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Court of Appeals No. 51217-3-II

DIVISION II  
COURT OF APPEALS  
IN AND FOR THE STATE OF WASHINGTON

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LISA LITTLETON,

Respondent,

v.

TERRY GROVER,

Petitioner.

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ON APPEAL FROM THE CLARK COUNTY SUPERIOR COURT

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BRIEF OF AMICI CURIAE  
ELECTRONIC FRONTIER FOUNDATION,  
PROF. AARON H. CAPLAN, AND PROF. EUGENE VOLOKH  
IN SUPPORT OF PETITIONER

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Venkat Balasubramani  
WSBA #28269  
Focal PLLC  
900 1st Avenue S., Suite 201  
Seattle, WA 98134  
(206) 529-4827  
venkat@focallaw.com  
*Counsel of record*

Eugene Volokh\*  
Scott & Cyan Banister  
First Amendment Clinic  
UCLA School of Law  
405 Hilgard Ave.  
Los Angeles, CA 90095  
(310) 206-3926  
volokh@law.ucla.edu  
*Admitted pro hac vice*

*Counsel for Amici Curiae*

\* Counsel would like to thank Benjamin Futernick, Karen Leung, and Patricia Yu, UCLA School of Law students who worked on this brief.

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

The Electronic Frontier Foundation is a nonprofit public advocacy organization aimed at promoting Internet freedom, and in particular online free speech. Prof. Aaron H. Caplan teaches First Amendment law at Loyola Law School, Los Angeles, and is the author of, among many other articles, Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781 (2013). Prof. Eugene Volokh teaches First Amendment law at UCLA School of Law, and is the author of, among many other articles, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 NW. U.L. REV. 731 (2013).

## **ISSUES TO BE ADDRESSED BY *AMICI CURIAE***

*Amici* discuss why the injunction in this case was unconstitutionally overbroad, in part unconstitutionally vague, and not authorized by statute.

## **STATEMENT OF THE CASE**

The facts discussed in this brief are set forth in the parties’ briefs.

## **INTRODUCTION**

The civil harassment statute is not a vehicle for pursuing economic advantage or stifling public criticism of business practices; it was enacted to remedy “serious, personal harassment through repeated invasions of a person’s privacy.” RCW 10.14.010. If unlawful harassment is shown, the statute authorizes no-contact orders, not “no-speech-about” orders. Speech like

Grover’s, directed to the general public, enjoys great constitutional protection—especially protection from injunctions that take the form of overbroad and vague prior restraints.

To be constitutional, injunctions restricting speech about people must be “specifically crafted to prohibit only unprotected speech.” *In re Marriage of Meredith*, 148 Wn. App. 887, 898 (Div. II, 2009). But the injunction in this case was not so crafted:

- (1) The provision of the injunction forbidding Grover from posting “personal information . . . of [Littleton]” was unconstitutionally vague; and even if that provision were clarified to refer just to information that is so private that its publication would be “highly offensive” to reasonable people, the provision would have still been unconstitutionally overbroad.
- (2) The provision forbidding Grover from posting “emails obtained regarding Petitioner or [TTL] if not specifically addressed to [Grover]” was likewise unconstitutionally overbroad, because it applies even to legally acquired emails.
- (3) The provision forbidding Grover from posting Littleton’s bank account information was also unconstitutionally overbroad; even if there is a First Amendment exception for speech that fits within the disclosure of private facts tort, such bank account information—which is revealed on the hundreds of checks we write each year—would not qualify.
- (4) The provision forbidding Grover from posting “pictures of [Littleton]” was also unconstitutionally overbroad, because it applied even to speech that does not infringe Littleton’s right of publicity.

The injunction was also not authorized by Washington’s anti-harassment statute, because it forbade even speech that has a legitimate purpose, such as warning consumers and providing information about TTL’s practices. And because the statute expressly excludes constitutionally protected

speech, the injunction's constitutional defects are also statutory defects.

## ARGUMENT

### **I. The District Court's injunction was an unconstitutional prior restraint on Grover's speech**

Prior restraints on speech, such as injunctions, "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). They are subject to even closer scrutiny under Article I, §5 of the Washington Constitution. *See Ino, Inc. v. Bellevue*, 132 Wn. 2d 103, 117 (1997). Even when they target speech about particular private individuals, they "carry a heavy presumption of unconstitutionality." *In re Marriage of Suggs*, 152 Wn.2d 74, 81 (2004); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). To be constitutional, such injunctions must (among other things) be "specifically crafted to prohibit only unprotected speech." *Meredith*, 148 Wn. App. at 898.

