IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PRIMATE FREEDOM PROJECT, INC., a non-profit corporation,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE NO. 1:08-CV-1166-ODE
REGENTS OF THE UNIVERSITY OF CALIFORNIA, in each of their official and individual capacities,	)	
Defendants.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION

Plaintiff, Primate Freedom Project, Inc. ("Primate Freedom Project" or "PFP"), seeks equitable relief associated with the Defendants' demands to alter its website. Primate Freedom Project, Inc. seeks relief because its own website contents are constitutionally protected, and the threats and claimed sanctions constitute a prior restraint on Primate Freedom Project, Inc.'s speech and a vague and overbroad abridgement of its free speech protections.[1]

Defendants' position is shapeshifting. The paper trail and the California lawsuit blend the Plaintiff with a named organizational defendant in the California case – UCLA Primate Freedom. In contrast, in this Court, Defendants treat them as entirely separate entities.

Defendants **now** place inordinate emphasis on the inside address typed in

[1] Defendants do not squarely address the ultimate constitutional questions, and Primate Freedom Project, Inc. relies on its prior Brief on this score.

their multiple correspondence to Primate Freedom Project, Inc.'s CEO. But the Plaintiff in this action clarified from the outset that Primate Freedom Project, Inc. and its CEO are not UCLA Primate Freedom.[2] Nevertheless, a stream of increasingly threatening correspondence continued. Most importantly, now, there are at least three strong indicators from Defendants that Primate Freedom Project, Inc.'s own website is subject to continued demands to change its content:

- Letter from Defendants, dated February 29, 2008: "Please note that under the terms of the Temporary Restraining Order, you are prohibited from 'placing or maintaining upon **any website** or otherwise disseminating any private or personal information' regarding any employee of The Regents. This would not only include emailing personal information as you referenced in the article, but all other means of disseminating the personal information of employees of The Regents. This letter is to inform and remind you that under the terms of the order, you may not disseminate this information by any means, including through email." *Complaint* ¶ 35 (G) (underlined emphasis in original).

- The Defendants' own brief in response to this preliminary injunction request indicates that the content from UCLA Primate Freedom's website cannot be placed **"on any website, which includes PFP's website."** *Defendants' Brief* at 7 n.3.

- The Defendants have now obtained a California order, effective until at least February 2009, that purports to constrain any website – including those of non-parties in the California action – which may act in concert with any named defendant in that action.[3] *See* **EX. M** attached to Declaration of Jean

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[2] Defendants' counsel repeatedly suggests that it had no responsibility to seek to determine who is the proper contact for UCLA Primate Freedom and that they were free to continue sending demands to Jean Barnes, CEO for Plaintiff, even after Jean Barnes informed counsel that she was improperly receiving correspondence. *Defendants' Brief* at 6, 13.

[3] The Defendants here also recently on April 14, 2008 mailed directly to Jean Barnes, CEO for Plaintiff, a default judgment from California against UCLA Primate Freedom again supposedly directed to UCLA Primate Freedom. Plaintiff herein requested, by letter, that all further correspondence be directed to counsel. *See* **EX. J, L** attached to Declaration of Jean Barnes.

Barnes (article, order).[4]

The breadth and duration of these content based restrictions on speech, never predicated on any judicial determination in any case involving Primate Freedom Project, Inc., renders hollow Defendants' suggestion that Plaintiff lacks an "injury in fact." Defendants' Brief, despite its protestations to the contrary, confirms the practical reality and legal consequence of its threats – a prior restraint that forced Primate Freedom Project, Inc. to self-censor and seek protection from this Court.

Given Defendants' shifting position, and its speech-chilling consequences, a well-crafted injunction and/or declaration will give Primate Freedom Project, Inc. a needed comfort zone to express its views.

