

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

FRANK D. SMITH, JR.,

Plaintiff,

v.

Case No.: 4:02-CV-280-HLM

CORNELL UNIVERSITY;

NATIONAL SCIENCE

FOUNDATION;

LOS ALAMOS NATIONAL

LABORATORY;

UNIVERSITY OF CALIFORNIA;

UNITED STATES DEPARTMENT

OF ENERGY;

and

PAUL GINSPARG, Professor of

Physics and Computer Science,

Cornell University, Individually and

in his Official Capacity;

SIMEON WARNER, Research

Associate, Computer Science

Department, Cornell University,

Individually and in his Official

Capacity;

SARAH THOMAS, University

Librarian, Cornell University,

Individually and in her Official

Capacity;

and

JEAN POLAND, Associate

Librarian, Cornell University,

Individually and in her Official	:
Capacity;	:
	:
and	:
	:
RICHARD LUCE, Administrative	:
Director, Los Alamos National	:
Laboratory, Individually;	:
JOHN C. BROWNE, Director, Los	:
Alamos National Laboratory,	:
Individually;	:
and	:
ROBERT L. VAN NESS, University	:
of California Assistant Vice President	:
for Laboratory Administration,	:
Individually;	:
	:
Defendants.	:

**MEMORANDUM IN SUPPORT OF RESPONSE OF PLAINTIFF**  
**FRANK D. SMITH, JR., TO MOTION TO DISMISS OF**  
**DEFENDANTS DEPARTMENT OF ENERGY AND NATIONAL**  
**SCIENCE FOUNDATION**

Pursuant to Federal Rule of Civil Procedure 12(b)(2) and 2(b)(6) and Local Rule 7.1, Plaintiff Frank D. Smith, Jr., respectfully submits this memorandum of law in support of his reponse opposing the motion to dismiss his claims against Defendants Department of Energy and National Science Foundation.

According to the criteria of Morris v. SSE, Inc., 843 F.2d 489, 492

(11th Cir.1988), the Court should, for the purposes of considering the Motion to Dismiss, make all reasonable inferences in favor of Plaintiff.

The Motion to Dismiss should be denied.

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### **Incorporation by Reference of Prior Memorandum and Affidavit**

Plaintiff hereby incorporates herein by reference Plaintiff's memorandum of law in support of his reponse (Plaintiff's Response to Cornell and Los Alamos) opposing the motions of Defendants Cornell University ("Cornell"), Paul Ginsparg, Simeon Warner, Sarah Thomas, and Jean Poland (collectively, "Cornell Defendants") and of Defendants The Regents of the University of California d/b/a Los Alamos National Laboratory ("The Regents"), Richard Luce, John C. Browne and Robert Van Ness (collectively, "the individual UC Defendants") to dismiss his claims, and the Affidavit of Plaintiff Frank D. Smith, Jr., (S.Aff.) in support thereof, which response and affidavit have heretofore been served on all Defendants including the Department of Energy (DOE) and the National Science Foundation (NSF).

## **Sovereign Immunity**

Plaintiff's Complaint is based on grounds including the First (Complaint, including ¶¶ 15, 25, 33, 50) and Fifth (Complaint, including ¶ 47) Amendments of the United States Constitution.

Plaintiff contends that the facts of this case, some of which Plaintiff expects to discover during its discovery phase, will show that Defendant NSF has participated in and continues to participate in the violation of Plaintiff's right to freedom of speech under the First Amendment of the United States Constitution and in violation of Plaintiff's right to due process under the Fifth Amendment of the United States Constitution by funding activities of the Cornell and/or the Los Alamos Defendants in administering the arXiv e-print archives, which are a public forum with a declared policy of open access.

Plaintiff contends that the facts of this case, some of which Plaintiff expects to discover during its discovery phase, will show that Defendant DOE has participated in and continues to participate in the violation of Plaintiff's right to freedom of speech under the First Amendment of the United States Constitution and in violation of Plaintiff's right to due process under the Fifth Amendment of the United States Constitution through its relationship with the Los Alamos Defendants in administering

the arXiv e-print archives and/or in acting as primary back-up for the arXiv e-print archives, which are a public forum with a declared policy of open access.

