IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

INTEL CORPORATION, Plaintiff/Respondent, v. KOUROSH KENNETH HAMIDI, *et al.*, Defendant/Appellant	No. S103781 Court of Appeal No. C033076 Sacramento County No. 98-AS-05067

After Decision By The Court of Appeal, Third Appellate District
On Appeal from Sacramento County Superior Court, Hon. John R. Lewis

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF DEFENDANT/APPELLANT KOUROSH KENNETH HAMIDI

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INTRODUCTION

Like most businesses, and certainly like all "high tech" businesses, just as it has a telephone system, Intel Corporation has an email system through which outsiders can contact its employees. Like the telephone, email is also available to employees for their own reasonable personal use. CT 70 (Ex. 1 to True Dec.). When Ken Hamidi sent his emails to Intel employees, they reached their intended recipients via the same Intel email system through which all outsiders communicate electronically with Intel employees and through which, on a reasonable basis, Intel employees send and receive other personal communications.

Hamidi did not send a large number of emails. All in all, he sent a total of only six emails over a period spanning close to two years. Moreover, Hamidi told the recipients of the emails that he would remove them from his mailing list upon request. CT 68 (True Dec., Ex. 2); CT 269 (Hamidi Dec. ¶ 7).

As Intel itself admits, such a small number of emails did not in any way damage or disrupt the functioning of Intel's email system. However, Intel objected to the content of the emails, which were highly critical of Intel's employment policies and of Intel's positions on issues such as the need for more workers from abroad. In its brief in the court of appeal, Intel characterized the messages as "highly inflammatory and calculated to upset Intel's employees." Respondent Intel Corporation's Brief (hereafter "Intel

Ct. App. Brief") at 2 n.1. They caused "consternation" among Intel's employees. *Id.* at 2. Accordingly, Intel filed this lawsuit, asking the court to enjoin Hamidi from communicating with Intel employees using their work email addresses. It claimed that Hamidi's emails constituted a trespass to its chattel, *i.e.*, an "invasion" of its email equipment. Using that somewhat novel theory, Intel successfully invoked the power of the state to stop Hamidi.

Unlike the usual plaintiff in a trespass to chattel action, Intel does not claim that Hamidi's emails in any way caused harm to its chattel—its email system. Rather, as the trial court found, the damage upon which Intel relies to support its claim flows directly from the content of Hamidi's communications. Because it disliked what Hamidi had to say, Intel spent time and money trying to block his communications. In addition, Intel claims damages because its employees spent time discussing the emails and Intel management had to spend time answering the questions generated by them. CT 354 (trial court's tentative ruling). [1]

The court of appeal upheld the lower court's injunction prohibiting Hamidi "from sending unsolicited email to addresses on Intel's computer systems." CT 359. It held that an injunction based upon a claim of trespass

[1] That tentative ruling was accepted and led to the entry of the formal order granting the motion for summary judgment and entering the permanent injunction that is the subject of this appeal. *See* CT 357, 358-59.

to chattel is appropriate, even in the absence of physical harm to or disruption of Intel's email system, and even though the only damages claimed by Intel were the direct result of the content of Hamidi's communications.

Amici believe that the court of appeal erred in holding that, as a matter of state law, Intel established its claim of trespass to chattel. If state law permits an injunction under these circumstances, however, this becomes a case of constitutional magnitude. Because it is the state, acting through a court-imposed injunction, that now prevents Mr. Hamidi from communicating with Intel employees using their email addresses at work, the case raises substantial First Amendment questions. It requires this Court to determine the extent to which the Constitution limits the state's power to construe the tort of trespass to chattel as authorizing a content-based injunction restraining a private individual's criticism of his previous employer.

In *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997), the Supreme Court held that the Internet, like books and newspapers, is entitled to the highest level of First Amendment protection. Email is an integral part of this extraordinary new medium of communication. It is, in some respects, the electronic equivalent of more familiar means of grassroots communication such as leafleting, targeted mailings, or labor picketing. But, unlike mail or other one-way forms of communication, email permits the recipient to

respond. It is interactive. It invites conversation and debate. As such email provides a critically important and constitutionally protected method of reaching a particularized audience—here Intel employees—in an efficient and inexpensive manner.

This Court must therefore consider the interplay between the values embraced by the First Amendment and the interests of the state that would be impaired by placing constitutional limits on the common law tort of trespass to chattel. The limits we propose are modest: that in order to establish liability for trespass to chattel in a case involving the communication of information, ideas, or point of view, the plaintiff must plead and prove, by clear and convincing evidence, that the alleged trespass resulted in either physical damage to or impairment of the functioning of the chattel. Harm flowing from the content of the communication may not form the basis for an action for trespass to chattel. The remedy for such content-related harm, to the extent one is permitted by the Constitution, must be found elsewhere in the law of torts.

SUMMARY OF ARGUMENT

The notion that the First Amendment protects the right to criticize others is hardly new. Regardless of the particular legal theory relied upon by the plaintiff, the cases consistently hold that the First Amendment either bars or significantly qualifies the right of a private party to turn to the

courts to silence or punish the speech of another. The tort that most quickly comes to mind, of course, is an action for libel. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Courts have imposed similar First Amendment constraints, however, in actions for interference with prospective economic advantage, invasion of privacy, and intentional infliction of emotional distress, as well as to actions under state and federal antitrust laws, and in disputes brought under the National Labor Relations Act.

