank you -- and you see how easy it is for one to misunderstand a reference or misinterpret your actual intentions." (Ex. 1, p. 177.) (Findings ¶ 19.)

24. At some point during this exchange, McBryan 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," and copying and pasting Rynearson's post referencing Moriwaki's analogy. (Pet. Attach. p. 19.) Moriwaki replied "Breathtaking. I hope that he is speaking metaphorically." (Pet. Attach. p. 20.) McBryan responded "He just confirmed that he is." (*Id.*) (Findings ¶ 19.)

25. As is clear from the context of Rynearson's "analogy" comment, Rynearson did not physically go to the public street outside of Moriwaki's house. In addition, he never

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followed, surveilled, monitored, tracked or otherwise intentionally placed himself in proximity to Moriwaki or his residence for the purpose of stalking him, contacting him, or interacting with him, nor engaged in any conduct that could constitute physical stalking. (Ex. A ¶ 25; 7/17/2017 Tr. 53:1-2.)

26. On February 5, 2017, Rynearson created a public Facebook page entitled "Clarence Moriwaki of Bainbridge Island." The first post, dated February 6, states "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." (Ex. 2, p. 144.) The page title was later changed to "Not Clarence Moriwaki of Bainbridge Island." (Findings ¶ 20.) Even when the page name was "Clarence Moriwaki of Bainbridge Island," however, any reader of the page's posts or visitor to the page, even one unfamiliar with Moriwaki, would have understood that it was a page about Moriwaki and critical of him, not a page written by Moriwaki himself. (*E.g.*, Ex. 2, p. 2 (displaying description visible in page's upper right hand corner reading "A neighborly rebuke of Clarence Moriwaki, prominent public face and past president of the Bainbridge Island Japanese Exclusion Memorial for his support of politicians who made internment legal again...")).

27. Rynearson did not post on the page again until February 23, with a post that described Moriwaki's work in politics, with the Memorial, and as a spokesperson for the Island and the Memorial, and criticized him as a "very poor reflection on our community and our values." (Ex. 2, p. 142.) On the page, there are a variety of memes, many bearing

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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'." (Ex. 2, p. 1.) (Findings ¶ 21.)

28. Rynearson posted on the "Not Clarence Moriwaki of Bainbridge Island" Facebook page almost daily, sometimes numerous times a day, from February 23 until Rynearson was served the Stalking Protection Order on March 15. Most of the posts are directly critical of Moriwaki's position with the Memorial in light of his support for politicians who voted for/ signed the NDAA and his failure to support SB 5176 or to publicly oppose the NDAA's indefinite-detention provisions. Other posts simply shared information about the NDAA and various efforts to fight it through lawsuits and state legislation. The thrust of the page is the argument that Moriwaki speaks out about the lessons of the Memorial in a partisan, one-sided way. (Ex. 2; Ex. A ¶¶ 84-118.) (Findings ¶ 22.)

29. Rynearson also posted public criticism of Moriwaki in other places. For example, Rynearson had written a review of the Memorial on the Memorial's Facebook page, rating the Memorial "5 stars" on January 25. Rynearson later edited his review to reflect his criticism of Moriwaki for supporting Governor Inslee and President Obama and for "censoring non-liberal viewpoints on this page." (Ex. A ¶ 69; Ex. 1, p. 103.). (Findings ¶ 8.)

30. Rynearson "sponsored" some of the posts on the "Not Clarence Moriwaki of Bainbridge Island" Facebook page, meaning that he paid Facebook to advertise those posts. Those ads, like all Facebook sponsored posts, could appear in feeds of people who had not previously visited the page or followed it and had not previously blocked the page or ad. (Ex.

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2, pp. 41, 57.) (Findings ¶ 23.) There is no evidence that the sponsored posts ever appeared on Moriwaki's Facebook page, and the record indicates they did not, because Moriwaki posted publicly on his own Facebook page suggesting that he had to take some technical steps to see the page. (Ex. 17 ("I managed to get through the block (thank you magic cyber friend, you know who you are) and sent my complaint.").)

31. Several people commented criticizing the Facebook page. (Findings ¶ 25.) Some people reported the page to Facebook, which determined that the page did not violate Facebook's community standards. (Ex. A ¶ 119; Ex. 2, pp. 17-18; Ex. 4 (community standards).) Fifty-three people, on the other hand, "liked" the page. (Ex. 2, p. 2.)

32. Rynearson made the "Not Clarence Moriwaki of Bainbridge Island" page non-public after being served with the temporary protection order on March 15. (Ex. A ¶ 118.) (Findings ¶ 26.)

33. Moriwaki filed a petition seeking an anti-stalking protection order on March 10. (Procedural History ¶ 1.) Moriwaki's petition claims he feels "constant anxiety, sleeplessness, fear of potential contact, upset over impact to [his] reputation, intimidated." (Pet., p. 4.) Thereafter, Moriwaki researched Rynearson's internet history and Air Force record going as far back as 2009. Based substantially on reports of Rynearson's interactions with other forums or pages from which Rynearson was blocked, some of Rynearson's blog posts, Rynearson's police accountability activities, and letters of reprimand Rynearson received in the military, Moriwaki stated in April 2017 that he feared for his physical safety. (Moriwaki Motion dated April 20, 2017, p. 12.) (Findings ¶ 24.)

