IN THE SUPREME COURT OF THE UNITED STATES

NO. 99-101

AMERICAN LIFE ACTIVISTS, DANIEL COAST, AND BRAINSPRING.COM

DEFENDANT-APELLANTS

V.

PLANNED PARENTING, INC., AND DR. MIKE NICKETTE,

PLAINTIFF-APPELLEES

BRIEF FOR THE DEFENDANT-APPELLANTS

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Argument: December 1, 1999
Ames Courtroom
8:00 p.m.

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Did the District Court wrongfully rule that the Nuremberg Files web site, which merely collects and reports information and contains no threats of any kind, violated the Freedom of Access to Building Entrances Act (FABE)[1], given that Internet content is entitled to full First Amendment protection?

Is an Internet Service Provider ("ISP"), whose own conduct did not violate FABE, immune from third party liability when it hosted unedited web content authored by its users?

INTRODUCTION

In the 1800s, the abolitionist movement was formed to protest against slavery, a practice that they considered wrong on both moral and religious grounds, even though it was legal at the time. In the last quarter of this century, the pro-life movement joined together to protest against abortion, a practice that they considered wrong on both moral and religious grounds, even though it was legal at the time and is still legal today. Just as abolitionists in the 1800s were denied free speech protection when protesting slavery when leaders in both the North and the South decided that their viewpoint was unpopular, pro-life protesters have had their free speech rights curtailed in our society because the pro-abortion forces have determined that the "unpopular" pro-life message must be extinguished at all costs, even if it means trampling on their First Amendment rights. With the passage of the Freedom of Access to Building Entrances Act (FABE), the pro-abortion forces were given another weapon to eradicate the free speech rights of abortion

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[1] FABE and the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, are identical except that FABE includes the words "or knowingly" in its definition of prohibited activities. Both statutes were part of the same legislative debate, and thus share an identical legislative history. Judicial opinions on either statute implicate the other statute unless the words "or knowingly" in the definition of prohibited activities would be dispositive.

protesters. Although this law should have been struck down on constitutional grounds, including inadequate authority under the Commerce Clause, violation of the First Amendment, and vagueness, only one court has had the courage to declare FABE unconstitutional[2]. Defendants hope that this Court will be similarly courageous.

This situation has careened so far out of control that these pro-abortion forces have launched their attacks against the First Amendment into a new arena, the Internet, and are threatening additional innocent parties who merely provide the infrastructure for the Internet. Just as abolitionists who dared to speak out or write against slavery were at risk of imprisonment, modern day abolitionists who dare speak out against abortion risk imprisonment and fines for doing nothing more than collecting information about the abortion industry and reporting about it. But in today's world, the pro-abortion forces also want to attack the very fiber of the Internet, the ISPs who provide storage and connectivity to those who want to participate in the Internet's global marketplace of ideas.

Although Defendants ALA and Coast urge this Court to show similar courage and strike down FABE as unconstitutional, all of the Defendants ask this Court to find that FABE does not apply to this exercise of First Amendment rights, that FABE was wrongly applied to Internet content, and that Defendant Brainspring is not liable in any way whatsoever.

STATEMENT OF FACTS

Members of Defendant ALA, including Defendant Daniel Coast, are activists who believe that the abortion industry is morally reprehensible and will eventually be made illegal, just as slavery became illegal in the 19th century. Just as Nazi war criminals were prosecuted at

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[2] *Hoffman v. Hunt* 923 F.Supp 791 (1996 W.D. N.C.).

Nuremberg, Defendants believe that one day, abortionists will be tried in courts of law for their crimes against humanity. To that end, they have collected publicly available evidence about those involved in the abortion industry and have invited other people to assist them in that collection activity. Defendants also gather news about the abortion industry and create reports based on that information. Defendants periodically store this information, which includes information about the Plaintiffs, on their web site, which is hosted by Defendant Brainspring, but this news gathering activity is the limit of their actions for the purposes of the case at hand. Defendants have never contacted Plaintiffs in any way whatsoever. (R. 11).

Similarly to the abolitionists of the 1800s who wrote against slavery, Defendants have been attacked for gathering news and writing against abortion. Because their pro-life writings and newsgathering activities are deemed undesirable by the Plaintiffs, the Plaintiffs are attempting to silence the Defendants by bringing this action.

ARGUMENTS

I. THE NUREMBURG FILES WEB SITE CONTENT, AS INTERNET CONTENT, SHOULD BE GIVEN FULL FIRST AMENDMENT PROTECTION.

This Court has clearly stated that Internet content deserves full First Amendment Protection. In *Reno v. ACLU*, 521 U.S. 844 (1997), when discussing sexually oriented content on the Internet, this Court stated that

> [the] Internet is not as "invasive" as radio or television. The District Court specifically found that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" [*citation omitted*]. It also … cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." *Reno v. ACLU* at 869.