A. Defendants served their California lawsuit and issued demands wrongly to Plaintiff

At the outset, Plaintiff addresses the improper service issues of the California lawsuit only to show that it was, and continued to be, wrongly contacted. The respective civil practice acts of both California and Georgia designate who a plaintiff should serve, if an organizational entity other than a corporation is named as a defendant. In short, in the related California action, plaintiffs therein attempted to serve the only name they could find. In the process of doing so, their relentless repeated correspondence to an improper person – despite being advised of their error – violated the First Amendment. *See* EX. 9 attached to Defendants' Brief.

> Actions may be maintained against and in the name of any unincorporated organization or association for any cause of action for or upon which the plaintiff therein may maintain such an action against the members of the organization or association.

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[4] Plaintiff will file as a supplemental exhibit the April *Order* from the California litigation referenced in the article.

> Service of process in the action against the organization or association shall be had by service upon any officer or official member of such organization or association, or upon any officer or official member of any branch or local of the organization or association, provided that any such organization or association may file with the Secretary of State a designated officer or agent upon whom service shall be had and his residence address within the state. If the designation is made and filed, service of process shall be had only on the officer or agent designated, if he can be found within the state.

O.C.G.A. § 9-2-25.[5] The purpose of this code section is to avoid having to locate a group of individuals in order to file suit in the county where each resides, and to fix venue. *See Drake v. Chesser*, 230 Ga. 148 (1973).

When a plaintiff sues an unincorporated entity, it must be careful to perfect service upon a proper individual, not just a member of the organization. *See Sheet Metal Works Int'l. Assoc. v. Carter*, 241 Ga. 220 (1978). The *Sheet Metal Workers* court exhaustively examined who could accept service on behalf of an incorporated association. In finding that such a person should be "a person who is clothed with some official duty or status to perform for the association or organization, other than that imposed upon an officer," the Court noted that the test was close

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[5] In California, if designation of an agent for the purpose of service of process [by an unincorporated association] has not been made as provided in Section 18200 [by designating an agent for service of process], if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in Section 18205 for delivery by hand of the process, and it is shown by affidavit to the satisfaction of a court or judge that process against an unincorporated association cannot be served with reasonable diligence upon the designated agent by hand or the unincorporated association in the manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or subdivision (a) of Section 415.20 of the Code of Civil Procedure, the court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address. Service in this manner constitutes personal service upon the unincorporated association. § 18220.

communication. *Id*. at 222. Only a person in "communication" and occupying a "close relationship" would satisfy the test.

> In a labor union, there are many offices occupied by members who are not officers, *i.e*. shop stewards, district and field representatives, trustees and committee chairmen. All of these positions are official positions and persons serving in them are considered members of the official family. As such, they are most likely to be in communication with and occupy a close relationship to the officers of the union, thereby giving reasonable assurance the officers will receive early notice of service of process if received by a member occupying one of the official positions.

Id. at 222.

In the instant case, the California plaintiffs opted to attempt service on an individual unlikely to satisfy the test; however, this person was the only person the California plaintiffs found. The California plaintiffs attempted to serve a person – this Plaintiff's CEO -- who lives on the opposite side of the country from the named defendant, who has not been in the state of California for many years, who has no close relationship with the named defendant, and who has little if any communication with the named defendant.

But service of the California lawsuit, proper or improper, is not the subject of the lawsuit filed by the Plaintiff herein. The fact that the California plaintiffs isolated the Plaintiff's CEO as a mistaken agent to accept service for their lawsuit, and still continued on with their communications after being told that they had served the wrong person. The relentless and repeated communications by the California plaintiffs, Defendants herein, to this Plaintiff, despite being advised that she was not the proper person to serve on behalf of the California defendant, violates this Plaintiff's First Amendment rights when they expanded their censorship threats to Plaintiff's own website.

B. Primate Freedom Project, Inc. has legitimate fears and standing.

The parties disagreement about standing rests on whether Primate Freedom Project, Inc.'s fear is reasonable or "an imagined threat of prosecution." *Defendants' Brief* at 10. There is no question that cease and desist demands can be challenged as prior restraints by the object or objects of those threats. *See Weaver v. Bonner*, 309 F.3d 1312, 1316-17 (11th Cir. 2002) ("cease and desist request" a prior restraint). The question here is whether Primate Freedom Project, Inc. can show that it reasonably construed the stream of correspondence as well as actions in the California court to mean that both UCLA Primate Freedom and Primate Freedom Project, Inc. were arguably being threatened.