Each of these cases involved a dispute between private parties. Yet in every single case, the court was unequivocal in holding that the First Amendment must be taken into account before speech may be enjoined or punished. In none of those cases did the court find the Constitution irrelevant—or that state action was missing—because the case concerned only a dispute between private parties. To the contrary, a long and distinguished line of cases holds that a court award of damages or a court ordered injunction in a common law tort action is state action that must comport with constitutional standards. Trespass to chattel "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. at 269.

In determining whether the First Amendment permits recovery, a number of factors are relevant. First, the court should determine whether it

has before it a content neutral application of the tort. Second, in examining whether liability may be imposed as the result of speech, the court must look closely to be sure that the interest being furthered is an interest that the cause of action is intended to protect. Finally, in the case of an injunction that has as its purpose the prohibition of speech, the court must determine whether the injunction can survive the heavy presumption against the constitutionality of prior restraints. The injunction before this court fails all three tests.

What, then, should be the rule that ensures that constitutional requirements are given due consideration when a plaintiff claims that unwanted communications have trespassed on its communication system? In most cases, the tort will, in all probability, be inapposite since it was never intended to remedy injury flowing from the content of a communication. Only where a plaintiff can prove, by clear and convincing evidence, that there has been substantial damage to or disruption of its communication system, may liability be imposed. This rule will, on the one hand, safeguard against abuse of the tort of trespass to chattel to punish or prohibit speech based on its content while, at the same time, give due deference to the legitimate state interests that are served by the cause of action.

ARGUMENT

I. THE FIRST AMENDMENT LIMITS THE POWER OF THE STATE TO RESTRAIN OR PUNISH SPEECH, EVEN IN DISPUTES BETWEEN PRIVATE PARTIES.

A. The State May Not Enforce Its Tort Law Without Regard to First Amendment Principles.

In the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court was asked to consider for the first time whether the First Amendment limits the power of the state to award damages in a libel action. Although the tort was old and venerable, the Court nevertheless held that state tort law may not be enforced without regard to constitutional limitations. It concluded that "the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . ." *Id.* at 264. The Court then set forth the constitutional standards that must be satisfied in order to impose liability in a libel action against a public official. As the Supreme Court later explained in *Gertz v. Welch*, 418 U.S. 323, 332 (1974), *Sullivan* essentially established a rule of "constitutional privilege" to be applied in libel cases in order to safeguard First Amendment values.

In a series of subsequent cases, the Supreme Court continued to refine the constitutional rules applicable in libel actions. *See, e.g.*, *Gertz v. Welch*, 418 U.S. 323; *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472

U.S. 749 (1985). However, the fundamental principle that animates the Court's decisions in *Sullivan* and its progeny is not confined to the common law of libel. It applies whenever the content of speech or the exercise of other First Amendment rights forms the basis for allegations of liability. First Amendment protections have thus been imposed in actions for interference with prospective economic advantage,[2] invasion of privacy,[3] negligent or intentional infliction of emotional distress,[4] fraud,[5] and malicious prosecution,[6] as well as in actions under state and federal

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[2] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986); *Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d 188 (1984); *Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528 (1991).

[3] *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

[4] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Paul v. Watchtower Bible Tract Society*, 819 F.2d 875 (9th Cir. 1987) (free exercise clause); *Herceg v. Hustler Magazine, Inc.*, 814 F. 2d 1017 (5th Cir. 1987); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002).

[5] *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1114 (1988).

[6] *City of Long Beach v. Bozek*, 31 Cal. 3d 527 (1982), *vacated on other grounds*, 459 U.S. 1095, *opinion reiterated in its entirety*, 33 Cal. 3d 727 (1983).

antitrust laws,[7] and in disputes brought under the National Labor Relations Act.[8] Three of these cases are illustrative of the general principle.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the NAACP and its members engaged in a boycott to force a number of local businesses to end their discriminatory practices. The merchants filed a state tort law action for malicious interference with business. They obtained an injunction against further boycott activities and a substantial damages judgment against the NAACP and a number of its members. The defendants claimed the judgment violated the First Amendment.

In the early stages of the boycott, there were a few instances of unlawful conduct by one or two of the defendants. However, the Supreme Court found that most of the conduct that formed the basis for the judgment, including attempts to shame others into not doing business with the stores, was protected by the First Amendment. In reversing the judgment against the defendants, the Supreme Court held: "the presence of activity protected by the First Amendment imposes restraints on the

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[7] *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961) (right to petition gov't); *Mine Workers v. Pennington*, 381 U.S. 657 (1965) (same); *Matossian v. Fahmie*, 101 Cal. App. 3d 128 (1980) (same).

[8] *BE & K Construction Company v. NLRB*, ___ U.S. ___, 122 S. Ct. 2390 (2002) (right to petition gov't); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (same).

grounds that may give rise to damages liability . . . ." 458 U.S. at 916-17;[9] *accord Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d at 195. The Court went on to hold that "'the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity.'" *Id.* at 918 (emphasis added) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)).