This Court's opinion continued, stating that

> unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." … This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." [*citation omitted*]. We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium. *Id.*

The fact that the Nuremberg Files web site may be unpopular does not remove its First Amendment protections. This Court has often repeated that the government cannot silence speech because others do not like what is being said. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court ruled:

> The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. *Id.* at 745-46.

This Court also said in *Street v. New York*, 394 U.S. 576 (1969):

> It is firmly settled that … the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. *Id.* at 592.

The main purpose of the First Amendment is to protect unpopular or controversial speech. This Court has recognized that protection, not suppression of vigorous debate, stands as a central principle of the Free Speech Clause. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), this Court stated:

> the function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a

> condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. *Id*. at 4.

This Court should be vigilant to ensure that FABE is not used as a weapon by pro-abortion forces to silence the pro-life point of view, particularly when it is in a wide-open forum such as the Internet.

II. THE APPLICATION OF FABE TO SUPPRESS SPEECH BASED ON CONTENT DEMONSTRATES THAT ITS GOAL IS TO LIMIT SPEECH, NOT TO REGULATE INTERSTATE COMMERCE.

Almost all of the information stored on the Nuremberg Files web site can be obtained from other publicly available sources. In many cases, more information is available from these other sources than is available on the Nuremberg Files web site. Given that the listing of doctors who provide abortions can be generated from several other sources, FABE violates the First Amendment because it selectively outlaws specific protest depending on the content and viewpoint of the speech. If opposition to abortion motivates the protestors, then they can be prosecuted under FABE. This indicates that Congress did not really intend to regulate interstate commerce with FABE, but curtail the First Amendment freedoms of those who oppose abortion.

Content-based and viewpoint-based restrictions on speech are unconstitutional. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 385 (1993) and *Widmar v. Vincent*, 454 U.S. 263 (1981). On its face and as applied, FABE is content-based and is thus "presumptively" invalid. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 US 105, 115-16 (1991). Congress cannot restrict speech because the government disfavors that point of view. As this Court said in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992):

> The First Amendment generally prevents government from proscribing speech … or even expressive conduct … because of disapproval of the

> ideas expressed. Content-based regulations are presumptively invalid. *Id.* at 382 (*citations omitted*).

Where it is the "content of speech" that determines if it is within a statute's restrictions, the statute is unconstitutional for lack of content-neutrality. *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Depart. v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. … The essence of this forbidden censorship is content control").

Just because the abortionists feel uncomfortable with the Nuremberg files is insufficient to warrant extinguishing Defendants' First Amendment rights. A regulation that permits the restriction of speech out of concern for its communicative impact is content-based. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989)*; Boos v. Barry*, 485 U.S. 312, 321 (1988). Moreover, the prevention of "emotional effects" on abortionists is an unconstitutional basis for restricting expression. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

Surprisingly, FABE **does not** apply to situations in which people blockade an abortion clinic for reasons having nothing to do with opposition to abortion. The Senate report offers the chilling, content-based distinction between illegal blockades under FABE and blockades that would not violate FABE:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their conduct might violate some other law, such as a local trespass law). In that example, the demonstrators motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

> The Committee has concluded that inclusion of the motive element is important to ensure that the Act is precisely targeted at the conduct that, as the Committee's record demonstrates, requires new Federal legislation: deliberate efforts to interfere with the delivery of abortion-related services.
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> Senate Report No. 103-117, 103rd Congress, 1st Session at 24 (emphasis added).

Now the same pro-abortion forces seek to suppress content on the Internet merely because it originates from a viewpoint with which they disagree. This Court ruled in *Reno v. ACLU* that sexually explicit content on the Internet cannot be proscribed, and even Nazi's and Klansmen can post their racist hate-filled speech on the Internet with full First Amendment protection. Yet for those who believe that innocent life is worth protecting and speak out or write against abortion, the District Court would deny them the same protections by applying FABE. This Court should not let such an egregious violation of fundamental First Amendment protections continue.

III. WHEN FABE IS STRICTLY CONSTRUED, AS IS APPROPRIATE FOR CONTENT ENJOYING FULL FIRST AMENDMENT PROTECTION, THE NUREMBERG FILES WEB SITE DOES NOT VIOLATE FABE IN ANY WAY, AND THE FINDING TO THE CONTRARY WAS CLEARLY ERRONEOUS.

Given that the Nuremberg Files web site is entitled to full First Amendment protection, FABE must be construed narrowly if it is going to regulate such a web site, and the District Court conceded that "the law requires a higher level of scrutiny and proof for an injunction involving speech". Decision and Order, ¶ 7. As such, it is clearly unreasonable to find that the content of the Nuremberg Files violates FABE.