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34. Rynearson has no criminal history and has not threatened Moriwaki nor engaged in any violence or threatening interactions with Moriwaki. Furthermore, there are no threats or violence in Rynearson's past. (Ex. A ¶¶ 25, 37.) (Conclusions ¶ 11.)

35. The temporary order required Rynearson to stay 100 feet away from Moriwaki and his residence. (Procedural History ¶ 5.) In April, although there had been no interactions (electronic or in-person) between the parties since before the petition was filed, Moriwaki requested that the stay-away distance be increased to 500 feet. (Moriwaki Motion dated April 20, 2017.) The parties' homes are in close proximity to one another, with Rynearson living in a neighborhood located northwest of Moriwaki's and roughly 300 feet away. (Moriwaki Motion dated April 27, 2017, Map #4; Findings ¶ 1). At an April 24, 2017 hearing, the Municipal Court increased the stay-away distance to 300 feet, rather than 500 feet, due to the proximity of the residences. (Procedural History ¶ 5.) Throughout the proceedings, Rynearson opposed any restriction on his right to travel and frequent local businesses, including opposing a stay-away restriction of any distance. (Response Brief, pp 31-32.).

36. After several continuances requested by Rynearson, the Municipal Court held the final order hearing on July 17, 2017. The Municipal Court did not take any testimony and decided the case on the paper record. The Municipal Court concluded that Moriwaki had satisfied the elements of stalking (RCW 9A.46.110), cyberstalking (RCW 9.61.260(1)(b) (repeated contacts)), and unlawful harassment (RCW 10.14.020) based on seven things: (i) Rynearson purportedly posting on Moriwaki's Facebook page after being asked to stop; (ii)

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Rynearson posting screen captures of posts that had been deleted by Moriwaki; (iii) Rynearson's public post referring to Moriwaki's "party" analogy in explaining that, metaphorically, he was not at Moriwaki's party but on the public street outside his house; (iv) Rynearson's text message to Moriwaki seeking comment on his blog about Moriwaki; (v) Rynearson's creation of the "Not Clarence Moriwaki of Bainbridge Island" page using Moriwaki's name; (vi) Rynearson's public posting of memes that used Moriwaki's image; and (v) Rynearson advertising some of the posts from the "Not Clarence Moriwaki of Bainbridge Island" on Facebook. (Conclusions ¶¶ 3-4.)

37. The Municipal Court entered a permanent Protection Order that contains the following restrictions:

a. Rynearson is prohibited from any contact with Moriwaki.

b. Rynearson is prohibited from keeping Moriwaki under surveillance.

c. Rynearson is excluded from Moriwaki's residence and workplace.

d. Rynearson is prohibited from knowingly coming within or remaining within 300 feet of Moriwaki or his residence or workplace. This stay-away distance does not prohibit Rynearson from using his residence, driveway, and common areas of his condo complex, except that Rynearson is specifically prohibited from using his easement that travels from his condo to Winslow Way (next to Winslow Green). Due to the location of Moriwaki's residence, the stay-away distance also prohibits Rynearson from visiting any business in Winslow Green, attending any community event at the Eagle Harbor Congregational Church, using the Madison Avenue entrance to the City Hall parking lot,

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and visiting any business on the northeast corner of the Madison Avenue and Winslow Way intersection (from the intersection north to the City Hall parking lot), in the heart of downtown Winslow. (Ex. 16.)

e. Rynearson is prohibited from knowingly appearing at any public events that Moriwaki attends. It is Rynearson's duty to leave should the parties inadvertently appear at the same location.

f. 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.

g. Rynearson is prohibited from using photographs of Moriwaki to create memes, posters, or other online uses. (Permanent Order for Protection, dated July 17, 2017.)

38. The Municipal Court found that a permanent order was justified due to Rynearson purportedly posting on Moriwaki's Facebook page after being asked to stop, the "Not Clarence Moriwaki of Bainbridge Island" Facebook page, the fact that Rynearson had been banned from online forums in the past, and the fact that he started a website that contained criticism of a prominent Air Force commentator who had (for a time) blocked him from commenting on his blog's Facebook page. (Conclusions ¶ 10.)

39. Rynearson filed a timely appeal.

II. CONCLUSIONS OF LAW

A. Governing Statutes

1. To obtain an anti-stalking protection order, a petitioner must prove stalking conduct.

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RCW 7.92.100(1)(A). Under RCW 7.92.020, stalking conduct includes:

a. any "act of cyberstalking as defined under RCW 9.61.260,"

b. any "course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that: (i) [w]ould cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling; (ii) [s]erves no lawful purpose; and (iii) [t]he stalker knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person," and

c. any "act of stalking as defined under RCW 9A.46.110."

2. A person commits an act of stalking as defined under RCW 9A.46.110 if he (i) "intentionally and repeatedly harasses … another person," (ii) the "person being harassed … is placed in fear that the stalker intends to injure the person, another person, or property," (iii) such fear is reasonable under the circumstances, and (iv) he intended to "frighten, intimidate, or harass" or knew or reasonably should have known the person was "afraid, intimidated, or harassed." RCW 9A.46.110.

