

**CASE NO. 09-5126**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**MICHAEL NEWDOW, et al.**

*Plaintiffs-Appellants,*

**v.**

**HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S. SUPREME  
COURT, et al.**

*Defendants-Appellees,*

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**On Appeal from the United States District Court  
for the District of Columbia**

**(District Court #1:08-cv-02248)**

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**PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO SUBMIT  
CHILD-IDENTIFYING INFORMATION UNDER SEAL**

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## **INTRODUCTION**

Religious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause.<sup>1</sup>

This case involves a challenge to the practice, apparently first initiated in the 1930s, of having government-sponsored (Christian) monotheism infused into the nation's presidential inaugurations.

Because there have been significant injuries suffered by litigants in cases where governmental endorsements of (Christian) monotheism have been challenged, infra, Plaintiffs (on January 6, 2009) sought leave to file their addresses under seal. Document #8. A subsequent motion seeking to allow pseudonyms, declarations and addresses to be filed under seal (with respect to what was at that time the key child plaintiff) was filed on January 14. Document #30. That same day, the District Court denied the initial motion, but granted the motion with respect to the child plaintiff. Document #36.

On March 10, 2009, Plaintiffs sought leave to file an Amended Complaint. Document #66. The Amended Complaint included numerous additional child plaintiffs and their families. Accordingly, one further motion seeking a protective

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<sup>1</sup> Letter of George Washington to Sir Edward Newenham (June 22, 1792), in Fitzpatrick JC (ed.). The writings of George Washington from the original manuscript sources. (Washington, DC: U.S. Government Printing Office; 1939), Vol. 32 (March 10, 1792 – June 30, 1793), p. 73.

order was filed. Document #70 (also filed March 10, 2009). Two days later, on March 12, the District Court dismissed the case for lack of standing, “tak[ing] no position” on the motion to amend the complaint, nor on the protective order motion. Document #74.

Because Plaintiffs believe that the children among them still require protection, they respectfully request leave to file under seal all Court documents that could lead to the identification of any child plaintiff. With the Court’s permission, pursuant to Local Rule 47.1 (“Matters Under Seal”), Plaintiffs will publicly file redacted versions of these documents, with the children’s (and their parents) names given pseudonymously, and with any addresses hidden.

### **CONSULTATION WITH OPPOSING COUNSEL**

Consultation regarding this Motion was obtained with Brad Rosenberg (counsel for the Federal Defendants) and Dominic Perella (counsel for the Presidential Inaugural Committee Defendants), both of whom have authorized the undersigned to represent that those Defendants do not object to this Motion. Kevin Snider (counsel for the invited clergy Defendants (Rev. Lowery and Rev. Warren)) has authorized the undersigned to state that his clients do not oppose this Motion.

## **LAW AND ARGUMENT**

### **I. There is a Need for Extra Caution in the Electronic Case Filing Environment**

Although electronic case filing has not yet been implemented in this Court, its arrival is imminent. See proposed Administrative Order, provided at the Court of Appeals' website.<sup>2</sup> Such electronic access facilitates public disclosure of private information. Because of this, Congress set forth section 205(c)(3)(A) of the E-Government Act of 2002, Pub. L. 107-347 (Dec. 17, 2002), 116 Stat. 2913. There, the Supreme Court was directed to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form."

Pursuant to this directive, Fed. R. App. P. 25(a)(5) now addresses these privacy and security concerns, specifically incorporating Fed. R. Civ. P. 5.2. In Rule 5.2, "the name of an individual known to be a minor" was one of the very few types of information specifically noted to require protection.<sup>3</sup>

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<sup>2</sup> Accessed on May 7, 2009 at [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20February%2012,%202009%20-%20Proposed%20Administrative%20Order%20Regarding%20ECF1/\\$FILE/ECF%20AdminOrder%20feb%202009.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20February%2012,%202009%20-%20Proposed%20Administrative%20Order%20Regarding%20ECF1/$FILE/ECF%20AdminOrder%20feb%202009.pdf)

<sup>3</sup> The others are, "an individual's social-security number, taxpayer-identification number, or birth date, ... or a financial-account number."

