Jeffrey Vernon Merkey
1058 East 50 South
Lindon, Utah 84042
Telephone: (801)427-3547
Facsimile: (801)427-3547
Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEFFREY VERNON MERKEY

vs.

YAHOO SCOX members atul666 and saltydogmn
PAMELA JONES a.k.a. GROKLAW.COM,
a.k.a. OSRM
and GROKLAW.NET
MRBUTTLE a.k.a. IP-WARS.NET
JEFF CAUSEY a.k.a. IP-WARS.NET
AL PETROFSKY a.k.a. SCOFACTS.ORG
DOES 1 through 200,

Defendants.

MEMORANDUM IN OPPOSITION TO ELECTRONIC FRONTIER FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF UTAH MOTION FOR LEAVE TO FILE AMICUS BRIEF

Case No: 2:05-cv-521 DAK

Honorable Dale Kimball
Federal Magistrate Samuel Alba

Pursuant to Federal Rule of Appelatte Procedure 29, Respondent Jeffrey Vernon Merkey submits his opposition to the motion for leave to file an Amicus brief on behalf of the Electronic Frontier Foundation ("EFF") and the American Civil Liberties Union ("ACLU").

NATURE OF THIS ACTION

1. This is a federal civil rights action pursuant to 42 U.S.C. § 1983 and § 1988, and the federal constitutional provisions and statutes referred to herein, by Jeffrey Vernon Merkey ("Merkey") against the named Defendants (sometimes hereinafter collectively referred to as "Defendants").

3. The damages Plaintiff seeks from Defendants are the proximate, direct and consequential result of Defendants' willful, and/or malicious, and/or intentional, and/or reckless and/or deliberately indifferent actions and/or omissions, individually or in concert with others, which violated Plaintiffs' federal constitutional and statutory rights including – but not limited to – their conduct in:

A. Unlawfully depriving, and conspiring to deprive, Plaintiff of his well-established federal constitutional and statutory rights to freely associate, to exercise his religious beliefs and practices, to enjoy his rights to privacy, and his rights to enjoy the due process and equal protection of law and the equal application of the law, without intrusion or interference, his freedom of speech, and his right of expressive association by conspiring to murder and/or threatening to murder Plaintiff, enlisting and/or soliciting others to murder plaintiff, intentionally inflicting emotional distress upon Plaintiff and advocating through public Internet postings and websites that Plaintiff commit suicide, in stealing Plaintiff's identity on the public Internet and posting comments and emails which defame him, in engaging in slander of title of Plaintiff's intellectual property, and in publicly defaming Plaintiff and tortiously interfering in Plaintiffs

career and business and cultural relationships;

B. Unlawfully harassing, intimidating, threatening, and otherwise substantially burdening the Plaintiff in the exercise their fundamental religious beliefs, freedom of speech, and the right of expressive association, by conspiring to murder and/or threatening to murder Plaintiff, enlisting and/or soliciting others to murder plaintiff, intentionally inflicting emotional distress upon plaintiff and advocating through public Internet postings and websites that Plaintiff commit suicide; and in stealing Plaintiff's identity on the public Internet and posting comments and emails which defame him, in engaging in slander of title of Plaintiff's intellectual property, in publicly defaming Plaintiff and tortiously interfering in Plaintiffs career and business and cultural relationships;

3. Plaintiffs assert that Defendants' conduct challenged herein, has and/or continues to deprive Plaintiffs of their well-established federal constitutional and statutory rights to: (1) freedom of speech; (2) assembly; (3) anti-establishment of religion; (4) free exercise of religion; (5) privacy; (6) due process, and (8) equal protection of the laws, all guaranteed under the First Amendment, and/or Fourth Amendment, and/or Fifth and/or Fourteenth Amendment to the United States Constitution, and/or the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.§2000cc et seq., PL 106274, and/or 42 U.S.C. §1996a, and/or Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 et seq.; and that each of the Defendants is personally and/or officially liable to the Plaintiffs for their malicious, and/or intentional, and/or deliberately

indifferent violations and deprivations of Plaintiffs' federal constitutional and statutory rights under both Federal and Utah State Law.