3. To "harass" requires:

> a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner…. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."

RCW 10.14.020; *see* RCW 9A.46.110(6)(c) (defining harassment for stalking purposes by

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reference to RCW 10.14.020).

4. As relevant here, a person commits an act of cyberstalking if, "with intent to harass, intimidate, torment, or embarrass any other person," he "makes an electronic communication to such other person or a third party," "[a]nonymously or repeatedly whether or not conversation occurs." RCW 9.61.260(1)(b).

B. Can the Protection Order Be Justified by Rynearson's Posts to the Public About Moriwaki, Including a Public Facebook Page that Repeatedly Criticized Moriwaki Using His Name and Image? No.

5. The Municipal Court based the Protection Order in part on Rynearson's creation of the "Not Clarence Moriwaki of Bainbridge Island" page using Moriwaki's name, Rynearson's public posting of memes that used Moriwaki's image, and Rynearson advertising some of the posts from the "Not Clarence Moriwaki of Bainbridge Island" on Facebook. (Conclusions ¶ 4.) None of these are a constitutionally-permissible basis for the Protection Order and they further fail to meet the statutory elements for cyberstalking, harassment, or stalking.

6. Rynearson's posts to the public about Moriwaki, including the use of his name and photograph, constitute speech protected under the First Amendment of the U.S. Constitution and Article I, Section 5 of the Washington Constitution. Under those constitutional provisions, Rynearson has a right to repeatedly criticize Moriwaki to third parties or the public at large. *See, e.g.*, *State v. Noah*, 103 Wn. App. 29, 34-35, 38-39 (Div. I 2000) (concluding that standing with signs outside a therapist's office with slogans like "David

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Calof, Mr. Windbag! Psychotherapist" and "David Calof Voice of Hatred and Revenge" was "protected speech and picketing" and "cannot be the basis for an antiharassment order"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (holding the First Amendment protected the right to distribute leaflets "critical of [a realtor's] real estate practices" that accused him of being a "panic peddler," requested calls to his home phone number, and were distributed among his neighbors, passed out at a local shopping center, and handed out to people on their way to or from the realtor's church); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (criticism of black residents who did not comply with a boycott of white-owned stores, whose names were listed in leaflets and mentioned in church speeches, was protected speech). Creating a Facebook page that criticizes Moriwaki or posting publicly on other Facebook pages about him uses different technology, but is equivalent for free speech purposes to leafletting or picketing.

7. Rynearson further has a right to use Moriwaki's name and image in such speech, including in "memes" reflecting Rynearson's criticism of Moriwaki. *See Noah*, 103 Wn. App. at 38 (holding that picketing activity that included signs featuring the name of the petitioner could not form the basis of an antiharassment protection order); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53-55 (1988) (the "art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided," but "graphic depictions and satirical cartoons have played a prominent role in public and political debate" and are constitutionally protected). Restricting the use of a picture or a name is a content-based speech restriction. *See Sarver v. Chartier,* 813 F.3d 891, 903 (9th Cir. 2016). And protection orders cannot, "consistent with

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the constitution," be based on the "speaker's … message." *Trummel v. Mitchell*, 156 Wn. 2d 653, 667 (2006).

8. Moreover, there was no possibility that a viewer could confuse Rynearson's message with one coming from Moriwaki himself, even when the Facebook page was named "Clarence Moriwaki of Bainbridge Island." The content on the page (including its sponsored posts) uniformly spoke of Moriwaki in the third person and criticized him. The very first post made plain that the purpose of the page was to argue that Moriwaki was unfit to represent the Memorial, and the page description displayed statically on the top right of the page described it as a "neighborly rebuke" of Moriwaki.

9. Rynearson's speech about Moriwaki remains constitutionally protected regardless of whether it was motivated in part by an intent to embarrass, harass, or torment Moriwaki (as would be required for a finding of cyberstalking under RCW 9.61.260(1)(b)). A "speaker's motivation" is generally "entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead op.); *id.* at 495 (Scalia, J., concurring in part and concurring in judgment). "Speech does not lose its protected character … simply because it may embarrass others or coerce them into action." *NAACP*, 458 U.S. at 910. Thus, the Supreme Court has held that speech expressed with the "intent to inflict emotional distress" remains protected 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. As the Supreme Court explained in *Hustler*, it held in *Garrison v. Louisiana*, 379 U.S. 64 (1964), that "even when a speaker or writer is

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motivated by hatred or ill will his expression was protected by the First Amendment." 458 U.S. at 54.[2] Furthermore, purpose-based regulation of speech is content discrimination, and under the First Amendment the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 2227 (2015).

