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12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SANTA CRUZ

14 PEOPLE OF THE STATE OF
15 CALIFORNIA,

16 Plaintiff,

17 v.

18 BRADLEY ALLEN,
19 ALEX DAROCY,
20 *et al.*,

21 Defendants.

Case Nos. F22193, F22195

**Amicus American Civil Liberties
Union of Northern California's Brief in
support of Bradley Stuart Allen and
Alex Darocy's Motion to Dismiss
(Penal Code § 995)**

Date: May 8, 2012
Time: 9:00 a.m.
Dept.: 6

1 **INTRODUCTION**

2 The government seeks to try Allen and Darocy as aiders and abettors and as conspirators
3 because they took and published photographs of a group of protesters who occupied a building; the
4 prosecution justified these theories of liability at the preliminary hearing based on the content of
5 Defendants’ reporting on the event.¹ Importantly, neither of these theories of criminal liability would
6 require any showing that either defendant actually entered the building; if they had stood behind the
7 police lines they would be equally guilty.

8 Because of the dangers that this type of prosecution poses to free speech and the freedom of
9 the press, the American Civil Liberties Union of Northern California requests permission to file this
10 amicus brief. Although reporters and others may not be shielded from civil or criminal liability for
11 their own acts simply because they are engaged in newsgathering activities, the First Amendment does
12 place limits on their liability for the acts of others. Here, because Defendants are being prosecuted for
13 conduct that occurred while they were gathering and disseminating information about a newsworthy
14 event, this Court must “critically examine the basis on which” vicarious liability is to be imposed to
15 ensure that Allen and Darocy are not being prosecuted for constitutionally protected conduct. *See*
16 *Nat’l Ass’n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 915
17 (1982). And it is particularly important in free-speech cases that this judicial review occur before trial,
18 because “the chilling effect upon the exercise of First Amendment rights may derive from the fact of
19 the prosecution, unaffected by the prospect of its success or failure.” *Dombrowski v. Pfister*, 380 U.S.
20 479, 487 (1965). A critical review of the evidence presented at the preliminary hearing in this matter
21 shows that there is insufficient evidence of the specific intent that is necessary to hold these two
22 defendants to answer for conspiracy or for aiding and abetting any crimes; the prosecution’s contrary
23 argument relies on an impermissible inference drawn from Defendants’ journalistic viewpoint.²

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25 ¹ People’s Mar. 15, 2012 Prelim. Hr’g Br. 3:3-8 (“They were there to publicize the protest for the
26 group. The photographs they took, the articles they posted... The defendants served as the public
information officers for the occupiers”); 1RT 18:23-19:23 (Mar. 15, 2012 Prelim. Hr’g Tr.).

27 ² This brief addresses only vicarious liability, not any possibility that defendants are guilty of a
28 substantive crime based on their own actions.

1 **INTEREST OF AMICUS CURIAE**

2 The American Civil Liberties Union of Northern California is a nonprofit civil-liberties
3 organization with a 75-year history of advocating for all persons' rights to freedom of speech and of
4 the press as established by the First Amendment of the U.S. Constitution and Article I, section 2 of the
5 California Constitution. It has been involved in numerous free-speech cases in our state and federal
6 courts as counsel of record and as amicus.

7 **FACTUAL BACKGROUND**

8 As they explain in their briefs, Bradley Allen and Alex Darocy are photojournalists who
9 publish photographs to an online media outlet called Indybay, a website that is intended to serve as an
10 alternative to the mainstream press and that began by covering the World Trade Organization protests
11 in Seattle. Allen is a senior member of Indymedia. Both Allen and Darocy are members of the
12 editorial board of Indybay. This means they are permitted to write feature articles as well as review
13 and edit the postings of other members.

14 Both Allen and Darocy are being prosecuted because of their coverage of a group that
15 occupied a vacant bank building on November 30, 2011. They maintain that they were present as
16 journalists to cover the event; the prosecution claims that they conspired with the group to commit
17 trespass and that their actions of taking and publishing photographs show that they are liable as aiders
18 and abettors to trespass and vandalism. At least one other photographer was present at the event: the
19 Santa Cruz Sentinel published several photographs of the action by a Mr. Thayler, including one taken
20 from inside the bank.³ There is no indication that Mr. Thayler is being prosecuted.

21 **ARGUMENT**

22 Because Defendants were involved in newsgathering, this court must critically examine the
23 basis for the conspiracy and aiding-and-abetting liability. And because prosecutions such as this one
24 can serve to chill speech even if they do not result in a conviction the court should be particularly
25 careful not to let the case proceed unless the holding order is supported by actual evidence, rather than
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27 ³ 1RT 109:8-110:3 (Mar. 13, 2012 Prelim. Hr'g Tr.)

1 unfounded assumptions or impermissible inferences drawn from the viewpoints expressed in
2 Defendants' reporting.

