No. 80059-1

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

ANNEMARIE CATLETT,

Respondent,

v.

ROBERT LEE TEEL,

Appellant.

ON APPEAL FROM THE ISLAND COUNTY SUPERIOR COURT

BRIEF OF *AMICI CURIAE* PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AND PROF. EUGENE VOLOKH IN SUPPORT OF APPELLANT

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* Counsel would like to thank Tanner Laiche, Rachel Levin, and Caleb Mathena, UCLA School of Law students who worked on this brief.

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, where he has written extensively on First Amendment law, including in *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw. U. L. Rev. 731 (2013).

II. ISSUES TO BE ADDRESSED BY *AMICI CURIAE*

Amici discuss why the order of protection in this case is unauthorized by RCW 10.14.020, is an unconstitutional content-based speech restriction, and is an impermissible prior restraint on speech. *Amici* hope this analysis will helpfully add to the arguments being made by the parties.

III. STATEMENT OF THE CASE

The facts discussed in this brief are set forth in the parties' briefs filed in this Court.

IV. INTRODUCTION

Publishing records already in the public domain is protected speech under the First Amendment and Washington Const. art. 1, § 5. It thus cannot

form the basis of a protection order under RCW 10.14.020, which explicitly exempts "constitutionally protected free speech."

The order also fails to satisfy the statutory requirement that Teel's speech serve no legitimate or lawful purpose. Posting public records about Catlett served several legitimate purposes, including defending Teel's reputation and informing Catlett's prospective clients about facts that could be potentially relevant in assessing her trustworthiness and qualifications as a real estate agent. And, in any event, Teel's speech cannot be stripped of constitutional protection based solely on a judicial determination that it "serves no legitimate or lawful purpose."

Besides the statutory violations, the order also violates the First Amendment. Because the order was issued based on the content of Teel's past constitutionally protected speech, it is a content-based burden imposed on such past speech. Also, under RCW 10.14.080(3), a protection order issued in response to "unlawful harassment" is intended to prevent a defendant from repeating such conduct. The protection order here was expressly granted in response to Teel's publication of records about Catlett; it thus appears that it prohibits similar publication in the future, and is therefore a content-based restriction—indeed, a prior restraint—on future speech. For all these reasons, the order is unconstitutional unless it is narrowly tailored to serve a compelling government interest, which it is not.

The order should therefore be vacated.

V. ARGUMENT

A. Standard of Review

Decisions involving constitutional challenges are reviewed *de novo*, *Shoop v. Kittitas County*, 149 Wn.2d 29, 33 (2003), as are questions of law, *Veach v. Culp*, 92 Wn.2d 570, 573 (1979). And "[a]ppellate judges in [a First Amendment] case must exercise independent judgment and determine whether the record establishes" that the speech was constitutionally unprotected. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984); *see also Duc Tan v. Le*, 177 Wn.2d 649, 669-70 (2013) ("Appellate courts [in a First Amendment case] must 'make an independent examination of the whole record' to ensure the judgment does not constitute a forbidden intrusion on the field of free expression." (citation omitted)).

B. The Order Is Invalid Under RCW 10.14.020

1. Teel's speech is constitutionally protected and thus does not count as a "course of conduct" under RCW 10.14.020

RCW 10.14.020(2) defines "unlawful harassment," in part, as "a knowing and willful *course of conduct* directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020 (emphasis

added). "'Course of conduct' . . . does not include constitutionally protected free speech." *Id*.

Publishing accurate and lawfully obtained information drawn from public records is constitutionally protected speech. *See Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). Likewise, "Const. art. 1, § 5 guarantees an absolute right to publish and broadcast accurate, lawfully obtained information that is a matter of public record." *State v. Coe*, 101 Wn.2d 364, 378 (1984). This absolute right equally protects speech conveyed online; there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

Here, Teel lawfully obtained government records about Catlett and made them available to the public online. Though people might prefer that certain public records about them not be publicized, "an individual has no constitutional privacy interest in a public record." *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 883 (2015). "[I]nterests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp.*, 420 U.S. at 494-95.