A. THE NUREMBERG FILES CONTENT CANNOT CONSTITUTE FORCE OR A THREAT OF FORCE, AND THUS FABE WAS WRONGFULLY APPLIED.

The very nature of the conduct prohibited by FABE is physical, thus as written speech, the Nuremberg Files web site cannot be in violation of FABE. Furthermore, the District Court

was clearly erroneous in finding that Defendants had communicated a true threat, particularly because the Plaintiffs failed to show or allege with specificity any threat directed at the Plaintiffs. The lack of specificity is not surprising, because an examination of the site reveals that, in fact, there are no "true threats" to be found. In fact, the stated aim of the Nuremberg Files web site is merely to collect evidence to be used at trial. It is clearly erroneous to claim that collecting evidence for use in support of the judicial process is a "true threat."

Unlike this Court and the Appellate Court cited in *Reno v. ACLU*, the District Court obviously did not comprehend the different types of Internet communication. This Court, in the *Reno v. ACLU* opinion, correctly described using the World Wide Web as an exercise in information retrieval.[3]

> The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information [others are called Web pages]. … Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. … The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications …. *Reno v. ACLU* at 852-53.

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[3] This Court relied in part on the opinion of the District Court in *ACLU v. Reno*, 929 F.Supp 824 (E.D. Pa. 1996), which provided a clear and concise categorization of Internet communications, classifying the Web as "remote information retrieval." *Id.* at 834.

The analogy to a library is particularly apropos because one must go looking for content in a library. Thus, one must go looking for a threat if, in fact, one actually exists; the threat does not come to the user. Using the District Court's flawed logic, both an author and a library would be guilty of "un-American activities" if the author wrote a publication and placed it in the library, if the publication contained publicly available information about judges, quoted the *Communist Manifesto*, and advocated violent overthrow of the government. Such obvious disregard for the First Amendment was discredited earlier in this century and should not be tolerated today, irrespective of the viewpoint expressed. However, the District Court's lack of understanding of Internet communication is further evidenced by its order stating that a "true threat" involves a person making a verbal statement which causes fear of bodily harm by the "listener" and that the "speaker" intended that the verbal statement be taken as a threat. Decision and Order, ¶ 3. In order for there to be a communication of a threat, the threat must be sent from the speaker to the listener. Aside from the fact that there was no verbal communication whatsoever between Defendants and Plaintiffs and as such the Plaintiffs could not have been "listeners," there was also no transmission of any kind from the Defendants to the Plaintiffs. If the District Court had correctly applied its own definition of a "true threat", then this case should never have gone to trial.

B. <u>THE LACK OF A FINDING THAT THE CONTENT OF THE NUREMBERG FILES WEB SITE IS LIKELY TO INCITE SOMEONE TO IMMINENT LAWLESS ACTION MUST MEAN THAT IT IS PROTECTED SPEECH AND THUS NOT IN VIOLATION OF FABE.</u>

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), this Court ruled that even the racist and hateful speech the Klu Klux Klan is entitled to first amendment protection, unless it constitutes an "incitement to imminent lawless action." *Id*. at 449. The very fact that a web site is a remote information retrieval process means that it is almost impossible to incite imminent lawless

action. The fact that the District Court did not find that the content of the Nuremberg Files web site did not incite someone to imminent lawless action (and did not fall into any other class of prohibited speech) means that, by default, it is protected speech. Thus the District Court's issuance of the injunction based on a lack of First Amendment protection was clearly erroneous. Decision and Order, ¶ 47.

IV. THE INJUNCTION ISSUED BY THE DISTRICT COURT IS UNCONSTITUTIONAL

By enjoining the publication if information publicly available elsewhere, the District Court violated Defendants First Amendment rights, both in terms of freedom of speech as well as freedom of the press. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court declared that an injunction that restricted the speech of pro-life protesters "require[ed] a somewhat more stringent application of general First Amendment principles." *Id*. at 765. This Court systematically struck down all of the elements of the injunction which "burdens more speech than necessary to protect access to the clinic." *Id*. at 771. This Court followed similar rationale in striking down portions of an injunction in *Schenck v. Pro-Choice Network Of Western New York*, 519 U.S. 357

The fact that the names of abortionists such as Drs. Gunn, Patterson, and Britton appear in a strikethrough font is merely reporting of news. All three murders occurred before 1995, before the Web was in widespread use or the Nuremberg Files even existed. Yet other online news services are not being attacked, and they carry much more detailed information about these murders. Several of these information sources reported the murders within hours of their occurrence.[4]

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[4] For example, Dr. Gunn was murdered on March 10, 1993. A Lexis-Nexis search for the event revealed 15 stories that ran on the 10th, 75 stories that ran on the 11th, 89 stories that ran on the 12th, and 40 stories that ran on the 13th.

