IN THE SUPREME COURT FOR THE STATE OF GEORGIA

MATTHEW CHAN, Appellant,	)	Case No.: S14A1652
	)	Court of Appeals No.: A14A0014
v.	)	
	)	Lower Court No.: SU13DM409
LINDA ELLIS, Appellee	)	

BRIEF OF *AMICI CURIAE* OF THE ELECTRONIC FRONTIER FOUNDATION AND PROFESSOR AARON H. CAPLAN IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

The Electronic Frontier Foundation ("EFF") is a nonprofit public advocacy organization that uses the skills of lawyers, policy analysts, activists, and technologists to promote Internet freedom, primarily through impact litigation in the American legal system. From its founding in the nascent days of the modern Internet, EFF has been concerned about protecting online free speech and about stimulating debate on the proper role of copyright law (and copyright enforcement) in a free society. This case is thus of special interest to EFF because a court has issued a clearly unconstitutional speech-restrictive injunction, and in the process stifled speech about the alleged abuse of copyright law.

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SUMMARY OF ARGUMENT

1. The First Amendment protects the right to speak about people, so long as the speech does not fall into an established First Amendment exception (such as those for defamation or for true threats). This includes the right to speak about private

figures, especially when they do something that others see—rightly or wrongly—as unethical.

Restraining orders and criminal stalking law may properly restrict unwanted speech *to* a person. But they may not restrict unwanted speech *about* a person, again unless the speech falls within a First Amendment exception. The trial court's order thus violates the First Amendment.

2. OCGA § 16-5-90 complies with these principles, because the speech that it bans is limited to "*contact[ing]* another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person" (emphasis added). This is properly interpreted to refer just to speech communicated specifically to the target—not speech said to the public at large, such as in a newspaper or on a Web page. Moreover, § 16-5-90 specifically excludes speech that has any "legitimate purpose."

Yet the trial court misinterpreted § 16-5-90 as also criminalizing speech *about* people, including speech that has the legitimate purpose of public criticism. As read by the trial court, § 16-5-90 violates the First Amendment. Read properly, § 16-5-90 does not violate the First Amendment, but also does not cover Matthew Chan's speech.

3. Title 47 U.S.C. § 230 also protects website operators from being held civilly or criminally liable for speech by their users, and bars injunctions ordering website operators to remove such speech. This is what prohibits, for instance, criminal or civil liability for newspaper websites based on the speech of their online commenters, though the sites likewise "ha[ve] the ability to remove posts in [their] capacity as the moderator[s]," Final Permanent Protective Order, T. 121.

Yet the trial court took the view that Mr. Chan had the legal duty to remove posts written by users, and expressly ordered Mr. Chan to do so. Indeed, the order suggests that Mr. Chan is required to continue to remove such posts in the future. The order therefore violates § 230.

ARGUMENT AND CITATION TO AUTHORITIES

I. The First Amendment Broadly Protects the Right to Criticize People, Including Private Figures.

By its own terms, Georgia's stalking statute "shall not apply to persons engaged in activities protected by the Constitution of the United States or of this state." OCGA § 16-5-92. Criticism of people is generally constitutionally protected, unless it falls within the narrow existing First Amendment exceptions, such as for defamation and threats.[1] This extends to speech about private individuals as well as to speech about public figures.

[1] Defamation cases are, of course, substantially constrained by the First Amendment. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz*

Thus, for instance, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), activists who disapproved of a real estate agent's (apparently lawful) behavior repeatedly leafleted near where the agent lived and went to church, demanding that he change his practices. Indeed, "[t]wo of the leaflets requested recipients to call respondent at his home phone number and urge him to sign the 'no solicitation' agreement." *Id.* at 417. Yet the Court struck down an injunction against such leafleting, reasoning that

> [n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.

Id. at 419-20.

Likewise, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the organizers of a boycott of white-owned stores demanded that black customers stop shopping at those stores. The organizers stationed "store watchers" outside the stores to take down the names of black shoppers who were not complying with the

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v. Robert Welch, Inc., 418 U.S. 323 (1974). Defamation is included here as a First Amendment exception simply in the sense that properly limited defamation statutes that comply with the rules set forth in *Sullivan*, *Gertz*, and related cases are constitutional.

boycott. Those names were then read aloud in local churches, and printed in leaflets that were distributed to other black residents. Some of the noncomplying shoppers were physically attacked for refusing to go along with the boycott. *Id.* at 894.

