IN THE SUPREME COURT
STATE OF GEORGIA

BRUCE MATHIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. S-02-G-0361**
	)	
THOMAS C. CANNON,	)	
	)	
Appellee.	)	

BRIEF OF AMICUS CURIAE

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STATEMENTS OF INTEREST

American Civil Liberties Union

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 350,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Georgia, Inc. is a state affiliate of the ACLU with over 3,500 members (collectively ACLU). The protection of principles of freedom of expression as guaranteed by the First Amendment is an area of special concern to the ACLU. In this connection, the ACLU has been at the forefront in numerous federal and state cases involving freedom of expression on the Internet. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 824 (1997); *Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700 (2002), vacating and remanding 217 F.3d 162 (3rd Cir. 2000); *American Library Association v. United States*, 201 F.Supp.2d 401 (E.D.Pa 2002); *American Civil Liberties Union v. Miller*, 977 F. Supp. 1228 (N.D.Ga. 1997).

The ACLU files this Brief of Amicus Curiae because the Georgia Court of Appeals decision below dangerously diminishes and chills constitutional protection for speakers on the "vast democratic forum" of the Internet, and broadly exposes speakers to whopping punitive damage awards without even a modicum of proof of actual harm or proof of actual malice. There is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 869-70 (1997); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (White, J., concurring) ("the First Amendment gives no more protection to the press in defamation

suits than it does to others exercising their freedom of speech"). A speaker on the Internet, just as a newspaper company, must have broad and full constitutional protection -- including the constitutionally mandated actual malice standard for private figure punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973).

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 world, including members in Georgia. EFF also maintains one of the world's most linked-to Web sites (http://www.eff.org). EFF has an interest in this case because of its longstanding goal of ensuring that the Constitutional rights that Americans enjoy in the non-digital world are transferred intact into cyberspace.

ARGUMENT AND CITATION OF AUTHORITY

I. A private plaintiff must prove actual malice by clear and convincing evidence to recover punitive damages

A. A private plaintiff must prove actual malice to recover punitive damages

The United States Supreme Court in *Gertz v. Welch, Inc.*, 418 U.S. 323 (1973) set forth the actual malice standard for imposing punitive damages in defamation cases. The issue before this Court is whether, under this standard, a private plaintiff must show actual malice by clear and convincing evidence before presumed or punitive damages can be recovered against a private defendant speaking on a matter of public concern. The first part of the answer is found in *Gertz*, which clearly requires actual malice for

punitive damages. *Gertz* answers the question certified by this Court by its plain language in holding that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 350

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964) the U.S. Supreme Court set forth the actual malice standard for public officials. *New York Times* holds that to recover for defamation, a public official must prove the defendant acted "with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* In *Gertz,* the Court imposed a less demanding standard for defamation suits by private individuals seeking *actual* damages but maintained the actual malice standard for imposition of presumed or *punitive* damages. The *Gertz* court endorsed this approach "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation" while recognizing "this countervailing state interest extends no further than compensation for actual injury." 418 U.S. at 348-49.

In *Diamond v. American Family Corp.,* 186 Ga. App. 681 (1988), the Georgia Court of Appeals rejected an award of punitive damages in a defamation action because of the absence of proof of knowledge of falsity of statements or reckless disregard for the truth. The Georgia court recognized that "[a]lthough *Gertz* relaxed the standard of proof necessary for a plaintiff to recover actual damages for defamation, the evidence must still meet the more demanding standard of 'actual malice,' as set forth in *New York Times Co. v. Sullivan*, in order to support a recovery of punitive damages." *Id.* at 684. *Gertz* further reasoned that states have no substantial interest in awarding plaintiffs "gratuitous awards of money damages far in excess of any actual injury" and found it "necessary to restrict defamation plaintiffs who do

not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Id.* at 349. In the case at bar, there is no allegation, nor evidence that the defendant acted with actual malice. The Court of Appeals erred in this case when it dispensed with the actual malice requirement by finding that the plaintiff was not

a public figure.[1] This only resolves part of the question because even as to private plaintiffs, *Gertz* makes clear that proof of actual malice is still constitutionally required for an award of punitive damages.[2]