Element 1(a) of the injunction is not necessary because it merely prohibits Defendants from breaking the law, which they simply have not done if FABE is properly construed. Furthermore, the elements 1(b) and 1(c) of the injunction cannot be enforced because mirror copies of the Nuremberg Files web site exist outside of the United States, which are accessible from within the United States, but are not under Defendants' control. Thus no compelling interest is served by the District Court's egregious denial of First Amendment protections for individuals who are pro-life and oppose abortion.

V. THIS COURT SHOULD STRIKE DOWN FABE AS UNCONSTITUTIONAL.

Although this Court has ample grounds to reverse the District Court without finding FABE itself unconstitutional, the Defendants nonetheless ask this Court to rule that FABE is unconstitutional because it is content-based, overbroad, and is also impermissibly vague. The very fact that pro-abortion forces are using FABE to attack a web site located thousands of miles from their physical location is but one example of why FABE should be struck down.

A. THIS COURT SHOULD RULE THAT FABE IS UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). It may "not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). FABE is not narrowly tailored on its face, and given that it is being applied to written information on the Internet, it is certainly not narrowly tailored as applied. In a case involving this exact statute,

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Far more information was released about Dr. Gunn's murder by other online sources than was ever included in the Nuremberg Files web site.

American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.) *cert. denied*, 116 S.Ct. 55 (1995), the Appeals Court stated that:

> [FABE] does not prohibit peaceful protesters from praying, chanting, counseling, carrying signs, distributing handbills, or otherwise expressing their opposition to abortion. What [FABE] does prohibit is force, the threat of force, and physical obstruction. *Id.* at 650 (emphasis added).

The Nuremberg Files web site can be viewed as an Internet handbill, or a cyber-pamphlet. If the Nuremberg Files collected its information on abortionists in order to provide information to support a boycott of some form, given their blatant disregard for the First Amendment freedoms of pro-life individuals, it is not beyond imagination to envision these same pro-abortion forces to attempting to apply FABE in an identical fashion. As this Court stated previously, "through the use of Web pages, [anyone] can become a pamphleteer" *Reno v. ACLU*, 521 U.S. at 869. This Court has repeatedly warned against governmental restrictions that chill leafleting. See, e.g. *United States v. Kokinda*, 497 U.S. 720, 734 (1990); *ISKON v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 2713-14 (1992) (O'Connor, J., concurring); *Ward*, 491 U.S. at 799 n.7; *United States v. Grace*, 461 U.S. 171, 177 (1983). Since the District Court so easily applied FABE to this cyber-pamphlet, which merely presents information and contains not a single statement advocating violence towards abortionists, FABE is obviously overbroad.

B. THIS COURT SHOULD RULE THAT FABE IS VOID FOR VAGUENESS

A statute is unconstitutionally vague if people of common intelligence must necessarily guess at its meaning and differ as to its application., *Zwickler v. Koota*, 389 U.S. 241, 249 (1967)(quoting *NAACP v. Alabama*, 377 U.S. 288, 308 (1964)). Vagueness concerns are especially evident in the context of the First Amendment, as is the case here. In the First Amendment context, the problem with vague statutes is that they produce a chilling effect on free speech. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). Vague statutes chill free speech

because people refrain from protected activity in fear that a unclear statute might apply to them. *Id*. FABE has the potential of vague application because of uncertainty over the terms, "physical obstruction," "intimidate," and "interfere." The second Circuit dealt with a similar issue in *Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989). The court held that a Connecticut statute making it criminal to "interfere with the lawful taking of wildlife by another person" was unconstitutionally overbroad and vague on its face. The Second Circuit stated that the term "interfere" "can mean anything" and "is so imprecise and indefinite that it is subject to any number of interpretations." *Id.* at 436. The court observed that the Connecticut "Hunter Harassment Act" "clearly is designed to protect hunters from conduct – verbal or otherwise – by those opposed to hunting," and, therefore could also be considered a content-based restriction. *Id.* at 437. The Second Circuit relied in part on this Court's invalidation, as facially overbroad, of an ordinance making it unlawful to "interrupt," a police officer in the performance of his duty. See *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987). The Second Circuit found that the term "interfere," like the term "interrupt," "deals not with … conduct, but with speech." *Dorman*, 862 F. 2d at 437. See also *City of Milwaukee v. Wroten*, 466 N.W. 2d 861 (Wis. 1991) (phrase "interfere with any police officer" is unconstitutional).