To date, five letters, four emails, and five other correspondence have been sent improperly to Jean Barnes in Georgia, in addition to one telephone call being made to her. Here is a calendar of those communications. *See* **EX. B-J** attached to Declaration of Jean Barnes.

February 20, 2008	telephone call, letter, email
February 22, 2008	correspondence containing pleading
February 25, 2008	correspondence containing pleading
February 26, 2008	letter, correspondence containing pleading
February 27, 2008	letter, email, correspondence containing pleading
February 28, 2008	letter, email
February 29, 2008	letter, email
April 14, 2008	correspondence containing pleading

Yet, Jean Barnes' association with UCLA Primate Freedom is minimal – she helps

with their website. She does not meet the threshold test for service upon an incorporated association: Jean Barnes is neither in "communication" with or occupies a "close relationship" with UCLA Primate Freedom. *See Sheet Metal Works Int'l. Assoc. v. Carter*, 241 Ga. 220, 222 (1978).

Early on, when Jean Barnes began receiving correspondence about a California lawsuit, she informed California counsel for Defendants that "I am not a party to this lawsuit. 2) I am consulting an attorney on Friday, February 29. 3) I have not been served." *See* EX. 9 attached to Defendants' Brief. Nevertheless, the letters and demands persistently continued. Until last week, there was no attempt by Defendant to explore the need to correct the target of their communications. Only then was Plaintiffs counsel asked for the first time, as the Sugg declaration reflects, whether Jean Barnes was the proper contact. California counsel for Defendants did not contact Barnes, Primate Freedom Project, Inc. or apparently anyone else previously to determine who was the proper contact person for UCLA Primate Freedom. *See* EX. 13 attached to Defendants' Brief.

All this might be excused as simply an error were it not for the fact that the letters, email, correspondence, California proceedings, and even Defendants' own Brief, purport to extend the censorial reach of their demands to "any website" specifically "includ[ing] PFP's website."

Defendants were well aware, when they first contacted Jean Barnes, that she is CEO and Director, and registered agent for service of process, of Primate Freedom Project, Inc., a national organization based in Georgia. *See* **EX. A** attached to the

Declaration of Jean Barnes.[6] Primate Freedom Project, Inc.'s own website also contained some information about the identities of researchers at public universities in California. Even though Barnes had informed the Defendants' California counsel that they she was not the proper contact for UCLA Primate Freedom, they continued to dispatch letters, emails, and correspondence demanding that the UCLA Primate Freedom's website be altered and later that "any website" be altered.

Defendants' defense rests on the proposition that because the inside address of their correspondence states "UCLA Primate Freedom" (*see* letters dated February 20, February 26, February 27, February 28, February 29, 2008), Jean Barnes and Primate Freedom Project, Inc. should have "feared not" despite the increasingly aggressive threats of contempt sanctions. It is hard to imagine the constitutional fortitude that Defendants expect. In any event, standing principles in First Amendment cases are grounded in more realistic concerns about "self-censorship" and ensuring "breathing space" for speech. *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967) ("We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the'chilling effect' upon exercise of First Amendment freedoms ...."); *ACLU v. The Florida Bar*, 50 F.3d 901, 904 (11th Cir. 1995); *Reeves v. McConn*, 631 F.2d 377, 381 n. 2 (5th Cir. 1980) ("standing requirements are less demanding when First Amendment freedoms are endangered").[7]

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[6] To date, there is no entry for UCLA Primate Freedom on either the California or Georgia respective Secretary of State's corporations' registry.

[7] The Eleventh Circuit rejects rigid pleading standards for standing. *See Smith v. Meese*, 821 F.2d 1484, 1496 n. 9 (11th Cir. 1987); *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994).