B. The actual malice standard for punitive damages applies equally to both media/public defendants and non-media/private defendants

The actual malice standard necessary to receive punitive damages applies to both media/public and non-media/private defendants alike. Although many cases have discussed differences between public and

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[1]While the parties debate the public figure doctrine, numerous Georgia statutory privileges require an actual malice standard here even for a private plaintiff's actual damages. O.C.G.A. § 51-5-7(1) (public duty), (2) (private moral duty), (3) (protection of own interest), (4) (public interest or concern). Moreover, amicae disagree with the Court of Appeals conclusion that the plaintiff was a private figure, and suggest that he is a limited purpose public figure regarding the controversy surrounding the Solid Waste Management Authority of Crisp County's financial difficulties and its impact on local taxes. An individual may become a limited purpose public figure if he "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351; *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 817 (2001). Appellee, who had a public contract with the Authority, sought to influence the "public controversy over Crisp County's policies," *inter alia* by writing a newspaper editorial on behalf and using the letterhead of the Authority titled "Editorial Response" -- responding to harsh criticism of the Authority's policies. R – 136; *see Mathis v. Cannon*, 252 Ga. App. 282, 284-85 (2002). This renders Appellee a limited purpose public figure.

[2] The plaintiff claims that he sought "general" damages and that those include "actual" or "special damages." That is simply not correct. O.C.G.A. § 51-12-2 distinguishes "general" damages from "special damages." If the plaintiff's Complaint sought only "general" and "punitive" damages, then the actual malice standard applies because in Georgia punitive damages are included in the genus of general damages. *Atlantic Coast Line R.R. v. Thomas*, 14 Ga. App. 619 (1914).

private *plaintiffs*, the Supreme Court has never distinguished public and private *defendants* from one another. In *New York Times Co. v. Sullivan* the Court "granted the separate petitions for certiorari of the individual [defendants'] petitions and of the *Times*" and did not differentiate between the media and non-media defendants at all throughout the decision. 376 U.S. 254, 264 (1964) (*citing New York Times Co. v. Sullivan*, 371 U.S. 946 (1963) (mem.)). Although the defendant in *Gertz* was a media entity, the Court again did not make any attempt to distinguish between media and non-media defendants. 418 U.S. 323 (1974). *See, e.g.*, Powell, Katherine W. *Defamation and The Nonmedia Speaker*, 41 Fed. Comm. L.J. 195, 198 (1989) (noting "the court's silence [in *Gertz*] on the issue of nonmedia protection from defamation suits. . .").

When given the explicit opportunity to diminish defamation protections for non-media defendants, the Court has refused to do so. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). *Dun & Bradstreet* holds that a plaintiff is relieved of the actual malice burden for punitive damages only if a statement does not involve a matter of public concern. Additionally, Justice White's concurrence in *Dun & Bradstreet* explicitly rejects any distinction between media and non-media defendants.[3] *Id.* at 773. He notes, "From its inception, without discussing the issue, we have applied the rule of New York Times to non-media defendants."[4] The Court has rejected this distinction on numerous

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[3] Justice White states, "Wisely, in my view, Justice Powell [writing for the majority] does not rest his application of a different rule here on a distinction between media and non-media defendants. On that issue, I agree with Justice Brennan [writing a dissenting opinion] that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn." *Dun & Bradstreet*, 472 U.S. 749, 773 (1985).

[4] *Id.*, at 773, n. 4 (citing *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 37

occasions and there is no reason this case should be the first to limit speech based on the speaker's affiliation (or lack thereof) with the press. *See e.g.*, Lidsky, Lyrissa B. *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L. J. 855, 906 n. 263 (2000) (arguing that the Supreme Court does not distinguish between media and non-media defendants).