Catlett suggests that Teel's speech may be unprotected because it is "harassing speech," RB 19—but "'[t]here is no categorical harassment ex-

ception to the First Amendment's free speech clause.'" *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.,* 605 F.3d 703, 708 (9th Cir. 2010) (quoting *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.)); *see also State v. Burkert*, 231 N.J. 257, 280 (2017) (same); *T.M. v. M.Z.*, 326 Mich. App. 227, 237-41 (2018) (same); *cf. City of Everett v. Moore*, 37 Wn. App. 862, 867 (1984) (striking down as unconstitutionally overbroad a criminal statute that defined "harassment" to include "communicat[ing] with a person . . . in a manner likely to [and intended to] cause annoyance or alarm").[1]

Catlett also suggests that the posted records are unprotected speech because they are "libelous." RB 19-21. Among other reasons that this suggestion is mistaken, Teel's speech is protected by the "fair report privilege"—"[s]o long as the publication is attributable to an official proceeding and is an accurate report or a fair abridgment thereof" (as Teel's postings

[1] Prohibition of one-to-one speech outside a public forum, such as in repeated unwanted telephone calls, has been upheld as a legitimate restriction of "harassing" speech. *See, e.g.*, *In re Meredith*, 148 Wn. App. 887, 899 (2009) (citing *State v. Alphonse*, 147 Wn. App. 891 (2008), a telephone harassment case, in stating that "the right to petition does not protect harassing . . . speech"). But telephone harassment, or other repeated unwanted one-to-one contact, differs sharply for First Amendment purposes from speech to the public like the republishing of public records in this case. For one thing, telephone calls are not communicated to the public, which is "critical" to the constitutionality of prohibiting telephone harassment. *See Seattle v. Huff*, 111 Wn.2d 923, 926 (1989). For another, telephone calls can be harassing without regard to their content, for example due to the unwanted ring in the middle of the night; but as described below, the order was necessarily based on the content of Teel's speech, which the First Amendment forbids.

were), "it is privileged." *Alpine Industries Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 385 (2002).

The fair report privilege applies "to any person who makes an oral, written or printed report to pass on the information that is available to the general public," Restatement (Second) of Torts § 611 cmt. c (1977), and includes "websites, webpages, and blogs," *McNamara v. Koehler*, 5 Wn. App. 2d 708, 716 (2018) (so holding as to statements posted on a law firm's webpage by an attorney). "[N]either the type of media nor the entity republishing reports of official public proceedings is relevant to determining whether the fair report privilege applies." *Id.* Under the privilege, "the press is not required to independently verify the allegations contained [in court documents.]" *Mark v. Seattle Times*, 96 Wn.2d 473, 493 (1981).

And the privilege covers copies of police reports and not just court documents (despite Catlett's contrary argument, RB 21). "The fair report privilege is a conditional privilege that protects from liability for defamation a republisher of a statement made in the course of an official public proceeding, including [but not limited to] judicial proceedings." *McNamara*, 5 Wn. App. 2d at 710. This also includes statements "contained in an official report" and not just "made in the course of an official public proceeding." *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 179 (1987). "The privilege

. . . extends to . . . [t]he filing of a report by an officer or agency of the government . . . .” Restatement (Second) of Torts § 611 cmt. d (1977).

Catlett does not point to any inaccuracies in the information that Teel posted, but instead argues that by placing hyperlinks both to records about Catlett and to documents concerning Mr. Martin’s criminal proceedings side-by-side, Teel’s speech “would mislead the casual observer to believe [that Catlett] was involved in the conviction.” RB 22. But Teel’s speech involved simple, accurate publication of documents about Mr. Martin’s criminal proceedings, and accurate publication of documents reporting that Catlett had been personally linked to Mr. Martin, CP 258-61; it was up to readers to decide what inference to draw from these reported facts. When considering whether speech is defamatory, “[a] court is bound to invest words with their natural and obvious meaning, and may not extend language by innuendo or by the conclusions of the pleader. The defamatory character of the language used must be certain and apparent from the words themselves . . . .” *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 234 (1978).

