

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION 4

KATHLEEN R., in her capacity  
as an individual, KATHLEEN R.,  
in her capacity as a taxpayer, and  
KATHLEEN R., in her capacity  
as guardian ad litem for  
BRANDON P., a minor,

Plaintiff and Appellant,

vs.

CITY OF LIVERMORE,

Defendant and Respondent.

NO. A086349

Alameda County  
Superior Court  
Case No. V-015266-4

(Hon. George C. Hernandez, Jr.,  
Presiding)

**REPLY BRIEF OF APPELLANT KATHLEEN R.**

**On appeal from an order of the Superior Court of California,  
County of Alameda, sustaining a demurrer without leave to amend**

**The Honorable George C. Hernandez, Jr., Presiding**

Michael Millen  
Attorney at Law  
State Bar #151731  
12 S. First St., Ste. 810  
San Jose, CA 95113

(408) 998-3262

Attorney for Appellant  
Kathleen R.

**Affiliate Attorney for the  
Pacific Justice Institute**

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#### NOTE CONCERNING AMICI

Rather than filing separate briefs, Appellant addresses all relevant amici arguments herein.

#### ARGUMENT

I. The Communications Decency Act was not intended to insulate the government from judicial review of its filtering policies, particularly with regard to the provision of obscene material to children

Appellant's Opening Brief provides a general analysis as to why the Communications Decency Act ("CDA") is inapplicable to the current lawsuit. Respondent's Brief raises a number of counterpoints to which Appellant will respond. As a preliminary matter, however, Appellant wants to put to rest a sort of overriding argument made by Respondent and amici that the CDA was somehow intended to immunize libraries from state and federal lawsuits concerning the libraries' willful choice to provide minors with obscene pornography.

In the beginning there was *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* (N.Y. Sup. Ct. May 24, 1995) 1995 WL 323710, in which Prodigy computer network system was held strictly liable for allowing others to post defamatory messages on its computer bulletin board system. The liability was based on the argument that because Prodigy had a policy restricting access to defamatory and other objectionable material, it thrust itself into the role of editor and publisher. (*Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331.) In response to this and the specter that *Stratton Oakmont* tort liability would inhibit robust growth of the

internet, Congress enacted §230, replete with its statement of national policy that it is,

the policy of the United States . . . 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.

Congress was bothered by the fact that in *Stratton, Prodigy* was found liable principally because it had tried, unsuccessfully, to restrict access to defamatory messages. This dissatisfaction is reflected by the Conference report of January 31, 1996, in which the committee states:

One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.

(Conference Report on S. 652 (Telecommunications Act of 1996), January 31, 1996, 142 (part 2) Congressional Record 1958, 104th Congress, 2nd Session (1996).

When Congress passed §230 of the Communications Decency Act, it also passed §223 (found at 42 U.S.C. §223). As written, §223(d)(1) made it illegal "to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." In addition, §223(d)(2) made it illegal to "knowingly permit[] any telecommunications facility under [a] person's control to be used for an activity prohibited" by §223(d)(1). As written, the law supported Appellant's position even more than Appellant has even demanded: it made it illegal to allow a minor to access a computer and view any patently offense image, as opposed to only images obscene as to minors.

At the same time, Congress was acutely aware of the various immunity provisions contained in §230(c). In order to make it clear that Congress was far more concerned with protecting children than giving immunity, Congress made clear that §230 immunity would never apply to §223 violations or, inter alia, to violation of any Federal criminal law. (See §230(d).)[1] For that reason, §230(d)(1) was made to say, "[n]othing in this section shall be construed to impair the enforcement of section 223 of this Act."

Congress did not intend §230 to trump every state statute in existence. In fact, in §230(d)(3), Congress made clear that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." As an example, a state law which held libraries liable for allowing school children to access obscene pornography at the library would be wholly consistent

with §230 because §230, via its §223(d)(1) exemption, clearly was not intended to immunize from liability those who provide indecent images to children. Similarly, if a state law was to be used in such a way as to allow a private citizen to prevent the library from providing her child obscene images on a computer terminal, such a law would pass muster under §230 because it is consistent with §223's goals of preventing children from seeing indecent images.