In interpreting this statute, several courts have ruled that content far more threatening than anything appearing on the Nuremberg Files web site was not in violation of FABE. In *Planned Parenthood of the Columbia/Willamette, Inc. v American Coalition of Life Activists*, 23 F. Supp 2d 1182 (D. Or. 1998), the court ruled that bumper stickers, which called for the execution of abortionists as murders did not constitute "true threats" and did not violate FABE. Similarly, in *Lucero v. Trosch* 904 F.Supp 1336 (S.D. Ala. 1995), the court ruled that statements by a priest who advocated the killing of abortionists as justifiable homicide did not violate

FABE. These statements included television footage of the priest telling an abortion doctor that the doctor should die and that it would be entirely permissible for someone to kill him. It is impossible to reconcile those decisions with the decision of the District Court, hence the obvious vagueness of the statute.

The inherent vagueness of the statute when applied to Internet content, as opposed to physically obstructive conduct, is also quite clear. Would it be a violation of FABE to create a web site calling for a zoning ordinance change that would force a clinic to close? Would the above-mentioned boycott web site be a violation of FABE? Given that FABE only applies to individuals who are pro-life, the answer is quite unclear. Would the zoning ordinance petition web site not be in violation if the web site owner wanted to use the zoning change was pro-abortion, but wanted thee space's zoning changed to permit its use in a more lucrative industrial purpose? The fact that one's belief system regarding abortion determines the applicability of FABE when applied to Internet content clearly demonstrates its vagueness. The fact that Defendants were found to have violated FABE by merely posting news and information on a web site is a clear indication of the vagueness of the statute. For these reasons and numerous others, FABE should be declared void for vagueness.

VI. BRAINSPRING.COM DID NOT, BY ITS OWN CONDUCT, VIOLATE FABE.

Brainspring.com admits to providing Internet access and web hosting services to Co-Defendants ALA and Coast. Brainspring does not believe nor intend to imply by the following arguments that ALA or Coast should be subject to any liability whatsoever. However, regardless of the Court's finding with respect to ALA and Coast, Brainspring cannot be said to have engaged in any conduct that violates FABE.

A. HOSTING A WEB SITE DOES NOT CONSTITUTE "FORCE" OR "THREAT OF FORCE" OR "PHYSICAL OBSTRUCTION."

The Freedom of Access to Building Entrances Act ("FABE"), 10 U.S.C. § 284, contains three subsections, each of which presents an avenue by which a person can be subject to criminal or civil liability. Although the District Court does not explicitly state which subsection it found Brainspring.com to have violated, the District Court implies that Brainspring violated subsection (a) because the court found that Brainspring "knowingly intimidated and interfered with the Plaintiffs who were in the business of providing reproductive health services." Decision and Order, ¶ 4. This finding is a misreading of the statute, for it ignores the important introductory phrase of subsection (a). Subsection (a) provides, in relevant part:

> [Whoever] *by force or threat of force or by physical obstruction*, knowingly…intimidates or interferes with…any person because that person is…providing reproductive health services…[shall be subject to penalties and civil remedies]. 10 U.S.C. § 284 (a) (emphasis added).

If Brainspring.com did not act "by force," by "threat of force," or by "physical obstruction," Brainspring cannot be held liable under subsections (a) or (b). That Brainspring.com *knew* about a potentially intimidating or interfering web site does not constitute liability. Nor is the finding that Brainspring hosted the web site on its network sufficient to put Brainspring within FABE's reach. The statute requires a more active role, a role that in its Decision and Order, the District Court did not find Brainspring to have occupied.

Under the statute, for Brainspring to be held liable, it must have acted by threat of force. The District Court determined that a person makes a "'true threat' when the person *makes a statement* [such as the statements made on the Nuremberg Files web site]." Decision and Order, ¶ 3 (emphasis added). Neither the jury nor the District Court found that Brainspring *made* any

statement whatsoever. Thus the District Court's holding in paragraph 4 of its Decision and Order is clearly erroneous.

The only finding of the jury was that "Brainspring.com knew of the Nuremberg Files Web site that it was hosting." Decision and Order, ¶ 4. Knowing about a threat of force is not the same as making a threat of force. The presence of the word "knowingly" in the FABE statute should not be misinterpreted. The statute forbids the act of *knowingly intimidating or interfering*. This is not the same as *knowing about intimidation or interference*. The word "knowingly" only modifies the actor who is intimidating or interfering. The insertion of the word "knowingly" then, is an attempt by Congress to make FABE more specific -- to restrict its reach to a smaller group of people. Only those who knowingly intimidate, as opposed to those who intimidate unknowingly, are subject to the penalties of FABE. What the District Court has done in its flawed reading is the exact opposite. It used the word "knowingly" to expand the reach of FABE by including those who knew about the intimidation in addition to those who knowingly intimidated. A closer reading of the statute and the findings reveal that Brainspring.com cannot be deemed to have violated either subsection (a) or subsection (b) of FABE.

