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August 22, 2003

Mr. Joseph Haas
United States Clerk of Court
400 South Phillips Avenue
Sioux Falls, SD 57104

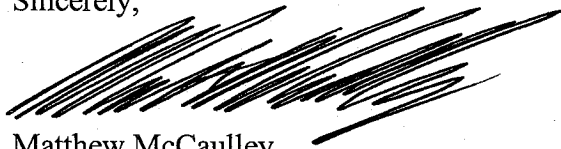
Re: James G. Abourezk vs. ProBush.com, Inc.
Civ. No. 03-4146

Dear Mr. Haas:

Enclosed for filing please find an original and a copy of the Amicus Brief of the Electronic Frontier Foundation and Professor Eugene Volokh in Support of Defendant ProBush.com's Rule 12(b)(6) Motion to Dismiss for the above referenced matter.

Please feel free to contact me should you have any questions or concerns, or if additional action is necessary on my part for this Amicus Brief to be filed in this docket.

Sincerely,



Matthew McCaulley
Attorney at Law

MM/sem
Enclosures

c: Ron Parsons, Esq. (w/ enc.)
Todd D. Epp, Esq. (w/ enc.)

embrace, of the First Amendment.

II. STATEMENT OF AMICUS CURIAE

Amici submit this brief amicus curiae in support of defendant ProBush.com's motion to dismiss. Amici believe that the ability of average citizens to put forth their opinions without censorship or limitation based upon their financial or other abilities is one of the greatest gifts of the digital age. Yet this gift requires protection from civil liability claims aimed not at redressing damage, but at silencing critics. Such spurious litigation, if allowed to continue, could render online publishing by those like ProBush.com prohibitively expensive, foster self-censorship and chill independent voices at a time when other barriers to such voices have finally been lowered.

The Electronic Frontier Foundation

The Electronic Frontier Foundation ("EFF") is a non-profit, civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has members all over the United States and maintains one of the most-linked-to Web sites in the world. (<http://www.eff.org>)

EFF believes that free speech is a fundamental human right, and that freedom of the press is vital to an open, democratic society. The vast web of electronic media that now connects us is heralding a new age of communications, a new way to convey speech. New digital networks offer tremendous potential to empower individuals in an ever overpowering world. While EFF is mindful of the serious issues that may arise when information flows free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected.

Professor Volokh

Eugene Volokh is Professor of Law at UCLA School of Law. He is the author of *THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS* (Foundation Press 2001), and

of more than twenty law review articles in the past ten years on free speech and on cyberspace law.

III. ARGUMENT

In order to best promote freedom of speech and freedom of the press in cyberspace, the Court should apply the doctrines of *Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL CIO v. Austin*, 418 U.S. 264 (1974) and *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970) and find that ProBush.com's use of the word "traitor" to describe Plaintiff resides firmly in the category of rhetorical hyperbole or opinion protected by the First Amendment. Especially in light of *Austin*, which itself discussed use of the word "traitor," Plaintiff's claim here is plainly inconsistent with the historical protection of speech that pre-dates digital technologies. Thus even outside the Internet context, ProBush.com's speech should be protected and Plaintiff's case dismissed.

Rather than echo the analysis ably put forth by counsel for ProBush.com, amici seek instead to emphasize the role of the Internet in this case, and suggest that this context further confirms the conclusion that this case should be dismissed. The Internet has emerged as a place of free speech where opinions of all stripes may be raised without fear of liability based upon disagreement with the messages they convey, or the vehemence with which they are put forward. Specifically, the context of Internet publication makes it less likely that a reader would reasonably interpret the list of "Traitors" on www.probush.com as stating actual facts about Sen. Abourezk or any of the other individuals listed. See e.g. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

The Internet enjoys a strong presumption of First Amendment protection. In holding that the Internet is entitled to the highest level of First Amendment protection, *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997), the Supreme Court recognized "the unique factors that affect

communication in the new and technology-laden medium of the Web,” *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999), a medium providing a “vast democratic for[um,]” *Reno v. ACLU*, 521 U.S. at 868, which gives average users an unprecedented ability to join a worldwide discussion and debate on a range of subjects “as diverse as human thought,” *id.* at 852, and where anyone “can become a town crier with a voice that resonates farther than it could from any soapbox” and “can become a pamphleteer.” *Id.* at 870.

The broad protection afforded by the courts and Congress to the Internet is rooted in the tradition of the “marketplace of ideas” crystallized by Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion), where he explained that “[t]he ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market,” as well as the profound national commitment to the principle that debate on public issues should be “uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The marketplace concept was echoed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974), where the court reminded us that “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”

With low barriers to entry, global reach and flexibility, the Internet has made manifest much of the promise of the marketplace of ideas. Yet as a result, and unlike newspapers, TV, and commercial radio, the Internet houses a good deal of individual, unedited speech. Readers have adjusted their expectations accordingly. People expect much Internet speech to be opinionated, even caustic, and often rife with poor grammar and spelling that would rarely be found in a professional publication. This is because it is accessible to average citizens who have

not necessarily embraced the modern "objective journalism" model and tradition of editorial oversight that newspapers and TV purport to follow. While some Internet publications are expressly offshoots of more traditional media where expectations of more "journalistic" standards remain, the vast majority are labors of love by individuals or groups of individuals with no qualifications other than a strong passion for a particular topic.

