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

**PLAINTIFF'S BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION**

Plaintiff, Primate Freedom Project, Inc., (Primate Freedom Project) seeks declaratory and preliminary injunctive relief associated with the Defendants' cease and desist demand that Plaintiff's website and others be significantly modified to remove certain statements and add others. Plaintiff files this action because it believes that its own website contents are constitutionally protected, and that the threats and claimed sanctions constitute a prior restraint on Plaintiff's Primate Freedom Project, Inc.'s speech and a vague and overbroad abridgement of its free speech protections.

**STATEMENT OF FACTS**

Plaintiff, Primate Freedom Project, Inc. is a non-profit Georgia corporation that has been in existence for eight years. It is registered as a Georgia non-profit corporation, and has approximately 47,000 supporters throughout the country. Supporters of the Primate Freedom Project, Inc. pay no dues and there is no charge

to participate. They may participate in the group merely by signing up on the web site and providing contact information. The Primate Freedom Project, Inc. primarily is an informational group, and supporters rely on it for information and news referencing primates and testing thereon. *Complaint*, ¶¶ 4-10

The Primate Freedom Project, Inc. has three components: Education, Advocacy, and Support. As stated in its website, the education component focuses on the following: "The public must be taught that monkeys and apes have minds and emotions very similar to our own. They must learn what is actually happening in laboratories right now. Once they know these things they will begin to understand that the experiments being performed on primates are as horrible as they would be if they were being performed on human children." Primate Freedom Project educates its supporters and the public through its website and pamphlets. Individual supporters of the Primate Freedom Project also educate people they come into contact with by wearing a "Primate Freedom Tag." Primate Freedom Tags are stainless steel tags permanently embossed with personal information about one individual monkey or ape locked in primate laboratories. Primate Freedom Project, also publishes *The Congressional Educator*, a newsletter written for members of Congress. *Complaint* ¶¶ 11-14.

The advocacy component of Primate Freedom Project works is described as follows on its website: "It is one thing to know what is happening, but yet another to speak out to demand that it stop. The Primate Freedom Project, Inc. is the primary sponsor of the 'Call for an Immediate Presidential Moratorium on Primate Experimentation.' This document has been endorsed by over two hundred organizations. We are consistent in our demand that the atrocity known as primate

experimentation be immediately stopped." The website also describes the advocacy of "individual supporters." It states "Individual supporters of the Primate Freedom Project attempt to intervene on behalf of the primate represented on their Primate Freedom Tag. They seek official documentation regarding the animal's life and situation. They send this information to the project and we publish the disarmingly sad stories of these victims' lives on the Primate Freedom Project website." *Complaint* ¶¶ 15-16.

Primate Freedom Project's "support" arm is also described on its website: "The Primate Freedom Project, Inc. supports and nurtures efforts aimed at ending primate experimentation. We do this by assisting campus and community-based groups in various ways. We co-sponsor billboards and advertisements in campus newspapers. We donate Primate Freedom Tags to campus efforts. We provide research services and write articles for campus publications. We foster community and campus-based Primate Freedom Projects and work to link those efforts together." While Primate Freedom Project primarily serves as an information conduit as described above, other state and or local groups with whom Plaintiff has no formal relationship, conduct events such as protests and or fundraisers independently. Primate Freedom Project, Inc. will publicize or allow posting on its website the activities of the groups. *Complaint* ¶¶ 17-23.

At some point, Defendants became concerned about the conduct of certain individuals and organizations in California who are dedicated to the cause of humane animal research. Defendants subsequently filed *The Regents of the University of California v. UCLA Primate Freedom et al.*, Superior Court of the State of California, County of Los Angeles, West District (Santa Monica), Case No. SC097145 (2008).

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.

Nevertheless, Defendants continued to send correspondence about the lawsuit to UCLA Primate Freedom c/o Jean Barnes, P.O. Box 1623, Fayetteville, GA 30214, which is the registered agent and address for Plaintiff Primate Freedom Project, Inc. The Defendants utilized the registered agent and address of Plaintiff Primate Freedom Project, Inc. apparently because they were unable to correctly locate and or identify any contact information for UCLA Primate Freedom. *Complaint* ¶¶ 31-32.