4. Plaintiffs reserve their right to also assert additional, pendent claims against Defendants for violating Plaintiffs' rights under the Constitution and Laws of the State of Utah.

STATEMENT OF FACTS

1. The EFF and ACLU Amicus Brief states, "Plaintiff seeks expedited discovery yet has failed to properly notify multiple defendants of the very existence of this lawsuit. ".

2. The EFF and ACLU brief states, "[defendants] ... appear to have no relationship with each other or the named defendants".

3. Defendants John Sage, Finchhaven.com, Grendel, Pagansavage.com, Merkey.net, Matt Merkey, and Brandon Suit have been dismissed from the litigation as of August 15, 2005, as these parties have settled their claims and joint stipulations have been reached with these parties pursuant to Rule 408.

4. Three separate emails have been sent to Pamela Jones and Groklaw.com since commencement of this action on June 21, 2005, and have not been responded to by her. Attempts to locate her for service have been unsuccessful to date. Pamela Jones continues to author and post stories to Groklaw.com and Groklaw.net and is either ignoring these requests or is evading service.

5. Jeff Causey has been contacted by telephone by Plaintiff and is aware of this action and has a received copies of the original and amended complaints. Jeff Causey has posted three stories on his website, IP-Wars.net discussing the claims and stating specific details of these conversations. Mr. Causey has stated during these telephone conversations he will not file an answer or accept a waiver of service. He also stated he would not answer the door should Plaintiff send the sheriff to serve him with process in this action.

6. Al Petrofsky had an entire web page dedicated to this litigation posted on the internet through scofacts.org, his personal website, and has answered the suit by filing an answer.

7. MRBUTTLE has posted comments about the litigation on the IP-Wars.net website, discussing the claims and specific facts alleged herein.

8. saltydogmn and atul666 have posted almost 100 messages on the Yahoo SCOX message board discussing the litigation and pleadings in the litigation. Both parties have sent emails to Plaintiff and have engaged in Rule 408 Settlement discussions relative to the litigation.

9. An individual identifying himself as atul666 has called the cell phone of Plaintiff over a dozen times since the commencement of this action, and made statements he "has lots of guns" and is "a gun rights activist" and that he "is coming to visit plaintiff" and other threatening language if he is not dropped from the litigation. The last call from this person was received while Plaintiff in the middle of an eye examination at the optometrist with the optometrist listening in on the conversation.

10. All of the named defendants active in this action are members of the SCOX message board and act in concert with one another as an Internet "lynch mob" who attack and harass Plaintiff through a variety of oppressive means.

11. Within 1 hour of the filing of this brief and motion with the Court, messages began appearing on the SCOX message board soliciting funds and donations to the EFF and ACLU from the named defendants and the general public by "anonymous" Internet posters. This motion and brief had not been entered on the electronic docket of the Court or even barely arrived in the hands of the parties to this action when these solicitations for donations began to circulate throughout the public Internet.

ARGUMENT

"An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Rule 37(1), Rules of the Supreme Court of the U.S.

Rule 29. Federal Rules of Appellate Procedure.

> A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for a later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons."

Plaintiff opposes the brief filed by the EFF and ACLU on the grounds of judicial efficiency, bad faith, defective arguments, incorrect facts, defective conclusions, and abuse of process. This is a preliminary ex-parte evidentiary hearing on a motion to obtain the address of service of individuals who engaged in interstate commerce and interstate computer transactions covered under the Communications Decency Act which violated and irreparably harmed Plaintiff. These interactions involve the transfer and distribution of sealed court documents, agreements, and personal financial information of Plaintiff, which have nothing to do with free speech claims of

defendant's.

