**No. 78665-2-I**

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

JASON E. SLOTEMAKER,

Petitioner-Appellant,

v.

STATE OF WASHINGTON,
Respondent-Appellee.

# BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, ELECTRONIC FRONTIER FOUNDATION, AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE*

Nancy Talner, WSBA #11196
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
901 5th Ave., Ste. 630
Seattle, WA 98164

Rita Griffith, WSBA #14360
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1511 3rd Ave., Ste. 503
Seattle, WA 98101

Hyland Hunt, WSBA #53697
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Ste. 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Eugene Volokh, *pro hac vice pending*
SCOTT & CYAN BANISTER FIRST AMENDMENT CLINIC
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095

*Attorneys for* Amici Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**WASHINGTON CASES**



**FEDERAL CASES**

**OTHER CASES**



**CONSTITUTION AND STATUTES**



**OTHER AUTHORITIES**

## 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 cause emotional distress or motivated by hostility—both because that speech is itself constitutionally valuable, and because restricting such speech unduly chills even well-motivated speech. As a federal district court has found, because RCW 9.61.260(1)(b) "criminalizes a large range of non-obscene, non-threatening speech, based only on (1) purportedly bad intent and (2) repetition or anonymity," it is facially overbroad and violates the First Amendment. *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 969 (W.D. Wash. 2019) (granting preliminary injunction).

The State now concedes the statute is unconstitutional. But that concession is not enough to remedy the harm caused by the statute, which criminalizes and chills a wide variety of fully protected political, social, and personal commentary. The concession does not bind other county prosecutors and, unless the unconstitutionality of the statute is addressed

by a published opinion, the statute will continue to cause harmful confusion for the public and participants in the legal system, and will continue to chill Washingtonians' speech. *Amici* urge the Court to issue a precedential opinion holding that RCW 9.61.260(1)(b) is overbroad and facially unconstitutional.

## IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization, with over 135,000 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 state and federal courts. *See, e.g.*, *Lakewood v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016); *Rynearson*, *supra*.

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 has

served as counsel or *amicus curiae* in many cases addressing free speech online. *See e.g.*, *Vancouver v. Edwards*, No. 18998V (Clark County Superior Court 2012); *Rynearson, supra*; *Backpage.com v. McKenna*, 2:12-cv-00954-RSM (W.D. Wash. 2012).

The Washington Association of Criminal Defense Lawyers ("WACDL") was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It regularly files amicus briefs in cases addressing important questions for criminal defendants and the criminal justice system in Washington.

*Amici* agree with the parties that Mr. Slotemaker's conviction must be vacated. *Amici* write separately to emphasize the importance of this case for all Washingtonians. The provision of the cyberstalking statute at issue reaches a wide variety of protected speech, including a large amount of social and political commentary on the internet. And, because most people will steer far clear of any criminal prohibition, it chills speech beyond its already overbroad prohibition. *Amici* urge the Court to issue a precedential opinion holding the statute unconstitutional, in order to

provide much-needed guidance and to aid in reducing this chilling effect.

## ISSUE ADDRESSED BY *AMICI CURIAE*

Is RCW 9.61.260(1)(b), which criminalizes speech (including speech to the public on matters of public concern) based solely on purportedly bad intent and repetition or anonymity, facially overbroad in violation of Article 1, Section 5 of the Washington Constitution and the First Amendment to the United States Constitution?

## STATEMENT OF THE CASE

The Skagit County District Court found Jason Slotemaker guilty of one count of cyberstalking in violation of RCW 9.61.260(1)(b) on the ground that he sent more than one offensive image (sexual photographs of his former wife, J.B.) by text message to a former girlfriend, B.C., for the purpose of embarrassing B.C. or J.B. Ruling Granting Discretionary Review, at 2, Sept. 20, 2018. Mr. Slotemaker appealed to the Skagit County Superior Court, which held that RCW 9.61.260(1)(b) was not overbroad. *Id*. This Court granted discretionary review. *Id*. at 3. The State has now conceded that the statute is unconstitutionally overbroad.

## ARGUMENT

### I. A Precedential Opinion Is Necessary To Provide Guidance On The Law's Invalidity And To Mitigate Its Chilling Effect.

