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

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiff, Primate Freedom Project, Inc., files this response to the several issues raised in Defendants' Motion to Dismiss. With a few exceptions, Defendants' motion is without merit.[1]

Simply put, Primate Freedom Project, Inc. seeks protection from this Court. Its Director has been hounded by threats of censorship and sanctions against UCLA Primate Freedom and Primate Freedom Project, Inc. even though she has both informed Defendants that she is not a party to litigation in California and is not the contact for any Defendant in that case. Defendants now assert that while Primate Freedom Project, Inc. is not a party to the California litigation, this Court should nevertheless refrain from ruling because of the California case. If Defendants truly do not have their sights set on Primate Freedom Project, Inc., one wonders why they

[1] Plaintiff will not devote a separate section to Defendants' stated ground that Plaintiff has failed to state a cause of action. *Defendants' Dismiss Brief* at 23. Defendants' arguments on this ground are redundant, and Plaintiff's responses are covered in full in the remaining sections of this Response.

do not simply consent to an order that gives Primate Freedom Project, Inc. the free speech breathing space to return its original content. The net effect of their conduct is that they have stifled Plaintiff without even making it a party to their California case.

I. Plaintiff has Legitimate Fears and Standing

Defendants reiterate the argument they made in opposition to a preliminary injunction, again arguing that Primate Freedom Project, Inc.'s fear of legal action is not reasonable. *Defendants' Dismiss Brief* at 6-8.[2] They do not distinguish any of the cases cited by Plaintiff, and the first amendment standing cases they cite involve no communications by the government at all let alone arguable threats of legal action.

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 focus is on Plaintiff's reasonable fears, not Defendants' intent. The question is whether Primate Freedom Project, Inc. reasonably construed the stream of correspondence to mean that both UCLA Primate Freedom and Primate Freedom Project, Inc. were arguably being threatened with legal action unless they altered their websites.

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.

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[2] Plaintiffs do not rest their standing on "fear" that the California lawsuit will be replicated elsewhere. *Compare Defendants' Dismiss Brief* at 7. Rather, they rest standing on the stream of correspondence received by Jean Barnes that targeted Primate Freedom Project, Inc.'s website and others.

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 proper 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' Injunction Response Brief. Nevertheless, the letters and demands persistently continued. Only recently, was there any attempt by Defendants to explore the need to correct the target of their communications. Only recently, as the Sugg declaration reflects, did they ever inquire 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' Injunction Response Brief.

And in their Motion to Dismiss, Defendants fail to explain why they have continued to send threatening correspondence to the wrong recipient despite being apprised of their error.

Moreover, the letters, email, correspondence, California proceedings, and even Defendants' own briefs, purport to extend the censorial reach of their demands to "any website" specifically "includ[ing] Primate Freedom Project, Inc.'s website." *See* Complaint, ¶ 35; Defendants' Preliminary Injunction Brief Response Brief at 7 n. 3; Supplemental Brief In Support of Preliminary Injunction EX. A (California Order. 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.[3] 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 she was not the proper contact for UCLA Primate Freedom, they continued to dispatch letters, emails, and correspondence demanding that UCLA Primate Freedom's website be altered and later that "any website" be altered.

Defendants' position 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

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

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"); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 2003) ("we agree with the First Circuit's admonition that the credible threat of prosecution standard 'is quite forgiving'").[4]

Indeed, in order to afford free speech "breathing space," the Supreme Court has allowed challenges to restrictions on speech *before* any legal action is taken. "[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).

The cases cited by Defendants, that "subjective chill" of speech is not sufficient to confer standing, are certainly correct but do not reach the issue here. *See Defendants' Dismiss Brief* at 7. Primate Freedom Project, Inc. does not suggest that unreasonably self-imposed chilling effect confers standing. Indeed, all the Supreme Court and Eleventh Circuit cases cited by Defendants involved no correspondence from a governmental entity indicating in any way that legal action

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[4] 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).

was being considered or even possible. They involved no cease and desist demands at all. That element, present here, takes this case well beyond subjective, self-imposed and unreasonable chilling of speech.