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), was an action for common law invasion of privacy. Using this theory, Keefe obtained an order enjoining the activities of a civic organization that had been distributing leaflets in a shopping center, at Keefe's church, and in his neighborhood, accusing him of block-busting. The Supreme Court reversed on First Amendment grounds: "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.* at 419; *accord CPC International, Inc. v. Skippy Inc.*, 214 F.3d at 462 ("just because speech is critical of a corporation and its business practices is not sufficient reason to enjoin the speech."); *see*

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[9] As discussed in the next section of this brief, the Court's ruling was predicated on an explicit holding that the court's entry of a judgment for damages was state action, subjecting the judgment to constitutional scrutiny. *Claiborne Hardware*, 458 U.S. at 916 n.51.

also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (First Amendment limits liability in action for intentional infliction of emotional distress based on unflattering parody).

Finally, this Court's decision in *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986), is important. *Blatty* sued the New York Times for intentional interference with prospective business advantage based on the Times' erroneous failure to include his novel in its list of best sellers. Labeling Blatty's action as a claim for injurious falsehood, the Court held that the same First Amendment limitations on liability that apply in libel actions are applicable to all causes of action for injurious falsehood, regardless of how the plaintiff has chosen to denominate the cause of action. The court noted that limiting First Amendment protection to defamation actions would simply allow a canny plaintiff to put some other label on the action "and thereby avoid the operation of the [First Amendment] limitations and frustrate their underlying purpose." 42 Cal. 3d at 1045; *accord Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528, 1542-45 (1991) (truthful statements are protected by the First Amendment, regardless of whether they injure the defendant by making it more difficult to attract customers).

Intel is employing the same strategy that this Court condemned in *Blatty*. It attempts to avoid the constitutional limitations imposed on tort actions that seek redress based on the content of speech by grounding its

cause of action in the relatively obscure (at least until recently) tort of trespass to chattel. Calling this an action for trespass to chattel, however, does not change the fact that the gravamen of Intel's grievance is its distaste for the content of Hamidi's messages, not its objection to the method of their delivery.

The First Amendment does not permit such tactics. To the extent Intel seeks relief by way of an action for trespass to chattel, that tort must be applied in a manner that prohibits the imposition of liability based on the content of the communication rather than on physical damage to or disruption of Intel's email system.

B. A Court's Issuance Of An Injunction Constitutes State Action Subject To Constitutional Review.

1. Controlling U.S. Supreme Court Cases Hold That A Court Order Imposing Damages Or Issuing An Injunction Is State Action.

This Court's decision in *Golden Gateway Center v. Golden Gateway Tenants Association*, 26 Cal. 4th 1013 (2001), raised, but did not decide, the question whether the granting of an injunction restraining speech constitutes state action for purposes of California's free speech clause. *See id.* at 1034 (plurality opinion). Three members of the Court concluded that

it does not. *Id.*[10] The court of appeal's decision in this case, however, squarely presents the issue, albeit in the federal context.

"The general proposition that common law is state action—that is, that the state 'acts' when its courts create and enforce common law rules—is hardly controversial." Laurence H. Tribe, *American Constitutional Law* § 18-6, at 1711 (2d ed. 1988) (hereafter "Tribe"); *accord* Erwin Chemerinsky, State Action, 618 PLI/Lit 183, 209 (1999) ("there seems little doubt that judges are government actors and that judicial remedies are state action"). This Court need only review the cases cited above to conclude that a court's enforcement of a common law rule of law is routinely subjected to constitutional scrutiny in the face of a claim that First Amendment rights are being abridged.

But that conclusion need not rest merely on inference. The Supreme Court has directly and uniformly held that state action exists whenever a court awards damages or issues an injunction in a dispute between private parties, even under a "neutral" rule of common law. As the Supreme Court held in *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948): "[I]t has never been suggested that state court action is immunized from the operation of [the

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[10] Although the plurality opinion addressed this issue only with respect to the California Constitution, it appears that it would have reached the same conclusion with respect to the federal constitution, as well.

Constitution] simply because the act is that of the judicial branch of the state government."

Although the Supreme Court's ruling in *Shelley* is one of the earliest cases to address the issue, it is by no means the only one. Nor has the holding there been confined to cases in which the court's action involved racial discrimination. In the Supreme Court's seminal decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, for example, the issue was whether an award of damages for libel constituted state action. The Court held:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

376 U.S. at 265 (citations omitted).

The Court reached the same conclusion in *NAACP v. Claiborne Hardware Co.*, a case based on a claim of interference with economic advantage:

> Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.

458 U.S. at 916 n. 51. It reached that same conclusion again in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991), a case in which plaintiff's

claim was based on the common law contract doctrine of promissory estoppel. *See also American Federation of Labor v. Swing*, 312 U.S. at 325-26 (injunction prohibiting labor picketing: "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."); *cf. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (considering First Amendment challenge to injunction limiting expressive activities of anti-abortion protestors); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 56 (liability for intentional infliction of emotional distress must take into account First Amendment standards); *Organization for a Better Austin v. Keefe*, 402 U.S. at 419 (First Amendment barred injunction in invasion of privacy action).

