FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LEE RYNEARSON III, *Plaintiff-Appellant*, v. ROBERT FERGUSON, Attorney General of the State of Washington; TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, *Defendants-Appellees.*	No. 17-35853 D.C. No. 3:17-cv-05531-RBL OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted July 12, 2018
Seattle, Washington

Filed September 7, 2018

Before: Richard R. Clifton and Jacqueline H. Nguyen, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

Opinion by Judge Clifton

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY[**]

Civil Rights

The panel reversed the district court's dismissal, on abstention grounds, of plaintiff's complaint seeking to enjoin enforcement of Washington's cyberstalking law and to obtain a declaratory judgment that the law is unconstitutional.

Plaintiff was the respondent in a Washington state court protection order proceeding filed by a person who lived near plaintiff and who was the subject of plaintiff's multiple online postings. Based on the allegations of stalking, cyberstalking and harassment, the state court entered a temporary stalking protection order against plaintiff. While the state court proceedings were pending, plaintiff filed a federal action which sought to enjoin enforcement of Washington's cyberstalking statute, Wash. Rev. Code § 9.61.260(1)(b).

The panel held that the Washington state stalking protection order proceedings against plaintiff did not fit into the narrow category of state cases in which federal abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971). The state proceedings were not quasi-criminal enforcement actions and did not involve the state's interest in enforcing the orders and judgments of its courts. Additionally, the panel held that *Younger* was not appropriate because plaintiff's federal constitutional challenge to the cyberstalking statute would not have the practical effect of enjoining the state proceedings. The panel noted that the

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

state court protection order was not based solely on the crime of cyberstalking, but also on a finding that plaintiff had committed stalking and unlawful harassment. Therefore, the declaratory judgment and injunction that plaintiff sought in the federal proceedings would not have prevented the municipal court from issuing a stalking protection order. The panel further concluded that the stalking protection orders issued by the state court and the cyberstalking statute covered different conduct and that even if the state were enjoined from enforcing the criminal cyberstalking law, plaintiff could still have been charged with violating the protection order. The panel remanded for further proceedings.

COUNSEL

Taylor de Laveaga (argued), Certified Law Student; Eugene Volokh (argued), Supervising Attorney; Scott and Cyan Banister First Amendment Clinic, UCLA School of Law, Los Angeles, California; Venkat Balasubramani, Focal PLLC, Seattle, Washington; for Plaintiff-Appellant.

Callie A. Castillo (argued), Deputy Solicitor General; Robert Ferguson, Attorney General; Office of the Attorney General, Olympia, Washington; for Defendants-Appellees.

OPINION

CLIFTON, Circuit Judge:

This appeal calls on us to consider the scope of federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971). In particular, we consider whether federal courts should abstain from exercising jurisdiction over a constitutional challenge to a state criminal statute while there are ongoing state court protection order proceedings arguably related to the challenge to the criminal statute. In the circumstances of this case, we conclude that abstention is not appropriate.

Plaintiff-Appellant Richard Rynearson III was named as the respondent in a Washington state court protection order proceeding filed by someone who lived near Rynearson and who was the subject of multiple online postings by Rynearson. Based on allegations that Rynearson had stalked, cyberstalked, and harassed the person seeking the protection order, the state municipal court entered a temporary stalking protection order against Rynearson. While those proceedings were pending in state court, Rynearson filed an action in federal court which sought to enjoin enforcement of Washington's cyberstalking law and to obtain a declaratory judgment that the law is unconstitutional. The federal action named two defendants: the Attorney General of Washington, Robert Ferguson, and the Kitsap County Prosecuting Attorney, Tina R. Robinson, the Defendants-Appellees in this appeal.

The district court dismissed Rynearson's complaint based on *Younger* abstention. In *Younger* and subsequent cases, the Supreme Court held that federal courts should abstain from exercising jurisdiction in exceptional circumstances when

state proceedings are ongoing. Rynearson appeals the dismissal. Because we conclude that the state protection proceedings do not present the exceptional circumstances that warrant abstention, we reverse the district court's dismissal of Rynearson's complaint and remand for further proceedings.

I. Background

Rynearson, who sometimes uses the name Richard Lee, regularly posts online about civil liberties issues. In his words, he has "tried to raise awareness of the erosion of civil liberties, and the expansion of executive power, related to the war on terror." He began that effort while serving in the Air Force. Upon retiring from the service, Rynearson moved to Bainbridge Island, Washington, in 2016. He had already become interested in the role of Bainbridge Island in the internment of Japanese-Americans during World War II. Even before moving there, he began to follow the work of the Bainbridge Island Japanese-American Exclusion Memorial. Clarence Moriwaki, a private citizen, was the volunteer founder of the memorial and a member of its board. In November 2016, Rynearson became Facebook friends with Moriwaki.

Rynearson believed that a provision in the National Defense Authorization Act of 2012 ("the NDAA") would permit indefinite detention of American citizens. Through regular posts on public Facebook pages, Rynearson began to criticize Moriwaki and other local leaders who failed to vocally condemn the NDAA. In January and February 2017, Rynearson posted numerous comments on Facebook and sent text messages to Moriwaki criticizing him for failing to express disapproval of public officials who supported the

NDAA. Moriwaki told Rynearson that he felt harassed and asked Rynearson to stop communicating with him and posting about him. Moriwaki lived approximately 300 feet from Rynearson's residence. Despite Moriwaki's request, Rynearson continued posting his critical comments on Moriwaki's Facebook page. Moriwaki then blocked Rynearson from posting on his Facebook page. Rynearson responded by creating a Facebook group initially called "Clarence Moriwaki of Bainbridge Island," where he posted memes criticizing Moriwaki. Rynearson ultimately renamed the page "Not Clarence Moriwaki of Bainbridge Island."

In March 2017, Moriwaki sought and obtained from the Bainbridge Island Municipal Court a temporary stalking protection order against Rynearson. This order compelled Rynearson to "remove public webpages/Facebook page with [Moriwaki's] name" and prohibited him from, among other things, having any contact with Moriwaki, keeping Moriwaki under surveillance, going within 100 feet of Moriwaki's residence or workplace, and attending events at which Moriwaki was present. In June 2017, in response to an inquiry by Rynearson's attorney, the state prosecutor said that he was not planning to file criminal charges against Rynearson at that time in the hope that Rynearson would comply with the protection order but that the prosecutor would revisit that decision if he received any future referrals.

On July 10, 2017, Rynearson filed a response in the municipal court opposing Moriwaki's petition for a permanent protection order. In this response, Rynearson included a challenge to the constitutionality of Washington's cyberstalking statute, Wash. Rev. Code § 9.61.260(1)(b). In relevant part, the statute provides:

> (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: . . .
>
> > (b) Anonymously or repeatedly whether or not conversation occurs . . . .

Wash. Rev. Code. § 9.61.260.

On July 17, 2017, the municipal court granted Moriwaki a permanent protection order against Rynearson. The court concluded that Moriwaki had shown by a preponderance of the evidence that Rynearson had stalked, cyberstalked, and unlawfully harassed him. The court rejected Rynearson's claim that his actions were protected by the First Amendment. The permanent protection order prohibited Rynearson from coming within 300 feet of Moriwaki's residence or workplace, forbade him from attending public events with Moriwaki, and prohibited Rynearson "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. [Rynearson] may not use the photograph of [Moriwaki] to create memes, posters, or other online uses."

Rynearson appealed the protection order. In January 2018 the Kitsap County Superior Court vacated the permanent protection order on the grounds that Rynearson's speech was protected by the First Amendment. The court did not rule on

the constitutionality of the cyberstalking statute. Moriwaki did not appeal this judgment.

In the meantime, while the permanent protection order proceeding was pending before the municipal court, Rynearson initiated the current federal action by filing his complaint in the district court challenging the constitutionality of Washington's cyberstalking statute under 42 U.S.C. § 1983. The complaint was filed on July 11, 2017, one day after Rynearson filed his opposition to the protection order in the municipal court and six days before that court held a hearing and issued the permanent protection order. In the federal action Rynearson sought a permanent injunction enjoining defendants from enforcing the statute and a declaratory judgment that the statute is unconstitutional.

Defendants filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion on the ground that the federal court should abstain under *Younger*. Rynearson appeals.

II. Discussion

We review a district court's *Younger* abstention determination de novo. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014). We conduct the *Younger* analysis "in light of the facts and circumstances existing at the time the federal action was filed." *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 881 n.6 (9th Cir. 2011).

In *Younger*, the Supreme Court held that federal courts should abstain from granting equitable relief as to the validity

of state criminal statutes when parallel criminal proceedings are ongoing in state court. 401 U.S. at 41. To do otherwise, the Court concluded, would be "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* The Court subsequently extended *Younger* abstention to a limited category of state civil cases. *See, e.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (applying *Younger* abstention to a federal suit that interfered with an ongoing state nuisance proceeding); *Juidice v. Vail*, 430 U.S. 327, 335 (1977) (applying *Younger* abstention to a federal suit that interfered with state contempt procedures); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432–37 (1982) (applying *Younger* abstention to a federal suit that interfered with state bar disciplinary proceedings). Both the Supreme Court and our court have repeatedly emphasized, however, that *Younger* abstention is "an extraordinary and narrow exception to the general rule that federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Potrero Hills*, 657 F.3d at 882 (internal quotation marks omitted).

With that directive in mind, we have developed a five-prong test to determine when *Younger* abstention should apply to a civil case. Specifically, "*Younger* abstention is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *ReadyLink*, 754 F.3d at 759. If these four threshold elements are established, we then consider a fifth prong: (5) "whether the federal action would have the practical effect of enjoining the state proceedings

and whether an exception to *Younger* applies." *Id.* Each of these requirements must be "strictly met." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

Only the second and fifth prongs of this test are at issue in this case. We discuss each in turn.

A. Prong Two: The State Proceeding Is Not Quasi-Criminal and Does Not Involve the State's Interest in Enforcing Court Orders

Rynearson argues that the district court erred in applying *Younger* abstention because state protection order proceedings are not quasi-criminal enforcement actions and do not involve the state's interest in enforcing the orders and judgments of its courts. We agree.

In *Sprint Communications, Inc. v. Jacobs*, the Supreme Court summarized much of its precedent on the nature of quasi-criminal civil enforcement actions:

> Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act. *See, e.g.*, *Middlesex*, 457 U.S., at 433–34 (state-initiated disciplinary proceedings against lawyer for violation of state ethics rules). In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. *See, e.g.*, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state-initiated administrative proceedings to

> enforce state civil rights laws); *Moore v. Sims*, 442 U.S. 415, 419–20 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (civil proceeding "brought by the State in its sovereign capacity" to recover welfare payments defendants had allegedly obtained by fraud) . . . . Investigations are commonly involved, often culminating in the filing of a formal complaint or charges. *See, e.g.*, *Dayton*, 477 U.S., at 624 (noting preliminary investigation and complaint); *Middlesex*, 457 U.S., at 433 (same).

571 U.S. 69, 79–80 (2013) (parallel citations omitted).

The district court concluded that protection order proceedings meet this standard because they are "akin to criminal prosecutions." But protection order proceedings in Washington are different from the enforcement actions discussed in *Sprint*. Under Washington law, a court may issue a protection order if it "finds by a preponderance of the evidence that the petitioner has been a victim of stalking conduct by the respondent." Wash. Rev. Code § 7.92.100(1)(a). This "petitioner" is a private party, not the state or local government. In Rynearson's case it was Moriwaki. The law does not require state authorities to conduct any investigation or file charges or a complaint in connection with an application for a protection order, and state actors are not party to the protection proceedings. Indeed, the stalking protection order statute specifically provides that a petitioner is not required to report the stalking conduct to the police to obtain a protection order. *See* Wash.

Rev. Code § 7.92.100(b) ("The petitioner shall not be denied a stalking protection order . . . because the petitioner did not report the stalking conduct to law enforcement."). In Rynearson's case, the state prosecutor's decision not to file criminal charges against Rynearson for his conduct did not bear on the municipal court's decision to grant Moriwaki a permanent protection order.

Furthermore, the purpose of Washington state stalking protection orders is not to "sanction" a party "for some wrongful act." *Sprint*, 571 U.S. at 79. Although a petitioner cannot receive a protection order unless the respondent has engaged in a wrongful act, the primary purpose of the order is to protect the petitioner, not punish the respondent. This is clear from the introduction to Washington's stalking protection statute:

> Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the stalking is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.

Wash. Rev. Code § 7.92.010.

To be sure, the stalking protection order statute makes reference to state criminal statutes. "Stalking conduct" is defined to include any act of stalking as defined under Washington Revised Code section 9A.46.110 or any act of cyberstalking as defined under Washington Revised Code

section 9.61.260. Wash. Rev. Code § 7.92.020(3).[1] Conduct in violation of those specified criminal statutes may be a basis on which a state court may grant a protection order, but that is not the only basis on which a protection order may be granted. More broadly, the mere fact that the protection order law refers to criminal statutes does not mean that protection order proceedings are quasi-criminal. As the Supreme Court noted in *Sprint*, "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." 571 U.S. at 72.

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[1] "Stalking conduct" means any of the following:

> (a) Any act of stalking as defined under [Wash. Rev. Code] § 9A.46.110;
>
> (b) Any act of cyberstalking as defined under [Wash. Rev. Code] § 9.61.260;
>
> (c) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that:
>
> (i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling;
>
> (ii) Serves no lawful purpose; and
>
> (iii) The 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.

Wash. Rev. Code § 7.92.020(3).

Washington stalking protection proceedings do not reflect any of the characteristics described in *Sprint*. Those proceedings are not quasi-criminal enforcement actions for *Younger* purposes.

Nor do the protection proceedings "involve a state's interest in enforcing the orders and judgments of its courts." *ReadyLink*, 754 F.3d at 759. The Supreme Court and our court have held that this standard is geared to ensuring that federal courts do not interfere in the procedures by which states administer their judicial system and ensure compliance with their judgments. This standard derives primarily from the Supreme Court's decisions in *Juidice* and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). In *Juidice*, the Court held that *Younger* abstention applied to a federal suit that sought to enjoin the use of state statutory contempt procedures because "[t]he contempt power lies at the core of the administration of a State's judicial system." 430 U.S. at 335. Similarly, in *Pennzoil* the Court held that *Younger* abstention applied to a federal suit challenging the constitutionality of state procedures that allowed judgment creditors to secure liens on all of a judgment debtor's real property. As the Court explained, "[t]his Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems." *Pennzoil*, 481 U.S. at 12–13. Further, "[b]oth *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained." *Id*. at 13–14 (footnote omitted).

We recently considered this standard in *Cook v. Harding*, 879 F.3d 1035 (9th Cir. 2018), *petition for cert. filed* (U.S. April 30, 2018) (No. 17-1487). In *Cook*, the plaintiff filed a federal suit challenging the constitutionality of a state statute, California Family Code section 7962, that "authorizes the judicial determination of legal parentage in accordance with the terms of a gestational surrogacy agreement." 879 F.3d at 1038. The plaintiff was party to a pending action in state court to enforce a surrogacy agreement when she filed her federal complaint. *Id.* We held that the state action did not involve the state's interest in enforcing the orders and judgments of its courts because

> Cook does not question the *process* by which California courts compel compliance with parentage determinations under state law. Rather, she alleges that Section 7962 is unconstitutional. Cook accordingly challenges the legislative prescriptions of Section 7962. As the Court held even before *Sprint*, *Younger* does not "require[] abstention in deference to a state judicial proceeding reviewing legislative . . . action."

Id. at 1041 (alterations in *Cook*) (quoting *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 368 (1989)).

Here, Rynearson's challenge is solely to the constitutionality of a criminal statute. Although conduct in violation of that statute can be (and was, in Rynearson's case) a partial basis for issuing a protection order, the criminal statute's constitutionality does not bear on the validity of the state's protection orders or the procedures by which the state

courts issue or enforce them. We therefore conclude that Rynearson's suit did not involve Washington's interest in enforcing the orders and judgments of its courts.

B. Prong Five: The Federal Suit Would Not Have the Practical Effect of Enjoining the State Protection Proceedings

Even if we were to decide that the state protection proceedings met the first four prongs described above, *Younger* abstention still would not be appropriate here because Rynearson's federal constitutional challenge to the cyberstalking statute would not "have the practical effect of enjoining the state proceedings." *ReadyLink*, 754 F.3d at 759.

Defendants argue that declaring the cyberstalking statute unconstitutional would have given Rynearson the means to stop the municipal court from continuing to apply the cyberstalking statute to Rynearson's conduct. That is not true. It would have been true that success in Rynearson's federal suit would have prevented state prosecutors from prosecuting Rynearson specifically for the crime of cyberstalking (which they ultimately decided not to do, anyway). But there is no basis to conclude that Rynearson's federal suit would have prevented the municipal court from granting Moriwaki a permanent protection order or prevented the state prosecutors from prosecuting Rynearson if he had violated the protection order.

Even if the cyberstalking statute were declared unconstitutional in federal court, the protection order was not based solely on the crime of cyberstalking. The stalking protection order statute clearly provides that the crime of

stalking and other forms of "stalking conduct" can be the basis for a protection order; cyberstalking is not required. *See* Wash. Rev. Code §§ 7.92.020, 7.92.100. In Rynearson's case, the municipal court found by a preponderance of the evidence that Rynearson had committed both stalking and unlawful harassment in addition to cyberstalking. Therefore, the declaratory judgment and injunction that Rynearson sought in the federal proceedings would not have prevented the municipal court from issuing a stalking protection order against Rynearson.

Nor would Rynearson's federal suit have blocked the state's ability to prosecute Rynearson had he violated the protection order. The stalking protection orders issued by the municipal court and the cyberstalking statute covered different conduct. The cyberstalking statute criminalizes repeated or anonymous electronic communications made "with intent to harass, intimidate, torment, or embarrass." Wash. Rev. Code § 9.61.260(1). The protection orders issued by the municipal court, on the other hand, prohibited Rynearson from, among other things, attending events with Moriwaki, contacting Moriwaki, and creating websites that used Moriwaki's name. Rynearson could have engaged in conduct prohibited by the orders but not criminalized under the challenged cyberstalking statute. Even if the state were enjoined from enforcing the criminal cyberstalking law, Rynearson could have been charged with violating the protection order.

Moreover, even if the federal action did cast doubt on the validity of the terms of the stalking protection order, Rynearson still would not be able to use any federal determination about the cyberstalking statute's constitutionality as a defense in a contempt proceeding. A

party cannot use a challenge to the validity of a court order as a defense in a proceeding for violation of that order under Washington law. *See City of Seattle v. May*, 256 P.3d 1161, 1163–64 (Wash. 2011) (en banc).

Rynearson did not challenge the terms of the protection orders issued against him in his federal suit. Nor did he challenge the constitutionality of Washington's protection order statute or the statute under which he would be prosecuted if he were to violate the order. *See* Wash. Rev. Code § 26.50.110. Rynearson's federal suit would not have had the practical effect of enjoining the state protection order proceedings.

III. Conclusion

Younger abstention is a limited exception to the obligation of federal courts to hear cases within the scope of their jurisdiction. We conclude that the Washington state stalking protection order proceedings against Rynearson did not fit into the narrow category of state cases in which federal abstention was appropriate. We reverse the district court's dismissal of Rynearson's complaint and remand for further proceedings.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. RYNEARSON, III, Plaintiff-Appellant, v. ROBERT FERGUSON, et al., Defendant-Appellee.	No. 17-35853

APPELLANT'S MOTION TO EXPEDITE BRIEFING AND HEARING

Pursuant to Ninth Circuit Rule 27-12, Appellant Richard Lee Rynearson, III hereby moves to expedite the briefing and hearing in this appeal because "in the absence of expedited treatment, irreparable harm may occur." Mr. Rynearson filed this federal suit, and moved for a preliminary injunction, because he faces a credible threat of prosecution under Washington's cyberstalking law, RCW 9.61.260(1)(b), and is self-censoring his speech accordingly.

The district court denied a preliminary injunction, but not because he found that Mr. Rynearson would not suffer irreparable harm or that the law was likely constitutional; to the contrary, he stated "Rynearson raises compelling questions as to the breadth and constitutionality of certain provisions" of the cyberstalking law, which are "seemingly reinforced by Defendants' reluctance to address the constitutionality of the statute during oral argument." Opinion, *Rynearson v. Ferguson*, No. 3:17-cv-05531, Dkt. No. 33, at 10 (W.D. Wash. Oct. 10, 2017)

("Opinion"). Nonetheless he denied the preliminary injunction motion as moot because he dismissed the suit under *Younger v. Harris*, 401 U.S. 37 (1971). In so doing, he abstained in favor of a civil state court proceeding between Mr. Rynearson and another private party, to which the state is not a party, about a protective order that was based on multiple statutes besides the cyberstalking law, and that would be wholly unaffected by the outcome of the federal case aside from any persuasive force of the federal court decision. Because Mr. Rynearson's protected First Amendment speech is unconstitutionally chilled every day that this case continues without an injunction, there is good cause for expedition. Indeed, expedition is available by rule in an interlocutory appeal when a preliminary injunction motion is denied, Cir. Rule 3-3. The same should apply here, because although the appeal is from a final order, that final order does not adjudicate the injunction issues on the merits.

The transcript has already been prepared and was filed in the district court on October 19, 2017 (Dkt. No. 36). Defendants-Appellees oppose this motion. A proposed briefing schedule is set forth at the conclusion of the motion.

1. Washington's cyberstalking statute is an alarmingly broad prohibition that criminalizes speaking online about someone else with the intent to "embarrass" that other person. Section 9.61.260(1)(b) provides that a "person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, . . . makes an electronic communication to such other

person or a third party . . . [a]nonymously or repeatedly whether or not conversation occurs." An "electronic communication" is defined to include the "transmission of information by . . . internet-based communications." RCW § 9.61.260(5). The statute separately criminalizes electronic speech that contains "any lewd, lascivious, indecent, or obscene words, images, or language," *id.* § 9.61.260(1)(a), or that "[t]hreaten[s] to inflict injury on the person or property of the person called or any member of his or her family or household," *id.* § 9.61.260(1)(c). Accordingly, Section 9.61.260(1)(b)—the provision at issue in this case—criminalizes a vast range of non-obscene, non-threatening speech, based only on (1) purportedly bad intent and (2) repetition or anonymity.

Traditional anti-stalking laws restrict communication to an unwilling listener. But Section 9.61.260(1)(b) goes much further, by criminalizing even public commentary about people. While laws "attempting to stop the flow of information into [objectors'] own household[s]" (speech to a person) are constitutional, laws that block criticism of a person said "to the public" (speech about a person) violate the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971). Even though the district court decision did not reach the merits of Mr. Rynearson's constitutional challenge, it reflects Mr. Rynearson's strong likelihood of success, noting that he raised "compelling questions" about the statute's

constitutionality and that Defendants declined to defend the statute on the merits at the preliminary-injunction hearing. Opinion, at 10.

2. Mr. Rynearson has a reasonable fear of enforcement proceedings under RCW 9.61.260(1)(b) and has self-censored his speech because of it. A plaintiff suffers "the constitutionally recognized injury of self-censorship" so long as he "fear[s] enforcement proceedings might be initiated by the State" and that "fear was reasonable." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003). A "well-founded fear that the law will be enforced" exists in "the free speech context" so long as "the plaintiff's intended speech arguably falls within the statute's reach." *Id.* at 1095. Mr. Rynearson has established that well-founded fear and self-censorship injury here: he fears enforcement proceedings, he has curtailed his speech as a result, and both his past and planned future speech arguably fall within the cyberstalking statute's reach. Decl. of Richard Rynearson ¶¶ 16-17, Dkt. No. 4 ("Rynearson Decl.").

With that, Mr. Rynearson "need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Cal. Pro-Life Council*, 328 F.3d at 1095 (citation omitted). But there is more here—the authorities *have* threatened to prosecute Mr. Rynearson for online speech critical of a local community leader. The police department referred a probable cause finding to the prosecutor based on such speech. Rynearson Decl. ¶ 13. And a representative of the

Kitsap County Prosecutor's office indicated that he was going to "sit on" that referral in the hope that Mr. Rynearson abided by a protective order (that then barred him from public online speech using a particular individual's name), and that he would "revisit" his charging decision if he "get[s] any future referrals." *Id.* ¶ 15, Ex. C. Mr. Rynearson reasonably believes "future referrals" could occur based on future speech arguably falling within the scope of RCW § 9.61.260(1)(b), and has censored his own speech accordingly.

3. The deprivation of Mr. Rynearson's First Amendment rights is irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (same). Because Mr. Rynearson is likely to prevail on his overbreadth challenge, he will suffer irreparable harm if the State is not enjoined from enforcing the law. A "colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief." *Doe*, 772 F.3d at 583 (internal quotation marks omitted).

4. No matter what happens in the state protective-order proceeding, it cannot repair or forestall this irreparable harm. The district court abstained from deciding whether, under the First Amendment, Washington prosecutors should be enjoined from enforcing the provision of the cyberstalking statute that bans repeated or anonymous online speech with intent to embarrass. Opinion, at 10. The court did

so because of a pending state civil lawsuit between Mr. Rynearson and another private party, Clarence Moriwaki, regarding a protective order that Mr. Moriwaki obtained based on Mr. Rynearson's past public speech. Opinion, at 3. We believe such abstention was an error because, among other things, this state-court proceeding—to which the state is not a party—is not a quasi-criminal action, Opinion, at 7-8, and because a federal judgment would not effectively enjoin the state proceedings, Opinion, at 9-10, when the protective order could be upheld in its entirety regardless of the constitutionality of the cyberstalking statute. And this error ought to be corrected promptly by this Court, because expedition is needed to prevent the ongoing deprivation of Mr. Rynearson's constitutional rights.

Nor can this ongoing deprivation be corrected within the state court proceeding. A Washington trial court is now reviewing that protective order (no appeal of right is permitted to any Washington appellate court, Wash. Rules of App. Proc. 2.2(c)), *Moriwaki v. Rynearson*, No. 17-2-01463-1 (Wash. Superior Ct.), so it is possible that *the order* may be vacated. But Mr. Rynearson's speech would be chilled by *the statute*, and the threat of criminal prosecution for violating the statute, regardless of whether the order is vacated.

The state court protective order restrains only very particular online speech about a particular person (Mr. Moriwaki): "websites, Facebook pages, blogs, forums, or other online entities that use [Mr. Moriwaki's] name or identifying information

. . . in the title or domain name," and the use of Mr. Moriwaki's photograph. *See* Order, *Moriwaki v. Rynearson*, No. 12-17 (Bainbridge Isl. Mun. Ct. July 17, 2017). The statute, on the other hand, can cover a vast range of speech about Mr. Moriwaki (and others) beyond the use of photographs or the use of a name in a title or domain name. Mr. Rynearson could thus publicly critique Mr. Moriwaki (a local community leader) without violating the protective order, but he has not done so because of the past referral of his speech for a cyberstalking prosecution by the local police department and his reasonable belief that the cyberstalking statute would be enforced against him for any future speech that even arguably comes within its ambit. Rynearson Decl. ¶¶ 16-17.

The cyberstalking statute, and its criminal enforcement, RCW 9.61.260(2), is entirely separate and distinct from criminal enforcement of protective orders, RCW 26.50.110(1). By and large, it is not the protective order that has restrained Mr. Rynearson's speech; it is the threat of enforcement of the cyberstalking statute. Only an injunction binding the state prosecutors can stop that irreparable harm.

5. Mr. Rynearson proposes a briefing schedule very similar to the briefing schedule that would have applied under Circuit Rule 3-3. Mr. Rynearson sought to file this appeal as a preliminary injunction appeal under Circuit Rule 3-3, but the appeal did not qualify under the rule because the district court's *Younger* dismissal was a final order. Yet the reasons for Rule 3-3 apply to this appeal as well: Mr.

Rynearson seeks a preliminary injunction, aimed at promptly preventing irreparable harm. The district court denied the injunction, on a basis that Mr. Rynearson argues is erroneous. That this basis related to abstention (thus leading to dismissal of the motion for preliminary injunction) rather than to the merits (which would have led to a denial of the motion, to which Rule 3-3 would have applied) should not deprive Mr. Rynearson of a prompt hearing on his First Amendment argument.

The schedule under Rule 3-3 would have dictated that the opening brief be filed by November 15, with the response brief 28 days later and the reply brief 21 days after that. By this motion, Mr. Rynearson proposes a substantially similar briefing schedule, as follows:

Appellant's Opening Brief and Excerpts of Record	November 21, 2017
Appellee's Brief	December 22, 2017
Appellant's Reply Brief	January 12, 2018

Mr. Rynearson proposes that argument be held in February 2018.

CONCLUSION

For the foregoing reasons, briefing and argument in this appeal should be expedited.

Respectfully submitted.

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October 31, 2017

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CERTIFICATE OF COMPLIANCE

The foregoing response is in 14-point Times New Roman proportional font and contains 1,777 words, and thus complies with the type-volume limitation set forth in Rule 27(d)(2) of the Federal Rules of Appellate Procedure:

/s/Eugene Volokh
Eugene Volokh

CERTIFICATE OF SERVICE

I hereby certify that, on October 31, 2017, I electronically filed the foregoing Motion to Expedite with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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No. 17-35853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. RYNEARSON, III,
Plaintiff-Appellant,

v.

ROBERT FERGUSON et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
The Honorable Ronald B. Leighton
Case No. 3:17-cv-05531-RBL

APPELLANT'S OPENING BRIEF

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* Counsel would like to thank Taylor De Laveaga, a UCLA School of Law student who worked on this brief.

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Statement of Issue Presented for Review

Whether a District Court's duty to hear a plaintiff's First Amendment challenge to a criminal cyberstalking statute is extinguished when a private party has sued in state court seeking a civil antistalking order against the plaintiff.

Statement of Facts

A. The Political Dispute Between Clarence Moriwaki and Richard Rynearson

Mr. Rynearson is an author and activist who regularly comments online about civil liberties, including about police abuse and the expansion of executive power in the wake of September 11. ER 26. Since his time as an officer in the U.S. Air Force, Rynearson has been interested in indefinite-detention issues, and particularly the detention provision in section 1021 of the National Defense Authorization Act (NDAA) of 2012, which, according to one court, unconstitutionally authorizes detention of American citizens without trial. *See* ER 27; *Hedges v. Obama*, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012), *rev'd for lack of jurisdiction*, 724 F.3d 170 (2d Cir. 2013).

A decade before retiring from the military, Rynearson decided to move to Bainbridge Island after his retirement. ER 27. Rynearson therefore

became interested years ago in Seattle-area public and civic organizations that seek to remember and teach the lessons of the Japanese-American internment in World War II, such as the Bainbridge Island Japanese-American Exclusion Memorial and Seattle-based Densho. ER 27. After moving to Bainbridge Island in 2016, Rynearson began following these groups more closely and would regularly post on public Facebook pages and groups criticizing local civic leaders who either failed to condemn the NDAA or vocally and strongly support pro-NDAA politicians, such as President Obama (who signed the NDAA) and Governor Inslee (who voted for it when he was a Congressman). ER 28-29.

In November 2016, Rynearson became Facebook "friends" with Clarence Moriwaki, the founder of and spokesperson for the Bainbridge Island Japanese-American Exclusion Memorial. ER 18-19. In January 2017, in response to political posts by Moriwaki, Rynearson posted comments on the public Facebook page run by Moriwaki criticizing Governor Inslee and President Obama for their support of the NDAA. ER 19. As Moriwaki deleted some of those posts, Rynearson also made comments criticizing Moriwaki for his failure to condemn the NDAA, his refusal to support proposed Washington legislation that would blunt the effect of

the NDAA in Washington, and for allegedly "censoring non-liberal viewpoints on [the Memorial's Facebook] page" (which Moriwaki authors and controls). ER 19, 20. On Feb. 5, Moriwaki asked Rynearson to stop posting on Moriwaki's Facebook page, and blocked Rynearson from posting on that page. ER 20-21.

After being blocked from posting on Moriwaki's page, Rynearson continued to criticize Moriwaki on a new page that Rynearson had created. The thrust of Rynearson's posts was that Moriwaki should be removed from his role as board member and de facto spokesperson for the Memorial because Moriwaki used the lessons of the internment, and his role with the Memorial, to selectively criticize only Republican politicians (chiefly, President Trump) in many media articles or appearances related to the Memorial. ER 30-32. That page, created on Feb. 5, 2017, was initially called "Clarence Moriwaki of Bainbridge Island," though the contents of the page made clear that it consisted of criticism of Moriwaki, rather than being written by Moriwaki; the page was later renamed "Not Clarence Moriwaki of Bainbridge Island." ER 20. Rynearson posted a similar critique of the founder of Densho on a different Facebook page. ER 29-30.

B. The Potential Criminal Prosecution Stemming from This Dispute

In February 2017, Moriwaki alleged to the local police department that Rynearson was criminally cyberstalking him. ER 32. In early March 2017, the Bainbridge Island Police Department concluded that Rynearson's posts constituted probable cause to believe Rynearson guilty of cyberstalking under RCW 9.61.260(1)(b), and referred the matter to the Kitsap County Prosecutor. ER 32. After the police referred potential criminal charges to the prosecutor, Moriwaki also applied for, and obtained, a temporary protective order. ER 32.

In June, Rynearson's attorney emailed a Kitsap County Prosecuting Attorney to inquire if the police referral would result in cyberstalking charges against Rynearson related to his online postings. ER 32. The prosecutor responded "I am not formally declining it [*i.e.*, the cyberstalking referral] and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abide by the NCO that's in place. If I get any future referrals, I will revisit the charging decision." ER 32-33, 48.

C. The Civil Litigation Stemming from the Dispute

On July 17, 2017, the Bainbridge Island Municipal Court granted a permanent protective order to Moriwaki, which was eventually vacated after the District Court's decision in this case. The order rested on three statutes: the criminal cyberstalking statute, RCW 9.61.260(1)(b), the civil harassment statute, RCW 10.14.020, and the stalking statute, RCW 9A.46.110 (for which either harassment or cyberstalking can be predicates). ER 24. A protective order can be predicated on any one of these three statutes. *See* RCW 7.92.020(3), 10.14.040. With respect to online speech, the order prohibited Rynearson "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[,]" as well as using Moriwaki's photograph.[1]

[1] Rynearson has moved the court to take judicial notice of the terms of the permanent protective order. "It is well established that [this Court] may take judicial notice of judicial proceedings in other courts," and there are no "time limits on [such] requests." *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014); *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (making clear that this applies to noticing state court proceedings as well).

Rynearson appealed the order to Kitsap Superior Court. The appeal addressed the validity of the order; there is no referral from the police department alleging any violation of the protective order, nor any pending contempt proceeding (civil or criminal) alleging violation of the order.

In January 2018, after the District Court's decision, the Kitsap Superior Court held that Rynearson's speech was constitutionally protected and vacated the protective order, without ruling on the constitutionality of the cyberstalking statute. *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811 (Wash. Super. Ct.). On February 5, 2018, that court denied a motion for reconsideration filed by Mr. Moriwaki. *Id.*, 2018 WL 733810. Moriwaki has 30 days to notice an appeal, plus another 15 days to request discretionary review from the Washington court of appeals. Wash. R. App. P. 5.2, 6.2. (Because the order was entered by a municipal court, the judicial review available by right in state court is limited to the state trial court of general jurisdiction. There is no appeal of right to a Washington appellate court. Wash. R. App. Proc. 2.2, 2.3.)

D. Rynearson's Federal Court Challenge to the Criminal Harassment Statute

Before the final order was entered in municipal court in the state case, Rynearson sued the applicable state and local prosecutors in their official

capacities in federal court, arguing that the cyberstalking statute's prohibition of public internet posts to third parties about someone else with intent to harass or embarrass was facially overbroad and unconstitutional under the First Amendment. Rynearson sued because he would like to continue to criticize Moriwaki and others through online speech not barred by the order—if necessary, harshly, though never using vulgarities or threats—but has been deterred from such posts by the fear of criminal prosecution for cyberstalking. ER 33.

In response to Rynearson's motion for a preliminary injunction, the defendants filed a cross-motion to dismiss arguing that the district was required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), due to the pending state civil case between Moriwaki and Rynearson. ER 5-6. The District Court noted that "Rynearson raises compelling questions as to the breadth and constitutionality of certain provisions in Wash. Rev. Code § 9.61.260," "seemingly reinforced by Defendants' reluctance to address the constitutionality of the statute during oral argument." ER 14. The District Court nonetheless dismissed Rynearson's suit on the ground that *Younger* required abstention. ER 14-15.

Summary of Argument

Plaintiff Richard Rynearson is seeking to vindicate his federal constitutional rights in federal court using a federal statute, 42 U.S.C. § 1983. His right of access to this federal forum is not precluded by *Younger* abstention, because

(1) this lawsuit does not seek to enjoin, or otherwise interfere with, any pending state proceedings; and

(2) even if Rynearson were requesting relief that could interfere with the state proceedings, those proceedings are not within the narrow category of civil suits that can justify *Younger* abstention.

This is especially true now that there is no state court order binding Rynearson. The only potentially continuing state proceeding is Moriwaki's attempt to get the order reinstated. Yet surely Rynearson's federal challenge to an actual, currently binding criminal statute cannot be blocked merely because a private party is trying to get a state court to reimpose a different (even if related) civil restriction on Rynearson.

1. The District Court abstained under *Younger* based on a civil proceeding brought by a private party (Moriwaki) against Rynearson in state court. But Moriwaki is not a party to this federal case; neither is the state

court judge or any other state court trial participant. Likewise, the prosecutor defendants in this case are not parties to *Moriwaki*. And the civil statute on which that action is based, RCW 7.92.100, is different from the criminal statute challenged here, RCW 9.61.260(1)(b). The latter is merely one of several potential statutes on which such a civil action may be predicated, and in fact was predicated in this case.

Moreover, an injunction in this case will not collaterally estop anyone in *Moriwaki*; it will not even be binding precedent in that case. At most, a federal court's decision in this case could be persuasive authority in the state-court appeal—useful input to the state courts' decisionmaking process, perhaps, but not interference with that process.

2. Even if federal relief in this case were to have the practical effect of enjoining the state proceeding, the existence of that proceeding cannot justify *Younger* abstention. First, the state proceeding is not a criminal or "quasi-criminal" case, such as a civil enforcement measure initiated by state officials. Second, this lawsuit does not seek to interfere with "'the core of the administration of a State's judicial system,'" *ReadyLink Healthcare v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014) (citation omitted). The federal plaintiff here seeks to prevent enforcement

of an unconstitutional criminal statute, not to interfere with state civil court processes, as would be the case with an attempt to enjoin a contempt proceeding or the enforcement of any state court order. Thus, none of the "exceptional categories" of cases that justify *Younger* abstention are present here. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592 (2013).

Younger abstention calls for federal courts to abstain from directly interfering in *ongoing* state criminal prosecutions, *Younger v. Harris,* 401 U.S. 37 (1971), and a few narrow categories of related civil proceedings. In this case, Rynearson is facing *future* criminal prosecution, a situation "where *Younger* does not apply." *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 885 (9th Cir. 2011). And the "garden variety civil litigation between private parties" involved in *Moriwaki* is not state enforcement action and would in any event not be enjoined; it thus cannot trigger *Younger* abstention. *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1168 (9th Cir. 2013).

Argument

Generally speaking, "the federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" *New Orleans Pub.*

Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 359 (1989) (citation omitted). Federal courts should abstain under *Younger* only when there are parallel state criminal proceedings, or some similar "exceptional categories" of civil cases. *Sprint*, 134 S. Ct. at 592.

> In civil cases, therefore, *Younger* abstention is appropriate only when the state proceedings:
> (1) are ongoing,
> (2) [(a)] are quasi-criminal enforcement actions *or*
> [(b)] involve a state's interest in enforcing the orders and judgments of its courts,
> (3) implicate an important state interest, *and*
> (4) allow litigants to raise federal challenges.

ReadyLink, 754 F.3d at 759 (paragraph breaks and emphasis added). Moreover, even if all four of these elements are satisfied, there is another requirement: (5) for *Younger* to apply, "the federal action would [have to] have the practical effect of enjoining the state proceedings." *Id.*

But here, a federal injunction against the defendant prosecutors would not "have the practical effect of enjoining" the (now-vacated) civil injunction obtained in state court by plaintiff Moriwaki, a private citizen (so element 5 is not satisfied). The state proceedings are not "quasi-criminal enforcement actions" (so element 2(a) is not satisfied). And the state proceedings do not involve the "state's interest in enforcing" court judgments (so element 2(b) is not satisfied). Because the situations in which *Younger*

can be applied are not present here, the District Court should not have abstained.[2]

I. A preliminary injunction preventing criminal enforcement would not enjoin the state civil proceedings

Younger applies only when "the federal action would have the practical effect of enjoining the state proceedings." *ReadyLink*, 754 F.3d at 759. Thus, a federal court should abstain where, for example, a plaintiff seeks to sue someone involved in the state proceeding—the prosecutor, the plaintiff, the judge, a witness, or some other key actor—or the plaintiff is directly challenging the proceeding itself. It is undisputed that none of those conditions apply here; Rynearson is not seeking to sue or bind anyone involved in the state proceeding, nor seeking an order requiring that any action be taken or not taken in the state proceeding. Nor can the federal action have any indirect effect on the state proceeding equivalent

[2] If the Washington Court of Appeals denies review, the state civil suit on which the District Court based its decision would no longer be "ongoing," plainly eliminating any basis for *Younger* abstention. *ReadyLink*, 754 F.3d at 759. But even if review were granted, the decision by the Kitsap Superior Court only underscores that *Younger* should not apply here.

to an injunction. No ruling in the federal action would authorize Rynearson to violate the (now-vacated) state order (contrary to the District Court's reasoning); even if the state order were reinstated, the federal judgment would not even have preclusive effect, or binding precedential effect. What's more, the state proceeding is brought under a statute that is not even at issue in the federal case.

A. Rynearson would not be able to use a federal injunction to block the enforcement of any hypothetical state civil order

Rynearson seeks relief from the prospective enforcement of Washington's *criminal* cyberstalking statute by challenging that statute in federal court. A federal injunction preventing criminal enforcement of that statute would not interfere with the state case brought by a private party under a separate civil statute (RCW 7.92.100), or with any hypothetical future prosecution under RCW 26.50.110 (the Washington statute criminalizing violations of state protection orders). The District Court thus erred in concluding that granting an injunction would "essentially authorize[Rynearson] to engage in conduct that violates the stalking protection order" and thus interfere with the state case. ER 14.

The now-vacated state court order did not forbid violations of RCW 9.61.260(1)(b). Indeed, it was narrower in some respects than the statute

and broader than others; it did not even mention the elements of RCW 9.61.260(1), including the key intent element that prosecutors referred to as a possible basis for that statute's validity (Def. Resp. to Pls.' Mot. for Prelim. Inj., ECF No. 23, at 18). The state municipal court cited Rynearson's allegedly violating RCW 9.61.260(1)(b) as one of the reasons for entering its order, but the elements of the statute are not elements of the order: The statute would bar

(1) any repeated speech published about anyone

(2) "with intent to harass, intimidate, torment, or embarrass" its subject. RCW 9.61.260(1),

but the order (if reinstated on discretionary review) would bar

(1) only uses of Moriwaki's name in titles, or of Moriwaki's image in any online publication, though

(2) without any limitation as to the speaker's intent.

RCW 9.61.260 being struck down would not block the order from being enforced, even if it were reinstated on appeal.

Rynearson is thus potentially subject to two distinct limitations on his speech. First, he is subject to the threat of prosecution for cyberstalking—which leads him to self-censor criticism of Moriwaki and others that could

be perceived as intended to embarrass. Second, if the order were reinstated, he would be subject to that limitation, too, which would prohibit only certain uses of Moriwaki's name and picture (but *not* prohibit Rynearson from engaging in other speech that could be deemed "cyberstalking" or "harassing"). A federal judgment would lift the first limit, but not the second.

If he succeeded in this federal suit, Rynearson would therefore be cleared to engage in critical speech of Moriwaki (and others) that does not violate any state-court order, which is precisely what he has alleged he would do absent the threat of prosecution: "resume [his] criticism of Mr. Moriwaki through online speech not barred by the ... protective order." ER 33.

Rynearson's success in the state appeal, on the other hand, lifted the second, order-based limit on his speech. But that success lifted only the second limit, and not the first: in vacating the protective order, the Kitsap Superior Court made no ruling on the constitutionality of the cyberstalking statute. Thus, even though the protective order has been vacated, that decision has not eliminated the threat of criminal prosecution under the cyberstalking statute that is also suppressing Rynearson's speech.

The District Court thus erred in reasoning that an injunction against enforcement of the cyberstalking statute would relate "to the very conduct that the civil protection order prohibits." ER 14. This is especially clear because Washington follows the collateral bar rule, which "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." *City of Seattle v. May*, 171 Wash. 2d 847, 852 (2011).

Arguments that an "order was 'merely erroneous, however flagrant'" cannot be raised as defenses in a prosecution for violating the order. *Id.* at 853 (citation omitted). The Washington Supreme Court has expressly renounced any suggestion "'that orders may be collaterally attacked after the alleged violations of the orders,'" *id.* (quoting *State v. Miller*, 156 Wash. 2d 23, 31 n.4 (2005)). Even if a person "earnestly believe[s] that the order is invalid, . . . his remedy is to seek modification of the order by the court that issued it; he is not free to violate the order with impunity." *Id.* at 857. Rynearson thus could not interpose a federal judgment that the cyberstalking statute is unconstitutional as a defense to a prosecution for violating the order, even if the order were reinstated and solely based on the cyberstalking statute (which it is not, *see* pp.20-21, *infra*).

None of the narrow exceptions to the collateral bar rule applies here. The first is for orders that are void, *id.* at 852, but the unconstitutionality of one of the statutes on which the court relied does not make the order "void"; that exception applies only if the court "lack[s] the power to issue the type of order." *Id.* Even if a court finds that the order cannot be enforced because it is "patently invalid" under the First Amendment, *id.* at 852 n.4, that would stem from the facial overbreadth of the order (a question that is not before the federal courts), not from the invalidity of one of the statutes that triggered the issuance of the order. *See id.* (citing, as a "patent[] invalid[ity]" case, *State ex rel. Superior Court of Snohomish County v. Sperry*, 79 Wash. 2d 69, 74 (1971), which stressed that the order in that case was "void on its face," 79 Wash. 2d at 74).

The second exception from the Washington collateral bar rule is for "orders that are inapplicable to the crime charged," "i.e., the order either does not apply to the defendant or does not apply to the charged conduct," *id.* at 854. That exception convers only situations where the order is being applied more broadly than the order's own words authorize.

The third exception is for "orders that cannot be constitutionally applied to the charged conduct," "e.g., orders that fail to give the restrained

party fair warning of the relevant prohibited conduct." *Id.* This exception was created to keep the rule consistent with an earlier precedent, in which "a no-contact order lacked statutorily required notice that the no-contact provisions applied even if the contact occurred at the request of the protected party." *Id.* at 853-54. "[I]f the order failed to give the defendant notice that the charged conduct was prohibited, the order should have been excluded as inapplicable." *Id.* at 854. The exception does not let a party challenge an order that is being enforced by raising a First Amendment challenge to one of the statutes that was cited by the court as a reason to enter the order.

In sum, the federal injunction that Rynearson seeks would protect him only from criminal prosecution for cyberstalking under RCW 9.61.260(1)(b). It would not authorize him to violate the order, even if the order were reinstated. He specifically stated that, if the injunction were granted, he would only engage in speech that did not violate the then-governing order; this likewise establishes the absence of intent to violate any hypothetical, reinstated order.

B. A federal injunction would not bind Moriwaki, either by collateral estoppel or otherwise

A federal injunction in this case also would not control the state proceeding through any orders issued to Moriwaki or any other state trial participant. Moriwaki is not a party in this federal case, and Rynearson is not seeking an order that would compel Moriwaki to do, or refrain from doing, anything.

Nor would a decision in this case collaterally estop Moriwaki from litigating the same issues in state court. *In re Moi*, 184 Wash. 2d 575, 580 (2015). *Younger* abstention might be unjustified even if such collateral estoppel were possible, *Potrero Hills Landfill*, 657 F.3d at 883 n.8, but it is especially unjustified when collateral estoppel does not apply.

C. A federal injunction would not be binding precedent in the state civil proceeding

A federal court's decision about whether a Washington state statute is constitutional "is not binding on Washington courts." *Matter of Paschke*, 80 Wash. App. 439, 448 n.5 (1996). While Washington courts "always give careful consideration to Ninth Circuit decisions," they "are not obligated to follow them." *Matter of Grisby*, 121 Wash. 2d 419, 430 (1993). A federal decision may well be persuasive precedent to the Washington courts; but

if that is so, then that shows that the federal decision would just be a valuable input to the state judicial process, not an interference with that process.

D. The statute in the state civil proceeding is different from the criminal statute being challenged in federal court

Finally, the civil statute that authorizes the injunction in *Moriwaki,* RCW 7.92.100, is different from the criminal statute challenged here, RCW 9.61.260(1)(b). A violation of RCW 9.61.260(1)(b) is only one of many possible predicates for the application of RCW 7.92.100. Indeed, the now-vacated civil state judgment here invoked not only the cyberstalking statute, but also the stalking statute and the civil harassment statute (which is a predicate for an order under RCW 7.92.100 by incorporation within the stalking statute). ER 24. Because a protective order can be issued on the basis of any one of those statutes alone, RCW 7.92.100, even if a federal judgment that the cyberstalking statute was unconstitutional were binding in the state civil suit (which it is not), it would not itself dictate the result of the state case.

This statutory scheme brings the case within the rule that "a pending state judicial proceeding does not come within *Younger* unless the federal plaintiff is being prosecuted in state court under the *same law* that is

challenged in federal court." *Wiener v. Cnty. of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) (emphasis added). In *Weiner*, the federal plaintiff challenged a state ordinance that was simply a permanent version of the temporary one used to actually prosecute him in state court. This Court still found *Younger* abstention improper, even though the two ordinances had identical aims (and identical constitutional deficiencies). Here, the plaintiff likewise challenges a different statute in federal court than the one under which the state action was brought.

E. None of the precedents involving interference with state court proceedings apply here

Thus, this case is not like any of the precedents in which federal court abstention was found to be necessary to avoid interfering with state court proceedings. Rynearson does not seek to enjoin an ongoing criminal prosecution, as plaintiffs sought to do in *Younger,* 401 U.S. at 41 (involving a normal criminal prosecution), or *Juidice v. Vail*, 430 U.S. 327, 335-36 (1977) (involving a contempt of court prosecution). Rynearson does not seek to enjoin the enforcement of a state judge's order against him, as the plaintiffs did in *Pennzoil Co. v. Texaco, Inc*, 481 U.S. 1, 14 (1987). Indeed, no proceeding to enforce the state protection order, by contempt or otherwise, is even pending.

