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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

ADRIAN BENTURA OZUNA,
Defendant/Appellant/Petitioner,

Filed *E*
Washington State Supreme Court

APR 08 2015

Ronald R. Carpenter
Clerk *by h*

**AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON AND WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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ORIGINAL

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INTEREST OF *AMICI CURIAE*

The interests of the organizations joining as amici curiae are described in the motion for leave to participate as amicus which accompanies this brief.

ISSUES TO BE ADDRESSED BY AMICI

1. Whether the offense of Intimidating a Witness requires proof that the defendant intentionally directed or communicated threats to another person.
2. Whether due process requires that intent be proved by more than prejudicial speculation.
3. Whether private written thoughts without proof the defendant directed or communicated them to others are protected by the Constitution.

STATEMENT OF THE CASE

The following facts are based on the parties' briefs and the Court of Appeals' opinion. The prosecution charged Adrian Ozuna with the crime of Intimidating a Witness in violation of RCW 9A.72.110(2). He was convicted of that crime at trial. The prosecution's case rested on unstamped and undelivered letters found in Ozuna's personal effects in the county jail. The letters stated:

So now you know what I want primo, don't hesitate vato. take action reep the rewards later. Don't think, just act. thinking is already hesitating. hit me up when after the shit get's handled. Do it on the 25 cause that's when I have court, I want to have a smile on my face that day knowing that, that fool's getting a lil tast of what's comeing to him. The 25 is the day I get sentenced. Good looking out primo, don't let me down fucker! I knew I could depend on you, a lil late but better late than never, que-no.

The letters were addressed to "Primo" and signed by "Primo."

One of the letters also said "bad things come to those that snitch." One letter called the recipient a "fucking trader" and said that another "can have him." A detective, who was given the letters by the jail guards who seized them from Ozuna's cell when he was being moved to another cell, believed that the letters referred to another inmate named Jaime Avalos who had been a witness in Ozuna's prior trial. There was no evidence Ozuna did anything to communicate the contents of the letter to another person.

Avalos was injured in the jail approximately a month later by David Soto. According to the State, Ozuna and Avalos are members of the same "gang." Ozuna later stated in a recorded jail phone call that he was emotional when he wrote the letters.

ARGUMENT

In order to prove Intimidation of a Witness, the State must establish beyond a reasonable doubt that the person charged intended to

“direct” a “threat” to another, where threat is defined as the defendant acting to “communicate” a threat, directly or indirectly. RCW 9A.72.110.¹ The issue before the Court is whether the prosecution satisfied its burden to prove both the act and mental state elements of the charged offense beyond a reasonable doubt. To answer this question, the Court must address for the first time what it means to “direct” and “communicate” a threat to another person.

The elements of the offense require the State to show facts sufficient to establish both the defendant’s act of “directing” or “communicating” and his intent to communicate the threat to a specific witness. This Court should hold that proof of a person’s private thoughts — even if the thoughts are put in writing such as in a private

¹ The crime charged in this case requires the prosecution to prove beyond a reasonable doubt the following statutory elements of RCW 9A.72.110:

- (2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.
- (3) As used in this section:
 - (a) "Threat" means:
 - (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
 - (ii) Threat as defined in RCW 9A.04.110(27) [now (28)].

The elements of a “threat” under RCW 9A.04.110(28) are in relevant part:
“Threat” means to communicate, directly or indirectly the intent:

- (a) To cause bodily injury in the future to the person threatened or to any other person; or . . .
- (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships[.]

diary, journal, or a draft of a message not sent — are insufficient to prove the necessary act of “directing” or “communicating” a threat, as well as being insufficient evidence of a specific intent to communicate those thoughts to the witness. To rule otherwise would violate the free speech protections of the State and federal constitution. U.S. Const. Am. I; Wash. Const. art. 1, sec. 5.

A. The “directing a threat” element requires proof of that act and intent to communicate the threat to another person.

Due process requires that each element of the crime charged be proven beyond a reasonable doubt. U.S. Const. Am. XIV; Wash. Const. art. I, sec. 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The relevant element of the charged crime of intimidating a witness is the defendant’s directing a threat to a former witness because of the witness’s role in an official proceeding. RCW 98.72.110(2). To prove this, the State must establish beyond a reasonable doubt that the defendant communicated the threat to the witness, directly or indirectly. The State fails to meet this burden where no evidence of an intentional communication is presented.