The Supreme Court held that these activities were protected by the First Amendment, despite the backdrop of violence and the attempt to use social ostracism to pressure black shoppers to forgo their legal rights to shop at white-owned stores. Though "[p]etitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism," the Court held, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.* at 909-10. Even financial liability for such speech was unconstitutional, the Court concluded. *Id.* at 921. By nature, then, an injunction against such speech would be even more clearly impermissible.

Similarly, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), upheld Hustler Magazine's right to criticize Jerry Falwell, even in a harsh and vulgar way; and though Falwell was a public figure, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), made clear that *Hustler* applies to all speech on matters of public concern, even if that speech mentions wholly private figures. *Snyder* (an intentional infliction of emotional distress case) held that defendants' speech condemning American legal and military policy was constitutionally protected even when it included severely emotionally distressing statements about an individual fallen soldier. In *Snyder*, the

private person involved was entirely a victim, rather than someone who allegedly behaved unethically (as in *Keefe*, *Claiborne*, *Hustler*, and this case), but the First Amendment protected the speech nonetheless. *See* Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. at 823-24 (discussing the relevance of *Snyder* to civil harassment cases).

To be sure, courts have allowed some restrictions on harmful speech said *to* an unwilling listener through a one-to-one medium of communication (such as telephone or e-mail), when that speech was seen as constituting harassment or stalking. But such restrictions on speech to a particular unwilling listener leave speakers entirely free to speak to *willing* listeners, and to try to persuade those willing listeners that the subject of the speech is behaving improperly. As the cases cited above demonstrate, restrictions on such speech *about* an unwilling subject cannot be justified by the propriety of restrictions on speech *to* the person. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Northwestern U. L. Rev. 731, 745-46 (2013) (discussing the constitutional distinction between speech about people and speech to people).

These cases also establish that Mr. Chan's speech is constitutionally protected. Ms. Ellis engaged in behavior that many people view as unethical, and indeed as an attempt to suppress others' statutorily and even constitutionally protected fair

use rights. *Golan v. Holder*, 132 S. Ct. 873 (2012) (describing the right to fair use of copyrighted materials as a "'built-in First Amendment accommodation[]', quoting *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003)). Discussion of such behavior "concern[s] 'a matter of public significance," which is defined as requiring only that the posts "generally, as opposed to the specific identity contained within [them], involve[] a matter of paramount public import," *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989)—the matter here being whether copyright enforcement is being used in an unethical and speech-stifling matter.

Mr. Chan criticized Ms. Ellis's business practices, and Ms. Ellis may have viewed some of that criticism as untrue; but any legal action Ms. Ellis takes in response to alleged falsehoods must abide by the constitutionally required limitations on the defamation tort. See *Hustler*, 485 U.S. at 56 (applying First Amendment limits on defamation law to intentional infliction of emotional distress claim); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying First Amendment limits on defamation law to false light invasion of privacy claim). The abbreviated and expedited procedures that OCGA § 16-5-94 envisions for genuine cases of stalking are not designed to resolve the legal questions involved in a defamation action. "A petitioner should not be able to evade the limits on defamation law (many of them constitutionally mandated) by redesignating the claim as civil harassment." Caplan,

Free Speech and Civil Harassment Orders, 64 Hastings L.J. at 821; *see also id*. at 837, 849.

Ms. Ellis also claims that the website contains true threats against her. Mr. Chan criticized Ms. Ellis, and provided a forum in which others criticized her as well. Even if some of the material posted on the forum is properly viewed as physically threatening—and *amici* think that it is not—the injunction goes very far beyond threatening speech, and covers all the material posted about Ms. Ellis. Likewise, that Mr. Chan posted the name of Ms. Ellis's husband and the subdivision in which Ms. Ellis lived cannot justify an injunction, just as the posting of Mr. Keefe's actual home telephone number could not justify an injunction in *Keefe*.

Indeed, the only possible justification for the remarkable breadth of the injunction in this case ("Respondent is hereby ORDERED to remove all posts relating to Ms. Ellis," Final Permanent Protective Order, T. 121) would be a conclusion that Ms. Ellis is entitled not to be sharply criticized online at all. The injunction is not limited to threatening statements or even to statements that discuss Ms. Ellis's husband or the area in which Ms. Ellis lives (though, again, such statements may well be protected given *Keefe*); instead, it applies to all speech about Ms. Ellis. Yet, under the First Amendment, no such entitlement to be free from criticism can exist.