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

11. Rynearson's speech about Moriwaki is constitutionally protected regardless of Moriwaki's status as a limited-purpose public figure because the First Amendment protects

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[2] There are at least two rationales for the rule that constitutional protection cannot lawfully depend upon a speaker's motive. First, "debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." *Garrison*, 379 U.S. at 73. Second, even if a speaker harbors a purportedly bad motive, "utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*

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the right to engage in repeated public criticism of even private figures. *See, e.g.*, *Noah*, 103 Wn. App. at 38-39 (holding that picketing critical of therapist is protected speech); *Keefe*, 402 U.S. at 419 (holding that distributing leaflets critical of realtor is protected speech); *Snyder*, 131 S. Ct. at 1219 (applying same standard applied in public-figure case (*Hustler*) to speech directed at the father of a slain soldier, a private figure).

12. In addition, however, Moriwaki is a limited-purpose public figure because he has voluntarily "thrust [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 about the lessons of the internment for modern-day policies. *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). A person need not be "universally famous," only "well known among those involved in the argument." *Exner v. Am. 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).

13. As the founder, past president, and de facto spokesperson for the Memorial, Moriwaki is well-known among those involved in preserving and teaching the lessons of the internment for modern issues. In a four-month period roughly overlapping with the speech Moriwaki based his petition on, Moriwaki has been featured in nearly a dozen articles or interviews and gave two speeches touching upon the Memorial or the internment and their

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relationship to policies adopted by President Trump. Ex. 8; Ex. 1 p. 171. And 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 lessons of the internment to oppose President Trump, but not to criticize President Obama or Governor Inslee.

14. Rynearson's speech is further protected because it is political speech related to matters of public concern. "[S]peech on public issues … is entitled to special protection," and "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder*, 131 S. Ct. at 1215, 1219 (so holding even in a private-figure-plaintiff case). Its "arguably inappropriate or controversial character … is irrelevant." *Id*. at 1216. That the "speaker may have had a personal interest" in making the critique "does not diminish the concern the public would have." *White v. State*, 131 Wn. 2d 1, 13 (1997). The speech at issue here addresses matters of public concern. The application of the NDAA to Americans is a public issue, as 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, as reflected in Moriwaki's many media appearances. Ex. 8. The matter of who represents the Memorial (a National Historic Site) to the public, and whether that person is viewed as a credible spokesperson on indefinite-detention issues, is also a matter of public concern. Regardless of the rightness or wrongness of Rynearson's opinions on these issues, they relate to legitimate public issues.

15. The fact that some of the posts were advertised does not remove the speech from constitutional protection. Most advertisements, including those advocating particular points of view on public issues, across a wide range of media (including Facebook), are displayed

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to people who did not first sign up to see the ads. That does not make a constitutional difference. *Cf. Citizens United v. FEC*, 130 S. Ct. 876, 890-91 (2010) (declining to draw "constitutional lines" between television (where "advertising spots reach viewers who have chosen a channel or a program for reasons unrelated to the advertising") and video on demand (which a viewer only sees after taking a "series of affirmative steps")). Spending money to engage in protected expression is itself protected expression. *See id.* at 898. Anyone who saw advertisements that they disliked could use Facebook's tools (e.g., blocking the ad or the page) to avoid seeing them, and under the First Amendment it is the viewer's burden to avert his eyes if he finds content distasteful. *Snyder*, 131 S. Ct at 1220 ("[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.") (alterations in original).

16. None of the speech on the "Not Clarence Moriwaki of Bainbridge Island" page falls into a historically unprotected category of speech such as true threats or defamation. "[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). "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *State v. Burkert*, __ A.3d __, 2017 WL 6492501, *12

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(N.J. Dec. 19, 2017) (internal quotation marks omitted) (so concluding in interpreting a criminal harassment statute, as a matter of constitutional avoidance, to be limited to unprotected categories of speech, such as true threats, as well as repeated unwanted one-to-one speech to a particular person); *Saxe v. State College Area School District*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). Rynearson's speech does not fall within any of the narrow categories of unprotected speech.

17. The true threats exception does not apply here. A "true threat" is a statement for which "a reasonable person would foresee that the statement would be interpreted … as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (Div. I 2007). As the Municipal Court found (Conclusions ¶ 11) Rynearson did not threaten Moriwaki at all, much less utter a true threat.

18. The speech is not defamatory, either. Defamation requires, among other things, a reputation-damaging false statement. *Gertz*, 418 U.S. at 342. Rhetorical hyperbole and opinion statements that cannot reasonably be interpreted as stating actual facts are not defamation and are protected under the First Amendment. *See Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Rynearson's speech did not contain defamatory false statements. In his pleadings below and brief in this Court, Moriwaki did not allege any false statements, and the Municipal Court did not find any. At the argument on appeal, Moriwaki argued that two statements in the February 6 post describing the Facebook page's purpose were false: that he was a public figure and that he was president of the Memorial.

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The former statement is opinion, however, and the latter, even if not true, is not reputation-damaging; thus, neither qualifies as defamation. Accordingly, Rynearson's speech does not fall into the defamation exception.

19. Finally, Rynearson's speech does not fall into the exception for speech integral to criminal conduct. That exception applies only if there is associated *non-speech* conduct that "is a sufficient basis for criminal punishment" to which some speech is "incidental." *State v. Strong*, 167 Wn. App. 206, 217 (Div. III 2012) (discussing speech uttered in the course of extortion). It is not applicable when, as here, the state seeks to regulate "pure speech." *Id.*; *cf. Noah*, 103 Wn. App. at 38-39 (holding picketing is fully protected speech in antiharassment case involving physical trespass and picketing).