1. It is an essential element of Intimidating a Witness that the defendant direct a threat to another person, which cannot be shown by a private thought.

Here, the essential element of Intimidation of a Witness that the prosecution had to prove is that the defendant “directed” the threat to the former witness. RCW 9A.72.110(2). Essential elements include those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. *State v. Powell*, 167 Wn.2d 672, 683, 223 P.3d 493 (2009) (lead opinion). To prove a person guilty, the State must plead and prove each element beyond a reasonable doubt. *See State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003), quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (An “essential element is one whose specification is necessary to prove the very illegality of the behavior charged”).

Even if the term “communicate” were not contained in the statutory definition of “threat,” the plain meaning of the phrase “direct a threat” necessarily implies intended communication of a threat. Where a term is undefined, courts look to the plain meaning of the word to determine what it means. *Burton v. Lehman*, 135 Wn.2d 416, 423, 103 P.3d 1230 (2005). Where a statute is clear it is not subject to judicial construction. *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d

282, *cert. denied*, 531 U.S. 984, 121 S.Ct 438, 148 L.Ed. 2d 444

(2000).

“Direct” is defined in the *Merriam-Webster Dictionary* to mean:

(1) “to cause (someone or something) to turn, move, or point in a particular way”,

(2) “to cause (someone’s attention, thought, emotions, etc.) to relate to a particular person, thing, goal, etc.”;

or

(3) “to say (something) to a particular person or group.”

Merriam-Webster Dictionary (2015) *available at* <http://www.merriam-webster.com/dictionary/direct>. This definition contemplates an intentional communicative act by the defendant. It is not satisfied by a private thought never intended to be communicated to another person.

Applying that plain meaning to the facts at issue here leads to the inescapable conclusion that there is insufficient evidence Ozuna directed a threat towards Avalos. The mere act of writing down words is not “directing” or communicating words “to” another. Nor does the act of private writing show, without more, intent to “direct” a threat to

another. Instead, this Court should find these essential elements have not been proven beyond a reasonable doubt.

2. The definition of communication requires proof of an intentional act of transmitting speech to another person.

The mere act of writing down one's thoughts is not "communication." This Court should find that Intimidation of a Witness requires an intent to communicate a threat. *See State v. Avila*, 102 Wn.App. 882, 893, 10 P.3d 486 (2000) (concluding that RCW 28A.635.100 contains an implied element of intent to utter the intimidating threat). That element is not satisfied where there is no evidence of an intent to communicate the threat to another.

As applicable in this case, "threat" is defined to mean to "communicat[ing,] directly or indirectly" the intent to use force ..." RCW 9A.72.110(3)(a)(ii). Like the term "direct," "communication" is not defined in the Intimidation of a Witness statute. *Id.* Because it is not defined, the Court should take a similar approach by analyzing the plain meaning of the term. *Lehman*, 135 Wn.2d at 423.

Where Washington appellate courts have analyzed communication in this or similar statutes, they have found there must be an attempt to transmit a message to another, either directly or

indirectly. There is an intentional transmission of a message to another in the cases cited by the State as well as others not cited. In *State v. Hansen*, this Court found that “whoever threatens a judge, either directly or indirectly” could be found guilty of the crime of intimidating a judge. 122 Wn.2d 712, 718, 862 P.2d 117 (1993). In *Hansen*, the threat was communicated verbally by the defendant to an attorney. *Id.*, at 714-715. In *State v. Anderson*, the Court of Appeals found that a threat communicated to a corrections officer was “enough if threats are directed towards a third party.” 111 Wn.App. 317, 322, 44 P.3d 857 (2002); *see also State v. Williamson*, 131 Wn.App. 1, 86 P.3d 1221 (2004) (evidence sufficient where defendant spoke to one victim, asking that the threat be conveyed to another).