The volume of correspondence sent by Defendants herein to Plaintiff's own Director constitutes a pattern of behavior that impacts and chills Plaintiff's own right to free and expressive speech. Defendants made several demands to Plaintiff's own Director demanding first that UCLA Primate Freedom change its web site, and later demanding that ***any*** website be restricted. *Complaint* ¶¶ 31-34.

The following cease and desist demands to Plaintiff's own Director at Plaintiff's address directly threaten Plaintiff Primate Freedom Project, Inc.'s right free and expressive speech:

1. Telephone voicemail message from Defendants, dated February 20, 2008: "Hi. I'm calling for the UCLA Primate Freedom Project. Um, I'm calling to give notice that tomorrow morning at 8:30 in Dept. A of Los Angeles Superior Court, in Santa Monica, at 1275 Main Street, Santa Monica, the Regents of the University of California will be moving for

a temporary restraining order against UCLA Primate Freedom. Again, tomorrow morning, 8:30, Dept A., Santa Monica, Los Angeles Superior Court, 1275 Main Street, Santa Monica." While Plaintiff Primate Freedom Project, Inc. was unable to hear the identity of the caller, the Defendants have admitted in the corresponding litigation, that it was they who left this telephone voicemail message. *See The Regents of the University of California v. UCLA Primate Freedom et al.*, Superior Court of the State of California, County of Los Angeles, West District (Santa Monica), Case No. SC097145: Declaration of Wendy Sugg, February 21, 2008, ¶ 3, Supplemental Declaration of Wendy Sugg, February 21 2008, ¶ 5.

2. Email message from Defendants, dated February 20, 2008 (*see* **EX. B**): "Attached please find notice of an ex parte TRO hearing tomorrow in Los Angeles Superior Court."

3. Letter from Defendants, dated February 20, 2008 (*see* **EX. C**): "Please be advised that Plaintiff The Regents of the University of California intends to move ex parte for the issuance of a temporary restraining order against all Defendants and an order to show cause why a preliminary injunction should not issue. Defendants in this proposed action are as follows: (1) UCLA Primate Freedom; (2) Animal Liberation Brigade, (3) Animal Liberation Front, (4) Linda Faith Greene (aka Lindy Greene), (5) Hillary Roney, (6) Kevin Olliff, (7) Ramin Saber, and (8) Tim Rusmisel."

4. Letter from Defendants, dated February 26, 2008 (*see* **EX. D**): "Enclosed

please find an amended Order to Show Cause re Preliminary Injunction and Temporary Restraining Order. Due to a clerical error, the Order has been amended. All terms of the Order remain the same."

5. Letter from Defendants, dated February 27, 2008 (*see* **EX. E**): "The Order and the Amended Order prohibit UCLA Primate Freedom from 'placing or maintaining upon any website or otherwise disseminating any private or personal information, including home addresses, home phone numbers, mobile phone numbers, email addresses or vehicle license plate numbers, regarding any individual known or believed to be an employee or student of The Regents who conducts, supports, or oversees animal research, or a family or household member who resides with such employee or student."

This demand also required the posting of specific language concerning the California lawsuit. *Complaint* ¶ 35(E).

6. Letter from Defendants, dated February 28, 2008 (*see* **EX. F**): "Despite UCLA Primate Freedom's actions with respect to its home page, UCLA Primate Freedom remains in violation of the Amended Order with respect to live and publicly available internal web pages that contain the personal information of Plaintiff's employees. Accordingly, Plaintiff requests that the following web pages be immediately disabled or modified to remove any and all information prohibited by the Amended Order:

- http://www.uclaprimatefredom.com/targets.html
- http://www.uclaprimatefredom.com/Anton.htm.
- http://www.uclaprimatefredom.com/abrams.html
- http://www.uclaprimatefredom.com/fairbank.html