In particular, a person's speech that criticizes another's business practices generally cannot be enjoined. *Keefe*, 402 U.S. at 419. Yet the injunction here tried to do exactly that: It restricted Grover's expression of opinions and facts about Littleton's business behavior.

If Littleton thinks Grover's statements about her are false and defamatory, she could have sued for libel. If she believed that embarrassing facts about her private life had been wrongly publicized in non-newsworthy ways,

she could have sued under the tort of public disclosure of private facts. Restatement (Second) of Torts § 652D (1997); *Reid v. Pierce County*, 136 Wn.2d 195, 205, 961 P.2d 333 (1998). Had she brought such suits, and made the showings required for such tort liability, she would have been entitled to damages. Even if she prevailed, it is uncertain under Washington law whether she would be entitled to an injunction against repeating such statements. *See Suggs*, 152 Wn.2d at 82 (declining to resolve whether injunction may be “constitutional prior restraint” when “it restrains libelous speech”).

But this injunction was not based on any finding that Grover’s blog was libelous or tortiously invasive of privacy. Indeed, a harassment proceeding under RCW 10.14 offers “[n]one of the substantive and procedural limitations that have been carefully constructed around defamation law.” Caplan, *supra*, 64 HASTINGS L.J. at 822. “A petitioner should not be able to evade the limits on defamation law (many of them constitutionally mandated) by redesignating the claim as civil harassment,” *id.*, and likewise for the limits on the disclosure of private facts tort. The injunction was thus facially unconstitutional, and therefore invalid.

**A. The “personal information” ban was unconstitutionally vague**

The injunction forbade Grover from posting “personal information . . . of [Littleton],” without defining what constitutes “personal information.” The term might have at least two possible meanings: (1) any information

“of or relating to a particular person,” *DeLong v. Parmelee*, 157 Wn. App. 119, 156, 236 P.3d 936 (Div. II, 2010) (internal quotation marks omitted) (so interpreting “personal information”), or (2) only information about Littleton that is so private that it would be “highly offensive” to disclose, tracking part of the Washington public disclosure of private facts tort, RCW 42.56.050. This ambiguity made the injunction unconstitutionally vague.

*Suggs*, 152 Wn.2d 74, illustrates this. In *Suggs*, the Supreme Court vacated an antiharassment order that forbade Suggs from “making invalid and unsubstantiated allegations . . . [thereby] annoying, harassing, vexing, or otherwise harming [the plaintiff] for no legitimate purpose.” *Id.* at 83. The Court found the phrase “invalid and unsubstantiated” to be unconstitutionally vague because “what may appear valid and substantiated to Suggs may ultimately be found invalid and unsubstantiated by a court.” *Id.* at 84. The order chilled Suggs’ protected speech because it discouraged her from making claims she thought were true. *Id.* Similarly, in *State v. Williams*, 144 Wn.2d 197 (2001), the Supreme Court struck down a statute criminalizing actions intended to cause “substantial harm to another’s mental health.” *Id.* at 204. The Court held that “mental health” was too vague for average citizens to understand what was being criminalized, noting that “each person’s perception of what constitutes the mental health of another will differ based on each person’s subjective impressions.” *Id.* at 206.

Like “invalid and unsubstantiated” in *Suggs* and “mental health” in *Williams*, the phrase “personal information” here was too vague. Different subjective views of privacy lead to different understandings of what constitutes “personal information.” Grover had no way of knowing whether the courts share his views on privacy, so he could not know how a court would determine whether posts include “personal” information about Littleton. His protected speech about Littleton was thus substantially chilled—especially given that it is a crime to violate such an injunction, RCW 18.235.160.

Consider, for instance, a hypothetical post about Littleton’s educational history, as a means of discussing her qualifications. Would this be “personal information” because it was about her behavior before she started her business, or would it not be personal because it was tied to her likely qualities as a business owner? Or consider a post about Littleton’s political activity—would that be “personal information,” because it was solely about Littleton’s personal life, or would it not be, because it was not about anything that she had tried to keep private? Grover could not know, and would have had to guess about the meaning of the injunction on peril of criminal punishment.

**B. The “personal information” ban was unconstitutionally overbroad**

The ban on publishing “personal information” was also unconstitutionally overbroad, whether it was read broadly—as covering any information about Littleton—or narrowly, as covering only information that is viewed

as so private that publishing it is “highly offensive.” The U.S. Supreme Court and the Washington Supreme Court have never decided whether the disclosure of private facts tort is consistent with the First Amendment. But even the narrow reading of the injunction would extend beyond the boundaries of that tort, and cover speech that cannot constitutionally be punished.

