

1 THE HONORABLE RONALD B. LEIGHTON

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 STORMANS, INCORPORATED, doing
business as RALPH'S THRIFTWAY;
10 RHONDA MESLER, MARGO THELEN;

11 Plaintiffs,

12 vs.

13 MARY SELECKY, Acting Secretary of the
Washington State Department of Health; et al.;

14 Defendants.

Civil Action No. CV-05374-RBL

**BRIEF OF *AMICI CURIAE* ALLIANCE
FOR JUSTICE, ET AL., IN OPPOSITION
TO PLAINTIFFS' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY
THIRD PARTIES PLANNED
PARENTHOOD OF WESTERN
WASHINGTON, NARAL PRO-CHOICE
WASHINGTON AND NORTHWEST
WOMEN'S LAW CENTER**

15 NOTED FOR HEARING:
16 OCTOBER 24, 2008

17 **I. INTRODUCTION**

18 The subpoenas for production of documents served upon Planned Parenthood of Western
19 Washington, NARAL Pro-Choice Washington, and the Northwest Women's Law Center
20 (collectively, the "Third Parties") threaten the constitutional rights of privacy, association,
21 assembly, and petition of all public interest organizations. This group of threatened public
22 interest organizations includes not just Third Parties and amici curiae Alliance for Justice, et al.

1 (“Amici”)¹ represented here, but also any and all organizations that advocate for or against
2 regulations or legislation at the state, national, or other government level. At stake in this motion
3 to compel is the ability of such public interest groups to organize, advocate, and work together
4 for the passage or rejection of laws and regulations—one of the most basic functions of a
5 working democracy. Further, not only do these subpoenas threaten public interest groups
6 nationwide, if enforced they would deprive government agencies and other government actors of
7 vital information provided by these groups, which are often the greatest experts on issues
8 affecting the public interest.

9 Subpoenas submitted by Plaintiffs Stormans Incorporated, Ralph’s Thriftway, Rhonda
10 Mesler, and Margo Thelen (collectively “Plaintiffs”) seek all manner of documents and
11 information from Third Parties, including internal communications, inter-organizational
12 communications, identities of current and past board members, and documents regarding
13 organizing and lobbying activities. *See* Dkt. No. 206, Exs. A-C (subpoenas and attachments
14 served on Third Parties), *see also Id.* at 4 (Plaintiffs’ Motion to Compel, purporting to “clarify”
15 or otherwise reduce the scope of Plaintiffs’ document requests). Plaintiffs state that these
16 documents and information are relevant for purposes of their arguments regarding the
17 constitutionality of WAC 246-869-010 and 246-863-095. However, if Plaintiffs were permitted
18 to obtain these documents, it would directly undermine the Third Parties’ exercise of their First
19 Amendment rights. Indeed, it would result in Plaintiffs obtaining private information that they
20 could use in the future to attack Third Parties. In the interest of protecting the continued work of
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23 ¹ Amici include Alliance for Justice, Advocates for Youth, the Asian American Legal Defense and
24 Education Fund, the Center for Children’s Law and Policy, the Center for Law & Social Policy, Center
25 for Reproductive Rights, the Center for Science in the Public Interest, Compassion & Choices, Disability
26 Rights Washington, the Education Law Center of Pennsylvania, Lambda Legal, Legal Momentum, the
27 MergerWatch Project, the Mexican American Legal Defense and Education Fund, the National
Partnership for Women & Families, the National Senior Citizens Law Center, the National Women’s Law
Center, Northwest Health Law Advocates, Planned Parenthood Affiliates of California, Planned
Parenthood Federation of America, Public Advocates, Inc., the Seattle Community Law Center, the
Southwest Women’s Law Center, and the Unemployment Law Project.

1 all public interest organizations, Amici respectfully request that the Court deny Plaintiffs'
2 Motion to Compel.²

3 **II. STATEMENT OF INTEREST**

4 Amici are public interest organizations, both national and state-based, that work on behalf
5 of their constituencies to effect change through legal and legislative advocacy. A full statement
6 of each organizations' individual interest in this matter is listed in Appendix A attached hereto.
7 These groups are committed to furthering the public interest and, in so doing, regularly engage in
8 internal and cross-organization research, strategizing, and conversation to enrich their efforts at
9 improving the law for their constituencies. The work of public interest groups—which at its core
10 is based on the First Amendment right to petition the government—is threatened by
11 unnecessarily intrusive and burdensome document requests. For this reason, Amici respectfully
12 submit that this Court should deny the Plaintiff's Motion to Compel.

