Case No. S235968

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWN HASSELL, *et al.*
Plaintiffs and Respondents,

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

MOTION FOR JUDICIAL NOTICE; DECLARATION OF ROCHELLE L. WILCOX WITH EXHIBITS A-C; [PROPOSED] ORDER

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I. SUMMARY OF ARGUMENT

Pursuant to Evidence Code §§ 452(d) and (h) and § 459, Petitioner Yelp Inc. ("Yelp") respectfully requests that the Court take judicial notice of the court records that are submitted with this Request for Judicial Notice as **Exhibits A** through **C** to the Declaration of Rochelle L. Wilcox ("Wilcox Decl."). As Yelp establishes below, this Court is authorized to take judicial notice of these court records, and it should do so because they are relevant to a key issue in this appeal—the standards for entering prior restraints, particularly as those standards are applied to a non-party who received no notice or opportunity to be heard in conjunction with the entry of that prior restraint.[1]

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ATTACHED COURT RECORDS AND ARTICLES

California Evidence Code § 459(a) provides in part that "[t]he reviewing court *shall* take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452." California Evidence Code § 452(d) authorizes a court to take judicial notice of "[r]ecords of

[1] This Court may take judicial notice of the documents submitted with this Request, although no similar request was made to the lower courts. *Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 (citing *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 384).

(1) any court of this state or (2) any court of record of the United States or of any state of the United States." California Evidence Code § 453, in turn, provides that "[t]he trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

Under Section 452(d), California courts regularly take judicial notice of the existence of court records (although they may not judicially notice the truth of the matters contained in those records). *E.g.*, *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1561-62; *County of San Diego v. Sierra* (1990) 217 Cal.App.3d 126, 128 n.2; *Magnolia Square Homeowners Ass'n v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056-57; *Artucovich v. Arizmendiz* (1967) 256 Cal.App.2d 130, 133-34; *Goldstein v. Hoffman* (1963) 213 Cal.App.2d 803, 814. Thus, this Court may take judicial notice of the existence of each document in a court file, including **Exhibits A** through **C**, as requested here. *Day v. Sharp* (1975) 50 Cal.App.3d 904.

Yelp asks the Court to take judicial notice of the following court records, attached as **Exhibits A** through **C**, which address the standards for entering prior restraints, particularly as those standards are applied to a

non-party who received no notice or opportunity to be heard in conjunction with the entry of that prior restraint:

Exhibit A: "Answer Brief on the Merits" filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* Cal. Supreme Court Case No. S127904.

Exhibit B: "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

Exhibit C: "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

As Yelp's merits briefs address, prior restraints are heavily disfavored under federal and California law, and they may be entered, if at all, only in the most extreme circumstances. The attached Briefs, which were submitted by Dean Chemerinsky in the primary United States and California Supreme Court cases to address this issue in recent years, persuasively demonstrate why a prior restraint may not be entered against a non-party such as Yelp unless that non-party is given notice and an opportunity to be heard. They are highly relevant to the Court's evaluation of this issue and Yelp therefore respectfully requests that the Court take judicial notice of the Briefs attached as **Exhibits A** through **C**.

Pursuant to California Rule of Court 8.252(a)(2), Yelp advises the Court that **Exhibits A** through **C** were not presented to the trial court in this matter.

III. CONCLUSION

As addressed above, the documents submitted with this Request for Judicial Notice establish important facts for this Court's consideration. Therefore, for the foregoing reasons, Yelp respectfully requests that the Court take judicial notice of the court records attached to this Request as **Exhibits A** through **C**.

Dated: July ~~19~~ 18, 2017

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox

By: _____
Rochelle L. Wilcox

Attorneys for Non-Party Appellant
YELP INC.

DECLARATION OF ROCHELLE L. WILCOX

I, Rochelle L. Wilcox, declare:

1. I am an attorney admitted to practice before all the courts of the State of California and before this Court. I am a partner in the law firm Davis Wright Tremaine LLP ("DWT") and I am one of the attorneys for Petitioner Yelp Inc. ("Yelp"). I have personal knowledge of the following facts and, if called upon to testify, I could and would competently testify to these facts.