As described below, and conceded by the State, the cyberstalking

statute is an alarmingly broad speech restriction that criminalizes a wide swath of political and social commentary. This has been recognized repeatedly in the courts, but the issue remains unsettled because there has been no precedential opinion that would preclude municipal or county prosecutors from bringing charges. *See, e.g.*, *State v. Stanley*, No. 74204-3-I, 2017 WL 3868480 (Wash. App. Sept. 5, 2017) (nonbinding) (questioning, without deciding, whether the statute is overbroad); *Bellingham v. Dodd*, No. CB 93720 (Bellingham Mun. Ct. Sept 30, 2016) (unpublished) (holding statute overbroad); *Rynearson*, 355 F. Supp. 3d at 969 (holding statute overbroad; judgment binds only Kitsap County Prosecutor and Attorney General).[1]

As a result, the cyberstalking statute continues to cause harm to Washingtonians across the State who are chilled from criticizing a local official on Twitter, starting a Facebook page to boycott a local business, or engaging in numerous other forms of protected speech on account of this law. And the statute has been used by local governments to try to suppress speech on matters of public concern. In 2011, for example, the Renton Police Department obtained a search warrant to compel Google to identify

[1] The State refers to *Rynearson* as a Ninth Circuit decision. Resp. Br. 3. The Ninth Circuit issued a decision on a procedural issue in the case, 903 F.3d 920 (9th Cir. 2018), but the decision by the Western District of Washington holding the statute unconstitutional was not appealed.

the individual who had anonymously posted cartoon videos on YouTube making fun of, and criticizing, the Renton Police Department. Jennifer Sullivan, *Web cartoons making fun of Renton taken seriously*, Seattle Times, Aug. 4, 2011. 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 have easily been charged as repeated or anonymous under paragraph (1)(b). The police later dropped the case, illustrating how the statute can be used to chill speech while avoiding a precedential ruling on its unconstitutionality.

To reduce the chilling effect of this concededly unconstitutional law, the Court should hold RCW 9.61.260(1)(b) unconstitutional in a precedential opinion. *Cf. Seattle v. State*, 100 Wn.2d 232, 237, 668 P.2d 1266 (1983) (holding that "continuing and substantial public interest" justified review of potentially moot case involving the First Amendment).

## II. Washington's Cyberstalking Law Is Overbroad And Facially Unconstitutional Under The First Amendment And Article 1, Section 5 Of The Washington Constitution.

A statute is overbroad, and 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, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010);

*Bradburn v. N. Cent. Reg'l Library Dist.,* 168 Wn.2d 789, 804, 231 P.3d 166 (2010) ("[O]ur article I, section 5 analysis of overbreadth follows the analysis under the First Amendment."). Here, a substantial amount of constitutionally protected speech is swept up in the statute's facially overbroad prohibitions.

### A. The Statute Is an Alarmingly Broad Restriction on Pure Speech to the Public that Prohibits a Substantial Amount of Protected Speech.

#### *1. The statute regulates pure speech to the public.*

The core activity that the cyberstalking statute restrains is speech, *i.e.*, "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, and instant messages. Moreover, such "communication" is the *only* activity the statute regulates; it does not reach any non-speech conduct.

Critically, the statute applies equally to communications to the public at large (such as a website) and one-on-one communications (such as email)—as well as every permutation in between. Speech on a website, blog, or public Facebook page takes place in the "most important place[]

(in a spatial sense) for the exchange of views" in the modern era, which 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, 198 L. Ed. 2d 273 (2017) (citation omitted).

***2. The speech regulation is content-based and very broad.***

RCW 9.61.260(1)(b) prohibits "[a]nonymously or repeatedly" "mak[ing] an electronic communication" "with intent to harass, intimidate, torment, or embarrass any other person." The statute separately criminalizes electronic speech that contains "any lewd, lascivious, indecent, or obscene words, images, or language," RCW 9.61.260(1)(a), or that "[t]hreaten[s] to inflict injury on … person or property," RCW 9.61.260(1)(c). Accordingly, RCW 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 culpable mental states sweep broadly. *See* pp. 12-18, *infra*. Second, RCW 9.61.260(1)(b) is not limited to true threats, obscenity, defamation, or any other category of unprotected speech. *See Stevens*, 559 U.S. at 468 (listing categories). In fact, because paragraphs (1)(a) and (1)(c) plainly cover obscenity and threats, respectively, much of the speech that can be restricted based on content is excluded from paragraph (1)(b)'s reach.