This Court is in accord. S*ee Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1114 (1988) (action for fraud and deceit: "[J]udicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes"); *Britt v. Superior Court*, 20 Cal. 3d 844, 856 n.3 (1978) (judicial discovery orders are state action subject to the strictures of the First Amendment's protection of the right of association) (dictum). So too is the Supreme Court of Oregon. *See Lloyd Corp. v. Whiffen*, 307 Or. 674, 680, 773 P.2d 1294, 1297 (1989) (action for unreasonable interference with plaintiff's property: "A court applying a

common-law rule or fashioning an equitable order must observe constitutional principles as much as a legislative or administrative body."); c*f. Aguilar v. Avis Rent A Car*, 21 Cal. 4th 121, 133 (1999) (considering First Amendment challenge to injunction in employment discrimination case). Lower federal and state courts have reached the same conclusion. *See, e.g., CPC International, Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000) ("First Amendment prohibits not only statutory abridgment but also judicial action that restrains free speech."); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (magistrate's order compelling discovery and trial court's enforcement of that order constitute state action); *Paul v. Watchtower Bible Tract Society*, 819 F.2d 875, 880 (9th Cir. 1987) ("State laws whether statutory or common law, including tort rules, constitute state action."); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d at 178 (state "cannot provide a remedy, either by its common law or by statute, that violates Midway's free speech rights" (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 and *Shelley v. Kraemer*, 334 U.S. 1)); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 1088, 1091-92 (W.D. Wash. 2001) (subpoena "even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations"); *Gerber v. Longboat Harbour North Condominium, Inc.*, 724 F. Supp. 884, 886-87 (M.D. Fla. 1989), *vacated on other grounds*, 757 F. Supp. 1339, 1342 (M.D. Fla. 1991) ("It is an exercise in sophistry to posit

that courts act as the state when enforcing racially restrictive covenants but not when giving effect to other provisions of the same covenant."); *Snyder v. Evangelical Orthodox Church*, 216 Cal. App. 3d 297, 306 (1989) (imposition of tort liability is state action).

In sum, whenever the Supreme Court has been confronted with a ruling by a court either awarding damages or imposing an injunction it has invariably held that the court's action was state action subject to constitutional review. That is because the two fundamental prerequisites of state action are present: (1) a state actor (the court); and (2) an alleged constitutional deprivation resulting from the application of a state rule of law. *See American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

2. There Is No Exception To The State Action Rule For The Judicial Enforcement Of The Tort Of Trespass To Chattel.

Rejecting the square holdings of the forgoing authorities, the court of appeal held that the trial court's injunction does not constitute state action, despite the fact that the injunction, by its explicit terms, prohibits speech. Relying on *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the court of appeal sought to avoid delving into the state action "morass" by concluding that there is, in effect, a special rule that the enforcement of a neutral trespass

law is not state action. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 253-54 (2001).

The Supreme Court's holding in *Lloyd* does not support that conclusion. In *Lloyd* the Court held only that the shopping center had not been dedicated to public use in such a way as to entitle others to claim First Amendment rights on shopping center property. *Lloyd*, 407 U.S. at 570; *see also*, *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976) (large self-contained shopping center not the functional equivalent of a municipality and therefore union members not entitled to engage in picketing there).

Neither *Lloyd* nor *Hudgens* address the issue presented here: whether an injunction prohibiting speech is state action and therefore subject to First Amendment review. Indeed, when the plaintiffs did prevail on state law grounds in a similar suit in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, the shopping center raised, and the Supreme Court considered, claims that this Court's ruling abridged the shopping center's rights under the First Amendment and deprived the center of its property rights under the Fifth and Fourteenth Amendments. Such constitutional claims never could have been considered if this Court's order were not state action.

Doctrinally, it is important to keep in mind the difference between deciding whether a court's issuance of an injunction is state action subject to constitutional review and deciding whether the injunction actually

violates the First Amendment. In *Cohen v. Cowles Media Co.*, 501 U.S. 663, for example, the Supreme Court found state action but went on to conclude that, on the facts of that case, holding the newspaper to its promise of confidentiality did not violate the First Amendment. Similarly, in *Pruneyard*, although the Supreme Court apparently concluded that this Court's ruling that plaintiffs were entitled to an injunction constituted state action requiring review of the shopping center's constitutional claims, it ultimately concluded that those claims did not entitle the shopping center to relief. *Pruneyard*, 447 U.S. at 84, 88.[11]

Indeed, had *Lloyd* and *Hudgens* been cases in which the shopping center had brought a trespass action against the protesters or the union, Amici believe that, while the end result would most likely have been the same, the Court would have reached that result as a matter of substantive First Amendment analysis. Put another way, the outcome in *Lloyd* and *Hudgens*, as analyzed by the Supreme Court, is as much the product of a conclusion that the owners' right to control their real property outweighed the rights of others to use that property for speech, as it is a determination that the shopping centers did not fall within the public function exception to the state action rule. *See* Tribe, § 18-5 at 1710-11 ("The relevant inquiry

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[11] Thus the Court rejected the shopping center's Fifth Amendment taking claim despite the fact that the petition gatherers may have "physically invaded" its property. 447 U.S. at 84. Similarly, it rejected the

would not have been whether the property was public or private, but whether state-protected freedom of speech in the shopping center context was required in order to secure first amendment values."). It seems quite unlikely, however, given its holdings in *Sullivan*, *Claiborne Hardware*, and *Cohen*, that the Court would have found an absence of state action in the lower court's enforcement of the state's trespass law.