In *Laird v. Tatum*, cited by Defendants, the plaintiffs lacked standing because the chilling effect rested, not on arguable threats but their "very perception of [data gathering] system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents." 408 U.S. 1, 13 (1972). In *Wilson v. State Bar of Georgia*, cited by Defendants, the disbarred attorneys who claimed a chilling effect had no standing because they "concede ... that 'there was no evidence regarding specific threats or actions' [and] the record indicates that the State Bar has repeatedly and consistently taken the position that the amendments have no application to the types of scenarios the disbarred attorneys have posed." 132 F.3d 1422, 1428-29 (11th Cir. 1998). Finally, in *Doe v. Pryor,* again cited by Defendants, the plaintiffs lacked standing because "[t]hey concede they have not been threatened with prosecution. Prosecution is not likely, and there is no credible threat of enforcement.... There is nothing in the record on appeal to indicate when the statute was last enforced, and it seems that neither party knows. Apparently, it has been years and years." 344 F.3d 1282, 1287 (11th Cir. 2003). Defendants' cases are the wholly distinguishable.

Indeed, in a more applicable line of cases, 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 in the future. *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).

These cases rest on the Supreme Court's reasoning that:

> 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). And more specifically, 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 briefs to this Court, they have claimed that they are empowered to seek to alter "any website" which "includes Primate Freedom Project, Inc., 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's fear of legal action and chill is reasonable. It has standing.

II. Plaintiff's Equitable Relief Claims are Against Officials in their Official Capacity are Not Barred by the Eleventh Amendment or Anti-Injunction Act.

The parties agree that the Regents as an entity is entitled to sovereign immunity. *See Defendants Dismiss Brief* at 9. The entity was not sued, only its members in their official capacity. The parties also agree that "the Eleventh Amendment unequivocally bars suits for money damages against a state." *Id.* However, Plaintiff did not sue the State of California either. To the extent Plaintiff's Complaint could somehow be construed as seeking any relief against the Regents as an entity or the State of California itself, those unintended claims should be dismissed for clarity purposes.

The parties also 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). Those are the primary federal equitable relief claims.

As to equitable relief pursuant to the state constitution, there is only slight disagreement. The parties 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. 89 (1984). *See Defendants' Dismiss Brief* at 14-15. However, where a federal proceeding alleges violations of a state constitution, Plaintiffs submit that a court may address whether governmental action crosses that state constitutional line. *See, e.g., Kenny A. ex rel. Winn v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005) (finding that Georgia Constitution requires appointment of counsel in certain civil proceedings). Additionally, the principles of *Pennhurst* are not 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 all state constitutional questions if the claims are either declaratory or supplementary to federal injunctive relief.

Defendants also argue that equitable relief claims for state law violations is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. *Defendants' Dismiss Brief* at 10-11. They do concede that the Anti-Injunction Act is not bar to federal claims. *Id.* at 11. Their argument as to state claims fails for two reasons. First, Plaintiff is aware of no case (and Defendants cite none) where the Anti-Injunction Act has barred a claim by a non-party to a state proceeding. Second, Primate Freedom Project, Inc.'s equitable relief claims do not involve a request to enjoin the California state proceeding anyway, only an order to protect them from threats of prosecution (informal prior restraints). This Court should reject the suggestion that the Anti-Injunction Act prevents federal suits, by non-parties to an existing state proceeding, that seek to raise state claims. To hold otherwise would force Primate Freedom

Project Inc.'s to intervene as a defendant in California, hire California lawyers, and litigate as a non-profit in a suit thousands of miles away simply in order to raise state equitable relief claims.[5]

Thus, equitable relief for federal claims is clearly viable against defendants in their official capacities, and equitable relief for state claims is also viable to the extent set out above.