Catlett’s brief does not offer any specific explanation of why the material was supposedly misleading. The trial court’s cursory statement that the information “implied that she was involved in this criminal matter,” though “the way the links were imbedded in the information about her would certainly give the casual impression that she was involved,” CP 445

¶ 13, does not amount to a finding of libel. And even if it did, "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes" that the speech was defamatory. *Bose Corp.*, 466 U.S. at 514. Here, the record does not establish such a thing.

2. Teel's speech serves legitimate and lawful purposes

The protection order is also invalid because Teel's speech serves "legitimate and lawful purpose[s]," such as vindicating Teel against false accusations and informing Catlett's prospective clients about facts that could be potentially relevant in assessing her qualifications as a real estate agent. Teel's speech is thereby excluded from RCW 10.14.020(2).

Defending one's own reputation by discrediting an accuser has long been viewed as a legitimate purpose. The Restatement of Torts recognizes that even inadvertently *false* statements might be conditionally privileged when "the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself." Restatement (Second) of Torts § 594 cmt. k (1977). This defensive purpose should be at least as clearly legitimate when the published information is true and drawn from public records.

Publishing the records in this case also served another legitimate purpose—informing the community of facts potentially bearing on Catlett's

moral character and trustworthiness. Such criticism of local businesspeople is constitutionally protected; consider, for instance, *Organization for a Better Austin v. Keefe*, where the Court held that the First Amendment protected leafleters who repeatedly "engag[ed] openly and vigorously in making the public aware of [the plaintiff's allegedly offensive, but lawful] real estate practices." 402 U.S. 415, 419 (1971). The Court concluded that, though defendants' reporting "was intended to exercise a coercive impact" on the plaintiff, it nevertheless served a legitimate purpose in "making the public aware of respondent's real estate practices." *Id*. Similarly, the information publicized by Teel—including records revealing that a man with whom Catlett had been involved had a prior conviction for real estate fraud—may inform people's judgment about whether Catlett would be a reliable fiduciary. Because any person seeking to enlist Catlett's services has a legitimate interest in knowing all information about Catlett that might bear on her trustworthiness, Teel's speech serves a legitimate purpose.

Additionally, under RCW 10.14.030,

> In determining whether the course of conduct serves any legitimate or lawful purpose, the court should 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;

(4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:
    (a) Protect property or liberty interests;
    (b) Enforce the law; or
    (c) Meet specific statutory duties or requirements;
(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.

Under factors (1) and (2), Teel's online speech about Catlett was not "contact" with her because it was not spoken directly to her (by e-mail, text message, or otherwise). The Georgia Supreme Court reversed a similar injunction in a case where defendants published online nearly 2,000 "mean-spirited," "distasteful," and "crude" posts about the plaintiff, many of which contained information that plaintiff "preferr[ed] to not be so public." *Chan v. Ellis*, 296 Ga. 838, 838 (2015). The court concluded that this online criticism was not "directed specifically to [plaintiff] as opposed to the public," *id.* at 840—it was not "*to* [plaintiff]," but rather "*about* [plaintiff]," *id.* at 841 (emphasis in original)—and therefore did "not amount to 'contact'" with plaintiff, *id.* Likewise, because the records Teel posted were posted for the public to read about Catlett, rather than being sent to Catlett, they were not "directed specifically" to Catlett and thus do not constitute "contact."

As for factor (3), the Superior Court did not expressly find whether Teel's speech appeared "designed to alarm, annoy, or harass" (though it did find the speech caused alarm and annoyance). But even if the court concluded that Teel's speech was so designed, his speech could still have also served another purpose that *is* legitimate and lawful. The question under the statute is whether the course of conduct "serves *any* legitimate or lawful purpose," RCW 10.14.030 (emphasis added); Teel's speech does.

Looking to factor (4), Teel was acting under the Washington Public Records Act, RCW 42.56.070, which is "a strongly worded mandate for broad disclosure of public records" and "should be liberally construed . . . in favor of disclosure." *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731 (2007). By further publicizing already public records, Teel's speech served the purpose of the Public Records act, which the legislature has determined to be legitimate.

Finally, as for factor (5), "an individual has no constitutional privacy interest in a public record," *Nissen*, 183 Wn.2d at 883, so Teel's speech could not have unreasonably interfered with Catlett's privacy. And factor (6) is inapplicable here because there had been no previous order.