The voluminous EFF and ACLU briefs on the First Amendment issues regarding Internet privacy for protection of free speech are interesting, but irrelevant. The mere fact that the defendants were engaged in free speech while they were also engaged in tortious actions does not address the claims of tortious interference or violation of Plaintiff's due process rights, rights to privacy, conspiracy to use the color of state law to harass and threaten plaintiff, and does not address the second element of their interaction in engaging on interstate computer transactions over the public Internet, which is covered under the CDA, section 230, and is preemptive under the Commerce Clause.

The Communications Decency Act of 1996, Section 230 states:

> **§ 230. Protection for private blocking and screening of offensive material**
>
> Release date: 2005-03-17
>
> (a) **Findings**
> The Congress finds the following:
> (1) 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.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
> (b) **Policy**
> It is the policy of the United States—
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4)to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5)to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
(c) **Protection for "Good Samaritan" blocking and screening of offensive material**
(1) **Treatment of publisher or speaker**
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
(2) **Civil liability**
No provider or user of an interactive computer service shall be held liable on account of—
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]
(d) **Obligations of interactive computer service**
A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.
(e) **Effect on other laws**
(1) **No effect on criminal law**
Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.
(2) **No effect on intellectual property law**
Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.
(3) **State law**
Nothing in this section shall be construed to prevent any State from enforcing

any State law that is consistent with this section. 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.

(4) **No effect on communications privacy law**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) **Definitions**

As used in this section:

(1) **Internet**

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) **Interactive computer service**

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) **Information content provider**

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) **Access software provider**

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Immunity under Section 230 requires that: (1) the defendant is a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.

Section 230's coverage is not complete: it excepts federal criminal liability and intellectual property law. 47 U.S.C. §§ 230(e)(1) (criminal) and (e)(2) (intellectual

property); see also *Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001) (no immunity for contributory liability for trademark infringement); *Perfect 10, Inc. v CCBill LLC* (No. CV 02-7624 LGB) (C.D. Cal. June 22, 2004) (state right of publicity claim is not covered by Section 230); *cf. Carfano*, 339 F.3d 1119 (dismissing, inter alia, right of publicity claim under Section 230 without discussion).

The Court has well established case law regarding the power of Congress to regulate interstate commerce, and this includes commerce over the public Internet in the form of weblog transactions. Under the Supremacy Clause, Congress and the Courts are the final arbiters of competing National and Individual interests. Congress stated as a matter of policy a compelling interest in protecting Internet users and the American Public from the dangers of the unregulated Internet:

> **" ..to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer."**

This act also states that privacy and abuse of criminal and intellectual property laws are not exempted activities – which have nothing to do with protected free speech. Since the defendants are alleged to have taken financial information and distributed it on the Internet, distributing sealed court documents, and stalking Plaintiff on the Internet and harassing Plaintiff, Free speech claims simply do not apply for purposes of evading service or discovery.

EFF and ACLU claims of free speech and First amendment concerns fail at this juncture under a rational basis test of the CDA and the Commerce Clause. The balancing test, if any, is a compelling interest standard of the rights of individuals to use the Internet to harass others under claims of protected free speech vs. the Congressional authority under the Commerce Clause to regulate the public Internet and transactions which occur there that violate the United States stated policies of promoting a free and safe Internet environment. Congress has stated that computers may not be used for stalk or harass United States Citizens and have stated such as a compelling government interest. Consequently, The United States interests in protecting the American People override defendant's First amendment rights to privacy when they engage in such conduct and cannot be used as shield to evade service or discovery and used to wrongfully invoke a constitutional privilege under the First Amendment.

The EFF and ACLU assert facts and conclusions not in evidence. Plaintiff has over 2000 Exhibits of Defendant's conduct on the Internet. This exhibits are Internet transactions as much as they are free speech. The Court has ruled that interstate transactions, whether computer created or telephonic ally created qualify as interstate commerce under the Authority of the Commerce Clause. (*United States v. South-Eastern Underwriters Assn 322 Us 533 (1944) that insurance transactions across state lines constituted interstate commerce, thereby logically establishing their immunity from discriminatory state taxation.)*

The Court has also consistently upheld the Authority of Congress to regulate

commerce between states and intrastate when these class of activities are involved in any area or class of activities Congress has chosen to regulate in support of National Interests, and that this authority is interpreted in the broadest possible sense.