III. Personal Jurisdiction Exists for Individual Capacity Damage Claims.

Defendants' personal jurisdiction defense, which they limit to individual capacity damage claims, misapprehends the nature of individual capacity claims. *Defendants' Dismiss Brief* at 11-12. Their argument rests on the assumption that Plaintiffs must show that each individual defendant took actions in Georgia, wholly apart from their collective actions as officials. However, when a plaintiff names an official in his individual capacity, the plaintiff is simply seeking "to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished); *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 417 (6th Cir. 2002) ("The district court's interpretation of 'state action' would eliminate all § 1983 suits against individual state officers.").

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[5] It is also appropriate to note that despite the important free speech issues presented, the California court apparently entered its initial order *without argument or even presence of defense counsel* and then later entered a preliminary injunction enjoining parties and arguably non-parties websites *for a year* until a full trial on the merits. While that court may well have been driven by serious alleged criminal acts, more sensitivity should be shown to legitimate free speech claims. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm."); *Northeastern Fla. Chapter of Ass"n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

Moreover, Primate Freedom Project, Inc. asserts specific personal jurisdiction based upon the fact that every contact with the Georgia forum is directly tied to the underlying prior restraint and free speech claims. The Georgia courts are authorized to exercise the broadest scope of personal jurisdiction authorized by the Due Process Clause of the Fourteenth Amendment, and the Defendants herein are subject to this Court's in personam jurisdiction. *See Innovative Clinical & Consultation Services, LLC v. First Nat'l. Bank*, 279 Ga. 672, 675 (2005).

A federal court sitting in diversity is bound by the long-arm statute of the state in which is sits. *See Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3rd 738, 746 (11th Cir. 2002) (finding in personam jurisdiction over defendants). Georgia's long-arm statute provides:

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
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> **(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;**

O.C.G.A. § 9-10-91 (emphasis supplied);[6] *National Egg Co. v. Bank Leumi le-Israel, B.M. et al.*, 514 F.Supp. 1126, 1128 (N.D. Ga. 1981) (bank subject to personal jurisdiction – denying two motions to dismiss on grounds of personal jurisdiction).

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[6] "In Georgia, courts are authorized to exercise the **broadest** scope of personal jurisdiction authorized by the Due Process Clause of the Fourteenth Amendment." *William L. McDonald v. Donald J. Ricci et al.*, 2007 U.S. Dist. LEXIS 48540 at 5 (N.D. Ga. 2007) (Thrash, J.) (emphasis supplied and citation omitted). Both the former Fifth Circuit and this Circuit have observed that this section is coterminus with due process. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 388 (11th Cir. 1989). The Georgia Supreme Court's construction of the statute has prompted courts in the Northern District to simply bypass the statutory analysis, and to proceed to the minimum contacts analysis under the Due Process Clause, *McDonald*, 2007 U.S. Dist. LEXIS 48540, * 5.

Personal jurisdiction may be general, which arises from the party's contacts with the forum state that are unrelated to the claim, or (as here) specific, which arise from the party's contact with the forum state that are related to the claim. *Nippon Credit Bank*, 219 F.3d 738, 747 (2002). Specific jurisdiction exists when minimum contacts are present that: (1) are related to the cause of action; (2) involve some act by which the defendant purposefully availed itself of the benefits of the forum; and (3) the conduct is such that the defendant should reasonably anticipate being sued in the forum state. *McDonald*, 2007 U.S. Dist. LEXIS 48540, * 6-7.

For example, in *National Egg Company*, the district court found that a bank's holding checks drawn on it payable to plaintiff, for an unreasonable time, in order to induce plaintiff to continue shipping eggs to a debtor of the bank, was sufficient to confer personal jurisdiction in Georgia. *See National Egg Co.*, 514 F. Supp. at 1128. The court stated, "a reasonable anticipation of being held subject to the in personam jurisdiction of this state's courts should be even more prevalent when a defendant consciously chose to inflict harm on a Georgia resident." *Id*. at 1128; *Complete Concepts, Ltd. v. General Handbags*, 880 F.2d 382, 388-89 (11th Cir. 1989) (in personam jurisdiction based on one single calculated visit to Georgia, and subsequent mail contact).