Requiring an intentional communicative act satisfies the purpose of RCW 9A.72.110. It stops innocent or constitutionally protected conduct from being subjected to punishment. *See State v. Kepiro*, 61 Wn.App. 116, 121, 810 P.2d 19 (1991); *see also State v. Bash*, 130 Wn.2d 594, 605, 925 P.2d 978 (1996) (reviewing court must consider whether strict liability reading of crime would encompass innocent conduct). Instead, it properly focuses on the conduct that Intimidation of a Witness is designed to prevent: intentional threats directed at a

witness as retaliation for testifying. Mutterings made in private, personal diaries, discarded draft emails stored in the cache on a computer or other writings not communicated to anyone were never intended to be criminalized by RCW 9A.72.110. While RCW 9A.72.110 only requires the direct or indirect communication of the threat, the statute is not satisfied where there is neither “directing a threat,” “communicating a threat,” nor intent to communicate the threat.

This analysis follows how this Court has analyzed the question of personal diaries or private mutterings in other statutes. This Court has consistently found that “one who writes a threat in a personal diary or mutters a threat unaware that it might be heard does not knowingly threaten.” *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). Although *Kilburn* analyzes the harassment statute, the principle that the State cannot criminalize private thoughts applies equally to the Intimidating a Witness statute. Extending the definition of communication in the intimidation statute to include private thoughts, in whatever form they were created, is well beyond the plain meaning of the word and should not be allowed.

This Court can find guidance in other states that have analyzed similar statutes. Like Washington, states that have interpreted similar criminal intimidation statutes have interpreted communication to require an intentional act of communication to someone, if not the intended victim of the threat. Indiana has ruled the statute can be satisfied where the threat is communicated through a third person. *Walls v. State*, 993 N.E.2d 262, *transfer denied* 999 N.E.2d 416 (2013). For its intimidation statute, Illinois has required “communication of that threat to another person.” *People v. Libbra*, 268 Ill.App.3d 194, 198-99, 205 Ill.Dec. 554 (1994). In Kansas, the court has held that communication “requires a declarant and a receiver for the threat because the threat must be perceived and comprehended.” *State v. Quinones*, 42 Kan. App. 2d 48, 55, 208 P.3d 335, 341 (2009), *citing State v. Woolverton*, 284 Kan. 59, 69, 159 P.3d 985 (2007). In Massachusetts, communication only occurs when a threatening comment is made to an intermediary with the intent that the intermediary pass along the threat to the intended target. *See Commonwealth v. Valentin V.*, 83 Mass. App. Ct. 202, 205, 982 N.E.2d 544, 547, *review denied*, 464 Mass. 1107, 984 N.E.2d 296 (2013),

citing *Commonwealth v. Perez*, 460 Mass. 683, 703, 954 N.E.2d 1 (2011).

The State argues that limiting RCW 9A.72.110 to circumstances where communication with another person occurs would unnecessarily restrict the State from investigating threats made publicly on Facebook or in some other electronic medium. This issue is not before this Court and should not be reached, but in any event a thought never intended to be communicated with another cannot be equated with posting on a social network or other space where it is necessarily communicated to others. It is a rare circumstance where a post to a website like Facebook would not reach other persons.² While it is impossible to answer the State's hypothetical without facts, a threat made somewhere the sender knows it will be seen by others is far more likely to satisfy RCW 9A.72.110 than a private writing that is never posted for public view. See *State v. Locke*, 175 Wn.App. 779, 784, 307 P.3d 771 (2013)

² The average Facebook post is seen by 35% of a user's friends. "How Many of Your Friends See Your Facebook Posts? The Debate's Over, It's 35%", *Business Insider*, Originally posted August 9, 2013, found at <http://www.businessinsider.com/35-percent-of-friends-see-your-facebook-posts-2013-8>. The average Facebook user has more than 200 friends in their network. "6 New Facts About Facebook", *Pew Research Center*, Originally posted February 3, 2014, available at <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/>.

(postings on website constitute true threat not protected by the First Amendment).

Private musings, whether in a diary, muttered privately or written in an unsent letter, either on paper or electronically, cannot prove beyond a reasonable doubt that a person directed a communication to another. This Court should find that without an intentional act to communicate, a conviction under RCW 9A.72.110 cannot be upheld.

B. The due process requirements for sufficient evidence in a criminal case prohibit a finding of criminal acts or intent based upon speculation.

The State argues that both the act and intent elements of the Intimidating a Witness charge can be inferred from possession of the letters and other acts it claims may be inferred from the possession of these letters by Ozuna. This Court should find there is insufficient evidence to infer intent or other acts from mere possession of the writings found in Ozuna's possession. The connection between Ozuna and the other evidence is too speculative to prove the required elements of the offense beyond a reasonable doubt.