Third, RCW 9.61.260(1)(b) is not confined to harassing speech directed to an unwilling listener. Rather, it covers online speech to third parties. There may be some cases where Washington may limit unwanted e-mails to a particular person. *Cf. Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 90 S. Ct. 148, 425 L. Ed. 2d 736 (1970) (upholding law forbidding businesses from sending certain material to private individuals once the recipients have told senders to stop). But RCW 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" may be permissible, trying to block public criticism about a person violates the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

Furthermore, speech is swept into this broad criminal prohibition based on its content rather than associated noncommunicative conduct. With respect to prohibitions on speech directed to a person, the prohibition may be based on conduct—i.e., the unwelcome ringing of the telephone, which can awaken or distract people regardless of the message conveyed. *See State v. Alexander*, 76 Wn. App. 830, 837-38, 888 P.2d 175 (1995) ("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."). Shorn of its content, however, the "conduct" of publicly

posting something online cannot itself be harassing, intimidating, or embarrassing. Rather, with respect to speech to third parties, a person cannot be convicted of cyberstalking without reference to the content of the speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015) ("[L]aws that cannot be justified without reference to the content of the regulated speech" are "content-based."). That the criminal prohibition turns on the speaker's intent confirms that it regulates based on content. *Id.* ("[D]efining regulated speech by its function or purpose" is a "distinction[] drawn based on the message a speaker conveys.").

In sum, RCW 9.61.260(1)(b) is "a criminal prohibition of alarming breadth." *Stevens*, 559 U.S. at 474. It potentially punishes a vast range of harsh rhetoric about political candidates and criticism of local civic and political leaders on matters of public concern, because any strident or repeated critique could be viewed as being said with the intent to torment, harass, or embarrass. Beyond that, the statute punishes a wide range of speech that is part of everyday life. *See* Petr Br. 24-26 (describing examples). 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*, 559 U.S. at 479-80. 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." *Id.* at 470.

### *3. These features distinguish cyberstalking from telephone harassment.*

The nature and breadth of the cyberstalking statute make it far more intrusive on protected speech than telephone harassment laws. Thus, although courts have upheld telephone harassment statutes against overbreadth challenges, *see Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989); *Alexander*, 76 Wn. App. at 840, the cyberstalking statute presents fundamentally different questions. First, the distinction between one-to-one speech and speech to the public is critical. *Cf. Huff*, 111 Wn.2d at 926. A telephone call is one-to-one, but the cyberstalking statute regulates speech to the public. Second, the cyberstalking statute regulates speech based on its content, whereas telephone harassment laws "do not regulate the content of speech." *Alexander*, 76 Wn. App. at 834 n.1.

Finally, phone calls have distinctively invasive features that are not shared by many varieties of internet speech. A "ringing telephone is an imperative which … must be obeyed with a prompt answer," that invades the "privacy of [a listener's] home." *Id.* at 836, 837. In contrast, much of the speech covered by the cyberstalking statute—for example, websites, blogs, and social media posts—do not invade a person's home and need not be directed to a particular person. Rather, the reader must affirmatively

choose to access them. *See Reno v. ACLU*, 521 U.S. 844, 869, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("[T]he 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."); *United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md. 2011) ("Twitter and Blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim.").

### B. The Statute's Intent Requirements Do Not Sufficiently Narrow Its Scope.

RCW 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, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). As the Court explained, "[i]f upon a lawful occasion for making a publication, [a 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.

The Supreme Court has offered two reasons for protecting speech

without regard to purpose. First, speech is 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 bad motives 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*.

For these reasons, a majority of the Supreme Court has agreed that a "speaker's motivation" is generally "entirely irrelevant to the question of constitutional protection" because "First Amendment freedoms need breathing space to survive," and "[a]n intent test provides none." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468-69, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (lead opinion) (citation omitted); *id.* at 495 (Scalia, J., concurring in part and concurring in the judgment) (rejecting a motivation-based test). The specific mental states singled out by the cyberstalking statute provide no justification for departure from this general rule.

***1. Intent to embarrass does not render speech unprotected.***

The core activity restrained by the cyberstalking statute—making an electronic communication—enjoys full First Amendment protection, even if such a communication is sent with "intent to … embarrass any other person." RCW 9.61.260(1). 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, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (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.").