Not only is the distinction between media and non-media defendants unsupported by the Supreme Court's jurisprudence, this distinction is particularly inapplicable to the Internet. In *American Library Association v. United States*, 201 F.Supp.2d (E.D.Penn. 2002), the court recognized that

> The "press" in 1791 was not the *New York Times* or the *Wall Street Journal*. It did not comprise large organizations of private interests, with millions of readers associated with each organization. Rather, the press then was much like the Internet today. The cost of a printing press was low, the readership was slight, and anyone (within reason) could become a publisher--and in fact an extraordinary number did. When the Constitution speaks of the rights of the "press," the architecture it has in mind is the architecture of the Internet.

Id. at 466 (quoting Lawrence Lessig, *Code* 183 (1999)).

The actual malice standard is particularly appropriate for protecting Internet communications because that medium empowers even private individuals who claim to be defamed with potent "self-help -- using available opportunities to contradict the lie or correct the error." *Gertz*, 418 U.S. at 345. On the Internet, these otherwise politically powerless private individuals are armed with hefty "opportunities for rebuttal" *Id.* As the Supreme Court stated:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

U.S. 64 (1964); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997). Thus, the actual malice standard should provide the broadest possible protection for all speakers on the Internet.

C. Georgia law requires proof of malice by clear and convincing evidence to impose punitive damages

Georgia law states, and the United States Constitution requires, that punitive damages must be proven by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b) states that

> Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

Gertz, 418 U.S. at 342 (plaintiff must show "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"). Under this requirement, negligence or even gross negligence is not adequate to support a punitive damage award. *Tower Financial Services, Inc. v. Smith,* 204 Ga. App. 910, 918 (1992). Something more than the mere commission of a tort is required for punitive damages. *Id.* Additionally, the Court of Appeals has held that mere professional negligence will not support punitive damages but the plaintiff must show clearly and convincingly an entire want of care. *Roseberry v. Brooks,* 218 Ga. App. 202, 210 (1995). The Georgia Court of Appeals upheld a punitive damage award in a defamation case where "there was clear and convincing evidence to support the jury's conclusion that [defendant's] actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." *Sparks v. Ellis*, 205 Ga. App. 263, 268 (1992). By this statute, Georgia

specifically imposes a high standard of proof -- clear and convincing evidence-- for the findings necessary for an award of punitive damages. Because a finding of actual malice is a prerequisite for the imposition of punitive damages, that finding must be supported by clear and convincing evidence.

II. Georgia law bars the plaintiff from receiving punitive damages without a request for retraction

The Court of Appeals erred in not finding that plaintiff's claim for punitive damages is barred by Georgia's retraction statutes. First, under the plain language of O.C.G.A. § 51-5-11 the defendant's Internet posting constitutes a publication to which the statute applies. Because the statute requires a written request for correction and retraction, and because the plaintiff did not make such a request, the plaintiff is barred from receiving punitive damages. Additionally, O.C.G.A. § 51-5-12 should apply to bar the plaintiff's claim for punitive damages because it is part of a comprehensive statutory scheme applicable to all defamation actions. It is supported by Georgia's common law of defamation that traditionally recognizes the application of common law principles in light of new technology.

A. An Internet posting is a "publication" under the plain language of O.C.G.A. § 51-5-11

1. An Internet posting meets the definition of a "publication"

In holding the statute inapplicable to an Internet posting the Court of Appeals misconstrued the plain language of the statute and mistakenly relied on inapplicable and erroneous precedent. O.C.G.A. § 51-5-11 specifically prohibits a plaintiff from recovering punitive damages unless the plaintiff requests correction and retraction in writing. The statute applies to any "publication of an erroneous statement," O.C.G.A. § 51-5-11(a), and requires a retraction to be issued in "a regular issue of the newspaper or other publication

in question." O.C.G.A. § 51-5-11(b)(1)(B). In the context of defamation law, "publication" is a term of art which refers to "[t]he communication of defamatory words to someone other than the person defamed," *Blacks' Law Dictionary* (7th ed. West 1999). In common parlance, "publication" refers not only to newspapers and magazines, but to any "communication (as of news or information) to the public" or "public announcement." *Webster's Third New International Dictionary, (Unabridged)* (Merriam-Webster 1993). An Internet posting qualifies under either definition.