In the fullness of time, the Supreme Court found that §223(d) was too broad and invalidated it. (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874.) The Supreme Court made clear that the reason it was invalidating §223(d) was because it sought to do too much – instead of simply making a crime to knowingly allow minors access to a computer terminal displaying obscene images (which would satisfy Kathleen R.), it also forbade displaying to minors anything "patently offensive." (47 U.S.C. §223(a)(1).) This was fatal, and the High Court found that "the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision." (*Id.* at 521 U.S. 882, 117 S.Ct. \_\_\_, 138 L.Ed.2d 904.)

However, the *Reno* decision does not affect the character of what Congress approved of as being "State law that is consistent with this section" in §230(d)(3). In other words, even though §223(d) cannot be used to impute federal criminal liability because of its overbreadth, the fact remains that it is a clear demarcation of the sort of law that Congress does not want touched by §230's immunity provisions.

It thus makes perfect sense that Messrs. Zeran and Blumenthal's defamation lawsuits fell in the face of §230's immunity. (See *Zeran and Blumenthal v. Drudge* (D.D.C. 1998) 992 F.Supp. 44.) Although by its own terms *Doe v. America Online* (1998) 718 So. 2d 385, review granted (Fla. 1999) 720 So.2d 390, has submitted questions to the Florida Supreme Court for analysis, has been accepted for review, and is thus not final, it would similarly be understandable as to why the *Doe* court would not hold America Online liable for merely allowing a child molester to post a message. In all three cases, the same commercial enterprise, America Online, was being sued for text messages which, like Prodigy, it said it would attempt to redact but for which it was unsuccessful.

Such cases are quite different than the one at bar, which seeks to redress a wrong which Congress considered to be outside the scope of §230 immunity – the knowing and intentional provision of obscene pornography to children, and that by a government agency.

This court is urged to find that California state law, to the extent it is used to prevent the distribution and display of obscene pornography to minors, is consistent with Congressional intent and is an example of "State law that is

consistent with this section [230]" as set forth in 47 U.S.C. §230(d)(3) and exemplified in §223(d).

With this background, Appellant now addresses the arguments of Respondent and amici as follows:

A. Congress never intended §230 immunity to allow distribution of obscene pornography to children

As thoroughly analyzed above, a government agency's choice to provide obscene pornography to children is not immunized by §230 because the model exception to the immunity, §223(d), specifically sought to prevent it and was intended to be an example of an action for which there was no immunity.

B. The history of §230 and all interpreting cases suggest that it has nothing to do with liability against government entities

Only one court, the Mainstream Loudoun court, has ever looked at the question of whether §230 gives immunity to government libraries themselves. That court found §230 to be irrelevant in such circumstances, noting:

Thus, as its name implies, §230 was enacted to minimize state regulation of Internet speech by encouraging private content providers to self-regulate against offensive material; §230 was not enacted to insulate government regulation of Internet speech from judicial review.

(Mainstream Loudoun v. Board of Trustees of the Loudoun County Library (1998) 2 F.Supp.2d 783, 790 (E.D.Va.)

Respondent suggests that Appellant has given "blind reliance" to a "confused reading" of this part of the Mainstream Loudoun decision, theorizing that the Mainstream Loudoun court was only referring to a part of §230 which, supposedly, does not apply here. Neither Mainstream Loudoun, nor its predecessor Zeran, will suffer such incorrect interpretations. The reason is that the immunities in §230 are essentially all or nothing — either public libraries get all of them or none of them. Respondent never reasons as to how it came to the conclusion that a library is logically entitled to certain immunity under the statute but not other immunity. The better reasoning is that the history and public policy behind §230 has nothing to do with protecting government entities at all.

The Zeran court used these principles to find that state defamation lawsuits against private companies for allowing postings to remain on their computers available for reading was exactly what Congress had in mind in giving immunity.

In turn, the Mainstream Loudoun court was quite familiar with Mr. Zeran and his unsuccessful attempt to hold America Online liable for refusing to withdraw

defamatory messages. After reviewing the history of the case law and §230 (Mainstream Loudoun, 2 F.Supp.2d at 789), the court concluded that while immunizing a library "is facially attractive" (id.), the fact is that "§230 was not enacted to insulate government regulation of Internet speech from judicial review." (Id. at 790.)[2]

Thus, while respondent and amici suggest §230 gives immunity to government libraries, neither the Congress nor the courts have so found.

C. Even if §230 immunity is generally available to Respondent, it is not available in light of the causes of action pleaded in this case.

Respondent suggests that because injunctions are based upon underlying causes of action, and because the causes of action pleaded here are supposedly pre-empted, no injunction can issue.