II. The Trial Court Wrongly Concluded That the Speech About Ms. Ellis Violated OCGA §§ 16-5-90 *et seq.*

Georgia's stalking statute is designed to advance public safety in cases where an obsessed person threatens the physical safety and privacy of others, in a manner resembling that which occurs in cases of domestic violence. *See generally* Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. at 790-95 (tracing the history of civil harassment statutes). Such statutorily-forbidden stalking can be seen in cases like *Garnsey v. Buice*, 306 Ga. App. 565, 565, 703 S.E.2d 28, 29 (2010), or *De Louis v. Sheppard*, 277 Ga. App. 768, 769, 627 S.E.2d 846, 847 (2006), where the defendants, standing near their victims, made obscene gestures, yelled obscenities, shot firearms into the air, ran noisy leaf blowers in the middle of the night, blocked access to driveways, shone spotlights into bedroom windows, and attempted to run cars off the road. This case presents an entirely different scenario, which does not involve the sort of conduct the Georgia legislature properly sought to restrain.

A. To the Extent Section 16-5-90 Covers Speech, It Covers Only Speech to a Person, not Speech About a Person.

The trial court erred in interpreting Georgia's civil and criminal stalking provisions. OCGA § 16-5-94 authorizes a restraining order only upon proof of "conduct constituting stalking" as defined in § 16-5-90. Under § 16-5-90(a)(1), a person commits the offense of stalking when "he or she follows, places under surveil-

lance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." "[H]arassing and intimidating" is further defined in OCGA § 16-5-90 as a "knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior and which serves no legitimate purpose." The statute is further limited by OCGA § 16-5-92, which says that the stalking law "shall not apply to persons engaged in activities protected by the Constitution of the United States or of this state."

By their plain language, these provisions require "conduct" or "behavior" that amounts to "following" or "surveillance" or "contact at or about a place," all of which must be for the purpose of "harassing and intimidating" a victim. "Harassing and intimidating" is a term of art that requires far more than proof that a defendant criticized someone so strongly that it caused emotional distress. To be "harassing and intimidating," defendant's "contact at or about a place" with the victim must be "directed at a specific person" (not at the public at large), and must give rise to "reasonable fear" for one's safety. The chief sponsor of the Act's 1998 amendments included language requiring a pattern of severe misconduct "to help avoid

abuse of the [judicial] system by people who overreact or become vindictive." Cathie J. France, *Crimes and Offenses Crimes Against the Person: Redefine Stalking*, 15 Ga. St. U. L. Rev. 62, 66 (1998).

Writing about a person is not equivalent to "following" or "surveillance." *See Trummel v. Mitchell*, 131 P.3d 305 (Wash. 2006) (holding that trial court abused its discretion by concluding that posting a story on the Internet, based on lawfully-obtained information, constituted "surveillance"). Similarly, posts on a discussion site about a person do not constitute "contact" with that person. "Contact" is defined in § 16-5-90 to mean "communication." This is consistent with earlier interpretations of "contact" as meaning "to get in touch with; communicate with," *Johnson v. State*, 264 Ga. 590, 591, 449 S.E.2d 94 (1994) (quoting *American Heritage Dictionary* (3d ed. 1992)). These terms connote an active attempt to convey a message directly to an identified listener, and not dissemination of a message that reaches the public at large.

Speech directed to third parties other than the victim, including speech published to the world at large, is not "contact" with the victim. Just as "[p]ublishing or discussing a person's medical condition with others obviously does not constitute following, placing under surveillance, or contacting that person," *Collins v. Bazan*, 256 Ga. App. 164, 165, 568 S.E.2d 72, 73 (2002) (reversing portion of a protective order under § 16-5-94), so publishing or discussing a person's threats to

litigate likewise does not qualify as following, placing under surveillance, or contacting that person.

Writing for a general audience about a person is not the same as contacting that person. We would not say, for instance, that the Washington Post contacted President Obama by publishing a comment critical of him in the newspaper. And we certainly would not say that the Washington Post contacted President Obama by failing to remove a critical website comment from a reader.