Nor is Rynearson trying to enjoin state anti-nuisance proceedings brought by a sheriff, as was the plaintiff in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 595-98 (1975). And Rynearson is not trying to prevent a state-sanctioned body from carrying out punishment, unlike the plaintiff in *Middlesex* who challenged punitive proceedings brought by a bar disciplinary board appointed by the state supreme court. Indeed, he is not even seeking a federal court judgment on whether the particular speech that gave rise to the protective order is protected by the First Amendment. All Rynearson is seeking is protection from the broader speech restriction imposed by the Washington criminal cyberstalking statute based on its facial unconstitutionality, while he is litigating the validity of the narrower restriction imposed by the July 2017 civil order.

II. None of the exceptional categories of civil cases which can justify *Younger* abstention apply

A. The *Moriwaki* lawsuit is not a "quasi-criminal enforcement action[]"

Even if a federal action would have the practical effect of enjoining state civil proceedings, a federal court should abstain under *Younger* only when the pending state action is a "quasi-criminal enforcement action" (or the requested federal-court injunction would interfere with the core

functioning of the state's judicial processes, which will be discussed in Part II.B). *See ReadyLink*, 754 F.3d at 759. The state is generally a party in quasi-criminal civil proceedings, and often initiates the action "to sanction the federal plaintiff" such as through investigation or filing a formal complaint or charges. *Sprint*, 134 S. Ct. at 592; *see ReadyLink*, 754 F.3d at 759-60 (finding no quasi-criminal proceeding, partly because the litigants in the civil proceeding were "private part[ies]").

The District Court held that the injunction granted in *Moriwaki* was sufficiently akin to criminal proceedings to trigger *Younger*. The Court characterized the injunction as "one party invoking the authority of the local court for protection," ER 11, and noted that, at one point, Rynearson was temporarily ordered to surrender some firearms (though that restraint was lifted in the permanent injunction), ER 11-12, which itself has since been vacated.

But the *Moriwaki* lawsuit was just a civil action brought by a private citizen, and like other such actions, rests simply on a finding by the preponderance of the evidence that a civil petitioner met the standards for relief. *See* RCW 7.92.030, 7.92.100. Like any other civil injunctive proceeding, its purpose is to prevent certain behavior in the future, not to

punish past misbehavior (though, like other civil injunctive proceedings, it may be triggered by an allegation of past misbehavior). RCW 7.92.130(4), 7.92.900. Though a violation of a stalking protection order is punishable as a gross misdemeanor, so is violation of any ordinary Washington civil injunction. *Compare* RCW 26.50.110 (punishment for violating a stalking protective order), *with* RCW 9.92.020, RCW 7.21.040 (punishment for violating any other injunction). And most injunctions deprive the target of his liberty (or, at times, of his access to certain property); their whole function is to restrict the target's freedom of action (or inaction).

Moreover, the stated legislative intent of the civil stalking protective order statute is not to punish civil defendants, but to benefit the "[v]ictims of stalking conduct" by giving them "the same protection and access to the court system as victims of domestic violence and sexual assault[.]" RCW 7.92.010. The *Moriwaki* civil injunction is thus unlike the rare types of civil proceedings in which *Younger* is correctly invoked. *See Huffman*, 420 U.S. at 597 (1975); *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 433.

A quasi-criminal proceeding is as absent here as it was in *ReadyLink*, where a plaintiff sued a defendant in federal court while a state court was reviewing a dispute between the same two parties. 754 F.3d at 760. This Court held in *ReadyLink* that *Younger* abstention was unwarranted, because the "mere 'initiation' of a judicial or quasi-judicial administrative proceeding" is not "an act of civil enforcement . . . 'akin to a criminal prosecution' in 'important respects.'" *Id.* at 759-60. Federal courts, this Court recognized, are generally obligated to exercise federal jurisdiction over federal claims; *Younger* creates a limited exception to that obligation, but the limitations on that exception would be rendered "meaningless" if the exception were extended to "every case in which a state judicial officer resolves a dispute between two private parties." *Id.* at 760. The mere existence of state civil proceedings where the state's role is to resolve a civil dispute between two private parties does not justify abstention under *Younger*.

B. This case does not involve an attempt to interfere with Washington's interest in enforcing its court orders

Younger abstention may also be justified (so long as a federal injunction would also effectively enjoin the state proceedings, see Part I.A) if a federal plaintiff seeks to interfere with an order at "'the core of' [a state's]

court system, implicating the 'State's interest in enforcing the orders and judgment of its courts,'" *ReadyLink*, 754 F.3d at 759 (citations omitted).

But, for reasons stated in Part I.A, this case involves no such interference. Cases in which there are interference with "core" orders and judgments

> involve the administration of the state judicial process—for example, an appeal bond requirement, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. at 12-14, a civil contempt order, *Juidice*, 430 U.S. at 335-36, or an appointment of a receiver, *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 815 (9th Cir. 1989).

ReadyLink, 754 F.3d at 759. But here there would be no interference with any such process, such as the process of enforcing protection orders. As noted in Part I, Rynearson was not seeking to block the enforcement of the *Moriwaki* order; and now there is not even an order to be enforced. Nor was there ever a state proceeding to enforce the order—and, even if there had been, any federal decision invalidating the criminal cyberstalking statute would not have offered a defense in any such enforcement proceeding. A state court would not have been bound by any federal decision striking down the statute, but would have at most treated it as persuasive precedent.

But even if this Court were to find that this federal suit is a challenge to a hypothetical reinstated version of Moriwaki's now-vacated civil order, a "challenge[to] only one . . . order, not the whole procedure" is "not a substantial enough interference with [a state's] administrative and judicial processes to justify abstention." *Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984). "To establish a vital interest in the state's judicial functions, an abstention proponent must assert more than a state's generic interest in the resolution of an individual case or in the enforcement of a single state court judgment." *Potrero Hills Landfill*, 657 F.3d at 886. Rather, a federal suit should lead to abstention under the interference-with-core-judicial-function theory only if it threatens "the state judiciary's vital functions." *Id.* When a plaintiff "challenges neither the authority of state courts to issue [orders] nor processes for their enforcement once issued," *id.* at 887, *Younger* abstention is inappropriate. And, as Part II.A argued, this case does not challenge the authority of the state court.

The Supreme Court's "dominant instruction [is] that, even in the presence of parallel state proceedings, abstention from the exercise of federal

jurisdiction is the 'exception, not the rule.'" *Sprint*, 134 S. Ct. at 593 (citation omitted). Defendants have not established that "any of the . . . exceptional categories" permitting abstention apply. *Id*. at 592.

Conclusion

Nothing in this case will interfere with the state court judgment in *Moriwaki*, even if that judgment were reinstated. A federal injunction in this case would not bind the state court or the civil plaintiff in that private suit. Such an injunction would bind only the state prosecutors, who are not parties in *Moriwaki*. Because the narrowly-crafted *Younger* exception to a federal court's "unflagging obligation" to resolve federal disputes does not apply, the District Court should not have abstained from resolving the First Amendment challenge to RCW 9.61.260(1)(b).

Respectfully Submitted,

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

Statement of Related Cases

There are no known related cases (as defined in 9th Cir. R. 28-2.6) pending in this Court.

Dated: February 14, 2018

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

Certificate of Compliance

This brief complies contains 5,616 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii); this complies the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

This brief has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Word 2010; this complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6).

Dated: February 14, 2018

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

Certificate of Service

I electronically filed the foregoing Appellant's Opening Brief with the Clerk of this Court using the appellate CM/ECF system on February 14, 2018.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: February 14, 2018

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

NO.17-35853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. RYNEARSON, III,
Appellant,

v.

ROBERT FERGUSON, Attorney General of the State of Washington

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,
Respondents.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 3:17-cv-05531-RBL
The Honorable Ronald B. Leighton
United States District Court Judge

RESPONDENTS' BRIEF

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I. INTRODUCTION

Younger abstention is reserved for those "exceptional" cases where the "prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). This is such a case.

Appellant Richard L. Rynearson asked the district court to enjoin Washington from enforcing its cyberstalking law, Wash. Rev. Code § 9.61.260, and to find the statute unconstitutional six days before a state municipal judge was to enter a permanent protective order against him for cyberstalking and find that the cyberstalking law was not unconstitutional as applied to him. The district court declined, finding that Washington's ongoing judicial action with Rynearson met all of the criteria for *Younger* abstention under the Supreme Court and this Court's jurisprudence.

Younger holds that a party who is the subject of certain ongoing state proceedings cannot seek federal equitable relief to block those proceedings. That is precisely what Rynearson attempted to do here. A stalking protection order proceeding concerns the State's judicial power to protect private citizens from criminal conduct. When Rynearson sought to declare Washington's cyberstalking law unconstitutional and enjoin its application, a Washington state court already had an ongoing protection order proceeding that concerned application of the

cyberstalking law to him. Had Rynearson been successful in his federal suit, the requested injunction and declaratory relief would have directly undercut the state court's authority by enjoining one of the laws upon which the court predicated its stalking protection orders. The district court's abstention showed respect for Washington's judicial administration of its laws and orders. This Court should affirm.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction to hear the matter under 28 U.S.C. § 1331. The district court entered an order dismissing the action on October 10, 2017, and entered the final judgment on October 13, 2017. ER 53 (Docket Nos. 33-34). Rynearson timely appealed on October 18, 2017. ER 53 (Docket No. 35). This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUE

Did the district court correctly abstain from interfering with Washington's ongoing civil stalking protection order proceedings against Rynearson?

IV. STATEMENT OF THE CASE

A. Washington State Court Authority to Issue Stalking Protection Orders

Washington's "Jennifer Paulson Stalking Protection Order Act," Wash. Rev. Code 7.92, empowers state courts with authority to issue civil orders designed to

protect private citizens from certain criminal conduct—namely, stalking, cyberstalking, and specific forms of harassment.

To invoke the court's protection, the victim (or another person on the victim's behalf) must file a petition alleging specific "stalking" conduct by the respondent and asserting under oath the reasons the petitioner is "reasonably fearful that the respondent intends to injure the petitioner or another person, or the petitioner's property or the property of another." Wash. Rev. Code §§ 7.92.030, .040; *see also* Wash. Rev. Code § 7.92.020(5). Upon receipt of the petition and accompanying materials, the court must order a hearing to be held within fourteen days. Wash. Rev. Code § 7.92.060. The court may also issue an ex parte temporary stalking order if "it appears from the petition and any additional evidence that the respondent has engaged in stalking conduct and that irreparable injury could result if an order is not issued immediately without prior notice." Wash. Rev. Code §§ 7.92.040, .120. A knowing violation of the court's ex parte temporary stalking order is punishable as a gross misdemeanor or a Class C felony depending on the nature of the violation. Wash. Rev. Code § 7.92.120(7); Wash. Rev. Code § 26.50.110.

At the hearing, the court must determine whether, based on a preponderance of evidence, the respondent has engaged in criminal "stalking," which is defined as:

(a) Any act of stalking as defined under [Wash. Rev. Code §] 9A.46.110[1];

(b) Any act of cyberstalking as defined under [Wash. Rev. Code §] 9.61.260[2];

(c) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that:

(i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling;

(ii) Serves no lawful purpose; and

(iii) The 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.

---

[1] (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

[2] (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.

Wash. Rev. Code §7.92.020(3); *see also* Wash. Rev. Code § 7.92.100. If so, the court may issue a "stalking protection order" for any appropriate duration and provide relief as the court deems appropriate, including restraining the respondent from having any contact with the victim or ordering "other injunctive relief" as necessary to protect the victim. *See* Wash. Rev. Code §§ 7.92.100(2), .130(1). The stalking protection order must also include conspicuous notice of the following warning:

> A knowing violation of this stalking protection order is a criminal offense under chapter 26.50 [Wash. Rev. Code] 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.

Wash. Rev. Code § 7.92.140.

B. The Anti-Stalking Proceedings Against Rynearson

On March 10, 2017, Clarence Moriwaki petitioned the Bainbridge Island Municipal Court for a civil order seeking protection from Rynearson's increasing online harassment and invective public and private online postings about Moriwaki. ER 17 ¶ 1; *see also* ER 32 ¶ 14. Three days later, the municipal court issued a temporary protection order requiring Rynearson to refrain from contacting Moriwaki and to remove his Facebook posts and webpages containing Moriwaki's name. ER 44-46. From March 27, 2017, to July 17, 2017, the municipal court then proceeded to hold a series of hearings to renew the temporary protection order, consider whether Rynearson had violated the court's order, and determine

whether the court should issue a permanent stalking protection order against him. *See* ER 17-18.

On July 11, 2017, in anticipation of the last municipal court hearing set for July 17, 2017, Rynearson submitted a "lengthy" brief arguing against issuance of a permanent protection order and challenging the constitutionality of Wash. Rev. Code § 9.61.260(1)(b) as applied to him. *See* ER 18, 24. That same day, Rynearson filed a complaint in the United States District Court for the Western District of Washington also challenging the constitutionality of Wash. Rev. Code § 9.61.260(1)(b). ER 51 (Docket No. 1). Rynearson simultaneously filed a motion for preliminary injunction asking the federal court to enjoin enforcement of the cyberstalking statute. ER 51 (Docket No. 3).

On July 17, 2017, the municipal court issued an order detailing the interactions between Moriwaki and Rynearson and the legal basis for issuing a permanent stalking order against Rynearson. ER 17-25. The municipal court concluded that all of the elements for stalking, cyberstalking (repeated contacts), and unlawful harassment had been proven. ER 24. The municipal court also found that the underlying laws for the protection order were not unconstitutional as applied to Rynearson. ER 24. It then concluded that Rynearson was likely to continue harassing and cyberstalking Moriwaki based on: his refusal to stop his online harassment after being told to stop; his stated intent to continue his harassment via a website in

Moriwaki's name after being blocked; his prior harassing behavior on various online forums; and his prior retaliatory behavior against another individual who had banned him online. ER 25. The municipal court issued a permanent stalking protection order that, in part, prohibited Rynearson from creating or maintaining any online sites using Moriwaki's name or photograph. *See* Docket No. 18 at 7-10.[3]

C. Procedural History

In the federal proceedings, State Defendants asked the district court to abstain from deciding the constitutionality of Wash. Rev. Code § 9.61.260(1)(b) under *Younger* and to dismiss the case. ER 52 (Docket No. 23). The district court agreed that dismissal was appropriate after finding that the case met all of the elements required for abstention set forth in this Court's *ReadyLink* decision. ER 5-15. Specifically, the district court found that the civil protection order proceedings (1) were ongoing; (2) quasi-criminal in nature or involved the state's interest in enforcing the municipal court's stalking protection orders; (3) implicated an important state interest; and (4) allowed Rynearson to raise his federal constitutional challenges to the cyberstalking statute. ER 5-15. The district court also found that

[3] A Washington superior court later overturned the permanent protection order on appeal. The superior court concluded that the elements of stalking had not been proven by a preponderance of the evidence and that Rynearson's online speech was protected by the First Amendment. Moriwaki did not seek further appeal, but as discussed later the ultimate outcome of those subsequent proceedings is irrelevant to whether the district court appropriately abstained from interfering with the state's then on-going court proceedings.

granting Rynearson his requested relief would effectively enjoin the state court proceedings by "essentially authoriz[ing Rynearson] to engage in conduct that violates the stalking protection order." ER 14. The district court accordingly dismissed the case. ER 14-15. This appeal followed.

V. SUMMARY OF ARGUMENT

Washington's stalking protection order proceedings against Rynearson satisfy all of the requirements for *Younger* abstention. A Washington state court had ongoing proceedings with Rynearson that concerned application of the State's cyberstalking statute, Wash. Rev. Code § 9.61.260(1)(b), when he asked the district court to declare the statute unconstitutional and to enjoin the statute's enforcement. Rynearson's requested relief would have directly undermined the state court's authority by allowing him to engage in the same criminal, cyberstalking conduct that the state court had already restrained him from committing. The district court appropriately declined Rynearson's request to interfere with the state court proceedings. This Court should affirm.

VI. ARGUMENT

The Court reviews the district court's *Younger* determination de novo. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014). The Court conducts the analysis "in light of the facts and circumstances existing at the time the federal action was filed." *Cook v. Harding*, 879 F.3d 1035,

1038 (9th Cir. 2018). The Court may also affirm on any ground supported by the record. *Id.*

A. The Principles of *Younger* Abstention

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court recognized that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger*, 401 U.S. at 43. In *Younger*, John Harris was the subject of a pending criminal prosecution in California state court and brought a federal suit in an attempt to thwart that prosecution. He challenged the California "Criminal Syndicalism Act" as facially unconstitutional under the First Amendment and asked that it be enjoined, halting his prosecution.

The Supreme Court rejected Harris's request, holding that to enjoin the state prosecution would be "fundamentally at odds with the function of the federal courts in our constitutional plan." *Id.* at 52. The "vital" power to declare statutes unconstitutional, "broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Id.* The Court also held that

> [the potential] existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. . . . Just as the incidental "chilling effect" of [some] statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself

> justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.

Younger, 401 U.S. at 51-52. Accordingly, the Court held that the federal courts should abstain in favor of allowing the California courts to resolve any constitutional claims by Harris.

Younger has since been held to apply to certain classes of state civil proceedings, "in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Comm'ns, Inc.*, 134 S. Ct. at 588 (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989) (*NOPSI*)). *Sprint* was the Supreme Court's most recent statement on the proper scope of *Younger* abstention in civil proceedings. The Court explained that the limited, "exceptional" circumstances fitting within the *Younger* doctrine "include, as catalogued in *NOPSI*, 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Comm'ns, Inc.*, 134 S. Ct. at 588 (citing *NOPSI*, 491 U.S. at 367-68).

The *Sprint* Court also held that courts should consider specific factors before invoking *Younger*. *Id.* at 593 (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433-35 (1982)). Those *Middlesex* factors ask whether "(1) there is 'an ongoing state judicial proceeding,' (2) those 'proceedings implicate

important state interests,' and (3) there is 'an adequate opportunity in the state proceedings to raise constitutional challenges.'" *ReadyLink Healthcare, Inc.*, 754 F.3d at 758 (quoting *Middlesex*, 457 U.S. at 432). This Court has also identified another requirement: "The requested relief must seek to enjoin—or have the practical effect of enjoining—ongoing state proceedings." *ReadyLink Healthcare, Inc.*, 754 F.3d at 758.

In sum, *Younger* abstention is appropriate in civil cases when the state proceedings (1) are ongoing, (2) are quasi-criminal enforcement actions or involve the state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, (4) allow the litigants to raise federal challenges, and (5) would have the practical effect of enjoining the state proceedings. *ReadyLink Healthcare, Inc.*, 754 F.3d at 759. This case satisfies all of the required elements for abstention.

B. *Younger* Abstention was Appropriate in this Case

Rynearson does not dispute that two of the five required elements for abstention are met: the stalking protection order proceedings implicate an important state interest and the proceedings allowed him to make his First Amendment challenges to Wash. Rev. Code § 9.61.260. *See* Appellant Br. (Docket No. 19) at 16-17. He instead disputes that the proceedings fall under either of the two categories of civil cases appropriate for abstention and that a federal injunction would have had

the "practical effect" of enjoining the municipal court's stalking protection proceedings. Appellant Br. at 16. He also suggests that dismissal of the municipal court's protection order eliminated any basis for abstention because the state proceedings are no longer "ongoing." *See* Appellant Br. at 17 n.2. All of Rynearson's contentions are wrong.

1. The State Court Proceedings were Ongoing When Rynearson Filed His Federal Complaint

As an initial matter, the Court can dispel with the suggestion that *Younger* abstention is no longer apt due to dismissal of the municipal court's permanent protection order. Whether abstention is warranted does not depend on subsequent state court events. *Kitchens v. Brown*, 825 F.2d 1337, 1341 (9th Cir. 1987); *see also Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 881 n.6 (9th Cir. 2011) (noting irrelevancy of "events that transpired subsequent to the district court's dismissal"). Rather, the relevant date for purposes of determining whether *Younger* applies is the date the federal complaint is filed. *ReadyLink Healthcare, Inc.*, 754 F.3d at 759 (citing *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004)). "[T]he critical question is not whether the state proceedings are still ongoing, but whether the state proceedings were underway before initiation of the federal proceedings." *Kitchens*, 825 F.2d at 1341 (internal quotation marks omitted). Accordingly, when *Younger* applies, "a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state

proceedings have ended. To the contrary, *Younger* abstention requires dismissal of the federal action." *Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1988); *accord Gilbertson*, 381 F.3d at 979-82 (discussing need for dismissal as opposed to a stay of federal proceedings when *Younger* applies and injunctive or declaratory relief is sought).[4]

Rynearson cannot dispute that his state court proceedings were "ongoing" when he filed his federal complaint for declaratory and injunctive relief on July 11, 2017. He filed it the same day he submitted his response brief to the municipal court arguing against issuance of a permanent protective order and challenging the constitutionality of Wash. Rev. Code § 9.61.260. *Compare* ER 18 ¶ 11 *with* ER 50 (Docket No. 1). Moreover, the municipal court's temporary protection order preventing Rynearson from maintaining any online sites about Moriwaki had been lodged against him for several months. ER 44-46. Because the date of Rynearson's federal filing is the "critical" date for purposes of determining whether the state proceedings were ongoing under the required *Younger* elements, it is irrelevant that

[4] The en banc court in *Gilbertson* drew a distinction in this regard between actions for damages and those seeking declaratory or injunctive relief. The court concluded that a federal stay rather than dismissal is appropriate when damages are sought because "neither the federal plaintiff's right to seek damages for constitutional violations nor the state's interest in its own system is frustrated." *Gilbertson*, 381 F.3d at 981. In contrast, when equitable relief is sought, the court determined that "dismissal (and only dismissal) is appropriate" because once the court finds that an injunction is not warranted under *Younger* "there is nothing more for the court to do." *Id.*

the state proceedings have now concluded. *See Gilbertson*, 381 F.3d at 969 n.4 (noting appeal regarding *Younger* not moot even though state court proceedings had since terminated).[5] There can be no question that the "ongoing" element for *Younger* abstention was satisfied. Dismissal was appropriate.

2. The Stalking Protection Order Proceedings Qualify as Either of the "Exceptional" Category of Civil Cases Required for Abstention

The district court correctly found that the state stalking protection order proceedings fit either (1) a "civil enforcement proceeding" that is "akin to a criminal prosecution," or (2) a civil proceeding that "implicates a state's interest in enforcing the orders and judgments of its courts[.]" *Sprint Commc'ns, Inc.*, 134 S. Ct. at 588, 591. Rynearson's arguments to the contrary fundamentally misunderstand the nature and purpose of Washington's civil stalking protection order proceedings. They also minimize the public importance of those proceedings and the impact that Rynearson's requested declaratory and injunctive relief would have had on the state court's power to protect citizens from cyberstalking.

[5] Rynearson may ask this Court to remand the proceedings back to the district court on the merits now that the state court proceedings have ended. To do so would be contrary to years of this Court's precedent. *E.g.*, *Gilbertson*, 381 F.3d at 981. It would also defeat the purpose of abstention, i.e., notions of comity and respect for state functions, as this Court has previously found. *Beltran*, 871 F.2d at 782-83. The end result may be that Rynearson will simply file a new complaint sometime in the future, but that will be another case. Here, dismissal is required. *Id.* at 782.

a. The Stalking Protection Order Proceedings are Akin to a Criminal Action

Sprint held that "[o]ur decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings 'akin to a criminal prosecution' in 'important respects.'" *Sprint Comm'ns, Inc.*, 134 S. Ct. at 592 (citing *Huffman v. Pursue, Inc.*, 420 U.S. 592, 604 (1975)). In *Huffman*, the Court found *Younger* abstention appropriate when an Ohio sheriff and prosecuting attorney attempted to bring a state-law civil nuisance action against the operators of a cinema showing "obscene" films. It held that this proceeding

> in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party . . . and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.

Huffman, 420 U.S. at 604. The Court added that the injunction issued by the district court "disrupted [the] State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." *Id*. at 605; *see also Sprint Comm'ns, Inc.*, 134 S. Ct. at 592 (civil enforcement cases appropriate for *Younger* abstention "are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act").

Rynearson asserts that the stalking protection order proceeding was "just a civil action brought by a private citizen" with a purpose of preventing certain behavior in the future. Appellant Br. at 28. This characterization fundamentally mischaracterizes the nature and purpose of the proceedings. It is true that the State is not a *named* party to the stalking protection order proceeding. *Cf. Sprint Comm'ns, Inc.*, 134 S. Ct. at 592 (noting, "a state actor is routinely a party to the state proceeding"). But Washington's protection order procedure represents a conscious strategy by the State to allow a stalking victim to quickly and directly invoke state judicial authority to shield that victim from what amounts to criminal behavior, i.e., stalking (criminalized in Wash. Rev. Code § 9A.46.110) and cyberstalking (criminalized in Wash. Rev. Code § 9.61.260).

Protection order proceedings are a means for state citizens to harness the courts' authority "to administer justice and to ensure the safety of court personnel, litigants and the public" by court order. *Cf. State v. Wadsworth*, 991 P.2d 80, 90 (Wash. 2000). While the Legislature determines when protection orders may be issued and on what grounds, e.g., Wash. Rev. Code. 7.92, the judiciary alone is responsible for assessing the criminal conduct and determining the "specific prohibitions against [the] restrained party which subjects the party to criminal liability" if they are violated. *Wadsworth*, 991 P.2d at 87. Accordingly, because protection orders are issued by the state courts based on prerequisites established by

law and to further the "public interest," the Washington Supreme Court has held they are not "a private right of enforcement" and that the court-imposed requirements may not "be waived by the victim." *State v. Dejarlais*, 969 P.2d 90, 92-93 (Wash. 1998). Washington does not consider protection order proceedings as a mere "civil dispute between two private parties." *Cf. Sprint Comm'ns, Inc.*, 134 S. Ct. at 593. Neither should this Court.

Many other aspects of the stalking protection order proceeding in this case make it "akin to a criminal prosecution" in the ways that the federal courts have found to meet the *Younger* test. The proceeding was "initiated to sanction the federal plaintiff," Rynearson, for alleged "wrongful act[s]" he committed. *See Sprint Comm'ns, Inc.*, 134 S. Ct. at 592 (citing *Middlesex*, 457 U.S. at 433-34). The municipal court imposed the stalking protection order based on the court's findings and conclusions that Rynearson's conduct met the elements of two separate crimes (stalking and cyberstalking), as well as the quasi-criminal "unlawful harassment." *E.g.*, ER 44-46, ER 24 ¶ 3. The stalking protection orders involved a deprivation of Rynearson's liberty, restricting his freedom of movement and action. ER 44-46; Docket No. 18 at 8; *see also* ER 25 ¶ 9. Further, while the municipal court later withdrew the requirement, the temporary stalking protection order initially required Rynearson to surrender nine firearms. *See* ER 17 ¶ 6; ER 25 ¶ 11. Last, violating the stalking protection orders would have subjected Rynearson to criminal prosecution

as a gross misdemeanor. Wash. Rev. Code § 7.92.140(3); Wash. Rev. Code § 26.50.110; *see also* ER 45 ("Warning to Respondent").

These characteristics show that the stalking protection order proceedings are "akin to a criminal prosecution," consistent with the cases in which courts have applied *Younger* abstention, such as the nuisance action in *Huffman* and the bar conduct investigation in *Middlesex*. In contrast, cases that the courts have found not to warrant *Younger* abstention as "quasi-criminal" involve private disputes that are not analogous to Washington's protection order system. *See, e.g.*, *Sprint Comm'ns, Inc.*, 134 S. Ct. at 593 (holding that a dispute between private parties before the Iowa Utilities Board was not "akin to a criminal prosecution"); *ReadyLink Healthcare, Inc.*, 754 F.3d at 757-60 (holding that state insurance commissioner's approval of an insurance fund's premium calculation "plainly was not a civil enforcement proceeding"). This Court should affirm that *Younger* abstention was appropriate for the "quasi-criminal" proceedings here.

b. The Stalking Protection Order Proceedings Involve the State's Interest in Enforcing the Orders and Judgments of its Courts

The stalking protection order proceedings also qualify for *Younger* abstention based on the other civil category identified in *Sprint*: a proceeding that "implicates [the] State's interest in enforcing the orders and judgments of its courts." *Sprint Comm'ns, Inc.*, 134 S. Ct. at 588.

The Supreme Court first discussed this basis for *Younger* abstention in *Juidice v. Vail*, 430 U.S. 327 (1977). In *Juidice*, a state court had entered a default judgment against a defendant in state litigation and then eventually ordered him jailed for contempt. *Id*. at 327-29. That defendant then sued the state court judges in federal court, asking the federal court to enjoin the state's use of its civil contempt procedures. The Supreme Court rejected this request, holding that

> [a] State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as is the State's interest in the enforcement of its criminal laws, *Younger*, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*. But we think it is of sufficiently great import to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system.

Juidice, 430 U.S. at 335. This Court has since recognized that this category applies when a federal plaintiff seeks to interfere with an order at the "core" of the judicial system, *ReadyLink Healthcare, Inc.*, 754 F.3d at 759, and which "relate[s] to the state courts' ability to enforce compliance with judgments already made." *Cook v. Harding*, 879 F.3d 1035, 1041 (9th Cir. 2018).

Rynearson claims that his federal suit would not have interfered with the State's judicial process or the municipal court's protection orders. Appellant Br. at 31-32. But this simply is not true. On the day he filed his federal complaint, Rynearson was already subject to a state court order prohibiting him from

cyberstalking Moriwaki and subjecting him to contempt if he were to violate that order. Rynearson was also a few days away from the municipal court issuing a permanent protection order on the same grounds and rejecting Rynearson's argument that the cyberstalking statute was unconstitutional as applied to him. Rynearson's federal action in the midst of these proceedings was an inappropriate attempt to get the federal court to intervene, "declare unconstitutional" Wash. Rev. Code § 9.61.260(1)(b), and generally enjoin the statute's enforcement.

Contrary to Rynearson's assertions, allowing him to seek federal court relief would have directly interfered with the municipal court's judicial process and enforcement of its orders. It would have interfered with the State's judicial function by calling into question whether the municipal court could apply Wash. Rev. Code § 9.61.260(1)(b) to Rynearson's conduct. It would also have interfered with the municipal court's ability to enforce its already existing protection order by enjoining application of the statute in any contempt proceeding. And it would have threatened the State's authority to make its own judicial determination about the constitutionality of the cyberstalking law. This Court should affirm that abstention was appropriate on this ground as well.

3. A Federal Injunction Would Have Had the Practical Effect of Enjoining the State Stalking Protection Order Proceedings

The last *Younger* inquiry is whether the federal action would have had the practical effect of enjoining the state proceedings. *ReadyLink Healthcare, Inc*, 754

F.3d at 759 (citing *Gilbertson*, 381 F.3d at 978, 983-84). Rynearson argues that he was not seeking "an order requiring that any action be taken or not taken in the state proceeding." Appellant Br. at 17. But this statement ignores his own requested relief: a preliminary and permanent injunction enjoining the State from enforcing Wash. Rev. Code § 9.61.260, and a declaratory judgment that the statute is unconstitutional. *See* ER 13. There should be no question that federal relief would have affected the state proceedings, because that is precisely the remedy that Rynearson sought.

On the same day the Supreme Court decided *Younger*, the Court also decided *Samuels v. Mackell*, 401 U.S. 66 (1971), a case similar in facts to that here. In *Samuels*, two defendants had been indicted in state court for criminal anarchy. While the state case was pending, the defendants filed suit in federal court asserting that the state's criminal anarchy statutes were unconstitutional under the First Amendment. *Samuels*, 401 U.S. at 67. They specifically sought to enjoin the state prosecution, but they also sought declaratory relief "to the effect that the challenged state laws were unconstitutional and void on the same grounds." *Id.* at 68. A three-judge district court found the statutes constitutional and dismissed the proceedings. *Id.* The Supreme Court affirmed, but on different grounds.

As to the defendants' request for injunctive relief, the Court held its decision in *Younger* controlled and the matter should have been dismissed on abstention. *Id.*

at 68-69. The Court concluded that the request for declaratory relief also required abstention, but for slightly different reasoning:

> In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "(f)urther necessary or proper relief," 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would.

Samuels, 401 U.S. at 72. The Court therefore found that the district court should have denied the request for declaratory relief without considering the merits. *Id.* at 73.

Like the defendants in *Samuels*, Rynearson was also the subject of ongoing state proceedings concerning the very law that he federally sought to enjoin and declare unconstitutional. While Rynearson spends many pages arguing about the effect of a federal judgment on future cyberstalking proceedings or on hypothetical future proceedings involving Moriwaki, *see* Appellant Br. 13-19, he ignores entirely the probable effect of a federal injunction or declaratory relief on the protection order proceedings that were currently in process. Just as it would have in *Samuels,* a

federal order enjoining Washington from enforcing Wash. Rev. Code § 9.61.260(1)(b) and declaring that statute unconstitutional would have given Rynearson the means to stop the municipal court from continuing to apply the cyberstalking statute to his conduct. *Cf. Samuels*, 401 U.S. at 73. And, since Rynearson's cyberstalking conduct was the primary form of harassment against Moriwalki, *see, e.g.*, ER 24 ¶ 4, it is unlikely that the municipal court could have proceeded with issuing the permanent stalking protection order on the basis of stalking or harassment alone.

In fact, Rynearson specifically told the district court that that he wished to resume making statements and communications about Moriwaki, but felt he could not do so while the stalking protection order was in place. *See* ER 7-8. Yet he now asserts that success in the federal suit would have only allowed him to "resume [his] criticism of Mr. Moriwaki through online speech not barred by . . . the protective order." Appellant Br. at 33 (citing ER 33). This argument is absurd. The municipal court's temporary protection order specifically prohibited Rynearson from maintaining any webpages or Facebook posts using Moriwaki's name. *See* ER 45. Therefore, at the time he filed his complaint, Rynearson could not have resumed *any* online speech about Moriwaki unless he specifically intended for the federal judgment to stop the state proceedings. As the district court concluded: "It is hard to envision how the state court proceeding could go forward if Rynearson [was]

equipped with an injunction . . . that essentially authorizes him to engage in conduct that violates the stalking protection order." ER 14.

VII. CONCLUSION

Rynearson's federal suit was a wrongful attempt to interfere with Washington's then on-going stalking protection order proceedings against him. The district court correctly abstained as the proceedings satisfy all of the required elements for *Younger* abstention. This Court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of March 2018.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Robert Ferguson, Attorney General of the State of Washington and Tina R. Robinson, Prosecuting Attorney for Kitsap County, Respondents, by and through their undersigned counsel, hereby state that there are no related cases to the instant appeal that are currently pending in this Court.

s/ Callie A. Castillo
CALLIE A. CASTILLO
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 5286 words.

s/ Callie A. Castillo
CALLIE A. CASTILLO
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States District Court Western District of Washington using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

s/ *Stephanie N. Lindey*
STEPHANIE N. LINDEY
Legal Assistant

No. 17-35853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD L. RYNEARSON, III,
Plaintiff-Appellant,

v.

ROBERT FERGUSON et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
The Honorable Ronald B. Leighton
Case No. 3:17-cv-05531-RBL

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Introduction

During the litigation before the District Court, Mr. Rynearson faced two distinct limits on his speech.

1. When Rynearson's complaint was filed, he was subject to a temporary protection order obtained in a civil proceeding by Mr. Moriwaki, a private party who is not involved in this case. That order required Rynearson only to "remove *public* webpages/Facebook page with [Moriwaki's] name," ER 45 (emphasis added), and did not bar Rynearson from posting about Moriwaki in private groups, or from posting about Moriwaki publicly without using Moriwaki's name. (Appellees thus err in saying that the order barred "*any* online speech about Moriwaki," Gov't Br. 23, and "any webpages or Facebook posts using Moriwaki's name," *id.*)

The permanent protection order, granted six days after this suit was filed, was further limited. It prohibited only (a) the online use of Moriwaki's photograph and (b) the use of Moriwaki's name or personal identifying information "in the title or domain name" of posts. Mot. for Jud. Notice Exh. A, at 2. The Supreme Court has instructed federal courts to consider, in their *Younger* abstention analysis, any proceedings that occur in state court after filing of the federal court complaint but before

"proceedings of substance on the merits have taken place in the federal court," *Hicks v. Miranda*, 422 U.S. 332, 349 (1975), so the terms of the permanent protective order would be relevant here (though the legal analysis would be the same if the temporary protective order were considered instead).

2. Rynearson, however, also faced—and continues to face—the threat of criminal prosecution under the state's cyberstalking statute. This threatens a wide range of speech that is not covered by either the temporary or permanent protective orders: any repeated speech said "with intent to harass, intimidate, torment, or embarrass" Moriwaki. RCW 9.61.260(1).

That prohibition applies, for instance, to speech expressly excluded from the temporary order: speech in a private (or "closed") discussion group. (This is relevant to Rynearson, because he had made one of his discussion groups private after the order was issued, ER 32, ¶ 14; the police department pointed to posts from that group in its RCW 9.61.260(1) probable cause referral to the prosecutor, ER 30-32, ¶¶ 12-13.) The RCW 9.61.260(1) prohibition also applies to posts that do not use Moriwaki's name, which the temporary order's limitation to pages "with

[Moriwaki's] name" does not cover. And the prohibition also applies to speech expressly excluded from the *permanent* order: speech that sharply criticizes Moriwaki but does not use Moriwaki's name or identifying information in the title of the page or post, and does not use Moriwaki's photograph.

Rynearson dealt with these two separate threats to his free speech rights through two separate legal challenges: He appealed the state court civil order (and eventually prevailed, *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811 (Wash. Super. Ct.)), but he went to federal court to protect himself against the separate threatened criminal prosecution. His success in the civil order proceeding does not protect him against any future criminal prosecution. Conversely, an injunction against such criminal prosecution would not have interfered with the civil order.

Appellees err in claiming that "Rynearson specifically told the district court that he wished to resume making statements and communications about Moriwaki, but felt he could not do so while the stalking protection order was in place," Gov't Br. 23 (citing ER 7-8). What the District Court said was, "If the Court were to grant this relief, Rynearson indicates that

he will resume his incessant online criticism of Moriwaki which gave rise to the stalking protection order" (ER 14, citing Rynearson's Declaration, Dkt. 4 at 8). And the Declaration, Dkt. 4 at 8, ER 33, expressly says, "I would like to resume my criticism of Mr. Moriwaki through online speech *not barred by the temporary protective order* or, if that order is lifted, by re-publishing the 'Not Clarence Moriwaki of Bainbridge Island' Facebook page" (emphasis added).

All along, Rynearson has recognized that the speech restriction imposed by the state civil court order can be removed only through the state litigation process. In the federal case, he seeks security only from the broader speech restriction imposed by the threat of state criminal prosecution.

The District Court therefore erred in abstaining under *Younger*, for two separate reasons. First, Rynearson's "requested relief" did not "seek to enjoin—or have the practical effect of enjoining—ongoing state proceedings." *ReadyLink Healthcare, Inc.*, 754 F.3d 754, 758 (9th Cir. 2018). Indeed, it could not have had any such effect, because the other participants in the civil proceeding (Moriwaki, and the Municipal and Superior Courts) were not parties to the criminal proceeding. For the same reason,

the federal injunction that Rynearson requested would not have interfered with state court proceedings. Rynearson Br. 12-22.

Second, the civil restraining order proceeding was not a criminal or quasi-criminal proceeding. It was a lawsuit between two private parties, which yielded an injunction similar to those regularly available in litigation between private parties. A private party's decision to sue over particular speech cannot block the speaker's right to go to federal court to prevent criminal prosecutors from separately prosecuting the speaker for other speech.

""[A] federal court's 'obligation' to hear and decide a case is 'virtually unflagging.' '*Younger* abstention remains an extraordinary and narrow exception to the general rule[.]'" *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018) (citations omitted). The exception does not apply here.

I. A federal injunction prohibiting criminal enforcement could not have practically enjoined the state civil proceedings

Rynearson's federal suit seeks to enjoin state and local prosecutors from enforcing RCW 9.61.260 in a particular manner—by criminal prosecution. The suit does not seek to "enjoin . . . application" of the cyberstalking statute, Gov't Br. 1, by state courts or state litigants. It cannot "generally enjoin" the statute's enforcement, Gov't Br. 20, in the sense of

blocking the statute's use in privately filed civil cases as well as in criminal ones. And to the extent Rynearson seeks to "enjoin[] the State from enforcing" RCW 9.61.260, Gov't Br. 21, that is limited to an injunction against state prosecutors enforcing the statute through criminal prosecutions. No injunction or declaratory judgment entered by the federal courts against prosecutors could bind civil litigants or Washington trial courts, who are not parties to this case.

Appellees assert that "a federal order enjoining Washington from enforcing RCW 9.61.260(1)(b) and declaring that statute unconstitutional would have given Rynearson the means to stop the municipal court from continuing to apply the cyberstalking statute to his conduct." Gov't Br. 22-23. But how could the order against state or local prosecutors "stop *the municipal court*" from doing anything?

The municipal court was not a party to the order, and neither was Moriwaki. As Appellees do not dispute, the federal proceedings would not have had collateral estoppel effect on the state case. *See* Rynearson Br. 19 (explaining this in detail). The federal proceedings would not have been binding precedent in the state case. *See* Rynearson Br. 19-20. And,

because Washington follows the collateral bar rule, the federal proceedings would not even have prevented prosecutors from initiating criminal proceedings against Rynearson for violating the order, if (purely hypothetically) Rynearson had indeed violated the order. *See* Rynearson Br. 16-18.

The only way in which a judgment in this federal case would "call[] into question" whether a state court could apply the cyberstalking statute to Rynearson's speech, Gov't Br. 20—not "stop the [state] court from continuing to apply the . . . statute," Gov't Br. 23—would be through the persuasive effect of the federal opinion's reasoning. Rynearson Br. 19-20. Yet such a persuasive effect is not forbidden interference by federal courts with state court proceedings; it is only one court providing useful input to another court's decisionmaking process.

The appellees rely chiefly on *Samuels v. Mackell*, 401 U.S. 66 (1971), which held that a declaratory judgment against state prosecutors would unduly interfere with pending proceedings brought by *those prosecutors*. Indeed, the Court stressed that the declaratory judgment in that case could have been enforced by "the district court . . . granting '[f]urther

necessary or proper relief,'" *id.* at 72 (citation omitted), including "a subsequent injunction against those proceedings," *id.* But here, even if any declaratory judgment of the statute's invalidity bound state prosecutors (again, the only binding effect in a federal lawsuit filed against prosecutors) and led to a subsequent injunction against future *criminal* proceedings, neither the declaratory judgment nor the injunction would have had any effect on the state *civil* proceedings in *Moriwaki v. Rynearson*.

II. The state proceedings are not within any of the exceptional categories of civil cases which can justify *Younger* abstention

Even apart from whether the federal action would have had the practical effect of enjoining state civil proceedings, the District Court should not have abstained unless the pending state action was a "quasi-criminal enforcement action" or the requested federal court relief would have interfered with the core functioning of the state's judicial processes. *ReadyLink*, 754 F.3d at 759. Neither category applies here.

A. *Moriwaki v. Rynearson* was not a "quasi-criminal enforcement action[]" akin to a criminal proceeding

Rynearson's opening brief explains why Moriwaki's restraining order case was not a "quasi-criminal" proceeding, but rather was like a typical civil injunctive proceeding:

1. Like a typical injunctive proceeding, it was brought by a private citizen, not a state actor, and without the application of any screening criteria or enforcement priorities by state enforcement agencies. *See* Rynearson Br. 23.
2. Like a typical injunctive proceeding, it offered a normal civil remedy—an order not to do certain things. *See* RCW 7.92.010 (specifying that the proceeding offers a "civil remedy").
3. Like a typical injunctive proceeding, it required a simple finding by a preponderance of the evidence that the civil petitioner met the standards for relief. *See* RCW 7.92.030, 7.92.100. *See* Rynearson Br. 23.
4. Like a typical injunctive proceeding, it was aimed at preventing future behavior, not punishing past behavior (though, as with other injunctions, it was triggered by an allegation of past misbehavior). *See* Rynearson Br. 23-24.
5. Any violations of the order could have led to criminal prosecution—just as any violations of an injunction could lead to criminal prosecution. *See* Rynearson Br. 24.

6. The statutorily authorized criminal penalty for violating the order would have been precisely the same as that for violating any other injunction. *See* Rynearson Br. 24; *compare* RCW 26.50.110(1)(a) (providing that violations of a protection order are a gross misdemeanor), 9.92.020 (providing that a gross misdemeanor is generally punishable by up to 364 days in jail and up to a $5000 fine) *with* RCW 7.21.040 (providing that criminal contempt of court is punishable by up to 364 days in jail and up to a $5000 fine).
7. "[T]he court-imposed requirements" of the protection order "may not be 'waived by the victim,'" Gov't Br. 17, but that is true of civil injunctions generally; Washington courts, like other courts, have upheld criminal contempt fines imposed for violation of injunctions, even when the parties have agreed to settle the dispute and thus waived enforcement of the injunction. *Mead Sch. Dist No. 354 v. Mead Ed. Ass'n*, 85 Wash. 2d 278, 286, 534 P.2d 561, 567 (1975) (upholding a fine in such a situation, because a trial court may "bolster respect for its future orders by attaching a deterrent sanction to violation," "totally independent of any concern of [the] parties," and notwithstanding the other party's willingness to condone the

violation). "Under no theory can a party that obtains an injunction bind the issuing court with condonation of contemptuous or illegal acts of those who violate the court's order. To give effect to such a theory would usurp the highest function of our courts." *Bd. of Junior College Dist. No. 508 v. Cook County College Teachers Union, Local 1600*, 262 N.E.2d 125, 129-30 (Ill. App. Ct. 1970) (applying the same rule).

Appellees assert that "Washington does not consider protection order proceedings as a mere 'civil dispute between two private parties,'" Gov't Br. 17, but the supposed differences to which they point are actually mainly similarities. Appellees, for instance, argue that "the court-imposed requirements may not 'be waived by the victim,'" *id.* at 17 (citation omitted)—but, as noted above, this is true for injunctions generally. Appellees argue that protection orders are designed "to further the 'public interest,'" Gov't Br. 17; but many ordinary rules enforced in ordinary private litigation further the public interest. *See, e.g.*, *Smith v. Bates Technical Coll.*, 139 Wash. 2d 793, 801 (2000) (tort of wrongful discharge); *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wash. 2d 260, 284 n.4 (2011)

(Washington Consumer Protection Act); *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 867 (9th Cir. 2017) (Copyright Act).

Appellees argue that "violating the stalking protection orders would have subjected Rynearson to criminal prosecution as a gross misdemeanor," Gov't Br. 17-18; but, as noted above (and not disputed by Appellees), precisely the same punishment can apply in criminal contempt proceedings for violating any injunction. Appellees argue that "[t]he stalking protection orders involved a deprivation of Rynearson's liberty, restricting his freedom of movement and action," Gov't Br. 17—but they do not show how this distinguishes the order from any injunction, which by definition restricts the enjoined party's action (or, in some instances, restricts the enjoined party from inaction), *see* Rynearson Br. 24. Appellees argue that the injunction was entered following "the court's findings and conclusions that Rynearson's conduct met the elements of two separate crimes" (and one admittedly civil statute), Gov't Br. 17, but that could be equally true for a wide range of injunctions against intentional torts that may share the elements of crimes (such as fraud, certain kinds of trespass, or battery). The only real difference between the protective order and a typical civil injunction is that such orders can include bans

on possession of firearms—but that is a minor difference that does not suffice to make "a civil remedy," RCW 7.92.010, quasi-criminal, especially given that the permanent protective order (which was issued before "proceedings of substance on the merits have taken place in the federal court," *Hicks*, 422 U.S. at 349) did not include any such ban. *See* Rynearson Br. 23.

In *ReadyLink*, the court held that *Younger* abstention was unwarranted, because the "mere 'initiation' of a judicial or quasi-judicial administrative proceeding" is not "an act of civil enforcement . . . 'akin to a criminal prosecution' in 'important respects.'" 754 F.3d at 757-60. That is especially so when the initiator is not a state actor but only a private party. Rynearson has the right to access federal court in order to vindicate his First Amendment rights to be free of criminal prosecution under an unconstitutionally overbroad statute. A private citizen like Moriwaki cannot block Rynearson's exercise of those rights by simply choosing to file a complaint seeking a civil protection order.

B. The federal action would not have interfered with the State's interest in enforcing the orders and judgments of its courts

The federal injunction that Rynearson seeks would also not have interfered with "the 'State's interest in enforcing the orders and judgments of its courts,'" *ReadyLink*, 754 F.3d at 759 (citations omitted). Rynearson seeks protection from criminal prosecution; he was not challenging "the state courts' ability to enforce compliance with judgments already made," *Cook v. Harding*, 879 F.3d 1035, 1041 (9th Cir. 2018), either as to protection orders generally or as to Moriwaki's order specifically. As noted in Part I, a federal injunction against criminal prosecution would not have let him resume the speech forbidden by that order, nor protected him from prosecution if he had violated the order.

Even if Rynearson were challenging the civil injunction itself, appellees do not contest that the state's interest in resolving an individual case does not justify *Younger* abstention. *Potrero Hills Landfill*, 657 F.3d 876, 886 (9th Cir. 2011). Indeed, a challenge to a single "order, not the whole procedure" would not justify abstention (though, again, this lawsuit is not challenging even a single order). *Champion Int'l Corp. v. Brown*, 731

F.2d 1406, 1408 (9th Cir. 1984). Rather, the question is whether the federal suit would have interfered with the "State's judicial process or the municipal court's protection orders," Gov't Br. 19—and it would not have.

Conclusion

An injunction barring Washington prosecutors from enforcing RCW 9.61.260, and an accompanying declaratory judgment entered against those prosecutors, would not have interfered with, much less practically enjoined, the state civil proceedings that were pending when the federal lawsuit was brought. Moreover, the state civil proceedings were not "quasi-criminal," and the state's interest in enforcing the orders and judgments is not jeopardized by the federal suit. Because *Younger* abstention does not apply, the District Court should not have abstained from resolving the First Amendment challenge to RCW 9.61.260(1)(b).

Respectfully Submitted,

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

Certificate of Compliance

This brief complies contains 2,808 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii); this complies the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

This brief has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Word 2010; this complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6).