3 **A. *Allen and Darocy were engaged in conduct that is protected under the First Amendment and***
4 ***article I, § 2 of the California Constitution.*⁴**

5 “Freedom of speech and freedom of the press, which are protected by the First Amendment
6 from infringement by Congress, are among the fundamental personal rights and liberties which are
7 protected by the Fourteenth Amendment from invasion by state action.” *Lovell v. Griffin*, 303 U.S.
8 444, 450 (1938). These constitutional guarantees secure the free flow of information, which is
9 essential to a healthy democracy.

10 Both of these protections apply to a broad range of people, topics, and activities. “Freedom of
11 the press is a fundamental personal right which is not confined to newspapers and periodicals.... The
12 press in its historic connotation comprehends every sort of publication which affords a vehicle of
13 information and opinion.” *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (citation omitted). Thus, the
14 constitutional protections for the press extend beyond the institutional press to anyone who would
15 gather information about matters of public interest and disseminate it to the public: The Supreme
16 Court has “consistently rejected the proposition that the institutional press has any constitutional
17 privilege beyond that of other speakers. With the advent of the Internet and the decline of print and
18 broadcast media, moreover, the line between the media and others who wish to comment on political
19 and social issues becomes far more blurred.” *Citizens United v. Federal Election Com'n*, 130 S.Ct.
20 876, 905-06 (2010); *see Gilk v. Cunniffe*, 655 F.3d 78, 82–84 (1st Cir. 2011) (holding First
21 Amendment right to gather news was violated and noting that “[i]t is of no significance that the
22 present case ... involves a private individual, and not a reporter, gathering information about public
23 officials”). Furthermore, what constitutes “news” is not limited to “simple accounts of public
24 proceedings and abstract commentary on well-known events.” *Shulman v. Group W Productions, Inc.*,

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26 ⁴ The liberty of speech clause of the California Constitution “is broader and more protective than
27 the free speech clause of the First Amendment.” *Best Friends Animal Soc’y v. Macerich Westside*
28 *Pavilion Property LLC*, 193 Cal. App. 4th 168, 174 (2011) (quoting *Los Angeles Alliance for Survival*
v. Los Angeles, 22 Cal.4th 352, 366 (2000)). References to the First Amendment in this brief include
this protection.

1 18 Cal.4th 200, 208 (1998) (lead opn. of Werdegar, J.). To the contrary, “a publication is newsworthy
2 if some reasonable members of the community could entertain a legitimate interest in it.” *Id.* at 225.

3 The prosecution against Allen and Darocy arises out of activities that receive First Amendment
4 protection under these principles. The Occupy movement, and the actions of November 30, are clearly
5 newsworthy; indeed, advocacy for social and political change lies “at the core of the First
6 Amendment.” *Nat’l Ass’n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S.
7 886, 926-27 (1982) (citation omitted). And, not surprisingly, the Santa Cruz Sentinel published at least
8 one story about it.⁵ Even under the prosecution’s theory, defendants were present “to publicize the
9 protest for the group.”⁶ It is thus undisputed that they took photographs of a newsworthy event and
10 published those photographs on the Indymedia website. It is also undisputed that they had acted as
11 journalists in the past.⁷ Whatever else the prosecution alleges that Allen and Darocy did on November
12 30, their conduct in taking photographs of a newsworthy event for publication was indisputably
13 protected by the First Amendment.

14 **B. *The prosecution’s theory that these reporters are vicariously guilty of the crimes that they***
15 ***photographed endangers the First Amendment.***

16 The courts have long recognized that the usual rules of vicarious criminal or civil liability can
17 run afoul of the First Amendment: “what is permissible when ordinary criminal conduct is involved,
18 frequently comes to grief when tested against the First Amendment.” *Castro v. Superior Court*, 9 Cal.
19 App. 3d 675, 686 (1970) (lead opn. of Kaus, P.J.). For example, the U.S. Supreme Court has held that
20 the advocacy of violence or other criminal activity cannot be punished “except where such advocacy is
21 directed to inciting or producing imminent lawless action and is likely to incite or produce such
22 action,” even if such protected speech could otherwise be classified as aiding and abetting a crime.
23 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). It has also held that individuals who are part of a
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25 ⁵ 1RT 109:8-110:3 (Mar. 13, 2012 Prelim. Hr’g Tr.)

26 ⁶ People’s Mar. 15, 2012 Prelim. Hr’g Br. 3:3-4.

27 ⁷ People’s Mar. 15, 2012 Prelim. Hr’g Br. 2:18-20, 4:15-24.

1 group that has both lawful and unlawful goals cannot be held criminally or civilly liable for the
2 unlawful actions taken by other members of the group, unless the group as a whole had unlawful goals
3 and the individual has the specific intent to further those goals. *Nat'l Ass'n for Advancement of*
4 *Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 918-920 (1982) (discussing two criminal
5 cases, *Scales v. United States*, 367 U.S. 203, 205 (1961) and *Noto v. United States*, 367 U.S. 290, 299-
6 300 (1961)). Moreover, there must be “clear proof” of this specific intent, “judged according to the
7 strictest law.” *Id.* at 919. These rules are necessary to reduce the “danger that one in sympathy with the
8 legitimate aims of such an organization, but not specifically intending to accomplish them by resort to
9 violence, might be punished for his adherence to lawful and constitutionally protected purposes,
10 because of other and unprotected purposes which he does not necessarily share.” *Id.* (quoting *Noto*,
11 367 U.S. at 299-300).