Even an open letter published on the Post site, or a column written as a statement to the President ("Dear President Obama ..."), would not properly be seen as contacting the President, including when the author hopes or intends that the President would be among the readers. Rather, such communications are speech to the readership of the publication at large, even when the speech criticizes a particular person who may (like the rest of the public) encounter the criticism.

The same principles apply when the communications occur over the Internet:

> Emails, texts, instant messages, and similar messages sent to a unique address of the petitioner may legitimately be considered contacts, just as a phone call would be. But writings on social media sites, blogs, or other web-related venues that have larger audiences are speech about the petitioner, rather than speech to the petitioner. They are no more "directed at" the petitioner within the meaning of [civil harassment] statutes than is the publication of a book or newspaper.

Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. at 849.

Indeed, in *Marks v. State*, 306 Ga. App. 824, 825, 703 S.E.2d 379 (2010), the court held that a web posting discussing a third party "obviously does not constitute . . . contacting that person." Even posting falsehoods about someone on several websites and e-mailing these postings to several people, the court held, is not "contact" or even "indirect contact." *Id.* Because the messages were never sent to the alleged victim, the court found that "no evidence was presented suggesting that Marks authored the web postings in order to get in touch with or communicate with his ex-wife." *Id.*

This was so even though it was doubtless likely that the statements about the ex-wife would eventually be communicated by someone to her (even if just by a friend who wanted her to be aware of what was being said about her), and even if the defendant may have wanted the ex-wife, in common with the rest of the world, to see them. Similarly, the posts on the ExtortionLetterInfo.com website were never sent by Mr. Chan to Ms. Ellis, and thus do not constitute "contact[ing]" Ms. Ellis. *Cf. Thornton v. Hemphill*, 300 Ga. App. 647, 686 S.E.2d 263 (2009) (upholding a restraining order premised in part on "contact" using the Internet, where the electronic contact involved e-mails sent to the target, not speech to the public about the target).

Finally, even if some items posted by Mr. Chan personally could be seen as attempts to "contact" Ms. Ellis, on the theory that Mr. Chan was hoping that Ms. El-

lis would read the materials, the great bulk of the material that the trial court ordered removed—"all posts relating to Ms. Ellis"—(1) would not qualify as "contact[ing]" Ms. Ellis even under such a theory, or (2) were not written by Mr. Chan.

B. Section 16-5-90 Does Not Apply to Public Criticism of a Person, Because Such Criticism Qualifies as a "Legitimate Purpose."

Section 16-5-90 also expressly excludes any speech said with a "legitimate purpose." Georgia courts rightly take a broad view of "legitimate purpose." In *Pilcher v. Stribling*, 282 Ga. 166, 647 S.E.2d 8 (2007), for instance, a group of firefighters sought a protective order against their chief under § 16-5-94, providing evidence that he had physically assaulted them "during basketball games conducted as part of their required physical training." This Court, though, concluded that the conduct was done "for the legitimate purpose of physical training," and was thus not covered by § 16-5-94. Likewise, in *Norman v. Doby*, 321 Ga. App. 126, 741 S.E.2d 293 (2013), an ex-husband made over 50 phone calls and sent over 20 text messages to his ex-wife in one weekend, but the Court of Appeals held that the protective order was rightly denied because there was sufficient evidence that the conduct was for the legitimate purpose of getting messages to his children.

The legitimate purpose in Mr. Chan's posts is even clearer. The posts about Ms. Ellis informed the public about Ms. Ellis' attempts to collect large sums of money

for what she claimed were copyright infringements, and criticized those attempts. Criticism of what the speaker perceives (rightly or wrongly) as extortionate and legally unfounded threats of litigation is a legitimate purpose. *See, e.g.*, *People v. Bethea*, 781 N.Y.S.2d 626 (Crim. Ct. 2004) (a "purpose . . . to criticize, denounce and humiliate Mr. Williams because defendant believes he has been a poor father to their child" "is lawful and legitimate because Americans are, after all, free to criticize one another"); *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989) (concluding that even "the use of offensive language" does not "negate (and thereby criminalize) the otherwise legitimate purpose of protesting governmental action").

