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IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHN ANDREW BOYAJIAN,

Defendant.

CASE NO. 15-5Z0124665

**BRIEF OF AMICUS CURIAE
ELECTRONIC FRONTIER
FOUNDATION**

INTRODUCTION

As people continue to adopt new communications technologies to express their thoughts, we must maintain our Constitutional guarantees of free speech and due process at the electronic frontier. The First Amendment requires “precision” when government regulates the content of speech, including on the Internet. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). The Washington cyberstalking statute lacks such precision. It bans making an electronic communication, with intent to embarrass (or harass, intimidate, or torment), if the communication is anonymous, repetitive, indecent, or threatening. Myriad applications violate the First Amendment. For example, it criminalizes journalists, activists, and political candidates who use blogs to embarrass public figures, if they do so anonymously, repeatedly, or with a four-letter word. The statute is thus facially overbroad.

1 **ARGUMENT**

2 **I. The Washington cyberstalking statute is facially overbroad.**

3 A statute is facially overbroad in violation of the First Amendment when “a substantial
4 number of its applications are unconstitutional, judged in relation to the statute’s plainly
5 legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010). *Accord City of Bellevue*
6 *v. Lorang*, 140 Wash. 2d 19, 26-27 (Wash. Sup. Ct. 2000). The facial overbreadth doctrine
7 “alter[s]” standing rules to allow litigants “to challenge a statute not because their own rights of
8 free expression are violated, but because of a judicial prediction or assumption that the statute’s
9 very existence may cause others not before the court to refrain from constitutionally protected
10 speech or expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This ensures speech
11 has “breathing space,” and speech restraints are “narrowly drawn.” *Id.* at 611.

12 Here, the core activity restrained by the Washington cyberstalking statute – making an
13 electronic communication – enjoys the fullest First Amendment protection. Electronic
14 communications are no less protected just because they are made with intent to “embarrass” or
15 even “torment” another. Nor is First Amendment protection diminished by sending such
16 communications anonymously, repetitively, or with a four-letter word. Thus, the statute is
17 facially overbroad. The problem is aggravated by elements that the statute lacks. The electronic
18 communication need not cause any actual harm, or even be seen by the targeted person. Nor
19 does the statute require any proof of any plausible possibility that the electronic communication
20 might have caused any harm to a reasonable person.¹

21 **A. The First Amendment protects “making an electronic communication.”**

22 The core activity banned by the Washington cyberstalking statute is “mak[ing] an
23

24 ¹ A limiting construction cannot save the statute. At its core, it prohibits what the First
25 Amendment protects: Internet communication that is embarrassing, and anonymous, repeated, or
26 indecent. *See Reno*, 521 U.S. at 884 (limiting constructions are allowed only if the statute is
“readily susceptible” to such construction, and courts cannot “rewrite” the statute). *See, e.g.,*
City of Seattle v. Ivan, 71 Wash. App. 145, 155-56 (Wash. Ct. App. 1993).

1 electronic communication” to the targeted person or any “third party.” RCW 9.61.260(1).
2 “Electronic communication” is broadly defined to cover any digital transmission of information,
3 including “internet-based communications.” RCW 9.61.260(5). Thus, the statute applies to any
4 conceivable form of modern electronic communications, including websites, blogs, social media,
5 emails, instant messages, etc. Also, it applies both to one-on-one communications (such as some
6 email), communications to a closed list of people (such as Facebook), and communications
7 available to everyone (such as a website).

8 Time and again, courts have closely scrutinized and then struck down speech restraints on
9 the Internet. *See, e.g., Reno*, 521 U.S. 844 (striking down the Communications Decency Act);
10 *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (preliminarily enjoining the Child Online Protection
11 Act). The Supreme Court explained: “any person with a phone line can become a town crier
12 with a voice that resonates farther than it could from any soapbox,” and “the content on the
13 Internet is as diverse as human thought.” *Reno*, 521 U.S. at 870.