- http://www.uclaprimatefredom.com/freimer.html
- http://www.uclaprimatefredom.com/fuster.html
- http://www.uclaprimatefredom.com/london.html
- http://www.uclaprimatefredom.com/peccei.html
- http://www.uclaprimatefredom.com/Rosenbaum.html
- http://www.uclaprimatefredom.com/flyers.html
- http://www.uclaprimatefredom.com/Abrams-UCLA.pdf
- http://www.uclaprimatefredom.com/Fairbanks-UCLA.pdf
- http://www.uclaprimatefredom.com/Fuster-UCLA.pdf
- http://www.uclaprimatefredom.com/Peccei-UCLA.pdf
- http://www.uclaprimatefredom.com/Rosenbaum-UCLA.pdf
- http://www.uclaprimatefredom.com/080210.html
- http://www.uclaprimatefredom.com/071222.html
- http://www.uclaprimatefredom.com/071014.html
- http://www.uclaprimatefredom.com/070916.html

Defendants made the above request, despite their admission in the preceding paragraph of the letter that UCLA Primate Freedom had removed other material from its website at the Defendants' request. *Complaint* ¶ 35(F).

7. Letter from Defendants, dated February 29, 2008 (*see* **EX. G**): "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" (underlined emphasis in original).

This particular cease and desist demand extends beyond the parties to the California action and demands alteration of the Plaintiff Primate Freedom Project, Inc.'s *own website* under threat of legal sanction. *Complaint* ¶ 35 (G).

In an abundance of caution, UCLA Primate Freedom self-censored and acceded to the demands of the Defendants and modified its own web-site. *Complaint* ¶¶ 37.

As a result of these communications delivered to Plaintiff's own Director, Plaintiff Primate Freedom Project, Inc. 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.

Plaintiff Primate Freedom Project, Inc. then filed this action seeking protection from further cease and desist demands and further prior restraint. *Complaint* ¶ 39.

## LEGAL BASIS FOR A PRELIMINARY INJUNCTION

A preliminary injunction is appropriate when the movant establishes: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest." *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005); *This That and the Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319, 1321-1322 (11th Cir. 2002). Plaintiff satisfies each of these requirements.

### A. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Defendants' cease and desist threats and demands are an impermissible "prior restraint." Prior restraints on speech, including threats of legal sanction by government officials, are subjected to the highest scrutiny under the First Amendment. Primate Freedom Project's website is constitutionally protected, and

there is no legal basis for Defendants' prior restraint.

### 1. Primate Freedom Project's Website Is Protected Under the First Amendment

Primate Freedom Project is criticizing government officials – one of the most prized freedoms in the Bill of Rights. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Trulock v. Freeh*, 275 F.3d 391, 404 (3rd Cir. 2001) ("The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials.") (citing *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)). "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Primate Freedom Project's speech is far from tame. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Our "profound national commitment to the principal of debate on public issues" requires tolerance for "vehement, caustic and sometimes unpleasantly sharp attacks." *Watts v. United States*, 394 U.S. 705 (1969); *see also Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (speech often a "weapon of attack"). Indeed, "speech may best serve its high

purpose when in induces conditions of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

*NAACP v. Claiborne Hardware* is particularly instructive on the scope of protected, but provocative, speech. 458 U.S. 886 (1982). The case involved a seven-year civil rights campaign that employed a variety of tactics, including the boycotting of white merchants. Because some recalcitrant blacks refused to join the boycott, some organizers would "identif[y] those who traded with the merchants." *Id.* at 903. The names were collected and "read aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909. Organizers gave several speeches containing threats-including those of physical violence-against the boycott violators. In addition, a number of violent acts-including shots fired at individuals' homes-were committed against the boycott breakers. *Id.* at 904-06.

A lawsuit was filed against several individuals and organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in activities associated with the boycott, including picketing and using store watchers. The Mississippi Supreme Court affirmed.

The United States Supreme Court noted that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888. The boycott "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court found error in ascribing to all boycott organizers illegal acts-including violence and threats of violence-of some of the activists. To lose their protective

freedom of speech, the Court held, it must be shown that each defendant had personally committed or authorized the unlawful acts. *Id.* at 932-34.

In particular, one defendant, Charles Evers, appeared to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n. 28;
- discipline would be taken against the violators, *id.* at 902;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck,"*id.* at 902;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.;*
- "blacks who traded with white merchants would be *answerable to him,"id.* at 900 n. 28. (emphasis in the original).