Indeed, such criticism of allegedly unethical behavior was precisely the purpose involved in *Keefe* and *Hustler*, and in large measure the purpose in *Claiborne Hardware* (though there the purpose of criticizing blacks who patronized white-owned stores was a means towards the end of furthering the boycott of those stores). And such criticism is part of the purpose of ExtortionLetterInfo.com, which was created to "discover, report, and comment" on certain copyright enforcement practices—practices that the founder views as "technically legal but ethically and morally questionable" because they "bull[y] and prey[] upon the legal ignorance of the letter recipients." Mission Statement, http://www.extortionletterinfo.com (last accessed Sept. 5, 2014). Indeed, ExtortionLetter-

Info.com and its founder are regularly mentioned by other news sources on precisely such matters.[2]

New York's high court recently struck down a criminal harassment statute that contained a "no legitimate purpose" clause, in part on the grounds that "the First Amendment forbids the government from deciding whether protected speech qualifies as 'legitimate.'" *People v. Marquan M.*, Case No. 139, 2014 N.Y. LEXIS 1527, 2014 WL 2931482 (N.Y. 2014). *Amici* agree with *Marquan M.* that speech about a person that does not fall within a First Amendment exception constitutes "protected speech" under the First Amendment, and thus cannot be barred based on

[2] *See, e.g.*, Mike Masnick, *Copyright Trolling Lawyer Abusing DMCA To Try To Silence Critic*, TechDirt, Aug. 26, 2014; http://www.techdirt.com/articles/20140826/05415528319/copyright-trolling-lawyer-abusing-dmca-to-try-to-silence-critics.shtmlt; Cory Doctorow, *Copyright Troll Abuses DMCA in Bid to Censor His Previous Life as a Troll-Fighter*, BoingBoing, Aug. 26, 2014, http://boingboing.net/2014/08/26/copyright-troll-abuses-dmca-in.html; Bob Audette, *Lawsuit Against Vernon Company Dropped, refiled*, Battleboro (Vt.) Reformer, July 31, 2014, http://www.reformer.com/localnews/ci_26247454/lawsuit-against-vernon-company-dropped-refiled; Christopher Zara, *Getty Images Lawsuits: Enforcement or Trolling? Fear of Letters Dwindling, Stock-Photo Giant Hits Federal Courts*, Int'l Bus. Times, Feb. 7, 2014, http://www.ibtimes.com/getty-images-lawsuits-enforcement-or-trolling-fear-letters-dwindling-stock-photo-giant-hits-federal; PF Louis, *Copyright Trolls, Image Bullies Exposed by ExtortionLetterInfo.com*, Natural News, June 16, 2013, http://www.naturalnews.com/040800_copyright_trolls_lawsuits_intellectual_property.html; Jeff John Roberts, *Copyright Trolls 2.0: Image Sites Embrace Righthaven Tactics*, Sept. 19, 2012, GigaOm, http://gigaom.com/2012/09/19/copyright-trolls-2-0-image-sites-embrace-righthaven-tactics/.

inferences about the speaker's supposedly improper purpose. "'[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (quoting Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001)); *see also* Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. at 814-15 (arguing that the "no legitimate purpose" elements in civil harassment statutes may be unconstitutionally vague); Volokh, *One-to One Speech vs. One-to-Many Speech*, 107 Northwestern U. L. Rev. at 776-80 (likewise). But even if some otherwise protected speech could be barred on the grounds that it has "no legitimate purpose," the purpose of publicly criticizing someone who was allegedly misusing the threat of litigation is eminently legitimate. And for the reasons described in Part I, Mr. Chan was "engaged in activities protected by the Constitution of the United States" when he managed his website, which means that the stalking statute "shall not apply" to him at all. § 16-5-92.

Indeed, to the extent that there is any constitutional doubt here, § 16-5-90 should be interpreted to avoid such doubt. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). And such an interpretation would simply involve reading the statute the most natural way—as prohibiting speech that "contact[s]" a person in the sense of being speech said specifically *to* a

person, and as excluding speech that is said *about* a person to a large audience (or speech that has the legitimate purpose of public criticism).

C. The Injunction to Delete All References to Ms. Ellis Exceeds Statutory Authority and Is Unconstitutional for its Overbreadth and Because It Is A Prior Restraint.

In those cases where "conduct constituting stalking" is shown by a preponderance of the evidence, § 16-5-94(d)(1) authorizes an injunction to "direct a party to refrain from *such conduct*" (emphasis added). But in this case, the trial court ordered Mr. Chan to "to remove *all* posts relating to Ms. Ellis" (emphasis added), no matter what they said or who wrote them.