14 **B. The First Amendment protects expression with intent to “embarrass.”**

15 The First Amendment protects the right to express messages that are intended to cause
16 embarrassment, insult, and outrage. *See, e.g., Boos v. Barry*, 485 U.S. 312, 322 (1988) (“in
17 public debate our own citizens must tolerate insulting, and even outrageous, speech in order to
18 provide adequate breathing space to the freedoms protected by the First Amendment”); *Hustler*
19 *Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (emphasizing the Court’s “longstanding
20 refusal to allow damages to be awarded because the speech in question may have an adverse
21 emotional impact”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech
22 does not lose its protected character . . . simply because it may embarrass others or coerce them
23 into action.”); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“debate on public issues
24 should be uninhibited, robust, and wide-open, and it may well include vehement, caustic, and
25 sometimes unpleasantly sharp attacks on government and public officials”). The First
26 Amendment “may indeed best serve its high purpose when it induces a condition of unrest,

1 creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v.*
2 *City of Chicago*, 337 U.S 1, 4 (1949).

3 The First Amendment protects a substantial number of electronic communications that
4 are made with the intent to embarrass someone else. To name just a few examples:

- 5 • A newspaper might publish on its website an editorial arguing that an elected official
6 should be embarrassed because of their misconduct.
- 7 • A government reform activist might publish on YouTube a video recording of
8 government malfeasance, and then send a text message to the wrongdoer’s boss that
9 identifies the post, to embarrass the wrongdoer and the boss, and thus encourage reform.
- 10 • An election challenger might publish on their website a list of the incumbent’s
11 controversial votes, to embarrass their opponent into withdrawing from the race.
- 12 • A former member of a religious congregation, after reading a digital news article about it,
13 might post in the article’s public comment section a criticism of the congregation’s
14 liturgy, to embarrass the spiritual leader into changing the liturgy.
- 15 • A restaurant customer might publish on Yelp a negative review, and email the review to
16 the owner, hoping embarrassment will spur the owner to improve the restaurant.

17 These communications, all protected by the First Amendment, are no less protected when
18 posted anonymously, or sent twice, or accompanied by a common four-letter word.

19 The remainder of the statute’s prohibited mental states – intent to “harass, intimidate, [or]
20 torment” – are also overbroad. In *United States v. Cassidy*, 814 F. Supp. 2d 574, 585-86 (D. Md.
21 2011), the court struck down as facially overbroad a ban on using an interactive computer
22 service, with intent to “harass” or “cause substantial emotional distress,” and thereby causing
23 such distress. The court reasoned: “Twitter and Blogs are today’s equivalent of a bulletin board
24 that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a
25 victim.” *Id.* See also *United States v. Popa*, 187 F.3d 672, 678 (D.C. Cir. 1999) (holding that a
26 ban on anonymous phone calls with intent to “annoy, abuse, or harass” was unconstitutional as
applied to a person who repeatedly called a government officer to complain about the
government); *State v. Brobst*, 857 A.2d 1253 (N.H. Sup. Ct. 2004) (holding that a ban on phone
calls with intent to “annoy or alarm” was facially overbroad).

1 Likewise, in *KKK v. City of Erie*, 99 F. Supp. 2d 583, 591-92 (W.D. Pa. 2000), the court
2 struck down as facially overbroad a ban on wearing a mask with intent “to intimidate, threaten,
3 abuse or harass.” The court reasoned that there were too many ways to apply this ban to
4 constitutionally protected messages: “A statement, for example, that the white race is supreme
5 and will rise again to dominate all other races may seem intimidating, or even threatening,
6 particularly when advocated by a large group of demonstrators showing solidarity. Advocacy for
7 a return to segregation may likewise be intimidating, particularly if accompanied by rough
8 language. A diatribe against a local official who is an ethnic minority, or a homosexual, may be
9 considered ‘abuse.’” *Id.*

10 **C. Three of the statute’s four qualifiers do not limit the scope of the criminal**
11 **ban to unprotected communications.²**

12 **1. The First Amendment protects “anonymous” communication.**

13 It is beyond dispute that the First Amendment protects the right to communicate
14 anonymously. *See, e.g., Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182
15 (1999) (striking down a ban on anonymous solicitation of ballot access signatures); *McIntyre v.*
16 *Ohio Elections Comm’n*, 514 U.S. 334 (1995) (striking down a ban on anonymous leafleting
17 designed to influence voters in an election); *Talley v. California*, 362 U.S. 60 (1960) (striking
18 down a ban on any anonymous leafleting). The Supreme Court has explained:

19 Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent
20 practice, but an honorable tradition of advocacy and of dissent. Anonymity is a
21 shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind
22 the Bill of Rights, and of the First Amendment in particular: to protect unpopular
individuals from retaliation – and their ideas from suppression – at the hand of an
intolerant society.