3. Teel's speech is protected under the First Amendment regardless of whether a court concludes that it does not serve a legitimate or lawful purpose

Speech that falls outside of a First Amendment exception cannot be stripped of constitutional protection simply because a court finds that the speaker had an illegitimate purpose. A speaker's "'motivation is entirely irrelevant to the question of constitutional protection.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead op.) (internal citation omitted). This is because:

> [A]n intent-based test would chill core political speech by opening the door to a trial on every [item of speech], on the theory that the speaker actually [had unlawful intent] . . . . An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." . . . "First Amendment freedoms need breathing space to survive." An intent test provides none.

Id. (internal citation omitted). Justice Scalia's three-justice concurrence agreed on this point:

> [Purpose-based tests] ultimately depend, however, upon a judicial judgment . . . that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. . . . Under these circumstances, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Id. at 493-94 (Scalia, J., concurring) (internal citation omitted). Thus, Teel's posting of information from public records cannot lose its First Amendment protection simply based on a judge's conclusion about Teel's motivation.

C. The Order Imposes an Unconstitutional Content-Based Speech Restriction

1. The order is a content-based restriction because it imposes burdens on Teel in response to the content of past protected speech

Besides being unjustified under Washington law, the order also violates the First Amendment, because it was issued in response to the content of Teel's constitutionally protected speech.

A law that imposes a burden on speakers based on the content of their constitutionally protected speech is presumptively unconstitutional. Thus, for instance, in *Miami Herald Co. v. Tornillo*, the Court struck down a statute under which, whenever a newspaper chose to publish material critical of a political candidate, the newspaper had to provide equal print space for the candidate to respond. 418 U.S. 241, 244 (1974). The Court determined that the statute was constitutionally equivalent to "a statute or regulation forbidding appellant to publish specified matter" because it "exacts a penalty on the basis of the content of a newspaper." *Id.* at 256. "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors

might well conclude that the safe course is to avoid controversy" in the future altogether. *Id.* at 257. Likewise, faced with the risk of being subjected to a restraining order based on constitutionally protected speech, a speaker might well conclude that the safe course is to avoid publishing opinions and facts that could lead such an order.

The Court in *Arkansas Writers' Project, Inc. v. Ragland* similarly struck down a state sales tax imposed on certain magazines that was based on the content of the magazine's speech. 481 U.S. 221, 229 (1987). Such a law, the Court held, violated the principle that the government may not "'restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Just as imposing a modest financial cost on speech based on its content unconstitutionally "restrict[s] expression," so too does imposing a restriction on movement and action (such as a protection order) based on the content of the target's past constitutionally protected speech. And the court below did act on the basis of the content of Teel's speech, specifically the publication of information about Ms. Catlett—the "action of knowingly and willfully making records requests . . . in such a way as to have them appear when Ms. Catlett's name was searched on the internet." CP 445.

2. The order is a content-based restriction because it limits Teel's future speech based on the content of its message

The protection order is also a content-based speech restriction because it appears to bar Teel from publishing public records about Catlett in the future. The protection order restrains Teel both from "making any attempts to contact [Catlett]" and "from making any attempts to keep [Catlett] under surveillance." RB exh. 1. Catlett herself asserts that Teel's past speech constituted the kind of "persistent *contacts* and *surveillance*" that this order now prohibits going forward, RB 17 (emphasis added):

> [T]he court found that on December 26, 2018, Mr. Teel made some public disclosure requests that combined requests for information about Ms. Catlett with requests about unrelated criminal proceedings about a third person, Mr. Martin. . . . There was clearly enough evidence in these findings without addressing whether any of Mr. Teel's internet postings are protected speech, to allow a court to conclude the persistent *contacts* and *surveillance* would cause a reasonable person substantial emotional distress.

RB 16-17 (emphasis added).

And beyond this, the function of RCW 10.14.080(3) is to restrict the very behavior that led to imposing the order: "[I]f the court finds by a preponderance of the evidence that unlawful harassment exists, a civil anti-harassment protection order shall issue *prohibiting such unlawful harassment*." RCW 10.14.080(3) (emphasis added). The order was issued solely based on the finding that Teel's publication of public records was a "course of conduct" amounting to "unlawful harassment," RB exh. 2; its prohibition

on future "contact" and "surveillance" thus appears to unconstitutionally forbid Teel from engaging in the same speech—publishing public records about Catlett—in the future. But if this court finds that the order does not forbid such future speech, because Teel's posting of the records is not "contact," then, for the reasons given at *supra* pp. 9-10, this order is baseless under RCW 10.14.020.