The order thus exceeds the scope of the statute, because it eliminates not merely "conduct constituting stalking" (if any is found to exist), but also other conduct. The order would require Mr. Chan to remove truthful statements about Ms. Ellis, expressions of opinion about Ms. Ellis, defenses of Ms. Ellis posted by her supporters, or any other statement, no matter how constitutionally protected.

A no-contact order is aimed at preventing statutorily forbidden surveillance, following, and contact. An order mandating the removal of speech on an entire subject (anything about Ms. Ellis) goes far beyond the statutory prohibition. Indeed, this Court recently held—dealing with OCGA § 34-1-7, the workplace violence restraining order statute—that a protective order "may extend only as far as" the un-

derlying statutory prohibition on improper contact, and therefore "vacate[d] the injunction and remand[ed] the case to the trial court for the entry of a new injunction that is fully consistent with OCGA § 34-1-7(e)." *Danforth v. Apple Inc.*, 294 Ga. 890, 897-98, 757 S.E.2d 96, 101-02 (2014).

The overbreadth of the injunction also makes it an unconstitutional prior restraint. *See Tory v. Cochran*, 544 U.S. 734, 738 (2005) (vacating an overbroad injunction on the grounds that it "amounts to an overly broad prior restraint upon speech, lacking plausible justification"). An "order" issued in "the area of First Amendment rights" must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968); Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. at 817-24 (discussing the First Amendment problems with overbroad injunctions). And the injunction violates 47 U.S.C. § 230, for the reasons explained below.

III. Mr. Chan May Not Be Held Liable for the Speech of Third-Party Content Creators Posting on His Forum, Nor May He Be Held Liable for Not Removing Such Content.

"[C]ourts have 'consistently held that § 230 provides a 'robust' immunity, and that all doubts must be resolved in favor of immunity.'" *Internet Brands, Inc. v. Jape*, 760 S.E.2d 1, 4 (Ga. App. June 24, 2014); *see also Jones v. Dirty World Entertainment Recordings*, 755 F.3d 398 (6th Cir. 2014); *Batzel v. Smith*, 333 F.3d

1018, 1031 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Someone who operates an online forum cannot be held liable for "content [that] was 'independently created or developed by third-party users.'" *Internet Brands*, 760 S.E.2d at 4.[3] "State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Id.* at 2-3 (quoting *Nemet Chevrolet v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 252 (4th Cir. 2009)).

The trial court thus erred in holding that Mr. Chan's "ability to remove posts in his capacity as the moderator," coupled with his "cho[osing] not to remove posts that were personally directed at Ms. Ellis,"[4] meant that Mr. Chan had violated § 16-5-90. A website moderator is not liable for defamation simply because he allows people to post allegedly defamatory posts, *Internet Brands*, 760 S.E.2d at 2-3, or chooses not to remove allegedly defamatory posts, *Jones*, 755 F.3d at 416; *Zeran*, 129 F.3d at 330. Likewise, such a moderator's choice not to remove allegedly threatening posts does not make him guilty of stalking. *See, e.g.*, *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 807-08 (2006) (applying § 230 immuni-

[3] *See also* Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 Willamette L. Rev. 93, 164-175 (2003) (discussing applicability of § 230(c) to online bulletin board and chat room operators).

[4] Final Permanent Protective Order, T. 121.

ty to shield company from liability for threatening messages sent using its computer services); *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 637 (App. Ct. Ill. 2012) (same); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1018 (Fla. 2001) (applying § 230 immunity to shield company from liability for child pornography that featured plaintiff's son and that was distributed by user of the company's computer services).[5]

The trial court also "enjoined and restrained" Mr. Chan from "any act constituting a violation of OCGA §§ 16-5-90 et seq. and . . . harassing, interfering, or intimidating the Petitioner or Petitioner's immediate family." Final Permanent Protective Order, T. 121. Given the trial court's earlier conclusion that Mr. Chan's allowing various posts about Ms. Ellis on his site constituted a violation of § 16-5-90, the court was presumably ordering Mr. Chan not to allow such posts on his site in the future. That, too, violates 47 U.S.C. § 230, because it likewise holds him responsible for policing the speech of the site's users.