## II. Case Law Supports Granting the Requested Relief

Although “[t]he Supreme Court and the D.C. Court of Appeals have not expressly condoned this practice; ... from time to time they have permitted pseudonymous litigation to proceed without comment. See, e.g., Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1374 (D.C. Cir. 1991).” Qualis v. Rumsfeld, 228 F.R.D.8, 10 (D.D.C. 2005). Thus, although our legal system is based on open proceedings, it is fundamental that Courts have authority and discretion to enter orders to protect the identities of parties when they might be endangered. Doe v. Porter, 370 F.3d 558, 560-561 (6th Cir. 2004) (upholding lower court’s grant of protective order allowing the use of pseudonyms in challenge to religious instruction in schools); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (reversing lower court’s denial of protective order allowing for pseudonyms). As the Fourth Circuit has noted:

[T]hough the general presumption of openness of judicial proceedings applies to party anonymity as a limited form of closure, it operates only as a presumption and not as an absolute, unreviewable license to deny. The rule rather is that under appropriate circumstances anonymity may, as a matter of discretion, be permitted.

James v. Jacobson, 6 F.3d 233, 238 (4<sup>th</sup> Cir. 1993).

The Seventh Circuit has echoed this view. “Judicial proceedings are supposed to be open ... in order to enable the proceedings to be monitored by the public. The concealment of a party’s name impedes public access to the facts of the case, which include the parties’ identity.” Doe v. City of Chicago, 360 F.3d 667, 669 (7<sup>th</sup> Cir. 2004).<sup>4</sup> Nonetheless, “[t]he presumption that parties’ identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the plaintiff ... exceeds the likely harm from concealment.” Id. In other words, as yet another Circuit has explained:

In cases where the plaintiffs have demonstrated a need for anonymity, the district court should use its powers to manage pretrial proceedings, see Fed. R. Civ. P. 16(b), and to issue protective orders limiting disclosure of the party’s name, see Fed. R. Civ. P. 26(c), to preserve the party’s anonymity to the greatest extent possible without prejudicing the opposing party’s ability to litigate the case.

Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000).

In the instant case, there are many who (mistakenly) view the litigation as an attack on their (Christian) monotheistic religious views. To those individuals, Plaintiffs “have invited an opprobrium analogous to the infamy associated with

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<sup>4</sup> But see Center for National Security Studies v. U.S. Department of Justice, 356 U.S. App. D.C. 333, 350-51 (D.C. Cir. 2003) (suggesting that the right of public access to trials has not been extended beyond criminal proceedings).



criminal behavior.” Stegall, 653 F.2d at 186. See, e.g., Exhibit A, containing a small sample of the emails received by Plaintiff Newdow. Because of this opprobrium, the need for pseudonymous filing has been recognized, at least implicitly, by the Supreme Court. See, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (parents individually and as “next friends” to their children were permitted to litigate pseudonymously when they challenged prayers at public high school football games).<sup>5</sup>

In this Circuit, a trial court has used five factors to determine if pseudonymous proceedings should be permitted. John Doe #1 v. Von Eschenbach, 2007 U.S. Dist. LEXIS 46310 (D.D.C. 2007). Those factors will be discussed sequentially here.

**a. The Justification is Not Merely to Avoid Annoyance and Criticism**

The first factor pertains to the claimed justification for anonymity. If it is the mere annoyance and criticism that often accompanies court cases, the justification will be deemed insufficient for infringing upon the public interest in open proceedings. Here, the justification is preventing actual harm. Thus, this factor falls in Plaintiffs’ favor.

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<sup>5</sup> Subsequently, the high Court decided a case involving a pseudonymous filing where the justification appears to be nowhere near as compelling as in the instant action. In City of San Diego v. Roe, 543 U.S. 77 (2004), a police officer who was terminated from his job because of sexually explicit videotapes he had made was permitted to file pseudonymously.