However, the Mainstream Loudoun noted that, "[e]ven if §230 were construed to apply to public libraries, defendants cite no authority to suggest that the 'tort-based' immunity to 'civil liability' described by §230 would bar the instant action, which is for declaratory and injunctive relief." (Mainstream Loudoun, 2 F.Supp.2d at 790.) This action similarly does not request monetary damages but requests "declaratory and injunctive relief."

In addition, Appellant's third cause of action was one for taxpayer waste under Code of Civil Proc. §526a. Such an action is a statutory right and is no way a "tort" (the wronging of one's rights by another.)

This distinction between tort and statutory suit against the government should not be underestimated. Regardless of their view or outcome, every court to ever look at §230 considered it at most to provide some form of immunity from tort liability (usually defamation) as opposed to some other form of liability. The Zeran court noted that "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 . . . ." (Zeran, 129 F.3d at 330) (emphasis added). It further noted that "Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages" (Id. at 330-331)(emphasis added)) and that "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect." (Id. at 331)(emphasis added).)

Mainstream Loudoun supports this interpretation, making it clear that "tort-based" claims are the only claims to which immunity would apply at all. (Mainstream Loudoun, 2 F.Supp.2d at 790.) The Blumenthal court found similarly, noting that "[w]hether wisely or not, it [§230] made the legislative judgment to effectively

immunize providers of interactive computer services from civil liability in tort . . . ." (Blumenthal, 992 F.Supp. at 49 (emphasis added).)

Because the waste of taxpayer funds cause of action is not a tort under anyone's definition, §230 does not apply.

## II. Appellant's state law causes of action are valid

Respondent argues that appellants state causes of action are themselves precluded and unactionable. State law does not so hold

Respondent first argues that the California Tort Claims Act (Gov. Code §810 et seq.) bars a request for declaratory relief. However, the authorities cited by Respondent say nothing of the sort. In truth, the Tort Claims Act does not apply to actions which seek injunctive or declaratory relief. As stated in *Harris V. State Personnel Bd.* (1985) 170 Cal.App.3d 639, 643,

Those actions which seek injunctive or declaratory relief and certain actions in mandamus, such as appellant's action herein, and where money is an incident thereto, are exempted from the statute.

Thus the Tort Claims Act has no bearing on this suit.

Respondent next argues that the C.C.P. §526(a) waste of taxpayer funds cause of action is incorrectly pleaded. Appellant has already asked this court to allow plaintiff an opportunity to amend the complaint to properly plead this cause of action. Respondent suggests that Appellant not be allowed to amend because under no circumstances is "providing unrestricted Internet access . . . illegal."

However, it is not the providing of unrestricted Internet access which is the problem; it is the provision of obscene pornography to children. Any use of public funds which violates law would be considered illegal, whether the law is criminal or civil. There are a host of state and criminal and civil statutes which prohibit the distribution, display, and exhibition of obscene pornography to adults and to children. (See, e.g., Cal. Penal Code §§311 et seq., 42 U.S.C. §223(a) (which was upheld by the *Reno v. ACLU* court with regard to obscenity), 18 U.S.C. §1465, and the simple fact that money spent without a rational basis is an illegal expenditure). Thus, Appellant will have no problem proving that illegal expenditures are being made. The court should find the C.C.P. §526(a) cause of action viable.

Respondent next argues that, supposedly because the alleged wrongful acts are authorized by statute, the public nuisance action fails because Appellant lacks standing. The standing issue was fully set forth in Appellant's Opening Brief and will not be repeated in full here. Suffice it to say that the nature of the injury suffered here is sufficient to satisfy both California law and the Restatement

Second of Torts. Further, Respondent mischaracterizes the wrongful act supposedly authorized by statute. Appellant is not complaining about unrestricted Internet access, but about the provision of obscene pornography to children. As an analogy, imagine the library had an ordinance which stated that patrons may use library owned and maintained electric typewriters while at the library. If a child signs up to use a typewriter and is severely injured because the typewriter has a short which electrocutes him and gives him a brain-injuring electric shock, and the library knows or even intends for this to happen, the City could not escape liability by arguing that the City policy specifically provided for the very act in question, because the policy only generally authorized the provision of typewriters and did not authorize the injuring of children or giving them known dangerous instrumentalities.