[5] Section 230 provides immunity against state criminal laws as well as against civil liability. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1274-75 (W.D. Wash. 2012); *Voicenet Communications, Inc. v. Corbett*, 39 Communications Reg. (P&F) 430 at 3 (E.D. Pa. 2006); *People v. Gourlay*, 2009 WL 529216, *3 (Mich. Ct. App. Mar. 3, 2009). Section 230(e)(3) expressly states, "No cause of action may be brought and no liability may be imposed under *any State or local law* that is inconsistent with this section" (emphasis added), and § 230(e)(1) expressly exempts "Federal criminal statute[s]"; state criminal statutes are thus covered.

In enacting 47 U.S.C. § 230, Congress recognized that online speech would be jeopardized if Internet service and content providers were held liable for policing the speech of their users. "The specter of tort liability in an area of such prolific speech [*i.e.*, the Internet] would have an obvious chilling effect." *Zeran*, 129 F.3d at 331. Congress therefore made it unnecessary for such providers to moderate posted material, either in general or even when someone gave the provider notice that certain material was allegedly actionable. "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *see also, e.g., Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Jones*, 755 F.3d at 407.

As the *Zeran* court found, even a regime of notice-based liability would compromise the "robust nature of Internet communication." *Zeran*, 129 F.3d at 330, 332-33. Under such a regime, websites that distribute third party content—political discussion sites, restaurant review sites, and so on—would tend to play it safe, and try to avoid liability by censoring any speech that might be seen by its subject as objectionable, even if it is in fact nonactionable. After all, taking down something that would ultimately be found to be nondefamatory and nonthreatening would merely risk alienating a few customers, and most website operators would have lit-

tle economic incentive to defend those customers' interests through litigation. On the other hand, not removing the material would risk criminal punishment, massive civil liability, or huge legal expenses even if the post would have eventually been found to be constitutionally protected.

And because service providers would be understandably concerned about potential liability (civil and criminal), complaining parties would gain the power to suppress even speech that they know is not actually illegal or actionable—but is merely offensive to them—because they would know that most website operators will err on the side of caution. "If notice could defeat immunity, anyone in any way 'displeased' with posted materials could utilize notice as a 'no-cost' means to create the basis for future lawsuits." *Donato v. Moldow*, 865 A.2d 711, 726 (N.J. Super. Ct. App. Div. 2005). "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." *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

The trial court also ordered Mr. Chan "to remove all posts relating to Ms. Ellis." Final Permanent Protective Order, T. 121. Such an order, besides being vastly overbroad and inconsistent both with the First Amendment (see Part I) and § 16-5-90 (see Part II), also violates 47 U.S.C. § 230. A website operator may not be ordered to remove allegedly actionable third-party content, just as it may not be held

liable for hosting such contact. *See Giordano v. Romeo*, 76 So. 3d 1100, 1102 (Fla. Ct. App. 2011) (refusing to order defendant to remove material from its site, because, under 47 U.S.C. § 230, the defendant "enjoys complete immunity from any action brought against it as a result of the postings of third party users of its website"); *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 412 (Sup. Ct. 2010) (relying on 47 U.S.C. § 230 in refusing to "order[] Yelp to delete from Yelp.com all references to him and his dental practice").

To be sure, Ms. Ellis is free to sue any person who created specific content about her (including Mr. Chan, if he was the author) to recover damages if that content is found to be constitutionally unprotected and tortious (e.g., defamatory or threatening). She just may not hold Mr. Chan liable for others' speech, or get an injunction ordering the removal of *all* speech about her, including speech that does not fall within any First Amendment exception.

CONCLUSION

For these reasons, the amicus curiae respectfully requests that this Court vacate the lower court's injunction, and order the lower court to enter judgment in favor of Mr. Chan.

Respectfully submitted, this 5th day of September, 2014.

/s/ Darren Summerville

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CERTIFICATE OF SERVICE

I hereby certify that I have delivered the attached **Brief of *Amici* The Electronic Frontier Foundation and Professor Aaron Caplan** to all counsel either by first class mail or by email service in PDF format, if a written agreement between counsel regarding such service. Service was made to:

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I have also filed the foregoing document with the Supreme Court's e-file system, which will cause an electronic copy of the attached to be delivered to all counsel.

This 5th day of September, 2014.

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