20. In sum, Rynearson's speech about Moriwaki, including the "Not Clarence Moriwaki of Bainbridge Island" page, is constitutionally protected and therefore cannot serve as the basis for a Protection Order.

21. Rynearson's speech about Moriwaki also fails to meet the statutory elements of stalking, harassment, or cyberstalking.

22. Rynearson's speech *about* Moriwaki does not qualify as stalking under RCW 7.92.020(c) because, *inter alia*, it does not involve "repeated or continuing contacts." Speaking *about* someone is not a contact *with* them; the subject of the critique need not see it at all and is free to ignore it. *See Chan v. Ellis*, 770 S.E.2d 851, 296 Ga. 838 (2014) (reversing antistalking order in part because "[Chan's] commentary to his website *about* Ellis," which was not "directed specifically *to* Ellis as opposed to the public," "generally

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does not amount to 'contact,' as that term is used in [the antistalking statute]"); *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."). That plain-language meaning of "contact" applies with special force here, where Moriwaki could not see the speech at issue except by taking technological steps to circumvent his own block. In addition, repeated contacts can constitute stalking only when they serve *no* lawful purpose. Rynearson's speech serves the lawful purpose of providing truthful comments or opinion on political topics and on issues of public concern.

23. Rynearson's speech about Moriwaki also does not satisfy the statutory requirements of harassment (and thereby fails to satisfy the elements of stalking predicated on harassment as well). As an initial matter, because it is constitutionally-protected speech, it is excluded from the statutory definition of harassment. RCW 10.14.020. In addition, as described above, it serves a lawful purpose, which negates one of the elements necessary to find harassment. Moreover, for repeated harassment to justify a finding of stalking, it must give rise to a reasonable fear of injury to a person or property. Nothing in Rynearson's speech about Moriwaki would give rise to a reasonable fear of physical injury.

24. According to the pleadings, Moriwaki's fear of Rynearson stems largely from Moriwaki's research into Rynearson's past internet postings and purportedly harassing speech on other websites. This research was conducted after Moriwaki had filed his petition for protection. Many of the reports of such speech come from anonymous individuals on

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other websites talking about past disputes. As such, they are not particularly reliable hearsay. But they are also irrelevant, as Moriwaki has no relationship to these other blogs/ forums, and especially because they did not lead to restraining orders or other legal action, but reported remedies such as blocking or banning Rynearson. *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).

25. Finally, Rynearson's speech about Moriwaki does not satisfy the intent element of the cyberstalking statute. Rynearson's history of posting about detention-related issues and the internment even before he interacted with Moriwaki indicate that Rynearson legitimately believes that partisan use of the Memorial's symbolism (as perceived by Rynearson) and Moriwaki's unwillingness to debate that issue confirmed that Moriwaki should not be a spokesperson for the Memorial. Rynearson's expression of that opinion does not establish an intent to harass, embarrass, or torment Moriwaki personally but rather an intent to call attention to Rynearson's belief that Moriwaki was not fit to speak for the Memorial.

26. Moreover, the Protection Order cannot rest on the cyberstalking statute, because the relevant provision of that statute, RCW 9.61.260(1)(b), is facially overbroad and therefore unconstitutional. A law is overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Bellevue v. Lorang*, 140 Wn. 2d 19, 27 (2000). The statute's prohibition of "anonymous[] or repeated[]" posts to third parties (including the public at large) with certain intent, RCW 9.61.260(1)(b), fails that test. For all of the same reasons that purportedly bad intent, or negative emotional reactions, does not remove speech from

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constitutional protection, the prohibition on any repeated speech about someone else with the intent to embarrass that person—which could describe much, if not most, political advertisements—plainly reaches a substantial amount of constitutionally protected speech.

C. Can the Protection Order Be Justified by Rynearson's Post Referencing Moriwaki's Analogy? No.

27. The Municipal Court based the Protection Order in part on Rynearson's public post referring to Moriwaki's "party" analogy in explaining that, metaphorically, he was not at Moriwaki's party but on the public street outside his house. (Conclusions ¶ 4.) This speech is not a constitutionally-permissible basis for the Protection Order and it fails to meet the statutory elements for cyberstalking, harassment, or stalking.

27. Rynearson statement was, "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 context, which expressly referenced Moriwaki's "party" analogy for Facebook, Rynearson's reference to standing "out on the public street now in front of [Moriwaki's] house talking to some of his guests (our mutual neighbors)" did not mean that he was literally standing outside of Moriwaki's house. Rather, Rynearson was using Moriwaki's analogy to explain that, because he was no longer posting on Moriwaki's page, Rynearson was not at Moriwaki's party (in the analogy) but outside. McBryan very quickly confirmed that Rynearson was speaking metaphorically and conveyed that information to Moriwaki. Moreover, even if Rynearson were physically on the public street outside Moriwaki's residence criticizing Moriwaki, that would be akin to

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constitutionally-protected picketing. *See Noah*, 103 Wn. App. at 38-39.