Here, this Court has specific personal jurisdiction over the individual Defendants. First, as in *Complete Concepts*, there is a pattern of regular correspondence that the Defendants directed to the Plaintiff. Defendants' minimum contacts – their continuous communication to the Plaintiff – are directly related to the claims herein. Defendants ceaselessly corresponded with the Plaintiff: February 20, 2008: telephone call, letter, email message from Defendants; February

22, 2008: correspondence containing pleading from Defendants; February 25, 2008: correspondence containing pleading from Defendants; February 26, 2008: letter from Defendants, correspondence containing pleading from Defendants; February 27, 2008: letter from Defendants, email from Defendants, correspondence containing pleading from Defendants; February 28, 2008: letter, email from Defendants; February 29, 2008: letter, email from Defendants; April 14, 2008: correspondence containing pleading from Defendants.

Second, in the minimum contacts Due Process analysis, Defendants have affirmatively reached out and threatened the Plaintiff. By demanding that Primate Freedom Project, Inc.'s website be modified, Defendants purposefully availed themselves of the Georgia forum. *See Complaint* ¶ 35 (G). Similarly, the Defendants mailed to the Plaintiff the Order from the California litigation, entered on April 22, 2008 and dated May 14, 2008, referencing "any website" including those of non-parties in the California action which may act in concert with any named Defendant in that action.

Third, the Defendants reasonably could anticipate being hailed into a Georgia court. Plaintiff is not named in the California lawsuit, nor is a party to the California lawsuit, and has had no contact with most of the named Defendants in the California lawsuit. *Complaint* ¶¶ 27-29. In fact, Plaintiff communicated to the Defendants that it was not a party to the California lawsuit. *Complaint* ¶ 30. Plaintiff also indicated early on that it was seeking counsel. Finally, as a result of the relentless communications delivered to Plaintiff, it became fearful of prospective legal sanctions against itself and removed material pertaining to another of the Defendants' universities, University of California Davis, from its own website.

Complaint ¶ 38.

Defendants' multiple communications related squarely to the claims herein rise to level of minimum contacts under the Georgia long arm statute and Due Process analysis to find in personam jurisdiction. Primate Freedom Project, Inc. asserts specific personal jurisdiction based upon the fact that every contact with the Georgia forum is directly tied to the underlying prior restraint and free speech claims.

IV. Qualified Immunity is No Defense to Damage Claims.

Defendants raise qualified immunity as a defense to individual capacity damage claims. *Defendants' Dismiss Brief* at 13-15. The Eleventh Circuit has emphasized that "a right may be so clear for the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official." *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (citation omitted). Indeed, *Evans* itself finds that even the general standard of "reasonableness" under the Fourth Amendment was sufficiently clear and "obvious" to warn that the searches at issue were unconstitutional. *Id*. at 1283. This case too is "well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct." *Id.* "It is not news to [the Eleventh Circuit] that official conduct may be so egregious that further warning and notice beyond the general statement of law found in the Constitution or the statute or the caselaw is unnecessary." *Willingham v. Loughnan*, 321 F.3d 1299, 1302 (11th Cir. 2003).

Several cases from the Supreme Court and Eleventh Circuit involve "informal prior restraints" and analyze them under the settled prior restraint doctrine that dates back to the Supreme Court's original decision in *Near v. Minnesota ex rel. Olson*,

283 U.S. 697 (1931). *See Plaintiff's Preliminary Injunction Brief* at 10-20 (citing cases). There is perhaps no area of First Amendment law that is more settled. Indeed, Defendants have not even attempted to defend this case on the First Amendment merits.