These statements "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended." Id.* at 927 (emphasis added). However, the Court concluded that the speech was protected and not "fighting words," not likely to cause an immediate panic or advocate imminent and likely violence under *Brandenburg v. Ohio,* 395 U.S. 444 (1969) and, not a "true threat" under, *Watts v. United States,* 394 U.S. 705, 705 (1969). *Id.* at 928 n. 71.

The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and could not be viewed as authorizing lawless action, even if they ultimately did lead to that result. Absent "evidence-apart from the speeches themselves-that Evers authorized ... violence" against the boycott

breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929.

Like *Claiborne Hardware,* this case involves an effort by groups and individuals in pursuit of a common political cause where some of the activities were lawful, others may not have been. Like *Claiborne Hardware,* Primate Freedom Projects speech is protected because there is absolutely no evidence that it was a participant in violent acts. Primate Freedom Project's speech was protected, and as shown below, the means to quash that speech – prior restraint – is the least tolerable under the First Amendment.

**2. Defendants Have Engaged in an Impermissible Prior Restraint Under the First Amendment**

"The doctrine of prior restraint, reduced to its simplest form, is that no prior restraint may prevent exercise of free speech, although criminal or civil action may result from that speech." *ACLU v. City of Pittsburgh,* 586 F. Supp. 417, 421 (W.D. Pa. 1984). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245 (2002); *see also NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 907 (1982). Prior restraint is censorship of the worst kind -- it prevents expression from reaching the marketplace of ideas. *Southeastern Promotions v. Conrad,* 420 U.S. 557, 559 (1975) ("a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand").

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). Indeed, the Supreme Court has written that "it has been generally, if not universally, considered that it is the chief purpose of [the First

Amendment] to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-14 (1931). Thus, "[a]ny prior restraint on expression comes ... with a heavy presumption against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity"); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (prohibiting prior restraint of "Pentagon Papers" containing sensitive national security data despite government's claim of "grave and irreparable" damage to the national security). Prior restraint is never allowed unless a case "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraint." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S 557, 559 (1975).

"Prior restraints are presumptively unconstitutional and face strict scrutiny." *Burk v. Augusta-Richmond Cty.*, 365 F.3D 1247 (11th Cir. 2004); *First National Bank of Boston v. Belloti*, 435 U.S. 765, 786 (1978) ("exacting scrutiny" applied). The Supreme Court explains:

> Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180-81 (1968).

Primate Freedom Project has been subjected to demands by government officials which threatened legal sanction if it failed to modify its website. This is a prior restraint. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court reviewed the constitutionality of the "Rhode Island Commission to Encourage Morality in Youth." *Id.* at 59. The Commission's purpose was "to educate the public

concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* The Commission's practice was to notify distributors that certain material had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youth under 18 years of age. *Id.* at 61. The typical notice provided by the Commission reminded the recipient that, in the absence of compliance, it was the Commission's duty to recommend prosecution of purveyors of obscenity to the Attorney General. *Id.* at 62.

The Supreme Court recognized that Rhode Island's informal threats of legal sanctions amounted to a prior restraint. The Court noted that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ." *Id.* at 68. In finding the informal notification system unconstitutional, the Supreme Court noted that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* at 70. Other courts have reached the same conclusion as the Supreme Court in *Bantam Books* – that threats of legal sanction by public officials are prior restraints. *See Penthouse Int'l v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984).

Similarly, several cases have analyzed prior restraints on websites. This Circuit's decision in *United States v. Carmichael*, presents one of the most thoughtful and complete analysis. There, the Alabama United States Attorney's Office moved for protective order requiring a defendant, charged with drug conspiracy and

money laundering, to take down his Internet website that was allegedly threatening to witnesses and government agents. 326 F.Supp. 2d 1267 (M.D. Ala. 2004); 326 F.Supp. 2d 1303 (M.D. Ala. 2004) (supplemental order). The website included the names, photographs and personal information on trial participants including agents and informants identified on the website as "wanted." The United States Attorney claimed that the website could have "several consequences harmful to law enforcement: (1) the site could increase the possibility that witnesses could be retaliated against or intimidated; (2) the site could hinder the government in getting additional witnesses to come forward; and (3) if the site posted photographs of law-enforcement agents, it could hinder their ability to work undercover, and it would increase the possibility that those agents would be retaliated against or harassed." *Id.* at 1273-74. An extensive evidentiary hearing was held where DEA agents presented concerns about the impact of the website on undercover operations, witnesses in the criminal case expressed their own "fear" that Carmichael was "trying to get him killed," and specific prior instances of alleged threats and intimidation by Carmichael were presented. *Id.* at 1274-77.