28. This comment on a post that McBryan opened to public comment, continuing Moriwaki's "party" analogy in describing how Rynearson was communicating from a location outside the "party," raises no inference of an intent to harass, embarrass, torment, or intimidate Moriwaki, as would be required for a finding of cyberstalking.

29. It also would not cause a reasonable person emotional distress, as would be required for unlawful harassment (or stalking predicated on harassment), because an objective reading of the comment makes plain that it was speaking in metaphor, and McBryan also very quickly confirmed that it was metaphorical.

30. Finally, the "analogy" comment cannot form the basis of a stalking finding based on "repeated contacts," both because it would not "cause a reasonable person to feel intimidated, frightened, or threatened," and because it did not involve "contact" between Moriwaki and Rynearson. At first, Rynearson engaged in a conversation with third parties *about* Moriwaki, but Moriwaki was not a party to the conversation. Moriwaki then commented, but without being able to see Rynearson's comments due to his blocking Rynearson. Rynearson then continued his conversation with third parties, using Moriwaki's "party" analogy to make a point, but he did not attempt to engage, nor engage, Moriwaki in any conversation or contact.

31. In addition, Rynearson's public comment was protected free speech. It did not fall into any unprotected category (e.g., true threats or defamation); it was speech to the public, not communication with Moriwaki; and nothing about it removes it from the sphere of

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constitutionally protected speech.

D. Can the Protection Order Be Justified by Rynearson's One-To-One Communications with Moriwaki? No.

32. The Municipal Court based the Protection Order in part on Rynearson's text message to Moriwaki seeking comment for his upcoming blog (which became the Facebook page) about Moriwaki. In addition, although not a basis for the Municipal Court's order, the two engaged in three conversations via Facebook message on January 29, February 4, and February 5. These one-to-one communications are constitutionally protected and do not satisfy the statutory elements for cyberstalking, harassment, or stalking.

33. *Unwanted* one-to-one communication that intrudes into private spheres, like the home, is not constitutionally protected. *See Rowan v. U.S. Post Office Dept*., 397 U.S. 728 (1970) (upholding a law "under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder"). Before a speaker is notified that further communication is unwanted, however, one-to-one communication is constitutionally protected. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), for example, the Supreme Court held that although a city could "punish those who call at a home in defiance of the previously expressed will of the occupant," it could not prohibit an individual who had *not* previously been told to stay away from a particular house from going door-to-door—unsolicited and without a prior invitation—to communicate with individual homeowners.

34. Rynearson did not, in any of the Facebook message conversations, reach out to Moriwaki after being put on notice that Moriwaki wanted to cease communication. On the

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contrary, both the January 29 and February 4 message conversations were initiated by Moriwaki; in the February 4 message, Moriwaki apologized to Rynearson; and both message conversations ended with a statement by Moriwaki ("To be continued") that indicated he wanted the conversation to continue. Rynearson initiated the message conversation on February 5, but he did so after Moriwaki's February 4 apology for deleting Rynearson's posts and "To be continued" ending would have reasonably suggested that continued communication was invited. Thus, none of the messages were unwanted, and they did not lose their constitutional protection on that basis.

35. Moreover, nothing about the content of the messages makes them lose their constitutional protection. In each of them, Moriwaki and Rynearson were arguing about whether Rynearson's comments about the NDAA, SB 5176, Governor Inslee, or Moriwaki's involvement in those issues represented "trolling" and "bullying" (as in Moriwaki's opinion) or simply a differing view (as in Rynearson's opinion). Rynearson (or his wife) attempted to explain why he commented about such topics on Moriwaki's page and Moriwaki attempted to explain why he felt bullied or harassed by the comments. The conversations sometimes became heated, with Moriwaki calling Rynearson a "little bit of a sociopath" and Rynearson telling Moriwaki that he was about to cross Rynearson's "line" of "diversity and mutual respect." But they did not include any true threats, defamation, or any other content falling into a historically unprotected category. They simply reflect an argument regarding some of the public comments that Rynearson made on Moriwaki's Facebook page.

36. In addition, the Facebook message conversations—all of which were either initiated

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or invited by Moriwaki—are not contacts that would cause a reasonable person "to feel intimidated, frightened, or threatened" (as required for stalking under RCW 7.92.020), or "to suffer substantial emotional distress" (as required for harassment and stalking predicated on harassment). Similarly, no intent to embarrass or torment Moriwaki can be inferred from Rynearson responding to Moriwaki's Facebook messages and arguing about whether his public comments (asking why Moriwaki did not support SB 5176 and criticizing the NDAA, President Obama, and Governor Inslee) constituted trolling or bullying. The messages reflect an argument between the parties over a short period of time, not Rynearson forcing unwanted one-to-one communication on Moriwaki.

37. Some minutes after Moriwaki said "we are done" and blocked Rynearson, Rynearson texted Moriwaki at the phone number Moriwaki had provided him when the parties exchanged numbers in December. Because it came after the Facebook block and "we are done" comment, if the text had continued the original argument a reasonable person would have understood it to be unwanted. But the text did not continue the same discussion that Moriwaki and Rynearson had previously been engaged in—instead, it gave Moriwaki a chance to comment for a blog about Moriwaki's work for the Memorial, which was identified by name and topic. This served a press function, and thus is part of Rynearson's free-speech right, because it is a recognized, legitimate procedure to give the subject of a story an opportunity to comment.