B. HOSTING A WEB SITE DOES NOT CONSTITUTE KNOWINGLY OR INTENTIONALLY DAMAGING OR DESTROYING PROPERTY.

Brainspring.com can additionally not be held in violation of FABE under subsection (c). This subsection proscribes knowingly or intentionally damaging or destroying property. The Plaintiffs do not allege and the lower court did not determine that Brainspring.com damaged or destroyed property. This subsection, therefore, clearly cannot apply to Brainspring.com.

VII. BRAINSPRING.COM CANNOT BE HELD CIVILLY OR CRIMINALLY LIABLE FOR CONDUCT ITS USERS MAY HAVE COMMITTED.

Since Brainspring.com cannot be said to have itself committed any act that violated FABE, the only way to attach liability to Brainspring is to hold it responsible for the actions of its users or customers. We maintain that neither ALA nor Daniel Coast committed any act in violation of FABE. However, should the Court find that ALA and Daniel Coast did violate FABE, Brainspring cannot be held liable for their actions.

A. THE UNDERLYING PURPOSE OF 47 U.S.C. § 230 PRECLUDES HOLDING AN ISP LIABLE FOR A USER'S VIOLATION OF FABE.

Congress established a large zone of immunity for Internet Service Providers in section 230 of the Communications Decency Act (CDA). "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied* 118 S.Ct. 2341. Thus, although section 230 does not apply to criminal liability, the spirit and intention underlying the statute logically extends to the case at hand. The Fourth Circuit ruled in *Zeran* that section 230 "by its plain language…creates a federal immunity to *any cause of action* that would make service providers liable for information originating with a third-party user of the service." *Id.*, 129 F.3d 327, 330 (emphasis added). Subsection (e)(1), therefore, which states that section 230 shall not be construed to impair the enforcement of criminal statutes, was not added to carve out an exception to liability for criminal cases. Rather, Congress simply intended to preserve its ability to prosecute the original culpable party. Thus the Fourth Circuit concludes:

> "[Section 230 does not mean] that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States 'to ensure vigorous enforcement of

> Federal criminal laws….' Congress made a policy choice, however, not to deter harmful on-line speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id.*, 129 F.3d 327, 330-331.

Plaintiffs in this case chose to use a criminal statute to impose liability on the ISP rather than a traditional negligence tort remedy (although Plaintiffs are seeking civil remedies under subsection (3) of FABE). The mere technical fact that Plaintiffs seek civil remedies under a *criminal* statute rather than under a civil cause of action should not permit Plaintiffs to override the clear Congressional intent behind CDA section 230. The underlying principle is the same: Plaintiffs are attempting to hold Brainspring, an intermediary, responsible for another party's potentially injurious message.

B. CONGRESS AND THE JUDICIARY HAVE SHOWN A PREFERENCE FOR SHIELDING ISPs FROM LIABILITY FOR CONDUCT OF THIRD PARTIES.

No court has faced the issue of whether FABE can apply to an Internet Service Provider (ISP) that hosts allegedly threatening or intimidating web sites, nor does the statute itself address this question. However, wherever Congress and courts have faced the issue of ISP liability, they have shown a clear preference for shielding the ISP. "With the rise of the Internet has come the ability to commit certain tortious acts.… Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP…." *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). The *Columbia Insurance* court noted, however, that "suing the ISP in these cases is most often not productive." *Id.*, 185 F.R.D. 573, 578 at n. 1. Suing the ISP is often attractive to plaintiffs because the ISP generally has deeper pockets than the actual tortfeasor and the ISP is easier to locate than a possibly anonymous or foreign tortfeasor. Despite these practical considerations, the ISP cannot be held liable in this case. It has never been sufficient justification to sue a defendant merely for

the reason that the defendant has the ability to pay a large judgment. Secondly, whereas sometimes ISPs are easier to locate than actual tortfeasors, the parties alleged of actually making the harmful speech in this case have been identified and named as Defendants.

In several subject areas Congress and courts have already acted to shield ISPs from liability. These areas include defamation, copyright infringement, and trademark infringement.

1. ISPs ARE NOT LIABLE FOR DEFAMATION COMMITTED BY THIRD PARTIES.

When users post defamatory statements either on their own web sites using an ISP's hosting services or on a bulletin board maintained by an ISP, courts have declined to impose liability on the ISP. The Fourth Circuit in *Zeran* ruled that AOL was immune from liability despite allowing a message to be posted on an AOL bulletin board that prompted angry callers to phone Zeran's home incessantly (about one call every two minutes at the incident's peak). *See Zeran*, 129 F.3d 327, 329. The D.C. Federal District Court refused to impose liability even when the ISP paid for and marketed the content. See *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Both *Zeran* and *Drudge* pointed to CDA section 230 in their rulings. Both cases also discussed the public policy rationale against imposing liability for defamation on ISPs. The court ruled in *Drudge*, "While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium." *Id.*, 992 F.Supp. 44, 49.