Indeed, in order to afford free speech "breathing space," the Supreme Court has allowed pre-enforcement challenges to restrictions on speech. *Compare Defendants' Brief* at 2 (claiming that "enforcement" is required for standing). "[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [action that] deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed ..., and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.... When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court.

Babbitt v. Farm Workers Natl. Union, 442 U.S. 289, 302 (1979) (citations omitted). The Eleventh Circuit has consistently allowed free speech challenges to proceed where the litigants can show that their speech is arguably violative of a restriction and they can show a basis for the speech-chilling fear of prosecution. *See, e.g., Jacobs v. The Florida Bar*, 50 F.3d 901, 904-905 (11th Cir. 1995) (standing proper where plaintiff intended "to engage in a specific course of conduct 'arguably affected with a constitutional interest'") (quoting *ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993)); *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 817-819 (5th Cir. 1979) (standing proper where "allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs"); *see also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1309 (11th Cir. 2000) (standing to bring facial challenge where parties sought to engage in constitutional speech that ordinance would restrict).

The Supreme Court has emphasized that recipients of cease and desist demands, such as here, "do not lightly disregard public officers' thinly veiled threats to institute [] proceedings against them if they do not come around . . ." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963). Here, Defendants have already zealously pursued a civil lawsuit against a similar website of a similar group. *See Steffel*, 415 U.S. at 459 (first amendment standing based on threats to plaintiff and others). Defendants have continued to submit demands to Plaintiff's CEO even though she informed Defendants that she is not the proper party to receive correspondence for the object of prosecution in that case. *See* EX. 9 attached to Defendants' Brief. And in correspondence, the California litigation, and Defendants' own Brief they have claimed that they are empowered to seek to alter "any website" which "includes PFP, Inc.'s website." Primate Freedom Project, Inc. is no shrinking violet, yet it self-censored its website in response to an often confusing but uniformly threatening stream of demands. Plaintiff plainly has standing.

C. Plaintiff's state law claims are not necessarily barred by the Eleventh Amendment.

The parties agree that injunctive and declaratory relief is potentially available against Defendants in their official capacities for violations of the United States Constitution. *See McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001). The parties likewise agree that *Pennhurst State School and Hospital v. Halderman* generally prevents a federal court from enjoining state officials to follow state law. 465 U.S. (1984). *See Defendants' Brief* at 14-15. However, where a federal proceeding alleges violations of a State Constitution, a court may address whether governmental action crosses that state constitutional line. *Kenny A. ex rel. Winn v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005) (Georgia Constitution requires

appointment of counsel in certain civil proceedings). Nor are the principles of *Pennhurst* abridged where equitable relief is entered for the violation of *both* federal and state law. While not critical to the outcome of this case, Plaintiff submits that the Eleventh Amendment is not a bar to addressing the all state constitutional questions.

D. Plaintiff only seeks injunctive relief on official capacity claims.

Plaintiff's only individual capacity claims are for damages, and those claims are not addressed in the current motion which only deals with equitable relief in Defendants' official capacities. *See generally Kentucky v. Graham*, 473 U.S. 159 (1985). Thus, Defendants' qualified immunity damages defense is not at issue here, *Defendants' Brief* at 16 n. 8, nor would it ultimately succeed because the body of law presented in Plaintiff's initial Brief creates clearly established law. Similarly, Defendants' personal jurisdiction argument, relating to individual capacity claims, *Defendants' Brief* at 16-18, is not at issue in Plaintiff's preliminary injunction request.

CONCLUSION

For the foregoing reasons, declaratory relief and a preliminary injunction should be entered finding that Primate Freedom Project, Inc.'s website is constitutionally protected, and enjoining Defendants from further threats and prior restraints. Again, given Defendants' shifting position, and its speech-chilling consequences, a well-crafted injunction and/or declaration will give Primate Freedom Project, Inc. a needed comfort zone to express its views.

DATED: This the 2nd day of May, 2008.[8]

Respectfully submitted,

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[8] Counsel certifies that this Brief is Bookman Antiqua, 13 point.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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