Of course, Internet speech -- like speech in other media -- does sometimes make statements that clearly are factual assertions. The South Dakota law of libel would naturally still apply there. But where a statement does not clearly appear to be a factual claim, but rather seems equally likely (or, as in this case, more likely) to be opinion, readers will tend to interpret it based in part on the medium in which it appears. If it had appeared in the News section of the New York Times, they might treat it as a factual assertion. But when it appears on an individual-run Web site -- especially a site with so many other cues that show that it is intended to merely express opinions -- readers will correctly perceive it as just opinion, not an assertion of fact.

Here, ProBush.com has even taken additional steps to ensure that readers understand the nature of the website. It expressly states: "Not to be taken seriously. These 'traitors' are not legal 'traitors' of the United States, though we wish they were." Thus, even if a casual reader failed to recognize from the tone and tenor of the website that it contains hyperbolic statements of opinion rather than facts, the express language of the publication leaves no room for confusion.¹

The remainder of the website confirms this conclusion, including the photo of former Vice President Al Gore that has obviously been "cut and pasted" in front of a chart identified as

¹ A slightly more careful reader would undoubtedly recognize the website's fanciful goal through its intentional misuse of the trademark symbol along with the term "Traitor List"™.

“crop circles,” with the caption, “If Al Gore decided to make a crop circle this is what it would look like” and “In my scientific opinion, this was made by a man named ED.” Taken as a whole, this website simply cannot be confused with a serious factual accusation of criminal behavior likely to mislead readers or injure Plaintiff.

Courts applying state defamation and trade libel law to speech by ordinary citizens on the Internet have explicitly recognized the often rough-and-tumble nature of this new medium. The dismissal of a defamation suit based upon Internet postings, *Global Telemedia Int'l, Inc. v. Doe I*, 132 F.Supp.2d 1261 (C.D. Cal. 2001), demonstrates this trend. The suit was premised on contributions to an Internet message board about GTMI, a publicly-traded company. Evaluating the postings in context to determine whether they were fact or opinion, the court observed:

Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.

Id. at 1267.

The postings that the *Global Telemedia* court reviewed demonstrate the broad range of expression that has been protected in the context of Internet speech:

- “I have never witnessed such blatant mis-management, these people hold our money and they dictate after they lie how it will be used.....greatest joke on the boards.”
- “we are being manipulated by the company so that they can fly the coop again”
- “another day with GTMI steering the sinking ship, but don’t worry they are headed for the calmer waters of the caribbean where your money will be safe from federal authorities”
- “you have been screwed out of your hard earned money here its time to talk about a lawsuit”

Id. at 1268-69.

Reviewing these and other similar postings, the court observed that “to put it mildly,

these postings ... lack the formality and polish typically found in documents in which a reader would expect to find facts,” *id.* at 1267, and that the posters “use[d] exaggeration, figurative speech and broad generalities.” Based on this context, the court reasoned that “while [the poster’s] sentiments are not positive, the statement contains exaggerated speech and broad generalities, all indicia of opinion. Given the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company is run.” *Id.* at 1270. The court concluded the statements were protected opinion and dismissed the lawsuit with prejudice. *See id.* at 1271.

Similarly, in *SPX Corp. v. Doe*, 253 F.Supp.2d 974, 981 (N.D. Ohio 2003), the court considered a defamation claim under Ohio law for statements including one titled: “SPX = Massive SEC and FBI Investigation,” which stated: “[O]verleveraged, lots of insider selling, shit businesses, and cooking the books.” *Id.* at 977. As in *Global Telemedia*, the court dismissed the case even though the words on their face indicated an allegation of illegal activity, noting that the fact that the statements were made in an “open and uncontrolled Internet forum” meant that they could not reasonably be interpreted as statement of facts for the purpose of a libel claim. *Id.* at 981.

Here, ProBush.com’s website, like the postings in *Global Telemedia* and *SPX*, contains exaggerated speech, broad generalities and figurative speech, including a claim that, if taken seriously, might potentially include illegal activity. Unlike the postings in the California case, however, ProBush.com took steps to expressly notify its readers that the comments were opinions and were not intended to be taken seriously. ProBush.com also expressly announced that its comments did not constitute a claim of illegal activity by Sen. Abourezk or anyone else. Yet with or without these disclaimers, ProBush.com’s speech could not be reasonably interpreted

as a statement of fact, and this conclusion is buttressed by the fact that the speech took place online.

IV. CONCLUSION

The ProBush.com website is a perfect illustration of the adoption by ordinary citizens of the Internet as a medium for speech. Using simple and inexpensive technology, ProBush.com has created a soapbox from which to trumpet its views to all who care to listen. Regardless of whether those opinions are shared by this court, amici or anyone one else on the planet, our Constitutional traditions require that they be protected from overreaching claims that would not only silence ProBush.com, but chill the millions of others who have embraced this new medium as a place where they can have a voice of their own.

Dated this 22nd day of August, 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Amicus Brief of the Electronic Frontier Foundation and Professor Eugene Volokh in Support of Defendant ProBush.com's Rule 12(b)(6) Motion to Dismiss was on this day sent via first class mail, postage prepaid, to the following:

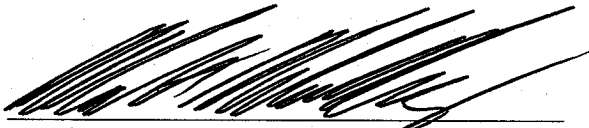
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Dated this 22nd day of August, 2003.


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