Dated: April 13, 2018

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

Certificate of Service

I electronically filed this brief using the appellate CM/ECF system on April 13, 2018. All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: April 13, 2018

s/ Eugene Volokh
Attorney for Appellant Richard Rynearson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RYNEARSON, III Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, Defendants.	NO. 2:17-cv-1042 DECLARATION OF RICHARD LEE RYNEARSON, III IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Richard Lee Rynearson, III, hereby declare as follows:

1. I am an adult competent to give testimony under oath in a court of law. The information contained herein is based on my personal knowledge and belief.

2. I am retired from the United States Air Force. Beginning while I was in the Air Force, I became very actively engaged online in activism related to preventing police abuse. I also tried to raise awareness of the erosion of civil liberties, and the expansion of executive power, related to the war on terror. To do this, I wrote a blog and engaged actively on various social media sites and internet forums, including Facebook. In particular, I criticized the Obama administration's decision to target and kill American citizens, based solely on executive-branch determinations, using drone strikes outside of war zones.

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3. While in the military, I also criticized the Obama administration's decision to lobby for, sign, and defend on appeal section 1021 of the National Defense Authorization Act ("NDAA") of 2012, which in my view (and the opinion of District Judge Katherine Forrest of the Southern District of New York) purports to authorize military detention of American citizens and lawful permanent residents pursuant to the laws of war—which means without trial and effectively indefinitely.

4. When I retired from the military, I moved to Bainbridge Island, Washington. My wife and I decided to move to the Island nearly ten years before I retired, and we bought a residence on the Island five years before my retirement. Given my interest in defending civil liberties from encroachment in the post-September-11 era, I was very interested to learn of the role of Bainbridge Island in the Japanese-American internment—one of the worst civil-liberties violations in our history. Bainbridge Island was the first location in the United States from which Japanese-Americans were rounded up and taken to internment camps. The local newspaper, the Bainbridge Island Review, was one of the few newspapers in the country to take a stand against the internment, and the support of the community resulted in the Island having one of the highest rates of return of Japanese-American families after the war ended.

5. Once I learned of this history, and years before I moved to Bainbridge Island, I began to follow the work of the Bainbridge Island Japanese-American Exclusion Memorial, and to highlight the good work of the Memorial to preserve this history and to present that history as a reminder for present-day debates on civil liberties during war. For example, in November of 2014, I blogged about the death of Fumiko Hayashida, an internee from Bainbridge Island who was featured in an iconic photograph of the internment. My blog post linked to a video about the Memorial. In November 2015, I shared (on a public Facebook page I managed) a video featuring Clarence Moriwaki, the founder of the Memorial, discussing the internment. I commented, "Excellent discussion on American soldiers forcing American citizens onto trains and taking them to concentration camps here in America. Incredibly important stuff, especially today." In December 2015, I shared (again on a public Facebook page) a post by Mr. Moriwaki about a

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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."

6. I shut down my blog when I retired from the military. I shifted my online advocacy and activism on indefinite-detention and executive-power issues to Facebook, and particularly two Facebook groups/pages. One is a Facebook group called "WWIII Japanese-American Internment," which I started in October 2016. The reference to "World War III" in the title of the group was meant to refer to the possibility that something like the internment could happen in some future (or even current) war. When I moved to Bainbridge Island, I began looking for a Facebook group that was focused on presenting the lessons of the internment's history and its relevance for current debates, but discovered that most of the groups focused on the internment either implicitly or expressly prohibited posts connecting the internment to current political debates. I therefore started the "WWIII Japanese-American Internment" group to provide a place to discuss the lessons of the internment for the modern era. Because of that purpose, the NDAA of 2012 has been a frequent topic of discussion in the group.

7. The other Facebook page is called SB 5176 – Block Indefinite Detention. It is designed to gather support for Washington Senate Bill 5176, which would prohibit Washington officials from cooperating with any federal effort to exercise the detention authority of section 1021 against citizens or lawful permanent residents in Washington. I started it soon after I learned of the bill, in February 2017. I stopped actively posting on the page when the bill was not voted out of committee in this year's regular session, but plan to revive the page for the 2018 regular session.

8. When I began to engage in online speech and discussion about the lessons of the internment for the modern era, I came to know of or interact with several of the leaders of civic groups related to the internment in the Seattle area. One was Tom Ikeda, founding Executive Director of Densho, a Seattle-area nonprofit with the mission to "educate, preserve, collaborate and inspire action for equity." Densho "preserve[s] and make[s] accessible primary source

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materials on the World War II incarceration of Japanese Americans" and present[s] these materials … for their historic value and as a means of exploring issues of democracy, intolerance, wartime hysteria, civil rights and the responsibilities of citizenship in our increasingly global society." Another such person was Mr. Moriwaki, the founder and current board member and spokesperson of the Bainbridge Island Japanese-American Memorial.

9. I became disillusioned with many of the leaders in the movement to preserve and teach the lessons of the internment because they either failed to condemn the indefinite-detention provisions of the NDAA of 2012 or only weakly condemned that law and continued to strongly support the politicians who had enacted it. Those politicians include President Obama, who lobbied for the elimination of an American-citizen exclusion from section 1021 of the NDAA and signed the bill into law and Governor Inslee, who voted for it when he was a member of Congress.

10. I came to believe that the civic leaders who represented the face of the internment's lessons to the public chose to use the internment as a platform to criticize only Republican politicians (now, chiefly President Trump), and that this lack of evenhandedness damaged the credibility of the movement. This was brought home to me through my in-person and online advocacy for SB 5176, when self-identified conservatives routinely responded to my entreaties to support the bill with the (erroneous) critique that I only cared about the issue now that President Trump was in office, and that I (or "the left") had ignored the NDAA when President Obama signed it.

11. Because of this disillusionment, I began to post public criticism of the civic leaders mentioned above online. For example, in December 2016, I posted a "note" (a long form post on Facebook akin to a blog post) in the WWIII Japanese-American Internment Facebook group entitled "Why the Next Trains Will Have Densho Bumper Stickers." In the note, I stated that "Mr. Ikeda, like so many in the community, in my experience, is a public supporter of President Obama" and that I had asked him "how he could proclaim 'let it not happen again' while at the same time publicly supporting a President who has paved the way for it to happen

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again" but that he had not answered. I also stated that "Mr. Ikeda is not alone in his hypocrisy," and criticized him for calling for his supporters to contact the Los Angeles Times to complain about the Times publishing a view on the internment with which Mr. Ikeda disagreed, rather than "fight[ing] bad speech" by "add[ing] our own better speech."

12. I also criticized Mr. Moriwaki, the founder of the Memorial and a figure often featured in news articles about the Memorial and its lessons for modern politics. For example:

a. On February 5, 2017, I posted a "meme" with Mr. Moriwaki's picture as the background image 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." I accompanied the meme with the comment "Clarence Moriwaki, long time president of the Bainbridge Island Japanese American Exclusion Memorial, vocally and enthusiastically supports two politicians who have expressly made it 'legal' for presidents to once again have our military arrest American citizens in America without charge or trial and throw them into military prison camps indefinitely. This is the president of a memorial that has the motto 'Let It Not Happen Again….'"

b. On February 6, 2017, in response to someone else's post about SB 5176 in the WWIII Japanese-American Internment group, I commented "Clarence Moriwaki has also refused to get the word out about this bill on his FB page. It's like he and Tom Ikeda would rather President Trump have the power to use the military to arrest Muslim Americans without charge or trial and throw them into military prisons indefinitely RATHER than support a bill that would overturn the work of their beloved President Obama."

c. On February 7, 2017, I shared a story about the Hedges v. Obama lawsuit (which challenged the NDAA of 2012) to the WWIII Japanese-American Internment group

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with a comment reading, in part, "For those worried about president Trump disappearing Americans without charge or trial….here is a great interview from the liberal man, Chris Hedges, who sued the government to stop this unconstitutional power and he references what happened to our Japanese American neighbors in the 1940s. While Judge Forrest issued an injunction, sadly the appeals court reversed it and the Supreme Court (which got it wrong in every single case concerning the Japanese American internment) refused to hear this lawsuit. This is the power that was signed into law by the politicians that are so vocally celebrated by Clarence Moriwaki, Tome Ikeda, and even George Takei. Never underestimate the power of Power to corrupt even those whose parents were victimized."

d. On February 5, 2017, I created a Facebook page for the purpose of criticizing Mr. Moriwaki and calling for his removal from his role as board member and representative of the Memorial. The Facebook page was initially named "Clarence Moriwaki of Bainbridge Island," but the page name was subsequently changed to "Not Clarence Moriwaki of Bainbridge Island."

e. On February 6, 2017, I explained that 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 the President or board member for our memorial."

f. The page includes general posts about the NDAA of 2012 along with posts critical of President Obama, Governor Inslee, and Mr. Moriwaki. For example, 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…"

g. An example of a post critical of Mr. Moriwaki is a post from February 23, 2017, that

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states in part "Clarence Moriwaki is a frequent spokesman for Bainbridge Island and for our memorial and he considers himself a part time journalist and is frequently in the media representing our community. We think he is a very poor reflection on our community and our values."

13. Due to these posts and other similar online speech, Mr. Moriwaki filed a report with the Bainbridge Island Police Department. The police found probable cause to believe that I intended to harass Mr. Moriwaki using electronic communication repeatedly and at times anonymously and therefore there was probable cause for a cyberstalking charge. The posts described in paragraph 12 were all attached to the police report. A true and correct copy of those screen captures of the posts is attached as **Exhibit A** hereto. Mr. Moriwaki also claimed physical stalking to the police, but the police department eliminated the stalking charge. The police department forwarded the cyberstalking report to the Kitsap County Prosecutor.

14. Mr. Moriwaki also applied for, and received, an ex parte temporary protective order. The temporary protective order requires, among other things, that I remove any public webpages and any Facebook page with Mr. Moriwaki's name. Order in *Moriwaki v. Rynearson*, No. 12-17 (Bainbridge Island Mun. Ct. Mar. 13, 2017) (requiring me to "remove public webpages/Facebook page with Petitioner's name"). A true and correct copy of the temporary protective order is attached as **Exhibit B** hereto. The hearing on a permanent protective order has not yet been held. Because of the temporary protective order, I have de-published the "Not Clarence Moriwaki of Bainbridge Island" Facebook page. I have also made the WWIII Japanese-American Internment group a non-public, closed group.

15. The attorney who represents me in the protective order case communicated on several occasions with a Kitsap County Deputy Prosecutor. In an email exchange in June 2017 regarding the potential for criminal charges, the prosecutor stated he was not going to charge me "at this time," but he was not "formally declining" charges, either. The prosecutor indicated that he was going to "sit on it" with the hope that I will follow the temporary protective order described above. The prosecutor further stated that he would "revisit the charging decision" if he

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got any further referrals about me. A true and correct copy of the email exchange with the prosecutor dated June 15, 2017 is attached as **Exhibit C** hereto. My understanding is that the statute of limitations for cyberstalking is two years.

16. I would like to resume my criticism of Mr. Moriwaki through online speech not barred by the temporary protective order or, if that order is lifted, by re-publishing the "Not Clarence Moriwaki of Bainbridge Island" Facebook page. I also intend to engage in substantially similar criticism of other civic leaders in the future. I sometimes use provocative rhetoric to make my critiques about the lack of evenhandedness in applying the lessons of the internment, for example by analogizing having someone uncritical of the NDAA as the spokesperson of the Japanese-American Exclusion Memorial as being like a neo-Nazi representing a Holocaust memorial. I would use similar rhetoric in the future. However, given that the police found probable cause for cyberstalking based on my past speech, the prosecutor did not decline charges, and the Kitsap Prosecutor's Office has indicated it is keeping an eye out for any complaints from my future speech, I have a genuine fear that I am likely to be prosecuted for any online speech that the target of my criticism finds embarrassing, harassing, or unpleasant.

17. Given Mr. Moriwaki's filing of a police report based on my past speech, and the interconnectedness of the leaders of the various Seattle-area organizations related to the internment, I also think it is reasonably likely that anything I say critical of any leader in that movement is likely to be reported to the police or a prosecutor, resulting in a "referral" that would cause the Kitsap Prosecutor's Office to charge me. For those reasons, I have censored what I say online since I learned of the police report. In particular, I have made no online statements about Mr. Moriwaki or Mr. Ikeda, and have stopped making posts in the WWIII Japanese-American Internment Facebook group altogether.

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

Dated: July 11, 2017

DocuSigned by:
Richard Lee Rynearson III
FB9D364C8C2645B...
Richard Lee Rynearson, III

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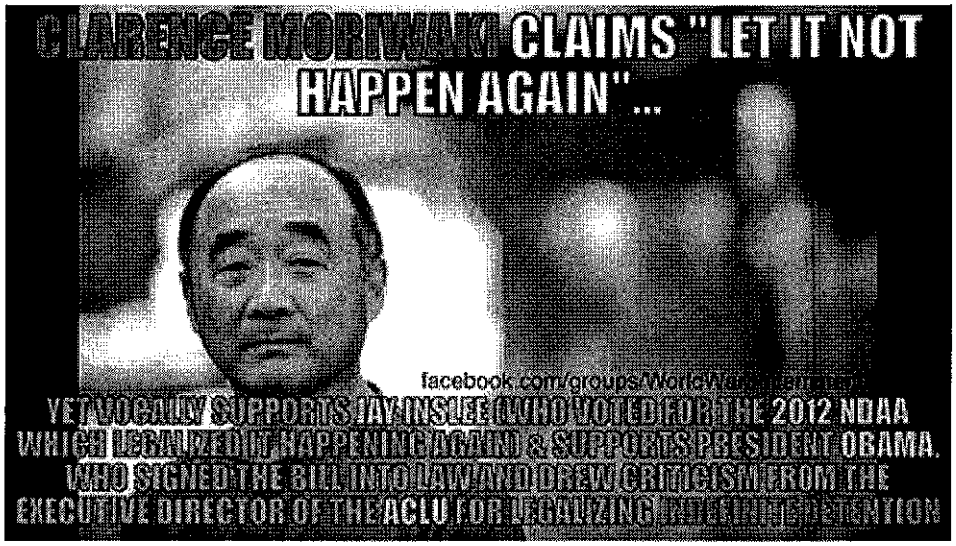
EXHIBIT A

Richard Lee
February 5 at 6:56pm

Clarence Moriwaki, long time president of the Bainbridge Island Japanese American Exclusion Memorial, vocally and enthusiastically supports two politicians who have expressly made it "legal" for presidents to once again have our military arrest American citizens in America without charge or trial and throw them into military prison camps indefinitely. This is the president of a memorial that has the motto "Let It Not Happen Again..."



Like

Share

11
Comments

Lara O'Neal Jones I don't believe that targeting a particular person like this is helpful. Please try and focus on positive action.
Like · February 7 at 8:26am

Richard Lee Lara, the conversation I want to have is about how our memorial's president not only supports politicians who make what FDR did to Japanese Americans legal to do again, but also how our memorial's president demonizes and shuns those who are different.

How do I have that conversation about a public person in our community who censors and bans those with differing views in personal discussion (and who also left this group that I invited him into after making only one post), while also alleviating your concerns?

Jason Casella shared Tenth Amendment Center's post.
January 22 at 9:17am

Tenth Amendment Center Like Page
January 21 at 4:41pm
"A bill introduced in the Washington state Senate would prohibit the state from assisting the federal government with indefinite detention without due process u...

See More

Washington Bill Would Help Block Indefinite Detention in the State

OLYMPIA, Wash. (Jan. 20, 2017) – A bill introduced in the Washington state Senate would prohibit the state from assisting the federal government with…
BLOG.TENTHAMENDMENTCENTER.COM

Like

Share

Seen by 3

22
Comments
View 1 more comment

Jonathan Songer Wouldn't it be nice if Washington state honored the Second Amendment too?
Like · 1 · January 28 at 2:11pm

Richard Lee Clarence Moriwaki has also refused to get the word out about this bill on his FB page. It's like he and Tom Ikeda would rather President Trump have the power to use the military to arrest Muslim Americans without charge or trial and throw

them into military prisons indefinitely RATHER than support a bill that would overturn the work of their beloved President Obama.
Like · February 6 at 7:30am

Richard Lee shared a link.
February 7 at 2:38pm

For those worried about president Trump disappearing Americans without charge or trial....here is a great interview from the liberal man, Chris Hedges, who sued the government to stop this unconstitutional power and he references what happened to our Japanese American neighbors in the 1940s. While Judge Forrest issued an injunction, sadly the appeals court reversed it and the Supreme Court (which got it wrong in every single case concerning the Japanese American internment) refused to hear this lawsuit.

This is the power that was signed into law by the politicians that are so vocally celebrated by Clarence Moriwaki, Tom Ikeda, and even George Takei.

Never underestimate the power of Power to corrupt even those whose parents were victimized. How easily

Chris Hedges NDAA Lawsuit Update

#ChrisHedges#Hedges#science#technology#discover#documentdiscover#Physicists#debate#philosophy#Atheist#
YOUTUBE.COM

Like

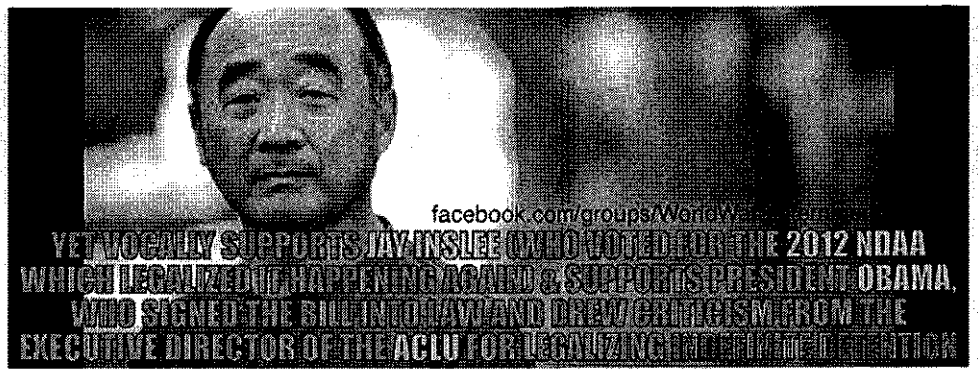
Share

9

From "Clarence Moriwaki of Bainbridge Island" FB Page

Clarence Moriwaki of Bainbridge Island

@BIClarenceMoriwaki



Like Follow Share ···

Send Message

Posts

Clarence Moriwaki of Bainbridge Island
February 6 at 8:28am

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.

While the goal of this page is to discuss serious issues of public interest, and to be challenging and honest, we also endeavor to ensure any discussion is civil. None of us are perfect and the rebuke of a friend is to be trusted over the kisses of a... See More

Chris Hedges: NDAA Lawsuit Update

Follow Sierra @ http://www.twitter.com/sierra_adamson Sierra...

YOUTUBE.COM

Learn More

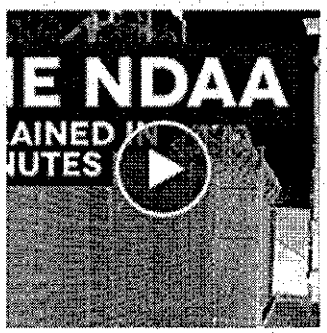
Like Comment Share

1 Chronological

View 1 more comment

Clarence Moriwaki of Bainbridge Island For those unfamiliar with the law that Clarence's beloved politicians passed and signed without so much as a cross word from Clarence who remained their loyal supporter...

https://youtu.be/RNcbsB1Pizg



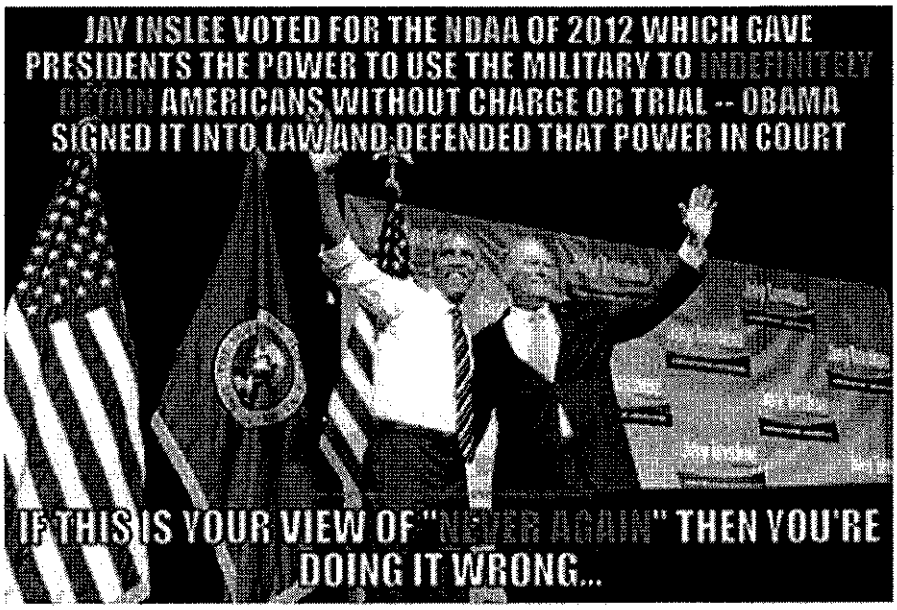
The NDAA Explained in 3 Minutes - YouTube

YOUTUBE.COM

Like · Reply · 4 hrs

Clarence Moriwaki of Bainbridge Island
21 hrs ·

Clarence Moriwaki worked for one of these politicians and vocally supports both. Is that compatible with "Let It Not Happen Again?" We don't think so.



Like Comment Share

7

1 share

Write a comment...

See All

Posts

Clarence Moriwaki of Bainbridge Island added a new photo.
21 hrs ·

Clarence Moriwaki of Bainbridge Island
21 hrs ·

Don't know Clarence Moriwaki, the President of the Bainbridge Island Japanese American Exclusion Memorial? He's a public figure who has spent his time a) in public office, b) running for public office, and c) working as a press secretary or in Public Relations as a "media strategist" for politicians in public office.

Clarence Moriwaki is a frequent spokesman for Bainbridge Island and for our memorial and he considers himself a part time journalist and is frequently in the media representing our community.

We think he is a very poor reflection on our community and our values.

Clarence Moriwaki | LinkedIn

View Clarence Moriwaki's professional profile on LinkedIn. LinkedIn is the world's largest business network, helping professionals like Clarence Moriwaki discover inside connections to recommended job…

LINKEDIN.COM

Learn More

Like Comment Share

3

Write a comment...

EXHIBIT B

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

CLARENCE MORIWAKI
Petitioner (Person Protected), DOB
vs.
RICK RYNEARSON aka [redacted]
Respondent (Person Restrained). DOB
RICHARD LEE

No. 17-17

Temporary Protection Order and Notice of Hearing – Stalking
(TMOSTKH)
(Clerk's action required) TN
Next Hearing Date and Time:
3/27 ~~10~~ 17 @ 1 PM
At: BAINBRIDGE ISLAND MUNICIPAL COURT

Respondent's Distinguishing Features:

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

Respondent Identifiers

Sex	Race	Hair
M	WHITE	BRN
Height	Weight	Eyes
5'8"	230	BRN

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 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.

The court has jurisdiction over the parties and the subject matter. The respondent will be served notice of his or her opportunity to be heard at the scheduled hearing.

No contact provisions begin on the next page.

the end of the hearing, noted above.

The terms of this order shall be effective until:

Based upon the petition, testimony, and case record, the court finds: 1) that the respondent committed stalking conduct against the protected person/s; 2) that there is good cause to grant each remedy, regardless of the lack of prior service or notice upon the respondent, because the harm which each remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief. **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.

☒ **Exclude from places**: respondent is ***excluded*** from the protected person/s' ☒ residence ☒ workplace ☐ school ☐ day care ☒ PUBLIC EVENTS WHERE PETITIONER IS PRESENT

☒ **Stay Away**: respondent is ***prohibited*** from knowingly coming within or knowingly remaining within 100 FT (distance) of the protected person/s' ☒ residence ☒ workplace ☐ school ☐ day care.

☒ other: REMOVE PUBLIC WEBPAGES/ FACEBOOK PAGE WITH PETITIONER'S NAME

The address is confidential ☒ The petitioner waives confidentiality of the protected person's address which is:

☐ **Surrender of Weapons**

Respondent shall immediately surrender any firearms and other dangerous weapons to the person or agency named in the Order to Surrender Weapons (Issued without Notice) signed by the court on this date, under this cause number.

- The respondent is directed to appear and show cause why the court should not enter an order for protection effective for one year or more and order the relief requested by the petitioner or other relief the court deems proper, which may include payment of costs.
- **Failure to appear at the hearing or to otherwise respond will result in the court issuing an order for protection – stalking pursuant to RCW Title 7.92, effective for a minimum of one year from the date of the hearing. The next hearing date and time is shown below the caption on page one.**
- The respondent may petition the court to modify or terminate the order if the respondent does not receive actual prior notice of the hearing and if the respondent alleges a meritorious defense to the order or that the order or its remedy is not authorized by this chapter.

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.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

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 IS. ☐ County Sheriff's Office ☒ Police Department **where petitioner lives** which shall enter it in the Washington Crime Information Center.

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.

This order is in effect until the next hearing date and time shown below the caption on page one.

Dated 3/13/17 at 2:35 a.m./(p.m.) _____ **Judge**

Presented by:

Clarence Moriwaki 3/13/2017
Petitioner/Petitioner's Lawyer Date

CLARENCE MORIWAKI
Please print WSBA NO.

I acknowledge receipt of a copy of this Order:

_____
Respondent Date

_____
Please Print

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

EXHIBIT C

Alexander Savojni

From: Alexander Takos <atakos@co.kitsap.wa.us>
Sent: Thursday, June 15, 2017 10:43 AM
To: Alexander Savojni
Subject: RE: Richard Lee Rynearson - Case Report: I17-000145

Alex,

I am not formally declining it and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abides by the NCO that's in place. If I get any future referrals, I will revisit the charging decision.

That is all the information I can provide.

Thanks,

-Alex

Alexander C. Takos
Deputy Prosecuting Attorney
Kitsap County Prosecuting Attorney's Office
atakos@co.kitsap.wa.us
Phone: (360) 337-5680
Fax: (360) 337-4949

From: Alexander Savojni [mailto:alexander@rhodeslegalgroup.com]
Sent: Thursday, June 15, 2017 10:10 AM
To: Alexander Takos <atakos@co.kitsap.wa.us>
Subject: RE: Richard Lee Rynearson - Case Report: I17-000145

Alex,

Sorry to be a pest but my other Bainbridge Island case is circling back around next week and I know the Judge will want a status update on whether charges are going to be filed or not. Do you happen to have an idea when a decision will be made?

Thanks.

Alexander Savojni
Attorney at Law
Rhodes Legal Group, PLLC

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-5531-RBL

PLAINTIFF'S OPPOSITION TO DEFENDANT ROBINSON'S MOTION TO DISMISS

NOTED ON MOTION CALENDAR: September 15, 2017

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I. INTRODUCTION

Defendant Tina Robinson, Kitsap County Prosecuting Attorney, aims her motion to dismiss against a claim for damages under 42 U.S.C. § 1983. The motion is misguided because there is no such claim here. Plaintiff Richard Rynearson is not bringing a claim for damages under section 1983; he is bringing a claim to enjoin future enforcement of a facially unconstitutional statute. *See* Complaint, Dkt. 1, at 7 (hereafter "Compl.") (prayer for relief). The three grounds for dismissal asserted by Defendant Robinson all fail because:

1) Section 1983 provides a cause of action for pre-enforcement injunctive relief to prohibit enforcement of an unconstitutional law, and even if it did not, no statutory cause of action is required.
2) A credible possibility of prosecution is sufficient to create constitutional injury and to permit such a claim to go forward, and no filing of charges (or any other act) by the prosecutor is needed.
3) Prosecutorial immunity extends only to claims for damages against a prosecutor in her personal capacity, and no such claim is made in the complaint.

Defendant Robinson is a proper defendant, in her official capacity, because (as she does not deny) she enforces Washington's criminal laws—including the facially unconstitutional cyberstalking statute—in Kitsap County. The relief sought by Mr. Rynearson is to enjoin her, preliminarily and permanently, from enforcing that law. Her motion to dismiss should thus be denied.

II. ARGUMENT

A. Ninth Circuit law clearly permits a claim for equitable relief under 42 U.S.C. § 1983

Defendant Robinson surmises that Mr. Rynearson is bringing a "claim for damages pursuant to 42 U.S.C. § 1983" because section 1983 was cited in the jurisdictional portion of the complaint and the complaint requests attorneys' fees under 42 U.S.C. § 1988, which Defendant Robinson contends are unavailable for a declaratory judgment claim under 28 U.S.C. § 2201. Def. Robinson Mot. to Dismiss, Dkt. 20, at 3-4 (hereinafter "Mot.").

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This argument reflects a misunderstanding of the complaint. Mr. Rynearson is not bringing a claim for damages, nor a claim limited to declaratory relief. He is bringing a claim for both injunctive and declaratory relief based on the facial unconstitutionality of RCW 9.60.261(1)(b). *See* Compl., at 7 (prayer for relief, which contains no request for damages); *id.* ¶ 4 (stating the claim against Defendant Robinson is for "equitable relief"). Such a claim may be brought under section 1983. *See, e.g.*, *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 616 (9th Cir. 1999) (reversing district court's refusal to exercise jurisdiction over section 1983 claim raising pre-enforcement First Amendment challenge to a statute based on threatened prosecution); *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015) (affirming summary judgment granted to physician in section 1983 claim against county prosecuting attorney enjoining enforcement of state abortion law); *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867 (9th Cir. 2013) (holding political party and potential signature gatherers had standing to bring pre-enforcement challenge, under section 1983, against state official to enjoin enforcement of a residency requirement for signature gatherers). And attorneys' fees are therefore available. 42 U.S.C. § 1988 (permitting award of fees in "any action" under section 1983).

Accordingly, nothing about the citation of section 1983 or the request for fees indicates a claim for damages is afoot. And even if section 1983 were somehow unavailable or inapplicable, the claim would still properly be before this Court, because no statutory cause of action is required to bring a claim seeking to enjoin a state official, in her official capacity, from enforcing an unconstitutional law. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England . . . . It is a judge-made remedy[.]").

B. The credible possibility of prosecution is sufficient constitutional injury

A claim to enjoin future criminal prosecution may be brought whenever a plaintiff faces a genuine possibility of prosecution under the law. *Cal. Pro-Life Council, Inc. v. Getman*, 328

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F.3d 1088, 1094 (9th Cir. 2003). A plaintiff satisfies that requirement when "he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). A plaintiff suffers "the constitutionally recognized injury of self-censorship" so long as he chills his speech based on a reasonable fear that "enforcement proceedings might be initiated by the State." *Cal. Pro-Life Council*, 328 F.3d at 1094-95. A "well-founded fear that the law will be enforced" exists in "the free speech context" so long as "the plaintiff's intended speech arguably falls within the statute's reach." *Id.* at 1095.

Defendant Robinson does not dispute that these precedents are applicable, that Mr. Rynearson has sufficiently alleged self-censorship, that Mr. Rynearson has sufficiently alleged a fear that enforcement proceedings might be initiated, or that his intended speech falls within the statute's reach. She does not, in fact, contest that Mr. Rynearson's fear of prosecution is reasonable. Instead—again apparently based upon an errant reading of the complaint as asserting a claim for damages—she contends that Mr. Rynearson was required to allege more, and specifically an "act" by Defendant Robinson that violated his constitutional rights. Mot. 4-6.

Not so. It "is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

> When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." Rather, . . . to establish "a dispute susceptible to resolution by a federal court," plaintiffs must allege that they have been "threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible."

Culinary Workers Union, 200 F.3d at 618 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (further citations omitted)). Indeed, Mr. Rynearson need not even " 'show that the authorities have threatened to prosecute him,' " because " 'the threat is latent in

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the existence of the statute.' " *Cal. Pro-Life Council*, 328 F.3d at 1095 (citation omitted).[1]

But there is more here. Here is the e-mail Mr. Rynearson received from Defendant Robinson's deputy:

> I am not formally declining it and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abides by the NCO that's in place [i.e., the order limiting Mr. Rynearson's speech about Mr. Moriwaki]. If I get any future referrals, I will revisit the charging decision.
>
> That is all the information I can provide.

Ex. C to Decl. of Richard Rynearson, Dkt. 4.

What would a reasonable, law-abiding citizen who does not want to risk arrest and prosecution think, when faced with a message such as this? He would reasonably perceive this as a threat of prosecution if he were to say certain things that are sharply critical of Mr. Moriwaki. The No Contact Order, after all, limited Mr. Rynearson's speech about Mr. Moriwaki. Ex. B to Decl. of Richard Rynearson, Dkt. 4. The past referral was based on speech about Mr. Moriwaki. Ex. A to Decl. of Richard Rynearson, Dkt. 4. Mr. Rynearson thus reasonably understood that Defendant Robinson's office will decide whether to prosecute him based on any future speech akin to the speech that generated the first referral. *See* Compl. ¶ 12-13. Mr. Rynearson has curtailed his online commentary as a result. Compl. ¶¶ 14, 25. That is more than enough to maintain a claim, because he has "suffered the constitutionally recognized injury of self-censorship." *Cal. Pro-Life Council*, 328 F.3d at 1095.

As the Ninth Circuit has held,

> [O]ne need not await "consummation of threatened injury" before challenging a statute restricting speech, to guard the risk that protected conduct will be

[1] The two cases cited by Defendant Robinson are wholly inapposite. Neither involves a pre-enforcement claim for injunctive and declaratory relief, much less a First Amendment claim or anything else approaching the circumstances of this case. *See Kildare v. Saenz*, 325 F.3d 1078, 1085-86 (9th Cir. 2003) (rejecting section 1983 claim that particular Social Security disability determinations violated procedural due process); *Mills v. Criminal District Court*, 837 F.2d 677, 678 (5th Cir. 1988) (rejecting section 1983 claim for damages and equitable relief due to conclusory allegations that judge, prosecutor, and defense counsel conspired to deprive a criminal defendant of a fair trial in a criminal case that had concluded).

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> deterred. To avoid the chilling effect of restrictions on speech, the Court has endorsed "a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences."

Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) (citations omitted). Mr. Rynearson is for now holding his tongue, and challenging the statute rather than "tak[ing his] chances," *id.*, that the prosecutor will indeed "revisit the charging decision." Ex. C to Decl. of Richard Rynearson, Dkt. 4. He has every right to do this.

Finally, even setting the threatened prosecution aside, Defendant Robinson is a proper defendant because of her undisputed role in enforcing criminal laws within Washington state. *See Culinary Workers Union*, 200 F.3d at 619 (holding that to be a proper defendant in a suit to enjoin enforcement of an unconstitutional statute, "the state official sued 'must have some connection with the enforcement of the act' ") (quoting *Ex Parte Young*, 209 U.S., 123, 157 (1908)).

C. Prosecutors are not immune from injunctions prohibiting unconstitutional actions

Defendant Robinson contends that a prosecutor is absolutely immune from a civil suit for damages (and fees) under section 1983 for constitutional violations committed within the scope of the prosecutor's role as an advocate. Mot. 6-7. That is irrelevant. As the complaint made clear, Defendant Robinson "is sued here in her official capacity for purposes of obtaining equitable relief." Compl. ¶ 6. No damages are claimed, and any attorney's fees would be paid out of the state treasury, not Defendant Robinson's pocket. *See Hutto v. Finney*, 437 U.S. 678, 693 (1978) (noting, with respect to a fee award under § 1988, that "since petitioners are sued in their official capacities, . . . it is obvious that the award will be paid with state funds"). Payment from state funds is allowed because Congress has permissibly abrogated state sovereign immunity with respect to fee awards in civil rights cases, and because fee awards do not implicate state sovereign immunity in the first place. *Id.* at 693-95. Any immunity from personal damages is wholly beside the point.

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III. CONCLUSION

For the foregoing reasons, Defendant Robinson's motion to dismiss should be denied.

DATED: September 6, 2017.

Respectfully submitted,

SCOTT & CYAN BANISTER FIRST AMENDMENT CLINIC

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CERTIFICATE OF SERVICE

I, Garrett Heilman, hereby certify that on September 6, 2017, I caused a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT ROBINSON'S MOTION TO DISMISS** to be served on all parties via the Court's CM/ECF system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: September 6, 2017

s/ Garrett Heilman
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WESTERN DISTRICT OF WASHINGTON
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Plaintiff,

-vs-

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-05531-RBL

REPLY IN SUPPORT OF DEFENDANT KITSAP COUNTY PROSECUTING ATTORNEY TINA R. ROBINSON'S MOTION FOR DISMISSAL PURSUANT TO FED.R.CIV.P. 12(B)(6)

NOTE ON MOTION CALENDAR: SEPTEMBER 15, 2017

I. Summary

Defendant Robinson does not dispute Plaintiff's right to seek injunctive relief against the enforcement of the cyberstalking statute at issue pursuant to 28 U.S.C. §2202 or any other legal basis. Instead, Defendant Robinson challenges Plaintiff's pursuit of a claim under 42 U.S.C. §1983 where Plaintiff's Complaint fails to articulate any action by Defendant Robinson that violated Plaintiff's

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constitutional rights and fails to articulate a "genuine threat of immediate prosecution" which is a pre-requisite for bringing a pre-enforcement action under §1983.

In responding, the plaintiff has made several key concessions.

Plaintiff concedes that he is not bringing a claim for damages pursuant to 42 U.S.C. §1983, and that he seeks only equitable relief.[1]

The plaintiff has further clarified that the conduct by Defendant Robinson which forms the basis of what we now surmise to be his §1983 pre-enforcement action is limited to an email sent by a prosecuting attorney indicating that the Prosecutor's Office might, in the future, re-evaluate whether to file charges against Plaintiff for violation of an NCO (or "no-contact order"). Plaintiff thus concedes that Defendant Robinson has never communicated any threat to prosecute Plaintiff under the cyberstalking statute at issue and only articulated some future possibility of prosecution related to violations of the NCO.

Finally, with regard to defendant Robinson's absolute prosecutorial immunity, Plaintiff does not contest that Defendant Robinson is entitled to prosecutorial immunity. He only states that her immunity is irrelevant, as any fine or penalty would be paid by the State, not by Ms. Robinson personally.

II. Reply

A. Plaintiff Has Failed To Plead Sufficient Facts Showing He Is Entitled To Relief For §1983 Pre-enforcement Action For Alleged Constitutional Deprivation by Defendant Robinson

Plaintiff's §1983 claim against Defendant Robinson should be dismissed because Plaintiff has failed to plead sufficient facts to establish that he is entitled to relief. The plaintiff concedes that his

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[1] Dkt. 25, at p. 4, lines 1-5.

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action is one at equity and that he does not request damages.[2] This is irrelevant. The type of relief sought by Plaintiff under his §1983 claim does not relieve him of the obligation to set forth a valid factual basis for his §1983 claim.[3] (*Nichols, supra,* holding that plaintiff's §1983 pre-enforcement action was insufficient where plaintiff failed to plead all the elements of a §1983 claim against each defendant).

Plaintiff concedes that Defendant Robinson has not yet taken any action against Plaintiff with respect to the challenged cyberstalking statute. Nonetheless, Plaintiff asserts that his §1983 claim should proceed because he faces a "genuine possibility of prosecution under the law."[4] This is not the proper standard for evaluating the sufficiency of a pre-enforcement action under §1983. When a plaintiff has not been "arrested, prosecuted, or incarcerated" for violating the regulation at issue, that plaintiff "must satisfy the criteria for an injury-in-fact that apply to pre-enforcement challenges to statutes regulating conduct."[5] The plaintiff "must show a "*genuine* threat of *imminent* prosecution," not the "mere possibility of criminal sanctions."[6]

In evaluating whether there is a genuine threat of imminent prosecution, courts consider the following three factors: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question." (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute."[7] Plaintiff's Complaint is deficient because it fails to set forth any facts to show that there is a

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[2] Id. At lines 4-5.
[3] Nichols v. Brown, 859 F. Supp. 2d 1118, 1127–28 (C.D. Cal. 2012)
[4] Dkt. 25 (page 2, lines 26-27).
[5] Nichols v. Brown, 859 F. Supp. 2d 1118, 1127–28 (C.D. Cal. 2012).
[6] Nichols, 859 F. Supp. 2d at 1127–28 (citing *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir.1996); California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1094 (9th Cir. 2003).
[7] *Cal. Pro-Life*, 328 F.3d at 1094 (citing Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000).

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"genuine threat of immediate prosecution." Plaintiff pleads only that a prosecuting attorney has indicated that he might, in the future, re-evaluate whether to file charges against Plaintiff for violation of a no-contact order, not for violation of the cyberstalking statute.

Plaintiff attributes the following communication to Defendant Robinson:

> I am not formally declining it and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abides by the NCO that's in place. [ ] If I get any future referrals, I will revisit the charging decision. [8]

The above communication does not mention or implicate the cyberstalking statute. This communication focuses solely on the enforcement of an "NCO" (no-contact order). Furthermore, the communication above merely indicates that Defendant Robinson will "revisit" the charging decision if she gets future "referrals" related to the no-contact order violation. Accordingly, the Complaint is completely void of any facts to suggest that Defendant Robinson communicated a specific warning or threat to initiate proceedings against Plaintiff under the challenged cyberstalking statute. Neither has the Complaint (or supplemental briefing) offered any fact to support any history of past prosecution under the statutory language challenged.

The Complaint is devoid of reference to any specific action of Defendant Robinson that violated a constitutional right of the plaintiff; it lacks any basis upon which to conclude that Ms. Robinson communicated a specific warning or threat to initiate proceedings; and there is simply no reference whatsoever to past prosecution or enforcement under the challenged statute. Accordingly, having failed to state a claim upon which relief may be based, Plaintiff's §1983 claim must fail.

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B. Plaintiff Does Not Dispute Robinson is Protected by Absolute Prosecutorial Immunity

Plaintiff does not contest the well-established legal principle that a prosecutor is protected by absolute prosecutorial immunity when performing the traditional role of an advocate,[9] or that a state prosecuting attorney "is absolutely immune from a civil suit for damages under §1983 for alleged deprivations of the accused's constitutional rights" when acting within the scope of his duties in initiating and pursuing criminal charges.[10] Instead, the plaintiff responds that such immunity is "irrelevant" because "[n]o damages are claimed, and any attorney's fees would be paid out of the state treasury, not Defendant Robinson's pocket."[11] Plaintiff's position does not help his case. Defendant Robinson is immune under the principle of prosecutorial immunity regardless of whether another entity is obligated to indemnify her in a cause of action.

Plaintiff argues that prosecutorial immunity protects only against claims for damages. However plaintiff has provided no authority to support the position that the protection of immunity is limited in any such manner. Nor would public policy support a finding that Defendant Robinson's prosecutorial immunity does not extend to Plaintiff's claim for attorney fees in connection with his §1983 pre-enforcement claim.

Plaintiff concedes that Defendant Robinson is immune from any claim for damages. There is no reason why that immunity should not extend to Plaintiff's request for attorney fees for alleged unconstitutional violations under §1983. Defendant Robinson does not contest that Plaintiff has the option to seek injunctive relief on any other legal basis. However, Defendant Robinson's prosecutorial

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[8] Dkt. 25. P. 6, lines 4-6. (narrative comments added in plaintiff's briefing, omitted.)
[9] *Kalina v. Fletcher,* 522 U.S. 118, 123, 118 S.Ct. 502, 130 L.Ed.2d 471 (1997).
[10] *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.#d.2d 128 (1976).
[11] Dkt. 25. p. 7, lines 16-19.

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immunity applies to protect her from liability under §1983 including the prevailing party attorney fees requested by Plaintiff for a §1983 claim.

Federal law is quite clear. "A state prosecuting attorney enjoys absolute immunity from liability under §1983 for his conduct 'in pursuing a criminal prosecution' insofar as he acts within his role as an 'advocate for the State' and his actions are 'intimately associated with the judicial phase of the criminal process.'[12] Plaintiff here concurs that Ms. Robinson is named as a defendant in her official capacity and the only facts alluding to her in the Complaint relate to a charging decision; clearly an act within the core function of a prosecuting attorney.[13]

Because Ms. Robinson is immune from suit under 42 U.S.C. §1983 for her charging decisions as a prosecutor, and is immune from the imposition or collection of any damages that may result therefrom, including the accrual of fees or costs, any such action against her must be dismissed.

III. Conclusion

For the reasons set forth above and as set forth in Defendant Robinson's Motion for Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff's §1983 claims against Defendant Robinson should be dismissed with prejudice.

Respectfully submitted this 15th day of September, 2017.

TINA R. ROBINSON
Kitsap County Prosecuting Attorney

/s/ Ione S. George
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Chief Deputy Prosecuting Attorney
Attorney for Defendant Tina R. Robinson

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[12] *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009), *quoting Imblar v. Pachtman*, 424 U.S. 409, 410, 430-31, 96 S.Ct. 984, 47 L.Ed.2d 128)1976).
[13] Id. See also, *Kalina v. Fletcher,* 522 U.S. 118, 123, 118 S.Ct. 502, 130 L.Ed.2d 471 (1997).

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I presented the foregoing document to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

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UNITED STATES DISTRICT COURT
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Defendants.

NO. 3:17-cv-5531

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
September 22, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff Richard Rynearson is seeking to vindicate his First Amendment rights in federal court under a federal statute, 42 U.S.C. § 1983. His right of access to this federal forum is not precluded by *Younger* abstention, because this lawsuit does not seek to enjoin, or otherwise interfere with, any pending state proceedings.

The plaintiff in the state case *Moriwaki v. Rynearson*,[1] Clarence Moriwaki, is not a party to this federal case; neither is the state court judge or any other state court trial participant. Likewise, the prosecutor defendants in this case are not parties to *Moriwaki*. An injunction in this case will not have collateral estoppel effect in *Moriwaki*; it will not even be binding precedent. At most, the court's decision in this case may be persuasive authority in the appeal of that state-court decision—but, if so, then it will simply be useful input to the state's decisionmaking process, not interference with that process.

Moreover, the state proceeding is not a criminal case. It is not a "quasi-criminal" case, such as a civil enforcement measure initiated by state officials. And this lawsuit does not seek to interfere with "'the core of the administration of a State's judicial system,'" *ReadyLink Healthcare v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014) (citation omitted), such as by trying to enjoin a contempt proceeding or the enforcement of a bond requirement. None of the "exceptional categories" of cases that justify *Younger* abstention, *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592 (2013), are thus present here.

Younger abstention calls for federal courts to abstain from directly interfering in *ongoing* state criminal prosecutions, *Younger v. Harris*, 401 U.S. 37 (1971), and a few closely related matters. In this case, Rynearson is facing *future* criminal prosecution, a situation "where *Younger* does not apply." *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 885 (9th Cir. 2011). And the "garden variety civil litigation between private parties" involved in *Moriwaki* is

[1] The opinion in that case is reproduced at Decl. of Darwin P. Roberts, ECF No. 24, exh. B, and the case is mentioned in Decl. of Richard Lee Rynearson, III, ECF No. 4, at 7, ¶ 14.

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not state enforcement action and cannot trigger *Younger* abstention. *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1168 (9th Cir. 2013).

II. LAW AND ARGUMENT

Generally speaking, "the federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (citation omitted). Declining to exercise jurisdiction and invoking *Younger* abstention is thus reserved for "exceptional categories" of cases. *Sprint*, 134 S. Ct. at 592. "In civil cases, therefore, *Younger* abstention is appropriate only when the state proceedings:

"(1) are ongoing,

"(2) [(a)] are quasi-criminal enforcement actions *or*

[(b)] involve a state's interest in enforcing the orders and judgments of its courts,

"(3) implicate an important state interest, *and*

"(4) allow litigants to raise federal challenges."

ReadyLink, 754 F.3d at 759 (paragraph breaks and emphasis added). Moreover, even if all four of these elements are satisfied, there is another requirement: (5) for *Younger* to apply, "the federal action would [have to] have the practical effect of enjoining the state proceedings." *Id.*

But here a federal injunction against the defendant prosecutors would not "have the practical effect of enjoining the state proceedings" brought by plaintiff Moriwaki, a private citizen (so element 5 is not satisfied). The state proceedings are not "quasi-criminal enforcement actions" (so element 2(a) is not satisfied). And the state proceedings do not involve the "state's interest in enforcing" court judgments (so element 2(b) is not satisfied).

A. An injunction in this case would not enjoin the *Moriwaki* civil proceedings

In the typical *Younger* abstention case, a plaintiff tries to block a state proceeding by suing someone involved in that proceeding—the prosecutor, the plaintiff, the judge, a witness, or some other key actor. The goal is to use the federal court's power to stop the state proceeding in its tracks. Nothing of the sort is present here.

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First, the only plaintiff in the state case—Moriwaki—is not a party in this federal case. Rynearson is not seeking an order compelling Moriwaki to do or not do anything. A decision in this case would not even collaterally estop Moriwaki from litigating the same issues in state court. *In re Moi*, 184 Wash. 2d 575, 580 (2015). *Younger* abstention might be unjustified even if such issue preclusion were possible, *Potrero Hills Landfill*, 657 F.3d at 883 n.8, but it is especially unjustified when issue preclusion does not apply.

Second, any order in this case would not be precedent binding on Washington state courts. *See, e.g.*, *Matter of Paschke*, 80 Wash. App. 439, 448 n.5 (1996) (noting that the federal court's determination of Washington state statute's constitutionality "is not binding on Washington courts"); *Matter of Grisby*, 121 Wash. 2d 419, 430 (1993) ("While we always give careful consideration to Ninth Circuit decisions, we are not obligated to follow them, and do not do so in this case.").

Third, because Washington follows the collateral bar rule, an injunction barring prosecutors from prosecuting RCW 9.61.260(1)(b) violations as such would not block them from prosecuting Rynearson under a separate statute, RCW 26.50.110, for violating the *Moriwaki* injunction. "The collateral bar rule prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." *City of Seattle v. May*, 171 Wash. 2d 847, 852 (2011).

Fourth, the civil statute authorizing the injunction in *Moriwaki*, RCW 7.92.100, is different from the criminal statute challenged here, RCW 9.61.260(1)(b) (though a violation of RCW 9.61.260(1)(b) is one possible predicate for the application of RCW 7.92.100). "[A] pending state judicial proceeding does not come within *Younger* unless the federal plaintiff is being prosecuted in state court under the *same law* that is challenged in federal court." *Wiener v. Cty. of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) (emphasis added). In *Weiner*, the Ninth Circuit held that *Younger* abstention was improper when the plaintiff was being prosecuted in state court under a different ordinance than the one being challenged in federal court, even when the two ordinances had identical aims and constitutional problems, and when the ordinance

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challenged in federal court was just a permanent version of the temporary ordinance being challenged in state court.