Public disclosures of private facts are tortious “if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Reid*, 136 Wn.2d at 205, 961 P.2d 333 (quoting Restatement (Second) of Torts § 652D). It is possible to read the phrase “personal information” in the injunction as covering only information about the person the disclosure of which “[w]ould be highly offensive to a reasonable person.”

But even under such a reading, the injunction would have still been overbroad, because nothing in the prohibition of the disclosure of “personal information” suggested any exception for personal information that is “of legitimate concern to the public.” Nor did the injunction have an exception for personal information drawn from government records, the disclosure of which is protected by the First Amendment even when the information is highly personal and potentially embarrassing. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (concluding that the government generally cannot ban publication of information that the government itself has placed

in public records); *Okla. Publ'g Co. v. District Court*, 430 U.S. 308, 310 (1977) (likewise). This provision was thus not “specifically crafted to prohibit only unprotected speech.” *Meredith*, 148 Wn. App. at 898.

**C. The ban on publishing “emails obtained regarding petitioner [TTL]” was unconstitutionally overbroad**

The restriction on publishing emails regarding Littleton or TTL that are “not specifically addressed to [Grover]” likewise forbade constitutionally protected speech. Say, for instance, that a dissatisfied TTL customer forwarded to Grover an e-mail that the customer had gotten from Littleton (perhaps because the customer had heard of Grover’s criticisms, and wants to support those criticisms). The injunction would have threatened Grover with criminal punishment for redistributing that e-mail, even though Grover had gotten it completely legally.

Indeed, Grover’s publication of e-mails might be constitutionally protected even if they had been illegally obtained (at least if Grover had not played a part in illegally obtaining them). In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the U.S. Supreme Court held that a federal statute could not categorically forbid publishing information drawn from an illegally intercepted telephone call, even when the publisher knew (or had reason to know) that the call had been illegally intercepted. *Id.* at 534. The same logic should invalidate categorical bans on publishing information drawn from illegally

forwarded e-mails. But this injunction was broader still, because it banned publishing information drawn even from *legally* forwarded e-mails.

Perhaps the district court was concerned about the possibility that some of the particular e-mails that Grover had republished had indeed been illegally obtained. But that court did not make any such factual finding, *see* District Court Transcript 67:25-68:3, and indeed noted that some of the e-mails were likely obtained by Grover from a friend of his, who was one of Littleton's addressees, Findings of Fact and Conclusions of Law 2:18-2:22. And the injunction unconstitutionally covered all e-mails, including ones that Grover receives in the future, without regard to how Grover gets them.

**D. The ban on posting any of Littleton's bank account information was unconstitutionally overbroad**

The "bank account information" restriction apparently stemmed from one of Grover's blog posts that showed two photos of two checks. *See* App. p. 327 (scan of Grover's blog post including two checks addressed to Deane Electric). Displaying a copy of a check is not inherently an invasion of the check-writer's privacy: Every check contains this information, and people therefore disclose it routinely to all the recipients of their checks, often hundreds of recipients each year. Moreover, there had been no factual finding that the checks were drawn on Littleton's personal account, *see* Ruling Granting Review at p. 1 ("The blog included . . . images showing the bank

account number and routing number for TTL”), and the injunction covered all of Littleton’s checks, personal or business; it thus appears doubtful that Littleton’s own privacy was involved here.

As noted above, public disclosures of private facts are only tortious “if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Reid*, 136 Wn.2d at 205, 961 P.2d 333 (quoting Restatement (Second) of Torts § 652D). “The right of privacy is commonly understood to pertain only to the intimate details of one’s personal and private life.” *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 38, 769 P.2d 283 (1989) (so stating in a Washington public records law case, but citing the Restatement disclosure tort standard); *Hearst v. Hoppe Corp.*, 90 Wn.2d 123, 136, 138, 580 P.2d 246 (1978) (likewise treating the Restatement rule as requiring a showing that the allegedly tortious speech “reveals intimate details of [a person’s] private life,” and again importing that standard into Washington public records law). The type of bank account information on checks is not intimate personal information that discloses, say, one’s sexual or medical history, or even one’s wealth. Rather, it is a form of addressing information for routing transactions, similar to one’s home address; yet attempts to restrict the publication of home addresses have been uniformly found unconstitutional. *See, e.g., Sheehan v. Gregoire*, 272 F. Supp. 2d

1135, 1150 (W.D. Wash. 2003); *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1249 (N.D. Fla. 2010); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1029 (E.D. Cal. 2017).