Only one Ninth Circuit case has ever interpreted *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) to allow restrictions on arguably threatening speech where there is no evidence that the originator intends to carry out illegal acts, and *United States v. Carmichael*, notes that the Eleventh Circuit "settled" law specifically rejects such a conclusion. 326 F.Supp. 2d 1267, 1279-81 (M.D. Ala. 2004) ("[t]he Supreme Court has not settled on a definition of a 'true threat,' but the United States Court of Appeals for the Eleventh Circuit has: 'A communication is a threat when in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor'").

The unconstitutionality here is clearly established, and Defendants had "fair warning" of the unconstitutionality of their actions. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) ("salient question" is whether there is some "fair warning" of unconstitutionality). Qualified immunity is no bar to damages.

V. This Court Should Not Abstain where Plaintiff is Not a Party to State Proceedings and Does Not Seek an Order Regarding Any Party to the State Proceeding.

Defendants various abstention arguments hold only surface appeal, and are rejected by some very explicit case law particularly where, as here, Plaintiff is not a party to the state proceedings and there is no order sought which interferes with the *parties* rights and obligations in the state proceeding. Here, Jean Barnes is not a proper representative for UCLA Primate Freedom, and informed Defendants of

that fact.[7] Moreover, Plaintiff does not seek an order enjoining the state proceedings, or any order regarding any party to the state proceeding. It simply seeks an order preventing further threats to its CEO who has informed defendants that she is not a proper recipient of threats or demands. These circumstances are a far cry from the "rare" case where a federal proceeding should be stopped in its tracks. *Carros v. Williams*, 807 F.2d 1286, 1290 (6th Cir. 1986) ("Because these [federal court] claims sought neither to interrupt nor challenge the propriety of the pending Michigan state court suit, we hold that the district court erred in abstaining them."); *Wexler v. Lepore,* 385 F.3d 1336, 1340 (11th Cir. 2004) ("We recently wrote that 'generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'") (citation omitted); *Weiner v. City of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) (same); *Gwynedd Properties, Inc. v. Lower Gwynedd Tp.*, 970 F.2d 1195 (3d Cir. 1992) (same).

Plaintiff does not seek to disrupt a California case where she is not a party – she simply seeks an order preventing threats to Primate Freedom Project, Inc.'s own website. To suggest that, to protect its interests, Plaintiff must intervene as a defendant in a California case and expose itself to an order censoring its own website from a state court without personal jurisdiction over Plaintiff belies the role of federal court's in protecting constitutional rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (Section 1983's "very purpose is ... to protect the people from

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[7] Like the merits arguments, Defendants have completely failed to respond to Plaintiffs' arguments about problems with personal service in the California case or explain why they doggedly continue to send correspondence to Jean Barnes, CEO for Primate Freedom Project, Inc. after she informed them that she was an erroneous recipient.

unconstitutional action under color of state law, 'whether that be executive, legislative *or judicial*'") (emphasis added); *England v. La. State Bd. of Med. Examiners*, 375 U.S. 411 (1964) ("[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled ... to accept instead a state court's determination of those claims").[8]

Abstention under *Younger v. Harris*, 410 U.S. 37 (1971), normally though not exclusively a prohibition on interference with state *criminal* proceedings, does not apply. First, *Younger* does not apply to non-parties to state proceedings. *Doran v. Salem Inn*, 422 U.S. 922, 928-29 (1975) ("non-parties to state enforcement proceedings who assert independent constitutional interests" not barred); *but see Hicks v. Miranda*, 422 U.S. 922, 928 (1975). Second, in the context of the First Amendment, the Supreme Court has held that *Younger* does not apply where (as here) the state proceedings are threatened but have not begun against the speaker:

> In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.... The[] ... principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'.... [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally

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[8] Defendants press the position that they are simply complying with California law regarding notice. *Defendants' Dismiss Brief* at 17-19. However, as briefed previously, Jean Barnes is not the proper recipient of service for UCLA Primate Freedom, they have no personal jurisdiction over Primate Freedom Project, Inc. in California, and have never sought to join Primate Freedom Project Inc. in that case. Even though Defendants have previously taken the position that they directed notice to Jean Barnes as representative for UCLA Primate Freedom only, they now appear to claim that they are also communicating with Primate Freedom Project, Inc. *Id.* at 17 n. 5.

> flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v Thompson, 415 U.S. 452, 459-62 (1974).[9] Here: (1) the relief sought can easily be framed without interfering with state proceedings; and (2) Plaintiff cannot otherwise protect its interests unless it seeks intervention as a defendant in a state court otherwise lacking personal jurisdiction, exposes itself to a state order and a foreign state's very unique tort laws restricting it speech, and litigates with California counsel in a case thousands of miles away. It is Defendants who reached into Georgia to threaten Plaintiff, and now they suggest that Plaintiff must protect its interest in their "home court" even though Plaintiff has never played ball in that forum. *Defendants' Dismiss Brief* at 20. *Younger* cannot be stretched to reach this case.

Abstention is also improper under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). "The short answer to the ... argument is to note that *Colorado River Water District* has been rejected as a basis for abstention under Section 1983 in this Circuit." *Alacare v. Baggiano*, 785 F.2d 963, 969 (11th Cir. 1984). That settles the issue.[10]

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[9] Indeed, in *Steffel*, as here, there were state proceedings involving *other* parties regarding the same free speech issues but *Younger* did not apply.

[10] In any event, *Colorado River* abstention is the rare "exceptional" case, and here would be particularly inappropriate given the delay of over one year for final state trial and even later adjudication in the California case (despite the pressing free speech issues in play), and inconvenience to Plaintiff of a distant forum where it is far less able to litigate long-distance than Defendant here. While Defendants claim "all the relevant parties and actions take place in California," *Defendants' Dismiss Brief* at 20, Plaintiff's lawsuit is not focused on events in California by activists they largely do not even know, but correspondence sent to Georgia repeatedly. And while the California case involves other state statutes and laws, those laws cannot circumvent the First Amendment. The balance begins under *Colorado River* abstention tipped toward

Finally, the Defendants want this court to abstain for generalized comity and federalism concerns. *Defendants' Dismiss Brief* at 21-23. They rely upon *McCuisick v. City of Melbourne*, 96 F.3d 478 (11th Cir. 1996). In *McCusick*, the plaintiff challenged in federal court a state court order enjoining free speech activities of certain parties and others "acting in concert" therewith. The plaintiff was not a party to the state proceeding. The United States Supreme Court had already reviewed the state court's order. *Madsen v. Women's Health Ctr.,* 512 U.S. 753 (1994). The Eleventh Circuit did not abstain and reviewed, facially, the state court injunction again to determine its overbreadth and whether it allowed arrests without probable cause. The only aspect of the challenge about which abstention adhered was an as applied challenge that was framed to require the federal court to modify the state court injunction and place the "itself [in] the role of overseer of the enforcement of a state court injunction." *Id.* at 488. Thus, with that exception, the Eleventh Circuit both recognized that the plaintiff would have a federal damage remedy and a analyzed facial challenge to the overbreadth of the state court order.

Here, Primate Freedom Project, Inc.'s injunctive relief is even more narrow than *McCuisick* allows. While Defendants' state injunction that they have received is plainly overbroad, and *McCuisick* allows a federal challenge on that basis, Plaintiff does not seek an order invalidating that state injunction. It simply seeks an order protecting its website from further threats, thus allowing it to return the original content of its website. There is no attempt to modify the state court order, and its impact on the named defendants there would be untouched. This case plainly does

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the exercise of jurisdiction, and the majority of factors tip the balance even farther away from abstention.

not meet the "extraordinary" requirements for abstention.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied, and 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. 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 11th day of June, 2008.[11]

Respectfully submitted,

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

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.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS** 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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