Respondent would admittedly have a better argument if it changed its library policy to state that "the library hereby encourages and will assist minors as needed in order to allow them to view and download obscene pornography." Until the library changes its policy to something specifically allowing the harm, however, this cause of action remains viable.

Respondent's final rebuttal to the state law claims is that the library is not a dangerous premises. This point, and the associated cases cited by Respondent, have already been fully covered in Appellants Opening Brief at 12-14. Respondent does not effectively counter Appellant's points, so there is nothing to specifically reply to here. Suffice it to say that any library which sets up a computer system in which is designed to knowingly allow children to view obscene material to their extreme psychological detriment is indeed a dangerous place.

### III. Appellant properly alleges a due process violation

Appellant alleges that the libraries past and continuing actions amount to substantive due process violations, both in the legislative and executive sense. However, virtually every case cited by amicus California State Association Of Counties deals with the executive portion of the substantive due process clause. In her Opening Brief at 14-19, Appellant Kathleen R. argues extensively that the primary problem with library's policy is that it fails the legislative aspect of the due process clause. Appellant also argued that it violated the executive aspect as well.

Respondent and amici spend a large amount of time discussing the executive aspect but very little time discussing the legislative aspect. All three briefs attack the legislative aspect from the same angle: Appellant has not alleged a fundamental right. This is incorrect.

In completely mischaracterizing Appellant's 14th Amendment argument, amicus ACLU suggests that "plaintiff contends that the Constitution imposes on the library the affirmative duty to monitor and control the Internet use of minors."

(ACLU Brief at 20). This is quite absurd, and Appellant's argument is far more cogent than the ACLU's misconstruction. Simply put, Appellant contends that the library, as a state actor, has a duty to avoid the knowing infliction of physical and emotional pain on her minor child.

Contrary to the protestations of amicus California State Association Of Counties, this fundamental right is not an invention of Appellants. This point is made many times throughout United States case law. In *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, the Ninth Circuit makes this point three times in three pages. On page 589 of the opinion the *Wood* court cites *Ingraham v. Wright* (1977) 430 U.S. 651, 674-675, 97 S.Ct. 1401, 1414, 51 L.Ed.2d 711 for the proposition that a "child had liberty interest in personal security and freedom from restraint and infliction of pain" and later on the same page states that "physical security [is] a liberty interest protected by the Constitution. See *Ingraham v. Wright*, supra." (*Wood*, 879 F.2d at 589.) Two pages later, the court reiterates in a footnote that the plaintiff had "shown sufficient facts which, if proven at trial, establish a violation of her right to personal security, a liberty interest protected by the fourteenth amendment." (*Wood*, 879 F.2d at 591 fn. 8.)

This is the same fundamental right to "bodily integrity" cited by the amicus itself as being found in *Washington v. Glucksberg* (1997) 521 U.S. 702, 138 L.Ed.2d 772, 117 S.Ct. 2258 and is what *Ingraham v. Wright* (1977) 430 U.S. 651, 673-674 [51 L.Ed.2d 711, 97 S.Ct. 1401], meant when it stated:

While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.

Amicus California State Association Of Counties suggests that because *Ingraham* discussed procedural due process concerns concerning this fundamental right, *Ingraham* has no bearing on analyzing fundamental rights in the substantive due process context. This is a red herring based upon a misreading of *Ingraham* and *Wood*. The *Ingraham* Court never deviated from its finding that freedom from pain was a fundamental right.

The substantive due process clause is designed to "bar[] certain government actions regardless of the fairness of the procedures used to implement them." (*Daniels v. Williams* (1986) 474 U.S. 327, 331.) In *Ingraham*, the High Court found that a student paddling performed by school officials was not the sort of "government action" that needed to be barred, particularly in light of the longstanding history of the practice and the existence of common-law remedies.

This does not change the fact that bodily integrity and freedom from pain is a fundamental right. A library which knowingly injures children by providing them with damaging material unprotected by the First Amendment works to deprive a child of a fundamental right. Somewhere in the territory of the right to "privacy,"

"personal security," "bodily integrity" and "freedom from bodily restraint and punishment" lies the right to not be knowingly and intentionally injured by the acts of government actors. Surely the concept of ordered liberty involves an inherent restraint on the State prohibiting it from knowingly causing pain and depriving a minor of health in such a circumstance. By providing Kathleen R.'s son with damaging, harmful, obscene pornography, the library is violating this fundamental right. Because a fundamental right is involved and is being harmed, the library must show a compelling state interest as opposed to a rational basis for its policies.