To be sure, some people may worry that if their bank account information is disclosed, it could be misused for criminal purposes. (Others have similar worries about their home addresses.) But that is not the proper concern of the disclosure of private facts tort, which focuses on “highly offensive” personal information, not on information—including business information—that might create the danger of fraud.

If the Washington Legislature wants to create a statute specifically prohibiting the publication of certain bank account information, it may do so; courts would then consider whether such a statute is constitutional, perhaps on a theory that the statute would be narrowly tailored to a compelling government interest in preventing fraud. But a single judge is not empowered to impose a prior restraint on this sort of speech that does not fall within any existing First Amendment exception.

**E. The prohibition on posting pictures of Littleton was unconstitutionally overbroad**

The prohibition on posting “pictures of [Littleton]” likewise covered constitutionally protected speech. Newspapers and television broadcasters,

of course, routinely publish people’s photographs without getting their permission. And ordinary citizens such as Grover have the same First Amendment rights as does the institutional press. *See Obsidian Fin. Grp., LLP v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014).

Some uses of a person’s picture—chiefly in advertising and merchandising—may be limited under the rubric of the “right of publicity,” though even such limitations have to be carefully defined to avoid First Amendment problems. *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). Yet the injunction went far beyond such narrow restrictions.

The Washington right of publicity statute, for instance, lets each person control “the use of his or her name, voice, signature, photograph, or likeness,” RCW 63.60.010, but only “in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations.” RCW 63.60.050. (Washington courts have not recognized any common-law right of publicity that might go beyond the statutory right. *Joplin Enters. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992).) Grover has not used Littleton’s image to advertise, solicit donations, or sell any goods, merchandise, or services on his blog—and in any event the injunction was not limited to such uses, and there were no trial court findings of the elements of a right of publicity violation.

Posting a picture of Littleton on Grover’s blog also would not have constituted tortious disclosure of private facts. *DeLong*, 157 Wn. App. at 157, 236 P.3d 936 (applying the personal privacy exception to Washington public records law, an exception based on the disclosure tort, *see Bellevue John Does I-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 212 (2008)). That is especially so because Littleton has voluntarily displayed her picture to the public in a YouTube video about TTL, *see Ruling Granting Review* at p. 1.

Such posting of pictures—or of other speech—is constitutionally protected regardless of whether it deals with matters of broad public concern, or just matters that particular people find important in their lives. “*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.*” *United States v. Stevens*, 559 U.S. 460, 479 (2010) (italics in original). People are free, for instance, to post pictures of friends, acquaintances, or even strangers that they have taken at a party or at a public function. *See, e.g., Ex parte Thompson*, 442 S.W.3d 325, 350-51 (Tex. Ct. Crim. App. 2014) (photographs of strangers taken in public are protected by the First Amendment). Likewise, Grover’s speech about Littleton—including his use of pictures of her, for instance ones drawn from her YouTube video—should be protected without regard to whether it deals with matters of public concern.

But in any event, speech that seeks to alert the public to businesses' alleged mistreatment of consumers is on a matter of public concern. Federal appellate courts, for instance, have treated speech as being on a matter of public concern when it alleged that a small business refused to give a refund to a customer who bought an allegedly defective product, *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009); that a mobile home park charged too high a rent and mistreated tenants, *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3d 959, 965 (9th Cir. 2008); *id.* at 966 (Callahan, J., dissenting) (“agree[ing] with the majority” that the claims of plaintiff’s “rent increases and operation of the mobile home park were issues of public concern”); and that a lawyer was “an ‘ambulance chaser’ with interest only in ‘slam dunk cases,’” *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 147, 150 (2d Cir. 2000). The same is true of Grover’s allegations that Littleton had not dealt fairly with her customers.

Nor is the injunction limited to speech alleging that Grover himself had supposedly been wronged—unlike in cases such as *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675 (Div. I, 1986), and *Johnson v. Ryan*, 186 Wn. App. 562 (Div. III, 2015), which found that such personal gripes were matters of private concern, for instance because they involved a speaker’s “complain[ing] about how *he* was wrongfully terminated.” *Johnson*, 186 Wn. App. at 580 (emphasis in original). The speech that prompted the injunction was

likewise not limited to such allegations that Grover himself was mistreated: It also extends to speech warning the public that Littleton and her business had mistreated consumers. Such speech is on a matter of public concern, and is fully protected by the First Amendment, in the absence of statements proven to be libelous in a properly litigated libel suit.

