

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

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

MAR 24 2008

JAMES N. HATTEN, Clerk
By: *[Signature]* Deputy Clerk

)
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 MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff seeks a preliminary injunction and declaratory relief. Specifically, Plaintiff seeks an order declaring null and void Defendants' commands, orders, threats, actions, policies, and procedures to the extent that they have suppressed Primate Freedom Project, Inc.'s expressive speech on its website which is protected under the free expression and petition clauses of the First and Fourteenth Amendments of the United States Constitution, the privileges and immunities, due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and Article I, § 1, ¶¶ I, II, V, VI, VII, IX of the Georgia Constitution and enjoining all Defendants, their officers,

agents, successors, employees, attorneys, and those acting in concert therewith within the scope of Federal Rule of Civil Procedure 65, from interfering with Primate Freedom Project Inc.'s website or engaging in further impermissible prior restraint of speech.

1. "To be entitled to a preliminary injunction, the plaintiffs must demonstrate that (1) they have a substantial likelihood of success on the merits, (2) they will suffer irreparable injury unless the injunction issues, (3) the threatened injury to them outweighs the damage that the injunction would have on the opposing parties, and (4) if issued, the injunction would not disserve the public interest." *This That and Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319, 1321-22 (11th Cir. 2002).

2. Plaintiff relies upon the accompanying brief, verified complaint and accompanying exhibits in support of their motion for preliminary injunction.

3. Plaintiff is substantially likely to succeed on the merits. *NAACP v. Claiborne Hardware* is particularly instructive on the scope of protected, but provocative, speech. 458 U.S. 886 (1982). It is, for all relevant purposes, indistinguishable from this case. Moreover, the means to utilized to quash Plaintiff's speech - prior restraint - is the least tolerable under the First Amendment. "[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);

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").

Several cases deal with "wanted" poster websites, and prior restraint of websites alleged to be threatening. Such speech is, almost uniformly, constitutionally protected. *United States v. Carmichael*, 326 F.Supp. 2d 1267 (M.D. Ala. 2004); 326 F.Supp. 2d 1303 (M.D. Ala. 2004) (website with "wanted" posters and personally identifiable information on informants protected); *Zieper v. Metzinger*, 392 F.Supp. 2d 516, 531 (S.D.N.Y. 2005) (website alleged to cause "riot" in Time Square protected); *Sheehan v. Gregorie*, 272 F.Supp.2d 1135 (W.D. Wash. 2003) (website may publish residential address, telephone number, and other personal information of law enforcement officers and court employees because statute barring such publication "with intent to harm or intimidate" unconstitutional); *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); *but see Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

4. Without an injunction, Plaintiff will suffer irreparable injury in the form of

chilling impact on free speech. Indeed, Plaintiff self-censored its website pending outcome of this lawsuit.

5. An injunction does not impede any compelling government interest.

6. Protecting First and Fourteenth Amendment protections is always in the public interest.

WHEREFORE, Plaintiff respectfully requests that this Court:

(A) Expediently schedule a hearing, if necessary, on the Plaintiff's request for a preliminary injunction;¹

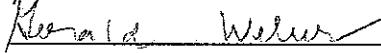
(B) Consolidate, if the Court deems it appropriate, the preliminary injunction with the trial on the merits for equitable relief;²

¹ *Cumulus Media, Inc. v. Clear Channel Communications*, 304 F.3d 1167, 1178 (11th Cir. 2002) ("[a]n evidentiary hearing is required for entry of a preliminary injunction only where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue") (internal quotations omitted); *McDonalds Corp. v. Robertson*, 147 F.3d 1301, 1311 (11th Cir 1998) ("Rule 65 does not require an evidentiary hearing," and hearing unnecessary where "material facts are not in dispute"); *Budlong v. Graham*, 488 F.Supp. 2d 1245, 1249 (N.D. Ga. 2006) ("The Court does not read Eleventh Circuit precedent to require a trial court to hold an evidentiary hearing whenever facts might be in dispute. The determination of whether the germane facts are "bitterly contested" is not, as this Court understands it, an exercise in the conceivable, but an assessment made on the papers and arguments in the record.") (emphasis in original).

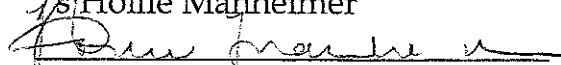
² *Drummond v. Fulton Cty. Dep't of Family and Children's Servs.*, 563 F.2d 1200, 1204 (5th Cir. 1977) ("the consolidation represented a responsible exercise of judicial discretion in view of the essentially legal nature of the contest and the need for prompt action on this case"); *Budlong v. Graham*, 488 F.Supp. 2d 1245,

- (C) Grant Plaintiff's motion for preliminary injunctive and declaratory relief; and
- (D) Grant such other relief as Plaintiff has requested in its Verified Complaint including damages, and reasonable attorneys' fees and costs.

DATED this the 24th day of March, 2008.

/s/ Gerald Weber

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1248-50 (N.D. Ga. 2006) (analyzing the factors to be considered in consolidating a preliminary injunction with a trial on the merits without the necessity of a hearing). Plaintiff does not waive any relief in consolidation.