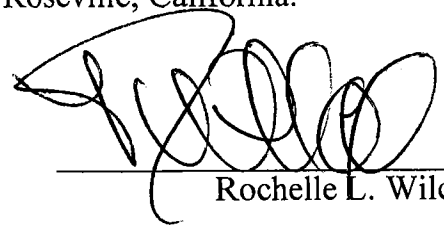
2. Attached as **Exhibit A** is a true and correct copy of an "Answer Brief on the Merits" filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* California Supreme Court Case No. S127904. I received the attached Exhibit A from one of the attorneys of record in *Balboa Island* around the time that Exhibit A was filed.

3. Attached as **Exhibit B** is a true and correct copy of "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488. I received the attached Exhibit B approximately three months ago from one of the attorneys who filed an Amicus Brief in the *Tory v. Cochran* matter.

4. Attached as **Exhibit C** is a true and correct copy of the : "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488. I received the attached Exhibit C approximately three months ago from one of the attorneys who

filed an Amicus Brief in the *Tory v. Cochran* matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was signed on July 18, 2017 at Roseville, California.



Rochelle L. Wilcox

[PROPOSED] ORDER

This Court, having considered the Motion For Judicial Notice of Petitioner Yelp Inc., and good cause having been shown therefore,

IT IS ORDERED that the Court takes judicial notice of the following documents:

Exhibit A: "Answer Brief on the Merits," filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* California Supreme Court Case No. S127904.

Exhibit B: "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

Exhibit C: "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

Dated: _____

By: _____
Honorable Tani Gorre Cantil-Sakauye
Chief Justice of the State of California

EXHIBIT A

S127904

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BALBOA ISLAND VILLAGE INN, INC.,
Plaintiff and Respondent,

v.

ANNE LEMEN,
Defendant and Appellant.

On Review from the Court of Appeal,
Fourth Appellate District, Division Three, Case No. G031636

After an Appeal from the Superior Court of Orange County,
Honorable Gerald G. Johnston, Case No. 01CC13243

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ISSUES PRESENTED

1. Whether a permanent injunction as a remedy in a defamation action violates the First Amendment.

2. Whether a permanent injunction violates the First Amendment when it is not narrowly tailored in its prohibition of all speech, in any place, at any time, about a matter of public concern, and when it is imposed without a finding that there was actual malice.

3. Whether the Court of Appeal erred in denying attorneys' fees when a party successfully vindicated the First Amendment by having an unconstitutional injunction, restricting speech on a matter of public concern, overturned.

STATEMENT OF FACTS

This case involves a long running conflict between a bar that served alcohol to young adults on a quaint island and a neighbor, Anne Lemen. There were news articles relating to the noise involving the Balboa Island Village Inn ("BIVI") that go back at least to 1989, the year Lemen purchased her property just across a small alley from BIVI. *Balboa Island Village Inn, Inc. v. Lemen*, 17 Cal. Rptr. 3d 352,

356 (2004) ("*BIVI*").[1]

Aric Toll purchased BIVI in 2000. *Id.* Soon afterwards, he submitted an application to the City of Newport Beach Planning Department for an expansion of the entertainment permit for BIVI, which included adding percussion.[2] Lemen was opposed. She felt BIVI was loud enough, as she could not sleep due to the rowdy patrons leaving BIVI during the early morning hours. The Court of Appeal described the situation: "Departing patrons often are inebriated and boisterous. Noise, disturbances, and public urination are not uncommon." *BIVI*, 17 Cal. Rptr. 3d at 356. Lemen had previously complained to the police and city officials. *Id.* She unsuccessfully tried to sell her house. *Id.*

Lemen started a petition drive and eventually got the signatures of approximately 400 of the 1,100 residents of Balboa Island. *Id.*[3]

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[1] *See also* Clerk's Transcript ("CT"): Ex. 1 (Feb. 20, 1998 *Orange County Register* article), Ex. 2 (Apr. 17, 1989 *Daily Pilot* article); Reporter's Transcript ("RT") (Aug. 19, 2002) at 3:22-4:3.

[2] *See* CT: Ex. 9 (Apr. 6, 2002 Petition opposing use permit for additions to live entertainment), Ex. 14 (June 20, 2002 Report to Newport Beach Planning Comm'n); RT (Aug. 19, 2002) at 25:9-26:23; RT (Aug. 26, 2002) at 30:23-31:8.

[3] *See also* RT (Aug. 19, 2002) at 6:5-10; RT (Aug. 20, 2002) at 76:12-23; RT (Aug. 26, 2002) at 84:13-17.