23 ² The statute’s fourth qualifier – its ban on threats – would violate the First Amendment as applied to
24 speech that is not a “true threat.” At a minimum, the speaker of an unprotected true threat must have a subjective
25 intent “to communicate a serious expression of an intent to commit an act of unlawful violence to a particular
26 individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). *See also Elonis v. United States*,
135 S. Ct. 2001, 2012 (2015) (interpreting a federal threat statute to require a subjective “purpose of issuing a
threat” or “knowledge that the communication will be viewed as a threat”). *See, e.g., Watts v. United States*, 394
U.S. 705 (1969) (protecting the statement, at a protest, that “if they ever make me carry a rifle the first man I want to
get in my sights is L.B.J.”).

1 *McIntyre*, 514 U.S. at 357. *See also id.* at 341-42 (emphasizing the use of anonymous speech by
2 the founders of the American republic).

3 The First Amendment right to communicate anonymously extends to the Internet. *See*,
4 *e.g.*, *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *Doe v. Cahill*,
5 884 A.2d 451, 456 (Del. Sup. Ct. 2005). This is because: “Internet anonymity facilitates the rich,
6 diverse, and far ranging exchange of ideas. The ability to speak one’s mind on the Internet
7 without the burden of the other party knowing all the facts about one’s identity can foster open
8 communication and robust debate.” *2TheMart.com Inc.*, 140 F. Supp. 2d at 1092.

9 Here, the statute makes it a crime to make a single electronic communication, if one does
10 so “anonymously,” and with intent to embarrass (or harass, intimidate, or torment) another
11 person. RCW 9.61.260(1)(b). The examples of protected communications listed above, *see*
12 *supra* Part I(B), with the added element of anonymity, are still fully protected by the First
13 Amendment. Thus, the ban on anonymous electronic communications is facially overbroad.

14 **2. The First Amendment protects “indecent” communication.**

15 The statute makes it a crime to make any electronic communication, with intent to
16 embarrass (or harass, intimidate, or torment), if the communication includes “lewd, lascivious,
17 indecent, or obscene” content. RCW 9.61.260(1)(c). The content-based ban on non-obscene
18 indecency is facially overbroad.

19 “Obscenity” is narrowly defined as a work where: (1) the average person, applying
20 contemporary community standards, would find that the work, taken as a whole, appeals to the
21 prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct
22 specifically defined in the applicable state law; and (3) the work, taken as a whole, lacks serious
23 literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).
24 Obscenity is among “the few” categories where the First Amendment allows content-based
25 restraint on speech. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

1 “Indecency,” on the other hand, is more broadly defined as speech referring to excretory
2 or sexual activities or organs in a patently offensive manner. *FCC v. Pacifica Foundn.*, 438 U.S.
3 726, 738-39 (1978). “Sexual expression which is indecent but not obscene is protected by the
4 First Amendment.” *Sable Commns. v. FCC*, 492 U.S. 115, 126 (1989). Thus, the First
5 Amendment protects the expression of indecency on the Internet. *See, e.g., Reno*, 521 U.S. 844;
6 *Ashcroft*, 542 U.S. 656. The First Amendment also protects the expression of indecency in
7 myriad other contexts. *See, e.g., United States v. Playboy Group*, 529 U.S. 803, 811-13 (2000)
8 (protecting indecent cable programs); *Sable Commns.*, 492 U.S. at 126 (protecting indecent
9 phone services); *Hess v. Indiana*, 414 U.S. 105 (1973) (protecting the statement “we’ll take the
10 fucking streets later” spoken to a crowd at a protest); *Cohen v. California*, 403 U.S. 15 (1971)
11 (protecting the statement “fuck the draft” displayed on a jacket in a courthouse). *Cf. Pacifica*,
12 438 U.S. at 748-50 (not protecting the daytime radio broadcast of George Carlin’s “filthy words”
13 monologue, given unique concerns about broadcast media).