**F. The injunction restricting Grover’s speech *about* Littleton cannot be justified by analogy to injunctions restricting unwanted speech *to* people**

A true no-contact order—the typical remedy in a civil harassment petition under RCW 10.14—is constitutionally acceptable, even though it would prevent the speech that would otherwise occur during that one-to-one interaction. Caplan, *supra*, 64 HASTINGS L.J. at 842-43. But there is a sharp constitutional distinction between restrictions on unwanted speech *to* a person and unwanted speech *about* a person. Volokh, *supra*, 107 NW. U. L. REV. at 745-51.

The U.S. Supreme Court has made this clear. In *Organization for a Better Austin v. Keefe*, for instance, activists who disapproved of a real estate agent’s (apparently lawful) behavior repeatedly leafleted near where the agent lived and went to church, demanding that he change his practices. That speech must have been highly distressing and intrusive: Indeed, “[t]wo of the leaflets requested recipients to call respondent at his home phone number and urge him to sign the ‘no solicitation’ agreement.” *Keefe*, 402

U.S. at 417. Yet the Court struck down an injunction against such leafleting:

No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.

*Id.* at 419-20. In the process, the Court held that an earlier case, *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970)—which had upheld a ban on unwanted mailings to recipients who explicitly stated they did not want to receive the mailings—was “not in point,” because the leafletting ban in *Keefe* involved a person “attempting to stop the flow of information . . . to the public” rather than “into his own household.” 402 U.S. at 420.

Likewise, *Frisby v. Schultz*, 487 U.S. 474 (1988), which upheld a narrowly tailored ban on residential picketing, did so only because such picketers did “not seek to disseminate a message to the general public, but to intrude upon the targeted resident.” *Id.* at 486. *Frisby* in turn reaffirmed *Keefe* as applicable to “more generally directed means of communication” in which “the flow of information [is] . . . to the public.” *Id.* (quoting *Keefe*, 402 U.S. at 420). Injunctions such as the one in this case are analogous to the unconstitutional injunction in *Keefe*, which restricted speech about a person, not the permissible statutes (upheld in *Rowan* and *Frisby*) that restricted unwanted speech to people.

Unsurprisingly, state courts have likewise rejected restrictions on speech about people, including ones entered under the rubric of “harassment” or “cyberstalking” law. For instance, in *David v. Textor*, the Florida Court of Appeal struck down an anti-cyberstalking injunction that barred a businessman from continuing his pattern of speech sharply criticizing his rival. 189 So.3d 871, 874 (Fla. Ct. App. 2016). The court found that the injunction was an unconstitutional “prior restraint” because it prevented “not only communications *to* Textor, but also communications *about* Textor.” *Id.* at 876 (emphasis in original). *See also Fox v. Hamptons at Metrowest Condo. Ass’n, Inc.*, 223 So.3d 453 (Fla. Ct. App. 2017) (likewise); *Van Liew v. Stansfield*, 47 N.E.3d 33 (Mass. 2016) (likewise). And the same is true for speech restrictions aimed at protecting privacy. *See Evans v. Evans*, 162 Cal. App. 4th 1157, 1161 (2008) (striking down injunction barring ex-wife from, among other things, posting “false and defamatory statements” and “confidential personal information” about ex-husband, because injunction was not limited to specific statements that had been found to be constitutionally unprotected). The upshot of these cases, from *Keefe* on, is clear: Injunctions as broad as the one issued against Grover violate the First Amendment.

**II. The injunction is inconsistent with Washington’s anti-harassment statute because Grover’s conduct was constitutionally protected and served legitimate purposes**

The injunction against Grover is also not authorized by RCW 10.14.

First, Grover’s speech was constitutionally protected, for the reasons explained above. Constitutionally protected activity cannot be counted toward the statutorily required harassing “course of conduct.” RCW 10.14.020(1). Once the constitutionally protected speech is excluded from consideration, the record contains no evidence of a harassing course of conduct. (Indeed, Grover and Littleton have not directly interacted with each other for years. Grover Opening Br. 4.) The statute also does not authorize orders that are vague, overbroad, or prior restraints: “Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly.” RCW 10.14.190.