The abstention cases Defendants cite, Defs.' Resp. to Mot. for Prelim. Inj. at 8-10, are thus inapposite. Rynearson does not seek to enjoin an ongoing criminal prosecution, as plaintiffs sought to do in *Younger*, 401 U.S. at 41 (involving a normal criminal prosecution), or *Juidice v. Vail*, 430 U.S. 327, 335-36 (1977) (involving a contempt of court prosecution). Rynearson does not seek to enjoin the enforcement of a state judge's order against him, as the plaintiffs sought in *Pennzoil Co. v. Texaco, Inc*, 481 U.S. 1, 14 (1987), and *Machetta v. Moren*, No. 4:16-cv-2377, 2017 WL 2805192, at *1-4 (S.D. Tex. Apr. 13, 2017) (a suit filed against the state court judges themselves). Rynearson does not seek to order a state judge to recuse himself from a state case, as the plaintiff sought in *Thomas v. Piccione*, No. 13-425, 2014 WL 1653066, at *3 (W.D. Pa. Apr. 24, 2014). Rynearson does not come to federal court suing the same party he litigated against in state court, seeking to block the judgment that the party had obtained, as was the case in *Minette v. Minette*, 162 F. Supp. 3d 643, 652 (S.D. Ohio 2016), or seeking to order the party to do something (such as surrender a passport), as plaintiff sought to do in *Karl v. Cifuentes*, No. 15-2542, 2015 WL 4940613, at *1-5 (E.D. Pa. Aug. 13, 2015).

Younger abstention is thus inappropriate—even apart from the reasons given in Parts II.B and II.C below—since such abstention is proper only when "the federal action would have the practical effect of enjoining the state proceedings." *ReadyLink*, 754 F.3d at 759.

B. The *Moriwaki* lawsuit is not a "quasi-criminal enforcement action[]"

Even if a federal action would have the practical effect of enjoining state proceedings, *Younger* abstention in a civil case is proper only when the pending state action is a "quasi-criminal enforcement action" (or the requested federal-court injunction would interfere with the core functioning of the state judicial process, which will be discussed in Part II.C). *See ReadyLink*, 754 F.3d at 759. But "quasi-criminal enforcement actions" are generally ones filed by state enforcement officials, albeit through the civil process rather than the criminal. The state is "routinely a party" to such proceedings, and often initiates the action "to sanction the federal

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plaintiff" such as through investigation or filing a formal complaint or charges. *Sprint*, 134 S. Ct. at 592; *see ReadyLink*, 754 F.3d at 759-60 (finding no quasi-criminal proceeding, partly because the litigants in the civil proceeding were "private part[ies]"). Two classic examples of such quasi-criminal enforcement are *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 597 (1975), and *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433 (1982), cited by Defs.' Resp. to Mot. for Prelim. Inj. at 8; these involved, respectively, state anti-nuisance proceedings brought by a sheriff and disciplinary proceedings brought by a bar disciplinary board appointed by the state supreme court.

Moriwaki, on the other hand, is an injunctive proceeding brought by a private citizen. Though it is brought under a specialized statute, that statute simply authorizes the issuance of a civil injunction. Like any other civil injunctive proceeding, its purpose is to prevent certain behavior in the future, not to punish past misbehavior (though, like other civil injunctive proceedings, it may be triggered by an allegation of past misbehavior). RCW 7.92.130(4), 7.92.900.

Defendants seek to distinguish RCW 7.92.100 from normal injunctions, but the alleged differences mostly prove to be similarities:

1. Defendants point out that enforcement of a RCW 7.92.100 injunction "may not 'be waived by [Moriwaki],'" *see* Defs.' Resp. to Mot. for Prelim. Inj. at 10 (citation omitted). But that is true of civil injunctions generally; Washington courts, like other courts, have upheld criminal contempt fines imposed for violation of injunctions, even when the parties have agreed to settle the dispute and thus waived enforcement of the injunction. *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wash. 2d 278, 286 (1975) (upholding a fine in such a situation, because a trial court may "bolster respect for its future orders by attaching a deterrent sanction to violation," "totally independent of any concern of [the] parties," and notwithstanding the other party's willingness to condone the violation). "Under no theory can a party that obtains an injunction bind the issuing court with condonation of contemptuous or illegal acts of those who violate the court's order. To give effect to such a theory would usurp the highest function of our

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courts." *Bd. of Junior Coll. Dist. No. 508 v. Cook Cty. Coll. Teachers Union, Local 1600*, 262 N.E.2d 125, 129-30 (Ill. App. Ct. 1970) (applying the same rule).

2. Defendants stress that violating a RCW 7.92.100 order is punishable as a gross misdemeanor. *See* Defs.' Resp. to Mot. for Prelim. Inj. at 10, citing RCW 26.50.110. But the violation of any injunction, which would constitute criminal contempt of court, is subject to precisely the same punishment: up to 364 days imprisonment and an up to $5000 fine. RCW 9.92.020; RCW 7.21.040.

3. Defendants argue that a RCW 7.92.100 injunction "involves a deprivation of Mr. Rynearson's liberty, restricting his freedom of movement and action," Def. Resp. to Mot. for Prelim. Inj. at 9. But most injunctions deprive the target of his liberty; their whole function is to restrict the target's freedom of action (or inaction).

4. Defendants argue that the state may intervene to defend RCW 9.61.260(1)(b) if Rynearson challenges it in the appeal of the state injunction proceeding. Def. Resp. to Mot. for Prelim. Inj. at 9 (citing RCW 7.24.110). But that is true of all civil proceedings seeking a declaratory judgment in which a "statute . . . is alleged to be unconstitutional," RCW 7.24.110.[2]

5. Defendants note that a similar civil injunction could be initiated by a state court under certain circumstances, Def. Resp. to Mot. for Prelim. Inj. at 10; RCW 7.92.160—but those circumstances are absent in this case. Such court-initiated orders are authorized only when the respondent is "charged with or arrested for stalking" and is then released before trial. *See* RCW 7.92.160. There was no such charge in *Moriwaki*; the injunction there rested simply on a finding by a preponderance of the evidence that a civil petitioner had met the standards for relief. *See* RCW 7.92.030, 7.92.100.

6. Defendants also note that "the law by default requires law enforcement personnel to serve the protection order on its subject," RCW 7.92.150. But while this default rule is the one

[2] Rynearson does not concede that this statute authorizes intervention in the pending state case, but even if it did, that would not establish any distinction between the state case at issue here and state civil litigation generally.

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way in which RCW 7.92.150 injunctions differ from other civil injunctions, the difference is slight. Washington Superior Court Rules, for instance, likewise authorize service of ordinary civil summons and process by law enforcement, though they provide the option of service by private process servers as well, Sup. Ct. R. 4(c). And, like the Superior Court Rules, RCW 7.92.150 likewise provides the option of service by private process servers. Moreover, under Washington law, ordinary process issued by district court judges—as well as "all executions and writs of attachment or of replevin"—"shall be served by a sheriff or a deputy." RCW 12.04.050. Routine service of court orders by law enforcement officials does not transform a civil case into a quasi-criminal proceeding.

A quasi-criminal proceeding is just as absent here as it was in *ReadyLink*, where the federal plaintiff brought suit while a state court was reviewing a disagreement between two private parties. 754 F.3d at 760. The Ninth Circuit held that *Younger* abstention was unwarranted, because the "mere 'initiation' of a judicial or quasi-judicial administrative proceeding" is not "an act of civil enforcement . . . 'akin to a criminal prosecution' in 'important respects.'" *Id.* at 759-60. Federal courts, the Ninth Circuit recognized, are generally obligated to exercise federal jurisdiction over federal claims; *Younger* offers a limited exception to that obligation, but the limitations on that exception would be rendered "meaningless" if the exception were extended to "every case in which a state judicial officer resolves a dispute between two private parties." *Id.* at 760. Similarly, the civil injunction here involves a dispute between two private parties, and any dispute-resolving or injunction-issuing role played by state courts does not justify a federal court's abstention from a distinct federal proceeding raising a constitutional challenge to a distinct criminal law.

C. This case does not involve an attempt to interfere with Washington's interest in enforcing its court orders

Younger abstention may also be justified if a federal plaintiff seeks to interfere with "'the core of' [a state's] court system, implicating the 'State's interest in enforcing the orders and judgment of its courts,'" *ReadyLink*, 754 F.3d at 759 (citations omitted) (so long as a federal

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injunction would also effectively enjoin the state proceedings, see Part II.A). But, for reasons stated in Part II.A, this case involves no such interference. Rynearson is not seeking to enjoin the enforcement of the *Moriwaki* order; if he prevails in this case, the *Moriwaki* order would remain enforceable unless it is reversed on appeal, where this court's decision would only have persuasive precedential effect.

The cases in which such interference with "core" orders and judgments was found are far removed from this case:

> "Core" orders involve the administration of the state judicial process—for example, an appeal bond requirement, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. at 12-14, a civil contempt order, *Juidice*, 430 U.S. at 335-36, or an appointment of a receiver, *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 815 (9th Cir. 1989).

ReadyLink, 754 F.3d at 759. No such interference with a "core" order is present here. There is indeed a state court injunction, but "[t]o establish a vital interest in the state's judicial functions, an abstention proponent must assert more than a state's generic interest in the resolution of an individual case or in the enforcement of a single state court judgment." *Potrero Hills Landfill*, 657 F.3d at 886. Rather, a federal proceeding must threaten "the state judiciary's vital functions." *Id.* When a suit "challenges neither the authority of state courts to issue [orders] nor processes for their enforcement once issued," *id.* at 887, *Younger* abstention is inappropriate. And, as Part II.A argued, this case does not challenge the authority of the state court in the *Moriwaki* proceeding. The Supreme Court's "dominant instruction [is] that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule." *Sprint*, 134 S. Ct. at 593. Defendants have not established that "any of the . . . exceptional categories" permitting abstention apply. *Id*. at 592.

III. CONCLUSION

Nothing in this case will interfere with the state court judgment in *Moriwaki*. An injunction in this case would not bind the state court or the plaintiff in that case. Such an injunction would bind only the state prosecutors, who are not parties in *Moriwaki*. Because the narrowly-crafted *Younger* exception to a federal court's "unflagging obligation" to resolve

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federal disputes does not apply, this Court must exercise its jurisdiction to resolve the federal dispute presented in this federal case.

DATED: September 18, 2017.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-5531

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
September 22, 2017

ORAL ARGUMENT REQUESTED

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A. A statute may be found facially overbroad under the First Amendment even when a statute has a "plainly legitimate sweep," so long as a "substantial number" of the statute's applications are unconstitutional.

Defendants argue that, "even in a First Amendment setting, 'a facial challenge must fail where the statute has a "plainly legitimate sweep,"'" Def. Resp. to Mot. for Prelim. Inj. 18 ("Resp."), citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). But, as *Washington State Grange* states in a footnote to that very paragraph, there is "a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" 552 U.S. at 449 n.6 (citations omitted); *see also United States v. Stevens*, 559 U.S. 460, 472-73 (2010) (noting that footnote 6 of *Washington State Grange* "recognize[d] 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep'"). The Court declined to apply the overbreadth doctrine in *Washington State Grange* only because there, "the parties fail[ed] to describe the instances of arguable overbreadth of the contested law." *Id.* But Rynearson has described many instances of likely overbreadth, Mot. for Prelim. Inj. 4-8.

Defendants likewise err in faulting Rynearson for supposedly "speculat[ing] about 'hypothetical' or 'imaginary' cases." Resp. 18 (citing *Wash. State Grange*, 552 U.S. at 449-50). An overbreadth challenge is all about pointing to examples of how a law may unconstitutionally apply. This is precisely how the Ninth Circuit, for instance, analyzed the overbreadth challenge in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011)—the court pointed to hypothetical examples of how an ordinance banning street solicitation of employment, business, or contributions could be applied, and then explained:

> Contrary to the City's argument, we are not "hypothesizing about speculative unlawful applications" of the Ordinance; we are simply listing some of the many types of protected speech that fall squarely within the plain language of this facially overbroad law. . . .
>
> [A]lthough the Supreme Court stated in *Washington State Grange* that, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond

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> the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," the Court acknowledged in a footnote that First Amendment overbreadth challenges are subject to a less-demanding standard, which requires only that "the parties . . . describe the instances of arguable overbreadth of the contested law." If the suggested examples fall within the plain language of the statute, the Plaintiffs have met their burden.

Id. at 948 n.7; *see also Stevens*, 559 U.S. at 474-77, 482 (striking down ban on videos depicting animal cruelty because it could cover a wide range of hypothetical cases, including depictions of hunting and some animal husbandry practices, though some of the statute's applications might be constitutional).

B. The criminal harassment bans upheld in the decisions cited by defendants were considerably narrower than RCW 9.61.260.

Defendants point to some court decisions that have upheld some other criminal harassment bans; but all those statutes were considerably narrower than the Washington statute, and the courts relied on that narrowness in upholding the statutes.

1. *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014), upheld the federal cyberstalking ban only because that statute required "'substantial harm to the victim,'" in the form of "'substantial emotional distress,'" and because "the proscribed acts [we]re tethered to the underlying criminal conduct and not to speech." *Id.* at 944 (citations omitted). The Washington statute has no such substantial distress or conduct requirement, and the Ninth Circuit did not have before it the constitutionality of a statute that—like Washington's—criminalized pure speech to third parties without any conduct element. *See id.* at 954 (Watford, J., concurring).

2. *United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015), dealt with the same federal statute, and also noted that the challenger in that case did not point to examples of others' protected speech which the law might punish, *id.* at 368—understandable, given the relative narrowness of that law. Rynearson has pointed to ample examples of such speech, which make the Washington statute overbroad. Mot. for Prelim. Inj. 4-8. The *Matusiewicz* court, moreover, distinguished, and cited with approval, another federal case holding that the same federal statute was unconstitutional as applied to an individual who "created a number of Twitter profiles, and

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used those profiles and multiple blogs to direct thousands of derogatory messages to [a] religious leader," *id.* at 371 (citing *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011))—precisely the sort of expression that is at the core, not the periphery, of the Washington statute.

3. *Burroughs v. Corey*, 92 F. Supp. 3d 1201 (M.D. Fla. 2015), upheld a Florida law that was limited to a "course of conduct" "that would likely cause substantial emotional distress" and that at the same time "serves no legitimate purpose," *id.* at 1204 (internal quotation marks omitted). The court stressed those limitations (which RCW 9.61.260 lacks) in upholding the statute against First Amendment challenge, *id.* at 1205-06, 1208-09. In addition, though speech was covered by the Florida law, the law as a whole—unlike RCW 9.61.260—did not solely regulate speech.

C. RCW 9.61.260 cannot be salvaged by arguing that it applies only to "conduct," "rather than the content of . . . speech," Resp. 18.

RCW 9.61.260 expressly targets speech, not conduct: It bars, in relevant part, "electronic communication" with any "third party" "[a]nonymously or repeatedly," when that communication is seen as intended to "harass, . . . torment, or embarrass" "any other person". Indeed, it is a content-based speech restriction, for reasons given in Mot. for Prelim. Inj. 10-11. Traditional telephone harassment laws that ban calls intended to harass the recipient may be aimed at the call's noncommunicative impact, such as the distracting ring, and may apply even if no conversation ensues. But the quoted portion of RCW 9.61.260—which bars communication intended to harass, torment, or embarrass one person but addressed to someone else (including the public at large)—covers only speech said about a person that contains embarrassing or otherwise offensive content.

Just like the harassment law that was found to be an unconstitutional speech restriction in *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016), RCW 9.61.260 "applies to speech and not solely, or even predominantly, to nonexpressive conduct," *id.* at 817; and it applies to speech to third parties precisely because of the content of its message. Mot. for Prelim. Inj. 10-11. "Posting information on the Internet—whatever the subject matter—can constitute speech as surely as

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stapling flyers to bulletin boards or distributing pamphlets to passers-by—activities long protected by the First Amendment." *Bishop*, 787 S.E.2d at 817.

"Such communication does not lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket." *Id.* Likewise, such communication does not lose protection simply because of its intent, Mot. for Prelim. Inj. 8-9, its repetition, Mot. for Prelim. Inj. 9-10, or its being labeled "harassment." "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area School District*, 240 F.3d 200, 204 (3d Cir. 2001).

D. Rynearson is suffering irreparable harm from the risk of prosecution.

Rynearson is suffering irreparable harm from the risk of prosecution, even beyond the harm he is facing from the state court order in *Moriwaki v. Rynearson* (reproduced in Decl. of Darwin P. Roberts, ECF No. 24, exh. B). The only speech about Moriwaki that the order restricts is the online use of Moriwaki's photograph, and of Moriwaki's "name or personal identifying information" in titles of Web pages and of other items. Order in *Moriwaki v. Rynearson*, at 2. Such a restriction, Rynearson believes, is still unconstitutional, but at least it is comparatively narrow. RCW 9.61.260, on the other hand, applies to a wide range of other speech, so long as it is anonymous or repeated, and perceived to be intended to "harass, . . . torment, or embarrass."

The Bainbridge Island Police Department found probable cause to believe that Rynearson had violated the RCW 9.61.260 ban on repeated and anonymous communication intended to harass (not that Rynearson had violated any protective order, as none was then in place). Comp. ¶ 13. Rynearson's lawyer asked the Kitsap County prosecutor's office about whether charges would be filed for that behavior, *id.* Exh. C, and the prosecutor responded,

> I am not formally declining it and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abides by the NCO that's in place. If I get any future referrals, I will revisit the charging decision. That is all the information I can provide.

Id. The exchange is not about possible violations of the no-contact order; no violations of the no-

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contact order were ever referred to the prosecutor. Rather, it involves a threat of enforcement of RCW 9.61.260 against any future speech that might be "referr[ed]," speech that is not limited to violations of the no-contact order.

The prosecutor's message creates a "well-founded fear that [RCW 9.61.260] will be enforced"—the requirement for standing, *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003)—especially since Rynearson's "intended speech arguably falls within [RCW 9.61.260's] reach." *Id.* at 1095. And this fear of prosecution also creates the irreparable harm; when the risk of prosecution "chill[s]" a person's First Amendment rights, that is itself "irreparable injury." *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012). As for Defendants' suggestion that Rynearson should rest easy because prosecutors *might* (not *will*) stay their hands given "[a]ctive questions regarding the constitutionality of [the] statute," Resp. 20: The "First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480.

DATED: September 20, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

DATED: September 20, 2017

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The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III, Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Kitsap County Prosecuting Attorney, Defendants.	NO. 3:17-cv-05531-RBL DEFENDANTS' REPLY RE: CROSS-MOTION TO DISMISS Cross-Motion Noted: September 22, 2017

I. INTRODUCTION AND SUMMARY

In his latest briefing, Mr. Rynearson argues that he is not seeking a federal injunction against all enforcement of Washington's cyberstalking statute. Instead, he claims, he is only seeking an injunction barring the Attorney General and the Kitsap County Prosecuting Attorney from criminally enforcing the cyberstalking statute against him (in the future). Mr. Rynearson cites *Ex parte Young*, 209 U.S. 123, 157 (1908), and *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999), for the proposition that injunctive relief against the prosecuting attorneys is proper here. *See* Docket #28, *passim*; Docket #25, at 5.

In fact, the Ninth Circuit's *Ex parte Young* jurisprudence dictates nearly the *opposite* result: that the Attorney General, at least, is not a proper defendant here and should be

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dismissed from this action. The Attorney General of Washington lacks primary criminal jurisdiction to enforce Wash. Rev. Code § 9.61.260(1)(b). The Attorney General would obtain such jurisdiction over Mr. Rynearson only upon accepting a future request from a county prosecuting attorney to take jurisdiction, or a grant of jurisdiction by the Governor, and then deciding that the facts and law warranted prosecution. There is no evidence any of this will happen. Mr. Rynearson's claim against the Attorney General is entirely speculative. Under Ninth Circuit case law, it fails Article III standing requirements, it is not ripe for an injunction, and it is barred by the Eleventh Amendment because *Ex parte Young* does not apply.

Similarly, Mr. Rynearson's claims against the Kitsap County Prosecuting Attorney are also simply too speculative to support Article III standing or an injunction. As Defendants have previously pointed out, there is no evidence that Kitsap County has ever contemplated prosecuting Mr. Rynearson for a direct violation of Wash. Rev. Code § 9.61.260(1)(b). Accordingly, Mr. Rynearson does not demonstrate an injury in fact sufficient to confer standing and does not demonstrate the irreparable harm necessary to obtain an injunction.

In the alternative, if this Court were to grant Mr. Rynearson's requested injunction, there is every reason to believe he would argue in state court that the injunction had the effect of invalidating the state stalking protection order against him. The stalking protection order was premised in significant part on a finding that Mr. Rynearson had violated Wash. Rev. Code § 9.61.260(1)(b). If a federal injunction suddenly barred any prosecution of Mr. Rynearson under the cyberstalking statute, it would impede prosecutors from proceeding against Mr. Rynearson for any further online speech in violation of the existing protection order. Mr. Rynearson claims the "collateral bar doctrine" would still allow him to be prosecuted for violating the order itself, but the "collateral bar doctrine" will not block a challenge that a protection order is "void" or "cannot be constitutionally applied to the charged conduct." As such, granting Mr. Rynearson's requested injunction would interfere with the

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state proceedings, which are quasi-criminal, and/or implicate the state's interest in enforcing its orders. *Younger* abstention remains appropriate.

In sum, if Mr. Rynearson is seeking only prospective relief from criminal prosecution, he lacks standing, his claim is unripe and speculative, and should be denied as to both defendants. His claim also should be denied as to the Attorney General under *Ex parte Young*. If this Court finds instead that Mr. Rynearson's requested injunction would affect the state proceedings against him, this Court should abstain under *Younger* and dismiss this action.

II. ARGUMENT

A. Mr. Rynearson lacks standing and his claim for an injunction against the Attorney General is barred by the Eleventh Amendment, because the Attorney General lacks jurisdiction to criminally prosecute Mr. Rynearson.

Mr. Rynearson's latest briefing attempts to avoid *Younger* abstention by disavowing that this litigation will have any effect on the state protection order proceeding. He now claims that the injunction he seeks in this case "would bind only the state prosecutors[.]" Response (Docket #28), at 12. Mr. Rynearson argues that under the doctrine set forth by the U.S. Supreme Court in *Ex parte Young*, "to be a proper defendant in a suit to enjoin enforcement of an unconstitutional statute, the state official sued must have some connection with the enforcement of the act." Plaintiff's Opposition (Docket #25), at 5 (citing *Culinary Workers Union v. Del Papa*, 200 F.3d at 619, and *Ex parte Young*, 209 U.S. at 157). If Mr. Rynearson, as he claims, is suing specifically to block the Attorney General of Washington from criminally prosecuting Mr. Rynearson at some point in the future, his claim against the Attorney General should be dismissed due to a lack of Article III standing and (under *Ex parte Young*) violating the Eleventh Amendment to the Constitution.

1. A plaintiff will have Article III standing and satisfy *Ex parte Young* as to a defendant official only if that official has authority to enforce a challenged statute *and* presents "a threat of enforcement."

The federal courts recognize that "when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing

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requires the named defendants to possess authority to enforce the complained-of provision." *Arizona Contractors Assn', Inc. v. Napolitano*, 526 F.Supp.2d 968, 982-83 (D. Ariz. 2007) (citing *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007)). There must be "the requisite causal connection between [the defendants'] responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress." *Arizona Contractors*, 526 F.Supp.2d at 983 (citing *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004)). "Article III requires a concrete dispute between the parties. '(A) federal court (can) act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Southern Pac. Transp. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (citations omitted).

In addition, the Ninth Circuit has recognized that under *Ex parte Young*, "there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute, *and there must be a threat of enforcement*." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (emphasis added). This is because *Ex parte Young* is an exception to the Eleventh Amendment immunity of states from federal suits by individual citizens. Allowing citizens to sue state officials in the absence of "some connection" of those state officials with enforcement "would be equivalent to suit against the state and would violate the Eleventh Amendment." *Brown*, 651 F.2d at 615 (citing *Ex parte Young*, 209 U.S. at 157). *Ex parte Young*'s exception to Eleventh Amendment immunity applies only to officials "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an [sic] unconstitutional act, violating the Federal Constitution." *Ex parte Young*, 209 U.S. at 156.

Applying these principles, the courts have repeatedly rejected suits against state attorneys general that sought to enjoin those attorneys general from taking enforcement actions over which they lacked jurisdiction, or had not taken any affirmative steps to accomplish. In

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Long, the Ninth Circuit affirmed a ruling that the Attorney General of California was unlikely to enforce the challenged vehicle regulation statute, or "encourage local law enforcement agencies" to do so, and that the "general supervisory powers" of the Attorney General were not sufficient "to establish the connection with enforcement required by *Ex parte Young*." *See Long*, 961 F.2d at 152. Further, "[t]he lack of threatened enforcement by the Attorney General means that the 'case or controversy' requirement of Article III is not satisfied." *Id*.

In *Brown*, the Ninth Circuit similarly affirmed the dismissal of a lawsuit against the Attorney General of Oregon. It held that the Attorney General "lacked authority to prosecute" the statute in question, and could not "compel the district attorneys to prosecute or refrain from doing so." *Brown*, 651 F.2d at 614. It therefore concluded that the plaintiffs lacked standing due to a lack of redressable injury fairly traceable to the actions of the Attorney General, and that the plaintiffs had not "establish[ed] sufficient connection with enforcement to satisfy *Ex parte Young*. The suit presents no justiciable controversy" as to the Attorney General. *Id*. at 615. *See also Arizona Contractors*, 526 F.Supp.2d at 982-85 (concluding that the Arizona Attorney General's lack of enforcement authority and failure to refer any case against the plaintiffs for county prosecution meant that the plaintiffs lacked Article III standing to sue the Attorney General); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145-46 (8th Cir. 2005) (plaintiffs lacked Article III standing to obtain injunction against Attorney General of Missouri who lacked enforcement authority over abortion statute and had shown no indication of taking enforcement action).

The most significant authority reaching a different result appears to be *Planned Parenthood of Idaho*, 376 F.3d 908. In that case, the Ninth Circuit concluded that the plaintiffs could sue the Attorney General of Idaho to enjoin the enforcement of a criminal abortion statute. The Court observed that "[s]tate attorneys general are not invariably proper defendants in challenges to state criminal laws. Where an attorney general cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his

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own prosecution, he may not be a proper defendant." *Id*. at 919 (citing *Long* and *Brown*). But the Ninth Circuit noted that under Idaho law, "determinatively here, unless the county prosecutor objects, the attorney general may, in his assistance, do every act that the county attorney can perform." *Id*. at 919-20 (citations and quotes omitted). The Ninth Circuit emphasized that the Attorney General of Idaho "may in effect deputize himself" to "stand in the role of a county prosecutor, and in that role exercise the same power to enforce the statute the prosecutor would have. That power demonstrates the requisite causal connection for standing purposes." However, the Ninth Circuit also noted that the Attorney General might in the same sense "be deputized by the governor." *Id*. *But see Arizona Contractors*, 526 F.Supp.2d at 984-85 (distinguishing *Planned Parenthood of Idaho*, noting that it involved "a challenge to an abortion law, and several courts of appeals have held that the Supreme Court relaxed standing requirements for abortion cases"). Finally, in *Culinary Workers Union*, the Attorney General had actively threatened to enforce the statute against the plaintiff and "defend[ed] her authority and power to do so." *Culinary Workers Union*, 200 F.3d at 619.

2. The Attorney General of Washington lacks jurisdiction to enforce Wash. Rev. Code § 9.61.260(1)(b), and has not threatened to enforce it against Mr. Rynearson.

The Attorney General of Washington lacks primary jurisdiction to enforce most of the criminal laws of Washington, including the cyberstalking statute challenged here. As to most criminal laws, the Attorney General obtains jurisdiction only at the request of a prosecuting attorney with jurisdiction over such an offense. *See* Wash. Rev. Code § 43.10.232(1)(a). Due to finite prosecutorial resources in the Office of the Attorney General, not every request by a county prosecuting attorney for the Attorney General to take jurisdiction is granted. The Attorney General also can obtain criminal jurisdiction based upon action by the Governor, but this is quite uncommon, or from a legislative committee that has fallen into disuse for this purpose. *See* Wash. Rev. Code § 43.10.232(1)(b) and (c). Older statutes allow the Attorney

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General to assist with or intervene in criminal prosecutions, but again only at the request of a local prosecutor or the Governor. *See* Wash. Rev. Code §§ 43.10.030(4), .090.

The Kitsap County Prosecuting Attorney has made no request under Wash. Rev. Code § 43.10.232(1)(a) for the Attorney General to prosecute Mr. Rynearson. Even if such a request were made, before commencing a prosecution, the Attorney General would have to determine that intake of the case would be feasible based on available resources and any other counties' pending requests for assistance, as well as whether criminal prosecution would be warranted based on the facts and circumstances of the case, the state of the law applicable to Mr. Rynearson's conduct, and the general prosecution standards for criminal cases. As noted above, these events have not occurred. Finally, there is no likelihood that the Governor would ever request the Attorney General to take jurisdiction over any case involving Mr. Rynearson, given the rarity of such requests.

For these reasons, this Court should follow the Ninth Circuit's decisions in *Long* and *Brown* and conclude both that Mr. Rynearson lacks Article III standing to sue the Attorney General to enjoin a future prosecution, and that his claims are barred by the Eleventh Amendment. The Attorney General would not be responsible for prosecuting Mr. Rynearson except following contingent, speculative future events. In addition, the Attorney General has not stated any threat to commence enforcement against him, as *Ex parte Young* requires.

Planned Parenthood of Idaho is not to the contrary. In Washington, unlike in Idaho, the Attorney General may not "deputize himself." The fact that Washington's Governor may on rare occasions give jurisdiction over a particular case to the Attorney General does not bring this case within the holding of *Planned Parenthood*. *Planned Parenthood* also involved the more relaxed standing requirements of an abortion case. This case, in contrast, is more comparable to the Arizona, California, and Oregon laws found to bar suit in *Long*, *Brown*, and *Arizona Contractors*. The Attorney General should be dismissed as a defendant.

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B. Mr. Rynearson's request for an injunction against the Kitsap County Prosecuting Attorney is also excessively speculative.

The Kitsap County Prosecuting Attorney does have criminal jurisdiction to potentially prosecute Mr. Rynearson for any future crimes he might commit in that jurisdiction, and in this sense is situated differently from the Attorney General. However, this Court can conclude that Mr. Rynearson's claims against the Kitsap County Prosecuting Attorney are also simply too speculative to support Article III standing or an injunction. As Defendants have previously pointed out, there is no evidence that Kitsap County has contemplated bringing a criminal prosecution against Mr. Rynearson for a direct violation of Wash. Rev. Code § 9.61.260(1)(b). The email exchange with the Kitsap deputy prosecutor submitted by Mr. Rynearson involved an assessment of whether Mr. Rynearson was complying with the stalking protection order—an order which Mr. Rynearson is now challenging in Kitsap County Superior Court.

Kitsap County has demonstrated no intention to charge Mr. Rynearson with cyberstalking. And Mr. Rynearson has offered no affirmative evidence of the same. Accordingly, Mr. Rynearson does not demonstrate an injury in fact sufficient to confer standing and does not demonstrate the irreparable harm necessary to obtain an injunction.

C. *Younger* abstention remains appropriate because Mr. Rynearson's requested injunction would interfere with the state proceedings against him.

Mr. Rynearson asserts that *Younger* abstention should not apply to this case because he is not seeking to interfere with the ongoing state proceedings against him. He argues, primarily, that his requested injunction will have no effect on the state proceedings because Mr. Moriwaki is not a defendant in this action, because a federal injunction against prosecuting Mr. Rynearson under the cyberstalking statute will not be binding in the protection order proceeding, and because Mr. Rynearson still could be prosecuted for violating the protection order even if he could not be prosecuted for violating the cyberstalking statute.

The argument that the state proceeding will be unaffected by a federal injunction because Mr. Moriwaki is not a defendant here actually reveals the extent to which the state

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proceeding is not, as Mr. Rynearson claims, a mere "civil disagreement between private parties." The stalking protection order is based in large part on allegations of conduct that would violate criminal laws, primarily the cyberstalking statute. *See* Defendants' Motion (Docket #23) at 5 (citing the municipal court's findings in support of the protection order). Criminal penalties are imposed for violation of such a protection order; indeed, Mr. Rynearson himself claims that it is his fear of such penalties that is motivating this suit. *Id*. at 3 (citing Rynearson Decl.); *id*. at 10. If this Court enjoins enforcement of Wash. Rev. Code § 9.61.260(1)(b) against Mr. Rynearson, Mr. Rynearson resumes his prior commentary about Mr. Moriwaki, and there is an attempt to prosecute him, Mr. Rynearson doubtless will contend that the protection order is invalid because it was predicated on a statute that has been enjoined by this Court and cannot be enforced against him. Combined with a federal injunction against prosecuting Mr. Rynearson for any underlying conduct violating Wash. Rev. Code § 9.61.260(1)(b), the state proceedings against Mr. Rynearson could become unenforceable.

Mr. Rynearson claims that the protection order will still be enforceable against him even if the enforcement of Wash. Rev. Code § 9.61.260(1)(b) is enjoined by this Court, because of the "collateral bar doctrine" (*see* Opposition, Docket #28, at 3). Mr. Rynearson cites *City of Seattle v. May*, 256 P.3d 1161 (Wash. 2011), for the proposition that under the doctrine, a party may not challenge "the validity of a court order in a proceeding for violation of that order." *Id*. But *May* itself indicates that the collateral bar doctrine does *not* apply to "orders that are void" and "orders that cannot be constitutionally applied to the charged conduct." *Id*. at 1165. A federal injunction barring enforcement of Wash. Rev. Code § 9.61.260(1)(b) against Mr. Rynearson on the grounds that it violates the First Amendment would fall within these exceptions to the collateral bar doctrine.

Mr. Rynearson alleges that his injunction will not interfere with the protection order proceeding because the protection order itself is authorized under a different statute (Wash. Rev. Code § 7.92.100) from the one he is challenging (Wash. Rev. Code § 9.61.260(1)(b)).

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Opposition (Docket #28), at 3. His citation to *Wiener v. Cty. of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994), is distinguishable. *Wiener* involved a challenge to a temporary county statute that was succeeded by a permanent statute. The Ninth Circuit held that *Younger* abstention was inappropriate in part because "there was no pending state proceeding" involving the permanent statute, only the prior, temporary statute. Here, in contrast, the state proceeding, though *authorized* by Wash. Rev. Code § 7.92.100, is *predicated* on alleged violations of Wash. Rev. Code § 9.61.260(1)(b). And, as noted previously, Mr. Rynearson is actively challenging Wash. Rev. Code § 9.61.260(1)(b) before the Kitsap County Superior Court, in his pending appeal of the protection order. Defendants' Motion (Docket #23), at 5. That is the principle of *Younger*: to allow Mr. Rynearson to make his constitutional arguments in the ongoing state forum rather than a new and supplemental federal forum.

D. The state case qualifies under the civil categories set forth in *Younger*.

Although Mr. Rynearson attempts to argue otherwise, the state proceedings against him plainly qualify as (1) a "civil enforcement proceeding" that is "akin to a criminal prosecution," or (2) a civil proceeding that "implicates a State's interest in enforcing the orders and judgments of its courts[.]" *Sprint*, 134 S. Ct. at 588, 591.

1. The stalking protection order proceeding qualifies for abstention as a civil enforcement proceeding "akin to a criminal prosecution."

Mr. Rynearson contends that the state stalking protection order proceeding is non-criminal because it is "an injunctive proceeding brought by a private citizen" that is "[l]ike any other civil injunctive proceeding." Opposition (Docket #28), at 8-9. Mr. Rynearson points out several ways in which he claims the proceeding is similar to various civil proceedings. *Id*. at 8-10. But he completely ignores the most important sources of authority establishing that the proceeding is quasi-criminal: the findings of the Legislature in enacting it, and the decisions of the Washington Supreme Court construing it. As Defendants argued previously (*see* Docket #23, at 8-10), the Legislature specifically stated that it was enacting the statute to protect

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"victims of stalking conduct" and give them "the same protection and access to the court system as victims of domestic violence and sexual assault…." Wash. Rev. Code § 7.92.010. The Washington Supreme Court recognized this quasi-criminal purpose in holding that a protection order is not "a private right of enforcement." *State v. Dejarlais*, 969 P.2d 90, 91-93 (Wash. 1998). Mr. Rynearson also makes no attempt to explain how a mere private civil "disagreement between two private parties" would result in one party having to immediately surrender all of his firearms to agents of the government.

The state courts in a protection order proceeding are not merely "resolving a dispute between two private parties"; they are providing a forum for one party to invoke the power of the state to quickly and effectively halt criminally sanctionable conduct by another party. *Sprint* did *not* hold that state officials must always be a named party for a proceeding to be quasi-criminal, only "generally." This anti-stalking proceeding is plainly different from the insurance premium calculation at issue in *ReadyLink* or the utility rate dispute at issue in *Sprint*. This Court can and should conclude that the protection order proceeding qualifies as "akin to a criminal action" for *Younger* purposes.

2. The stalking protection order proceeding involves the State's interest in enforcing the orders and judgments of its courts.

Mr. Rynearson also contends that this action would not affect the State's interest in enforcing the orders and judgments of its courts. As Mr. Rynearson in effect acknowledges, if this Court finds that the requested federal injunction would have the practical effect of interfering with the state proceedings, it also would impair the operation of those proceedings and implicate the state's interest in enforcing its courts' orders. Cf. Opposition (Docket #28) at 11-12 (citing back to its own discussion of interference at pp. 2-4). Defendants agree; the results of both inquiries should be the same. Both support *Younger* abstention.

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E. The *Middlesex* factors also support *Younger* abstention.

Mr. Rynearson does not appear to contest that all of the *Middlesex* factors are satisfied here: the state stalking protection proceeding was ongoing at the time the federal suit was filed, it involves important state interests, and that it provides an adequate opportunity to raise federal challenges. Motion (Docket #23) at 13; *Cf.* Opposition (Docket #28). He also does not contest that no other exception to Younger applies. *Id.*

III. CONCLUSION

If Mr. Rynearson's request for an injunction is directed only at prospective criminal enforcement against him, he lacks standing, has not cited the imminent harm necessary for an injunction, and (as to the Attorney General) does not fall within the *Ex parte Young* exception to the Eleventh Amendment. If his requested injunction would have the effect of interfering with the state proceedings against him, *Younger* abstention is entirely appropriate. Defendants respectfully submit that on all of these grounds, Mr. Rynearson's request for an injunction and fees should be denied and this case dismissed.

DATED this 21st day of September, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I electronically filed a true and correct copy of the foregoing document with the United States District Court ECF system, which will send notification of the filing to the following:

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

RICHARD L. RYNEARSON, III, Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and, TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, Defendants.	3:17-CV-05531 September 22, 2017

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

PRELIMINARY INJUNCTION HEARING

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MORNING SESSION

SEPTEMBER 22, 2017

THE COURT: Good morning.

00:09:43 THE CLERK: Rynearson versus Ferguson, C17-5531RBL,

00:09:49 Counsel, please make an appearance for the record.

00:09:52 MR. VOLOKH: Eugene Volokh representing Rynearson.

00:09:57 THE COURT: Anyone over there?

00:09:58 MR. BALASUBRAMANI: Mr. Balasubramani for Rynearson.

00:10:04 MR. HEILMAN: Garrett Heilman for Plaintiff Rynearson.

00:10:07 MR. ROBERTS: Darwin Roberts for the Office of

00:10:11 Attorney General.

00:10:13 MS. GEORGE: Ione George, Kitsap County Prosecutor's

00:10:18 Office.

00:10:18 THE COURT: This is on the motion for preliminary

00:10:31 injunction filed by plaintiff. I have reviewed all of the

00:10:34 memorandum. I have reviewed the declarations, the Findings

00:10:46 of Fact and Conclusions of Law.

00:10:47 Given the history of the dispute, as painful as that

00:10:53 is, I am focused on the constitutionality issue. I know that

00:11:09 the Attorney General has arguments ex rel Younger, Young,

00:11:16 Younger abstention, collateral bar, all that. You can weave

00:11:23 that into your argument. I am most interested in the

00:11:28 substantive issue on the constitutionality of the statute.

00:11:34 That is just where I am thinking.

00:11:38 Mr. Volokh, if you are going to be the spokesman, you are up.

00:11:42 MR. VOLOKH: All right. Your Honor, thank you very much.

00:11:48 So the relevant statute provides in relevant part that it is a crime to anonymously or repeatedly communicate electronically to a third party, could be the public, could be somebody else, with the intent to, among other things, harass, torment or embarrass any person. We think that cannot be constitutional.

00:12:10 If you think about much of what goes on these days during the election, could be Candidate Trump might have been, under this statute, guilty of cyberstalking Secretary Clinton and vice versa. We think even as to matters of purely private concern, the statute is unconstitutional and overbroad. For example, if somebody posts something online about how she broke up with her boyfriend because he cheated on her, and she wants him to feel embarrassed for how badly he treated her, but the statute is not limited to matters of private concern, applies to speech about --

00:12:50 THE COURT: Can you keep up with him?

00:12:50 MR. VOLOKH: My students have remarked the same in class.

00:12:55 The statute equally applies to public figures and matters

00:12:59 of public concern. To give one example from the case law,
00:13:02 Hustler vs Falwell, that almost certainly was intended to
00:13:06 embarrass and torment Jerry Falwell. It wasn't online.
00:13:11 There was no online then. It was only one issue. Imagine if
00:13:14 it had been posted twice. That, too, would have been --
00:13:17 would have been covered by the statute, and that shows the
00:13:21 statute is substantially overbroad.
00:13:23 In the First Amendment substantial overbreadth
00:13:28 challenge, all we need to show is it applies to a substantial
00:13:30 range of constitutionally protected behavior. It may have a
00:13:35 legitimate scope, for example, as to threatening statements,
00:13:39 statements that are so intimidating as to be threatening.
00:13:42 True threats, we do not object to its application there or to
00:13:45 the word "intimidate" there.
00:13:47 The statute, we think we have shown, is substantially
00:13:52 overbroad because it covers a substantial range of speech.
00:13:55 Your Honor, I would be happy to go on, but I prefer to
00:14:00 answer any questions you have about this or about some of the
00:14:03 procedural issues in this case.
00:14:05 THE COURT: I have questions about the overbreadth.
00:14:11 We can do this in the round, and the defense can make their
00:14:15 arguments and you can get back up. It is a serious issue
00:14:24 about an innate argument. The substance of this case is, the
00:14:40 social media is painfully, painfully absurd. What we are
00:14:59 doing in our society with these rants from people who have

too much time on their hands and overactive fingers is tough, tough to do. I have known you, and I have observed you in the CACM Committee with your requests for access to PACER and all that stuff, and I respect so much your work and that of Mr. Roberts and Ms. Ione. It is a precious right. We have to tread lightly on the contours of that right, but reading the ramp up to the cyberstalking allegation is just painful, painful.

I want to hear from Mr. Roberts and Ms. Ione, and then we will have you back out.

Your point is that it is just vague, overly broad, and it is not enforceable as constitutional.

I'll hear from Mr. Roberts.

MR. VOLOKH: Thank you.

MR. ROBERTS: Thank you, Your Honor.

With great respect to the Court and your interest in the constitutionality issues, I feel like I would be remiss on behalf of my client if --

THE COURT: You spent 80 percent of your brief on those issues of why we shouldn't decide this.

MR. ROBERTS: Not just why you shouldn't decide this, but there is no jurisdiction over the Attorney General. In particular, the Ex parte Young argument. If what they are requesting is an injunction against the Attorney General enforcing the statute, they cannot get that. We lack

jurisdiction to enforce it. Our jurisdiction would depend on contingent future events, and under the line of Ninth Circuit cases we cited, the Southern Pacific case, the Van de Kamp case, it is just not there. On that grounds, the Attorney General should be out.

THE COURT: How about Planned Parenthood?

MR. ROBERTS: Planned Parenthood -- I realize this came up late in the briefing, that's why I prominently cited Planned Parenthood because I didn't want there to be any suggestion I was hiding negative authority.

Planned Parenthood is distinguishable because the Idaho AG stands in a different position. They can deputize themselves. Although in both states the governor can deputize the AG, the court cited that as the distinguishing factor. Here, you have to look at whether there is any likelihood of that happening. It is such a rare event in the state of Washington the governor deputizes the AG to take criminal jurisdiction. Planned Parenthood should not control this case. On that ground, they cannot obtain an injunction against the Attorney General's Office.

Beyond that, the Court does also, on Ex parte Young grounds, need to look at whether the Kitsap County Prosecuting Attorney's Office has made adequate threat of enforcement to trigger jurisdiction over the constitutional question here. I appreciate the Court's concern about the

00:19:14 constitutional questions. Obviously the state courts have
00:19:17 questions about the constitutionality of this statute as
00:19:20 well.

00:19:21 The state courts can do things this Court can't.
00:19:24 They can adopt limiting constructions of the statute as the
00:19:28 Washington Court of Appeals did in the Kohonen case. They,
00:19:32 themselves, can declare the statute unconstitutional as they
00:19:35 did in the Dodd case.

00:19:37 These issues, Your Honor, are firmly teed up for the
00:19:41 Kitsap County Superior Court right now with no question of
00:19:45 standing, no question of abstention, no Article III issues.

00:19:50 Mr. Rynearson can go into court and file these
00:19:55 questions wherever. I don't think there is any suggestion
00:19:57 that the Washington state courts are less sympathetic or more
00:20:03 hostile to First Amendment overbreadth claims than this Court
00:20:07 would be.

00:20:08 If this Court finds that the e-mail correspondence from
00:20:14 the Kitsap County Deputy Prosecuting Attorney does not
00:20:18 satisfy the standard for threatened enforcement under Ex
00:20:23 parte Young, there is no jurisdiction. Both the Prosecutor's
00:20:28 Offices have 11th Amendment immunity. They cannot raise the
00:20:31 overbreadth argument without jurisdiction. That is the Dream
00:20:36 Palace vs Maricopa County case.

00:20:37 I believe Ms. George may want to address further the
00:20:41 issue of why that e-mail does not indicate an intent by the

Prosecuting Attorney's Office, who, as plaintiffs have emphasized, is the defendant here, why the Prosecuting Attorney's Office does not have intent to enforce the statute against Mr. Rynearson.

THE COURT: All right.

MR. ROBERTS: I would be happy to address Younger because I don't think it is -- I think it is an important consideration here. I think principles of comity and federalism should apply, particularly when you don't have any indication the state -- when you don't have any indication the state forum is an inadequate forum for this question.

It does appear to me that the effort by the plaintiffs to enjoin the prosecutors, who would ultimately be responsible for enforcing any violations of the protection order from enforcing the statute that is the predicate for the enforcement order. I mean, I gather we are not talking here about whether Mr. Rynearson can engage in online speech about President Trump or Former President Obama. We are talking about whether he can engage in speech about Mr. Moriwaki, and what will happen if he resumes engaging in speech about Mr. Moriwaki.

I cannot imagine a circumstance in which the plaintiffs obtained an injunction against the Kitsap County Prosecuting Attorney's Office barring them from prosecuting Mr. Rynearson under this statute and him not saying, in the

protection order appeal in the superior court, this doesn't affect me whatsoever. As they said in their brief, you know, it is persuasive authority on you, but we will have to relitigate the entire question of the constitutionality of the statute. He is going to argue it has the effect of kicking the legs out from under the prosecution, Your Honor.

THE COURT: You concede the State has questions about the overbreadth of the statute?

MR. ROBERTS: Litigants in the Washington courts have raised questions about the overbreadth of the statute, which, in the decisions that we cited and the plaintiffs did not cite, were resolved in favor of the defendants, and again -- and limiting the sweep of the statute.

THE COURT: Right. Okay. Thank you.

Ms. George, I apologize, I --

MS. GEORGE: That's okay. I like Ms. Ione. It works for me. Thank you, Your Honor.

THE COURT: It has been about about a year since you have been here. I forgot.

MS. GEORGE: All good. My involvement, my statements here will be very short. I have deferred to the State for these arguments. I don't want to belabor the point. My comments will be very short with regard to those statements made about the prosecutor's specific threats. I would say, there have been no specific threats.

00:23:56 The statements have been focused on this e-mail. I would point out that all that has been referred to is the prosecutor's response. The prosecutor made no specific threats. In those cases that have been cited in the Attorney General's brief, we are talking about statements made by prosecuting authorities where they have reached out to a defendant and said, "Cease and desist what you are doing or we will prosecute you. You are at risk. Stop it."

What we have here is a situation where a couple of referrals were made to the Prosecutor's Office. One of them was prosecuted. There was another case where the prosecutor did nothing. The prosecutor has no obligation to respond, and they didn't. They had it. We didn't do anything. It was an attorney who reached out and they said to a deputy prosecutor, sorry to pester you. This case is certainly -- another case is circling back and the judge will -- well, to be specific, "Sorry, to pester you. My other Bainbridge Island case is circling back around next week. I know the judge will want a status update on whether the charges will be filed or not. Do you happen to have an idea?" Somebody reached out and said, "What are you going to do?" The deputy prosecutor said, "I haven't made a decision. If something happens, I might do something." That is not a specific threat.

What the statute requires when we are talking about this

is, is there a genuine possibility of prosecution under the law.

THE COURT: There has to be a concrete threat.

MS. GEORGE: The prosecutor has to articulate a specific warning or threat to prosecute. There has to be also the history of past prosecution or an action under the specific statute. That has never been addressed here. Never, in any of the briefing. There has been no showing of this Prosecutor's Office ever taking an action under the statute. It is a vacuum under this litigation. It is a hole in this case that hasn't been shown and can't be shown.

THE COURT: You guys are two ships passing in the night. Professor deals with the core issue of the constitutionality. The defendants are relying, perhaps persuasively, on the limitations of the Court to address this issue.

Mr. Volokh.

MR. VOLOKH: Thank you very much. Let me turn to some of these procedural issues in the order that were raised. First, is the jurisdiction over the Washington Attorney General. The leading decision on this, district court decision from this very courtroom, Judge Robart, is Skokomish Indian Tribe vs Goldmark. It interprets the statute that describes the authority of the Washington Attorney General which says not just that the Attorney

00:26:44 General may prosecute upon the request of, but upon the
00:26:47 request of or with a concurrence of, among other things,
00:26:52 county prosecutors, and the Court concluded that was
00:26:55 sufficient to provide jurisdiction. That case is 949 F.Supp.
00:27:00 2d, 1168. It is from 2014 from this district. That's what
00:27:06 we have to say about jurisdiction over the Attorney General,
00:27:08 although, of course, our case can proceed if we have
00:27:10 jurisdiction over either the Attorney General or the County
00:27:13 Prosecutor's Office.