The court in *Zeran* was even more forthright: "The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech." *Zeran*, 129 F.3d 327, 330.

2. *ISPs ARE NOT LIABLE FOR COPYRIGHT INFRINGEMENT COMMITTED BY THIRD PARTIES.*

Using similar rationale for shielding ISPs from defamation liability, Congress and courts have refused to impose liability for copyright infringement. This year, the President has signed legislation immunizing ISPs from claims for copyright infringement when third parties using the ISP's services violate copyright laws. The On-Line Copyright Infringement Liability Limitation Act, a portion of the Digital Millennium Copyright Act, 17 U.S.C. § 512, exempts ISPs not only from monetary relief, but from injunctive relief as well when users violate copyright laws.

Congress in this instance followed the sensible position adopted by courts. In one of the first Internet intellectual property cases, the Northern District of California refused to impose liability for copyright infringement on an ISP when third parties used the provider's BBS system to post unauthorized copies of a copyrighted work. See *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995). The court held that imposing liability on ISPs would be "extreme" and "unreasonable." *Id.*, 907 F.Supp. 1361, 1369. As in the defamation cases, the proper defendant is the actual defamer or infringer, not the ISP. To hold an ISP liable for actions of third parties is "unnecessary as there is already a party directly liable for causing the copies to be made." *Id.*, 907 F.Supp. 1361, 1372.

3. *ISPs ARE NOT LIABLE FOR TRADEMARK INFRINGEMENT COMMITTED BY THIRD PARTIES.*

Finally, courts have refused to hold ISPs liable for trademark infringement or dilution committed by third parties. Network Solutions, Inc., is responsible for registering domain names in the most popular top-level domains (.com, .net, and .org). Several private parties used NSI's web site to register variations of the mark "Skunk Works," a federally registered trademark owned by Lockheed Martin. Lockheed sued NSI alleging trademark infringement, dilution, and

contributory infringement. As with defamation and copyright infringement, courts will not hold the Internet service liable when third parties committed the violations. See *Lockheed Martin Corporation v. Network Solutions, Inc.*, 985 F.Supp. 949 (C.D. Cal. 1997).

C. HOLDING ISPs LIABLE FOR CONDUCT OF CUSTOMERS WOULD RESULT IN DEVASTATING CHILLING EFFECTS ON FREE EXPRESSION.

The convergence of several areas of law on the same conclusion is not merely coincidental. Strong policy reasons exist for the overwhelming resistance to ISP liability in diverse areas. Most importantly, imposing criminal or civil liability on ISPs for the content posted by third parties would immediately and dramatically restrict free expression on-line. As one court noted, "If Usenet servers were responsible for screening all messages coming through their systems, this could have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet devised." *Religious Technology Center*, 907 F.Supp. 1361, 1377-78. An ISP with limited resources, if required to sift through thousands or perhaps millions of pages of content for fear of liability, will either be unable to act as a conduit of information for the public or will severely restrict what information becomes available. In limiting ISP liability, Congress has explicitly opted to weigh the substantial and unprecedented benefit of free discussion made possible by the Internet over the fear of injurious speech. In its statutorily articulated findings, Congress declares:

> The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.... The Internet [offers] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.... The Internet [has] flourished, to the benefit of all Americans, with a minimum of government regulation. 47 U.S.C. § 230(a)(1), (3) and (4).

Based on these findings, Congress has adopted the clear policy "to preserve the vibrant and competitive free market that presently exists for the Internet...unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Where statutory and judicial tradition express a concern and favor for free expression, courts should be wary of enforcing otherwise legal enactments that would have a "chilling effect" on the expression or speech. First articulated by this Court in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), the concept of a chilling effect is of equal concern in this case. In *Gibson*, this Court worried that obligatory disclosure of the NAACP's membership rolls would serve to deter citizens from joining the controversial and unpopular organization. This Court reasoned that "the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is...immediate and substantial." *Gibson*, 373 U.S. 539, 557..

The Internet has become an outlet for people espousing unpopular views to disseminate their opinions cheaply to a large audience. By imposing FABE criminal liability on ISPs, the ISP will be required to obtain detailed personal information about its subscribers. This, in turn, will serve to deter unpopular parties from expressing their views over the Internet. As in *Gibson*, this scenario is troubling because it would most significantly effect those people who hold the most unpopular views – the very group that requires the most stringent First Amendment protection.