### **b. There is a Real Risk of Retaliatory Harm**

The second factor looks at whether or not there is a real risk of retaliatory harm. That this factor is also in Plaintiffs' favor is difficult to deny. In fact, the real risks have been demonstrated unequivocally in a book detailing the harms suffered by "Religious Minorities and Dissenters" in this country.<sup>6</sup> The stories are frightening. For instance, the Herdahls were a Lutheran family in a Southern Baptist Mississippi town. When the Herdahl children did not participate in "decidedly Southern Baptist" public school prayers, they were harassed by "[b]oth teachers and students." When the family filed suit to stop this clearly unlawful practice, "the harassment got even worse. Her family received bomb threats. She received a death threat, and the name calling and ridicule worsened."<sup>7</sup>

A second story concerned individuals in Alabama. The Herrings were "a Jewish family whose children had been subjected to severe religious discrimination and harassment in school." The children "were physically assaulted by classmates because of their religion; swastikas were drawn on their lockers, bookbags, and jackets; and they were regularly taunted by the other children." The mother, in a sworn statement to the Court, stated:

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<sup>6</sup> Ravitch FS. *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters*. (Northeastern University Press: Boston, 2001).

<sup>7</sup> *Id.*, at 8-9.

Every day that I send my children to Pike County schools, I wonder if I am sending them into a war zone. ... The consequences of the school environment on my children's psyches are devastating. My children are growing up believing that America is a caste society and they are untouchables – except for the purpose of getting beaten up. One child suffered “serious nightmares.”<sup>8</sup>

“Rachel Bauchman, a Jewish high school student, objected to overtly religious songs, which were sung at high school graduations by the high school choir of which she was a member. ... Rachel obtained a court order prohibiting the graduation songs. However, at the urging of parents and some students, the choir performed one of the religious songs anyway. ... When Rachel and her mother got up to leave – Rachel in tears – parents and students in the audience jeered and spat on them.”<sup>9</sup>

Like Plaintiffs here, Joann Bell filed a federal lawsuit to stop government-sponsored prayer. As detailed in Exhibit B:

After I filed the lawsuit, my family and I received numerous threatening telephone calls and letters. These threats promised physical harm and even death to my family members and me as a result of my involvement as a plaintiff in the lawsuit. Many of the telephone calls told me that our home would be burned. I could not even perform such simple tasks as shopping for groceries in the community without being confronted by other persons about the lawsuit.

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<sup>8</sup> Id., at 9-11.

<sup>9</sup> Id., at 11-12.

When Ms. Bell responded to a bomb threat at her children's school, "several school employees circled the car. One of the employees grabbed me by the hair of the head and battered my head against the frame of the car's door." After the family's home "was burned in a fire of suspicious origin," the family moved from the school district "motivated by a grave concern for the safety of our family." Exhibit B.

### **c. Children are Involved**

Whether or not children are involved is the third factor. Here, a number of plaintiffs are children and/or their parents. Disclosure of the identifying data of either will obviously place the children at risk.

### **d. The Action is Against the Government**

Von Eschenbach cited Yacovelli v. Moeser, 2004 U.S. Dist. LEXIS 9152 (M.D.N.C. 2004) for the proposition that "[w]hen a plaintiff challenges the government or government activity, courts are more likely to permit plaintiffs to proceed under a pseudonym." In the instant litigation, it is governmental activity that is being challenged.<sup>10</sup>

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<sup>10</sup> Although Defendants Warren and Lowery are private individuals when leading their congregations in prayer, they functioned as government agents when they were given access to the inaugural dais. "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 299 (1966).

**e. There is No Risk of Unfairness to the Defendants**

The fifth and last factor is the degree of unfairness to Defendants. It is difficult to conceive of how Defendants will in any way be prejudiced by having the children's identifying information filed under seal.

**CONCLUSION**

Good cause having been shown, Plaintiffs respectfully request that the Court order the requested relief and allow any information that would identify the child plaintiffs to be filed under seal.