The Court of Appeals' reasoning for refusing to apply O.C.G.A. § 51-5-11 to Internet postings does not withstand scrutiny. First, the court reasoned that the statute's terms "contemplate actions between an aggrieved party and a newspaper. . . [and] do not appear to address actions between two individuals." *Mathis v. Cannon,* 252 Ga. App. 282, 285 (2001). This type of reasoning simply mischaracterizes the nature of the Internet. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997), the U.S. Supreme Court recognized that "[a]ny person or organization with a computer connected to the Internet can 'publish' information. Publishers include government agencies, education institutions, commercial entities, advocacy groups, and *individuals*." *Id. (emphasis added).* The Court further noted that "[w]eb publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individual newsletters about that person or organization, which are available to everyone on the Web." *Id.* at 853 n.9. The Court of Appeals sought to distinguish the present action by emphasizing that the retraction statute contemplates an action between an aggrieved party and a newspaper, television station or radio station. Because of the widespread ability of an individual to publish on the Internet, however, the Court of Appeals' distinction

between traditional media outlets and Internet postings is merely an illusory one. Since an individual may "publish" on the Internet just like one "publishes" a newspaper, the statute should apply.

Not only is the Court of Appeals narrow reading of the statute unsupported by the language of the statute itself, but would require an absurd result if followed to conclusion. For example, under this interpretation the statute would not apply to a suit for libel against a regular columnist in a newspaper unless the newspaper itself was named a defendant. Neither is the Court of Appeals' holding in this case supported by its questionable ruling in *Williamson v. Lucas*, 171 Ga. App. 695 (1984), where it held that O.C.G.A. § 51-5-11 did not apply to statements made on a radio talk show because the meaning of "publication" in the statute was "restricted to a written publication." *Id.* at 697. While the Court of Appeals' holding in *Williamson* is suspect, it clearly does not apply to this purely textual posting on an Internet message board. The Internet, like newspapers and magazines, is a visual medium, which primarily communicates text and images. Radio, on the other hand, is auditory, and words transmitted over the radio are rarely described as "published." By contrast, writers, publishers, and the United States Supreme Court describe the posting of text to the Internet as "publication." Defendant's Internet posting constitutes a "publication" under O.C.G.A. § 51-5-11 and plaintiff is barred from receiving punitive damages because of his failure to request retraction.

2. If the Internet posting is not a "publication" under O.C.G.A. § 51-5-11 then it cannot be a "publication" for purposes of liability

In Georgia, a libel is "published" as soon as it is communicated to any person other than the party libeled. O.C.G.A. § 51-5-3. The Georgia Court of Appeals has held that "defamatory matter is published as soon as it is communicated to any person other than the impugned party." *Baskin v. Rogers*, 229 Ga.

App. 250, 252 (1997). Publication entails the ability to *control* the libel. *Mullinax v. Miller*, 242 Ga. App. 811, 814 (2000). In *Brandon v. Arkansas Fuel Oil Co.*, 64 Ga. App. 139 (1940) the Georgia Court of Appeals held that a "libel may be published by transmission thereof through telegraph. The writing of a message and the delivery of it to the telegraph company for transmission to the plaintiff constitutes a publication by the writer of the message." *Id.*

The court below used one definition of "publication" to hold the defendant liable for defamation and used another, different definition to find that the retraction statute did not apply to the demand for punitive damages. This distinction is erroneous and inconsistent with principles of legislative interpretation. In Georgia, "a statute must be construed in relation to other statues of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes "in pari materia," are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto." *Monticello, Ltd. v. City of Atlanta*, 231 Ga. App. 382, 383 (1998). The Court of Appeals' assertion that O.C.G.A. § 51-5-11 only applies to written publications cannot stand, since the clear language of the statute applies to merely a "publication." O.C.G.A. § 51-5-11(a). The statute calls for a retraction to be *published* in a newspaper or "other *publication* in question." O.C.G.A. § 51-5-11(b)(1)(B) *(emphasis added)*. Nowhere in the statute does the word "print" or "printed" appear but the statute refers only to *publication*. Because the retraction code sections and liability sections of the code for libel are part of the same subject matter, the Court should construe them together. If the Internet posting fails to meet the requirement of a publication for the purposes of the retraction statute, then likewise it must fail to meet the requirement for publication for purposes of liability.