In *State v. Vasquez*, this Court answered whether intent to use items in a criminal way can be inferred from mere possession. 178

Wn.2d 1, 309 P.3d 318 (2013). If the State is allowed to make such an inference, it is relieved of its burden to prove all of the elements of a crime beyond a reasonable doubt and its evidence is insufficient. *Id.* at 7. Naked possession cannot prove beyond a reasonable doubt intent to engage in criminal use where possession and intent are both elements of the crime. *Vasquez* at 178 Wn.2d at 8; *see also State v. Brockob*, 159 Wn.2d 311, 318, 330-31, 150 P.3d 59 (2006) (possession of cold tablets containing pseudoephedrine insufficient to prove intent to manufacture methamphetamine); *State v. O'Connor*, 155 Wn.App. 282, 290, 229 P.3d 880 (2010) (mere possession of controlled substance does not support an inference of intent). Just as mere possession in forgery or drug cases does not satisfy the elements of the charged offense in these cases, neither does mere possession of an undelivered letter support an intent to direct a communication to another as required by RCW 9A.72.110.

As in *Vasquez*, this court should reject the “why else would he have them” argument.³ This standard would eliminate the State’s

³ In the Court of Appeals’ decision in *Vasquez*, the Court asked “And here why else would Mr. Vasquez have them” in upholding a conviction that was reversed by this Court. *State v. Vasquez*, 166 Wn.App. 50, 53, 269 P.3d 370, *reversed by State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013).

burden to prove both intent and directing or communicating a threat. Instead, this Court should find that possession cannot establish intent or the other required elements of the charged offense beyond a reasonable doubt. *Vasquez*, 178 Wn.2d at 13.

The Court should also reject the logical probability analysis asserted by the State as showing sufficient evidence to support the conviction. The State argues that other evidence was introduced to prove intent, specifically a communication that occurred after the letters were seized by jail staff, that an assault occurred in the jail and that both Ozuna and Soto were gang members. It is true that “the specific criminal intent of the accused may be inferred from the *conduct* where it is *plainly indicated* as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). But an inference based on nothing more than “logical probability,” while adequate in the civil sphere, alone cannot sustain a finding of guilt. “[B]ecause the prosecution must prove every element beyond a reasonable doubt, the rational connection contained in a sole and sufficient inference must be true beyond a reasonable doubt.” *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995) (citing *Ulster County Court v. Allen*, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d

777 (1979)). Here, the evidence fails to show that the defendant must have intended to direct a threat to a former witness just because an undelivered letter was found in his possession. Applying the standard asserted by the State would allow the fact finder to speculate about guilt rather than find guilt beyond a reasonable doubt, as due process requires.

C. The free speech guarantees of the United States and Washington Constitutions protect private thoughts not communicated to others

The First Amendment and Wash. Const. Article 1, Sec. 5 support the conclusion that private writings not communicated to another cannot by themselves constitute a crime. U.S. Const. Am. I (“Congress shall make no law ... abridging the freedom of speech”); Wash. Const. art. 1, sec. 5. (“Every person may freely speak, write and publish on all subjects...”). As the United States Supreme Court has explained, an individual's right to personal freedom includes freedom with respect to private thoughts, and those private thoughts are beyond the reach of the government’s criminal punishment powers: “Whatever the power of the state to control public **dissemination** of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.” *Stanley v.*

Georgia, 394 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (emphasis added). *Accord*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), quoting *Stanley*. *And see*, *United States v. Curtin*, 489 F.3d 935, 959-62 (9th Cir. 2007) (Kleinfeld, J., concurring) (noting “The Constitution has long protected our private papers and thoughts, even those entirely lacking in social value,” and “Fantasy is constitutionally protected,” and distinguishing fantasy from proof of intent.)

The Texas Court of Criminal Appeals similarly agreed that “the First Amendment protects thoughts just as it protects speech. *Ex Parte Lo*, 424 S.W.3d 10, 25-26 (Texas Crim. App. 2013) (citing *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) for the proposition that the First Amendment protects “freedom of thought”). The Texas Court warned that

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the “thought police.” It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene. To protect the right of citizens to think freely and to protect speech for its own sake,

the Supreme Court's cases “draw vital distinctions between ... ideas and conduct.”

Id.