00:27:14 Now, as to the standing required to show sufficient threat
00:27:19 of enforcement, California Pro-Life Council is the leading
00:27:23 precedent on that, we think, in the Ninth Circuit from 2003,
00:27:27 although it is also echoed in the Wolfson vs Brammer case in
00:27:31 2010. California Pro-Life Council makes clear it doesn't
00:27:35 have to be a specific threat as to this particular defendant.
00:27:37 Quoting favorably the Seventh Circuit the Court says, "The
00:27:40 threat is latent in the existence of the statute if the
00:27:43 statute arguably covers the person's speech." In that case,
00:27:47 the person can take a hold-your-tongue-and-challenge-now
00:27:52 approach, which is ultimately more respectful of the judicial
00:27:55 process and of the law. To say, I am not going to say
00:27:59 something that might be illegal, I am going to try to get
00:28:02 adjudication of my rights under this.

00:28:05 This is not the standard rule in other areas. It is
00:28:09 the rule for First Amendment purposes because of the threat

00:28:11 that overbroad statutes can have a chilling effect. That is
00:28:14 relevant and substantive, but under the California Pro-Life
00:28:18 Council it is also relevant to the standing point.
00:28:21 We think there is ample standing here. Partly that is
00:28:26 because of the very existence of the statute. Also partly
00:28:29 because of the e-mail. To be sure, a response to the defense
00:28:34 lawyer's question, that's one way prosecutors communicate
00:28:38 their intention. The e-mail has to do with case report
00:28:41 I-17000145. That is the police report. Your Honor can take
00:28:47 judicial notice. If you want a copy of it, we have copies.
00:28:50 That is clearly a report that is about a claim of
00:28:53 cyberstalking. It is not about a claim of violation of the
00:28:55 protective order. It is a claim, because at the time the
00:28:59 challenge on that happened, there had been no protective
00:29:02 order. This was a cyberstalking referral by the police
00:29:05 department. They found there was probable cause to conclude
00:29:08 Mr. Rynearson was cyberstalking, referred to the prosecutor,
00:29:13 and when asked what was going on, the prosecutor says, "I am
00:29:14 not formally declining, but I am not going to charge it at
00:29:17 this time. I am going to sit on it with the hope
00:29:19 Mr. Rynearson abides by the NCO. If I get any future
00:29:23 referrals" -- I take it referrals for violation of the
00:29:28 cyberstalking, the issue involved -- "I will revisit the
00:29:31 charging decision."
00:29:32 We think a reasonable, law abiding person that

00:29:34 doesn't want to get arrested, doesn't want to get prosecuted,
00:29:36 is asking is it safe for me to speak now or should I hold my
00:29:40 tongue and challenge it in court, would say, you know, there
00:29:44 is a sufficient and reasonable threat to me of enforcement of
00:29:48 the cyberstalking statute for any speech that I may -- might
00:29:53 engage in that might arguably be seen as intended to
00:29:56 embarrass and be repeated. Those are the only elements of
00:29:58 that in the electronic communication that is under the
00:30:03 statute.

00:30:03 Now, as to the question of whether a state court might
00:30:07 kind of interpret the statute more broadly, that is a
00:30:10 separate abstention question not raised in the brief. The
00:30:13 leading precedent is City of Houston vs Hill from 1987 where
00:30:18 one of the things the court specifically said is abstention
00:30:22 is not encouraged in constitutional and First Amendment
00:30:25 cases -- that was a First Amendment case -- because the
00:30:28 speakers are entitled to go to federal court and have their
00:30:32 federal rights adjudicated.

00:30:35 Finally, as to the Younger abstention, there is a
00:30:41 state proceeding for sure. The state proceeding is not
00:30:46 brought by the parties here. We are not seeking to enjoin
00:30:49 the parties to that proceeding. We are not seeking to enjoin
00:30:53 Mr. Moriwaki. We are not seeking to enjoin the Court or any
00:30:58 of the other witnesses or whatever else are issues. All of
00:31:01 the precedents that have been cited, to our knowledge the

precedents in Younger, have to do with that kind of interference in state proceedings. We don't think there is such a thing.

Now, it is true the state proceeding is based on a civil statute where one of the predicates, and the state judge found there was another statute provided a predicate, is the statute here. Under Washington's Collateral Bar Rule, Mr. Rynearson has to comply with that order regardless of whether -- of whether he thinks the statute is invalid. Ultimately if hypothetically there is a contempt proceeding, we think the Collateral Bar Rule would likely prevent us raising the constitutionality of the statute as a challenge.

In any event, that has to do with hypothetical future event proceedings. Younger has to do with injunctions dealing with current proceedings. We think this injunction would not interfere with those proceedings. It wouldn't enjoin anybody. We think it would have a powerful persuasive precedential effect. That is an interference. If the judge says, I am persuaded by the federal district court's reasoning, that's not federal district court interfering with the proceeding. It is providing useful input.

THE COURT: It is a difficult position to be in the case of the federal court to seem like poaching in a state proceeding that is -- it is not proceeding right now. There is good reason why state courts should have the first crack

00:33:10 at their statute. Federal courts are the keepers of the
00:33:17 Constitution, the United States Constitution. We take that
00:33:22 very seriously.
00:33:26 Mr. Roberts, Ms. George, do you have anything to add?
00:33:31 MR. ROBERTS: Your Honor, if I may be heard briefly
00:33:33 on the jurisdiction issue. I frankly haven't read the
00:33:38 Skokomish Indian Tribe case they are referring to.
00:33:41 THE COURT: It intersected the Skokomish hunting
00:33:46 decision that I made just a couple months ago. That is why I
00:33:49 am familiar with Goldmark.
00:33:52 MR. ROBERTS: Got you. I don't mean to turn myself
00:33:55 into a witness here. We certainly don't argue that the
00:34:01 concurrence language isn't there. That is just not the way
00:34:05 it works. I mean, the prosecutors have the jurisdiction.
00:34:10 Under the law could we say to them, hey, could we have some
00:34:14 jurisdiction, and they concur. Yes, absolutely. Again, that
00:34:18 is a contingent future event that hasn't happened. There is
00:34:22 no indication that it will. That is the real test here, is
00:34:26 there a threat? Practically speaking, it never looks that
00:34:30 way. If you filed the public records request and got all the
00:34:34 letters confirming jurisdiction and all the cases, they
00:34:37 always go from the county prosecutors to the Attorney
00:34:41 General's Office. We don't have jurisdiction until they say,
00:34:46 "Why don't you take it."
00:34:48 Thank you, Your Honor.

00:34:50 THE COURT: Anything further, Ms. George?

00:34:52 MS. GEORGE: No.

00:34:53 MR. VOLOKH: I want to mention one thing that hasn't come up, for the sake of completeness. I believe it was in the County's reply to the motion to dismiss. They raise the prosecutorial immunity question. They argue attorney fees are barred by prosecutorial immunity. Turns out there is precedent on that. The leading case is Supreme Court of Virginia vs Consumers Union of the U.S., 446 U.S. 17, 1980. There is also a follow-up circuit court decision from the Tenth Circuit in Wilson vs Stocker, 819, F.2d, 1987. They make clear that prosecutorial immunity does not extend to either declaratory judgment or injunctions or attorney fees. It only extends to damages, which we are not claiming. We wanted to mention that, for the sake of completeness.

00:35:48 THE COURT: Thank you.

00:35:49 I'll have a decision out in about two weeks. Thank you for your written materials, your oral presentations. I am questioning whether we got everybody up and dressed for this. There wasn't the direct, head-on debate on the constitutionality of this statute that I wanted to invite. Little bit of a rope-a-dope. I see why you are arguing that way. We have encountered Younger abstention and Ex parte Young in the past, and we will ferret out your argument and render a decision in a couple of weeks.

00:37:04 Thank you. Have a great weekend.

00:37:16 (The proceedings adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Angela Nicolavo

ANGELA NICOLAVO
COURT REPORTER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 01 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RICHARD LEE RYNEARSON III,

Plaintiff - Appellant,

v.

ROBERT FERGUSON, Attorney General of the State of Washington and TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants - Appellees.

No. 17-35853

D.C. No. 3:17-cv-05531-RBL
U.S. District Court for Western Washington, Tacoma

MANDATE

The judgment of this Court, entered September 07, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica F. Flores Poblano
Deputy Clerk
Ninth Circuit Rule 27-7

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-5531

PLAINTIFF'S RENEWED MOTION FOR A PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
November 2, 2018

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

It is a crime for Washingtonians to speak online "repeatedly or anonymously" if a jury finds that their purpose is to "harass, intimidate, torment, or embarrass." *See* RCW 9.61.260(1)(b) (criminalizing "mak[ing] an electronic communication to . . . a third party" "with intent to harass, intimidate, torment, or embarrass any other person" if communication is done "[a]nonymously or repeatedly"). Yet the First Amendment protects even speech intended to insult or motivated by hostility—both because that speech is itself constitutionally valuable, and because restricting such speech unduly chills even well-motivated speech.

Section 9.61.260(1)(b) therefore violates the First Amendment on its face. Plaintiff Richard Rynearson asks this Court to find the statute's prohibition on speech "to . . . a third party" "with intent to harass, intimidate, torment, or embarrass any other person . . . repeatedly or anonymously" to be facially overbroad, and to issue a preliminary injunction—and ultimately, after a hearing, a declaratory judgment and permanent injunction—against its enforcement. Rynearson is not challenging the prohibition on "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language" about a person. He similarly does not object to the prohibition on communications that "[t]hreaten[] to inflict injury on the person or property of the person called or any member of his or her family or household." These provisions can be severed from the unconstitutional prohibitions on "repeated[] or anonymous[]" speech; the Washington Legislature expressly made the cyberstalking statute severable. Laws of 2004, ch. 94, § 6. Rynearson likewise does not object to the prohibition on "repeated[] or anonymous[]" communication *to* a particular person. But the prohibition on truthful statements about someone else, made to the public—including willing third-party listeners—runs afoul of the First Amendment.

Rynearson first filed this motion for a preliminary injunction in July 2017. The Court dismissed the suit on abstention grounds under *Younger v. Harris*, 401 U.S. 37 (1971), in light of a then-pending civil protection order case in state court. In an expedited appeal, the Ninth Circuit reversed and remanded the case. *Rynearson v. Ferguson*, No. 17-35853, 2018 WL 4263253 (9th

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Cir. Sept. 7, 2018). Accordingly, Rynearson now renews his motion.

II. STATEMENT OF FACTS

Rynearson is an online author and activist who regularly writes online posts and comments to the public related to civil liberties, including about police abuse and the expansion of executive power in the wake of September 11. (Declaration of Richard L. Rynearson, III in Support of Motion for Preliminary Injunction (Rynearson Decl.) ¶¶ 6-7.) Rynearson's writings are often critical—and sometimes harshly so—of local public figures and government officials. (*Id.* ¶¶ 11-12.) These writings are well within the traditions of independent American political discourse, and are intended both to raise the awareness of other citizens regarding the civil-liberties issues that Rynearson writes about, and to hold civic and political leaders accountable to the community through pointed criticism. This sort of expression is at the very heart of political speech which the First Amendment most strongly protects.

Many of Rynearson's online posts and comments relate to a detention provision in the National Defense Authorization Act ("NDAA") of 2012. Specifically, Section 1021, which was found to authorize the unconstitutional detention of American citizens without trial under the laws of war. *See Hedges v. Obama*, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012), *rev'd for lack of jurisdiction*, 724 F.3d 170 (2d Cir. 2013). (Rynearson Decl. ¶ 3.) Given his interest in indefinite-detention issues, Rynearson became interested years ago in public and civic organizations in the Seattle area that memorialize and seek to present the lessons of the Japanese-American internment in World War II, such as the Bainbridge Island Japanese-American Exclusion Memorial and Seattle-based Densho. (*Id.* ¶¶ 4-5, 8.)

In the past, Rynearson has regularly posted on public Facebook pages and groups criticizing the leadership of those public and civic organizations, either because those leaders failed to condemn the NDAA or because they vocally and strongly support politicians who voted for or signed the NDAA, such as Governor Jay Inslee and former President Barack Obama. (*Id.* ¶¶ 11-12.) For example, in February 2017, Rynearson wrote a series of public posts on Facebook criticizing Clarence Moriwaki, the founder of the Bainbridge Island Japanese-American

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Exclusion Memorial ("Memorial"), for failing to criticize Governor Inslee and President Obama for voting for/signing the NDAA. (*Id.* ¶ 12.) The thrust of Rynearson's posts was that Moriwaki should be removed from his role as board member and de facto spokesperson for the Memorial because Moriwaki used the lessons of the internment, and his role with the Memorial, to criticize Republican politicians (chiefly, President Trump) in many media articles or appearances related to the Memorial, but failed to criticize Democratic politicians. (*Id.*)

Rynearson's posts often include invective, ridicule, and harsh language (but no profanity, obscenity, or threats) intended to criticize or call into question the actions and motives of these civic leaders and other public figures. (*Id.* ¶¶ 11-12.) He reasonably fears prosecution under the cyberstalking statute for such posts. (*Id.* ¶¶ 16-17.) In fact, the Bainbridge Island Police Department referred a police report to the Kitsap County Prosecutor finding probable cause for cyberstalking based on such critical posts to and about Moriwaki. (*Id.* ¶ 13.) The prosecutor has not brought charges, but sent an email stating that he would revisit his decision regarding charges based on Rynearson's future behavior, including his future speech. (*Id.* ¶ 15.)

For a period of time, from March 2017 to January 2018, Rynearson was also subject to a civil protection order imposed by the Bainbridge Island Municipal Court based on posts critical of Moriwaki. (*Id.* ¶ 14; *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *12 (Wash. Sup. Ct. Jan. 10, 2018). The cyberstalking statute was one of the statutes invoked by the Municipal Court in imposing the protection order. *Moriwaki*, 2018 WL 733811, at *5. The order imposed sharp limits on Rynearson's speech, such as barring the use of Moriwaki's name in the titles or domain names of webpages. (Declaration of Eugene Volokh in Support of Motion for Preliminary Injunction, Ex. B.) The order has now been vacated on the ground that it was impermissibly based on Rynearson's constitutionally-protected speech. *Moriwaki*, 2018 WL 733811, at *12. But the lifting of the order's limits on Rynearson's speech does not lift the restraint imposed by the cyberstalking statute itself. *See Rynearson*, 2018 WL 4263253, at *7 ("The stalking protection orders issued by the municipal court and the cyberstalking statute covered different conduct.").

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Rynearson engages in core political expression squarely within the heartland of what the First Amendment protects, and yet legitimately fears prosecution under the cyberstalking statute based upon the provocative and critical nature of what he writes and publishes online.

III. ARGUMENT

To obtain a preliminary injunction, the movant must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (alteration in original). When evaluating the likelihood of success in a First Amendment challenge, the movant "bears the initial burden of making a colorable claim that [his] First Amendment rights have been infringed, or are threatened with infringement." *Id.* Then, the "burden shifts to the government to justify the restriction." *Id.* "[C]aselaw clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

A. Plaintiff likely will succeed in establishing that Section 9.61.260(1)(b) violates the First Amendment

A statute is facially invalid under the First Amendment if it is "overbroad," meaning "'a substantial amount of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'" *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013) (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)) (alteration in original). Section 9.61.260(1)(b) is unconstitutionally overbroad on its face, because it criminalizes much heated political and personal commentary of the sort that is routine when people discuss matters that outrage them.

1. Section 9.61.260(1)(b) is an alarmingly broad restriction on pure speech

Section 9.61.260(1)(b) provides that a "person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, . . . makes an electronic

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communication to such other person or a third party . . . [a]nonymously or repeatedly whether or not conversation occurs." An "electronic communication" is the "transmission of information by wire, radio, optical cable, electromagnetic, or other similar means . . . includ[ing], but . . . not limited to, . . . internet-based communications." RCW 9.61.260(5). The statute separately criminalizes electronic speech that contains "any lewd, lascivious, indecent, or obscene words, images, or language," *id.* 9.61.260(1)(a), or that "[t]hreaten[s] to inflict injury on the person or property of the person called or any member of his or her family or household," *id.* 9.61.260(1)(c). Accordingly, Section 9.61.260(1)(b) criminalizes a vast range of non-obscene, non-threatening speech, based only on (1) purportedly bad intent and (2) repetition or anonymity.

The breadth of the statute extends in several dimensions. First, the intent provision—sweeping in speech that a jury might find was intended to "harass, intimidate, torment, or embarrass any other person"—reaches broadly. The terms "harass, intimidate, torment, or embarrass" are not defined by the statute. The Washington Supreme Court, in a case examining the similarly-worded telephone-harassment statute, has defined "intimidate" to include "compel[ling] to action or inaction (as by threats)," *Seattle v. Huff*, 767 P.2d 572, 576 (Wash. 1989), but it did not provide a definition for the other proscribed purposes.

When statutory terms are undefined, however, Washington courts generally give them their ordinary meaning, including the dictionary definition. *See id.* (defining "intimidate" by reference to definition in Webster's Third New International Dictionary). The dictionary definition of "harass" includes "to vex, trouble, or annoy continually or chronically," Webster's Third New International Dictionary, Unabridged (online ed. 2017), and the meaning of "torment" includes "to cause worry or vexation to," *id.* Finally, "embarrass" means "to cause to experience a state of self-conscious distress." *Id.* As a result, even public criticisms of public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently "vex" or "annoy" those public figures, or to embarrass or make them "self-conscious" about something.

Second, Section 9.61.260(1)(b) is not limited to true threats, obscenity, defamation, or

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any other category of unprotected speech. In fact, because paragraphs (1)(a) and (1)(c) plainly cover obscenity and threats, respectively, much of the speech that can be restricted under the First Amendment is excluded from Section 9.61.260(1)(b)'s reach, so most of the speech that falls within Section 9.61.260(1)(b) is actually protected speech.

And even paragraph (1)(a)—which covers "any lewd, lascivious, [or] indecent . . . words, images, or language" in addition to "obscene" speech—reaches mostly protected speech, i.e., speech that would not fall within the definition of unprotected "obscenity." That paragraph is not directly at issue here, but it illustrates the extreme breadth of the cyberstalking statute and how it reaches core political speech to the public that is protected by the First Amendment. In 2011, for example, the Renton Police Department obtained a search warrant to compel Google to identify the individual who had anonymously posted cartoon videos on YouTube making fun of, and criticizing, the City of Renton and its Police Department. Jennifer Sullivan, *Web cartoons making fun of Renton taken seriously*, Seattle Times, Aug. 4, 2011. The videos communicated criticisms related to a new jail, internal investigations, and department morale, but also referred to alleged sex acts involving Police Department employees. *Id.* The police obtained a warrant by contending that the videos were "cyberstalking" due to "lewd content" or "indecent language that is meant to embarrass and emotionally torment" the police officers who were the subjects of the criticism. *Id.* The same content could just have easily been charged as repeated or anonymous under paragraph (1)(b), because more than one video was posted and the poster used a pen name. The police later dropped the case, but it is nonetheless a useful example of how far the statute reaches.

Third, Section 9.61.260(1)(b) is not confined to harassing speech directed to an unwilling listener. Rather, it expressly covers online speech with intent to embarrass any other person both when spoken to "such person" and to "a third party." Traditionally, criminal harassment laws covered speech made to a particular unwilling person—for instance, telephone calls, letters sent to a particular home, or e-mails sent to a particular person. Thus, for instance, the Supreme Court upheld a federal law forbidding people from sending certain material to others once the

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recipients have told senders to stop. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 730 (1970). "[N]o one has a right to press even 'good' ideas on an unwilling recipient," the Court reasoned. *Rowan*, 397 U.S. at 738. For that reason, Washington may constitutionally be permitted to bar repeated unwanted e-mails after the recipient has told the speaker to stop, as it has done with unwanted telephone calls. RCW 9.61.230.

But Section 9.61.260(1)(b) goes much further, by criminalizing even public commentary *about* people. While "attempting to stop the flow of information into [one's] own household" (speech to a person) is permissible, trying to block criticism of a person said "to the public" (speech about a person) violates the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971); *see also Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (upholding ban on targeted residential picketing, because such picketing "is narrowly directed at the household, not the public," and is thus "fundamentally different from more generally directed means of communication that may not be completely banned").

And this distinction makes sense: restrictions on speech *to* a person (such as unwanted telephone calls) nonetheless allow dissemination of information to willing listeners. On the other hand, restrictions on speech *about* a person are far broader, and thus unconstitutionally undermine "robust political debate" (as well as conversation on other topics). *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

Finally, because the statute criminalizes public speech about a person with certain intent, Section 9.61.260(1)(b) regulates pure speech, without any associated noncommunicative conduct. With respect to prohibitions on speech directed to a person, for example with telephone harassment, it is the harassing conduct that is prohibited—i.e., the unwelcome ringing of the telephone, which can awaken or distract people regardless of the message conveyed. The conduct of publicly posting something (independent of the post's content) cannot itself be harassing, intimidating, or embarrassing. Rather, a person can be convicted of cyberstalking based only on the content of his pure speech, without any associated harassing conduct. This distinguishes the Washington cyberstalking statute from other cyberstalking statutes that have

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been upheld against facial challenges. *See United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (holding that "because 18 U.S.C. § 2261A proscribes harassing and intimidating conduct, the statute is not facially invalid under the First Amendment," as the "proscribed acts are tethered to the underlying criminal conduct and not to speech"); *id.* at 954 (Watford, J., concurring) ("If a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply.").

Section 9.61.260(1)(b) is thus "a criminal prohibition of alarming breadth." *Stevens*, 130 S. Ct. at 1588. It potentially punishes a vast range of harsh rhetoric about political candidates. Even Hillary Clinton and Donald Trump could have been punished under this statute, if they had tweeted things in Washington that were intended to "harass" or "embarrass" each other. The statute also punishes a vast range of criticism of local civic and political leaders on matters of local or national public concern, because any harsh or repeated critique could be perceived as being done with intent to harass or embarrass.

Beyond that, the statute punishes a wide range of speech that is part of everyday life. Say, for instance, that a woman breaks up with her unfaithful boyfriend, and she posts on her Facebook page about how she feels about him. A prosecutor may easily conclude that the woman posted her Facebook message with the "intent to harass . . . or embarrass" her ex-boyfriend, by making him feel ashamed. Yet such speech on the details of our daily lives is also constitutionally protected. Even "[w]holly neutral futilities" that lack political, artistic, or similar value are "still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591.

2. The requirement of a bad purpose does not salvage Section 9.61.260(1)(b)

Section 9.61.260(1)(b) is not rendered constitutional by the requirement that the speech be intended to harass, torment, intimidate, or embarrass. The Supreme Court has repeatedly held that bad intentions do not strip speech of constitutional protection. Thus, in *Garrison v. Louisiana*, the Court rejected the view that reputation-injuring speech could be punished because of the speaker's allegedly bad motives, such as a "wanton desire to injure." 379 U.S. 64, 78 (1964). As the Court explained, "[i]f upon a lawful occasion for making a publication, [a

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speaker] has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice." *Id.* at 73 (internal quotation marks and citation omitted).

Likewise, in *Hustler Magazine*, the Supreme Court overturned an intentional infliction of emotional distress verdict, concluding that a bad motive does not strip speech of constitutional protection. 485 U.S. at 53. And in *Snyder v. Phelps*, the Court applied this principle to speech about private figures as well as public figures. 562 U.S. 443, 458 (2011). More broadly, the Supreme Court has held that 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 opinion) (citation omitted); *id.* at 495 (Scalia, J., concurring in part and concurring in the judgment) (likewise rejecting a test based on speaker motivation). This Court has likewise struck down as overbroad a ban on publishing certain information "with the intent to harm or intimidate," *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149 (W.D. Wash. 2003), reasoning that the First Amendment "preclude[s] the State of Washington from proscribing pure speech based solely on the speaker's subjective intent." And this was so even though the statute was limited to publishing the home address and phone numbers of law enforcement officials.

The Supreme Court has offered two reasons for protecting speech without regard to purpose. First, speech remains valuable even if the speaker's motives may be unsavory. "[E]ven if [a speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison*, 379 U.S. at 73.

Second, restricting speech based on its bad motive risks chilling even well-motivated speech. "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 . . . ." *Id.* "No reasonable speaker would choose to run an ad covered by [the statute] if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion." *Wis. Right to Life*, 551 U.S. at 468 (Roberts, C.J., joined by Alito, J.) (internal quotation marks omitted). "First Amendment freedoms need

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breathing space to survive," and "[a]n intent test provides none." *Id.* at 468-69 (citations omitted). Any effort to distinguish restricted speech from unrestricted speech "based on intent of the speaker would 'offe[r] no security for free discussion,' and would 'compe[l] the speaker to hedge and trim.'" *Id*. at 495 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) (internal citations and some internal quotation marks omitted).

The same applies to Section 9.61.260(1)(b). Rynearson, and others like him, will constantly have to worry that their harsh criticism of public figures or public officials might be seen as ill-motivated by a prosecutor, and might put them at risk of prosecution (and jail). Section 9.61.260(1)(b) "offe[rs] no security for free discussion," and "provides no[]" "breathing space" for speech; it is therefore unconstitutional.

3. Section 9.61.260(1)(b) is also not saved by the requirement of repetition or anonymity

Other than intent, the only requirement for speech to be proscribed by Section 9.61.260(1)(b) is that it be "repeated" or "anonymous." The anonymity element only renders the prohibition more unconstitutional, not less. 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.'" *Doe*, 772 F.3d at 574 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995)). Anonymity on the internet is no less protected, because "online speech stands on the same footing as other speech." *Id.* (citation omitted). Indeed, the Supreme Court has recently recognized "the most important place[] . . . 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).

And the repetition element does not save the statute, either. Speech does not lose its protection because it is said more than once. The individuals distributing leaflets in *Organization for a Better Austin* distributed at least four different leaflets targeting a realtor and criticizing his business practices, and they distributed leaflets for "several days" at a shopping center, on "two

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other occasions" at the realtor's church, and at least one other time, at the houses of the realtor's neighbors. 402 U.S. at 417. That is surely "repeated" speech targeting a particular individual, but the Supreme Court nonetheless held it was protected by the First Amendment, even though it was "intended to exercise a coercive impact on" the realtor. *Id.* at 419.

4. Section 9.61.260(1)(b) restricts protected speech based on its content, and must therefore be judged under strict scrutiny (which it cannot pass)

The government generally "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) (citation omitted). Defining "regulated speech by its function *or purpose*" makes a restriction "content based." *Id.* at 2227 (emphasis added). And that is precisely what Section 9.61.260(1)(b) does—it criminalizes speech based on the speaker's purpose, i.e. intent. Moreover, a law is content-based when, "[i]n order to enforce the regulation, an official must necessarily examine the content of the message that is conveyed." *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006); *see also Sheehan*, 272 F. Supp. 2d at 1146 ("When an individual enforcing a statute must examine the content of the speech to determine whether the statute governs, the statute is content-based."). Determining whether online speech about someone was intended to harass or embarrass will necessarily require examination of the speech's content.

Nor can the restriction be treated as content-neutral under the so-called "secondary effects" doctrine, under which the government can adopt a "time, place, or manner regulation aimed at the 'secondary effects' of the proscribed speech." *Sheehan*, 272 F. Supp. 2d at 1146. "The emotive impact of speech on its audience is not a 'secondary effect'"; laws that "regulate[] speech due to its potential primary impact"—such as their emotive impact on the targets of the speech—"must be considered content-based." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (lead opinion); *id.* at 334 (Brennan, J., concurring in the judgment). *See also Texas v. Johnson*, 491 U.S. 397, 412 (1989) ("[T]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself.") (internal quotation marks omitted); *Sheehan*, 272 F. Supp. 2d at 1146. Likewise, Section 9.61.260(1)(b), which aims to control the

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emotional impact of speech by banning speech intended to "harass, torment, intimidate, or embarrass," is therefore content-based.

Section 9.61.260(1)(b) is thus subject to strict scrutiny, and is therefore "presumptively unconstitutional" unless it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2226–27, 2230-31 (internal quotation marks and citation omitted). Moreover, because Rynearson has made a "colorable claim that [his] First Amendment rights have been infringed, or are threatened with infringement," it is Defendants' burden "to justify the restriction." *Doe*, 772 F.3d at 570; *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1283 (W.D. Wash. 2012) ("Since Plaintiffs have met their burden of showing that [the statute] is a content-based restriction that implicates First Amendment rights, it is Defendants' burden to demonstrate that the statute is constitutional."). Defendants cannot meet that burden. There is no compelling state interest in forbidding all non-threatening and non-obscene online speech that is seen as having a caustic purpose.

Moreover, Section 9.61.260(1)(b) is far from "narrowly tailored." To be narrowly tailored, a content-based restriction on speech must be "the least restrictive means of furthering a compelling government interest." *ACLU of Nev.*, 466 F.3d at 794. Yet Section 9.61.260(1)(b) restricts a broad range of speech that falls far outside any First Amendment exception—indeed, it mostly restricts such speech because it excludes speech that could be considered to fall within the unprotected categories of obscenity and true threats. Nor does Section 9.61.260(1)(b) require that the subject of the offending speech suffer any legally cognizable injury, or even be aware of the speech. *See State v. Bishop*, 787 S.E.2d 814, 820 (N.C. 2016) (reasoning that an anti-cyberbullying statute did not satisfy strict scrutiny, in part, because the statute did not require that the victim suffer an injury or even know about the offending speech). It is the antithesis of a narrowly-tailored restriction.

B. Plaintiff will suffer irreparable harm without a preliminary injunction

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see*

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also Doe, 772 F.3d at 583 (same). Because Rynearson is likely to prevail on his overbreadth challenge, it therefore follows that he will suffer irreparable harm if the State is not enjoined from enforcing the law. A "colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief," and an injunction should issue "[i]f the underlying constitutional question is close." *Doe*, 772 F.3d at 583 (internal quotation marks omitted); *see also Backpage.com*, 881 F. Supp. 2d at 1286 (finding irreparable injury to support granting a preliminary injunction based on the movant's likelihood of success on its overbreadth challenge).

C. The balance of equities favors Plaintiff

Because Rynearson is likely to prevail on his overbreadth challenge—and because such an injunction will leave the government free to punish genuinely dangerous online speech, such as true threats, as well as harassing physical conduct (through the anti-stalking and anti-harassment statutes, RCW 9A.46.020, 9A.46.110) and harassing telephone calls (RCW 9.61.230)—the balance of equities favors granting the injunction. *Cf. Backpage.com*, 881 F. Supp. 2d at 1286 (finding that balance of equities tipped toward plaintiff who had demonstrated likelihood of success on overbreadth challenge when "Washington can enforce other laws banning prostitution and the exploitation of minors" while preliminary injunction was in place).

D. A preliminary injunction is in the public interest

The Ninth Circuit has "consistently recognized the significant public interest in upholding free speech principles," because "the ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiff], but also the interests of others subjected to the same restriction." *Klein*, 584 F.3d at 1208 (internal quotation marks and citation omitted). Here, the public interest favors a preliminary injunction, because it would vindicate important First Amendment principles in light of Rynearson's likelihood of success on his overbreadth challenge.

E. Plaintiff faces a genuine threat of prosecution

Whether the court "frame[s] [its] jurisdictional inquiry as one of standing or of ripeness, the analysis is the same." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir.

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2003). A plaintiff "must face a genuine threat of imminent prosecution." *Id.* at 1094 (internal quotation marks omitted). A plaintiff satisfies that requirement when "he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). The Ninth Circuit considers "(1) whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute." *Cal. Pro-Life Council*, 328 F.3d at 1094 (internal quotation marks omitted).

A threat or warning of prosecution is not an essential element of standing. *Id.* Rather, a plaintiff suffers "the constitutionally recognized injury of self-censorship" so long as he "fear[s] enforcement proceedings might be initiated by the State" and that "fear was reasonable." *Id.* at 1094-95. A "well-founded fear that the law will be enforced" exists in "the free speech context" so long as "the plaintiff's intended speech arguably falls within the statute's reach." *Id.* at 1095. Rynearson has established that well-founded fear and self-censorship injury here: he fears enforcement proceedings, he has curtailed his speech as a result, and both his past and planned future speech arguably fall within the cyberstalking statute's reach. (Rynearson Decl. ¶¶ 16-17.)

With that, Rynearson "need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Cal. Pro-Life Council*, 328 F.3d at 1095 (citation omitted). But there is more here. The police department referred a probable cause finding to the prosecutor. (Rynearson Decl. ¶ 13.) Moreover, a representative of the Kitsap County Prosecutor's office indicated that the decision whether to file charges would be based in part on whether the office receives any further referrals related to Rynearson, which Rynearson reasonably believes could occur based on future speech arguably falling within the scope of RCW 9.61.260(1)(b). (*Id.* ¶ 15, Ex. C.) While these threats of prosecution are not necessary to establish standing, their chilling effect remains to this day. And Rynearson has articulated his intent to engage in the future in speech substantially similar to the speech that gave rise to the

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police department's probable cause finding; that is enough to show his "concrete plan" with respect to the future. *See Susan B. Anthony List*, 134 S. Ct. at 2345 ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.").

It "is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Because Rynearson's fear of prosecution is not "imaginary or wholly speculative," Rynearson has established a genuine threat of prosecution sufficient to satisfy the Article III justiciability requirements. *Susan B. Anthony List*, 134 S. Ct. at 2343.

IV. CONCLUSION

Section 9.61.260(1)(b) criminalizes a wide range of protected speech, both on political and personal topics, going far beyond unprotected categories of speech (such as true threats or libel). This Court should therefore grant Rynearson's motion for preliminary injunction, so that Rynearson and other Washingtonians can speak their minds without fear of criminal penalty.

DATED: October 5, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018 I electronically filed the PLAINTIFF'S RENEWED MOTION FOR A PRELIMINARY INJUNCTION; DECLARATION OF RICHARD LEE RYNEARSON, III IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF EUGENE VOLOKH IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; and [PROPOSED] ORDER GRANTING PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

DATED: October 5, 2018

s/Venkat Balasubramani
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RYNEARSON, III Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, Defendants.	NO. 2:17-cv-1042 DECLARATION OF RICHARD LEE RYNEARSON, III IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Richard Lee Rynearson, III, hereby declare as follows:

1. I am an adult competent to give testimony under oath in a court of law. The information contained herein is based on my personal knowledge and belief.

2. I am retired from the United States Air Force. Beginning while I was in the Air Force, I became very actively engaged online in activism related to preventing police abuse. I also tried to raise awareness of the erosion of civil liberties, and the expansion of executive power, related to the war on terror. To do this, I wrote a blog and engaged actively on various social media sites and internet forums, including Facebook. In particular, I criticized the Obama administration's decision to target and kill American citizens, based solely on executive-branch determinations, using drone strikes outside of war zones.

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3. While in the military, I also criticized the Obama administration's decision to lobby for, sign, and defend on appeal section 1021 of the National Defense Authorization Act ("NDAA") of 2012, which in my view (and the opinion of District Judge Katherine Forrest of the Southern District of New York) purports to authorize military detention of American citizens and lawful permanent residents pursuant to the laws of war—which means without trial and effectively indefinitely.

4. When I retired from the military, I moved to Bainbridge Island, Washington. My wife and I decided to move to the Island nearly ten years before I retired, and we bought a residence on the Island five years before my retirement. Given my interest in defending civil liberties from encroachment in the post-September-11 era, I was very interested to learn of the role of Bainbridge Island in the Japanese-American internment—one of the worst civil-liberties violations in our history. Bainbridge Island was the first location in the United States from which Japanese-Americans were rounded up and taken to internment camps. The local newspaper, the Bainbridge Island Review, was one of the few newspapers in the country to take a stand against the internment, and the support of the community resulted in the Island having one of the highest rates of return of Japanese-American families after the war ended.

5. Once I learned of this history, and years before I moved to Bainbridge Island, I began to follow the work of the Bainbridge Island Japanese-American Exclusion Memorial, and to highlight the good work of the Memorial to preserve this history and to present that history as a reminder for present-day debates on civil liberties during war. For example, in November of 2014, I blogged about the death of Fumiko Hayashida, an internee from Bainbridge Island who was featured in an iconic photograph of the internment. My blog post linked to a video about the Memorial. In November 2015, I shared (on a public Facebook page I managed) a video featuring Clarence Moriwaki, the founder of the Memorial, discussing the internment. I commented, "Excellent discussion on American soldiers forcing American citizens onto trains and taking them to concentration camps here in America. Incredibly important stuff, especially today." In December 2015, I shared (again on a public Facebook page) a post by Mr. Moriwaki about a

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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."

6. I shut down my blog when I retired from the military. I shifted my online advocacy and activism on indefinite-detention and executive-power issues to Facebook, and particularly two Facebook groups/pages. One is a Facebook group called "WWIII Japanese-American Internment," which I started in October 2016. The reference to "World War III" in the title of the group was meant to refer to the possibility that something like the internment could happen in some future (or even current) war. When I moved to Bainbridge Island, I began looking for a Facebook group that was focused on presenting the lessons of the internment's history and its relevance for current debates, but discovered that most of the groups focused on the internment either implicitly or expressly prohibited posts connecting the internment to current political debates. I therefore started the "WWIII Japanese-American Internment" group to provide a place to discuss the lessons of the internment for the modern era. Because of that purpose, the NDAA of 2012 has been a frequent topic of discussion in the group.

7. The other Facebook page is called SB 5176 – Block Indefinite Detention. It is designed to gather support for Washington Senate Bill 5176, which would prohibit Washington officials from cooperating with any federal effort to exercise the detention authority of section 1021 against citizens or lawful permanent residents in Washington. I started it soon after I learned of the bill, in February 2017. I stopped actively posting on the page when the bill was not voted out of committee in this year's regular session, but plan to revive the page for the 2018 regular session.

8. When I began to engage in online speech and discussion about the lessons of the internment for the modern era, I came to know of or interact with several of the leaders of civic groups related to the internment in the Seattle area. One was Tom Ikeda, founding Executive Director of Densho, a Seattle-area nonprofit with the mission to "educate, preserve, collaborate and inspire action for equity." Densho "preserve[s] and make[s] accessible primary source

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materials on the World War II incarceration of Japanese Americans" and present[s] these materials … for their historic value and as a means of exploring issues of democracy, intolerance, wartime hysteria, civil rights and the responsibilities of citizenship in our increasingly global society." Another such person was Mr. Moriwaki, the founder and current board member and spokesperson of the Bainbridge Island Japanese-American Memorial.

9. I became disillusioned with many of the leaders in the movement to preserve and teach the lessons of the internment because they either failed to condemn the indefinite-detention provisions of the NDAA of 2012 or only weakly condemned that law and continued to strongly support the politicians who had enacted it. Those politicians include President Obama, who lobbied for the elimination of an American-citizen exclusion from section 1021 of the NDAA and signed the bill into law and Governor Inslee, who voted for it when he was a member of Congress.

10. I came to believe that the civic leaders who represented the face of the internment's lessons to the public chose to use the internment as a platform to criticize only Republican politicians (now, chiefly President Trump), and that this lack of evenhandedness damaged the credibility of the movement. This was brought home to me through my in-person and online advocacy for SB 5176, when self-identified conservatives routinely responded to my entreaties to support the bill with the (erroneous) critique that I only cared about the issue now that President Trump was in office, and that I (or "the left") had ignored the NDAA when President Obama signed it.

11. Because of this disillusionment, I began to post public criticism of the civic leaders mentioned above online. For example, in December 2016, I posted a "note" (a long form post on Facebook akin to a blog post) in the WWIII Japanese-American Internment Facebook group entitled "Why the Next Trains Will Have Densho Bumper Stickers." In the note, I stated that "Mr. Ikeda, like so many in the community, in my experience, is a public supporter of President Obama" and that I had asked him "how he could proclaim 'let it not happen again' while at the same time publicly supporting a President who has paved the way for it to happen

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again" but that he had not answered. I also stated that "Mr. Ikeda is not alone in his hypocrisy," and criticized him for calling for his supporters to contact the Los Angeles Times to complain about the Times publishing a view on the internment with which Mr. Ikeda disagreed, rather than "fight[ing] bad speech" by "add[ing] our own better speech."

12. I also criticized Mr. Moriwaki, the founder of the Memorial and a figure often featured in news articles about the Memorial and its lessons for modern politics. For example:

a. On February 5, 2017, I posted a "meme" with Mr. Moriwaki's picture as the background image 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." I accompanied the meme with the comment "Clarence Moriwaki, long time president of the Bainbridge Island Japanese American Exclusion Memorial, vocally and enthusiastically supports two politicians who have expressly made it 'legal' for presidents to once again have our military arrest American citizens in America without charge or trial and throw them into military prison camps indefinitely. This is the president of a memorial that has the motto 'Let It Not Happen Again….'"

b. On February 6, 2017, in response to someone else's post about SB 5176 in the WWIII Japanese-American Internment group, I commented "Clarence Moriwaki has also refused to get the word out about this bill on his FB page. It's like he and Tom Ikeda would rather President Trump have the power to use the military to arrest Muslim Americans without charge or trial and throw them into military prisons indefinitely RATHER than support a bill that would overturn the work of their beloved President Obama."

c. On February 7, 2017, I shared a story about the Hedges v. Obama lawsuit (which challenged the NDAA of 2012) to the WWIII Japanese-American Internment group

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with a comment reading, in part, "For those worried about president Trump disappearing Americans without charge or trial….here is a great interview from the liberal man, Chris Hedges, who sued the government to stop this unconstitutional power and he references what happened to our Japanese American neighbors in the 1940s. While Judge Forrest issued an injunction, sadly the appeals court reversed it and the Supreme Court (which got it wrong in every single case concerning the Japanese American internment) refused to hear this lawsuit. This is the power that was signed into law by the politicians that are so vocally celebrated by Clarence Moriwaki, Tome Ikeda, and even George Takei. Never underestimate the power of Power to corrupt even those whose parents were victimized."

d. On February 5, 2017, I created a Facebook page for the purpose of criticizing Mr. Moriwaki and calling for his removal from his role as board member and representative of the Memorial. The Facebook page was initially named "Clarence Moriwaki of Bainbridge Island," but the page name was subsequently changed to "Not Clarence Moriwaki of Bainbridge Island."

e. On February 6, 2017, I explained that 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 the President or board member for our memorial."

f. The page includes general posts about the NDAA of 2012 along with posts critical of President Obama, Governor Inslee, and Mr. Moriwaki. For example, 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…"

g. An example of a post critical of Mr. Moriwaki is a post from February 23, 2017, that

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states in part "Clarence Moriwaki is a frequent spokesman for Bainbridge Island and for our memorial and he considers himself a part time journalist and is frequently in the media representing our community. We think he is a very poor reflection on our community and our values."

13. Due to these posts and other similar online speech, Mr. Moriwaki filed a report with the Bainbridge Island Police Department. The police found probable cause to believe that I intended to harass Mr. Moriwaki using electronic communication repeatedly and at times anonymously and therefore there was probable cause for a cyberstalking charge. The posts described in paragraph 12 were all attached to the police report. A true and correct copy of those screen captures of the posts is attached as **Exhibit A** hereto. Mr. Moriwaki also claimed physical stalking to the police, but the police department eliminated the stalking charge. The police department forwarded the cyberstalking report to the Kitsap County Prosecutor.

14. Mr. Moriwaki also applied for, and received, an ex parte temporary protective order. The temporary protective order requires, among other things, that I remove any public webpages and any Facebook page with Mr. Moriwaki's name. Order in *Moriwaki v. Rynearson*, No. 12-17 (Bainbridge Island Mun. Ct. Mar. 13, 2017) (requiring me to "remove public webpages/Facebook page with Petitioner's name"). A true and correct copy of the temporary protective order is attached as **Exhibit B** hereto. The hearing on a permanent protective order has not yet been held. Because of the temporary protective order, I have de-published the "Not Clarence Moriwaki of Bainbridge Island" Facebook page. I have also made the WWIII Japanese-American Internment group a non-public, closed group.

15. The attorney who represents me in the protective order case communicated on several occasions with a Kitsap County Deputy Prosecutor. In an email exchange in June 2017 regarding the potential for criminal charges, the prosecutor stated he was not going to charge me "at this time," but he was not "formally declining" charges, either. The prosecutor indicated that he was going to "sit on it" with the hope that I will follow the temporary protective order described above. The prosecutor further stated that he would "revisit the charging decision" if he

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got any further referrals about me. A true and correct copy of the email exchange with the prosecutor dated June 15, 2017 is attached as **Exhibit C** hereto. My understanding is that the statute of limitations for cyberstalking is two years.

16. I would like to resume my criticism of Mr. Moriwaki through online speech not barred by the temporary protective order or, if that order is lifted, by re-publishing the "Not Clarence Moriwaki of Bainbridge Island" Facebook page. I also intend to engage in substantially similar criticism of other civic leaders in the future. I sometimes use provocative rhetoric to make my critiques about the lack of evenhandedness in applying the lessons of the internment, for example by analogizing having someone uncritical of the NDAA as the spokesperson of the Japanese-American Exclusion Memorial as being like a neo-Nazi representing a Holocaust memorial. I would use similar rhetoric in the future. However, given that the police found probable cause for cyberstalking based on my past speech, the prosecutor did not decline charges, and the Kitsap Prosecutor's Office has indicated it is keeping an eye out for any complaints from my future speech, I have a genuine fear that I am likely to be prosecuted for any online speech that the target of my criticism finds embarrassing, harassing, or unpleasant.

17. Given Mr. Moriwaki's filing of a police report based on my past speech, and the interconnectedness of the leaders of the various Seattle-area organizations related to the internment, I also think it is reasonably likely that anything I say critical of any leader in that movement is likely to be reported to the police or a prosecutor, resulting in a "referral" that would cause the Kitsap Prosecutor's Office to charge me. For those reasons, I have censored what I say online since I learned of the police report. In particular, I have made no online statements about Mr. Moriwaki or Mr. Ikeda, and have stopped making posts in the WWIII Japanese-American Internment Facebook group altogether.

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

Dated: July 11, 2017

DocuSigned by:
Richard Lee Rynearson III
FB9D364C8C2645B...
Richard Lee Rynearson, III

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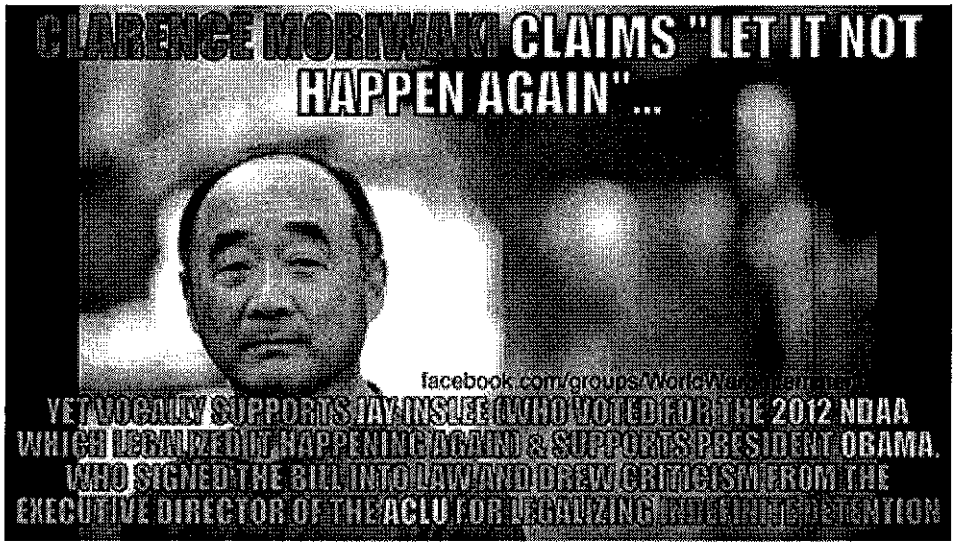
EXHIBIT A

Richard Lee
February 5 at 6:56pm

Clarence Moriwaki, long time president of the Bainbridge Island Japanese American Exclusion Memorial, vocally and enthusiastically supports two politicians who have expressly made it "legal" for presidents to once again have our military arrest American citizens in America without charge or trial and throw them into military prison camps indefinitely. This is the president of a memorial that has the motto "Let It Not Happen Again..."



Like

Share

11
Comments

Lara O'Neal Jones I don't believe that targeting a particular person like this is helpful. Please try and focus on positive action.
Like · February 7 at 8:26am

Richard Lee Lara, the conversation I want to have is about how our memorial's president not only supports politicians who make what FDR did to Japanese Americans legal to do again, but also how our memorial's president demonizes and shuns those who are different.

How do I have that conversation about a public person in our community who censors and bans those with differing views in personal discussion (and who also left this group that I invited him into after making only one post), while also alleviating your concerns?

Jason Casella shared Tenth Amendment Center's post.
January 22 at 9:17am

Tenth Amendment Center Like Page
January 21 at 4:41pm
"A bill introduced in the Washington state Senate would prohibit the state from assisting the federal government with indefinite detention without due process u...

See More

Washington Bill Would Help Block Indefinite Detention in the State

OLYMPIA, Wash. (Jan. 20, 2017) – A bill introduced in the Washington state Senate would prohibit the state from assisting the federal government with…
BLOG.TENTHAMENDMENTCENTER.COM

Like

Share

Seen by 3

22
Comments
View 1 more comment

Jonathan Songer Wouldn't it be nice if Washington state honored the Second Amendment too?
Like · 1 · January 28 at 2:11pm

Richard Lee Clarence Moriwaki has also refused to get the word out about this bill on his FB page. It's like he and Tom Ikeda would rather President Trump have the power to use the military to arrest Muslim Americans without charge or trial and throw

them into military prisons indefinitely RATHER than support a bill that would overturn the work of their beloved President Obama.
Like · February 6 at 7:30am

Richard Lee shared a link.
February 7 at 2:38pm

For those worried about president Trump disappearing Americans without charge or trial....here is a great interview from the liberal man, Chris Hedges, who sued the government to stop this unconstitutional power and he references what happened to our Japanese American neighbors in the 1940s. While Judge Forrest issued an injunction, sadly the appeals court reversed it and the Supreme Court (which got it wrong in every single case concerning the Japanese American internment) refused to hear this lawsuit.

This is the power that was signed into law by the politicians that are so vocally celebrated by Clarence Moriwaki, Tom Ikeda, and even George Takei.