B. O.C.G.A. § 51-5-12 creates a consistent statutory scheme for all defamation actions

The Georgia legislature exhibited its dissatisfaction with *Williamson* and its desire for a seamless statutory scheme where failure to request a retraction would preclude punitive damage awards regardless of the medium of mass communication. In 1989, the legislature enacted O.C.G.A. § 51-5-12, which specifically clarified the retraction requirement for broadcasts. This section tracks the language of § 51-5-11 but for a "visual or sound broadcast." O.C.G.A. § 51-5-12(a). The Peach Sheet for this statute notes that § 51-5-12 was enacted in response to "a void in the statutory scheme" left by the Court of Appeals' decision in *Williamson*. 6 Ga. St. U.L. Rev. 330, 331 (1989). By filling this void, the legislature demonstrated its intent that, regardless of the medium of mass communication a defendant uses to communicate with the public, punitive damages for libel should be awarded only when a retraction has been requested and refused.

In *Williamson,* the Court of Appeals refused to extend § 51-5-11 to cover a radio broadcast relying on the rule of statutory construction that "[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it." 171 Ga. App. at 698 (*quoting Botts v. Southeastern Pipe-Line Co.,* 190 Ga. 689, 700-701 (1940)). At the time of the *Williamson* decision the statute was construed to solely cover written publications and print media. Though questionable, at the time the statutory scheme referenced only one medium-- writing. Today's statutory landscape requires a different conclusion. The legislature enacted O.C.G.A. § 51-5-12 to require retraction in broadcast media, to fill the statutory void and create a consistent scheme. This Court should recognize the application of the retraction requirement to the Internet. In Georgia, "statutes 'are to be construed in connection and in harmony with the existing law, and as a part of a *general and uniform system* of

jurisprudence'." *Williamson,* 171 Ga. App. at 702 (Deen, P.J., dissenting) (*quoting Botts,* 190 Ga. at 701). In fact, "[i]t is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning." *Monticello,* 231 Ga. App. at 384. Read together O.C.G.A. § 51-5-11 and O.C.G.A. § 51-5-12 create a seamless statutory approach to defamation actions which clearly requires a request for retraction before punitive damages may be awarded in print, broadcast and on the Internet.

Additionally, the Court of Appeals attempted to distinguish the Internet from traditional broadcast media because "the audience in a chat room is in a constant state of flux, making the remedy envisioned by O.C.G.A. § 51-5-12 inapplicable." *Mathis,* 252 Ga. App. at 286. First, nothing in the text of O.C.G.A. § 51-5-12 supports such a restrictive reading. Moreover, the court exhibited another fundamental misunderstanding of the nature of the Internet. Internet groups like newspapers and magazines, have loyal readerships. Because a retraction on the Internet can be posted directly under the original comment-- or even replace it entirely-- it may be even more likely to be noticed than a broadcast retraction by the very persons who read the original posting.

C. Georgia's common law tradition in defamation actions supports treating the Internet like other traditional media

Georgia's common law approach to defamation supports the inclusion of Internet postings among traditional media and a consistent approach to both. In a 1962 decision by the Georgia Court of Appeals the law of "defamacast" was born. *American Broadcasting--Paramount Theatres, Inc. v. Simpson,* 106 Ga. App. 230 (1962). In *American Broadcasting,* the Court of Appeals dealt with defamation as

broadcast on television. Since defamation on a television broadcast did not fit squarely into the common law categories of slander or libel, the Georgia court created the law of "defamacast" by adapting common law principles in light of the then new technology. *Id.* at 237.