14 The statute’s other two adjectives do not limit its scope. “Lewd,” a term arising often in
15 school speech cases, can be viewed as a synonym for “indecent.” *See Bethel Sch. Dist. v.*
16 *Fraser*, 478 U.S. 675 (1986) (using the terms interchangeably); *Morse v. Fredrick*, 551 U.S. 393,
17 404 (2007) (same). “Lascivious” means: “Tending to excite lust; *lewd; indecent; obscene;*
18 relating to sexual impurity; tending to deprave the morals in respect to sexual relations.” *See*
19 *Black’s Law Dictionary*, available at thelawdictionary.org/lascivious/ (emphasis added). Also,
20 under the canon of statutory construction *noscitur a sociis*, “a word is given more precise content
21 by the neighboring words with which it is associated.” *United States v. Williams*, 553 U.S. 285,
22 294 (2008).

23 In short, the statute extends far beyond unprotected obscenity, to also prohibit Internet
24 communications that contain protected non-obscene indecency. The government cannot
25 undertake such content discrimination unless it can prove that alternative measures “will not be
26 as effective as the challenged statute” at achieving the government’s goals. *Ashcroft*, 542 U.S. at

1 665. *See also Sable Comms.*, 492 U.S. at 126 (requiring laws targeting indecency to be “the
2 least restrictive means” to further “a compelling interest”); *Playboy Group*, 529 U.S. at 811-13
3 (2000) (same). There plainly are less restrictive means for the government to protect the public
4 from stalking, than to ban every use of a four-letter word in an electronic communication sent
5 with the intent to embarrass. *See also Hess*, 414 U.S. 105 (protecting a four-letter word); *Cohen*,
6 403 U.S. 15 (same). Thus, the statute’s ban on indecent speech is facially overbroad.

7 **3. The First Amendment protects “repeated” communication.**

8 The statute makes it a crime to make a single electronic communication, if one does so
9 “repeatedly,” and with intent to embarrass (or harass, intimidate, or torment). RCW
10 9.61.260(1)(b). But online communications do not lose their protected status merely because
11 they are “repeated.” The recipients have simple tools at their disposal to ignore or block such
12 communications. *See Cassidy*, 814 F. Supp. 2d at 585-86 (“Twitter and Blogs are today’s
13 equivalent of a bulletin board that one is free to disregard”). Notably, the ban does not even
14 require the communication to be unwanted, or to follow a request to cease further messages.

15 **II. Key terms of the statute are vague.**

16 Litigants may facially challenge a statute that is vague in violation of the Due Process
17 Clause of the Fourteenth Amendment. “[T]he void-for-vagueness doctrine requires that a penal
18 statute define the criminal offense with sufficient definiteness that ordinary people can
19 understand what conduct is prohibited and in a manner that does not encourage arbitrary and
20 discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also City of*
21 *Chicago v. Morales*, 527 U.S. 41, 60 (1999) (criminal statutes must “establish minimal
22 guidelines to govern law enforcement”). The vagueness doctrine applies with “particular force”
23 to laws that restrain speech. *Hynes v. Borough of Oradell*, 425 U.S. 610, 620 (1976).

24 **A. The term “repeated” is vague.**

25 The statutory term “repeated,” RCW 9.61.260(1)(b), is vague in three scenarios. First,
26 some makers of electronic communications will express a single message by sending multiple

1 short transmissions in quick succession (such as “hello” followed by “how are you”). Second,
2 some senders and recipients of electronic communications will have one short correspondence by
3 multiple transmissions on both sides in quick succession (such as “hello”, “hello yourself”, “how
4 are you”, and “ok”). Third, a sender might transmit a message to one person, and then quickly
5 forward it to a second person. It is unclear whether any of these three sequential electronic
6 communications would be a “repeated” communication in violation of the statute. This
7 vagueness fails to give reasonable people sufficient notice of what conduct is prohibited, and it
8 invites arbitrary enforcement. *See Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. Sup.
9 Ct. 1994) (finding vague the word “repeatedly” in a harassment statute).