Never underestimate the power of Power to corrupt even those whose parents were victimized. How easily

Chris Hedges NDAA Lawsuit Update

#ChrisHedges#Hedges#science#technology#discover#documentdiscover#Physicists#debate#philosophy#Atheist#
YOUTUBE.COM

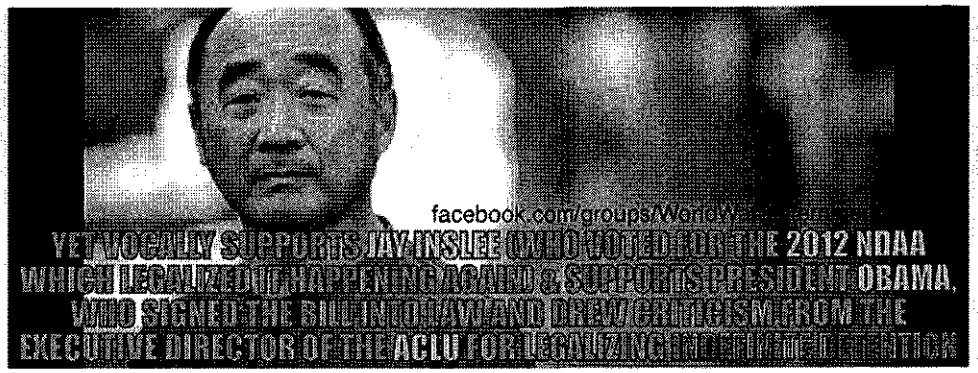
Like

Share

9

From "Clarence Moriwaki of Bainbridge Island" FB Page

Clarence Moriwaki of Bainbridge Island
@BIClarenceMoriwaki



Like Follow Share ···

Send Message

Posts

Clarence Moriwaki of Bainbridge Island
February 6 at 8:28am

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.

While the goal of this page is to discuss serious issues of public interest, and to be challenging and honest, we also endeavor to ensure any discussion is civil. None of us are perfect and the rebuke of a friend is to be trusted over the kisses of a... See More

Chris Hedges: NDAA Lawsuit Update

Follow Sierra @ http://www.twitter.com/sierra_adamson Sierra...

YOUTUBE.COM

Learn More

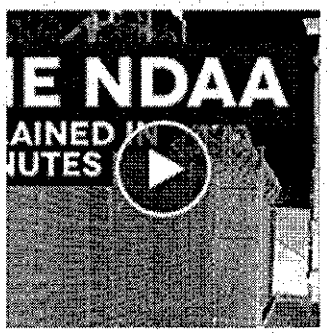
Like Comment Share

1 Chronological

View 1 more comment

Clarence Moriwaki of Bainbridge Island For those unfamiliar with the law that Clarence's beloved politicians passed and signed without so much as a cross word from Clarence who remained their loyal supporter...

https://youtu.be/RNcbsB1Pizg



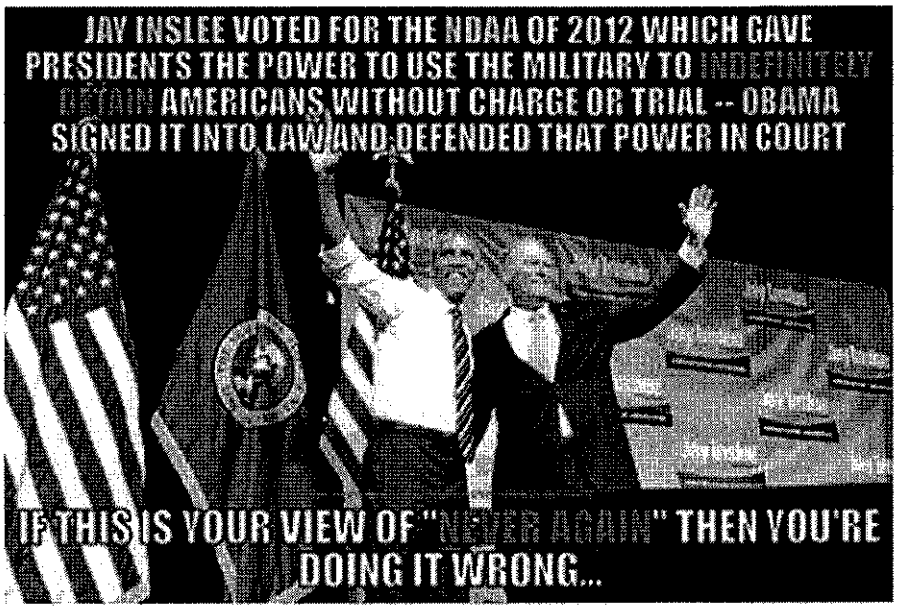
The NDAA Explained in 3 Minutes - YouTube

YOUTUBE.COM

Like · Reply · 4 hrs

Clarence Moriwaki of Bainbridge Island
21 hrs ·

Clarence Moriwaki worked for one of these politicians and vocally supports both. Is that compatible with "Let It Not Happen Again?" We don't think so.



Like Comment Share

7

1 share

Write a comment...

See All

Posts

Clarence Moriwaki of Bainbridge Island added a new photo.
21 hrs ·

Clarence Moriwaki of Bainbridge Island
21 hrs ·

Don't know Clarence Moriwaki, the President of the Bainbridge Island Japanese American Exclusion Memorial? He's a public figure who has spent his time a) in public office, b) running for public office, and c) working as a press secretary or in Public Relations as a "media strategist" for politicians in public office.

Clarence Moriwaki is a frequent spokesman for Bainbridge Island and for our memorial and he considers himself a part time journalist and is frequently in the media representing our community.

We think he is a very poor reflection on our community and our values.

Clarence Moriwaki | LinkedIn

View Clarence Moriwaki's professional profile on LinkedIn. LinkedIn is the world's largest business network, helping professionals like Clarence Moriwaki discover inside connections to recommended job…

LINKEDIN.COM

Learn More

Like Comment Share

3

Write a comment...

EXHIBIT B

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

CLARENCE MORIWAKI
Petitioner (Person Protected), DOB
vs.
RICK RYNEARSON aka [redacted]
Respondent (Person Restrained). DOB
RICHARD LEE

No. 17-17

Temporary Protection Order and Notice of Hearing – Stalking
(TMOSTKH)
(Clerk's action required) TN
Next Hearing Date and Time:
3/27 ~~10~~ 17 1 PM
At: BAINBRIDGE ISLAND MUNICIPAL COURT

Respondent's Distinguishing Features:

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

Respondent Identifiers

Sex	Race	Hair
M	WHITE	BRN
Height	Weight	Eyes
5'8"	230	BRN

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 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.

The court has jurisdiction over the parties and the subject matter. The respondent will be served notice of his or her opportunity to be heard at the scheduled hearing.

No contact provisions begin on the next page.

the end of the hearing, noted above.

The terms of this order shall be effective until:

Based upon the petition, testimony, and case record, the court finds: 1) that the respondent committed stalking conduct against the protected person/s; 2) that there is good cause to grant each remedy, regardless of the lack of prior service or notice upon the respondent, because the harm which each remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief. **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.

☒ **Exclude from places**: respondent is ***excluded*** from the protected person/s' ☒ residence ☒ workplace ☐ school ☐ day care ☒ PUBLIC EVENTS WHERE PETITIONER IS PRESENT

☒ **Stay Away**: respondent is ***prohibited*** from knowingly coming within or knowingly remaining within 100 FT (distance) of the protected person/s' ☒ residence ☒ workplace ☐ school ☐ day care.

☒ other: REMOVE PUBLIC WEBPAGES/FACEBOOK PAGE WITH PETITIONER'S NAME

The address is confidential ☒ The petitioner waives confidentiality of the protected person's address which is:

☐ **Surrender of Weapons**

Respondent shall immediately surrender any firearms and other dangerous weapons to the person or agency named in the Order to Surrender Weapons (Issued without Notice) signed by the court on this date, under this cause number.

- The respondent is directed to appear and show cause why the court should not enter an order for protection effective for one year or more and order the relief requested by the petitioner or other relief the court deems proper, which may include payment of costs.
- **Failure to appear at the hearing or to otherwise respond will result in the court issuing an order for protection – stalking pursuant to RCW Title 7.92, effective for a minimum of one year from the date of the hearing. The next hearing date and time is shown below the caption on page one.**
- The respondent may petition the court to modify or terminate the order if the respondent does not receive actual prior notice of the hearing and if the respondent alleges a meritorious defense to the order or that the order or its remedy is not authorized by this chapter.

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.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

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 IS. ☐ County Sheriff's Office ☒ Police Department **where petitioner lives** which shall enter it in the Washington Crime Information Center.

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.

This order is in effect until the next hearing date and time shown below the caption on page one.

Dated 3/13/17 at 2:35 a.m./(p.m.) _____ **Judge**

Presented by:

Clarence Moriwaki 3/13/2017
Petitioner/Petitioner's Lawyer Date

CLARENCE MORIWAKI
Please print WSBA NO.

I acknowledge receipt of a copy of this Order:

_____
Respondent Date

_____
Please Print

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

EXHIBIT C

Alexander Savojni

From: Alexander Takos <atakos@co.kitsap.wa.us>
Sent: Thursday, June 15, 2017 10:43 AM
To: Alexander Savojni
Subject: RE: Richard Lee Rynearson - Case Report: I17-000145

Alex,

I am not formally declining it and I am not going to charge it at this time. I am going to sit on it with the hope that Mr. Rynearson abides by the NCO that's in place. If I get any future referrals, I will revisit the charging decision.

That is all the information I can provide.

Thanks,

-Alex

Alexander C. Takos
Deputy Prosecuting Attorney
Kitsap County Prosecuting Attorney's Office
atakos@co.kitsap.wa.us
Phone: (360) 337-5680
Fax: (360) 337-4949

From: Alexander Savojni [mailto:alexander@rhodeslegalgroup.com]
Sent: Thursday, June 15, 2017 10:10 AM
To: Alexander Takos <atakos@co.kitsap.wa.us>
Subject: RE: Richard Lee Rynearson - Case Report: I17-000145

Alex,

Sorry to be a pest but my other Bainbridge Island case is circling back around next week and I know the Judge will want a status update on whether charges are going to be filed or not. Do you happen to have an idea when a decision will be made?

Thanks.

Alexander Savojni
Attorney at Law
Rhodes Legal Group, PLLC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, Defendants.	NO. 3:17-cv-5531 DECLARATION OF EUGENE VOLOKH IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 1746(2), Eugene Volokh hereby declares as follows:

1. I am over the age of eighteen and competent to testify.

2. I am counsel of record for Richard Rynearson in the above-captioned action.

3. To the best of my knowledge and belief, all materials attached to this declaration represent true and correct copies from their sources in court records.

4. Attached as Exhibit A is a true and correct copy of the Findings of Fact and Conclusions of Law entered on July 17, 2017, by the Bainbridge Island Municipal Court in *Moriwaki v. Rynearson*, No. 12-17.

5. Attached as Exhibit B is a true and correct copy of the Order of Protection issued on July 17, 2017, by the Bainbridge Island Municipal Court in *Moriwaki v. Rynearson*, No. 12-

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Seattle, WA 98134
Tel (206) 529-4827
Fax (206) 260-3966

17.

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

Dated: October 5, 2018

s/ Eugene Volokh
Eugene Volokh

focal PLLC
900 1st Avenue S., Suite 201
Seattle, WA 98134
Tel (206) 529-4827
Fax (206) 260-3966

EXHIBIT A

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 individual 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

EXHIBIT B

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 [redacted] 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: [redacted], 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:

Signature of Respondent/ Lawyer WSBA No. Print Name: Richard L. Rynearson III

Signature of Petitioner/ Lawyer WSBA No. Print Name: CLARENCE MORIWAKI

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

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD LEE RYNEARSON, III,

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

Case No. 3:17-cv-05531-RBL

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* American Civil Liberties Union of Washington and Electronic Frontier Foundation state that they do not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of *amici*.

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I. INTEREST OF *AMICI*[1]

The **Electronic Frontier Foundation** ("EFF") is a San Francisco-based, non-profit, member-supported digital rights organization. Focusing on the intersection of civil liberties and technology, EFF actively encourages industry, government, and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF has over 37,000 dues-paying members nationwide. EFF publishes a comprehensive archive of digital civil liberties information at www.eff.org. EFF serves as counsel or *amicus curiae* in many cases addressing free speech online. *See e.g., City of Vancouver v. Edwards*, No. 18998V (Wash. Dist. Ct. for Clark County 2012); *Backpage.com v. McKenna*, 2:12-cv-00954-RSM (W.D. Wa. 2012); *United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011); *Savage v. Council of American-Islamic Relations, Inc.*, No. 07-cv-06076-SI (N.D. Cal. 2007).

American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization, with over 80,000 members and supporters, that is dedicated to the preservation of civil liberties including the right to free speech. The ACLU-WA strongly opposes laws and government action that infringe on the free exchange of ideas or that unconstitutionally restrict protected expression. It has advocated for free speech and the First Amendment directly, and as *amicus curiae*, at all levels of the state and federal court systems. *See, e.g., Berger v. City of Seattle*, 569 F.3d 1029, 1034 (9th Cir. 2009).

[1] No party or party's counsel participated in the writing of the brief in whole or in part. No party, party's counsel or other person contributed money to fund the preparation or submission of the brief.

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II. INTRODUCTION

Amici curiae EFF and ACLU-WA support Plaintiff's motion for a preliminary injunction to enjoin enforcement of RCW 9.61.260(1)(b) because the First Amendment clearly and fully applies to protect the Internet speech and other electronic communications impacted by this cyberstalking statute.

Plaintiff properly attacks subsection (1)(b) of RCW 9.61.260, as unconstitutionally vague and overbroad, lacking the precision the First Amendment requires when government regulates speech on the Internet. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

RCW 9.61.260(1)(b) criminalizes everyday uses of electronic communications such as a parents' posting of embarrassing photographs of their children on Facebook, or tweeted photos of ugly shirts and bad haircuts by a classmate before a 25-year re-union.

Plaintiff is correct. Subsection (1)(b) of the cyberstalking statute is unconstitutional.

III. ARGUMENT

A. The statute's restraint on Internet speech violates the First Amendment.

Under the overbreadth doctrine, a statute violates the First Amendment on its face when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The First Amendment's facial overbreadth doctrine applies fully to Internet speech and other electronic communications. *See, e.g.*, *id.* (striking down a ban on creating and disseminating video depictions of animal cruelty); *Reno*, 521 U.S. 844 (striking down a ban on indecency on the Internet); *Doe v. Marion County*, 705 F.3d 694 (7th Cir. 2013) (striking down a ban on Internet social media use by registered sex offenders); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014) (striking down a ban on harassment on the Internet).

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Here, a substantial amount of constitutionally protected speech is swept up in the statute's facially overbroad prohibitions.

1. *The First Amendment protects "making an electronic communication."*

The Washington cyberstalking statute is subject to First Amendment scrutiny because the core activity that it restrains is "mak[ing] an electronic communication" to a targeted person or any "third party." RCW 9.61.260(1). "Electronic communication" is broadly defined to cover any digital transmission of information, including "internet-based communications." RCW 9.61.260(5). Thus, the statute applies to any conceivable form of modern electronic communications, including websites, blogs, social media, emails, instant messages, etc. Also, it applies both to one-on-one communications (such as email), communications to a closed list of people (such as Facebook), and communications available to everyone (such as a website).

It is well-settled that restraints on Internet speech may violate the First Amendment. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (preliminarily enjoining the Child Online Protection Act); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016) (striking down a North Carolina cyberbullying statute). *See also, e.g.*, *Reno*, 521 U.S. 844; *Doe*, 705 F.3d 694; *Marquan M.*, 19 N.E.3d 480.

2. *The First Amendment protects online expression with intent to "embarrass."*

The core activity restrained by the Washington cyberstalking statute—making an electronic communication—enjoys the fullest First Amendment protection, even if such a communication is sent with "intent to . . . embarrass any other person." RCW 9.61.260(1). A speaker's intent to embarrass someone else does not diminish the First Amendment's protection of electronic communication. Indeed, the First Amendment protects the right to express messages that are intended to cause embarrassment, insult, and outrage. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, and even

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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, 55 (1988) (emphasizing the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S 1, 4 (1949).

Nothing in First Amendment case law distinguishes First Amendment protection on the basis of the mode of communication, i.e., online. Such protection exists to cover the nature of communication. Hence, the First Amendment should protect online speech intended to cause "embarrassment" to the same extent as embarrassing speech distributed via broadcast or the press, particularly because embarrassment caused by online speech has become quite common. Examples of online and electronic speech that the statute criminalizes blatantly illustrate why it violates the First Amendment because it is facially overbroad:

- A newspaper website editorial argues that an elected public official should be removed from office because of drunken behavior at a Little League game.
- A government reform activist publishes on YouTube a video recording of a government employee stuffing her purse with office pens, and texts the message to her boss, to embarrass the wrongdoer and the boss, and thus encourage reform.

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- A losing election challenger posts on his website a list of the incumbent's past domestic violence arrests.
- A mother posts on Facebook embarrassing anecdotes and photos each year about her children, including stories the children might not want shared to commemorate the children's birthdays.
- A college friend publishes embarrassing photos of his former classmates—the out-of-style hair and clothing!
- A fellow law partner embarrasses a colleague by posting an excessively laudatory message on the firm's web-site about a big "win."

Clearly, the "embarrass" provision of the statute sweeps too broadly, encompassing protected speech within its net and this provision should be stricken. *Reno*, 521 U.S. 844

3. *The statute's other prohibitions are overbroad, online and off.*

The statute also bans Internet communications sent with intent to "harass, intimidate, [or] torment" someone else. RCW 9.61.260(1). This speech restraint, also facially overbroad, violates the First Amendment.

Courts have struck down online harassment statutes with similar words as facially unconstitutional. *Bishop*, 787 S.E.2d at 821 (striking down a ban on posting a minor's private sexual information on the Internet with intent "to intimidate or torment"); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014) (striking down a ban on digital posts with "intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person").

Likewise, phone harassment statutes that contain similar words have been stricken as facially overbroad. *State v. Brobst*, 857 A.2d 1253 (N.H. 2004) (striking down a ban on phone

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calls with intent to "annoy or alarm"). *See also United States v. Popa*, 187 F.3d 672, 678 (D.C. Cir. 1999) (holding that a ban on anonymous phone calls with intent to "annoy, abuse, threaten, or harass" was unconstitutional as applied to a person who repeatedly called a government officer to complain about the government).

Speech bans containing language similar to that in RCW 9.61.260(1)(b) simply do not pass constitutional muster in any circumstance. For instance, in *KKK v. City of Erie*, 99 F. Supp. 2d 583, 591-92 (W.D. Pa. 2000), the court struck down as facially overbroad a ban on wearing a mask with intent "to intimidate, threaten, abuse or harass." The court reasoned that there were too many ways to apply this ban to constitutionally protected messages:

> A statement, for example, that the white race is supreme and will rise again to dominate all other races may seem intimidating, or even threatening, particularly when advocated by a large group of demonstrators showing solidarity. Advocacy for a return to segregation may likewise be intimidating, particularly if accompanied by rough language. A diatribe against a local official who is an ethnic minority, or a homosexual, may be considered "abuse."

Id.

4. *The statute criminalizes anonymous and repeated speech, which is protected by the First Amendment.*

The statute bans Internet communications, with the requisite state-of-mind, if they are sent "anonymously or repeatedly." RCW 9.61.260(1)(b). But the First Amendment protects anonymous and repeated communications.[2]

[2] Plaintiff does not at this time challenge the statute's ban on "lewd, lascivious, indecent, or obscene" words or images. RCW 9.61.260(1)(a). However, *amici* note that the First Amendment protects all but "obscene" communication. *Sable Commc'ns v.* FCC, 492 U.S. 115, 126 (1989). Thus, the prohibition involving "lewd, lascivious, [or] indecent" communication in the statute may also be constitutionally defective. The statute's ban on threats, RCW 9.61.260(1)(c), would violate the First Amendment as applied to speech that is not a "true threat." At a minimum, the speaker of an unprotected true threat must have a subjective intent "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group

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Online communications protected by the First Amendment are no less protected when posted anonymously. The statute makes it a crime to make a single electronic communication, if one does so "anonymously," and with intent to embarrass (or harass, intimidate, or torment) another person. RCW 9.61.260(1)(b).

Anonymous speech[3] through electronic communications is common across the Internet and it allows for valuable, protected discussions to occur. Internet anonymity is critical for activists and other who could face harm and intimidation for publicly criticizing their powerful opponents.

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

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

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of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). *See also Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (interpreting a federal threat statute to require a subjective "purpose of issuing a threat" or "knowledge that the communication will be viewed as a threat"). *See, e.g.*, *Watts v. United States*, 394 U.S. 705 (1969) (protecting the statement, at a protest, that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.").

[3] Anonymity can be created through use of pseudonyms. Myriad communication platforms, like Twitter, Tumblr, and Reddit, invite speakers to use pseudonyms to participate in public forums and private conversations. Email and messaging providers also typically allow speakers to create accounts and send electronic communications using pseudonyms.

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

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

The statute also criminalizes electronic communication made "repeatedly" and with intent to embarrass (or harass, intimidate, or torment). RCW 9.61.260(1)(b). But speech does not lose its First Amendment protection, online or offline, merely because of its repetition. *See, e.g.*, *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015) (in a case brought by a group that regularly protested outside of churches, striking down a ban on such protests).

There is no compelling state interest in banning repeated electronic communications, which are commonplace in an electronic environment, such as duplicate e-mail messages. Moreover, the recipients of unwanted messages typically have simple tools at their disposal to block, delete, or ignore repeated communications that are unwanted, without ever viewing the content of the communication itself.

5. *The statute is overbroad because it lacks any requirement of harm.*

The statute's facial overbreadth is aggravated by the absence of the element of harm to the subject of the speech or to anyone else.

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When a law burdens speech, government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these arms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality). Without a demonstration of harm, restraint on speech is not narrowly tailored. *See United States v. Alvarez*, 567 U.S. 709, 732-37 (2012) (Breyer, J., concurring in the judgment) (distinguishing the unconstitutional Stolen Valor Act, which did not require proof of actual or likely harm, from constitutional limits on false speech, which do).

Here, the forbidden electronic communication need not cause any actual harm, or even be seen by the targeted person. Nor does the statute require any proof of any plausible possibility that the electronic communication might have caused harm to a reasonable person. Because there are myriad applications of the statute where "the recited harms" are not "real," *Turner*, 512 U.S. at 664, the statute is facially overbroad.[4]

B. Portions of the statute also violate the due process clause because they are vague.

A criminal statute that is vague violates the Due Process Clause of the Fourteenth Amendment. The vagueness doctrine applies with "particular force" to laws that restrain speech. *Hynes v. Borough of Oradell*, 425 U.S. 610, 620 (1976). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See*

[4] A limiting construction cannot save the statute. At its core, the statute prohibits what the First Amendment protects: Internet communication that is intended to embarrass, if sent in a manner that is anonymous, repeated, or indecent. *See Reno*, 521 U.S. at 884 (limiting constructions are allowed only if the statute is "readily susceptible" to such construction, and courts cannot "rewrite" the statute).

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also City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (criminal statutes must "establish minimal guidelines to govern law enforcement").

1. *The term "repeated" is vague.*

The statutory term "repeated," RCW 9.61.260(1)(b), is vague as applied to online communications.[5] Because online communications, such as messaging and social media interactions, tend to resemble real-time oral conversations rather than time-delayed written correspondence, it is unclear when an offending communication will be considered "repeated." Consider three common online scenarios. First, some electronic communicators may send multiple short transmissions in quick succession (such as "hello" followed by "how are you"). Second, some electronic communicators correspond via multiple transmissions on both sides in quick succession (such as "hello", "hello yourself", "how are you", and "ok"). Third, a sender might transmit a message to one person, and then quickly forward it to a second person. It is possible or any of the foregoing to be considered "repeated" communications due to the imprecision of the meaning "repeated," making the communicators vulnerable to the prosecution under RCW 9.61.260(1)(b).

2. *The phrase "harass, intimidate, torment, or embarrass" is vague.*

The terms "harass, intimidate, torment, or embarrass," RCW 9.61.260(1)(b), are also unconstitutionally vague, particularly in the context of Internet speech. A person who communicates on social media and other Internet channels often does not know who will receive

[5] The word "repeatedly" is also unconstitutionally vague in the context of offline harassment statutes. *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994).

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their messages, and whether the recipients are susceptible to embarrassment, intimidation, torment, or harassment.

For each of these statutory terms, the application of the statute will turn on the unpredictable effect of words on people with varying sensibilities. In *KKK*, the court on vagueness grounds struck down a ban on wearing a mask with intent to intimidate, threaten, abuse, or harass. The court explained: "To some extent, the speaker's liability is potentially defined by the reaction or sensibilities of the listener," and "what is 'intimidating or threatening' to one person may not be to another." 99 F. Supp. 2d at 592.

Likewise, in *State v. Bryan*, 910 P.2d 212 (Kan. 1996), the court struck down as unconstitutionally vague a statute against "following" where doing so "seriously alarms, annoys or harasses." The court reasoned: "In the absence of an objective standard, the terms 'annoys,' 'alarms,' and harasses' subject the defendant to the particular sensibilities of the individual victim. Different persons have different sensibilities." *Id.* at 220. *See also Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking down a ban on "annoying" loitering); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 992 P.2d 496 (2000) (striking down a ban on phone calls lacking a "legitimate" purpose).

The nature of the Internet, and social media postings in particular, exacerbate this forbidden unpredictability. In *KKK* and *Bryan*, the speakers could not predict the impact of their speech on the finite and knowable set of people that they physically encountered. On the Internet, it is many times harder for speakers to predict the impact of their speech on the infinite and unknowable set of people that might come across their speech in cyberspace.

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C. Conduct criminalized by phone harassment statutes is qualitatively different from Internet-related speech.

Internet communications are materially different than phone communications. Thus, while Washington courts have upheld telephone harassment and threat statutes against overbreadth and vagueness challenges, the Washington cyberstalking statute addresses fundamentally different conduct. *See State v. Alphonse*, 147 Wn. App. 891, 197 P.3d 1211 (2008); *State v. Alexander*, 888 P.2d 175 (1995); *State v. Dyson*, 74 Wn.App. 237, 872 P.2d 1115 (Ct. App. 1994); *City of Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989). These courts relied on distinctively invasive features of phone calls that are not shared by Internet communications. *See Alexander*, 888 P.2d at 180 ("The gravamen of the offense [of telephone harassment] is the thrusting of an offensive and unwanted communication upon one who is unable to ignore it."); *id.* at 179 ("[A] ringing telephone is an imperative which must be obeyed with a prompt answer."); *Dyson*, 872 P.2d at 1120 ("[T]he telephone . . . presents to some people a unique instrument through which to harass and abuse others."). Moreover, "the recipient of a telephone call does not know who is calling, and once the telephone has been answered, the victim is at the mercy of the caller until the call can be terminated by hanging up." *Alexander*, 888 P.2 at 179. Finally, "telephone communication occurs in a nonpublic forum." *Id. Accord Huff*, 767 P.2d 574.

Unlike a phone call that is directed to one person, a Facebook update, a Tweet, and a blog post are directed to many people. Where a phone call "occurs in a nonpublic forum," *Alexander*, 888 P.2 at 179, the "vast democratic forums of the Internet" are today "the most important places (in a spatial sense) for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). *Cf. Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (distinguishing a protest directed at a specific person's home, which is not protected, from a protest directed at all of the homes in a

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neighborhood, which is protected). Moreover, while a phone call can "thrust[] an offensive and unwanted communication upon one who is unable to ignore it," *Alexander*, 888 P.2 at 180, people have tools of choice to avoid unwanted electronic communications.

Even one-to-one digital communications, like many emails and text messages, lack key features that save the telephone harassment statutes. Recipients of electronic communications, unlike recipients of phone calls, can more easily avoid unwanted messages. No ring requires an immediate response; email recipients can delay review at their discretion. There is no risk that a recipient will accidentally speak to a person they are avoiding; email recipients can decide which messages to delete without reading their contents. *Cf. Reno*, 521 U.S. at 869 ("the Internet is not as 'invasive' as radio or television," because it does not "'invade' an individual's home or appear on one's computer screen unbidden").

CONCLUSION

For the reasons above, *amici* Electronic Frontier Foundation and American Civil Liberties Foundation of Washington respectfully request that this Court grant Plaintiff's motion for preliminary injunction, and strike down RCW 9.61.260(1)(b) in Washington cyberstalking statute as facially overbroad in violation of the First Amendment and vague in violation of the Fourteenth Amendment.

Dated this 12th day of October, 2018.

Respectfully Submitted,

By: *s/Nancy L. Talner*

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The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III,

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Kitsap County Prosecuting Attorney,

Defendants.

NO. 3:17-cv-05531-RBL

DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: November 30, 2018

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Constitutional Provisions

I. INTRODUCTION

This Court should reject Rynearson's attack on Washington's cyberstalking law, Wash. Rev. Code § 9.61.260(1)(b), which protects against stalkers using the Internet and other electronic means to terrorize and harm their intended victims.

As a threshold issue, this matter is not justiciable because of Rynearson's lack of standing. Rynearson cannot satisfy the constitutional requirement of having a personal, credible injury or threat of injury because the type of speech he wishes to engage in does not fall within the scope of Wash. Rev. Code § 9.61.260. Indeed, a Washington state court has already held Rynearson's speech to be protected under the First Amendment. Rynearson also cannot satisfy the constitutional requirements of causation and redressability when he faces no threat of prosecution for his protected speech from either of the named Defendants and any judgment in this case would provide ineffectual relief from enforcement of the statute statewide. Because Rynearson cannot establish an actual, genuine case or controversy instead of one based on hypotheticals or conjecture, his claims cannot proceed.

Even on the merits of Rynearson's motion, Rynearson has not met his heavy burden to obtain injunctive relief. Wash. Rev. Code § 9.61.260(1)(b) satisfies constitutional scrutiny. While Rynearson asserts the statute criminalizes protected speech, he ignores the wide swath of plainly legitimate applications to stalking conduct that are supported by the statute's plain meaning and Washington state case law. Even if Rynearson could show a likelihood of success on the merits, he has failed to prove the other elements required to obtain injunctive relief. In particular, Rynearson cannot demonstrate a likelihood of irreparable harm absent an injunction when his speech is constitutionally protected and outside the scope of cyberstalking law. He thus faces no risk that either Attorney General Ferguson or Kitsap County Prosecutor Robinson would seek to prosecute him or anyone else for engaging in the type of speech for which he seeks relief. Rynearson also cannot show that the balance of equities are in his favor or that an injunction against the cyberstalking law is in the public interest.

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II. FACTS RELEVANT TO MOTION

Clarence Moriwaki and Richard Lee Rynearson, III both reside on Bainbridge Island, Washington and have homes that are about 300 feet apart. Moriwaki is the founder of Bainbridge Island Japanese-American Exclusion Memorial, an organization dedicated to raising awareness about the internment of Japanese-Americans in Washington State during World War II. Rynearson regularly posts online about civil liberties issues. At issue in this case are Rynearson's repeated criticisms that Moriwaki failed to vocally condemn a provision in the National Defense Authorization Act of 2012 that Rynearson believed would permit indefinite detention of American citizens. The criticism came in the form of Facebook posts and messages to and about Moriwaki on Moriwaki's personal Facebook page; text messages to Moriwaki's cell phone; Rynearson's creation of a public Facebook page calling into question Moriwaki's fitness as President and board member of the Memorial; and public posting of a "meme" about Moriwaki on that Facebook page. *See* Dkt. 45 (Rynearson Decl.) ¶¶ 2-12; Mot. at 2:3-3:14; *see also* Dkt. 46 (Volokh Decl.) at 5-10, (Ex. A, Bainbridge Island Municipal Court Findings of Fact).

Based on allegations that Rynearson had stalked, cyberstalked, and harassed Moriwaki, a state municipal court entered a temporary stalking protection order against Rynearson in July 2017. Rynearson appealed the protection order. *See* Dkt. 46, Ex. B. In January 2018, the Washington State Kitsap County Superior Court vacated the protection order on grounds that Rynearson's speech was protected by the First Amendment. *Moriwaki v Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *1 (Wash. Super. Jan. 10, 2018). Applying Supreme Court precedent to Wash. Rev. Code § 9.61.260, the superior court found that Rynearson's online speech, "while causing emotional distress to Moriwaki, cannot be restricted solely because it is upsetting or arouses contempt." *Id*. at *10-11. The superior court therefore vacated the protection order because Rynearson's communications and conduct fell under the umbrella of constitutionally protected speech. *Id*. at *12.

While these proceedings were pending in state court, Rynearson filed this lawsuit seeking a declaratory judgment that Washington's cyberstalking statute, Wash. Rev. Code § 9.61.260(1)(b) is facially invalid under the First Amendment, and an injunction prohibiting the named Defendants or any one "acting for, with or in active concert with" Defendants from enforcing Section .260(1)(b). Dkt. 1, at 7. This Court dismissed Rynearson's complaint based on *Younger* abstention. The Ninth Circuit reversed the dismissal and, following remand, Rynearson filed this motion for preliminary injunction again seeking to enjoin Attorney General Ferguson and Kitsap County Prosecutor Robinson from enforcing Wash. Rev. Code § 9.61.260(1)(b) to prohibit his "criticism of Mr. Moriwaki through online speech" and "substantially similar criticism of other civic leaders in the future" (Dkt. 45 ¶ 16), and so that "other Washingtonians can [similarly] speak their minds without fear of criminal penalty" (Mot. at 15:14-15).

III. ARGUMENT

A. Rynearson Lacks Standing to Challenge Washington's Cyberstalking Statute

As a threshold issue, this case is not justiciable because Rynearson lacks standing to challenge the constitutionality of Washington's cyberstalking statute. Article III of the federal Constitution limits the judicial power of federal courts to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Standing to bring a claim is a "controlling element[ ] in the definition of a case or controversy." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007) (alteration in original). "At an 'irreducible constitutional minimum,' Article III standing requires proof (1) that the plaintiff suffered an injury in fact that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;' (2) of a causal connection between that injury and the complained-of conduct; and (3) that a favorable decision will likely redress the alleged injury." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

As part of this inquiry, the plaintiff must establish a "personal stake in the outcome" so as to assure "concrete adverseness" in the controversy. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

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While the Supreme Court has adopted a "relaxed approach" to standing when First Amendment overbreadth is asserted, it has done so only upon a showing that the plaintiff is "immediately in danger of sustaining[ ] a direct injury as a result of an [executive or legislative] action." *Alaska Right to Life*, 504 F.3d at 851 (alterations in original) (quoting *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972)). In other words, even when the plaintiff challenges the constitutionality of a statute because it may "unconstitutionally chill" the First Amendment rights of others, the plaintiff must still satisfy the "rigid constitutional requirement" of having a personal, credible injury or threat of injury from the challenged statute. *Lopez v. Gandaele*, 630 F.3d 775, 785 (9th Cir. 2010). This requires proof not only that the plaintiff has "an actual and well-founded fear that the law will be enforced against [him]," but also that the "plaintiff's intended speech arguably falls within the statute's reach." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (alteration in original). If, however, the enforcing jurisdiction has already interpreted the challenged law as not applying to the plaintiff, then the plaintiff's claims of future harm "lack credibility" and dismissal is required. *Lopez*, 630 F.3d at 788.

Here, Rynearson cannot establish any "case" or "controversy" because the type of speech that he wishes to engage in does not fall within the scope of Washington's cyberstalking statute. First, Rynearson cannot show an "actual and well-grounded fear" that he risks criminal prosecution for violating the cyberstalking law. As a preliminary matter, Attorney General Ferguson does not possess inherent criminal law enforcement authority, Wash. Const. art. III, § 21, but may, pursuant to state law, only investigate or prosecute criminal matters if specifically requested to do so by the Governor or a local county prosecuting attorney. *See* Wash. Rev. Code §§ 43.10.090, .232. But Rynearson does not allege, nor could he, that Attorney General Ferguson has ever been asked by the Governor or a county prosecutor to "communicate a specific warning" or "threaten to initiate proceedings" against Rynearson—or anyone else—to enforce the

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cyberstalking statute.[1] *Cf. S. Pac. Co. v. Conway*, 115 F.2d 746, 750 (9th Cir. 1940) (affirming dismissal of declaratory judgment action when no proof that state attorney general had ever threatened or taken any action to enforce statute). Further, while Rynearson points to the probable cause police report and resulting email from the Kitsap County Prosecuting Attorney's Office as a threat of prosecution (*see* Mot. at 14;Dkt. 45, Ex. C), a Washington superior court rejected the notion that the communications and conduct at issue in those reports fell under the scope of the cyberstalking statute. *Moriwawki*, 2018 WL 733811, at *10-12. If Rynearson cannot be subject to a protective order for cyberstalking because he was engaging in protected speech, then he certainly cannot be criminally prosecuted for the same communications. Thus, Rynearson faces no reasonable threat of prosecution from Kitsap County Prosecutor Robinson, as he claims. *See* Mot. at 14-15.

Second, Rynearson cannot establish that his proposed speech falls within the reach of the cyberstalking statute. One Washington court has already said Rynearson's speech was protected and thus could not be subject to a stalking protection order brought under the cyberstalking statute. There is no reason to believe that other Washington courts would apply a different interpretation should Rynearson "engage in the future in speech substantially similar to the speech that gave rise to the police department's probable cause finding." Mot. at 14-15. While Rynearson may claim he is chilled from future speech, his continued self-censorship is not based on any real threat of present or future harm because of application of the cyberstalking statute to him. *See Lopez*, 630 F.3d at 792 ("injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them").

[1] If Rynearson included Attorney General Ferguson not because of his own individual actions, but as an attempt to enjoin the State of Washington from enforcing Wash. Rev. Code § 9.61.260(1)(b), then his claims are barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest," regardless whether the plaintiff seeks "damages or injunctive relief.").

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Finally, Rynearson has provided no proof that either Defendant has any intent to enforce Wash. Rev. Code § 9.61.260(1)(b) against him. Thus without a threat of injury from these Defendants there is no "redress" for this Court to provide. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976) (federal court may act only to "redress injury that fairly can be traced to the challenged action of the defendant"). Even if there were, granting injunctive and declaratory relief against Attorney General Ferguson and Kitsap County Prosecutor Robinson would not provide Rynearson complete, effectual relief from enforcement of the cyberstalking statute, and thus Rynearson cannot establish the final prong for standing. *See Lujan*, 504 U.S. at 569. The Supreme Court has long held that "courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945). To the extent that Rynearson seeks protection from prosecution should he engage in actual cyberstalking—not protected speech—in other jurisdictions, Rynearson has neither named any other local county prosecutor in this lawsuit nor attempted to show that either named Defendant could control the prosecutors' actions. In fact, they cannot. *See State v. Yates*, 161 Wash. 2d 714, 740, 168 P.3d 359 (2007) (recognizing that each county prosecutor has a "sovereign right" under the state constitution to determine how crimes within each county should be prosecuted), *overturned on other grounds by State v. Gregory*, 427 P.3d 621 (Wash. Oct. 11, 2018); *State v. Bryant*, 146 Wash. 2d 90, 102, 42 P.3d 1278 (2002) (decision to prosecute or not is within discretion of each county prosecutor; power does not include authority to bind prosecutors of neighboring counties); *State ex rel. Hamilton v. Superior Court for Whatcom Cty.*, 3 Wash. 2d 633, 638-40, 101 P.2d 588 (1940) (limiting attorney general's "supervisory control and direction" over county prosecutors to that specifically stated in Wash. Rev. Code 43.10, which does not include prohibiting prosecutors from taking specific criminal or civil action within their authority). Thus, even if this Court were to provide redress in this

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case, it would not bind other prosecutors from enforcing Wash. Rev. Code § 9.61.260(1)(b) and would not provide Rynearson effective relief.

In sum, Rynearson lacks standing to raise his overbreadth challenge to Washington's cyberstalking statute because he cannot show that he personally faces a specific, credible threat of prosecution from the named Defendants for violating Washington's cyberstalking statute based on his intended communications. More importantly, Rynearson's public, online speech has already been held to be protected by the First Amendment. There is thus no present genuine case or controversy requiring this Court's attention. This action must be dismissed.

B. Rynearson Cannot Meet His High Burden to Obtain Injunctive Relief

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). In each case, the court must balance the competing claims and consider the effects on each party, paying "'particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The party seeking injunctive relief bears the burden of establishing that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.* at 20. Any preliminary relief "must be tailored to remedy the specific harm alleged" and can only apply to the specific plaintiff before the court. *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009). Moreover, "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *McCormack*, 694 F.3d at 1020 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)).

Rynearson has not met his burden to obtain injunctive relief. He cannot show a likelihood of success on the merits. Rynearson mischaracterizes the function and application of Wash. Rev.

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Code § 9.61.260(1)(b), which primarily regulates stalking conduct achieved through electronic means and has never been held by a Washington court to apply to pure speech. Even if Rynearson could show a likelihood of success on the merits, he has failed to show the other elements required to obtain injunctive relief. In particular, Rynearson can show no likelihood of irreparable harm when his intended speech has already been held outside the scope of cyberstalking law. He thus faces no risk that either Attorney General Ferguson or Kitsap County Prosecutor Robinson would seek to prosecute him for engaging in the type of speech for which he seeks relief. Rynearson also cannot show that the balance of equities are in his favor or that an injunction is in the public interest. Washington's cyberstalking law, including its (1)(b) provisions, serves an important purpose of protecting victims of stalking from being terrorized through electronic means.

1. Rynearson Has Not Shown He Is Likely to Prevail on His Overbreadth Challenge to Wash. Rev. Code § 9.61.260(1)(b)

a. Overbreadth doctrine is strong medicine and requires Rynearson to show real and substantial overbreadth judged in relation to the statute's plainly legitimate sweep

Rynearson's overbreadth challenge has no merit. The Supreme Court has repeatedly "recognized that the overbreadth doctrine is 'strong medicine' and [has] employed it with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). This is because the overbreadth doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech[.]" *United States v. Williams*, 553 U.S. 285, 292 (2008). Accordingly, the Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," before it may be invalidated.

Id. This is particularly true "where conduct and not merely speech is involved." *Broadrick*, 413 U.S. at 615.

In determining whether a statute's alleged overbreadth is substantial, courts consider a statute's application to real-world conduct, not "fanciful hypotheticals." *Williams*, 553 U.S. at 301-02. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801.

Here, Rynearson fails to meet his burden to prove "from the text of [the law] *and from actual fact*," that substantial overbreadth exists because (1) Wash. Rev. Code § 9.61.260(1)(b)'s plainly legitimate sweep is wide and it covers primarily stalking conduct; and (2) there are few—if any—unconstitutional applications of the statute as evidenced by how the statute has in fact been applied in Washington State. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (alteration in original) (emphasis added).

b. The statute's plainly legitimate sweep is extensive because it regulates mostly conduct, not speech

"The first step in overbreadth analysis is to construe the challenged statute" to determine if and to what extent it reaches protected speech. *Williams*, 553 U.S. at 293. To do so, this Court must interpret the law the same as would the Washington Supreme Court, which is to ascertain and carry out the Washington Legislature's intent through the statute's plain meaning. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1209 (9th Cir. 2010); *State Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash. 2d 1, 9-10, 43 P.3d 4 (2002). "Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.' " *State v. Gonzalez*, 168 Wash.

2d 256, 263, 226 P.3d 131 (2010). Here, the language of Wash. Rev. Code § 9.61.260(1)(b) indicates that its plainly legitimate sweep is considerable because it primarily regulates the conduct of harassment and stalking, as evidenced by the specific intent provision in the statute, which requires proof of an "intent to harass, intimidate, torment, or embarrass any other person." Wash. Rev. Code § 9.61.260(1).

Rynearson relies on selective definitions to argue that these terms suggest that "public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently 'vex' or 'annoy' those public figures, or to embarrass or make them 'self-conscious' about something." Mot. at 5:10-26. But this approach is squarely at odds with the rule that courts should construe statutes to avoid constitutional infirmities. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 299 (2001). This is particularly true when the terms at issue are in fact susceptible to a narrower construction. Indeed, a facial challenge fails if the statute is susceptible to a narrowing construction that would cure its constitutional infirmity. *See Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965) (allowing for "benefit of limiting construction"); *Ala. Fed'n of Labor, Local Union 103 v. McAdory*, 325 U.S. 450, 470 (1945) (one of primary ways to avoid unnecessary constitutional decisions is "to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 n.8 (1936) (Brandeis, J., concurring) (citing cases). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the Legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501, 504 (1979)).

As Rynearson must concede, the Washington Supreme Court has already "very narrowly" defined the term "intimidate" to include only "compel[ling] to action or inaction (as by threats)." *City of Seattle v. Huff*, 111 Wash. 2d 923, 929, 767 P.2d 572 (1989) (alteration in

orginal); *see also* Mot. at 5:14-15. Further, Rynearson fails to mention that the dictionary primarily defines "harass" as "to lay waste" and "to worry and impede by repeated attacks." *Harass*, Webster's Third New International Dictionary of the English Language 1031 (2002). Similarly, the definition of "torment" includes "the infliction of torture . . . to punish or coerce someone." *Torment*, Webster's at 2412. And the term "embarrass" includes "to place in doubt, perplexity or difficulties," as well as "to hamper or impede the movement or freedom of movement of [a person]." *Embarrass*, Webster's at 739. Consistent with these dictionary definitions, Wash. Rev. Code § 9.61.260 can be narrowly construed to proscribe unwanted harassment and stalking conduct intended to cause victims extreme and persistent distress.

Moreover, the cyberstalking statute requires intent to form when the person "makes an electronic communication"—that is when the communication is sent or initiated (before anything is read or received). This is further evidence that Wash. Rev. Code § 9.61.260 proscribes conduct—the act of making an electronic communication with the intent to harass—and not speech. *Cf. State v. Lilyblad*, 163 Wash. 2d 1, 4, 10, 177 P.3d 686 (2008) ("to make" a telephone call includes only "the point of connection" so defendant must "form the specific intent to harass at the time the defendant initiates the call to the victim"); *accord State v. Sloan*, 149 Wash. App. 736, 744-45, 205 P.3d 172 (2009); *State v. Meneses*, 149 Wash. App. 707, 713, 205 P.3d 916 (2009) ("[t]he word 'makes' is critical" because it means "to begin or initiate the telephone call").

Further, under subsection (1)(b), the electronic communication must be made "anonymously and repeatedly *whether or not conversation occurs*." Wash. Rev. Code § 9.61.260(1)(b) (emphasis added). In other words, liability does not turn on conversation or even speech, but rather repeated and anonymous harassment. Cyberstalkers can easily use the Internet to send hundreds, even thousands, of frightening messages in a matter of minutes, which over days, weeks, or even years can cause extreme trauma to the victim, even if the messages

were in fact received by third persons.[2] This is true even if the thousands of messages contain a seemingly friendly message like "I love you." If sent with the requisite intent repeatedly and anonymously, it would still be conduct that constituted harassment notwithstanding the content of the message. Rynearson's argument that the statute criminalizes "pure speech, without any associated noncomunicative conduct," simply misreads the statute. Mot. at 7.

Wash. Rev. Code § 9.61.260's legislative history further confirms that the Washington Legislature did not intend for the cyberstalking statute to regulate constitutionally protected speech. Rather, it was intended to regulate the use of new technologies to stalk and harass victims. H.B. Rep. on Engrossed Substitute H.B. 2771, 58th Leg., Reg. Sess. (Wash. 2004) (cyberstalking statute was enacted to prevent predators from "us[ing] technology to terrorize their victims"). Indeed, testimony for the bill notes that "[c]yberstalking is an expression of an old crime: violence against women"—a nod to the federal cyberstalking law which was enacted as part of the Violence Against Women's Act and an acknowledgment that the statute was not meant to broaden criminal liability for protected speech, but rather to target violent acts that had simply found a new medium—the Internet. *Id*. at 4. Another bill report similarly notes that there are already "three criminal laws in Washington that prohibit harassment and stalking" but another is needed to address "the use of new technologies" to stalk and harass victims. S.B. Rep. on Engrossed Substitute H.B. 2771, at 2, 58th Leg., Reg. Sess. (Wash. 2004).

Finally, an identical intent provision in the telephone harassment statute, Wash. Rev. Code § 9.61.230, resulted in state courts narrowly construing that statute to reach only the conduct of harassment. *See State v. Dyson*, 74 Wash. App. 237, 245 n.5, 872 P.2d 1115 (1994) (telephone harassment statute "is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another" (*id*. at 243); *State v. Alexander*, 76

[2] *See, e.g.*, Denver Pratt, *He was sent to jail for harassing her. A year later, the threatening messages started again*, Bellingham Herald, Oct. 17, 2018, https://www.courts.wa.gov/content/publicupload/eclips/2018%2010%2017%20He%20was%20sent%20to%20jail%20for%20harassing%20her%20A%20year%20later%20the%20threatening%20messages%20started%20again.pdf.

Wash. App. 830, 839, 888 P.2d 175 (1995) ("the specific intent requirement, which places the focus of the statute on the caller, sufficiently narrows the scope of the proscribed conduct" with minimal—if any—impact on protected speech); *State v. Alphonse*, 147 Wash. App. 891, 903, 197 P.3d 1211 (2008) ("the statute regulates conduct implicating speech, not speech itself").

Washington courts have consistently found that intent to "harass, intimidate, torment or embarrass" does not render the telephone harassment statute overbroad and there is no reason to construe the intent provision in the cyberstalking statute broader where the plain language is identical, the terms are susceptible to a narrower construction, and both statutes are clearly intended to target harassing conduct. *See Alexander*, 76 Wash. App. at 839; *Huff*, 111 Wash. 2d at 923-29; *see also Holmes v. Lovick*, No. C11-1097-RSM-BAT, 2012 WL 1357028, at *5 (W.D. Wash. Jan. 30, 2012) ("[t]here has been no successful challenge to this statute on the basis of overbreadth or vagueness"), *report and recommendation adopted*, 2012 WL 1327813 (W.D. Wash. Apr. 16, 2012); *State v. Sanchez*, 177 Wash. 2d 835, 843-44, 306 P.3d 935 (2013) (faced with undefined terms, courts "look to related statutes," and will read them together "to achieve a harmonious total statutory scheme" (internal quotation marks omitted)).[3] Indeed, in an unpublished opinion, a Washington state court recently rejected an argument that "intent to 'harass' is overbroad" in the cyberstalking statute, noting that the "cyberstalking statute mirrors the telephone harassment statute, [Wash. Rev. Code §] 9.61.230, which has been upheld against numerous constitutional challenges." *State v. Stanley*, 200 Wash. App. 1035, *6 (2017) (footnote omitted), *review denied*, 189 Wash. 2d 1036 (2018), *cert. denied*, 138 S. Ct. 1702 (2018), *reh'g denied*, 138 S. Ct. 2670 (2018).