This Court in *Kilburn* agreed with the same principle; in a case like Ozuna’s involving a charge requiring proof that the defendant communicated a threat, the Court noted that the private thoughts of a person, whether in written form or said aloud, cannot be criminalized until they are communicated. *Kilburn*, 151 Wn.2d at 48. Because there was no proof of Ozuna’s intent to “direct” or “communicate” a threat, this Court should find that the private letters found in his possession are constitutionally protected.

Allegedly criminal threats are a form of pure speech. A statute criminalizing threatening language “must be interpreted with the commands of the First Amendment clearly in mind.” *State v. Williams*, 144 Wn.2d 197, 207, 26 P.3d 890 (2001) (quoting *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). “‘True threats’ encompass those statements where the speaker **means to communicate** a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (emphasis added). Because punishment of threats implicates

pure speech, the government bears the burden of proving the law does so in a constitutional manner. *Ex Parte Lo, supra*, 424 S.W.3d at 25.

Applying the above analysis, the private thoughts of a person, whether in written form or expressed in another form, cannot be criminalized unless they are communicated. *Kilburn*, 151 Wn.2d at 48. This Court should find that the written private thoughts of Ozuna, with no proof he “directed,” “communicated” or intended to communicate them, were protected by the United States and Washington constitutional right to free speech.

CONCLUSION

Concluding there is insufficient evidence to convict of Intimidating a Witness in this case will not allow intimidation of witnesses and other court actors to go “unchecked.” The prosecution may be able to sufficiently prove the elements of other offenses, but if it chooses to prosecute for this offense, there must be evidence sufficient to prove beyond a reasonable doubt that the defendant “directed” or “communicated” a threat, with the necessary intent. Where the State fails to provide evidence of any of these elements, the court should find that the State has failed to meet its burden of proof.

Respectfully submitted this 30th day of March 2015.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Plaintiff/Respondent,

v.

ADRIAN BENTURA OZUNA,
Defendant/Appellant/Petitioner

No. 90666-1

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, TRAVIS STEARNS, STATE THAT ON THE 30th DAY OF MARCH 2015, I CAUSED THE ORIGINAL **MOTION TO FILE AMICUS MOTION AND THE AMICUS CURIAE BRIEF OF THE ACLU OF WASHINGTON FOUNDATION AND THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

Dennis Morgan
Attorney at Law
PO Box 1019
Republic, WA 99166-1019

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David Trefry, Tamara Hanlon
Yakima County Prosecutors Office
PO Box 4846
Spokane, WA 99220-0846

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Nancy Talner
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SIGNED in SEATTLE, WASHINGTON the 30th day of March, 2015



Travis Stearns

OFFICE RECEPTIONIST, CLERK

To: Travis D. Stearns
Cc: David Trefry; 'Suzanne Elliott' (suzanne@suzanneelliottlaw.com); Nancy Talner; Tamara Hanlon; 'Dennis Morgan'
Subject: RE: State v. Ozuna No. 90666-1, Amicus Brief of ACLU-WA and WACDL

Received 3-30-2015

Supreme Court Clerk's Office

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From: Travis D. Stearns [mailto:Travis@washapp.org]
Sent: Monday, March 30, 2015 4:19 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: David Trefry; 'Suzanne Elliott' (suzanne@suzanneelliottlaw.com); Nancy Talner; Tamara Hanlon; 'Dennis Morgan'
Subject: FW: State v. Ozuna No. 90666-1, Amicus Brief of ACLU-WA and WACDL

Apologies. I failed to actually file it with the clerk. I'm resending this with the clerk's email address attached. T.

From: Travis D. Stearns
Sent: Monday, March 30, 2015 3:31 PM
To: 'David Trefry'; 'Suzanne Elliott' (suzanne@suzanneelliottlaw.com); Nancy Talner; Tamara Hanlon; 'Dennis Morgan'
Cc: Maria Riley
Subject: State v. Ozuna No. 90666-1, Amicus Brief of ACLU-WA and WACDL

Please accept for filing the following in the matter of State v. Ozuna, No. 90666-1:

1. Motion to File Amicus Brief of ACLU-WA and WACDL
2. Amicus Brief of ACLU-WA and WACDL
3. Certificate of Service

All parties have consented to email service and are copied on this email.

Please let me know if you have any difficulties with the attached files opening.

Regards,

Travis Stearns