13 **III. SUMMARY OF ARGUMENT**

14 If enforced, the subpoenas served upon the Third Parties in this case would directly
15 violate the Third Parties' constitutional freedoms, and would threaten the freedoms of other
16 public interest organizations which may receive similar subpoenas in the future. Subjecting
17 public interest organizations to broad and unnecessary third party discovery, simply because they
18 may have advocated for or against adoption of a particular law, would stifle the constitutional
19 rights of *all* public interest organizations to conduct their most basic organizing and other
20 political activities. Moreover, third party discovery of the type sought in this case would have
21 the adverse effect of depriving government entities of one of their most vital information
22 sources, thus rendering legislative and rulemaking processes less efficient and potentially less
23 responsive to the needs of vulnerable or voiceless communities whom public interest groups
24 represent.

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² The Motion of Alliance for Justice, et al. for Leave to File Brief of Amici Curiae has been filed
27 concurrently with this brief, and is noted for hearing on November 7, 2008.

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IV. ARGUMENT

(A) Enforcing Plaintiffs' Subpoenas Would Violate the Constitutional Freedoms of the Third Parties

Enforcing the subpoenas served by Plaintiffs on the Third Parties in this case would violate the First Amendment freedoms of those entities to privacy, assembly, association, and to petition government for redress. Plaintiffs' subpoenas in this case demand not only the production of internal Third Party documents relating to the challenged regulation, but also seek myriad other types of documents and information relating to the Third Parties' internal administration, internal communications, and communications with other advocacy partners. The integrity and privacy of these documents and information, however, is critical to the First Amendment rights of these Third Parties, and indeed the First Amendment rights of any organization that advocates on behalf of its members or constituents.

The Supreme Court has stated "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [statutes discouraging association]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Accordingly, courts have repeatedly held that requests such as these violate First Amendment rights of assembly, association, petition, and privacy. *See, e.g., Gibson v. Flor. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (reversing a contempt conviction for failure to comply with request for member identification), *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (disclosure of membership lists could not be compelled by community ordinances), *Burse v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972) (rejecting contempt convictions for refusing to answer grand jury questions on the basis of the First Amendment), superseded by statute on other grounds as stated in *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988); *Ealy v. Littlejohn*, 569 F.2d 219, 226-31 (5th Cir. 1978) (First Amendment limits court's power to interfere with freedoms of association and expression).

Further, the federal courts have repeatedly recognized that the freedom to associate and petition under the First Amendment encompasses much more than membership lists. *See, e.g.,*

1 *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (recognizing that the right of
2 association applies to entities as well as individuals), *Bursey*, 466 F.2d at 1088 (protecting
3 funding sources), *Ealy*, 569 F.2d at 230 (protecting identity of meeting attendees, meeting
4 discussions, and funding sources), *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.C. Cir.
5 2002) (describing the importance of protest, organizing, and fundraising to the freedom of
6 association). Plaintiffs' attempt to fit its subpoenas within the bounds of the First Amendment
7 by foregoing its former request for membership lists is therefore misguided. *See* Dkt. No. 206
8 (Plaintiffs' Motion to Compel), at 4.

9 The ultimate effect of enforcing Plaintiffs' subpoenas, notwithstanding Plaintiffs' own
10 narrow view of constitutional rights, would be to violate Third Parties' First Amendment rights
11 of privacy, assembly, association, and petition under well-established law. Such an infringement
12 would serve notice to public interest organizations of all political views that participation in
13 legislative or rulemaking processes could lead to intrusive discovery requests, thus stifling the
14 exercise of First Amendment rights of all public interest groups and by extension, the
15 communities and individuals they serve.