12 Here, the government does not deny that Defendants were reporting about what was happening
13 during the occupation; rather, it claims that their supposedly biased reporting shows that they were
14 acting as “the occupiers’ press agents,” and “were there to publicize the protest for the group” rather
15 than to present a fair and balanced picture of the event.⁸ Had they published photos that portrayed the
16 Occupiers in a bad light the government could not be making these arguments and, accordingly, would
17 likely not be prosecuting them. Thus, what distinguishes Allen and Darocy from any other reporters
18 who might have covered the action (and from the other reporter who did enter the building but is
19 apparently not being prosecuted) is the content and viewpoint of their reporting. The inference that the
20 government asks this Court to draw from a journalist’s published work cannot constitute the clear
21 proof of specific intent that is required to support vicarious liability in cases involving the First
22 Amendment.⁹

23 And this prosecution shows why these First Amendment rules are so important to protecting
24 press freedom. Even putting aside the fundamental constitutional problems with prosecuting a reporter

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26 ⁸ People’s Mar. 15, 2012 Prelim. Hr’g Br. 2:18-20, 3:3-4.

27 ⁹ This is not to suggest that the prosecution cannot rely on a journalist’s published work to show
28 the facts that it depicts or any criminal conduct or intent it admits.

1 – or anybody– because of his expression of political or social views,¹⁰ prosecution of journalists for
2 conspiracy, based on inferences drawn from their reporting, promotes self-censorship. Under the
3 prosecution’s aiding-and-abetting theory, a reporter who covered the occupation here at issue from
4 outside the building and whose coverage was sympathetic to the demonstrators could face prosecution
5 just as easily as the defendants in this case. A journalist who toured a California medical marijuana
6 dispensary and interviewed its workers and then wrote about it in favorable terms could face federal
7 prosecution for abetting the sale of marijuana, on the grounds that the favorable coverage was intended
8 to promote the dispensary’s business. If the fact that Allen and Darocy were able to gain access to the
9 protestors and the bank supports an inference that they were part of a conspiracy, then the fact that a
10 reporter managed to get access to the dispensary or schedule an interview with the owner would also
11 support an inference that he had conspired with the dispensary to promote its sales by writing a
12 favorable story about its practices. Reporters may well avoid writing such stories, or make sure that
13 they do not present too favorable a view of illegal or unpopular causes or activities, to avoid any
14 danger of prosecution.

15 It may well be that the government would be unable to prove beyond a reasonable doubt that
16 these hypothetical journalists – or the defendants in this case – had actually conspired, or truly had the
17 requisite specific intent to aid and abet, but by then the harm to journalistic independence will have
18 been done: “[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact
19 of the prosecution, unaffected by the prospect of its success or failure.” *Dombrowski v. Pfister*, 380
20 U.S. 479, 487 (1965). Courts must therefore be particularly careful not to allow such prosecutions to
21 go forward unless they are justified by the evidence. *See Shulman v. Group W Productions, Inc.*, 18
22 Cal.4th 200, 228 (1998) (“[B]ecause unnecessarily protracted litigation would have a chilling effect
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24 ¹⁰ Selective prosecution because of a person’s speech is unconstitutional: “[j]ust as discrimination
25 on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the
26 exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a
27 member of a group unpopular with the government.” *Murgia v. Municipal Court*, 15 Cal.3d 286, 302-
28 03 (1975) (citations omitted); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“the First Amendment
prohibits government officials from subjecting an individual to retaliatory actions, including criminal
prosecutions, for speaking out”).

1 upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is
2 desirable.”). This Court should accordingly act now to ensure that Allen and Darocy are not required
3 to stand trial for unsupported charges.

4 **CONCLUSION**

5 The prosecution’s theories of liability for conspiracy to trespass and aiding and abetting trespass
6 seek to punish Allen and Darocy for activity they engaged in that is protected by the First Amendment
7 and the liberty of speech clause of the California Constitution. This type of prosecution endangers the
8 freedom of the press by punishing journalists based on the content and viewpoint of the material they
9 publish, by impermissibly burdening newsgathering, and by ultimately restricting the public’s access
10 to newsworthy events. The Court should dismiss the conspiracy charges, as well as any other charges
11 that rest upon an aiding-and-abetting theory of liability.¹¹

12 DATED: May 3, 2012

13 Respectfully Submitted,

14 AMERICAN CIVIL LIBERTIES UNION OF
15 NORTHERN CALIFORNIA

16 By: Michael T. Risher

17 Michael T. Risher
18 Novella Coleman
19 Attorneys for Amicus Curiae
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27 ¹¹ As noted above, this brief does address non-vicarious liability.
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