[3] Washington courts have construed other parts of the cyberstalking statute narrowly and there is also no reason to think they would take a different approach to subsection (1)(b). *See, e.g., State v. Bell*, 183 Wash. App. 1029 (2014) (requiring a finding of a "true threat" to sustain a cyberstalking conviction under subsection (1)(c)); *State v. Kohonen*, 192 Wash. App. 567, 370 P.3d 16 (2016) (same; blog posts stating that defendant wanted to punch alleged victim in the throat and containing a hashtag stating that victim "must die" did not constitute a "true threat," so as to lose their status as protected speech where speech was hyperbolic).

Rynearson argues that the requirement of bad purpose does not salvage Wash. Rev. Code § 9.61.260(1)(b) because a speaker's intent is irrelevant to First Amendment analysis. Mot. at 8:21-10:10. But the cases he cites do not involve cyberstalking—or any harassment statutes—and instead involve statutes and torts that, if applicable, would have the potential of suppressing the highest form of protected speech, i.e., political speech, if an intent-based test were to be adopted. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454-56 (2011) (picketing of a funeral involved matters of public concern); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (First Amendment protects parodies of public figures); *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 467 (2007) (rejecting intent-based test for determining if ad is functional equivalent of express advocacy); *Garrison v. Louisana*, 379 U.S. 64, 73 (1964) ("debate on public issues" may be in inhibited if speaker fears he will be prosecuted for speaking out of hatred); *Hustler Magazine, Inc.*, 485 U.S. at 53 ("while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures"); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1142, 1149 (W.D. Wash. 2003) ("true threats do not hinge on a speaker's subjective intent" where "there is cause for concern when the Legislature enacts a statute proscribing a type of political speech in a concerted effort to silence particular speakers").

By contrast, intent can and has been properly considered when analyzing challenges to cyberstalking harassment statutes. Rynearson ignores the overwhelming consensus across jurisdictions finding that cyberstalking statutes with a mens rea element constitutionally criminalize the conduct of harassment.[4] Thus, the plain language of Wash. Rev. Code

[4] Federal courts have also upheld a similar federal cyberstalking statute which requires proof of an "intent to kill, injure, harass, intimidate, or place under surveillance" against overbreadth challenges, finding similarly that 18 U.S.C. § 2261A applies to conduct, not expression. *See United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) ("Because a substantial number of the statute's applications will not be unconstitutional, we decline to use the " 'strong medicine' of 'overbreadth[.]' "); *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (agreeing with reasoning in *Petrovic* and rejecting defendant's argument that, because the statute did not define "substantial emotional distress" or "harassment," it was overbroad); *United States v. Bowker*, 372 F.3d 365, 378 (6th Cir. 2004) (rejecting facial overbreadth challenge to a prior version of the statute and stating: "We fail to see how a law that prohibits interstate travel with the intent to kill, injure, harass or intimidate has a substantial sweep of

§ 9.61.260(1)(b) and state courts' narrow construction of an identical intent provision in the telephone harassment statute make clear that the cyberstalking statute targets harassing conduct, making its legitimate sweep considerable both in an absolute sense and judged in relation to any potential overbreadth. As discussed further below, Rynearson has not even come close to meeting his burden of showing a "substantial" number of unconstitutional applications based on actual fact.

c. Whatever hypothetical protected speech Wash. Rev. Code § 9.61.260(1)(b) may proscribe is marginal relative to its plainly legitimate sweep

The next question is whether the law burdens substantially more speech relative to the statute's plainly legitimate sweep. "[E]ven if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" *Ferber*, 458 U.S. at 770 n.25 (alterations in *Parker*) (quoting *Parker v. Levy*, 417 U.S. 733, 760 (1974)). As noted above, the cyberstalking statute criminalizes mostly conduct, and what little hypothetical speech it may reach does not render it overbroad because the statute is tailored to address concerns specific to cyberstalking conduct and the deleterious effects therefrom. Moreover, Rynearson has not shown a "realistic danger" of prosecution for any of the alleged hypotheticals. *Bd. of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

Recognizing the distinctive features of the Internet that make cyberstalking especially harmful, the Washington Legislature enacted the statute to include provisions regarding anonymity, repetitious communications, and third-party communications. Cyberstalking can

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constitutionally protected conduct."), *vacated on other grounds*, 543 U.S. 1182 (2005), *reinstated in relevant part*, 125 Fed. App'x 701 (6th Cir. 2005); *United States v. Moreland*, 207 F. Supp. 3d 1222, 1227-28 (N.D. Okla. 2016) (federal cyberstalking law not facially overbroad because it required proof of course of conduct done with specific intent to injure, harass, or intimidate); *see also Burroughs v. Corey*, 92 F. Supp. 3d 1201, 1208 (M.D. Fla. 2015), *aff'd*, 647 Fed. App'x 967 (11th Cir. 2016) (upholding Florida's cyberstalking statute against overbreadth claim where statute regulated conduct).

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take many forms and due to the omnipresence of the Internet, cyberstalkers have the ability to instantly stalk and harass their victims by repeatedly sending e-mails or texts, widely dispersing messages on blogs or message boards, stalking from anywhere in the world, concealing their own identity, stealing their victim's identity, or stalking their victim through a third party.

The requirement of anonymity narrows the statute's scope and addresses the ease with which stalkers can utilize the Internet and other technologies to remain anonymous, hide, or even change identities, making it difficult for law enforcement to find and prosecute cyberstalkers while at the same time enabling cyberstalkers to use more threatening speech without fear of repercussion. *See* Nisha Ajmani, *Cyberstalking and Free Speech: Rethinking the Rangel Standard in the Age of the Internet*, 90 Or. L. Rev. 303, 314 n.75 (2011) (citing Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 Colum. J.L. & Soc. Probs. 65, 83-84 (2002)). Anonymity also causes more fear and uneasiness in victims who have may have no idea who is stalking them, making it difficult to evaluate the threat. Ajmani, 90 Or. L. Rev. at 324. These were the exact concerns facing the Washington Legislature. Testimony advocating for enactment of Wash. Rev. Code § 9.61.260 stated that "[a]nonymity and randomness are the tools of the cyberstalker" who can harass victims "for any reason" and "for any length of time" making "the victim feel terrorized and alone." H.B. Rep. on Engrossed Substitute H.B. 2771, at 4, 58th Leg., Reg. Sess. (Wash. 2004). Rynearson's argument that an author's decision to remain anonymous is an aspect of protected speech is not applicable where the anonymity is solely for the purpose of harassing victims or evading law enforcement. *See* Mot. at 10:13-23.

The requirement of repetition similarly narrows the scope of the statute by targeting stalking behavior—that is, repeated harassment over some length of time. Cyberstalkers can threaten and harass victims instantaneously from virtually anywhere in the world and with more frequency than offline stalkers because the Internet is faster and cheaper than other forms of communication, such as regular mail. Ajmani, 90 Or. L. Rev. at 316. A cyberstalker could even

set up his or her email account to send intimidating messages automatically and repeatedly. *Id.* at 315. Rynearson's argument that speech does not lose its protection because it is said more than once is a non-starter because passing out leaflets is not the same as stalking someone. Mot. at 10:24-11:4 (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971)).

Rynearson argues that the statute is overbroad because it criminalizes speech made to third parties. This feature of the cyberstalking statute admittedly broadens its scope but only to the extent necessary to address concerns that cyberstalkers could take on the identity of the victim, or encourage other like-minded individuals to stalk in their place. Indeed, the Washington Legislature was presented with testimony that an anonymous stalker had harassed a "constituent of the Senate and House prime sponsors" by sending malicious emails to the victim and victim's co-workers for over five years, and "pretended to be the victim in on-line chat rooms and posted her home and work phone number so that men seeking sexual liaisons could call her." S.B. Rep. on Engrossed Substitute H.B. 2771, at 2, 58th Leg., Reg. Sess. (Wash. 2004). Against this backdrop, the Legislature enacted a substitute bill that included communications to third parties. H.B. Rep. on Engrossed Substitute H.B. 2771, 58th Leg., Reg. Sess. (Wash. 2004).

Unfortunately, there are numerous examples of criminal cyberstalking behavior taking the form of communications to third parties. For example, in one case out of Maryland, the stalker used his ex-girlfriend's name and personal information to create Internet advertisements and fake social media accounts that implored men to visit the victim for sex. As a result, a number of strangers presented themselves at the victim's door seeking sexual intercourse, causing the victim terror and fear. *United States v. Sayer*, No. 2:11-CR-113-DBH, 2012 WL 1714746, at *1 (D. Me. May 15, 2012), *aff'd*, 748 F.3d 425 (1st Cir. 2014). In another case, a man took on his victim's identity and posted her phone number and address online, along with a message fantasizing about being raped. Several men went to her house, referring to the Internet solicitation that was posted in her name, and raped her. *See* Joanna Lee Mishler, *Cyberstalking: Can Communication Via the Internet Constitute a Credible Threat, and Should an Internet*

Service Provider Be Liable If It Does?, 17 Santa Clara Computer & High Tech. L.J. 115, 116 (Dec. 2000). Another woman found a message posted on the Internet, listing her home phone number, her address, and a message that read, "[she] was available for sex anytime of the day or night." *Id*. at 116-17 (alteration in orginal). Numerous individuals called the victim in response to the posting. *Id*. at 117. In yet another example, a cyberstalker devoted a website to fuel his obsession with his victim. He chronicled her daily activities and expressed thoughts about harming and killing her, which he finally did when he murdered her at her dentist office. Neither the victim nor her family were aware of the website, which had been live for two years. *Id*. at 129-30.

As evidenced by these horrific real-life examples, a requirement that the stalker convey a threat specifically to the target would fail to reach a substantial amount of cyberstalking conduct because cyberstalkers can and have posted alarming and frightening language online or used technology to incite other individuals to commit violence against a specific person. Likewise, a requirement that the victim tell the stalker to stop (*see* Mot. at 7) would insulate criminal conduct from liability in cases where the victim is completely unaware of the stalker's activities.

Importantly, Washington courts have not applied the telephone harassment statute to situations where "there was little doubt from the circumstances of the conduct that it formed a clear and particularized political or social message very much understood by those who viewed it." *Young v. New York City Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990); *see, e.g.*, *Bini v. City of Vancouver*, No. C16-5460 BHS, 2017 WL 2226233, at *6 (W.D. Wash. May 22, 2017) (plaintiff sent emails to Smith's family and several of her business associates with attachments and links to a blog that grossly disparaged Smith's character, claiming that she was a "fraud," "an excessive drinker," and that the injuries she sustained at the hands of her incarcerated husband were actually the result of her "own alcohol-induced rage"); *Stanley*, 200 Wash. App. at 1035 (defendant sent hundreds of messages over the course of four years threatening to kill

his targets, including from accounts using a made up name, to "break [the women] down," "increase their stress," and to "scare" them (alteration in original)); *Bell*, 183 Wash. App. 1029 (conviction after defendant kicked and choked his wife, drove away, and then sent her a text message in which he called her a "bitch," and threatened to kill her). Thus, there is little danger that a person who "anonymously and repeatedly" makes electronic communications for the sole purpose of communicating a message—even one others might find objectionable—would be culpable under the statute.

And, as noted previously, a limiting construction could ameliorate any potential overbreadth concerns, as would partial severance of any unconstitutional applications; courts prefer these to facial invalidation which ought to be used "[r]arely, if ever." *Hicks*, 539 U.S. at 118-19, 124 (2003). If a particular word in the statute appears to cover both protected and unprotected speech, the correct remedy is not to "excise[ ] the word from the statute entirely" but to declare the application unconstitutional. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985) (severing application of obscenity statute). Here, like the statute in *Brockett*, Washington's cyberstalking statute explicitly authorizes courts to sever not just statutory provisions, but applications as well. 2004 Wash. Sess. Laws 326 ("If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."); *see also* Mot. at 1:18-19. The fact that the statute covers both protected and unprotected speech further compels this court to reject Rynearson's facial invalidation request.

In sum, Rynearson presents a weak case for facial invalidity. The statute's legitimate sweep is considerable, and it is difficult to show a "substantial" number of unconstitutional applications. His musings on Hillary Clinton and Donald Trump's tweets, or the woman who breaks up with her boyfriend and then posts on Facebook how she feels, or criticism of local and political leaders do not satisfy this requirement because they are based on speculation and inconsistent with how the statute has been applied in Washington State. Mot. at 8. Rynearson

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does not—nor can he—point to a single case where the statute has been construed to criminalize his posited hypotheticals. Thus, any arguably impermissible applications of the statute amount to a tiny fraction of the materials within the statute's reach and the court "[should not] assume that the [Washington] courts will widen the possibly invalid reach of the statute by giving an expansive construction[.]" *Ferber*, 458 U.S. at 773.

2. Wash. Rev. Code § 9.61.260(1)(b) is not facially invalid for failure to meet intermediate or strict scrutiny

At the outset, Rynearson argues that the preliminary injunction factors are met only as to his theory that Wash. Rev. Code § 9.61.260(1)(b) is facially overbroad, and makes no argument regarding the statute's alleged invalidity due to failure to meet strict scrutiny. *See Ashcroft v. ACLU*, 535 U.S. 564, 585-86 (2002) (overbreadth differs from strict scrutiny; majority of the court found statute was not overbroad in violation of the First Amendment, but expressed no view on whether statue would survive strict scrutiny).[5] Thus, Rynearson has waived his right to an injunction based on his alleged theory that Washington's cyberstalking statute fails strict scrutiny. *Cf. Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (district court "properly considered the remaining *Winter* elements only as to claims it concluded were meritorious").

Further, Rynearson's facial challenge based on this theory fails because he has not shown that the statute can never be validly applied. An ordinance may be facially unconstitutional in one of two ways: "either [ ] it is unconstitutional in every conceivable application, or [ ] it seeks

[5] Justice Thomas delivered the opinion of the Court in *Ashcroft* and, for this particular point, was joined by Justices Rehnquist, O'Connor, Scalia, and Breyer. Justice Stevens' dissenting opinion also affirms that overbreadth is a separate inquiry from whether a law survives strict scrutiny. *See Ashcroft*, 535 U.S. at 610 n.6 (Stevens, J., dissenting) (noting that Justice Kennedy's concerns went mostly to "whether [the law] survives strict scrutiny, not overbreadth"); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 263 (2002) (O'Connor, J., dissenting in part) (answering question of whether statute fails strict scrutiny prior to addressing overbreadth claim); *S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1142 n.5, *as amended by*, 160 F.3d 541 (9th Cir. 1998) (concluding that ordinance was overbroad and therefore declining to reach the issue of whether ordinance constituted a restriction on commercial speech triggering strict scrutiny review); *Klein v. San Diego Cty.*, 463 F.3d 1029, 1038 (9th Cir. 2006) (analyzing the two theories separately).

to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of the City Council of the City of Los Angeles*, 466 U.S. at 796; *see also id*. at 796 n.15 (citing cases); *accord Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998), *as amended on denial of reh'g* (July 29, 1998). In other words, "a plaintiff whose conduct *is* protected may bring a facial challenge to a statute he contends is unconstitutional, without having to employ the overbreadth doctrine, [only] by arguing that the statute could never be applied in a valid manner and would chill the speech of others." *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 n.4 (9th Cir. 1999). Rynearson does not even attempt to meet this standard and instead concedes that there are constitutional applications of the cyberstalking statute. *See* Mot. at 7 (repeated unwanted emails could be constitutionally prohibited if victim asked speaker to stop).

Rynearson's argument fails for the additional reason that the statute survives constitutional scrutiny. There are a number of reasons this Court should apply intermediate rather than strict scrutiny to Wash. Rev. Code § 9.61.260(1)(b). First, the statute is content neutral because it is not directed at particular groups or viewpoints and seeks to regulate cyberstalking behavior in an even-handed and neutral manner. *See Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (although breach-of-the-peace statute regulated in political expression, it was not directed at particular viewpoints and thus regulated an even-handed manner and was not overbroad). Indeed, a kind message (such as "Hey beautiful"), or a seemingly benign message (such as "I saw your daughter"), or even messages with only images could fall within the statute's reach if spoken (or typed) with the requisite intent repeatedly and anonymously.

Second, rather than targeting the content of speech, the cyberstalking statute targets the consequences of speech—or the "secondary effects." *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437-42 (2002) (government must have leeway to address secondary effects of speech). Specifically, the cyberstalking statute targets speech that causes "deleterious

effects" associated with cyberstalking, and the state's interests in privacy and safety of stalking victims is unrelated to the content of the speech. *See id*. at 446.

Third, the speech punished by the cyberstalking statute will rarely touch on matters of public concern because stalking is often fueled by a pre-existing *personal* relationship or conflict. *See Snyder*, 562 U.S. at 451-54 (whether the First Amendment prohibits regulation largely turns on "whether speech is of public or private concern" because speech on matters of public concern are at the "heart" of the First Amendment). Finally, cyberstalkers will undoubtedly invade the homes of their victims through messages via cell phone, tablet, or computer thereby invading victims' privacy and holding them "captive" to repeated harassing messages through the use of technology. *See FCC v. Pacifica Found.*, 438 U.S. 726, 759 (1978) (home is "the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds"); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) ("even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy").

Applying intermediate scrutiny, Washington's cyberstalking statute furthers an important or substantial governmental interest unrelated to the suppression of free speech, and reaches no broader than necessary to further that interest. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). The rise of the Internet created a new medium for stalking behavior. The resulting harm to stalking victims spans a wide spectrum, leaving victims scared, traumatized, and depressed for years after stalking incidents. "Cyberstalking can make a victim feel fearful, powerless, frustrated, enraged, and isolated." H.B. Rep. on Engrossed Substitute H.B. 2771, at 4, 58th Leg., Reg. Sess. (Wash. 2004). To address these dangers, the Legislature enacted Wash. Rev. Code § 9.61.260. And as discussed above, the statute reaches no broader than necessary to further that interest. For these same reasons, even applying strict scrutiny, the statute survives.

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C. Rynearson Has Not Shown He Will Suffer Immediate Irreparable Harm

Rynearson improperly "collapse[s the remaining *Winter* factors] into the merits" factor. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). Although a colorable First Amendment claim "raises the specter" of irreparable harm and public interest considerations, proving the likelihood of success on the merits—a showing Rynearson has not made here—is not enough to satisfy *Winter*. *See Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014) (citing *Stormans, Inc.*, 586 F.3d at 1138); *see also Gresham v. Picker*, 705 Fed. App'x 554, 557 (9th Cir. 2017). Even in a First Amendment case, the moving party bears the burden of meeting *all four factors*, and therefore Rynearson must separately prove irreparable injury, that the balance of equities weighs in his favor, and that an injunction would be in the public interest. *DISH Network Corp.*, 653 F.3d at 776-77.

To establish "irreparable harm," Rynearson must show "immediate threatened injury" that is non-speculative. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Goldie's Bookstore, Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984). This requirement is strictly applied where, as here, plaintiff seeks "injunctive relief against government actions[.]" *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 557 (9th Cir. 1990) (when seeking injunctive relief against government actions which allegedly violate the law, "the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical' ") (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).

Here, as with Rynearson's issues of standing, there is no current, let alone immediate, threat of prosecution or harm to Rynearson. Rynearson cannot credibly allege that he faces immediate and irreparable harm due to his fear of a hypothetical criminal prosecution where a state court has already determined that he is engaged in protected speech; the Kitsap County Prosecutor has not pursued any action against Rynearson; and Attorney General Ferguson has never taken any action that would result in Rynearson being prosecuted under Wash. Rev. Code § 9.61.260(1)(b).

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D. The Balance of Equities and Public Interest Do Not Favor an Injunction

The balance of equities and public interest considerations do not favor an injunction because there is a strong public interest in prohibiting cyberstalking conduct, and the statute can and already has been given a narrowing construction to avoid concerns that it will reach beyond that to issues of public concern.

In considering the equities, the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. Since this case involves the government, the balance of equities factor merges with the fourth factor, public interest. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013). Here, Wash. Rev. Code § 9.61.260(1)(b) reflects the State's considered judgment of what policies and laws would effectively protect victims of cyberstalking from harassment, violence, and invasions of privacy through electronic means. The stated purpose of the cyberstalking statute is "for the immediate preservation of the public peace, health, or safety." 2004 Wash. Sess. Laws 326; *see also* H.B. Rep. on Engrossed Substitute H.B. 2771, 58th Leg., Reg. Sess. (Wash. 2004) (noting negative effects that cyberstalking has on victims). Thus, this Court "should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington[.]" *Stormans, Inc.*, 586 F.3d at 1140. Moreover, the statute is narrowly drawn to address issues particular to cyberstalking and the negative effects that result, and Rynearson has not shown that any person in Washington advancing political or religious rhetoric or public discussion has ever been prosecuted under Wash. Rev. Code § 9.61.260(1)(b). Where a plaintiff has "not shown a likelihood of success on the merits of [a] First Amendment claim," this fact weighs against finding the public interest favors an injunction. *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

IV. CONCLUSION

This Court should dismiss Rynearson's case for lack of constitutional standing. In the alternative, Rynearson has not met his burden to obtain injunctive relief and, therefore, his motion for preliminary injunction should be denied.

DATED this 26th day of October 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States District Court Western District of Washington using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

s/ *Stephanie N. Lindey*
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The Honorable RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD LEE RYNEARSON, III,

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-05531-RBL

DEFENDANTS' RESPONSE TO AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

Amici Curiae Electronic Frontier Foundation and American Civil Liberties Union of Washington assert overbreadth arguments about Washington's cyberstalking law already made by Plaintiff Rynearson and refuted by the Defendants Attorney General Ferguson and Kitsap County Prosecutor Robinson. *See* Defs.' Mot. Dismiss & Opp. Mot. Prelim. Inj. at 3-20 (Dkt. No. 53). Such repetition is not helpful to the Court. *Cf. Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, 2015 WL 12868223 (E.D. Wash. Jan. 14, 2015). Amici also raise a new vagueness claim not asserted or argued by Rynearson, which this Court should decline to consider as improper. *See Fisher v. Kealoha*, 976 F. Supp. 2d 1200, 1209 n.14 (D. Haw. 2013) (citing *United States. v. Gementera*, 379 F.3d 596, 607-08 (9th Cir. 2004); *Intermountain Fair Housing Council v. Boise Rescue Missions Ministries*, 657 F.3d 988, 996 n.6 (9th Cir. 2011)).

In any event, this Court can reject Amici's arguments. Amici attack individual components of Wash. Rev. Code § 9.61.260(1)(b) as overbroad and vague while ignoring the actual scope, context, and fair application of the law. When properly construed as prohibiting stalking conduct made through electronic means, the statute's plainly legitimate sweep overshadows any potential reach toward protected speech. Likewise, the ordinary meaning of Wash. Rev. Code § 9.61.260(1)(b)'s statutory terms and a common sense understanding of the crime the statute intends to prevent (i.e., stalking) provide adequate notice and prevent arbitrary enforcement. In sum, Washington's cyberstalking statute is a constitutionally viable means to protect victims from criminal conduct achieved online and through other modes of electronic communication. This Court should reject Rynearson and Amici's claims to the contrary.

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II. ARGUMENT

A. Amici Have Not Shown That Wash. Rev. Code § 9.61.260(1)(b) Is Overbroad

1. "Electronic Communication" Does Not Render the Statute Overbroad

Amici argue that the statute is facially overbroad because "electronic communication" is defined broadly to include "internet-based communications" which are subject to First Amendment protections. Amicus Br. at 2, 4. But just because the First Amendment protects online speech does not mean Wash. Rev. Code § 9.61.260(1)(b) is overbroad if a substantial number of its applications are constitutional. *United States v. Williams*, 553 U.S. 285, 292 (2008). As the State Defendants have shown, the plainly legitimate sweep of the cyberstalking statute is wide compared to any alleged overbreadth. *See* Dkt. No. 53, at 9-15. Amici have not shown otherwise.

Moreover, the cases cited by Amici are inapposite as they concern enactment of a blanket prohibition on Internet speech after Congress explicitly found that there was a less restrictive and more effective alternative (*Ashcroft v. ACLU*, 542 U.S. 656, 666-68 (2004)), and a content-based restriction on Internet speech that was found to sweep too broadly because the state advocated for a broad interpretation of the intent requirement (*State v. Bishop*, 368 N.C. 869, 875-79, 787 S.E.2d 814 (2016)). Here, there is no blanket prohibition on Internet speech and the statute is tailored to address unique attributes of electronic modes of communication that make it easier for cyberstalkers to reach their victims repeatedly from anywhere at any time. *See* Dkt. No. 53, at 12, 15-17. Moreover, the State has not advocated for a broad interpretation of the statute—in fact, quite the opposite. *See* Dkt. No. 53, at 10-11. Thus, while "electronic communications" includes many modes of communications, Wash. Rev. Code § 9.61.260(1)(b) properly proscribes only a small subset of repeated or anonymous communications specifically made with the intent to harass, intimidate, torment, or embarrass another person.

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2. "Embarrass" Does Not Render the Statute Overbroad

Amici argue that the "embarrass" provision sweeps too broadly because the First Amendment protects messages intended to embarrass. Amicus Br. at 3-5. But "a single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words." *State v. Flores*, 164 Wash. 2d 1, 12, 186 P.3d 1038 (2008). "In applying this principle to determine the meaning of a word in a series, a court 'should take into consideration the meaning naturally attaching to them from the context . . . .'" *Id.*; *accord Williams*, 553 U.S at 294 (recognizing words can be given more precise content by the neighboring words with which they are associated).

Here, "embarrass" is part of a series of scienter requirements, appearing next to "harass, intimidate, [and] torment." Wash. Rev. Code § 9.61.260(1). And its dictionary definition includes "to place in doubt, perplexity or difficulties," as well as "to hamper or impede the movement or freedom of movement of a person." *See* Dkt. No. 53, at 11 (citing *Embarrass*, Webster's Third New International Dictionary of the English Language 739 (2002)). Read in context with the other terms, "embarrass" can be narrowly construed to proscribe unwanted harassment and stalking conduct intended to restrain the freedom of the victim.

The cases cited by Amici hold that citizens must tolerate insulting or embarrassing speech in order to further "public debate" on issues of public importance—not to enable cyberstalkers to harm their intended victims. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (regulating signs critical of government and governmental policies); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (First Amendment protects "public debate about public figures"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982) (names of nonparticipants in boycott were read out loud to urge their participation; court found that this type of speech does not lose protection simply because it might embarrass others); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it

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may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (speech to over eight hundred persons in an auditorium in Chicago protected because the "vitality of civil and political institutions in our society depends on free discussion"). Accordingly, the reasoning in those cases does not apply here.

Finally, Amici's hypotheticals regarding "embarrassing" communications are irrelevant because they do not concern electronic communications made anonymously or repeatedly and therefore do not fall within the statute challenged in this case (Wash. Rev. Code § 9.61.260(1)(b)). *See* Amicus Br. at 4-5. They are also entirely unlike how the statute has been applied in Washington State. *See Williams*, 553 U.S. at 301 (in determining whether a statute's alleged overbreadth is substantial, courts consider a statute's application to real-world conduct, not "fanciful hypotheticals"). Amici do not point to a single case where the statute has been construed to criminalize their posited hypotheticals or anything remotely similar. Thus, any arguably impermissible applications of the statute to speech intended to "embarrass" is outweighed by the statute's plainly legitimate reach and the court should not "assume that [Washington] courts will widen the possibly invalid reach of the statute by giving an expansive construction[.]" *New York v. Ferber*, 458 U.S. 747, 773 (1982).

3. Far From Raising Overbreadth Concerns, the Statute's Intent Requirement Narrows Its Reach

Amici repeat Plaintiff's argument that the statute is overbroad because it criminalizes speech made with the intent to "harass, intimidate, [or] torment." Amicus Br. at 5-6. To support this argument, Amici ignore Washington authority construing an identical intent provision in the telephone harassment statute and instead cite cases from other jurisdictions construing statutes with broader intent requirements. *See Bishop*, 368 N.C. at 879 (reading intent provision broadly where the state advocated for broad definitions of "intimidate" and "torment"); *People v. Marquan M.*, 24 N.Y.3d 1, 9, 19 N.E.3d 480 (2014) ("the provision pertains to electronic

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communications that are meant to 'harass, annoy . . . taunt . . . [or] humiliate' any person or entity, not just those that are intended to 'threaten, abuse . . . intimidate, torment' ") (alterations in original).

As explained more fully in the opposition to the motion for preliminary injunction, Washington courts have found that intent to "harass, intimidate, torment, or embarrass" does not render the telephone harassment statute overbroad and there is no reason to construe the intent provision in the cyberstalking statute broader where the plain language is identical, the terms are susceptible to a narrower construction, and both statutes are clearly intended to target harassing conduct. *See* Dkt. No. 53, at 12-13. Thus, like the telephone harassment statute, the intent provision in the cyberstalking statute does not render it overbroad but instead narrows it to reach primarily—if not solely—the conduct of *making* harassing electronic communications. *Cf. State v. Dyson*, 74 Wash. App. 237, 243, 245 n.5, 872 P.2d 1115 (1994) (telephone harassment statute "is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another").

4. The Requirement That the Electronic Communication Be Made "Anonymously or Repeatedly" Does Not Render The Statute Overbroad

Next, Amici repeat yet another of Plaintiff's argument that the statute is overbroad because it criminalizes anonymous and repeated speech—both of which have found First Amendment protection in other contexts. Amicus Br. at 6-8. But as the State has explained, these requirements focus the statute's scope by targeting stalking conduct, and are narrowly tailored to address the ease with which cyberstalkers can stalk and harass their victims by repeatedly sending e-mails or texts, widely dispersing messages on blogs or message boards, stalking from anywhere in the world, concealing their own identity, stealing their victim's identity, or stalking their victim through a third party. *See* Dkt. No. 53, at 15-17.

Indeed, Amici's cited cases confirm that the policies behind protecting anonymous speech are not at issue here because cyberstalking is not an "honorable tradition of advocacy [or]

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of dissent," and protecting the anonymity of cyberstalkers does not "protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (anonymous pamphleteering); *see also Talley v. California*, 362 U.S. 60, 64 (1960) (anonymous distribution of handbills); *John Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (protection extends to Internet specifically because through the use of online speech, any person "can become a pamphleteer"); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (protecting anonymous solicitation of ballot access signatures). While "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind" the same is not true for cyberstalking or any type of stalking for that matter. *Talley*, 362 U.S. at 64.

Likewise, the argument that speech does not lose its protection because it is said "repeatedly" is a non-starter because gathering outside a Catholic church to address sexual abuse by priests and other "matters of public concern" is not the same as stalking someone. *See* Amicus Br. at 8 (citing *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015)). And contrary to Amici's argument, the State does have a compelling interest in banning repeated electronic communications intended to harass victims. *See* Amicus Br. at 8. And the mere fact that recipients could block repeat messages is not sufficient because a sender could instantly create a new phone number, email address, blog, webpage, or other forum to continue sending harassing messages. Thus, the anonymity and repetition requirements do not raise overbreadth concerns and instead are narrowly tailored to proscribe online stalking behavior.

5. Lack Of An Express Harm Requirement Does Not Render The Statute Overbroad

Amici argue that the statute is overboard because it lacks a harm requirement. Amicus Br. at 8-9. To support this argument, Amici cite *Turner Broadcasting System, Inc. v. FCC*, 512

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U.S. 622, 664 (1994). However, this passage in *Turner Broadcasting* addresses the government's burden of showing that its asserted interest in passing a statute or regulation is to protect against real, non-conjectural harms. Here, there is no real dispute that the cyberstalking statute was enacted to protect cyberstalking victims against the real harms associated with cyberstalking. And Justice Breyer's concurrence in *United States v. Alvarez*, 567 U.S. 709 (2012), supports the State's argument that Wash. Rev. Code § 9.61.260(1)(b)—though not explicitly requiring proof of injury—is targeted to protect against "a subset of [cyberstalking behavior] where specific harm is more likely to occur." *Id.* at 736 (Breyer, J., concurring) (discussing different types of statutes that require some likelihood of harm).

In sum, Wash. Rev. Code § 9.61.260(1)(b)'s plainly legitimate sweep is considerable because it regulates primarily the conduct of harassment and stalking, as evidenced by the specific intent provision in the statute, which mirrors the intent provision in the telephone harassment statute and requires proof of an "intent to harass, intimidate, torment, or embarrass any other person." Wash. Rev. Code § 9.61.260(1). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801. Amici's recycled and largely unsupported arguments, as well as their irrelevant hypotheticals, do not meet this high burden.

B. The Court Should Reject Amici's New Argument That Wash. Rev. Code § 9.61.260(1)(b) Is Unconstitutionally Vague

Amici advance a new and meritless argument that the statute is vague in violation of the due process clause. Amicus Br. at 9-11. At the outset, the court should decline to consider any vagueness challenge to the statute as it is raised only by Amici, and Amici have not demonstrated

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that exceptional circumstances exist. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) (absent "exceptional circumstances" court will not address issues raised only in amicus at district court). The overbreadth and void for vagueness doctrines are interrelated but conceptually distinct. *See Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967). While the overbreadth doctrine is based on the free speech rights of the First Amendment, the void for vagueness doctrine is based on the due process protection of the Fifth and Fourteenth Amendments of the United States Constitution. Rynearson has not alleged a vagueness challenge in his complaint or otherwise argued this theory in the motion for preliminary injunction. Thus, this Court should decline to consider Section III.B of the Amicus Brief.

In any case, Wash. Rev. Code § 9.61.260(1)(b) is not unconstitutionally vague. Courts will find a statute unconstitutionally vague only "if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement[.]" *United States v. Osinger*, 753 F.3d 939, 944-45 (9th Cir. 2014). The vagueness doctrine recognizes that legislatures encounter "practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). For this reason, notwithstanding that a statute's "standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

Here, an ordinary person would see that Wash. Rev. Code § 9.61.260(1)(b) proscribes a specific course of conduct that is intended to cause harm or distress to the intended victim and does not apply to public speech. In fact, it does not apply to such speech. A Washington superior court has already found that Rynearson's speech was protected and thus could not be subject to

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a stalking protection order brought under the cyberstalking statute. There is no reason to believe that other Washington courts would apply a different interpretation in other contexts.

Far from rendering the statute vague, both the "repeatedly" element and the requirement of specific intent sufficiently inform both citizens and law enforcement officers of what acts constitute cyberstalking. Amici argue that "repeatedly" is vague because messaging online tends to resemble real-time oral conversation. Amicus Br. at 10. But that makes no sense. "Repeatedly" is no less exact in the oral context—common sense makes clear that saying something "repeatedly" means to say it more than once, and in this context, with the intent to harass. The dictionary confirms that "repeatedly" means "recurring again and again." *Repeated*, Webster's at 1924. And a Washington court has specifically found that the definition of "repeatedly" in a telephone harassment ordinance was sufficiently "clear to persons of common intelligence" and that it means "'said, made, or done again, or again and again.'" *State v. Alexander*, 76 Wash. App. 830, 842, 888 P.2d 175 (1995) (quoting *Webster's New World Dictionary* 633 (2d ed. 1975)). "Moreover, 'repeatedly' does not invite subjective evaluation by law enforcement." *Id.* Thus, read in light of the statute as a whole, "repeatedly" means to make an electronic communication again and again for the purpose of harassing the target.

Amici next argue that the intent to "harass, intimidate, torment, or embarrass" is vague. Amicus Br. at 10-11. To the contrary, the Supreme Court has long recognized that a scienter requirement alone tends to defeat vagueness challenges to criminal statutes. *Screws v. United States*, 325 U.S. 91, 101 (1945). This is because if "the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Id*. at 102; *see also Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("scienter requirements alleviate vagueness concerns"); *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (describing impermissibly vague criminal law as one that "contains no *mens rea* requirement"); *Colautti v. Franklin*, 439 U.S. 379, 395 & n.13 (1979) ("the constitutionality of a vague statutory standard

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is closely related to whether that standard incorporates a requirement of *mens rea*"); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952) (requirement of specific intent does much to destroy any argument that statute is vague).

Here, the inclusion of a specific intent requirement provides notice to individuals engaging in any non-criminal Internet activities that they are not cyberstalking their targets within the meaning of Wash. Rev. Code § 9.61.260(1)(b) unless they intend to do so or knowingly do so. Amici's claim that the intent element of the statute is inadequately defined is in tension with the Supreme Court's instruction that, rather than being a source of fatal vagueness, a scienter requirement "mitigate[s] a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Moreover, as with the term "repeatedly," Washington courts have already upheld this identical intent provision as sufficiently precise. *State v. Alphonse*, 142 Wash. App. 417, 438, 174 P.3d 684 (2008) (telephone harassment statute "includes a specific [intent] element which further serves to dispel any vagueness concerns"); *City of Seattle v. Huff*, 111 Wash. 2d 923, 929, 767 P.2d 572 (1989) ("intimidate," "harass" and "torment" in Seattle telephone harassment ordinance are narrowly defined "so that persons of common intelligence can ascertain when their intent falls within the ordinance's prohibitions"). Indeed, the widely-accepted understanding of what constitutes stalking has resulted in numerous unsuccessful void-for-vagueness challenges brought against state stalking laws. *See People v. Stuart*, 100 N.Y.2d 412, 418 n.4, 797 N.E.2d 28 (2003) (collecting state court decisions upholding stalking statutes, noting that vagueness challenges to stalking statutes have almost uniformly been rejected by reviewing courts).[1]

[1] Nearly every state and federal court faced with a vagueness challenge to stalking statutes that employ similar—if not identical—terms have concluded that these terms are not unconstitutionally vague. *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (observing that "harass" is not an "obscure word[ ]"; "Most people would readily understand [harass] to mean 'to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute[.]"); *United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018) (federal cyberstalking

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The two cases cited by Amici are islands in a sea of contrary authority and are in any case inapposite. *State v. Bryan*, 259 Kan. 143, 153-54, 910 P.2d 212 (1996), found that the Kansas state stalking statute was different from most other stalking statutes that had survived vagueness challenges due to its "use of subjective terms such as 'alarms' or 'annoys.'" *Id*. at 153-54. These terms are not at issue here. And *Church of American Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 592 (W.D. Pa. 2000), found that an anti-mask ordinance was vague, in part because of testimony from the police department that it was "unsure how to apply the Ordinance in the context of the Klan's planned demonstration." There is no such testimony here, and in fact the superior court ruling makes clear that speech like that of Rynearson's is protected.

Amici's vagueness argument boils down to a claim that the terms "harass, intimidate, torment, or embarrass" subject a speaker to the particular sensibilities of each individual victim. Amicus Br. at 8-9. But that simply misreads the statute—the terms set forth an intent requirement, not an injury requirement. The ordinary meaning of the statutory terms and a common sense understanding of the crime the statute intends to prevent (i.e., stalking) provide

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statute was not unconstitutionally vague as it used readily understandable terms such as "harass" and "intimidate"); *accord United States v. Conlan*, 786 F.3d 380, 385-86 (5th Cir. 2015); *United States v. Osinger*, 753 F.3d 939, 944-45 (9th Cir. 2014); *United States v. Sayer*, 748 F.3d 425, 436 (1st Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 854-56 (8th Cir. 2012); *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012); *United States v. Bowker*, 372 F.3d 365, 379-83 (6th Cir. 2004); *People v. Sucic*, 401 Ill. App. 3d 492, 928 N.E.2d 1231 (2010) (requirement under state cyberstalking statute that conduct "alarms, torments, or terrorizes" the victim not vague); *Galloway v. State*, 365 Md. 599, 628, 781 A.2d 851 (2001) ("harass" is a term "commonly understood by ordinary people and, as such, provide[s] fair notice to potential offenders and adequate guidance for enforcement"); *People v. Ewing*, 76 Cal. App. 4th 199, 207, 90 Cal. Rptr. 2d 177 (1999), *as modified on denial of reh'g* (Dec. 2, 1999) ("torment" has a "clear and understandable dictionary definition"); *State v. Saunders*, 302 N.J. Super. 509, 695 A.2d 722 (Ct. App. Div. 1997) (upholding stalking statute because "annoy" is not unconstitutionally vague); *State v. Richards*, 127 Idaho 31, 38-39, 896 P.2d 357 (Ct. App. 1995) ("harass" is a word "commonly employed in ordinary conversation").

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adequate notice and prevent arbitrary enforcement. Accordingly, Amici have not shown that the cyberstalking statute is unconstitutionally vague.

C. Internet Harassment Is Similar To Telephone Harassment For Purposes Of This Constitutional Analysis

Last, in an attempt to avoid addressing contrary authority in the State of Washington upholding the telephone harassment statute, Amici argue generally that telephones are different from the Internet. Amicus Br. at 12-13. While that may be true in some respects, the invasive features of a telephone are perhaps even more extreme in Internet communications. With the advent of the iPhone and other smart phones, online communications are just as readily accessible and just as intrusive as a phone call. But because there are myriad ways to communicate via Internet—e.g., emails, texts, Facebook posts and messages, Google voice calls, WhatsApp calls and messages, Instagram posts—online speech is in actuality likely to be more intrusive for most people. Contrary to Amici's argument, just like the phone, the Internet "presents to some people a unique instrument through which to harass and abuse others." *Dyson*, 74 Wash. App. at 244.

Amici argue that online communications are different because unlike a phone call, an online message such as a Facebook post or a blog can be directed at many people. Amicus Br. at 12-13. But because the cyberstalking statute targets messages that are intended to harass a specific person, the fact that a message may appear in a public place weighs less heavily. *See* Dkt. No. 53, at 15-16, 22. Last, Amici argue that the recipients of electronic communications can more easily avoid unwanted messages whereas the same is not true of a telephone. Amicus Br. at 13. But, in today's online society, it is all but impossible to avoid such communications. Thus, for all practical purposes, this feature does not distinguish a phone from an electric communication.

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III. CONCLUSION

For these reasons, this Court should reject Rynearson and Amici's request to enjoin Wash. Rev. Code § 9.61.260(1)(b). The cyberstalking statute is neither unconstitutionally overbroad nor vague, and should be upheld.

DATED this 9th day of November 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States District Court Western District of Washington using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

s/ *Stephanie N. Lindey*
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HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD L. RYNEARSON, III

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

NO. 3:17-cv-5531

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
November 30, 2018

ORAL ARGUMENT REQUESTED

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I. Introduction

The parties agree that "passing out leaflets is not the same as stalking someone." Defs. Mot. to Dismiss and Opp. to Prelim. Inj. ("Opp.") 17. The problem is that Washington law defines the electronic equivalent of passing out leaflets as "stalking," so long as the author harbors (even partly) an intent to embarrass. *See* Opp. 16 (listing "dispersing messages on blogs or message boards" as a form of cyberstalking). Updating, for the internet age, the leafletting, publishing, and picketing cases Defendants must concede involve protected speech (Opp. 14, 17), the speech in those cases comfortably falls within the scope of the cyberstalking law—demonstrating the statute's vast overbreadth and the way it criminalizes core First Amendment activity.

For example, consider *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Today, someone opposed to a local realtor's "real estate practices" might write Facebook posts, rather than leaflets, criticizing his practices, accusing him of being a "panic peddler," and requesting others to call his home phone number. *Id.* at 417. Rather than physically handing out leaflets to the realtor's neighbors, at a local shopping center, and outside the realtor's church, the posts' author might email them to the neighborhood listserv and post them on the church's Facebook page. *Id*. Such posts would be electronic and repeated communications to third parties, and a jury would have no trouble finding the posts were made with intent to embarrass, or even to intimidate, as they were designed to compel the realtor to change his real estate practices through fear of social ostracism. *See City of Seattle v. Huff*, 767 P.2d 572, 576 (Wash. 1989) (defining "intimidate" as "compel[ling] to action or inaction"). Such posts are therefore prohibited by the cyberstalking statute. Yet the fact that "expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment," *Keefe*, 402 U.S. at 419—and that must be true regardless of whether the communication is written and distributed on paper or on the internet.

Or take *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). If the exact same parody were published online—using the name and picture of Jerry Falwell, and describing his "first time" as occurring "during a drunken incestuous rendezvous with his mother in an outhouse," *id.* at 48—

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it would plainly meet the statutory elements of cyberstalking, were it posted anonymously or more than once. After all, a jury found that the magazine intended to inflict emotional distress, *id.* at 49, so it would easily infer intent to harass or to embarrass. The parody cannot be constitutionally protected on paper but unprotected online—yet it, too, is criminalized by the cyberstalking statute.

Defendants seek to distinguish these cases as involving laws that "have the potential of suppressing . . . political speech." Opp. 14. But so does the cyberstalking statute. As a Washington court of appeals noted, a "variety of political and social commentary, including caustic criticism of public figures, may be swept up" in the cyberstalking statute. *State v. Stanley*, No. 74204-3-I, 2017 WL 3868480, *9 (Wash. App. Sept. 5, 2017) (nonbinding, but usable as persuasive authority per Wash. G.R. 14.1).[1] The statute nowhere excludes speech on matters of public concern, or speech about public figures. Moreover, although the First Amendment may extend *heightened* protection to speech on matters of public concern—itself a category broader than "political speech"—the Amendment's protections extend far beyond that. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating law that punished people for falsely claiming that they have been awarded military medals). The "guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

In an effort to avoid subjecting the cyberstalking statute to strict scrutiny, Defendants argue that the statute regulates conduct, not speech. But a statute that expressly criminalizes "mak[ing] an electronic communication," RCW 9.61.260(1), and nothing else, is a speech restriction. Calling speech the "act of communicating" does not make it non-expressive conduct. Nor does speech

[1] Plaintiff disagrees with the First Amendment conclusion in *Stanley* that the intent-to-harass portion of RCW 9.61.260(1) & (1)(b) should be upheld. *Stanley* took the view that this provision "mirrors the telephone harassment statute," 2017 WL 3868480 at *6, but, for reasons noted *infra* p. 12 and in Renewed Mot. for Prelim. Inj. ("P.I. Mot.") 6-7, the telephone harassment statute differs in important ways from the ban on online speech to third parties about a person. But the Washington Court of Appeals' interpretation of the scope of a Washington statute is more relevant here than its analysis of federal constitutional law.

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become "conduct" because it is uttered with a certain intent. Still less can Defendants justify the challenged provision of the statute—a ban on certain repeated or anonymous electronic communication to third parties, Compl. ¶ 3—on the basis of noncommunicative aspects of the speech. A law that restricts some speech about a person to third parties (including the public at large) necessarily criminalizes speech based on its content, not its noncommunicative attributes.

This content-based restriction covers a substantial amount of protected speech. Defendants do not dispute that Rynearson has identified many examples of how protected speech is covered by the statute's terms. Instead, they seek to define the statute's coverage by cases that have been prosecuted (as reflected in appellate decisions). The statute's speech-suppressing impact has not been as limited as Defendants would have it, but in any event, overbreadth is not determined by prosecutorial discretion. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. Rynearson has shown that many common forms of protected speech are criminalized. That is enough.

Defendants fare no better in their attempts to satisfy strict scrutiny, an issue Rynearson has not waived. Subsection (1)(b) of the cyberstalking statute is not narrowly tailored to serve the interest identified by Defendants: protecting individuals from the emotional harms of stalking. Threatening speech is covered by subsection (1)(c). Lewd and lascivious speech is covered by (1)(a). Communications *to* a person that invade his home—which may sometimes be properly covered by, for instance, telephone harassment statutes, precisely because such communications are targeted to a particular unwilling listener—are not covered by the prohibition on speech to third parties, P.I. Mot. 6-7. All that subsection (1)(b) adds to the statute, then, is a prohibition on constitutionally protected speech about third parties—indeed, on *all* repeated (or anonymous) speech about a third party that is said with a supposedly malign intent (such as the intent to embarrass). Such a broad ban cannot be justified by an asserted government interest in shielding people from offensive speech said about them.

Finally, Defendants' breezy assertion that the Court need not worry about the cyberstalking

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statute being applied to "any person in Washington advancing political or religious rhetoric or public discussion" (Opp. 24) founders on the very facts of this case—which also reinforce why Rynearson has standing to bring this suit. Rynearson was engaged in political speech, yet the cyberstalking statute was applied to him by the police and a municipal court judge. And a prosecutor in the Kitsap County Prosecutor's office stated that he would "sit on" the referred cyberstalking charges and see if he received any more referrals related to Rynearson. Rynearson's decision to censor his speech rather than risk prosecution is based on a well-founded fear, given that his speech at least arguably falls within the reach of the statute. That self-censorship is irreparable harm that can be remedied only by an injunction.

II. Rynearson Has Standing to Challenge the Cyberstalking Law.

Rynearson has standing to bring this case because (i) as the government does not dispute, he is suffering "the constitutionally recognized injury of self-censorship," *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003), (ii) his "intended speech arguably falls within the statute's reach," which establishes a "well-founded fear that the law will be enforced," *id.*, and (iii) enjoining the local prosecutor and the Attorney General—the two authorities who can prosecute crimes in Kitsap County—would redress his injury.

Defendants attempt (Opp. 4) to raise the bar for standing by arguing that Rynearson must show both "an actual and well-founded fear that the law will be enforced against [him]" *and* that his intended speech falls within the statute's reach. But, as the Ninth Circuit explained, this is a single requirement: "if the plaintiff's intended speech arguably falls within the statute's reach," then a well-founded "fear of prosecution will . . . inure." *Cal. Pro-Life Council*, 328 F.3d at 1095. Rynearson's intended speech at least *arguably* falls within the cyberstalking statute's reach, which is enough to establish a well-founded fear of prosecution and that Rynearson is suffering an injury-in-fact that confers standing.

The Bainbridge Island Police Department clearly thought that Rynearson's past speech fell within the reach of the statute—and by analogy would presumably reach the same conclusion regarding similar future speech—because it found probable cause to believe that Rynearson had

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violated the RCW 9.61.260 ban on repeated and anonymous communication intended to harass and referred charges to the Kitsap County Prosecutor. (Declaration of Richard L. Rynearson, III in Support of Motion for Preliminary Injunction ¶ 13.) The Kitsap County prosecutor's office did not respond to the referral by asserting that Rynearson's speech fell outside the scope of the statute. Instead, a prosecutor said that he was going to "sit on" the referred cyberstalking charges and would consider prosecuting Rynearson for cyberstalking if he "get[s] any future referrals," *id.* Ex. C—suggesting not only that the prosecutor then believed that Rynearson's speech fell within the scope of the statute, but also that Rynearson's future speech would be subject to searching scrutiny for possible prosecution. And a municipal court judge found that Rynearson's speech fell within the scope of the cyberstalking statute. (Declaration of Eugene Volokh in Support of Motion for Preliminary Injunction, Ex. A.) It is thus at least arguable that Rynearson's past or intended speech falls within the statute, and his fear is well-founded.