16 **(B) Allowing Broad Third-Party Discovery of Public Interest Organizations**
17 **Chills the Exercise of Constitutional Rights by All Organizations**

18 If Plaintiffs' Motion to Compel is granted and the Third Parties were required to comply
19 with Plaintiffs' onerous and unconstitutional requests, there would be a chilling effect on the
20 organizing work and political association of public interest organizations nationwide. Such a
21 ruling would signal that any litigant's disagreement with a statute or regulation would make all
22 manner of internal documents and information of any and all organizations that advocated for or
23 against such regulation fair game for discovery. Indeed, the federal courts have often noted the
24 chilling effect on the First Amendment rights of organizations to assemble and petition where
25 discovery of organizational activities and information is at issue. *See, e.g., Brown v. Socialist*
26 *Workers 74' Campaign Comm.*, 459 U.S. 87, 91 (1982) (noting that "[s]hould [recipients of
27 funding] involvement be publicized, these persons would be as vulnerable to threats, harassment,

1 and reprisals as are contributors whose connection with the party is solely financial”), *Buckley v.*
2 *Valeo*, 424 U.S. 1, 64 (1976) (describing how disclosure can infringe upon association rights),
3 *NAACP*, 357 U.S. at 462 (describing how disclosure of organizing activities would dissuade
4 association). Finally, perhaps the most troubling result of granting the Motion to Compel and
5 allowing Plaintiffs access to the confidential files of Third Parties, is that it would send a signal
6 that advocacy groups on the losing side of a regulatory matter could use such discovery as a tool
7 for harassing any organization which is effective in influencing the regulatory process. *See, e.g.,*
8 *Adolph Coors Co. v. Wallace*, 570 F.Supp. 202, 209 (N.D. Cal. 1983) (First Amendment scrutiny
9 is to be heightened where “civil lawsuits could be misused as coercive devices to cripple, or
10 subdue, vocal opponents”); *see also, generally*, Joan Steinman, *Privacy of Association: A*
11 *Burgeoning Privilege in Civil Discovery*, 17 HARV. C.R.-C.L. L. REV. 355 (1982) (describing the
12 threat civil discovery poses to advocacy organizations). *Amici* have scoured the Plaintiffs’
13 Motion for an adequate justification for such an intrusive subpoena, and have not found one.
14 This lack of real justification for Plaintiffs’ subpoenas suggests that Plaintiffs’ actual purpose is
15 to “cripple, or subdue” vocal organizations who took a position different from their own in a
16 rulemaking process. Plaintiffs should not be allowed to use the litigation process in this way.

17 **(C) Subjecting Public Interest Organizations to Such Discovery Hurts**
18 **Government and the Legislative and Rulemaking Processes**

19 By chilling the work of public interest organizations, discovery such as that propounded
20 by Plaintiffs undermines the efficiency of government legislation and rulemaking. Legislators,
21 administrative agencies, and other government actors regularly rely on information and studies
22 provided by public interest organizations. *See Nonprofit Sector Increasing Numbers and Key*
23 *Role in Delivering Federal Services: Hearing Before the Subcomm. on Oversight, Committee on*
24 *Ways and Means, House of Representatives*, 110th Cong. 9 (2007) (statement of United States
25 Government Accountability Office) (“government relies increasingly on new networks and
26 partnerships to achieve critical results and develop public policy, often including multiple federal
27 agencies, non- or quasi-government organizations, for-profit and nonprofit contractors, and state

1 and local governments”). Such organizations, of all ideological persuasions, are often the only
2 source of information regarding technical regulatory matters as well as the only subject matter
3 experts on issues affecting the greater community. They are the bridge between the public and
4 the government. That bridge is even more significant when the represented group or
5 constituency has important needs but faces barriers to self-advocacy. Many of the amici curiae
6 represent just such constituencies, including low-income people, children, people with
7 disabilities, and people living without access to healthcare. Therefore, an unrestricted flow of
8 information between government and public interest organizations in the legislative and rule
9 making processes best addresses the overall needs of community members. Third party
10 subpoenas such as these tighten the valve on this information source by subjecting public interest
11 groups to disclosure of their internal records, and would result in dramatically less efficient
12 legislative and rulemaking processes, as well as less effective regulations and laws.

13 **V. CONCLUSION**

14 For the foregoing reasons, Amici urge this Court to protect the First Amendment rights of
15 the Third Parties, as well as other public interest organizations which may face similar subpoenas
16 in the future, by denying Plaintiffs’ Motion to Compel.