Similarly, recognizing that the issuance of the injunction in *Golden Gateway* was state action would not have barred this Court from concluding that, because the Golden Gateway complex was not generally open to the public, the rights of the tenants to distribute leaflets did not trump the right of the owners of the complex to control their property. Indeed, that is precisely the analysis of the concurring opinion. *Golden Gateway*, 26 Cal. 4th at 1063 (George, C.J., concurring) (concluding as a matter of substantive free speech doctrine that article 1, § 2(a) does not apply because apartment complex was not freely open to the public).[12]

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shopping center's argument that the injunction constituted "compelled speech" in violation of the First Amendment. *Id.* at 85-88.

[12] This also explains the result in cases like *Radich v. Goode*, 886 F.2d 1391,1398-99 (3d Cir. 1989) (holding that there was no First Amendment right to protest on abortion clinic's private property and therefore unnecessarily, and erroneously, concluding that action of police officer in arresting plaintiffs was not state action) and of the *Golden Gateway* plurality's reliance on cases such as *Linn Valley Lakes Property Owners Ass'n v. Brockway*, 250 Kan. 169, 172-72, 824 P.2d 948, 951 (1992) (holding not that state action was absent but only that there was no improper state action in enforcing restrictive covenant), *Midlake On Big Boulder Lake v. Cappuccio*, 449 Pa. Super 124, 673 A.2d 340 (1996)

As Professor Tribe explains in a somewhat related discussion of the state action problem: "To decide . . . that the Constitution creates a zone within which government should be free simply to leave the disputed choice in private hands, is to make a defensible decision—but it is a decision about the substantive reach of specific constitutional commands rather than a decision about whether the government has done anything to which the Constitution speaks." Tribe, § 18-7 at 1720 (emphasis in original). In short, holding that state action exists does not dictate the outcome of a case. It simply requires the court to address the constitutional issue on the merits. C*ompare, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, *with Cohen v. Cowles Media Co.*, 501 U.S. 663; *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), *with Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092.

(focusing on right of parties to contract away First Amendment rights, as did Court in *Cohen*, but erroneously couching decision in terms of absence of state action), and *Commonwealth v. Hood*, 389 Mass 581, 588-89, 452 N.E. 2D 188, 193 (1983) (defendants could be prosecuted for trespassing on property that was more private than a shopping mall). Significantly, none of these cases even cite, let alone attempt to reconcile their holdings with the Supreme Court's holdings in cases such as *Sullivan, Cohen*, or *Claiborne Hardware*. Although the Washington state court of appeal did attempt to distinguish *Cohen* in holding that the enforcement of a settlement agreement between private parties is not state action, its distinction is unpersuasive. *See State v. Noah*, 103 Wash. App. 29, 49, 9 P.3d 858, 870-71 (2000). There is no meaningful difference between the enforcement of the state common law doctrine of promissory estoppel and the enforcement of state-created contract rights for purposes of state action analysis.

Finally, this is not a case in which Hamidi, by invoking the state action doctrine, is attempting to require Intel to conform its actions to constitutional standards. *See Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d at 253 (citing Tribe, § 18-1 at 1679); *Golden Gateway*, 26 Cal. 4th at 1030 (citing Tribe, § 18-2 at 1691). Hamidi is not asserting a right to compel Intel to provide him with access to its computer system, for example. Nor does he contend that Intel's efforts to block his access to their system through technological means violates his right to communicate with Intel employees using their work email addresses. The issue here is quite different: whether the state may come to Intel's aid in order to force Hamidi to stop sending his emails.[13] It is only because of the "'overt,

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[13] In this connection it is important to keep in mind the critical difference between a court's action in issuing an injunction and the action of a private party in seeking the assistance of the court. Asking the state for assistance in enforcing private rights does not transform a private party into a state actor. It is this distinction that explains the holdings in a number of the cases relied upon by the court of appeal. *See, e.g., Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238, 243 (1st Cir. 1981) (act of nursing home management in calling police did not make nursing home state actor); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (act of filing lawsuit did not make CompuServe a state actor; court neither discussed nor even cited controlling Supreme Court authority cited above that would have required it to reach question of whether its entry of injunction was state action); *Cyber Promotions, Inc v. American [sic] Online, Inc.*, 948 F. Supp. 436, 445 (E.D. Pa. 1996) (plaintiff had no right under First Amendment to send spam; AOL'S filing of lawsuit did not make it state actor); *International Society for Krishna Consciousness, Inc. v. Reber*, 454 F. Supp. 1385, 1388-89 & n.1 (C.D. Cal. 1978) (threatening to have police arrest plaintiffs did not make Knotts Berry Farm a state actor; action against police chief and

significant assistance'" of the state that Hamidi has been prevented from speaking. *See American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. at 54 (quoting *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988); c*ompare Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *with Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *cf. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (relying on state's delegation to private parties of significant role in jury selection process in holding that exercise of peremptory challenges must comport with constitutional standards).

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district attorney improper because neither had threatened plaintiff with arrest).