Gonzales vs. Raich, et. 545 U.S. _____ (2005):

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, *e.g., Perez*, 402 U. S., at 151; *Wickard* v. *Filburn*, 317 U. S. 111, 128-129 (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.*, at 125. We have never required Congress to legislate with scientific exactitude. When Congress decides that the " 'total incidence' " of a practice poses a threat to a national market, it may regulate the entire class. See *Perez*, 402 U. S., at 154-155 (quoting *Westfall* v. *United States*, 274 U. S. 256, 259 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so")). In this vein, we have reiterated that when " 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' " *E.g., Lopez*, 514 U. S., at 558 (emphasis deleted) (quoting *Maryland* v. *Wirtz*, 392 U. S. 183, 196, n. 27 (1968)).)
>
> " ... Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity. "
>
> In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. *Lopez*, 514 U. S., at 557; see also *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276-280 (1981); *Perez*, 402 U. S., at 155-156; *Katzenbach* v. *McClung*, 379 U. S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 252-253 (1964). Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U. S. C. §801(5), and concerns about diversion into illicit channels,[33] we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.
>
> " ... Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U. S. Const., Art. I, §8. That the regulation ensnares some purely intrastate

> activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme."

The EFF and ACLU also claim that the evidentiary standard for obtaining expedited discovery for purposes of service and to identify parties must meet the same standard required to obtain a preliminary injunction is not supported by existing case law involving Internet transactions where potentially unlawful acts were committed. Plaintiff is prepared to put on such an evidentiary hearing for the Court should the Court chose to accept the EFF and ACLU "junk law" legal briefs and arguments. Based upon the Supremacy Clause and Congress directives regarding the Internet, any balancing test clearly tips in favor of Plaintiff based upon the alleged actions of Defendants, not their alleged "free speech" and right to anonymously violate the laws of the United States.

Based upon the numerous Internet postings soliciting donations to the EFF and ACLU which rapidly surfaced on the public Internet within 1 hour of these pleadings being filed with the Court (and not docketed), the only logical conclusion is the EFF and ACLU are using this action as a "gala fund raiser" to dupe the ignorant and misinformed on the Internet and solicit funds to "protect free speech". Review of their briefs and motions clearly indicate that are some sort of "ambulance chaser" organization who solicits donations from the general public to file and interpose themselves in litigations to which they have no standing.

Given that this litigation has not even reached the preliminary injunction phase, the filing of an Amicus Brief under Rule 29 of the Federal Rules of Appellate procedure

seems very premature and an abuse of process.

CONCLUSION

The motion should be denied as the brief submitted by EFF and the ACLU contains numerous defects, false assertions, incorrect facts, irrelevant case law and citations, was offered in bad faith effort as a "publicity stunt" in order to solicit moneys from the general public and the ignorant, submits matters for consideration outside the scope of venue for this action, and is an attempt at witness tampering and abuse of process.

DATED this 15 day of August, 2005.

JEFFREY VERNON MERKEY, Plaintiff

CERIFICATE OF SERVICE/MAILING

I certify that a true and correct copy of RESPONDENT JEFFREY VERNON MERKEY'S MEMO OPPOSING MOTION FOR LEAVE TO FILE AMICUS BRIEF AND NOTICE OF DISMISSAL, in the styled action of 2:05CV521DAK filed in the US District Court, District of Utah, Central Division was mailed to all Parties or delivered by hand to:

Alan P. Petrofsky
3618 Alameda
Apt 5
Menlo Park, CA 94025

Margaret Plane
355 North 300 West
Salt Lake City, UT 84103

Kurt Opsahl
Matt Zimmerman
Corynne McSherry
454 Shotwell Street
San Francisco, CA 94110

8/15/05

JEFFREY VERNON MERKEY Plaintiff