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18 Respectfully submitted this 20th day of October, 2008.

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CERTIFICATE OF SERVICE

I certify that today I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties in this action:

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13 DATED this 20th day of October, 2008.

14 s/ Jessica M. Andrade
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APPENDIX A

Alliance for Justice (“AFJ”) is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. Since its inception in 1979, AFJ has worked to advance the cause of justice for all Americans, strengthen the public interest community's ability to influence public policy, and foster the next generation of advocates.

Advocates for Youth is an organization dedicated to creating programs and advocating for policies that help young people make informed and responsible decisions about their reproductive and sexual health. Advocates for Youth provides information, training, and strategic assistance to youth-serving organizations, policy makers, youth activists, and the media in the United States and the developing world.

The Asian American Legal Defense and Education Fund (“AALDEF”), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Center for Children's Law and Policy (“CCLP”) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. CCLP's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation, in states throughout the country.

The Center for Law & Social Policy (CLASP) is a national public policy advocacy organization that develops and advocates for policies at the federal, state and local levels that improve the lives of low-income people. CLASP's focus is on policies that strengthen families and create pathways to education and work. Through careful research and analysis and effective advocacy, we develop and promote new ideas, mobilize others, and directly assist governments and advocates to put in place successful strategies that deliver results that matter to people across America. Among other issues, CLASP works on child care and early education, child support and low-income fathers, child welfare, civil legal aid, disconnected and disadvantaged youth, prisoner re-entry, work supports, workforce development, adult and post-secondary education, job quality and work-life balance and reducing poverty.

The Center for Reproductive Rights, through litigation and advocacy, uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to protect, respect and fulfill.

The Center for Science in the Public Interest (“CSPI”) is the leading national, non-profit organization advocating for nutrition and health, food safety, and sound science. CSPI's twin missions are to conduct innovative research and advocacy programs in health and nutrition, and to provide consumers with current, useful information about their health and well-being. CSPI regularly comments on, and informs the public about, the activities of governmental agencies.

Compassion & Choices is a nonprofit organization working to improve care and expand choice at the end of life. As a national organization with over 60 local groups, affiliates and chapters, and more than 50,000 members, Compassion & Choices helps patients and their loved ones face the end of life with calming facts and choices of action during a difficult time. Compassion & Choices also aggressively pursues legal reform to promote pain care, advance directives, and the legalization of physician aid in dying.

Disability Rights Washington (“DRW”) is an organization designated by federal law and the Governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory and mental disabilities. DRW is federally mandated to advocate for the rights of people with disabilities in Washington.

The Education Law Center of Pennsylvania (“ELC”) has been advocating for more than 30 years for better and fairer educational opportunities for Pennsylvania's most educationally disadvantaged public school students, such as children from low income families, with special needs, who are homeless, and who are in the child welfare or juvenile justice system. The ELC has litigated many cases that concern the rights of public school students, especially those with disabilities, and has also advocated for laws and policies that increase equity and educational opportunity for their client population.

Lambda Legal is the oldest and largest nonprofit legal organization advocating nationally for full recognition of the civil rights of lesbian, gay, bisexual and transgender (“LGBT”) people and those living with HIV through impact litigation, education and public policy work. Because of Lambda Legal’s significant interest in development and enforcement of religiously neutral rules that ensure patient access to medically appropriate care, Lambda Legal submitted a letter to the Washington State Board of Pharmacy in strong support of the regulations at issue in this case. Lambda Legal, as an organization similarly situated to third parties from whom Plaintiffs seek discovery in this case, has a great interest in the discovery proposed in Plaintiffs’ Motion to Compel.

Legal Momentum is the oldest legal advocacy organization in the United States dedicated to advancing the rights of women and girls. Legal Momentum is committed to improving, through advocacy efforts like those of Third Parties, the health of women and girls, including their reproductive and privacy rights, to freedom from violence against women, to protecting the freedoms embodied in our Constitution and to access to health care.

The MergerWatch Project (“MergerWatch”) is a non-profit, national initiative that works to protect patient’s rights and access to comprehensive health care (especially reproductive health care) from the impact of religious or morally-based health care restrictions. MergerWatch strategies include public education, policy analysis, community organizing and regulatory intervention, with an emphasis on empowering communities to fight for patients’ rights and access to care.