38. In any event, the text messages comprised a single conversation and thus cannot establish the "repeated" element required for stalking, harassment, or cyberstalking. *See*

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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."). Moreover, a single text-message conversation requesting comment on a blog would not cause a reasonable person *substantial* emotional distress (harassment), or "to feel intimidated, frightened, or threatened" (stalking), much less to fear injury to person or property (stalking predicated on harassment). And it served a lawful purpose—offering Moriwaki the opportunity to respond to criticism that Rynearson intended to publish about him. For these reasons, it does not satisfy the statutory requirements that would justify a Protection Order.

E. Can the Protection Order Be Justified by Rynearson's Public Comments on Moriwaki's Facebook Page? No.

39. The Municipal Court based the Protection Order in part on Rynearson purportedly posting on Moriwaki's Facebook page after being asked to stop and Rynearson posting screen captures of posts that had been deleted by Moriwaki. (Conclusions ¶ 4.) The first finding is contradicted by the record, and the second unlawfully penalizes constitutionally-protected speech. Moreover, nothing about the nature of Rynearson's comments on Moriwaki's Facebook page would strip constitutional protection from those posts or justify the Protection Order.

40. Over more than seven weeks from December 14 to February 5, Rynearson made comments about President Obama, Governor Inslee, the NDAA, or SB 5176 on about seven comment threads on Moriwaki's Facebook page, all of which were public comments on public posts. Although Rynearson was an active Facebook user, he was no more active than

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Moriwaki; all of Rynearson's posts on Moriwaki's Facebook page were comments on public posts that Moriwaki initiated. None were posts to Moriwaki's page initiating a comment thread that did not already exist. The number of Rynearson's comments in a thread sometimes outpaced Moriwaki's, but not by much. For example, in the February 4 thread on Moriwaki's post praising Governor Inslee, Rynearson posted about eight comments to Moriwaki's five. Moreover, Rynearson's political comments were on posts that also discussed political topics, including the risk of the internment occurring again. Nothing about the pace or nature of Rynearson's political posts—which by and large were about President Obama or Governor Inslee, not Moriwaki—would cause a reasonable person to experience substantial emotional distress or raise an inference of an intent to embarrass or torment Moriwaki. With respect to the posts that Moriwaki deleted, in one case he apologized for the deletion (February 4), and in the other (February 5) there were only a handful of posts, over a short period of time, that commented on Moriwaki's deletions and also included screen captures. While this might cause some annoyance, it would not reasonably cause substantial emotional distress. Moreover, it was entirely remedied by the Facebook block, weeks before the Protection Order was entered.

41. Furthermore, Rynearson did not post on Moriwaki's Facebook page after being asked to stop. The Municipal Court's conclusion otherwise is not supported by the record. Moriwaki complained about a post on January 29, and on February 4, he apologized for deleting one of Rynearson's posts, but he did not ask Rynearson to stop posting on his page. Moriwaki first asked Rynearson to stop posting on February 5, and Rynearson was blocked

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and did not post again after that.

42. Rynearson's posts on Moriwaki's Facebook page were also constitutionally protected speech. Unlike one-to-one messages, public comments on Facebook pages are made in a public forum, *i.e.*, a "channel[] of communication used by the public at large for assembly and speech." *Seattle v. Huff*, 111 Wn. 2d 923, 927 (1989). 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 social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Under Article I, Section 5, any regulation of speech in a public forum—even content-neutral time, place, and manner restrictions—must pass strict scrutiny, by being "narrowly tailored" to serve a "compelling governmental interest." *Huff*, 111 Wn. 2d at 926, 928.

43. A Protective Order is not necessary to serve any compelling government interest with respect to Rynearson's posts on Moriwaki's Facebook page. As described, the posts largely criticized President Obama and Governor Inslee or discussed SB 5176; nothing in their content would put them in an unprotected category. Nor do they lose protection because Moriwaki objected to them or (in some cases) deleted them. The audience for Rynearson's comments on Moriwaki's Facebook page was not Moriwaki alone, but the public at large; none of the relevant posts or comments were even limited to "friends" only. That publicly accessible page is owned by Facebook, whose terms and standards Rynearson did not violate. In some cases (the February 4 and 5 comments criticizing Governor Inslee on the February 3 post praising Governor Inslee), the audience for Rynearson's comments

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included not only the public at large, but the Governor himself, whom Moriwaki "tagged" with both the Governor's official and personal Facebook pages.

44. Because the audience for Rynearson's comments included willing third-party listeners, it does not fall within the narrow rule that permits the government to penalize unwanted one-to-one communication. *See Keefe*, 402 U.S. at 420 (distinguishing a realtor's attempt to stop leafletting from cases permitting individuals to shut off communication into their homes because "[a]mong other important distinctions," the realtor was "not attempting to stop the flow of information into his own household, but to the public"). 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." Facebook's software let Moriwaki exclude Rynearson from posting on this part of Facebook's public forum; when Moriwaki did this, Rynearson respected the exclusion and stopped, approximately five weeks before a protective order was requested. A protective order based on Rynearson's posts on Moriwaki's Facebook page thus not only fails to satisfy the statutory prerequisites, but it also fails strict scrutiny because it is not necessary to serve any government interest.