In support of their contention that they have sovereign immunity in this case, Defendants DOE and NSF cite in their Memorandum the case of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In that case, involving the Fourth Amendment, the opinion of the Court was delivered by Mr. Justice Brennan, who said:

“... It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S., at 684 (footnote omitted) ...

... "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163

(1803). ...”.

The opinion in the case of *Bell v. Hood*, 327 U.S. 678 (1946), cited by Mr. Justice Brennan in the *Bivens* case, was delivered by Mr. Justice Black, who said (footnotes omitted):

“... Petitioners' complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents' invasion of these rights caused the damages for which they seek to recover and point further to 28 U.S.C. 41(1), 28 U.S.C.A. 41(1), which authorizes the federal district courts to try 'suits of a civil nature' where the matter in controversy 'arises under the Constitution or laws of the United States,' whether these are suits in 'equity' or at 'law.' Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. ... That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution. And it is established practice

for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.

Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. § 41(1), 28 U.S.C.A. 41(1), and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully v. First National Bank*, 299 U.S. 109, 112, 113 S., 57 S.Ct. 96, 97; *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199, 200 S., 41 S.Ct. 243, 244, 245. REVERSED. ...”.

With respect to the statement of Mr. Justice Black “... it is also well settled that where legal rights have been invaded, and a federal statute



provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. ...”, Plaintiff notes that 28 U.S.C. § 1346, United States as defendant, states in part:

“(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

...

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ...”.

Plaintiff’s Complaint does not seek any money damages other than “... his costs, expenses, and reasonable attorneys’ fees pursuant to, inter alia, 42 U.S.C. § 1988, 28 U.S.C. § 2412 and other federal and state laws; ...” (Complaint, Request for Relief (c)), and

Plaintiff hereby waives any claim under this action exceeding \$10,000 in amount against Defendants DOE and NSF and voluntarily limits his monetary claims under this action against Defendants DOE and NSF to no more than \$10,000.

Therefore, under 28 U.S.C. § 1346 and the First and Fifth Amendments of the United States Constitution, as well as any and all other applicable laws and Constitutional provisions, Plaintiff's action against Defendants DOE and NSF is not barred by sovereign immunity.

## **Remedies Sought against Defendant DOE**

With respect to the nature of relief sought against Defendant DOE, Plaintiff notes that his Request for Relief is in the alternative, and that it is now unknown exactly what relief might be deemed by the Court to be the most just and equitable under the facts of this case, especially since all the facts have not yet been discovered now, prior to the discovery phase of this case.

However, one possible outcome might be that the Cornell Defendants prove to be unable or unwilling to administer the arXiv e-print archives as an open access public forum with due process, in which case it might be just and equitable that the transfer of administration of the arXiv e-print archives from DOE and the Los Alamos Defendants be rescinded and that DOE and the Los Alamos Defendants be ordered by the Court to administer the arXiv e-print archives as an open access public forum with due process.

Such an outcome is a reasonable possibility, and would constitute substantial relief against Defendant DOE.

## **Remedies Sought against Defendant NSF**

With respect to the nature of relief sought against Defendant NSF, Plaintiff notes that his Request for Relief is in the alternative, and that it is now unknown exactly what relief might be deemed by the Court to be the most just and equitable under the facts of this case, especially since all the facts have not yet been discovered now, prior to the discovery phase of this case.

However, one possible outcome might be that the Cornell Defendants prove to be unable or unwilling to administer the arXiv e-print archives as an open access public forum with due process, in which case it might be just and equitable that Defendant NSF be ordered to terminate all financial support to the Cornell Defendants that is related to the arXiv e-print archives, unless and until the Cornell Defendants begin, and continue, to administer the arXiv e-print archives as an open access public forum with due process.

Such an outcome is a reasonable possibility, and would constitute substantial relief against Defendant NSF.

**conclusion**

Plaintiff respectfully submits that this Memorandum shows that the facts and issues of fact in this case are such that said Motion to Dismiss should be denied.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 2003.

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