With regard to the executive, as opposed to the legislative, due process question, amicus California State Association Of Counties at pp. 29-33 cites a litany of cases involving adults and concludes that a substantive due process violation attaches only when "the individual has been placed in a dependent and helpless position . . . ." (United States v. Koon (9th Cir. 1994) 34 F.3d 1416, 1447 [police officers inflicted physical injuries on plaintiff during arrest] revd. in part on other grounds (1996) 518 U.S. 81, 135 L.Ed.2d 392, 116 S.Ct. 2035), it is not clear what the amicus would have a child do who is provided obscene pornography by a librarian. None of these cases involve the situation where the victim is a child and the State itself is causing the harm. Similarly, while it may be that "foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship" (Graham v. Independent School District (10th Cir. 1994) 22 F.3d 991, 994), such a rule is unhelpful when it is the government actor itself who is directly harming the child.

While it may be true that the state did not kill the youngster but that the ocean did in *Bradberry v. Pinellas County* (11th Cir. 1986) 789 F.2d 1513, [no constitutional violation by failing to protect by providing lifeguards], the question to be answered here is whether the library "affirmatively placed the plaintiff in a position of danger." (*Wood*, 879 F.2d at 589-90.)

There was no problem before the City started its policy of essentially giving obscene pornography to any willing child who asks. Brandon P. has never needed government protection in his trips to the library; rather, he needed the government to stop giving him obscene pornography. It should not be forgotten that the allegations of the complaint are that the library knows and intends to keep giving children obscene images on library computers and intends to allow them to use library equipment to view and store those images.

While the ACLU waxes fervent in its hypothesizing that "Kathleen R. seeks to impose her values on the manner in which Internet access is governed at the Livermore public library," (ACLU Brief at 22), the truth is that Kathleen R.'s values are irrelevant to the requested relief. It is the value of the Congress, the State legislature, the courts, and just about everyone else (except perhaps the ACLU) that obscene pornography harms children and has no redeeming value. Unlike the plaintiffs in *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), Kathleen R. is not hypothesizing that exposure to non-obscene

sexually-related information harms her right to direct the upbringing of her child; rather, she is claiming that actual exposure to obscene pornography has psychologically harmed her son and it is on his behalf that she brings this action. Kathleen R.'s son has been psychologically damaged by the library's provision to him of obscene pornography, and this violated his constitutional right of bodily integrity and freedom from pain.

The ACLU goes on to argue that the library's policy (which ultimately allows young children to be given obscene pornography) is "reasonable" (ACLU brief at 24). The ACLU analogizes this with *Martinez v. California* (1980) 444 U.S. 277, in which a state's policy of releasing a sex offender who murdered a girl was found to be non-actionable, even though, like the speed limit, "it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander." (Id. at 282.) In *Martinez*, however, it was not the state actor who tortured and murdered the victim but rather a supervening criminal actor unaffiliated with the state. The same cannot be said of the library, against whom plaintiff seeks an injunction to prevent it from distributing to minors further harmful obscene pornography. When the state is the one who intentionally acts as the last link in the chain of distribution, such "link in the chain" arguments fall flat.

#### IV. Concerns about the constitutionality of a remedy are premature

The ACLU suggests that Appellant has demanded an incredibly broad injunction which would, by definition, be unconstitutional in its application.

This is incorrect, for the prayer of the complaint does not set forth the only precise language sought. With regard to the problem of children such as Brandon P. harming themselves by viewing obscene images on the library's computers, the library could solve the present problem any number of ways. As an example, Appellant would be satisfied if the city would prohibit minors from using the Internet unless the minor had verified written parental permission. Interestingly, amici Palos Verdes and Lodi Public Library Board of Trustees have in fact adopted an Internet use policy that provides unrestricted use of the libraries' Internet connections for all adults and any minor with parental permission. (Amicus Curiae Brief for California State Association Of Counties, et al., at 2). Appellant has indicated in the past that she would settle for such a reasonable informed consent scheme, so it seems that amici and Appellant have a similar belief as to what "reasonability" is in practice.

