Supreme Court No. 83060-6
Court of Appeals No. 37098-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

ANTHONY P. MEREDITH, Respondent

and

JAZMIN E. MURIEL, Petitioner

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals decision in this matter, if left undisturbed, will significantly impair the ability of the family courts of this State to protect victims of domestic violence. Moreover, this decision, which is out of line with other courts across the nation, establishes a dangerous precedent that could have repercussions far beyond the borders of Washington. It is therefore important that this Court accept the petition for review of this case.

The Court of Appeals erred when it discerned a constitutionally protected interest of the Respondent in seeking to inject himself into Petitioner's immigration proceedings. In fact, this case does not involve any constitutionally secured speech or actions of the Respondent. Rather, it is about the ability of the courts of this State to protect victims of domestic violence from ongoing abuse, intimidation, and harassment – conduct that lacks First Amendment protection.

In invalidating the family court's order, the Court of Appeals inappropriately disregarded the State's significant interest in protecting Petitioner from further harm, improperly undermined the ability of the family courts in this State to protect victims of domestic violence, and fundamentally misapplied the core principles of the First Amendment of the United States Constitution.

II. IDENTITIES AND INTERESTS OF AMICUS

The identities and interests of *Amicus* are set forth in *Amicus* motion to file brief of *amicus curiae*, which *Amicus* are filing contemporaneously with this brief.

III. STATEMENT OF THE CASE

Amicus adopt the statement of the case set forth in Petitioner's petition for review.

IV. ARGUMENT

The First Amendment does not apply to Respondent's continued efforts to harm Petitioner by injecting himself into her immigration proceedings. The fact that these efforts involve communications with governmental entities does not transform such conduct into speech or conduct protected by the First Amendment. Moreover, in view of the State's strong interest in protecting the safety of its residents, and given the family court's findings regarding Respondent's abuse and harassment of Petitioner, the protection order issued in this case readily passes constitutional muster as a reasonable restriction of any arguably protected speech that Respondent might seek to communicate.

A. The Civil Protection Order Does Not Infringe on Respondent's Right to Petition.

To the extent that Respondent's (Meredith's) abusive conduct even arguably implicates the First Amendment, the relevant prong would

appear to be the petition clause. But, as demonstrated herein, the petition clause does not extend protection to Respondent's restricted behavior, since he has no legal interest in Petitioner's (Muriel's) immigration proceedings.

In *Sure-Tan, Inc. v. N.L.R.B.*, the Supreme Court expressly held that there is no right under the petition clause to participate in another person's immigration proceedings. 467 U.S. 883, 897 (1984). In that case, an employer argued that the NLRB improperly burdened his First Amendment petition clause rights by barring him from contacting the INS regarding certain of his employees. The Court rejected this claim, finding that the employer, who was seeking to retaliate against employees for union activities, lacked a personal interest in the employees' immigration proceedings sufficient to trigger First Amendment protection, since non-parties have "no judicially cognizable interest in procuring enforcement of the immigration laws." *Id.* at 897. Respondent in this case has no more right to inject himself in Petitioner's immigration proceedings than the employer had to inject himself in his employees' immigration proceedings in *Sure-Tan*. In fact, Respondent has even less of an interest than the employer in *Sure-Tan* in light of the strong federal policy codified in the Violence Against Women Act "designed to ensure that abusers …cannot

use the immigration system against their victims"[1] and prohibiting immigration officials from relying upon or seeking information provided by an abuser in a case involving his victim. 8 U.S.C. § 1367.

Sure-Tan's holding is consistent with the well-established principle that only "bona fide grievance[s]" are protected by the First Amendment right to petition. *See Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983)[2] The Court of Appeals did not find, nor could it on the record before it and in light of *Sure-Tan*, any "bona-fide grievance" that Respondent has in regard to Petitioner's immigration proceedings that could bring Meredith's efforts to inject himself into Muriel's immigration proceedings under the protection of the petition clause. In this regard, the Court of Appeals erred in concluding that "Meredith had the right, as does everyone in this country, to make a valid report to government authorities regarding Muriel's presence in this country."

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[1] "Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402" H.R. Rep. No. 109-233, at 122 (2005).

[2] None of the cases from other jurisdictions cited by the Court of Appeals are apposite. In all of those cases, the party invoking the right of petition had some legitimate interest in the governmental proceedings. *See, e.g., Hobart v. Ferebee*, 2004 S.D. 138, 692 N.W.2d 509 (S.D. 2004) (neighbor's complaints about activities that affected his property); *Stachura v. Truszkowski*, 763 F.2d 211 (6th Cir. 1985) (parents' petition to remove their children's teacher because of questionable teaching methods); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992) (educator group's petition to remove principal following use of racial slur).

Even if a Respondent could somehow identify a protected interest in participating in Petitioner's immigration proceedings, the family court was justified, under *State v. Alphonse*, 197 P.3d 1211, 147 Wn. App. 891 (2008), in issuing the protection order. In *Alphonse*, the court held that petitions made with the "intent to harass, intimidate, torment or embarrass" are not afforded First Amendment protection, even where the petitioner can establish a legally valid interest in the proceedings. *Id.* Here, the family court specifically restricted Respondent from interfering in Petitioner's immigration proceedings based on its well-supported finding that Meredith's "bad faith effort to interfere in Muriel's petition ... for permanent residency" was abuse and that his attempts to "force [Muriel] to return to Columbia" were part of his "behavior extravagant in the extreme to basically try to destroy" her. Finding of Facts and Conclusions of Law at p.4. Thus, under *Alphonse*, the protection order should be upheld.