The case of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), is a prime example of protection for embarrassing speech. If the exact same parody were published online anonymously or more than once—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—it would meet the statutory elements of cyberstalking. After all, a jury found that the magazine intended to inflict emotional distress, *id.* at 49, so it would easily infer intent to embarrass. The parody cannot be protected on paper but unprotected online—yet it is criminalized by the cyberstalking statute, notwithstanding the Supreme Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact." *Id.* at 55.

As this Court noted, a "variety of political and social commentary, including caustic criticism of public figures, may be swept up as an intent to embarrass someone while using rough language." *Stanley*, 2017 WL

3868480 at *9 (nonbinding). Such speech is fully protected. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (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").

***2. The statute's other intent requirements cover a substantial amount of protected speech.***

Because the statute criminalizes even truthful speech to the public *about* someone else, and not only messages *to* a targeted person, the remaining intent requirements also cover a substantial amount of protected speech and are overbroad. *See Rynearson*, 355 F. Supp. 3d at 969-70 (noting that given the breadth of the terms "harass" and "torment," "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 them").

The terms "harass, intimidate, [and] torment" are not defined by the statute, and sweep broadly. 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)," *Huff*, 111 Wn.2d at 929, but it did not provide a definition for the other proscribed purposes. Giving the other terms their ordinary meaning, *see*

*id.* (defining "intimidate" by reference to Webster's Third New International Dictionary), "harass" means "to vex, trouble, or annoy continually or chronically," Webster's Third New International Dictionary, Unabridged (online ed. 2017), the meaning of "torment" includes "to cause worry or vexation to," *id.*, and much protected speech, especially speech critical of public figures or designed to cause businesses or officials to change their practices, can fall within these prohibitions.

Consider *Organization for a Better Austin v. Keefe*, *supra*. Today, someone opposed to a local realtor's "real estate practices" might write Facebook posts, rather than leaflets, criticizing the realtor and accusing him of being a "panic peddler." 402 U.S. at 417. Rather than handing out leaflets in neighborhood locations, *id.*, the critique might be emailed to the neighborhood listserv or posted on a blog. A jury could easily find the posts were made with intent to vex the realtor, placing them within the cyberstalking prohibition. Yet they constitute protected speech on matters of local concern. *See id.* at 419 (noting pamphleteers were permissibly "engaged openly and vigorously in making the public aware of respondent's real estate practices," even if their views were "offensive").

The same goes for the intent to intimidate. Because threats are covered by paragraph (1)(c), the intent to intimidate as applied to paragraph (1)(b) necessarily covers speech that does *not* include any

threats but is nonetheless designed to compel "to action or inaction." *Huff*, 111 Wn.2d at 929. But much protected speech—such as boycotts or picket lines—is designed to compel action or inaction. The intent "to exercise a coercive impact … does not remove [speech] from the reach of the First Amendment," *Keefe*, 402 U.S. at 419—and that must be true regardless of whether the speech is distributed on paper or on the internet. "Speech 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, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

As with the intent to embarrass, a vast swath of political and social commentary and criticism is swept up by the cyberstalking statute's prohibitions on posting something on the internet with the intent to vex or annoy someone else, or to compel them to action. Indeed, the cyberstalking statute does not even require that its proscribed purposes be a speaker's sole motivation for speaking. As courts in other states have recognized, such statutes cover far too much protected speech. *State v. Burkert*, 174 A.3d 987, 990 (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*, 991 N.Y.S.2d 792, 15 N.E.3d 805 (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").

### C. Anonymous and Repeated Speech Is Fully Protected by the First Amendment.

The cyberstalking statute also goes too far because it prohibits anonymous or repeated speech. The First Amendment protects the right to speak anonymously. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (striking down a ban on anonymous leafleting designed to influence voters). "[A]nonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357.

The constitutional analysis is no different when communications are electronic. Anonymous speech is common across the internet and allows for valuable discussions to occur. Internet anonymity is critical for activists and others who could face harm and intimidation for publicly criticizing their powerful opponents. In sum, 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." *McIntyre*, 514 U.S. at 342.

The statute also criminalizes electronic communication made "repeatedly" with proscribed intent. RCW 9.61.260(1)(b). But speech does not lose its protection because it is said more than once. The individuals distributing leaflets in *Keefe* distributed leaflets on several different occasions. 402 U.S. at 417. That is surely "repeated" speech about a particular individual, but the Supreme Court nonetheless held it was protected by the First Amendment. *Id.* at 419.