The Kitsap County Superior Court held that the cyberstalking statute could not constitutionally be applied to the past speech that was at issue in the protection order proceeding. *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *12 (Wash. Sup. Ct. Jan. 10, 2018). But that does not mean that the cyberstalking statute does not cover Rynearson's speech. Rather, it shows that the statute's broad scope sweeps in protected speech, including political speech critical of public figures. *See id.* at *7. And the Superior Court's constitutional holding neither binds Defendants nor inoculates Rynearson against a prosecution based on *future* protected speech. A future state court might again rule in Rynearson's favor—but Rynearson need not risk prosecution to find out:

> Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). By showing that his speech arguably falls within the scope of the cyberstalking law, Rynearson has established that he suffers the injury of

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self-censorship on account of a well-founded fear of prosecution.

That injury would be redressed by an injunction prohibiting the Kitsap County Prosecutor and Attorney General from enforcing the challenged provision of the statute. Defendants claim (Opp. 4, 6) that Rynearson's injury is not redressable because he has not proved that either Defendant has present intent to enforce the cyberstalking law against him, and the Attorney General's enforcement authority requires a request by the local prosecutor or Governor. But Rynearson's injury would be redressed by an injunction because of Defendants' official responsibilities, regardless of the current incumbents' present intent (which is not immutable). *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (question is whether there is a "requisite causal connection between [defendants'] responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress"). That the Washington Attorney General's authority is exercised by request does not alter the fact that, once deputized, he can exercise the same prosecutorial authority as a county prosecutor. *See Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1183 (W.D. Wash. 2014) (holding Attorney General was proper defendant in pre-enforcement suit because "Mr. Ferguson can deputize himself (subject to the concurrence of the governor or the other authorities listed in RCW 43.10.232(1)) to stand in the role of the county prosecutor and exercise the same power as the county prosecutors named herein"). That power to exercise the same authority as a county prosecutor "demonstrates the requisite causal connection for standing purposes." *Planned Parenthood of Idaho*, 376 F.3d at 1920.

Finally, there was no requirement for Rynearson to sue every county prosecutor in Washington in order to have standing. Rynearson agrees that county prosecutors who are not party to this case would not be bound by any injunction (Opp. 6), but he has not alleged he is suffering any injury from the possibility of prosecution in other counties. Accordingly, all that is required to provide him complete and effective relief from the irreparable injury that he *is* suffering is to enjoin the two prosecutors who can bring prosecutions in Kitsap County: the Kitsap County Prosecutor and the Attorney General.

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III. All Four Factors Weigh in Favor of a Preliminary Injunction.

In his renewed motion for a preliminary injunction, Rynearson showed that he was likely to succeed on the merits of his First Amendment claim. Defendants' rejoinders that the cyberstalking statute regulates either mostly conduct or mostly unprotected speech fail to grapple with the cyberstalking statute's plain text and clear application to a wide variety of protected speech—including political speech and speech on matters of public concern. Nor can Defendants show that the statute is narrowly tailored to serve the anti-stalking interest Defendants identify. Combined with the strong showing of likelihood of success on the merits, the threat of prosecution in this very case shows that the statute poses a real threat to political speech, that Rynearson is suffering irreparable harm in the absence of an injunction, and that the public interest and balance of equities all favor the issuance of a preliminary injunction.

A. The cyberstalking statute primarily regulates speech, not conduct.

Defendants repeatedly assert that the cyberstalking statute regulates "conduct." But Defendants define the forbidden "conduct" as communicating: "making an electronic communication with the intent to harass" (Opp. 11). A synonym for "making an electronic communication" is speaking or writing. Every form of speech can be described as an "act," but that does not make it conduct. *See, e.g.*, *State v. Bishop*, 787 S.E.2d 814, 817-18 (N.C. 2016) (holding that internet "communication" with "the intent to intimidate or torment a minor" does not "lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket") (invalidating North Carolina's "cyberbullying" statute). Imagine a statute that criminalized writing (or handing out) a leaflet with the intent to embarrass someone (*see Keefe*, 402 U.S. at 417), holding a sign at a funeral with the intent to torment (*see Snyder v. Phelps*, 562 U.S. 443, 448 (2011)), or printing a magazine article with the intent to harass (*see Hustler*, 485 U.S. at 48). None of these are "conduct" regulations, no matter how framed—and neither is the cyberstalking statute's prohibition on "dispersing messages on blogs or message boards" with bad intent (Opp. 16).

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First, the text of the cyberstalking statute is expressly—and *only*—directed at "electronic communication." RCW 9.61.260(1) ("A person is guilty of cyberstalking if he or she, with [prohibited] intent . . . makes an electronic communication"). Communication is speech. That makes the statute a speech regulation. *See United States v. O'Brien*, 391 U.S. 367, 375 (1968) (holding a statute regulates conduct rather than speech when, among other things, "on its face [it] deals with conduct having no connection with speech" and "there is nothing necessarily expressive about [the prohibited] conduct"). This is not a case where a generally applicable conduct regulation incidentally covers speech. *See, e.g.*, *id.* (upholding statute that prohibits destruction of draft card despite its application to symbolic burning of draft card in protest).[2] It is a case where the subsection's coverage begins and ends with speech. *See State v. Kohonen*, 370 P.3d 16, 21 (Wash. App. 2016) (construing subsection 1(c) of the cyberstalking statute to reach only unprotected category of "true threats" because of "the danger that the criminal statute will be used to criminalize pure speech"). When the "only 'conduct' which the State [seeks] to punish is the fact of communication," any resulting "conviction rest[s] solely upon 'speech.'" *Cohen v. California*, 403 U.S. 15, 18 (1971).

Second, the intent requirement does not convert the statute's speech restriction into a conduct regulation, contrary to Defendants' argument (Opp. 10-11, 14). Precisely the opposite: It shows the speech restriction is content-based. "Some facial distinctions based on a message are obvious . . . and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict

[2] Even if the cyberstalking statute did regulate speech only incidentally, it would still fail constitutional muster because it does not pass intermediate scrutiny. Incidental speech regulation is unconstitutional unless it "furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The cyberstalking statute cannot pass that test, because any interest in preventing speech to some people about other people is related to the suppression of free expression; the "emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself," *Texas v. Johnson*, 491 U.S. 397, 412 (1989), and that is equally so for the emotive impact of speech on the person being talked about. *See* pp. 17-18, *infra*.

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scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). An author who posts repeatedly about someone else (from his ex-girlfriend to the mayor) with the intent to praise that person is untouched; an author who posts repeatedly about someone else with the intent to embarrass him risks arrest. Because the author's expressive purpose in making the communication determines on which side of the line he falls, the statute regulates based on content.

If it were true, as Defendants' suggest (Opp. 10-11, 14), that the government can freely regulate speech so long as it adds a bad-intent element, then the Supreme Court's cases invalidating intentional infliction of emotional distress judgments would have come out the other way. In both *Snyder* and *Hustler*, the state law at issue required the speaker to intentionally (or recklessly) inflict emotional distress. *See Snyder*, 562 U.S. at 451; *Hustler*, 485 U.S. at 50. Yet the judgments did not stand. *See also Garrison v. Louisiana*, 379 U.S. 64, 78 (1964) (speech does not lose its constitutional protection even when it is said with "wanton desire to injure"). Defendants' theory that bad intent converts speech into conduct also fails entirely to grapple with *why* intent is irrelevant to the First Amendment's protection. *See* P.I. Mot. 9. If speech could be criminalized as "conduct" any time a jury could find an intent to embarrass or harass, the chilling effect would be widespread: much speech of value would go unsaid, from anonymous reviews castigating a business for its failed customer service, to repeated posts warning friends about an ex-boyfriend's stinginess, to internet attack ads on political candidates. *See Garrison*, 379 U.S. at 73.

Defendants attempt (Opp. 14) to dodge the import of these cases on the ground that the laws at issue could suppress political speech. But so can the cyberstalking statute. *See Stanley*, 2017 WL 3868480 at *9 (noting the statute reaches "contemporary electronic communication, social media, and internet postings" and a "variety of political and social commentary"). In any event, the principle that protected speech does not lose its protection because it was uttered with bad intent is not limited to "political" speech. It has been applied to all speech on matters of public concern (which includes "any matter of political, social, or other concern" or "legitimate news interest," *Snyder*, 562 U.S. at 453), including, for instance, a scurrilous and vulgar attack on a well-known minister, *Hustler*, 485 U.S. at 48. Indeed, even speech on private matters is generally

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constitutionally protected: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Stevens*, 559 U.S. at 479.[3]

There is also no narrow reading of the various intent requirements that can save the statute (*contra* Opp. 10-11). Defendants call the Washington Supreme Court's interpretation of "intimidate"—including "compel[ling] to action or inaction," *Huff*, 767 P.2d at 576—"narrow," but "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *see Keefe*, 402 U.S. at 419.[4]

Nor is it proper to substitute specialized meanings for common understandings of the other three intent triggers. No Washington court is likely to read "embarrass" to mean "to hamper or impede . . . movement," as Defendants suggest (Opp. 11), *see Stanley*, 2017 WL 3868480 at *9 (suggesting "intent to embarrass" would cover "caustic criticism"), or to substitute the military-context meaning of the word harass ("to impede and exhaust (an enemy) by repeated attacks or raids," American Heritage Dictionary 798 (4th ed. 2000)), for its more common meaning of "to irritate or torment persistently," *id*. And reading "embarrass" to mean "to place in doubt, perplexity or difficulties," Opp. 11, would only make matters worse: Surely it cannot be constitutional to outlaw repeatedly speaking online about people in a way intended to place them in doubt, perplexity, or difficulties.

The statute also cannot be rescued by the narrow-construction or constitutional-avoidance

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[3] *Snyder* suggested that speech on matters of private concern might sometimes be subject to civil liability, *see* 562 U.S. at 451-54, but *Stevens* makes clear that such speech is generally immune from criminal punishment, unless it fits within one of the existing narrow First Amendment exceptions, such as for true threats.

[4] The Washington Supreme Court used the phrase "as by threats" as illustrative of intimidation, but did not interpret intimidation as limited to threats. *See Huff*, 767 P.2d at 576. Nor could it, as the telephone harassment ordinance considered in that case, like the cyberstalking statute, separately covers non-threatening speech and threatening speech.

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canons. Subsection 1(c) could be narrowly construed to reach only true threats because that is an unprotected category of speech covered within a facially too-broad statutory definition. *See Kohonen*, 370 P.3d at 21. But there is no unprotected category within anonymous or repeated speech with bad intent to which the subsection could be narrowed. On the contrary, anonymity is an aspect of the *content* of speech that is itself constitutionally protected. P.I. Mot. 10. And there "is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.).

Moreover, there is no "consensus" that an intent element converts a speech prohibition into a conduct regulation. Defendants cite cases (Opp. 14 & n.4) upholding the federal cyberstalking statute, which—unlike RCW 9.61.260—criminalizes conduct that may or may not include speech, *not* speech itself. *See* 18 U.S.C. § 2261A(2) (defining criminal cyberstalking as "with the intent to kill, injure, harass, intimidate, . . . us[ing] the mail, any interactive computer service or electronic communication service . . . , or any other facility of interstate or foreign commerce to engage in a course of conduct that . . . places that person in reasonable fear of . . . death . . . or serious bodily injury" or "causes . . . substantial emotional distress"). The Ninth Circuit's decision upholding the federal statute depended upon the fact (missing here) that the "proscribed acts are tethered to the underlying criminal conduct and not to speech," *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014). Here the proscribed acts are tied *only* to "communication"—not conduct.[5]

Indeed, the consensus regarding anti-"harassment" statutes, like Washington's, that criminalize speech itself is that such statutes are unconstitutional. *See Bishop*, 787 S.E.2d at 819 (invalidating North Carolina statute prohibiting internet "communication" with "the intent to

[5] Likewise, the Florida statute addressed in *Burroughs v. Corey*, 92 F. Supp. 3d 1201 (M.D. Fla. 2015), *aff'd*, 647 F. App'x 967 (11th Cir. 2016), applied to a "course of conduct" that "causes substantial emotional distress" and "serves no legitimate purpose," *id.* at 1204 (internal quotation marks omitted)—limitations lacking in Washington's statute. In addition, the law, unlike RCW 9.61.260, did not solely regulate speech.

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intimidate or torment a minor"); *State v. Burkert*, 174 A.3d 987, 1000, 1002 (N.J. 2017) (holding that criminal harassment statute requiring "purpose to harass" can only be constitutionally applied to "repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfere with that person's reasonable expectation of privacy," because "[s]peech . . . cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt"); *People v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014) (striking down criminal harassment statute that banned certain "written communication[s]" said "with intent to harass, annoy, threaten or alarm another person").

Third, the statute necessarily criminalizes the speaker's message, not noncommunicative aspects of his speech. With respect to repeated or anonymous speech to third parties, the prohibition can be applied only by reference to the content of the speech. *See Reed*, 135 S. Ct. at 2227 (even laws that are "facially content neutral[] will be considered content-based regulations of speech" when they "cannot be justified without reference to the content of the regulated speech") (internal quotation marks omitted). As an initial matter, prohibiting anonymity is a facial content restriction because an "author's decision to remain anonymous" is a "decision[] concerning omissions or additions to the content" of his message. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Prohibiting speech based on its purpose is also a facial content restriction. *Reed*, 135 S. Ct. at 2227. Moreover, when the communication is to third parties, rather than one-to-one emails saying "I love you" to the target of harassment (as hypothesized by Defendants, Opp. 12), the intent to harass (or embarrass or intimidate) a person can be inferred only from what the communication *says* about that person. Stripped of the messages' content, there is no way that a jury could find that "widely dispersing messages on blogs or message boards" (Opp. 16) is harassing. It is necessarily the disparaging content of the blog posts that is criminalized.

The *Bini* case (Opp. 18) illustrates the point. Stripped of the content of the web site and emails at issue, the facts in that case would indicate that Bini (or his girlfriend) created a web site and sent emails to his ex-wife's family and several of her business associates. *Bini v. City of*

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Vancouver, No. C16-5460, 2017 WL 2226233, at *6 (W.D. Wash. May 22, 2017). There is nothing about the noncommunicative aspects of that speech that could place it within the cyberstalking statute's prohibition. Rather, Bini was arrested for cyberstalking because the *content* of the emails and web site were disparaging, calling the ex-wife a "fraud" and "an excessive drinker," and claiming that her injuries were the result of her "own alcohol-induced rage." *Id.* Some of those statements may have been negligently false assertions of fact, and therefore unprotected defamation. But that could at most justify a libel lawsuit; Washington courts have made clear that criminal punishment of libel is unconstitutional unless it is limited to false factual statements said with "actual malice," a requirement that RCW 9.61.260 does not include. *Parmelee v. O'Neel*, 186 P.3d 1094 (Wash. App. 2008), *rev'd as to attorney fees*, 229 P.3d 723 (Wash. 2010).

The fact that the cyberstalking statute necessarily regulates based on content distinguishes it from the otherwise similar telephone harassment statute (*contra* Opp. 12-13). The telephone harassment law may be aimed at the call's noncommunicative impact, such as the distracting ring, and may apply even if no conversation ensues. The "no conversation" caveat cannot, however, serve the same function for electronic communication because—unlike a telephone call which may intrude and harass even if there is a hang-up—electronic speech to third parties cannot harass someone else unless it says *something* (presumably disparaging or embarrassing) about the target.

Finally, the legislature's good motives (Opp. 12) do not matter. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229. The cyberstalking statute runs that risk in spades. The police in Renton have already attempted to use it to shut down the posting of internet videos critical of police officers. *See* P.I. Mot. 6. It is not hard to imagine a local government official attempting to use a cyberstalking prosecution—or, with just as much harm, the threat of prosecution—to shut down a blog or Facebook page containing vituperative criticism of local figures. That the legislature may have wanted to capture stalking *conduct* cannot save a statute that on its face regulates only *speech*.

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B. The common, real-world speech falling within the statute's scope shows that a "substantial number" of the statute's applications are unconstitutional.

The parties agree (Opp. 8-9) that a statute is overbroad 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.[6] But Defendants err in faulting Rynearson for supposedly showing overbreadth through "fanciful hypotheticals," Opp. 9. In a First Amendment challenge, the challenger need only "'describe the instances of arguable overbreadth of the contested law.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 n.7 (9th Cir. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.442, 449-50 & n.6 (2008)). "If the suggested examples fall within the plain language of the statute, the Plaintiffs have met their burden." *Id.*

The examples offered by Rynearson, P.I. Mot. 8, are common, real-world examples that fall within the plain language of the statute and Defendants do not argue otherwise. Defendants' contention (Opp. 20) that Rynearson must establish that individuals have actually been prosecuted for protected speech gets the standard wrong. *See Stevens*, 559 U.S. at 474-77, 482 (striking down ban on videos depicting animal cruelty because it could cover a wide range of hypothetical cases, including depictions of hunting and some animal husbandry practices, without any instances of prosecution for such videos). And it misses that an unconstitutionally overbroad statute causes harm even if it has not been used, because the "threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *See, e.g., Dombrowski*, 380 U.S. at 486 (alteration in original). "[T]he value of a sword of Damocles is that it hangs—not that it drops." *Rafeedie v. INS*, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (internal quotation marks and citations omitted).

Defendants fare no better with their other attempts to show that the cyberstalking statute's

[6] In their response to the *amici* brief, Defendants argue that the statute is not overbroad "if a substantial number of its applications are constitutional." Resp. to *Amici* Br. 2. That is not the test for overbreadth—if a substantial number of the statute's applications are *un*constitutional, judged in relation to its legitimate sweep, then the statute is overbroad, *Stevens*, 559 U.S. at 473, regardless of whether a substantial number of other applications are constitutional.

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legitimate sweep exceeds its coverage of protected speech. Defendants contend that the anonymity requirement is needed because anonymity allows "cyberstalkers to use more threatening speech without fear of repercussion" (Opp. 16). But threatening speech is covered by subsection 1(c), and is criminalized without regard to anonymity. Only non-threatening speech is criminalized under RCW 9.61.260 for its anonymity. And the *ipse dixit* that non-threatening anonymous speech loses its protection when anonymity is "solely" for the purpose of harassing victims or evading law enforcement misses both that (1) the statute does not require harassment to be the "sole" purpose of the criminalized speech and that (2) avoiding "official retaliation" is a time-honored rationale for the protection of anonymity. *McIntyre*, 514 U.S. at 341.

Requiring repetition does not narrow the statute's coverage to mostly unprotected speech, either. Perfectly legitimate, if caustic, criticism is often repeated over time (and the statute requires only two communications, which need not take long). Most campaigns designed to change behavior unfold over time, whether they take the form of picketing or a Facebook page. *See, e.g.*, *Keefe*, 402 U.S. at 417; *NAACP*, 458 U.S. at 898, 903-04 (upholding right to conduct boycott that extended over 7 years and included regularly publicizing names of individuals who violated the boycott, branding them "traitors to the black cause," and calling them "demeaning names"). Defendants say that passing out leaflets is not stalking (Opp. 16). But they fail to explain the difference between a web site and emails calling someone a "fraud" and "excessive drinker" (which Defendants say *is* stalking under RCW 9.61.260, Opp. 18) and the same calling someone a "panic peddler" and asking others to call his home phone—the speech in *Keefe*, which has been held to be constitutionally protected.

The amount of protected speech covered by the third-party-communication provision is likewise substantial in relation to that provision's legitimate application. All of the horrific examples put forward by Defendants (drawn from across the nation, Opp. 17-18) either involved "lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act," RCW 9.61.260(1)(a), or threats, *id.* 9.61.260(1)(c). Defendants' inability to identify examples of legitimate applications of the cyberstalking statute that involve

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neither lewd comments nor threats is telling.

Rynearson is not arguing that the First Amendment requires that "the stalker convey a threat specifically to the target" (Opp. 18). He is arguing that, with respect to the non-threatening speech to third parties at issue in subsection (1)(b)—which is criminalized solely because it is repeated or anonymous and uttered with bad intent—the statute reaches almost exclusively protected speech. The only example Defendants offer falling into this category is *Bini*, and Defendants make no effort (Opp. 18) to show why application of the statute was legitimate there. It is *possible* that the speech in *Bini* was defamatory. But the statute requires no such finding.

Finally, as applied to communications to third parties—the only aspect challenged here—RCW 9.61.260(1)(b) cannot be saved by a limiting construction or severance of unconstitutional applications (Opp. 19). A limiting construction requires words that are reasonably subject to the proposed limitation. *See State v. Immelt*, 267 P.3d 305, 310-11 (Wash. 2011) (declining to read statute narrowly where "the language of the horn ordinance provides no basis for a sufficiently limiting construction to avoid an overbreadth problem"). Because neither intent nor anonymity nor repetition strip speech of First Amendment protection, none of those statutory elements can be narrowly construed as limited to a category of speech that the government is permitted to regulate on account of its content. *See Alvarez*, 567 U.S. at 717-18 (plurality) (describing those categories).

Moreover, Rynearson is proposing that the statute be severed and subsection (1)(b) be invalidated as applied to speech to third parties, rather than invalidating the cyberstalking statute in its entirety. Defendants offer no specifics on what additional severance of unconstitutional applications would be possible, and none are apparent. As the likelihood of success on the overbreadth challenge indicates, most (if not all) of the applications of subsection (1)(b) to speech to third parties are unconstitutional.

C. Defendants cannot establish that the statute passes strict scrutiny.

Defendants also err in arguing (Opp. 20-22) that the cyberstalking statute survives strict scrutiny and that Rynearson has waived any argument to the contrary.

As to waiver, Defendants cite the various opinions in *Ashcroft v. ACLU*, 535 U.S. 564

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(2002), for the proposition that overbreadth and strict scrutiny are distinct doctrines. They *are* distinct, but that does not mean that Rynearson waived any arguments related to strict scrutiny. Overbreadth is one of two ways to establish facial invalidity (the other being a claim that a statute is invalid in all applications, which Defendants correctly note is not made here). *See Stevens*, 559 U.S. at 472-73. And overbroad statutes often fail strict scrutiny because, by sweeping in a substantial amount of protected speech, they necessarily fail to be "narrowly tailored" to serve a compelling government interest. *See Reno v. ACLU*, 521 U.S. 844, 882 (1997) (holding that an overbroad statute's "defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision"). Defendants are welcome to try to show that the statute is not overbroad because it passes strict scrutiny, but Rynearson has preserved his right to respond to that argument.

Rynearson's opening brief separately addressed both overbreadth and strict scrutiny. *See* P.I. Mot. 4-8 (analyzing the "alarming breadth" of the statute), 11-12 (arguing for application of strict scrutiny). Arguing for the application of strict scrutiny was all Rynearson was required to do. In *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011), the Ninth Circuit explained that the party seeking an injunction against a restriction on speech bears the initial burden of "making a colorable claim" that the regulation threatens to infringe on plaintiff's First Amendment rights. *Id.* at 1116. Once a plaintiff makes this showing, the burden shifts to the government to justify the restriction. *Id.*; *see also Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 746 (9th Cir. 2012) (shifting burden to the state to justify speech restrictions under strict scrutiny after finding plaintiff made a colorable claim of a First Amendment violation). Accordingly, Defendants must show that subsection (1)(b) furthers a compelling interest and is narrowly tailored to serve that interest. *Sanders County*, 698 F.3d at 746.

Defendants cannot meet that burden. They cannot dodge strict scrutiny on the ground that the statute is content neutral. The claim that even "kind" messages fall within the statute's reach if typed with the requisite intent (Opp. 21) only demonstrates that the statute's application turns on the speaker's expressive purpose, which makes it content-based. *Reed*, 135 S. Ct. at 2227. And

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they fail to show that the prohibition on repeated or anonymous speech to third parties is narrowly tailored to serve the interest they identify—protecting stalking victims from feeling scared, traumatized, or depressed (Opp. 22).

The "secondary effects" doctrine (Opp. 20-21) is inapplicable, because the "emotive impact of speech on its audience is not a 'secondary effect,'" and justifying the statute based on speech's emotional impact only reinforces that the regulation is content-based. *Johnson*, 491 U.S. at 412. Moreover, regardless of whether Defendants are right that "stalking is often fueled by a pre-existing *personal* relationship" (Opp. 21), the cyberstalking statute is not so restricted, showing—again—that it is not tailored at all, much less narrowly.

Even wider of the mark is Defendants' contention (Opp. 22) that cyberstalkers will "undoubtedly" invade the homes of their victims through their messages. If this is a claim that the speakers will follow up on their speech to the public by also speaking directly to the person they are condemning, then a prohibition on unwelcome one-to-one messages *to* a victim will "undoubtedly" suffice to address the interest identified by Defendants, and there is no need (much less a compelling one) to criminalize speech to third parties and the public. But if it is a claim that the person being condemned will access the speech from home, after hearing about it from a friend (or when Googling his own name), then the answer is that people cannot be shielded from such discoveries—just as a newspaper cannot be punished for repeatedly writing something about a local citizen, even though the citizen might well read that story in his own home. *See Snyder*, 562 U.S. at 459 ("In most circumstances, the 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).

Likewise, the concern that "cyberstalkers could take on the identity of the victim, or encourage other like-minded individuals to stalk in their place," Opp. 17, might be dealt with through narrowly tailored bans on impersonation, *cf.* RCW 4.24.790 (civil suit for "electronic impersonation"), or on solicitation of criminal conduct by readers. It cannot justify a broad ban

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on, for instance, twice saying something about someone online that is intended to embarrass them.

It bears repeating, moreover, that subsection (1)(b) serves the government's interest only to the extent that there is a compelling interest in restricting speech that is not threatening or lewd: those other kinds of speech are covered by other subsections. This wholesale lack of tailoring means that subsection (1)(b) cannot be justified even under the more lenient intermediate-scrutiny standard of restricting speech no greater degree than "essential to the furtherance of [a substantial] interest." *O'Brien*, 391 U.S. at 377. Akin to burning "the house to roast the pig," subsection (1)(b) "threatens to torch a large segment of the Internet community." *Reno*, 521 U.S. at 882.

D. The remaining factors support a preliminary injunction.

The parties agree that all four factors must be considered in determining whether to grant a preliminary injunction: likelihood of success on the merits, irreparable harm, the balance of equities, and the public interest. *See* P.I. Mot. 12-13 (discussing factors other than likelihood of success on the merits). But Defendants give short shrift to the degree to which Rynearson's likelihood of success on the merits informs the other three factors. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) ("A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.") (internal quotation marks omitted).

As for irreparable harm, Rynearson has shown not only a likelihood of success on the merits but also that he has a well-founded fear of prosecution and has censored his speech as a result. When the risk of prosecution "chill[s]" a person's First Amendment rights, that is itself "irreparable injury." *Sanders County*, 698 F.3d at 748; *see also Doe*, 772 F.3d at 583 (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (internal quotation marks omitted).

As for the balance of equities, enjoining Defendants from enforcing the ban on anonymous or repeated communications to third parties will leave the government plenty of tools to protect actual stalking victims from "harassment, violence, and invasions of privacy" (Opp. 24). Nothing in the injunction would affect the ability of Defendants to prosecute any crime involving violence—which the cyberstalking statute does not address—and even threats of violence (covered

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under subsection (1)(c)) would be open to prosecution under the requested injunction. Nor would the requested injunction impair Defendants' ability to protect individuals from invasions of privacy, because the injunction addresses only communications to third parties and not one-to-one communications to a person.

On the other side of the balance, given the criminal penalties imposed by the statute, there "is a potential for extraordinary harm and a serious chill upon protected speech." *Doe*, 772 F.3d at 583. Accordingly, both the balance of equities and the public interest favor entry of an injunction. *See id.* (affirming injunction where, despite "the State's significant interest in protecting its citizens from crime," "nothing in the record suggests that enjoining the . . . Act would seriously hamper the State's efforts to investigate [the relevant] offenses, as it can still employ other methods to do so").

DATED: November 16, 2018.

Respectfully submitted,

SCOTT & CYAN BANISTER FIRST AMENDMENT CLINIC

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

DATED: November 16, 2018

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The Honorable RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD LEE RYNEARSON, III, Plaintiff, v. ROBERT FERGUSON, Attorney General of the State of Washington, and TINA R. ROBINSON, Prosecuting Attorney for Kitsap County, Defendants.	NO. 3:17-CV-05531-RBL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS NOTE ON MOTION CALENDAR: November 30, 2018

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I. INTRODUCTION

Rynearson asks this Court to review Washington's cyberstalking law, Wash. Rev. Code § 9.61.260(1)(b), based on hypothetical and conjecture that do not satisfy Article III's genuine "cases" or "controversies" requirement. Rynearson lacks any personal, credible injury or threat of injury because a Washington court has already held his speech to be constitutionally protected and it is thus not "arguably" within the scope of the cyberstalking law. Rynearson also has not proven that he faces a credible, imminent threat of prosecution when neither Attorney General Ferguson nor Kitsap County Prosecutor Robinson seek to prosecute him for engaging in constitutionally protected speech. Because Rynearson has not shown the minimal requirements for standing, this action cannot proceed.

II. ARGUMENT IN SUPPORT OF DISMISSAL

As this Court well knows, Article III requires Rynearson to have established (1) an "injury-in-fact" to a legally protected interest that is both "concrete and particularized," as well as "actual and imminent"; (2) a causal connection between his injury and the conduct complained of; and (3) that his injury will "likely not merely speculative[ly]" be redressed by a favorable decision. *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Further, because Rynearson seeks only injunctive and declaratory relief in this case, he is required to show "a very significant possibility of future harm," as it is "insufficient" for him to demonstrate only a "past injury" to establish standing. *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1126. Rynearson fails to meet his constitutional burden to establish any of these elements by a "clear showing." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010).

First, Rynearson suffers no actual or imminent injury or threat of injury from enforcement of the cyberstalking law against him. *Lujan*, 504 U.S. at 560. Rynearson asserts that he has an "actual and well-founded fear that the law will be enforced against him" because his intended past speech "arguably" falls within the cyberstalking law's reach. Rynearson Reply &

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Opp. (Dkt. No. 55) at 4 (citing *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)). However, as recognized by the Ninth Circuit, such a claim of future harm "lack[s] credibility" if the challenged statute is "not applicable" to the plaintiff or "the enforcing authority has disavowed the applicability of the challenged law" to the plaintiff. *See Lopez*, 630 F.3d at 788 (citing *Cal. Pro-Life Council, Inc.*, 328 F.3d at 1095). Both of these considerations negate any credible, future threat of prosecution against Rynearson here. *See* Def. Mot. to Dismiss & Opp. (Dkt. No. 53) at 4-5. A Washington court has already held that the cyberstalking law cannot be applied to Rynearson's protected speech. *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *12 (Kitsap Cty. Super. Ct. Jan. 10, 2018). Moreover, it is absurd for Rynearson to suggest that either Attorney General Ferguson or Kitsap County Prosecutor Robinson would ignore a court's "constitutional holding" to apply the challenged law to Rynearson's protected speech in the future. Rynearson Reply & Opp. at 5. They would not. Both Attorney General Ferguson and Kitsap County Prosecutor Robinson have an obligation to uphold the Constitution, just as this Court does. Rynearson faces no "specific, credible threat of adverse government action" based on applicability of the cyberstalking law to him. *Lopez*, 630 F.3d at 792.

Second, Rynearson has not established a "'line of causation between' Defendants' action" or that his "alleged harm [] is more than 'attenuated.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citing *Allen v. Wright*, 468 U.S. 737, 757 (1984)). Rynearson asserts Attorney General Ferguson has the general ability to enforce the State's criminal laws and this fact alone is sufficient to establish a causal connection to his alleged harm. Rynearson Reply & Opp. at 6 (relying on *Planned Parenthood of Idaho* v. *Wasden*, 376 F.3d 908, 919 (9th Cir. 2004)). But Rynearson ignores the Ninth Circuit's caution in *Wasden* that "a generalized duty to enforce state law" will not usually subject an official to suit. *Wasden*, 376 F.3d at 919. Rynearson also ignores the requirement that he must first show that his "asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422

U.S. 490, 505 (1975). As shown in the Defendants' motion and unrefuted by Rynearson, he cannot point to any action by the named Defendants that suggests that either would enforce or have threatened to enforce Wash. Rev. Code § 9.61.260(1)(b) against him or anyone else for their protected speech. To the extent that Rynearson relies on the email from the Kitsap County Prosecuting Attorney's Office, the Washington superior court's ruling has already negated any latent threat in that email. *Compare* Decl. Rynearson, Ex. C (Dkt. 45) *with Moriwaki*, 2018 WL 733811, at *10-12. And, to the extent he relies on the conduct of others not before this Court (e.g., Bainbridge Island Police Department and the Kitsap County municipal court judge), their actions are insufficient to establish any credible threat of future harm by the named Defendants. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-06 (1983) (past exposure to illegal conduct by others is insufficient to establish Article III case or controversy).

Finally, Rynearson admits that granting him relief in this case would not prevent other county prosecutors from enforcing the cyberstalking law against him or anyone else. Rynearson Reply & Opp. at 6; *see also* Wash. Rev. Code § 9.61.260(4) ("an 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"). Thus, even if this Court were to accept Rynearson's facial challenge of the cyberstalking statute—which the Court should not—enjoining the named Defendants would *not* redress his purported injury. Rynearson would continue to be subject to the law in other counties throughout the State.

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III. CONCLUSION

Rynearson lacks standing to raise his constitutional challenge to Washington's cyberstalking statute. This action must be dismissed.

DATED this 30th day of November 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States District Court Western District of Washington using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

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HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD LEE RYNEARSON, III,

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of the State of Washington, and

TINA R. ROBINSON, Prosecuting Attorney for Kitsap County,

Defendants.

Case No. 3:17-cv-05531-RBL

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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DISCLOSURE OF CORPORATE AFFILIATIONS

AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST

IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Electronic Frontier Foundation and American Civil Liberties Union of Washington state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of the stock of *amici*.

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I. INTEREST OF *AMICI*[1]

The **Electronic Frontier Foundation** ("EFF") is a San Francisco-based, non-profit, member-supported digital rights organization. Focusing on the intersection of civil liberties and technology, EFF actively encourages industry, government, and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF has over 38,000 dues-paying members nationwide. EFF publishes a comprehensive archive of digital civil liberties information at www.eff.org. EFF serves as counsel or amicus curiae in many cases addressing free speech online. *See e.g., City of Vancouver v. Edwards*, No. 18998V (Clark County Superior Court 2012); *Backpage.com v. McKenna*, 2:12-cv-00954-RSM (W.D. Wa. 2012); *United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011); *Savage v. Council of American-Islamic Relations, Inc.*, No. 07-cv-06076-SI (N.D. Cal. 2007).

American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization, with over 75,000 members and supporters, that is dedicated to the preservation of civil liberties including the right to free speech. The ACLU-WA strongly opposes laws and government action that infringe on the free exchange of ideas or that unconstitutionally restrict protected expression. It has advocated for free speech and the First Amendment directly, and as amicus curiae, at all levels of the state and federal court systems. *See, e.g., Berger v. City of Seattle*, 569 F.3d 1029, 1034 (9th Cir. 2009).

[1] No party or party's counsel participated in the writing of the brief in whole or in part. No party, party's counsel or other person contributed money to fund the preparation or submission of the brief.

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II. INTRODUCTION

Amici curiae EFF and ACLU-WA support Plaintiff's motion for a preliminary injunction to enjoin enforcement of RCW 9.61.260(1)(b) because the First Amendment clearly, and fully applies to protect the Internet speech and other electronic communications impacted by this cyberstalking statute.

Plaintiff properly attacks subsection (1)(b) of RCW 9.61.260, as unconstitutionally vague and overbroad, lacking the precision the First Amendment requires when government regulates speech on the Internet. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

RCW 9.61.260(1)(b) criminalizes everyday uses of electronic communications such as a parents' posting of embarrassing photographs of their children on Facebook, or tweeted photos of ugly shirts and bad haircuts by a classmate before a 25-year class re-union.

Plaintiff is correct. Subsection (1)(b) of the cyberstalking statute is unconstitutional.

III. ARGUMENT

A. The Statute's restraint on Internet speech violates the First Amendment.

Under the overbreadth doctrine, a statute violates the First Amendment on its face when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The First Amendment's facial overbreadth doctrine applies fully to Internet speech and other electronic communications. *See, e.g., id.* (striking down a ban on creating and disseminating video depictions of animal cruelty); *Reno*, 521 U.S. 844 (striking down a ban on indecency on the Internet); *Doe v. Marion County*, 705 F.3d 694 (7th Cir. 2013) (striking down a ban on Internet social media use by registered sex offenders); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014) (striking down a ban on harassment on the Internet).

Here, a substantial amount of constitutionally protected speech is swept up in the statute's facially overbroad prohibitions.

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1. The First Amendment protects "making an electronic communication."

The Washington cyberstalking statute is subject to First Amendment scrutiny because the core activity that it restrains is "mak[ing] an electronic communication" to a targeted person or any "third party." RCW 9.61.260(1). "Electronic communication" is broadly defined to cover any digital transmission of information, including "internet-based communications." RCW 9.61.260(5). Thus, the statute applies to any conceivable form of modern electronic communications, including websites, blogs, social media, emails, instant messages, etc. Also, it applies both to one-on-one communications (such as email), communications to a closed list of people (such as Facebook), and communications available to everyone (such as a website).

It is well-settled that restraints on Internet speech may violate the First Amendment. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004) (preliminarily enjoining the Child Online Protection Act); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016) (striking down a North Carolina cyberbullying statute). *See also, e.g., Reno*, 521 U.S. 844; *Doe*, 705 F.3d 694; *Marquan M.*, 19 N.E.3d 480.

2. The First Amendment protects online expression with intent to "embarrass."

The core activity restrained by the Washington cyberstalking statute—making an electronic communication—enjoys the fullest First Amendment protection, even if such a communication is sent with "intent to . . . embarrass any other person." RCW 9.61.260(1). A speaker's intent to embarrass someone else does not diminish the First Amendment's protection of electronic communication. Indeed, the First Amendment protects the right to express messages that are intended to cause embarrassment, insult, and outrage. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens 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, 55 (1988) (emphasizing the Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate

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on public issues should be uninhibited, robust, and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S 1, 4 (1949).

Nothing in First Amendment case law distinguishes First Amendment protection on the basis of the mode of communication, i.e., online. Such protection exists to cover the nature of the communication. Hence, the First Amendment should protect online speech intended to cause "embarrassment" to the same extent as embarrassing speech distributed via broadcast or the press, particularly because embarrassment caused by online speech has been become quite common. Examples of online or electronic speech that the statute criminalizes blatantly illustrate why it violates the First Amendment because it is facially overbroad:

- A newspaper website editorial argues that an elected public official should be removed from office because of drunken behavior at a Little League game.
- A government reform activist publishes on YouTube a video recording of a government employee stuffing her purse with office pens, and texts the message to her boss, to embarrass the wrongdoer and the boss, and thus encourage reform.
- A losing election challenger posts on his website a list of the incumbent's past domestic violence arrests.
- A mother posts on Facebook embarrassing anecdotes and photos each year about her children, including stories the children might not want shared to commemorate the children's birthdays.
- A college friend publishes embarrassing photos of his former classmates—the out-of-style hair and clothing!
- A fellow law partner embarrasses a colleague by posting an excessively laudatory message on the firm's web-site about a big "win."

Clearly, the "embarrass" provision of the statute sweeps too broadly, encompassing

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protected speech within its net and this provision should be stricken. *Reno*, 521 U.S. 844

3. The statute's other prohibitions are overbroad, online and off.

The statute also bans Internet communications sent with intent to "harass, intimidate, [or] torment" someone else. RCW 9.61.260(1). This speech restraint, also facially overbroad, violates the First Amendment.

Courts have struck down online harassment statutes with similar words as facially unconstitutional. *Bishop*, 787 S.E.2d at 821 (striking down a ban on posting a minor's private sexual information on the Internet with intent "to intimidate or torment"); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014) (striking down a ban on digital posts with "intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person").

Likewise, phone harassment statutes that contain similar words have been stricken as facially overbroad. *State v. Brobst*, 857 A.2d 1253 (N.H. 2004) (striking down a ban on phone calls with intent to "annoy or alarm"). S*ee also United States v. Popa*, 187 F.3d 672, 678 (D.C. Cir. 1999) (holding that a ban on anonymous phone calls with intent to "annoy, abuse, threaten, or harass" was unconstitutional as applied to a person who repeatedly called a government officer to complain about the government).

Speech bans containing language similar to that in RCW 9.61.260(1)(b) simply do not pass constitutional muster in any circumstance. For instance in *KKK v. City of Erie*, 99 F. Supp. 2d 583, 591-92 (W.D. Pa. 2000), the court struck down as facially overbroad a ban on wearing a mask with intent "to intimidate, threaten, abuse or harass." The court reasoned that there were too many ways to apply this ban to constitutionally protected messages:

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> A statement, for example, that the white race is supreme and will rise again to dominate all other races may seem intimidating, or even threatening, particularly when advocated by a large group of demonstrators showing solidarity. Advocacy for a return to segregation may likewise be intimidating, particularly if accompanied by rough language. A diatribe against a local official who is an ethnic minority, or a homosexual, may be considered "abuse."

I d .

4. The statute criminalizes anonymous and repeated speech, which is protected by the First Amendment.

The statute bans Internet communications, with the requisite state-of-mind, if they are sent "anonymously or repeatedly." RCW 9.61.260(1)(b). But the First Amendment protects anonymous and repeated communications.[2]

Online communications protected by the First Amendment are no less protected when posted anonymously. The statute makes it a crime to make a single electronic communication, if one does so "anonymously," and with intent to embarrass (or harass, intimidate, or torment) another person. RCW 9.61.260(1)(b).

Anonymous speech[3] through electronic communications is common across the Internet and it allows for valuable, protected discussions to occur. Internet anonymity is critical for

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[2] Plaintiff does not at this time challenge the statute's ban on "lewd, lascivious, indecent, or obscene" words or images. RCW 9.61.260(1)(a). However, *amici* note that the First Amendment protects all but "obscene" communication. *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989). Thus, the prohibition involving "lewd, lascivious, [or] indecent" communication in the statute may also be constitutionally defective. The statute's ban on threats, RCW 9.61.260(1)(c), would violate the First Amendment as applied to speech that is not a "true threat." At a minimum, the speaker of an unprotected true threat must have a subjective intent "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). *See also Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (interpreting a federal threat statute to require a subjective "purpose of issuing a threat" or "knowledge that the communication will be viewed as a threat"). *See, e.g.*, *Watts v. United States*, 394 U.S. 705 (1969) (protecting the statement, at a protest, that "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.").

[3] Anonymity can be created through use of pseudonyms. Myriad communication platforms, like Twitter, Tumblr, and Reddit, invite speakers to use pseudonyms to participate in public forums and private conversations. Email and messaging providers also typically allow speakers to create accounts and send electronic communications using pseudonyms.

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activists and others who could face harm and intimidation for publicly criticizing their powerful opponents.

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

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

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

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

The statute also criminalizes electronic communication made "repeatedly" and with intent to embarrass (or harass, intimidate, or torment). RCW 9.61.260(1)(b). But speech does not lose its First Amendment protection, online or offline, merely because of its repetition. *See, e.g., Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785 (8th Cir. 2015) (in a case brought by a group that regularly protested outside of churches, striking down a ban on such protests).

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There is no compelling state interest in banning repeated electronic communications, which are commonplace in an electronic environment, such as duplicate e-mail messages. Moreover, the recipients of unwanted messages typically have simple tools at their disposal to block, delete, or ignore repeated communications that are unwanted, without ever viewing the content of the communication itself.

5. The statute is overbroad because it lacks any requirement of harm.

The statute's facial overbreadth is aggravated by the absence of the element of harm to the subject of the speech or to anyone else.

When a law burdens speech, government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality). Without a demonstration of harm, restraint on speech is not narrowly tailored. *See also United States v. Alvarez*, 567 U.S. 709, 732-37 (2012) (Breyer, J., concurring in the judgment) (distinguishing the unconstitutional Stolen Valor Act, which did not require proof of actual or likely harm, from constitutional limits on false speech, which do).

Here, the forbidden electronic communication need not cause any actual harm, or even be seen by the targeted person. Nor does the statute require any proof of any plausible possibility that the electronic communication might have caused harm to a reasonable person. Because there are myriad applications of the statute where "the recited harms" are not "real," *Turner*, 512 U.S. at 664, the statute is facially overbroad.[4]

[4] A limiting construction cannot save the statute. At its core, the statute prohibits what the First Amendment protects: Internet communication that is intended to embarrass, if sent in a manner that is anonymous, repeated, or indecent. *See Reno*, 521 U.S. at 884 (limiting constructions are allowed only if the statute is "readily susceptible" to such construction, and courts cannot "rewrite" the statute).

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B. Portions Of The Statute Also Violate The Due Process Clause Because They Are Vague.

A criminal statute that is vague violates the Due Process Clause of the Fourteenth Amendment. The vagueness doctrine applies with "particular force" to laws that restrain speech. *Hynes v. Borough of Oradell*, 425 U.S. 610, 620 (1976). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (criminal statutes must "establish minimal guidelines to govern law enforcement").

1. The term "repeated" is vague.

The statutory term "repeated," RCW 9.61.260(1)(b), is vague as applied to online communications.[5] Because online communications, such as messaging and social media interactions, tend to resemble real-time oral conversations rather than time-delayed written correspondence, it is unclear when an offending communication will be considered "repeated." Consider three common online scenarios. First, some electronic communicators may send multiple short transmissions in quick succession (such as "hello" followed by "how are you"). Second, some electronic communicators correspond via multiple transmissions on both sides in quick succession (such as "hello", "hello yourself", "how are you", and "ok"). Third, a sender might transmit a message to one person, and then quickly forward it to a second person. It is possible for any of the foregoing to be considered "repeated" communications due to the imprecision of the meaning of "repeated," making the communicators vulnerable to prosecution under RCW 9.61.260(1)(b).

[5] The word "repeatedly" is also unconstitutionally vague in the context of offline harassment statutes. *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994).

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2. The phrase "harass, intimidate, torment, or embarrass" is vague.

The terms "harass, intimidate, torment, or embarrass," RCW 9.61.260(1)(b), are also unconstitutionally vague, particularly in the context of Internet speech. A person who communicates on social media and other Internet channels often does not know who will receive their messages, and whether the recipients are susceptible to embarrassment, intimidation, torment, or harassment.

For each of these statutory terms, the application of the statute will turn on the unpredictable effect of words on people with varying sensibilities. In *KKK*, the court on vagueness grounds struck down a ban on wearing a mask with intent to intimidate, threaten, abuse, or harass. The court explained: "To some extent, the speaker's liability is potentially defined by the reaction or sensibilities of the listener," and "what is 'intimidating or threatening' to one person may not be to another." 99 F. Supp. 2d at 592.

Likewise, in *State v. Bryan*, 910 P.2d 212 (Kan. 1996), the court struck down as unconstitutionally vague a statute against "following" where doing so "seriously alarms, annoys or harasses." The court reasoned: "In the absence of an objective standard, the terms 'annoys,' 'alarms,' and harasses' subject the defendant to the particular sensibilities of the individual victim. Different persons have different sensibilities." *Id.* at 220. *See also Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking down a ban on "annoying" loitering); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 992 P.2d 496, (2000) (striking down a ban on phone calls lacking a "legitimate" purpose).

The nature of the Internet, and social media postings in particular, exacerbate this forbidden unpredictability. In *KKK* and *Bryan*, the speakers could not predict the impact of their speech on the finite and knowable set of people that they physically encountered. On the Internet, speakers simply cannot predict the impact of their speech on the infinite and unknowable set of people that might come across their speech in cyberspace.

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C. Conduct criminalized by phone harassment statutes is qualitatively different from Internet-related speech.

Internet communications are materially different than phone communications. Thus, while Washington courts have upheld telephone harassment and threat statutes against overbreadth and vagueness challenges, the Washington cyberstalking statute addresses fundamentally different conduct. *See State v. Alphonse*, 147 Wn. App. 891, 197 P.3d 1211 (2008); *State v. Alexander*, 888 P.2d 175 (1995); *State v. Dyson*, 74 Wn. App. 237, 872 P.2d 1115 (Ct. App. 1994); *City of Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989). These courts relied on distinctively invasive features of phone calls that are not shared by Internet communications. *See Alexander*, 888 P.2d at 180 ("The gravamen of the offense [of telephone harassment] is the thrusting of an offensive and unwanted communication upon one who is unable to ignore it."); *id.* at 179 ("[A] ringing telephone is an imperative which must be obeyed with a prompt answer."); *Dyson*, 872 P.2d at 1120 ("[T]he telephone . . . presents to some people a unique instrument through which to harass and abuse others."). Moreover, "the recipient of a telephone call does not know who is calling, and once the telephone has been answered, the victim is at the mercy of the caller until the call can be terminated by hanging up." *Alexander*, 888 P.2 at 179. Finally, "telephone communication occurs in a nonpublic forum." *Id. Accord Huff*, 767 P.2d at 574.

Unlike a phone call that is directed to one person, a Facebook update, a Tweet, and a blog post are directed to many people. Where a phone call "occurs in a nonpublic forum," *Alexander*, 888 P.2 at 179, the "vast democratic forums of the Internet" are today "the most important places (in a spatial sense) for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). *Cf. Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (distinguishing a protest directed at a specific person's home, which is not protected, from a protest directed at all of the homes in a neighborhood, which is protected). Moreover, while a phone call can "thrust[] an offensive and unwanted communication upon one who is unable to ignore it," *Alexander*, 888 P.2 at 180, people have tools of choice to avoid unwanted electronic communications.

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Even one-to-one digital communications, like many emails and text messages, lack key features that might justify telephone harassment statutes. Recipients of electronic communications, unlike recipients of phone calls, can more easily avoid unwanted messages. No ring requires an immediate response; email recipients can delay review at their discretion. There is no risk that a recipient will accidentally speak to a person they are avoiding; email recipients can decide which messages to delete without reading their contents. *Cf. Reno*, 521 U.S. at 869 ("the Internet is not as 'invasive' as radio or television," because it does not "'invade' an individual's home or appear on one's computer screen unbidden").

IV. CONCLUSION

For the reasons above, *amici* Electronic Frontier Foundation and American Civil Liberties Foundation of Washington respectfully request that this Court grant Plaintiff's motion for preliminary injunction, and strike down RCW 9.61.260(1)(b) in Washington's cyberstalking statute as facially overbroad in violation of the First Amendment and vague in violation of the Fourteenth Amendment.

Dated this 21st day of August, 2017.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 21st day of August, 2017, at Seattle, Washington.

s/Adina Davis
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