Similarly, the discussion from Rotunda and Nowak, cited by the court of appeal, is consistent with this analysis. 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 16.3 at 786 (3d ed. 1999). The section from which that discussion is drawn discusses "the amount of contacts with government which will subject a private person's activities to the restrictions of the Constitution." *Id.* at 783. Indeed, the discussion cited by the court of appeal simply makes two points: First, Rotunda and Nowak note that the entry of a decree by a court is not dispositive of the underlying question of whether the decree violates the constitution. They do not suggest, however, that a lower court is not constrained by constitutional considerations in entering a decree or that the reviewing court should not address the constitutional question at all when one party appeals the lower court's decision. Second, Rotunda and Nowak note that simply bringing a lawsuit is not enough to transform a private party into a state actor. Nothing in the passage supports the argument that a court's entry of an injunction is not itself state action.

C. The Injunction Entered By The Court Is A Content-Based Prior Restraint of Speech That Violates The First Amendment.

1. The Trial Court Imposed Liability Based Solely On The Content of Hamidi's Speech.

Intel does not argue, and neither of the courts below found, that Hamidi's emails caused any physical harm to or impairment of its use of its email computer system. Rather, the basis for finding sufficient "damage" to support an injunction for trespass to chattel was the discomfiture caused by Hamidi's communications. Thus the trial court held that Intel had met its burden of proving damages based solely on the following: "Intel has been injured by diminished employee productivity, and in devoting company resources to blocking efforts and to addressing employees about Hamidi's emails. These injuries, which impair the value to Intel of its email system, are sufficient to support a cause of action for trespass to chattels." *Intel Corp. v. Hamidi*, No. 98-AS05067, 1999 WL 450944 at *2 (Cal. Super. Apr. 28, 1999).

There can be no doubt that the diminished employee productivity, the felt need to stop Hamidi's emails through blocking, and the time spent talking to employees about those six emails were all directly related to their content. Intel characterizes Hamidi's messages, which raised questions about Intel's future plans for its workforce, as "highly inflammatory and calculated to upset Intel's employees." Intel Ct. App. Brief at 2 n.1. It

describes his messages as causing "consternation and bewilderment." *Id.* at 2. In short, employees were "diverted . . . from productive tasks," *id.*, because they were concerned about the charges that Hamidi made. Accordingly, management had to spend time answering their questions. And because Intel disliked and disagreed with what Hamidi had to say, it spent time and money trying to block the emails.

In sum, Intel does not, and cannot, argue that its claimed damages result from anything other than the content of Hamidi's emails. All of its allegations of damage focus on the reactions to Hamidi's messages; there is no evidence that Intel would have attempted to block those messages had they been laudatory. These factors, coupled with the fact that Intel maintains an email system that permits the outside world to communicate with its employees using email and that, at the same time, it permits its employees to make reasonable personal use of its system, lead to but one conclusion: all of the damage that formed the predicate for the cause of action and hence, for the issuance of the injunction, resulted not from the use of the Intel email system to complete the transmission of Hamidi's messages; it resulted from the impact of Hamidi's message on their audience (Intel and its employees). *Cf. Laguna Publishing Co. v. Golden Rain Foundation*, 131 Cal. App. 3d 816, 844 (1982) ("Golden Rain, acting with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech . . . rights of plaintiff").

Because this injunction is justified solely on the basis of the impact of Hamidi's message on its audience, it is, by constitutional definition, content-based. *Reno v. ACLU*, 521 U.S. at 868; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Thus, while in an ordinary case, application of the tort of trespass to chattels may be content-neutral, its application here was anything but that.

2. The Trial Court's Injunction Is A Prior Restraint That Violates The First Amendment.

As originally filed, Intel's complaint sought both an award of damages and an injunction. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d at 247. When it moved for summary judgment, however, Intel dismissed its damages claim. *Id.* As between an award of damages and the issuance of an injunction, however, the imposition of an injunction is, from a First Amendment perspective, far more draconian. It is "the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). While an award of damages may chill future speech, *New York Times Co. v. Sullivan*, 376 U.S. at 278-79, an injunction that prohibits future communications utterly silences speech before it

occurs, regardless of its worth or consequences. *See Nebraska Press Ass'n*, 427 U.S. at 559.[14]

"Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see New York Times Co. v. United States*, 403 US. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). They come to the court bearing a heavy presumption against their constitutionality. *Organization for a Better Austin v. Keefe*, 402 U.S. at 419; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Wilson v. Superior Court*, 13 Cal. 3d 652, 657, 658 (1975). A plaintiff "carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. at 419. They are rarely upheld. *See New York Times Co. v. United States*, 403 US. 713 (Pentagon Papers case); *Wilson v. Superior Court*, 13 Cal. 3d at 660 ("the circulation of election campaign charges, even if deemed extravagant or misleading, does not present a danger of sufficient magnitude to warrant a prior restraint.").

[14] Moreover, the consequences of disobedience, which include both the possibility of civil and criminal contempt, are far more serious, and, for purposes of a state action analysis, entail even greater state involvement than would a simple damages judgment.

Two cases, one a United States Supreme Court case, the other a California case, are dispositive here. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), discussed above, the Supreme Court reversed an injunction in an invasion of privacy action that prohibited the distribution of leaflets accusing the plaintiff of unsavory business practices. The Court held:

> It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights.

Id. at 418. As in this case, the "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications," the dissemination of ideas. *Id.* at 418-19.