B. The Civil Protection Order Does Not Impermissibly Restrict Meredith's Protected Speech.

Meredith's lack of any right to participate in Muriel's immigration proceedings substantially, if not entirely, eviscerates his claim under the First Amendment's speech clause as well as the petition clause. His attempts to communicate with immigration officials, as part of his effort

"to destroy" Muriel, are unprotected conduct, not speech protected by the First Amendment. Moreover, in view of the significant government interests at stake, the process for judicial exception to the prohibition of the protection order sufficiently protects any potentially non-abusive communication that Respondent might seek to transmit.

1. Abusive speech is not protected by the First Amendment because it is essentially conduct not expression.

Respondents' interference in Petitioner's immigration process and his efforts to have her deported back to Columbia, which the family court found to be abusive conduct intended to injure and "destroy" Petitioner, fall outside any protection afforded by the First Amendment's speech clause. In the seminal case of *Chaplinsky v. New Hampshire,* the Supreme Court established that certain categories of speech, including libelous and harassing words, or "'fighting' words – those which by their very utterance inflict injury" are not protected by the First Amendment. 315 U.S. 568, 571-72 (1942). In determining that these categories of speech fall outside the ambit of First Amendment protection, the Court emphasized that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Abusive interference in a proceeding where

the abuser has no "judicially cognizable interest" would clearly fall into this category.

Communications intended to cause injury are, despite their verbal character, deemed conduct rather than expressive speech. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 386 (1992). It is well settled that the mere fact that injurious conduct may be "initiated, evidenced, or carried out by means of language, either spoken, written, or printed" does not insulate such conduct from regulation or even prohibition. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (U.S. 1978); *see also Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Courts in other states have consistently adhered to this principle and rejected claims that the First Amendment protects the kind of abusive verbal conduct restrained by domestic abuse protection orders. *See, e.g., Rzeszutek v. Beck*, 649 N.E.2d 673, 680-81 (Ind. Ct. App. 1995)(protection order is constitutional because "such threatening and abusive contact is not protected" by the First Amendment.); *Gilbert v. State*, 1988 Okla. Cr. 268, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988)(rejecting argument that First Amendment "cover[s] threatening or abusive communication to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse"); *Maldonado v. Maldonado*, 631 A.2d 40, 41, 43 (D.C. 1993)(upholding civil protection

order restraining an abusive spouse from contacting INS). By specifically restricting Meredith from contacting any federal government agency concerning Petitioner's immigration status, the family court acted to protect Muriel from further abusive conduct, not expressive speech.

2. The restriction in the protection order is not overbroad when weighed against the significant State interest in protecting abuse victims.

Even if Meredith could identify some reason other than seeking to harm Muriel to communicate with immigration officials, the family court's order is a content-neutral "time, place and manner" restriction that is appropriately tailored to the circumstances and therefore passes constitutional muster when weighed against the significant state interests at stake. *See Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)(content-neutral "time, place, and manner" restrictions are constitutional where significant state interests are at stake and alternative channels of communication remain open).[3]

The threshold requirement of content neutrality is easily met here. That is because the protection order was issued to restrict Respondent's ability to make or carry out his threats of using the legal system to abuse

Muriel, and was not based on any "hostility-or-favoritism-towards the underlying message." *Madsen v. Women's Health Center*, 512 U.S. 753, 763-64 (1994).

In terms of the State interest here at stake (*see N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), this State indisputably has a significant interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388; s*ee also Western States Med. Center v. Shalala*, 238 F.3d 1090, 1094 (9th Cir. 2001) ("Government has a significant interest in protecting the health, safety, and welfare of its citizens")(*citing Rubin v. Coors Brewing Co.,* 514 U.S. 476, 485 (1995)); *State v. Hardy,* 452 Utah. Adv. Rep. 3, 54 P.3d 645, 649 (Utah Ct. App. 2002)("The state has an inarguably significant interest in protecting the health and well-being of its citizens"). This interest is heightened in the domestic violence context, where the state has a "compelling interest" in "preserving the mental and emotional health of

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(continued)

[3] It should be noted that this analysis is contextual, and the Court has emphasized the need for deference to the knowledge of the trial courts that formulate such orders. *See e.g., Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests the Court grant Petitioner Jazmin E. Muriel's petition for review of *In re Marriage of Meredith*, 148 Wn. App. 887 (2009).

Respectfully submitted,

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GR 17 AFFIDAVIT OF MISTY A. EDMUNDSON TO: BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REVIEW

I, Misty A. Edmundson, under penalty of perjury under the laws of the State of Washington, declare as follows:

1. I am over the age of eighteen, am competent to testify and have personal knowledge of the facts contained in this declaration.

2. Attached hereto is an electronically signed **Brief of *Amicus Curiae* in Support of Petition for Review**. This **Brief of *Amicus Curiae* in Support of Petition for Review** was received by my office via electronic mail.

3. I have examined the attached and determined that it consists of eighteen (18) pages, including this GR 17 Affidavit, and it is complete and legible.

4. The original will be retained by my office until 60 days after completion of this case, pursuant to GR 17(a)(1).

DATED this 17Th day of July, 2009, at Seattle, Washington.

Misty A. Edmundson, WSBA #29606

SUBSCRIBED AND SWORN TO before me this 17th day of July, 2009.

Helen M. Thomas
Notary Public in and for the State of Washington, residing at Kent .
My Commission Expires: 09/29/2012

HELEN M. THOMAS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 9-29-12