Respectfully submitted this 14<sup>th</sup> day of May, 2009,



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Respectfully submitted this 14<sup>th</sup> day of May, 2009,

/s/ - Michael Newdow

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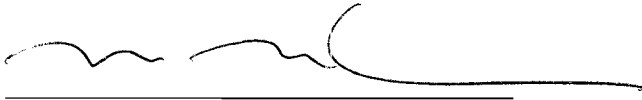
**EXHIBIT A**

I, Michael Newdow, declare as follows:

- (1) The attached are accurate replicas of emails received by me in response to my efforts to have the government abide by the Establishment Clause.
- (2) These emails comprise only a small fraction of the emails I have received. Many of the others have expressed similar sentiments.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2009.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Michael Newdow

Thu Aug 21 10:26:33 EDT 2008

Rees IP Address: 198.133.214.11

Rees email address is: [overthehill124@yahoo.com](mailto:overthehill124@yahoo.com)

----- Their Message -----

If you don't like what this country stands for, get the hell out!!! No one is asking you to stay!! I'm sure there are other countries that would welcome you with open arms.

Fri Aug 22 07:39:47 EDT 2008

Rees IP Address: 75.148.144.166

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

YOU SHOULD BE KILLED

Wed Dec 31 14:59:04 EST 2008

Rees IP Address: 155.8.89.2

Rees email address is: [fregman42@yahoo.com](mailto:fregman42@yahoo.com)

----- Their Message -----

I'm appalled that people like you, atheist, gays and many other groups like you think that you are the only people in this country. You all want everything to be just for you. Well let me tell you, you are not the only people here. There are God fearing Americans here as well. And just as you may have the right to not be subject to hearing "so help me God" during the inauguration, I have the right TO hear it. If you don't want to listen to it, there is a button on your remote that will change the channel or turn your TV off completely. Its your choice. As a Christian, if something offends me, I don't support. Being an American is about having freedom of choices. If you don't like something choose something else. This country was founded on Christian values, however people like you have twisted the Constitution, which I fought to protect for over 23 years, in such a way that we can't even wish someone Merry Christmas or wear a pin in public proclaiming Christianity because it might offend someone. Its sad to know that people like you believe this is all there is to life. Live on this earth for a few years, die, and thats it. How sad. God promises a life without pain, tears, or worries if we seek first His Kingdom. You have a right to be an atheist, but don't let your right to be an atheist infringe on my right to be a Christian. God Bless



Wed Dec 31 23:10:45 EST 2008

Rees IP Address: 24.237.98.47

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

FUCK OFF! Leave my constitution alone and leave my right to pray in public alone. People like you are ruining this country. You and your ridiculous cult are nothing but a bunch of whining, snibbling, little pussies. Give up now because you will never win. How dare you and who the hell do you think you are? How convenient to have your phone number right there in front of my face. Shall I give you a ring? I don't think it would be a friendly conversation.....so until then....FUCK OFF.

Wed Dec 31 17:46:46 EST 2008

Rees IP Address: 209.181.125.130

Rees email address is: [psmith98\\_2002@yahoo.com](mailto:psmith98_2002@yahoo.com)

----- Their Message -----

STOP the BS campaign! You have NO right to express your beliefs by taking honest, hardworking AMERICANS to court to try and appease your lack of faith. GOD is the right direction for people of all lands and all faiths!

Your choice of not believing is like your choice to not believe in Santa Claus, fine, but you don't have to remove all occurrences of Christmas movies and specials, so don't try to eliminate God from our currency, pledges and oaths. The Majority of people believe in GOD and we trust in GOD and we have every right to do so! I will not take you to court to expunge your rights, so don't take our ministers and other Americans to court to try and expunge theirs! If you choose to not watch nor attend the inauguration, that is also your choice, but to do so and mention in court papers that it will offend you, get over it! I could see if the inauguration had cursing, nudity or some other flagrant offensive language or actions, but for you to avoid it all for the single word in a phrase, "so help me God!" I call you a whiner, a 'squeaky wheel' looking for some oil of satisfaction!