The Mexican American Legal Defense and Educational Fund (“MALDEF”) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of the over 40 million Latinos living in the United States through litigation, public policy advocacy, and community education.

The National Partnership for Women & Families, founded as the Women's Legal Defense Fund in 1971, is a non-partisan, non-profit advocacy group that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has a long history of working to secure high quality, affordable health care for all by filing amicus curiae briefs in major health access and reproductive rights cases.

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For approximately 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs.

National Women's Law Center is a non-profit legal advocacy organization that has been working since 1972 to advance and protect women's legal rights in areas including education, employment, family economic security, and health. The National Women's Law Center uses the law in all its forms: getting new laws on the books and enforced; litigating ground-breaking cases in state and federal courts all the way to the Supreme Court; and educating the public about ways to make the law and public policies work for women and their families.

Northwest Health Law Advocates ("NoHLA") is a non-profit legal and policy advocacy organization founded in 1999 to promote increased access to health care on behalf of low- and moderate-income Washington State residents. NoHLA represents low-income clients in cases seeking improved access to health care, provides training and consultation to many community-based legal assistance organizations, private attorneys, and provides advocacy to improve health care access in public forums such as rulemaking comments and legislative analysis. As a small organization, NoHLA often works with other groups to achieve common objectives to improve affordability and access to care for low-income individuals.

Planned Parenthood Affiliates of California ("PPAC") is an education and advocacy 501(c)(4) organization that represents the nine Planned Parenthood affiliates in California on state and federal issues that relate to reproductive health. PPAC provides the mechanism for California affiliates' joint decisions, communication and action and speaks on behalf of California Planned Parenthood affiliates on state-wide issues. PPAC's focus is to enhance through joint action the individual affiliates' impact on public policies relevant to direct delivery of clinical services and patient care, as well as statewide educational activities related to reproductive health.

Planned Parenthood Federal of America, ("PPFA") is the nation's largest and most trusted voluntary reproductive health care organization. PPFA's 99 affiliates operate approximately 850 healthcare centers nationwide. In addition to providing reproductive health care, PPFA and its affiliates, including Planned Parenthood of Western Washington, one of the third parties subpoenaed by plaintiffs, are among the nation's most active and widely recognized advocates for increased access to comprehensive reproductive health services and education.

Public Advocates Inc. is a non-profit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. Public Advocates spurs change through collaboration with grassroots groups representing low income communities, people of color and immigrants, combined with strategic policy reform, media advocacy and litigation. Public Advocates has participated extensively as counsel and as an amicus in federal and state litigation regarding substantive and procedural issues, including right to legal services, attorneys fee provisions, and class action issues.

The Seattle Community Law Center (“SCLC”) is a nonprofit organization providing legal services to low-income and homeless individuals with disabilities in the Seattle region. SCLC assists individuals who are unable to work due to severe medical conditions to establish eligibility for federal disability benefits to which they are entitled. In collaboration with other nonprofit advocacy groups, SCLC also engages in advocacy to help identify the systemic barriers that often prevent eligible claimants from securing the safety-net benefits to which they are entitled, and SCLC works to ensure that the practices and internal policies of relevant government agencies are in compliance with state and federal law.

The Southwest Women’s Law Center is a nonprofit women’s legal advocacy organization which mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women’s Law Center works in collaboration with a wide variety of direct service and advocacy organizations to develop public advocacy strategies to address violence against women, to eliminate discrimination, to help lift women and their families out of poverty, and to ensure that women have access to comprehensive family planning and reproductive health services.

The Unemployment Law Project (“ULP”) is a non-profit law firm that represents individuals at no charge in their efforts to obtain or retain their unemployment benefits when they are unemployed through no fault of their own. ULP was established in 1984 and has two offices, one in Seattle, one in Spokane. ULP represents individuals from across the State of Washington, potentially in every county. In the past year, ULP have worked on cases in association with the Northwest Women’s Law Center and the American Civil Liberties Union to further the broad public interest that often is at stake in these cases. ULP is a member of the statewide Alliance for Equal Justice and often consults and collaborate with other organizations inside and outside the Alliance. ULP regularly engages in internal and cross-organization research, strategizing, and conversation to enrich their efforts.