Perfectly legitimate, if caustic, criticism is often repeated. Most campaigns designed to change behavior unfold over time, whether they involve 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 regularly publicize names of individuals who violated seven-year boycott). In sum, neither the anonymity nor repetition requirements reduce the statute's overbreadth.

## III. The Statute Is Not Narrowly Tailored To Serve A Compelling Government Interest.

Because it regulates speech to the public based on content, the cyberstalking statute can survive only if it meets strict scrutiny, *i.e.*, it is narrowly tailored to serve a compelling government interest. *See Huff*, 111 Wn.2d at 926. It is the State's burden to meet this standard. *See State v.*

*Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011) (The State "bears the burden of justifying a restriction on speech."). Given its concession, the State has made no attempt to satisfy this test. Nor could it. 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*, 521 U.S. at 882 (holding that an overbroad statute's "defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision").

## CONCLUSION

The Superior Court should be reversed and RCW 9.61.260(1)(b) declared facially unconstitutional in a precedential opinion.

July 1, 2019

Respectfully submitted,


Nancy Talner, WSBA #11196
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
901 5th Ave., Ste. 630
Seattle, WA 98164

Hyland Hunt, WSBA #53697
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Ste. 900
Washington, DC 20001
(202) 868-6915

Rita Griffith, WSBA #14360
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1511 3rd Ave., Ste. 503
Seattle, WA 98101

Eugene Volokh, *pro hac vice pending*
SCOTT & CYAN BANISTER FIRST AMENDMENT CLINIC
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095

*Attorneys for* Amici Curiae

**CERTIFICATE OF SERVICE**

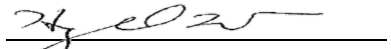
I hereby certify that on July 1, 2019, I served the foregoing brief upon the following counsel of record electronically via the court portal:

Douglas R. Hyldahl
Douglas Hyldahl, PS Inc.
103 E. Holly St., Ste. 505
Bellingham, WA 98225

*Attorney for Petitioner*

Haley W. Sebens
Office of Skagit County Prosecuting Attorney
Courthouse Annex
605 South Third
Mt Vernon, WA 98273

*Attorneys for Respondent*



Hyland Hunt

# APPENDIX

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

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

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

## FACTUAL AND PROCEDURAL SUMMARY

RCW 9.61.260 provides:

**Cyberstalking.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## ANALYSIS

### A. CRAIGSLIST IS A "THIRD PARTY"

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

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

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

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

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

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

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

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

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

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

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

## C. OVERBREADTH CHALLENGE

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

### 1. STANDARDS FOR AN "OVERBREADTH" CHALLENGE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. STANDARDS FOR REGULATING SPEECH IN A PUBLIC FORUM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### D. VAGUENESS CHALLENGE

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

## CONCLUSION

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

## ORDERS

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

DATED this 30th day of September, 2016.

COMMISSIONER PETE SMILEY

## DEUTSCH HUNT PLLC

## July 01, 2019 - 1:20 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 78665-2 |
| **Appellate Court Case Title:** | State of Washington Respondent v. Jason E. Slotemaker, Petitioner |
| **Superior Court Case Number:** | 16-1-00886-0 |

**The following documents have been uploaded:**

- 786652_Briefs_20190701131230D1843869_3805.pdf
  This File Contains:
  Briefs - Amicus Curiae
  *The Original File Name was Slotemaker Amicus Brief.pdf*
- 786652_Motion_20190701131230D1843869_3224.pdf
  This File Contains:
  Motion 1 - Other
  *The Original File Name was Volokh pro hac motion.pdf*
- 786652_Motion_20190701131230D1843869_5327.pdf
  This File Contains:
  Motion 2 - Other
  *The Original File Name was Slotemaker Amicus Motion.pdf*

**A copy of the uploaded files will be sent to:**

- doug@hyldahl-law.com
- hsebens@co.skagit.wa.us
- skagitappeals@co.skagit.wa.us
- talner@aclu-wa.org
- volokh@law.ucla.edu

**Comments:**

Motions are the Motion for Leave to File Amicus Brief and Motion for Admission Pro Hac Vice

---

Sender Name: Hyland Hunt - Email: hhunt@deutschhunt.com
Address:
300 NEW JERSEY AVE NW STE 900
WASHINGTON, DC, 20001-2271
Phone: 202-868-6915

**Note: The Filing Id is 20190701131230D1843869**