The court analyzed the website and evidence against the "true threat" doctrine noting that "[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.'" *Id.* at 1279-81 (*citing United States v. Alaboud*, 347 F.3d 1293, 1296-97 (11th Cir.2003)). Analyzing the language of the website, the context in which it appeared including Carmichael's prior conviction for murder and the "history of violence committed against

informants in drug distribution cases generally," and the testimony of the witnesses claiming intimidation and other harms, the court found that there was no true threat. *Id.* at 1281-91. Though it felt that the government made its "strongest argument ... that the website is meant to encourage others to inflict harm on them," the court nevertheless concluded that the "stringent" First Amendment standard was not satisfied. In reaching its conclusion, the court noted:

> This case presents a conflict between, on the one hand, the government's interests in protecting the safety of its witnesses and agents and in enforcing the law, and, on the other hand, Carmichael's less tangible constitutional interests in free speech and preparing his defense. Put another way, the government has argued that if Carmichael's site stays up, physical harm could come to witnesses and agents and the government could be inhibited from enforcing the law in the future, while Carmichael has argued that, if the site is taken down, his rights will be violated. The court has thus been asked not only to weigh very dissimilar interests but to predict the likelihood that future events will implicate those interests.
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> [T]his posture creates an incentive for the court to over-predict the danger posed by Carmichael's website. If the court permits the site to remain up and a witness or agent is harmed, the court will be blamed for predicting incorrectly. However, if the court restricts or prohibits Carmichael's site, few will even be able to judge whether the court predicted accurately because the site will no longer be available in the same form, if at all. Thus, the safest course for the court is to over-predict the danger posed by Carmichael's site. Indeed, when confronted with a conflict between the public safety and an individual's rights, it is almost always going to be most comfortable to err on the side of public safety.
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> The antidote to this incentive is to examine rigorously the government's claim that Carmichael's website poses a threat. The court has done this and concludes that, while the website certainly imposes discomfort on some individuals, it is not a serious threat sufficient to warrant a prior restraint on Carmichael's speech or an imposition on his constitutional right to investigate his case..... *Id.* at 1301.

Likewise, in *Zieper v. Metzinger*, the FBI demanded that a website video of a mock terrorist attack in Time Square be removed because of security concerns, and specifically law enforcement concerns that the video might "incite a riot." 392

F.Supp. 2d 516, 531 (S.D.N.Y. 2005). Zieper's video included no actors or action, "but rather consists simply of the narrator and what appears to be daytime street footage at various locations in Times Square. As described by plaintiffs, '[t]he plan [depicted in the film] included the use of violence, including a staged sexual assault.'" *Id.* at 520. FBI agents repeatedly demanded that the website video be removed. Zieper refused, and filed suit seeking protection from a prior restraint. First, the district court concluded that the video was protected speech: "To a reasonable person viewing the video for this first time, it may suggest that someone had planned to undertake activities that are unlawful. That circumstance, in isolation, does not strip the video of its protection as speech." *Id.* at 525. Next, the court looked to whether the threats constituted a prior restraint, and found that a jury question was presented focused on the following:

> Where the use of coercive power is threatened, First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech. The exercise of First Amendment freedoms may be deterred almost as potently by the threat of sanctions as by their actual application." Only when a government official attempts to coerce, rather than convince, does a First Amendment violation occur. The test is objective: whether the official's comments 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request' to cease engaging in protected speech. *Id.* at 525 (citations omitted).