In *Paradise Hills Associates v. Procel*, 235 Cal. App. 3d 1528 (1991), the defendant erected signs on her house calling attention to her dispute with the plaintiff. The plaintiff sued for interference with prospective business advantage and obtained a preliminary injunction prohibiting Procel from making any statements claiming that her house was defectively built. The court of appeal reversed, holding that the injunction was an invalid prior restraint. In words that are particularly apt here, the court quoted the Supreme Court's admonition in *Keefe*: "'No prior decisions support the claim that the interest of an individual in being

free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of court.'" *Id.* at 1539 (quoting *Keefe*, 402 U.S. at 419); *accord CPC International, Inc. v. Skippy Inc.*, 214 F.3d at 462 (same).[15]

Hamidi's emails are the high tech equivalent of the leaflets in *Keefe* and the signs on the defendant's house in *Procel*. Just as the lower court's order prohibiting the distribution of leaflets in *Keefe* was an unconstitutional prior restraint, so too is the trial court's order prohibiting Hamidi from sending emails to Intel employees using their work email addresses. It is, unquestionably, a court order that prohibits speech activities. *See Alexander v. United States*, 509 U.S. at 550. The fact that Hamidi may have other—obviously less effective—means of attempting to communicate with Intel employees does not change the nature of the

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[15] The court of appeal sought to distinguish *Procel* on the ground that the court there opined that an injunction barring Ms. Procel from the plaintiff's real property might have been proper under appropriate circumstances. This argument misunderstands the significance of *Procel*. Had Ms. Procel come on to plaintiff's property, plaintiff would have sued for trespass to real property, not for interference with prospective business advantage. The tort of trespass to chattel, like the tort of interference with prospective economic advantage, serves interests quite different from those served by laws barring trespass to real property. As discussed in both Hamidi's opening brief and in the dissenting opinion in the court of appeal, the tort of trespass to chattel does not protect against the mere inviolability of the chattel. It protects only against damage to the chattel. *Accord Restatement (Second) of Torts*, § 218 cmt. e. Just as the First Amendment prohibited plaintiff in *Procel* from using the court to silence its critic by bringing an action for interference with prospective business advantage, the

court's injunction as a prior restraint. Nor does it make that prior restraint permissible. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766, 770 (1964) ("the union's interest in picketing is [not] diminished because it may communicate its message at other, admittedly less advantageous locations . . . ."); *see Reno v. ACLU*, 521 U.S. 844, 880 (1997). Labeling a disfavored message a trespass to chattel does not surmount the constitutional obstacle.

II. WHERE A TRESPASS TO CHATTEL ACTION IS BASED ON THE USE OF THE CHATTEL FOR PURPOSES OF COMMUNICATION, THE FIRST AMENDMENT REQUIRES THAT THE ELEMENT OF DAMAGE BE PROVEN BY DAMAGE TO THE CHATTEL ITSELF

As can be seen from the discussion in Part I.A., where liability is based on otherwise protected First Amendment expression, the Constitution may impose special requirements before that expression may be punished or prohibited. In cases brought under common law tort theories, the Constitution often requires that additional elements be proven before liability will attach. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 56 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033 (1986), and other cases cited in Part I.A., *supra*.

First Amendment bars the prior restraint at issue here under a theory of trespass to chattel.

In fashioning the appropriate rule, the courts weigh the First Amendment interests at stake against the degree to which important state interests would be compromised by restricting the circumstances under which recovery is allowed. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985); *Gertz v. Welch*, 418 U.S. 323 (1974); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d at 910-11; *Britt v. Superior Court*, 20 Cal. 3d 844 (1978). In this connection, "[i]t is . . . appropriate to require that state remedies . . . reach no farther than is necessary to protect the legitimate interest involved." *Gertz v. Welch*, 418 U.S. at 349; *see Britt v. Superior Court*, 20 Cal. 3d at 859.

In this case, Amici believe that both Hamidi and Justice Kolkey argue correctly that, simply as a matter of state tort law, an action for trespass to chattel based on the transmission of email may lie, if at all, only upon a showing that the alleged trespass resulted in at least temporary physical damage to or physical disruption of the email system. As a matter of constitutional law, we believe that that must be the rule whenever liability for trespass to chattel is imposed on the basis of communications presumptively protected by the First Amendment. Moreover, in order to establish liability, such damages must be substantial and they must be proven by clear and convincing evidence. *See Gertz v. Welch*, 418 U.S. 323, 342 (1974); *New York Times Co. v. Sullivan*, 376 U.S. at 285-86. Even upon such a showing, no injunction would be permissible absent a

finding by the court that the injunction is necessary to serve a significant state interest unrelated to the content of the communication and that the injunction burdens no more speech than necessary. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

This suggested rule is not only wholly consistent with the underlying nature of the tort of trespass to chattel, it is a rule that is constitutionally compelled. Because the essence of the wrong alleged in a case like this is that the communication of ideas or information has invaded the plaintiff's protected interest in its personal property, it is critical that liability be imposed only where the harm that will support relief is unrelated to the content of the communication—an interest not legitimately served by the tort—and that even where a remedy may be appropriate, that the impact on communication is no greater than absolutely necessary.