10 **B. The phrase “harass, intimidate, torment, or embarrass” is vague.**

11 The statute bars making certain electronic communications, with intent to “harass,
12 intimidate, torment, or embarrass.” RCW 9.61.260(1)(b). This is vague, because too often its
13 application will turn on the unpredictable effect of words on people with varying sensibilities.
14 As the court explained in *KKK*, when striking down on vagueness grounds a ban on wearing a
15 mask with intent to intimidate, threaten, abuse, or harass: “To some extent, the speaker’s liability
16 is potentially defined by the reaction or sensibilities of the listener,” and “what is ‘intimidating or
17 threatening’ to one person may not be to another.” 99 F. Supp. 2d at 592.

18 Likewise, in *State v. Bryan*, 910 P.2d 212 (Kan. Sup. Ct. 1996), the court struck down as
19 unconstitutionally vague a statute against following where doing so “seriously alarms, annoys or
20 harasses.” The court reasoned: “In the absence of an objective standard, the terms ‘annoys,’
21 ‘alarms,’ and harasses’ subject the defendant to the particular sensibilities of the individual
22 victim. Different persons have different sensibilities.” *Id.* at 220. *See also Coates v. City of*
23 *Cincinnati*, 402 U.S. 611 (1971) (striking down a ban on “annoying” loitering); *Lorang*, 140
24 Wash. 2d 19 (striking down a ban on phone calls lacking a “legitimate” purpose).

1 **III. Decisions upholding phone harassment statutes are inapposite here.**

2 Washington courts have upheld telephone harassment and threat statutes against
3 overbreadth and vagueness challenges. *See, e.g., State v. Alphonse*, 147 Wash. App. 891 (Wash.
4 Ct. App. 2008); *State v. Alexander*, 888 P.2d 175 (Wash. Ct. App. 1995); *State v. Dyson*, 872
5 P.2d 1115 (Wash. Ct. App. 1994); *City of Seattle v. Huff*, 111 Wash. 2d 923 (Wash. Sup. Ct.
6 1989). In doing so, these courts emphasized that “[t]he gravamen of the offense [of telephone
7 harassment] is the thrusting of an offensive and unwanted communication upon one who is
8 unable to ignore it.” *Alexander*, 888 P.2 at 180. *See also id.* at 179 (“a ringing telephone is an
9 imperative which must be obeyed with a prompt answer”); *Dyson*, 872 P.2d at 1120 (“the
10 telephone . . . presents to some people a unique instrument through which to harass and abuse
11 others”). Moreover, “the recipient of a telephone call does not know who is calling, and once the
12 telephone has been answered, the victim is at the mercy of the caller until the call can be
13 terminated by hanging up.” *Alexander*, 888 P.2 at 179. Finally, “telephone communication
14 occurs in a nonpublic forum.” *Id. Accord Huff*, 111 Wash. 2d at 927.

15 The electronic communications here are fundamentally different. Phone calls are
16 directed to one person. But many electronic communications are sent to a large number of
17 people (*e.g.*, a Facebook account), or all people with Internet access (*e.g.*, blogs and Twitter).
18 *See Cassidy*, 814 F. Supp. 2d at 585-86 (“Twitter and Blogs are today’s equivalent of a bulletin
19 board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a
20 victim”). In such digital venues for mass communication, as in traditional venues for the same,
21 “government may not prohibit the expression of an idea simply because society finds the idea
22 itself offensive or disagreeable.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

23 Some electronic communications can be directed to one person (*e.g.*, emails). Such
24 communications are fundamentally unlike incoming phone calls. No ring requires an immediate
25 response. Rather, email recipients can delay review until a convenient time. Also, there is no
26 risk that a recipient will accidentally speak to a person they are avoiding. Rather, email

1 recipients can decide which messages to delete without reading them. *Cf. Reno*, 521 U.S. at 869
2 (“the Internet is not as invasive as radio or television,” because it does not “invade an
3 individual’s home or appear on one’s computer screen unbidden”). In sum, recipients of
4 electronic communications, unlike recipients of phone calls, can avoid unwanted messages.

5 CONCLUSION

6 For the reasons above, *amicus curiae* Electronic Frontier Foundation respectfully
7 requests that this Court grant defendant’s motion to dismiss, and that it strike down the
8 Washington cyberstalking statute as facially overbroad in violation of the First Amendment and
9 vague in violation of the Fourteenth Amendment.

10 Respectfully submitted,

11 Dated: December 7, 2015

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