In *Sheehan v. Gregorie*, the operator of website directed to issue of police accountability brought action challenging constitutionality of state statute, which prohibited release of residential address, telephone number, and other personal information of law enforcement officers and court employees "with intent to harm or intimidate." 272 F.Supp.2d 1135 (W.D. Wash. 2003). The plaintiff, as here, removed personally identifiable information on law enforcement officers, but filed

suit claiming that the "disclosure of lawfully-obtained, publicly-available personal identifying information regarding individual officers is a necessary tool to communicate and achieve his political message of police accountability." *Id.* at 1139 n.2. After analyzing the First Amendment case law that permits much advocacy on lawlessness, the court held "the statute, on its face, simply does not regulate true threats as defined by First Amendment jurisprudence." *Id.* at 1143. And while the government argued that argue that "the statute represents a need to further a state interest of the highest order protecting law enforcement-related, corrections officer-related, and court-related employees from harm and intimidation," *id.* at 1145, the court found that the regulation was both a content-based restriction on speech and that the government's interests were not compelling. *Id.* at 1147-1150. *See also Porter v. Bowen*, 496 U.S. 1009 (9th Cir. 2007) (threatened prosecution of vote-swapping website unconstitutional); *Pilchesky v. Miller*, 2006 WL 2884445 (M.D. Pa. 2006) (public officials demands to shut down on-line message board with "wanted" postings about public officials stated First Amendment claim).

Set against this wall of authority is one Ninth Circuit decision that, in the face of actual murders of abortion doctors identified and crossed-out on website "wanted" posters, led to a splintered *en banc* decision allowing restrictions on a website pursuant to federal legislation passed to protect abortion providers. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc). The decision occurred after a jury verdict, so the majority "construe[d] the facts in the light most favorable" to the physicians including that defendants were "aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the

reproductive health services community who was identified." Given that construction, and "the previous pattern of 'WANTED' posters identifying a specific physician followed by that physician's murder," the majority concluded that the jury's finding of a "true threat" should not be reversed. *Id.* at 1063.[1] The majority sought to distinguish *Claiborne Hardware,* by focusing on the federal statute creating special protections for abortion providers. *Id.* at 1073-74.

Judge Kozinski and the other dissenters found the case indistinguishable from *Claiborne Hardware.* In particular, as the dissenters pointed out, the majority, ignored a critical element of *Claiborne Hardware:* "The Supreme Court held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, *unless it is shown that the defendants actually participated in or authorized the illegal conduct.*" *Id.* at 1095 (emphasis added). The *Carmichael* decision in Alabama also identified that distinction additionally noting that "the United States Court of Appeals for the Eleventh Circuit has [defined true threats as]: '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.*'" 326 F.Supp.2d at 1279 (emphasis added) (*distinguishing Planned Parenthood of Columbia/Willamette* and siding with its dissenters). Beyond the Ninth Circuit's utilization of the wrong test, this case is readily distinguishable as: (1) there is no underlying federal statute here, (2) there is absolutely no evidence that Primate Freedom Project has done anything more than exercise free speech, non-violently, on an issue of public import, and (3) the level of violence *by others* is far less

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[1] "Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 1080.

significant than the abortion violence that included the deaths of three of twelve persons crossed-out on wanted posters. *See also Sheehan*, 272 F.Supp.2d at 1141-43 (*distinguishing Planned Parenthood of Columbia/Willamette*). This Court should follow the Supreme Court's decision in *Claiborne Hardware*, and the Supreme Court's broad protection of even advocacy of illegal conduct.

Ultimately, Primate Freedom Project finds itself in a situation analogous to those receiving notices in *Bantam Books* and its website-censorship-threat progeny. A device that "compels or restrains belief and association is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod v. Burns*, 427 U.S. 347, 357 (1976)(quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)). Defendants engaged in a prior restraint warranting injunctive relief. *See Bantam Books*, 372 U.S. at 638 n.8.