Second, to be harassment, a course of conduct must be “directed at a specific person.” RCW 10.14.020(2). Speech to the world in general—as occurs on a blog post like Grover’s—is not “directed at” Littleton, any more than a newspaper advertisement criticizing the President is “directed at” the President for purposes of the harassment statute. Statutory harassment requires one-to-one interactions, as through unwanted contact in person, by phone, by letter, by email, by text message, or other targeted behavior.

Third, the definition of “unlawful harassment” covers only certain conduct “which serves no legitimate or lawful purpose.” RCW 10.14.020(2). Grover’s past posts did serve legitimate purposes: defending his reputation

and business, and informing consumers about their warranty rights and TTL's deceptive business practices. And the injunction banned future speech that could likewise have served these legitimate purposes.

RCW 10.14.030 also states that, to determine whether conduct serves a "legitimate purpose," courts may consider whether,

(1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties; (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted; (3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner; . . . (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner; (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

RCW 10.14.030 (subsection (4) omitted as it relates to whether respondent acted pursuant to statutory authority, which is irrelevant here).

As to factors (1) and (2), Grover's speech about Littleton on his blog was not "contact" with Littleton, as his blog defended his reputation and provided the public with information about his business dispute. *See Chan v. Ellis*, 296 Ga. 838, 841 (2015) (online criticism was not "contact" with the subject of the criticism under anti-stalking statute because the blog posts were not "directed specifically *to* [the subject] as opposed to the public"). As to factor (5), Grover's posts did not constitute an actionable invasion of

her privacy, *see supra* Part I.B, and the injunction is not limited to such posts. As to factor (6), Grover’s interactions with Littleton were not restricted by any prior court orders. And as to factor (3), whether or not Grover intended to annoy Littleton, his blog also gave customers potentially important information. Businesspeople, whether competitors or former business partners, will often have some ill will towards each other stemming from their past interactions, but that cannot justify concluding that their future factual criticisms of each other necessarily lack a legitimate purpose.

### CONCLUSION

The injunction against Grover was an unconstitutional prior restraint on his speech, because it restricted constitutionally protected speech and not just unprotected speech. For the same reason, and also because the injunction restricted speech that has a “legitimate or lawful purpose,” it was not authorized by the statute. It should therefore be reversed.

Respectfully submitted,

/s  
Venkat Balasubramani  
WSBA #28269  
Focal PLLC  
900 1st Avenue S., Suite 201  
Seattle, WA 98134  
(206) 529-4827  
venkat@focallaw.com  
*Counsel of record*

Eugene Volokh  
Scott & Cyan Banister  
First Amendment Clinic  
UCLA School of Law  
405 Hilgard Ave.  
Los Angeles, CA 90095  
(310) 206-3926  
volokh@law.ucla.edu  
*Admitted pro hac vice*

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April 12, 2018 - 2:02 PM

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51217-3  
**Appellate Court Case Title:** Terry Grover, Appellant v. Lisa Littleton, Respondent  
**Superior Court Case Number:** 17-2-05055-9

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DIVISION II  
COURT OF APPEALS  
IN AND FOR THE STATE OF WASHINGTON

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LISA LITTLETON,

Respondent,

v.

TERRY GROVER,

Petitioner.

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ON APPEAL FROM THE CLARK COUNTY SUPERIOR COURT

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CERTIFICATE OF SERVICE

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Venkat Balasubramani  
WSBA #28269  
Focal PLLC  
900 1st Avenue S., Suite 201  
Seattle, WA 98134  
(206) 529-4827  
venkat@focallaw.com  
*Counsel of record*

Eugene Volokh  
Scott & Cyan Banister  
First Amendment Clinic  
UCLA School of Law  
405 Hilgard Ave.  
Los Angeles, CA 90095  
(310) 206-3926  
volokh@law.ucla.edu  
*Pro hac vice admission pending*

*Counsel for Amici Curiae*

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I hereby certify that on April 13, 2018, I caused to be served the MOTION OF ELECTRONIC FRONTIER FOUNDATION, PROF. AARON H. CAPLAN, AND PROF. EUGENE VOLOKH FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER and the BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, PROF. AARON H. CAPLAN, AND PROF. EUGENE VOLOKH IN SUPPORT OF PETITIONER by hand delivery to the following:

Angus Lee  
Angus Lee Law Firm  
9105A NE Hwy 99, St 200,  
Vancouver, WA 98665

Thomas Rask  
Kell, Alterman & Runstein  
520 SW Yamhill St #600  
Portland, OR 97204

Dated this 13th day of April, 2018



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Misty Elwood, Paralegal

## FOCAL PLLC

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