This proposed rule strikes the correct balance between the First Amendment interests at stake and the state's interest in the enforcement of its common law tort of trespass to chattel. Here the First Amendment interests are very strong. Email, by definition, involves the communication of information or ideas. It is quickly becoming the preferred method of communication for an increasingly large segment of the population. And, it is particularly well-suited to communicating with employees concerning workplace-related issues, because the list of addresses is readily accessible, the messages need not be read during work hours, and delivery is quicker,

more efficient, and much less expensive than handing out leaflets at the entrance to the workplace or attempting to compile home addresses and mail the information. It is also less intrusive and less disruptive than attempting to communicate by telephone.

The infringement on legitimate state interests effected by requiring proof of damage to the chattel or disruption of its functioning, on the other hand, is slight. The tort of trespass to chattel does not have as its purpose the stifling of communication. Rather, according to the Restatement, the tort serves the limited purpose of protecting a chattel from damage as the result of unauthorized use. *See Restatement (Second) of Torts*, § 218 & cmt. e.

Thus, the rule proposed by Amici infringes on the interests of the state, if at all, only on the margins. First, the rule will apply only in those cases involving the use of a chattel for the transmission of protected communications. Accordingly, the number of cases in which the rule will come into play is limited. Second, it will bar recovery in an even smaller subset of cases: those in which the alleged damage or disruption is not to the communications system itself, but rather is a result of the content of the message. It is in precisely these cases that First Amendment interests are at their peak, while the state's interests are at their lowest point since it is the protection of the chattel from harm that is the primary interest at stake. While the proposed rule would bar liability here, it would not affect Intel's

ability, for example, to bring a trespass to chattel action against someone who sent Intel employees an email containing a virus.

Third, where it is the content of the communication that is the source of the alleged damage, it does not undermine a significant state interest to require that the plaintiff plead its case under a tort theory intended to address that sort of harm. As discussed above, these other causes of action, which this Court has referred to collectively under the rubric "injurious falsehood," *see Blatty v. New York Times Co.*, 42 Cal. 3d 1033, have all been narrowed to accommodate the tension between the First Amendment and the state's desire to provide redress for speech that causes harm to the plaintiff. The proposed rule thus prevents a plaintiff from circumventing these First Amendment safeguards by transmuting a cause of action based on the content of speech into a cause of action for trespass to chattel. Since it is the method of delivery of the message that forms the basis for the trespass, it is both fair and reasonable to require that the damage that supports the tort be damage to or disruption of the delivery system, not damage resulting from the content of the message delivered.

Finally, it is likely that, as in this case, there are a number of self-help remedies that are available to the plaintiff, making a court-imposed remedy unnecessary. *See CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. at 1023 (in trespass to chattel action, self-help measures should be used before resorting to the processes of the court); *see also Gertz v. Welch*,

418 U.S. 323, 344 (1974). That is particularly important where, as here, the remedy sought is an injunction. Under traditional rules of equity, where there is a strong public interest at stake in not issuing the injunction (here the First Amendment interests affected by the injunction) and where there is little need for the injunction, an injunction should not be granted. *See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal. 3d 317 (1979); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, Local No. 31*, 61 Cal. 2d 766 (1964); *Lloyd Corp., Ltd. v. Whiffen*, 307 Or. 674, 773 P.2d 1294 (1989). This rule has particular force where the injunction in question forbids not conduct but rather is a prior restraint on otherwise protected speech.

An examination of the remedies available to Intel illustrates this last point. First, Intel has at its disposal its formidable resources to present its side of the story to its employees. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied is more speech, not enforced silence."). One can hardly argue that Hamidi has the advantage over Intel in terms of opportunity to make its case. *See Gertz v. Welch*, 418 U.S. at 344. Second, Intel could, if it chooses, instruct its employees not to read Hamidi's messages on company time. *Cf. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994) (injunction prohibiting anti-abortion protestors from holding up signs that were visible from inside the clinic restrained more speech than necessary; all clinic had

to do was close its curtains). Intel could also make sure that employees are informed that Hamidi will delete an employee's name from his mailing list upon the employee's request.[16] A court-issued injunction is unnecessary.

In sum, while Intel might prefer to have the added force of a court order to aid it in silencing Hamidi, it already has at its disposal ample means of combating Hamidi's messages. These remedies, coupled with Intel's willingness to allow the general public to communicate with its employees through its email system and its willingness to allow Intel employees reasonable personal use of the system, all demonstrate that, even under ordinary rules of equity, no injunction should have been issued here.

Holding that Intel may not establish liability for trespass to chattel based on injuries flowing from the content of Hamidi's messages works no substantial infringement on the state's legitimate interests. Such a ruling safeguards vital First Amendment interests while leaving the legitimate state interests served by the tort intact.

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[16] It is one thing for Intel to inform its employees that they can avoid further emails by asking Hamidi to delete their names from his mailing list. It is quite another for Intel to purport to speak on behalf of its many thousands of employees by sending such an instruction itself, on behalf of its entire workforce. *Compare Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) (invalidating ordinance that prohibited leafletting at homes; decision should be that of individual homeowner), *with Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970) (upholding statute that requires mailers to honor householder's request to be removed from mailing list and to stop all further mailings). The decision whether or not to continue receiving Hamidi's messages should be that of the employee, not Intel.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeal should be reversed.

Dated: August 7, 2002

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