### C. Defendants Have Engaged in an Impermissible Prior Restraint Under Georgia Constitution

The Georgia Constitution even more clearly bars **essentially all** prior restraint. The Georgia Supreme Court has, since 1873, flatly and unequivocally held that "equity will not enjoin [even unprotected speech such as] libel and slander." *Pittman v. Cohn Communities, Inc.*, 240 Ga. 106, 109 (1977) (citing *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70, 72 (1873)); *see also Cohen v. Advanced Med. Group of Ga.*, 496 S.E.2d 710, 711 (Ga. 1998). The Georgia Constitution's free speech protections are even stronger than those of the United States Constitution in the area of prior restraint in that "all interference" with speech before it occurs is "absolutely interdicted." *K. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 792 (1962). The Georgia Constitution of 1983 provides:

> Freedom of Speech and Press Guaranteed. No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

Ga. Const. 1983, Art. I, Sec. I, Par. V.[2] "[T]he State constitutional guarantee of freedom of speech is absolute in what it protects." *Hirsh v. City of Atlanta*, 261 Ga. 22, 27 (1991). *See, e.g. Georgia Gazette Publ'g Co. v. Ramsey*, 248 Ga. 528, 530 (1981); *Singer*, 49 Ga. at 72-73; *Fernandez v. North Ga. Reg'l Medical Ctr., Inc.*, 260 Ga. 765, 766 (1991); *Brannon v. American Micro Distrib.*, 255 Ga. 691, 692 (1986); *Pittman v. Cohn Communications*, 240 Ga. 106, 110 (1977).

*K. Gordon Murray* explained Georgia's constitutional prohibition on prior restraints as follows:

> This means that no interference, no matter for how short a time nor the smallness of degree, can be tolerated [not even] for one second in any conceivable manner.... [I]ntrusion even for the shortest time and in the most superficial manner would be an invasion of constitutionally protected liberty.

217 Ga. at 793 ("The far reaching effect of this decision does not escape our notice or concern.... [Nevertheless,] we have no alternative to saying, this sayeth the Constitution, and we cheerfully obey."); *see also Georgia Gazette Publ. Co*, 248 Ga. at 530. Therefore, under the Georgia Constitution, even more clearly than the First Amendment, Defendants' prior restraint is unconstitutional.

### B. RESTRAINTS ON SPEECH CAUSE IRREPARABLE INJURY

The "irreparable injury" requirement is a simple matter in cases of prior restraint. "The loss of First Amendment freedoms, even for minimal periods of time,

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[2] This provision "traces its lineage to the first Constitution of our State, in 1777, antedating the First Amendment by fourteen years." *Martin Luther King, Jr. Center for Social Change, Inc v. Am. Heritage Prod.*, 250 Ga. 135, 150 (1982) (Weltner, J., concurring).

unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Northeastern Fla. Chapter of Ass"n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990); *ACLU v. Reno*, 929 F. Supp. 824, 851 (D. Pa. 1996). As demonstrated above, the Cease and Desist threats have caused Primate Freedom Project to modify its website and self-censor. Irreparable harm is shown.

### C. THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFF'S FAVOR

In assessing a request for preliminary injunctive relief, courts must weigh the relative hardships faced by each party. *See Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691, 693-94 (4th Cir. 1994). In so doing, courts generally balance the injury faced by the person applying for an injunction against the injury that would be sustained by the defendant if relief were granted. *See Yakus v. United States*, 321 U.S. 414, 440 (1943) (court balances convenience of parties and possible injuries as they may be affected by granting or withholding injunction). In this case, the equities decisively tip in Primate Freedom Project's favor. Plaintiff has already self-censored in the face of Defendant's threats. In such a situation, "the seriousness of the injury caused by allegedly unconstitutional restraints on fundamental rights weighs in favor of a preliminary injunction." *One World One Family Now v. City of Key West*, 852 F. Supp. 1005, 1013 (S.D. Fla. 1994); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122, 1126 (5th Cir. 1978) (determining that the relative injuries tip in favor of plaintiff in First Amendment case, and noting that "in our constitutional scheme of things [restrictions on First Amendment rights] are viewed very gravely indeed.")

## D. GRANTING RELIEF IS IN THE PUBLIC INTEREST

Finally, a preliminary injunction serves the public interest by fostering free speech. "No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *Reno*, 929 F. Supp. at 851 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

## CONCLUSION

For the foregoing reasons, declaratory relief and a preliminary injunction should be entered finding that Primate Freedom Projects website is constitutionally protected, and enjoining Defendants from further threats and prior restraints.

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Respectfully submitted,

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