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Anti-Abortion Site Wins Appeal

by Declan McCullagh

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WASHINGTON — An embattled website sporting photos of gore-splattered fetuses and “wanted” posters for abortion doctors can remain online, a federal appeals court ruled Wednesday.

A unanimous three-judge panel of the Ninth Circuit Court of Appeals said that the so-called Nuremberg Files, which listed names and home addresses of doctors, did not violate the First Amendment’s guarantee of freedom of expression.

The 40KB ruling doesn’t affect the continued existence of the site, which has moved offshore to a server in South Africa. But it does throw out a record \$109 million verdict against the defendants — abortion foes including the American Coalition of Life Activists (ACLA), Advocates for Life Ministries, and webmaster Neal Horsley.

This represents a severe setback to the plaintiffs — including Planned Parenthood and the Portland Feminist Women’s Health Center — who sued to restrict the distribution of materials that targeted doctors who performed abortions. They were joined by an affiliate of the American Civil Liberties Union, which in this case departed from its usual role as an uncompromising defender of free speech.

In a ringing defense of the First Amendment, Judge Alex Kozinski wrote that “political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party.”

This case caps years of antagonism between ACLA and its pro-choice opponents, during which time the group compiled lists of a “Deadly Dozen” abortion doctors and at a 1995 event showed off a poster declaring them guilty of “crimes against humanity.”

The ACLA said that these lists would record information that could be used as evidence against the doctors once abortion became illegal and “the tide of this nation’s opinion turns against the wanton slaughter of God’s children.”

Planned Parenthood and its allies originally sued just the ACLA, a dozen activists, and one other group. But the trial judge ruled that Horsley, who ran the “Nuremberg Files” website that featured ACLA material, was a co-conspirator who created the site in concert with the ACLA.

U.S. District Judge Robert Jones ruled in favor of the abortion-rights groups, handing down an injunction barring the defendants from publishing the posters, the website, or any related material. Kozinski and his fellow judges, Andrew Kleinfeld and William W Schwarzer, reversed the decision and told the district judge to “dissolve the injunction and enter judgment for the defendants on all counts.”

Kozinski likened the case to a 1982 ruling by the Supreme Court in NAACP v. Claiborne Hardware Co., that dealt with a boycott by the NAACP against white-owned businesses in Mississippi. NAACP activists wearing black hats stood outside stores and wrote down names of customers, which were then read aloud and published in newspapers.

The Supreme Court parsed this closely, saying that the NAACP may have created a fear of violent retaliation but had not directly “authorized, ratified, or directly threatened acts of violence.”

“The First Amendment protects ACLA’s statements no less than the statements of the NAACP,” Kozinski wrote. “If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.