Next, there will be a cry that the inauguration is not spoken in Hebrew, Spanish, Korean, Vietnamese, etc...and that will offend those "Americans" that feel that it is a violation of their rights. Perhaps, the President should have equal time with a pledge on the Koran? Do you see how ludicrous this can get, real fast?!?!

My kids are offended by the Athesist kids that refuse to stand and say the

Pledge of Allegiance to the Flag of America, because it has the word God in it. Mumble past it. But if you do NOT stand for the Nation of America, than please exercise your right to move to another Country that will better fit your beliefs. If you need money to move out of this Country, let me know and I will help you.

Peace.

Wed Dec 31 15:28:45 EST 2008

Rees IP Address: 99.230.98.202

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

you're a fucking idiot

so help me GOD

Wed Dec 10 21:59:46 EST 2008

Rees IP Address: 68.186.202.225

Rees email address is: [mgoebel@charter.net](mailto:mgoebel@charter.net)

----- Their Message -----

God loves you Mike. He sent His only Son, Jesus Christ to pay the price for the SIN that consumes your life. You wage this little futile war against a God you do not believe in because you can not see Him. YOU WILL DIE. We all do. 5 minutes after you die, your soul will leave this old broken body. You will be taken before Christ. You know the rest of the story. You have NO PEACE in your life. NO JOY. NO HAPPINESS. You will NEVER attain any of these things because of the SIN that blinds you. I will pray that your life remain as miserable as it is until you come to SALVATION through Jesus Christ.

Tue Dec 30 21:04:10 EST 2008

Rees IP Address: 72.4.178.176

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

GET A FUCKING LIFE. I'd say God Bless You, but I wouldn't mean it.

Signed,

A former Green Beret who risked his life for his country and his God.

Tue Dec 30 11:35:59 EST 2008

Rees IP Address: 166.197.34.206

Rees email address is: [Aegiskidd@gmail.com](mailto:Aegiskidd@gmail.com)

----- Their Message -----

congratulations... I think you turn more people on to God than the best of the Bible thumpers! I don't consider you an American because you OBVIOUSLY have no idea what this country stands for ;) you are another silly liberal with an agenda that will NEVER stick in the mainstream!

You're funny to listen to too, thanks for the hilarious entertainment on the radio today... I'm sure you have more people laughing at you than you know ;) you represent a tiny minority of people who will NEVER succeed. I will strive to convert one more person to Christianity before this year is over in honor of you ;) it's freedom OF religion, not freedom FROM religion, silly little guy!!!

Wed Dec 31 11:03:02 EST 2008

Rees IP Address: 98.246.13.129

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

Mike - You are the most despicable excuse for a human being I have ever met. Sadly, the justice system in this company must hear your petty, foolish arguments. Even worse is that the news media wants to cover such a self-absorbed plea as yours.

Let me speak on behalf of the vast majority of Americans. FUCK YOU. Whether you or I are religious or not, its utterly foolish to argue such small things as you are arguing. If you really don't like our Pledge of Allegiance or the swearing in of the President, don't watch it. Don't participate in it. But especially don't infringe on the preference of the vast majority of Americans by assuming your selfish efforts represent the rest of us.

You are a waste of a life Mike. I cannot emphasize enough how much you disgust the rest of America.

Tue Dec 30 14:06:37 EST 2008

Rees IP Address: 63.240.117.100

Rees email address is: [scfsanfran@yahoo.com](mailto:scfsanfran@yahoo.com)

----- Their Message -----

An Establishment Cause Activist? What a joke you are. Your litigious efforts to remove 'In God We Trust', 'Under God' etc. disgust me. You're pathetic. And now you want to get an injunction to prevent any reference to God in the swearing- in ceremony at the inauguration? You're an even bigger idiot. Do something better with your time and quit wasting everyone else's time with your decidedly 'un-American' viewpoints. If you don't like our Constitution, our Pledge of Allegiance, the way our currency is printed, etc. then get the fuck out of our country. You're a fucking disgrace and people like you clearly have nothing else better to do (and clearly aren't smart enough to have a successful career as an attorney) than stir the pot promoting your own interests. You clearly need controversy to draw enough attention to your activism to put food on your table. Do something in life that isn't so divisive and litigious. You represent all that is wrong with our society. You'd get an injunction preventing the Nativity Scene. You deserve to burn in Hell, buddy. But then again, you don't believe in Hell.