And if the order does restrict Teel's future speech, it does so on the basis of content. A restriction is content-based if it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotations omitted). Given that the order seems to be an attempt to stop speech about Catlett (and not just unwanted speech said to her), determining whether the speech is about Catlett would necessarily require examination of the content of Teel's future publications.

This restriction is also content-based since it prohibits speech "because of the topic discussed or the idea or message expressed," and distinguishes speech "by its function or purpose," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)—it restricts speech about a particular topic (Catlett) based on the damage that the speech might cause to Catlett's reputation, and based on a finding that the speech supposedly has an illegitimate purpose. *Cf. Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016) (concluding

that a restriction on speech about a person, there under a law that "'prohibit[s] any other person from using a celebrity's name, voice, signature, photograph, or likeness for commercial purposes without the [celebrity's] consent,'" is content-based).

3. The order is a prior restraint on Teel's future protected speech

In addition to acting as a content-based restriction, the order is also a prior restraint on future speech. Prior restraints are "official restrictions imposed upon speech or other forms of expression in advance of actual publication." *Seattle v. Bittner*, 81 Wn.2d 747, 756 (1973) (internal quotations omitted). Any prior restraint imposed on a "constitutionally-protected medium of expression comes into court bearing a heavy presumption against its constitutionality." *Id.* at 750-55. To overcome this presumption under the federal Constitution—much less Washington's even more stringent constitutional guarantee, *see* AB 17—the regulated speech must fall within one of the narrowly defined exceptions to First Amendment protection, and the restraint must "have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Such a prior restraint "'must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order.'" *In re Marriage of Suggs*, 152 Wn.2d 74, 84

(2004) (quoting *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968)).

In this case, the protection order restrains Teel from further publishing information that is already in the public domain. Such speech does not fall into any First Amendment exception, and, as explained below, the order is not narrowly tailored to a compelling government interest and thus cannot survive strict scrutiny. It is therefore an unconstitutional prior restraint.

D. The Order Does Not Survive Strict Scrutiny

Because the order is a content-based speech restriction, "it must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). But under Washington law, there is no compelling interest in restricting the publication of police reports received via the Public Records Act. To the contrary, "the policy of [the PRA is] that free and open examination of public records is in the public interest," even though it "may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

More broadly, the Supreme Court has expressly held that restrictions on publishing information that is in the public domain are not narrowly tailored. In *Florida Star*, 491 U.S. at 138, the Court struck down a state statute that made it civilly actionable for a newspaper to publish the name of a rape

victim. Though the interest in protecting victims' privacy is "highly significant," "imposing liability for publication" of public records "is too precipitous a means of advancing th[is] interest[]," *id.* at 525, where "the government has failed to police itself in disseminating information," *id.* at 538.

In Teel's case, the information he publicized was likewise provided to him by government authorities—and "where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination." *Id.* The government's disseminating information as part of the public record "can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further." *Id.* at 538-39. If the government wants to prevent the republishing of such arrest records, the government must stop releasing them in the first place.

The Court in *B.J.F.* also found that "the facial underinclusiveness of [the statute] raises serious doubts about whether [the state] is, in fact, serving . . . the significant interests [being invoked]." *Id.* at 540. "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* The same is true of the order restricting

Teel's speech. When the government attempts the extraordinary measure of punishing truthful publication of Catlett's police reports, it must apply this speech restriction evenhandedly to all speakers, not just singling out Teel.

VI. CONCLUSION

The order is not authorized by RCW 10.14.020, because it was issued in response to Teel's constitutionally protected speech. It is an unconstitutional burden imposed based on the content of Teel's past speech. It is an unconstitutional content-based restriction on Teel's future speech. It is an impermissible prior restraint on speech. It cannot pass strict scrutiny. It should therefore be reversed.

Respectfully submitted,

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