F. Can the Protection Order Be Justified on Any Other Basis? No.

45. The court has separately analyzed the different bases identified by the Municipal Court as justifying the order and determined that each of them rests on constitutionally-protected speech that cannot be the basis for a Protection Order and that does not meet the

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statutory requirements of the harassment, cyberstalking, and stalking statutes. The analysis is no different if all of the speech is considered together; it remains constitutionally protected and insufficient to satisfy the relevant statutes. Moreover, the record establishes that to the extent any remedy was needed, the Facebook block was a complete and sufficient remedy that halted the one-to-one communication between Moriwaki and Rynearson, as well as any posts by Rynearson to the public on Moriwaki's Facebook page, more than a month before any protective order was in place. Accordingly, the order must be vacated in its entirety.

46. The speech restriction in the order is unlawful for an additional reason. It prohibits Rynearson from creating or maintaining websites or internet entities using Moriwaki's name or personal identifying information in the title or domain name, and from using Moriwaki's picture for memes, posters, or other online uses. This 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, Section 5 of the Washington Constitution. *Ino Ino, Inc. v. Bellevue*, 132 Wn. 2d 103, 117 (1997). Protection orders restricting speech "carry a heavy presumption of unconstitutionality." *In re Marriage of Suggs*, 152 Wn. 2d 74, 81 (2004). An order must be "specifically crafted to prohibit only unprotected speech," *In re Marriage of Meredith*, 148 Wn. App. 887, 898 (Div. II 2009), and the speech restriction is not. It bars Rynearson from engaging in much protected speech, such as 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

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with the Memorial." It also bars Rynearson from creating "memes," which are also constitutionally protected forms of speech.

47. The public-events restriction is also invalid for the additional reason that it is an unconstitutional prior restraint. It impermissibly restricts Rynearson's First Amendment right of association, secured by cases such as *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Given Moriwaki's prominence in the Bainbridge Island community, it is likely that he would attend most major civic events there, and virtually guaranteed that he would attend any local event about the internment. The public-event restriction thus bars Rynearson from many civic events regardless of whether Rynearson's attendance would even be known to Moriwaki. That is an unconstitutional prior restraint on Rynearson's associational freedom, but it is also unwarranted by the facts. *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). There are no allegations that Rynearson disrupted any public event attended or hosted by Moriwaki or engaged in anything other than normal, polite social interactions with Moriwaki or other attendees, even though Rynearson attended several such events, including one two weeks after Moriwaki blocked him on Facebook.

48. The restrictions on Rynearson's physical liberty in the order are also invalid for the additional reason that they are not warranted by the facts and they interfere with Rynearson's

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use of his real property.[3] The restrictions are not necessary to protect Moriwaki: Rynearson did not physically stalk Moriwaki or threaten him in any manner, and there were no hostile or inappropriate in-person encounters between them. On the other hand, the 300-foot stay-away restriction imposes severe burdens on Rynearson. It expressly bars Rynearson from ever using his easement to travel to Winslow Way. It effectively excludes him from a large part of downtown Winslow, while also requiring him to take an indirect, and longer, walking route to the ferry. And it puts him in the difficult and demeaning position of having to leave public places where he otherwise has every right to be, just because Moriwaki appears there. There is no justification for any such restrictions on Rynearson's right to use his easement, to travel, and to frequent local businesses. *See Trummel*, 156 Wn. 2d at 668-669.

49. The permanent term of the order is also unlawful for the additional reason that it was based on intent to engage in constitutionally protected activity or Rynearson's irrelevant and constitutionally protected past online activity. The only speech by Rynearson related to Moriwaki after the day Moriwaki blocked him on Facebook was Rynearson's constitutionally protected speech to third parties. For more than five weeks, with no protection order in place, Rynearson made no attempt to contact Moriwaki by email, Facebook message, text message, telephone, or other means. He also did not attempt to post on Moriwaki's Facebook page. Accordingly, the record does not support an inference that

[3] To the extent the order rested on a harassment finding, it was also unlawful for the additional reason that a municipal court issuing an antiharassment order lacks authority to prohibit the respondent from the use or enjoyment of real property to which the respondent has a cognizable claim. RCW 10.14.080(8). In prohibiting Rynearson's use and enjoyment of his easement, the municipal court thus exceeded its authority.

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Rynearson would contact, harass, or stalk Moriwaki in the absence of a permanent order.

The judgment of the Municipal Court is reversed and the Protection Order is vacated in its entirety.

DATED:

_____

THE HONORABLE KEVIN D. HULL

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Respectfully submitted,

Dated: December 22, 2017

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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 Proposed Findings of Fact and Conclusions of Law was served by delivery to Federal Express on December 22, 2017, for next-business-day delivery to:

Clarence Moriwaki
155 Madison Ave N
Bainbridge Island, WA 98110

Dated: _____

_____
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