The court began with the acknowledgement that in Georgia, libel and slander code sections are a codification of the common law. *Id.* When the common law first recognized a right of action for defamatory remarks, the only action was for slander. Development of a new media--the printing press-- led to the development an action for printed defamation -- libel. *Id.* In considering the new challenge of television and radio broadcasts, the court asked, "[m]ay not the common law of Georgia develop a new classification to deal with these new media?" *Id.* The court then emphasized that the "genius of the common law has been its ability to meet the challenges posed by changing circumstances." *Id.* at 238.

These general principles recognized in 1962 at the advent of television and radio should likewise guide this court in applying them to today's new media-- the Internet. Georgia's common law of defamation illustrates a flexibility and willingness to apply basic underlying principles to new media. In *American Broadcasting*, the court recognized that "the common law must adapt, and classically has adapted, to meet new situations." *Id.* at 240. This Court should likewise adapt, and apply Georgia's consistent statutory scheme to the Internet.

D. The Court of Appeals' Opinion Demonstrates Misunderstanding of the "Chatroom" and a Fundamental Misunderstanding of the Purpose of Punitive Damages and the Retraction Statute

The Court of Appeals held that the retraction statute should not be applied to Internet chat rooms because, supposedly unlike the readers of a magazine or audience for a newscast (which the Court of Appeals supposes would have the same readers or viewers from day to day), the participants in a chat

room are supposedly "in a constant state of flux," so the retraction would be unlikely to reach the same audience that received the earlier, actionable communication. *Mathis*, 252 Ga.App. at 285-86. This is a holding with neither record support nor factual truth. It is also legally irrelevant.

First, anyone with experience with chatrooms knows well that chatrooms are "inhabited" by a cast of regulars. These are people who log in frequently and participate in the chat daily if not more often. Second, postings to a chat room stay up until removed by the moderator/host. Thus, a retraction could remain posted for months, visible to every person who logged in to the chatroom over that period. Third, participants in the chatroom "sign in." There is often a record of each person who participated. If the desire or requirement were to make sure the retraction reached all or substantially all of those exposed to the actionable "chat," each person could be informed by email or instant messenger (a form of interactive email) of the retraction. In this case, only 44 people logged in to the chatroom while the statements at issue were posted, and any user could likely check to see if the screen names of participants have changed from one day to the next.

Comparing this state of facts to a magazine or television newscast shows that a retraction is more likely to reach the original audience (if that were required) than is a retraction in the next issue of a magazine or next newscast. People reading a magazine in a doctor's office are unlikely to happen to read the same magazine in the month or week when a retraction is published; people who watched the news on a Sunday may not watch it on a Wednesday – and there is no way to find out; people who watch *60 Minutes* when the feature story is on quintuplets are unlikely to be the same people who watch when the feature story is on insider trading.

It has never been a requirement of the retraction statute that the retraction reach all, a certain percentage, or even any of the recipients of the actionable communication. The reason for that is plain under Georgia law: compliance with the retraction statute is a prerequisite for the award of punitive damages, not compensatory damages. Punitive damages are to penalize, punish and deter the conduct and culpability of the defendant, not to recompense harm to the plaintiff. Thus, the willingness to retract a libelous publication goes towards refuting the willful and wanton nature of the conduct. Although it may (and hopefully will) ameliorate some of the damages, it is the act of retraction that bars punitive damages, not the effect of the retraction on the beliefs of the recipients thereof. Thus, even were the Court of Appeals correct in its belief in the inefficacy of retractions on the Internet (and it is not correct), the retraction requirement would be no less logically or legally applicable.

This _____ day of July, 2002.

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CERTIFICATE OF SERVICE

I, Jeffrey O. Bramlett, hereby certify that I have caused a copy of the foregoing BRIEF OF AMICUS CURIAE to be served on opposing counsel by United States Mail in a properly addressed envelope with adequate postage affixed thereto as follows:

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