The ACLU suggests that plaintiff's prayer is defective in that it requests a prior restraint. This prior restraint rule only applies when the defendant is a private entity; otherwise, there are no constitutional concerns. The First Amendment was designed to protect people from the State, and was not designed to protect one branch of the State (a library) from another branch of the State. The reason for this is self-evident: if the State desires to speak but finds it cannot, it need only pass rules allowing it to speak. Plaintiffs have previously challenged the ACLU to

produce any authority which suggests that a decision by a superior court allegedly limiting a city library's provision of materials somehow implicates the First Amendment rights of the library. If specific patrons have specific complaints after a solution is implemented, such could be dealt with in the course of time.

More importantly, however, is the fact that appellants have never suggested a specific system such as that invalidated in the case of *People ex rel. Busch v. Projection Room Theatre* (1976) 17 Cal.3d 42 (State v. private bookstore). Even the Busch court saw no problem with permanently enjoining the showing of specific obscenities found to be obscene by a jury. As the Busch court summed up:

We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required.

(Id. at 60.) The court is thus asked to allow the case to proceed to trial and, after a verdict in favor of plaintiffs, allow the trial court to fashion an appropriate remedy.

## CONCLUSION

Congress never intended §230 to shield libraries who knowingly provide obscene and harmful material to children, and provided §223 as proof positive of this. The lower court erred by sustaining the demurrer without leave to amend. This court is asked to reverse the decision and order the defendant to file an answer.

Respectfully submitted,

Dated: January 10, 2000

Office of Michael Millen  
Attorney at Law

By: \_\_\_\_\_  
Michael Millen  
Attorney for Plaintiff Kathleen R.

PROOF OF SERVICE

I am an active member of the State Bar of California and am not a party to this cause. My business address is 12 S. First St., Suite 810, San Jose, CA 95113. On the date below, I served a copy of

1. REPLY BRIEF OF APPELLANT KATHLEEN R.

? by depositing each of them in a sealed, postage-paid envelope in the United States mail in Santa Clara, CA, on the date indicated below, said envelope being addressed to

Daniel Sodergren, Esq.  
City Attorney's Office  
1052 S. Livermore Ave.  
Livermore, CA 94550  
(Representing City of Livermore)  
For: Hon. George C. Hernandez  
Superior Court Clerk  
5672 Stoneridge Dr.  
Pleasanton, CA 94588  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-3600  
(Served five copies of brief) ANN BRICK, State Bar #65296  
American Civil Liberties Union  
Foundation of Northern California  
1663 Mission Street, Suite 460  
San Francisco, CA 94103  
(Representing ACLU)

CHRISTOPHER A. HANSEN  
ANN BEESON  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
(Representing ACLU)

ELLIOT M. MINCBERG  
LAWRENCE S. OTTINGER  
People for the American Way  
Foundation  
2000 M Street, NW, Suite 400  
Washington, DC 20036  
(Representing People for the

American Way)

MICHAEL TRAYNOR  
MATTHEW D. BROWN  
Cooley Godward Llp  
One Maritime Plaza, 20th Floor  
San Francisco, CA 94111  
(Representing The California State  
Association Of Counties, 48  
California Cities, The Palos Verdes  
Library District, And The Lodi  
Public Library Board Of Trustees)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 10, 2000  
Office of Michael Millen  
Attorney at Law

By: \_\_\_\_\_  
Michael Millen

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Footnotes

[1] All parties agree that Federal criminal law is untouched by §230 immunities because §230(d)(1) specifically says so. In light of this, Judge Brinkema's dicta (in *Mainstream Loudoun II*, 24 F.Supp.2d 552, 561 fn. 15) regarding immunity from criminal prosecution is just that – unreasoned dicta that had nothing to do with the resolution of the civil action and which on its face completely contravenes Congress' intent and the Zeran statement that the act deals with immunity from tort liability (*Zeran*, 129 F.3d 330). This isolated, undiscussed, contradictory, dicta suggestion found in a footnote raises far more questions than it answers to be of any help in resolving the instant dispute.

[2] The only counter to this analysis offered by Respondent and amici is that *Mainstream Loudoun* involved a federal constitutional challenge which would trump any attempt by Congress to give immunity. However, this does not invalidate *Mainstream Loudoun*'s finding but merely provides another (and

unreached) reason as to why there was no immunity. Every federal judge knows that arguments of constitutional invalidity are not to be invoked if there is some other way to dispose of an issue. The Mainstream Loudoun court followed this principle to the letter, finding that there was no immunity based upon the statute and thus constitutional analysis of the immunity provision was unnecessary.