Indeed, the Southern District of New York worried that reckless imposition of liability on ISPs would severely devastate free speech. In ruling that an ISP that operated a database would not be held liable for libel posted by a user, the court likened the situation to a bookseller sued

for selling an offensive book. In so doing, the Southern District quoted this Court's ruling on that subject:

> Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. *Cubby, Inc. v. Compuserve Inc*., 776 F.Supp. 135, 139-40 (S.D.N.Y. 1991), quoting *Smith v. California*, 361 U.S. 147, 153.

Whenever there is a risk of substantially weakening the power of the First Amendment, courts should proceed with caution. In this instance, however, Congress has already considered the issue and rendered its decision. The threat of ISP liability poses too great a risk to valuable free expression.

D. HOLDING ISPs LIABLE FOR CRIMINAL CONDUCT OF CUSTOMERS WOULD RESULT IN DEPRIVATION OF DUE PROCESS.

By imposing criminal liability on an ISP for the conduct of third parties, this Court would be depriving the third parties of due process. The proper forum for adjudicating criminal disputes is in a court of law, where rules of evidence and rights of the accused prevail. If an ISP can invoke liability for its users' criminal conduct, the ISP will be forced to determine whether its users are violating criminal statutes. The ISP may be forced to restrict the user's speech, remove the user's web pages, intercept the user's e-mail, and muffle the user's voice. In making a determination of criminal wrongdoing, the ISP alone would serve as judge, jury, and executioner. It would determine culpability, define the sentence, and administer the consequences. This would clearly be contrary to Congress's intent and would be in stark violation of a strong tradition of restrained judicial attitudes towards Internet service providers.

While the constitutional guarantee of free speech applies only to abridgment by federal or state government, there are long-standing exceptions to that general rule recognized by this Court. Most notably, a "company town" that performs traditionally public functions may not abridge speech or expression on sidewalks or other public-like areas. See *Marsh v. Alabama*, 326 U.S. 501 (1946). Similarly, a publicly accessible Internet network, with thousands of daily hits, scores of members, and chat rooms and resources for all sorts of constituents, should not be forced by this Court to deprive its members of free expression without due process of law. The only way to afford a user its constitutionally mandated due process is to bring questions of potentially injurious speech to an open court. These decisions should not be forced behind closed doors at an ISP's corporate headquarters.

E. ISP LIABILITY FOR THE ACTION OF ITS USERS WOULD INCREASE THE OPERATING COST OF THE ISP, PRECLUDING MANY FROM USING AND PARTICIPATING IN THE ISP's SERVICES.

An Internet service provider such as Brainspring.com contains thousands of member web sites and possibly millions of pages of information. To impose liability on the ISP for the content of these pages would dramatically increase the operating costs of the ISP and change the nature of the Internet. Congress specifically chose to preserve the relatively unfettered nature of the Internet partly due to this fear. If the ISP must raise prices, it no longer becomes accessible to all and what was once one of the greatest aspects of the Internet will have vanished. The Congressionally celebrated "forum for a true diversity of political discourse" (47 U.S.C. § 230(a)(3)) will wither away. Imposing liability for user conduct would force the ISP to hire a large monitoring and legal staff. It may need to pay expensive premiums. In either case, the ISP will no longer be an outlet for the poor person's voice.

The fact that Brainspring was notified about the Nuremberg Site is immaterial. A company like Brainspring receives countless e-mails every day, many of which may criticize web content. If it were forced to investigate every site where this notification exists, it would have no choice but to dramatically raise its operating costs. Schools, public interest groups, and other educational and political entities for which the Internet is trumpeted as a golden resource would be the victims of this eventuality.

That Brainspring receives advertising revenue from "banner advertisements" it places at the bottom of every web site should likewise not invoke liability. Brainspring can no more single out which web sites it will not line with banner advertisements than it can monitor which web sites it should exclude or edit. The authors of the Nuremberg Files site did not pay Brainspring to post the site. Brainspring therefore received no direct financial benefit from hosting the questioned site. In any case, mere payment received to publish injurious speech is not enough to incur liability. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

VIII. HOLDING BRAINSPRING.COM LIABLE FOR CONDUCT THE OF ALA WOULD DISTORT THE PARTIES' CONTRACTUAL RELATIONSHIP.

Finally, imposing liability on Brainspring for the actions of ALA and Coast would go against the terms of the contract signed by the parties. The clear expectations of the parties when Brainspring agreed to host web content for ALA was that, should the content be deemed "violative of another's rights," the user (ALA) and not Brainspring will "take responsibility." *Brainspring.com User's Policy* (Exhibit A), ¶ 2(h). ALA agreed to indemnify Brainspring for any transmission placed by ALA or those using ALA's account. *Id.*, ¶ 6. This Court should not now counteract the clear original intentions and expectations of the parties.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the injunction overturned.

Respectfully Submitted

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