Thu Jan 1 04:05:09 EST 2009

Rees IP Address: 66.153.234.44

Ree did not give a return email address, so you can't reply to this on.

----- Their Message -----

You are a friggin idiot....please don't waste your money filing another lawsuit....because you only make yourself look like the ass that you are. Idiots like you are the problem with society, and the sooner the news outlets stop giving you coverage the better.....THE FREEDOM OF RELIGION IS EXPRESSED IN THE FOUNDING FATHERS ARTICLES OF GOV'T YOU HAVE EVERY RIGHT TO EXPRESS YOUR "RELIGION" OR LACK THERE OF, BUT SOMETIMES THIS USELESS BULLSHIT DOES NOTHING BUT WASTE THE COURTS TIME AND YOUR MONEY....HEY IF YOU WANT TO WASTE YOUR MONEY JUST SEND IT TO ME JACKASS.

## EXHIBIT B

### AFFIDAVIT OF JOANN BELL

I, Joann Bell, of lawful age, depose and state:

1. I am a lifelong resident of the State of Oklahoma. I have raised four children who are now all adults. During my children's upbringing, I was occupied at various times as either a full-time homemaker or in employment outside my home. I now have three grandchildren.

2. During the spring of 1981, my three youngest children attended school at Little Axe Independent School District #70 in Cleveland County, Oklahoma. At that time, I learned that the school was engaged in sponsoring prayer meetings. I then unsuccessfully attempted to the Little Axe Administration and School Board to discontinue this practice, as I believed it violated the First Amendment.

3. After failing to convince members of the Little Axe School Board and Administration to stop the school-sponsored prayer meetings, I filed a federal lawsuit in May of 1981. That case, *Bell v. Little Axe*, (subsequently appealed, 766 F.2d. 1391, 10<sup>th</sup> Circuit, 1985) was tried in the U.S. District Court for the Western District of Oklahoma during December of 1982.

4. After I filed the lawsuit, my family and I received numerous threatening telephone calls and letters. These threats promised physical harm and even death to my family members and me as a result of my involvement as a plaintiff in the lawsuit. Many of the telephone calls told me that our home would be burned. I could not even perform such simple tasks as shopping for groceries in the community without being confronted by other persons about the lawsuit.

5. On May 14, 1981, I was notified by telephone about a bomb threat to my children's school. My husband and I rushed to the school out of concern for our children's safety. After we arrived at the school, several school employees circled the car. One of the employees grabbed me by the hair of the head and battered my head against the frame of the car's door while she attempted to pull me from the vehicle.

6. On September 18, 1981, my home was burned in a fire of suspicious origin. I had no insurance for this loss. On the day following the fire, many members of the community drove past my property while honking their horns or yelling taunts at my family and me.

7. After the destruction of my home, my family moved out of the Little Axe School District. In addition to the lack of a residence, the move was motivated by a grave concern for the safety of our family.

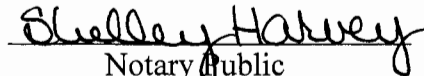
8. My fellow citizens' resentment of my involvement in *Bell v. Little Axe* created personal nightmare for my family and me. This resentment and the actions it triggered deprived us of any peace of mind or any semblance of a normal family life.

Further, Affiant sayeth not.

  
Joann Bell

Subscribed to and sworn before me this 5<sup>th</sup> day of October, 2004

My commission expires:  
11-21-2005

  
Notary Public  
#01019273