Thus, the speech which was the basis for this action involved a clear matter of public concern: those who signed the petitions were in opposition to the expansion of the entertainment permit for BIVI. This was an issue put into the public domain by BIVI and the city planners welcomed input from the surrounding community.[4] Given the problem Lemen had in getting people to take her seriously, she took a series of videotapes and photographs of what she felt was inappropriate conduct and violations of various laws in order to document wrongdoing at BIVI. *Id.* The videos provide compelling support for Lemen's concerns about BIVI. *See* CT: Exs. 68 (A), (B), (C) (videos).

BIVI sued Lemen for nuisance, defamation, and interference with business, seeking only injunctive relief. *BIVI*, 17 Cal. Rptr. 3d at 357. After a bench trial, the trial court found in BIVI's favor and issued a permanent injunction prohibiting Lemen from (1) initiating contact with persons known by Lemen to be BIVI employees, (2) making certain identified defamatory statements about BIVI to third persons, and (3) filming (whether by video camera or still

[4] As discussed below, since this was, in fact, a public issue, then the truth or falsity of the statements made should not have been the subject of a lawsuit.

photography) within 25 feet of BIVI's premises, unless on her own property, and except to document an immediate disturbance or damage to her property. *Id.*

The California Court of Appeal reversed. *Id.* at 355, 368. It declared: "We hold an injunction absolutely enjoining defendant Anne Lemen from making certain statements adjudicated to be defamatory under common law causes of action for libel and slander constitutes a content-based prior restraint on speech in violation of the First Amendment to the United States Constitution and article I, section 2, subdivision (a) of the California Constitution." *Id.* at 355. Specifically, the Court of Appeal stated that "the portions of the injunction prohibiting Lemen from making the identified defamatory statements and from initiating contact with Village Inn employees constitute impermissible prior restraints on speech and are overly broad." *Id.* But, the Court of Appeal upheld the portion of the injunction prohibiting Lemen from filming within 25 feet of BIVI's premises and also denied Lemen's request for attorneys' fees under Code of Civil Procedure § 1021.5. *Id.*

SUMMARY OF ARGUMENT

Never in the 214 year history of the First Amendment has the United States Supreme Court approved an injunction as a remedy in a defamation action. In its landmark ruling in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court held that a permanent injunction is a prior restraint; that prior restraints are allowed in only the most limited and compelling circumstances; and that courts may not enjoin future speech even when they find that defamation has occurred.

The Court of Appeal properly overturned an injunction issued by the Superior Court as violating both the United States Constitution and the California Constitution. First, the Court of Appeal properly ruled that a permanent injunction is a prior restraint and that such injunctions are not a permissible remedy in defamation actions. Centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See, e.g.*, Rodney Smolla, *Law of Defamation*, § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley,

Injunction as Remedy Against Defamation of Person, 47 A.L.R.2d 715 (1956). Indeed, throughout American history, the United States Supreme Court has held that damages, not injunctions, are the appropriate remedy in defamation actions. *See, e.g., Pennekamp v. Florida*, 328 U.S. 331, 346-471 (1946); *Near,* 283 U.S. at 718-19; *Francis v. Flinn,* 118 U.S. 385, 389 (1886).

Second, the Court of Appeal properly held that even if injunctions are permissible, the injunction in this case is unconstitutionally overbroad. Earlier this year, in *Tory v. Cochran*, 125 S.Ct. 2108, 2111 (2005), the United States Supreme Court held that injunctions in defamation cases are prior restraints, which must be narrowly tailored if they are to exist at all. But, as the Court of Appeal concluded, the injunction in this case is anything but narrowly tailored: it prohibits Lemen from saying anything about BIVI to anyone, anywhere in the world. Indeed, this injunction is even broader than the one overturned by the Court in *Tory v. Cochran*, which only enjoined speech in public forums.

Finally, the Court of Appeal erred in denying Lemen a recovery of attorneys' fees after it upheld her free speech claim and overturned the injunction issued by the Superior Court. California Code of Civil

Procedure § 1021.5 permits a court to award attorney fees to a successful party in "any action which has resulted in the enforcement of an important right affecting the public interest." The law is clear that free speech rights are included among those "recognized as 'important rights[s] affecting the public interest.'" *Family Planning Specialists Medical Group, Inc. v. Powers*, 39 Cal. App. 4th 1561, 1568 (1995).

ARGUMENT

I. THE INJUNCTION IN THIS CASE WAS A PRIOR RESTRAINT ON SPEECH OF PUBLIC CONCERN

A. Court Orders Permanently Enjoining Speech Are Prior Restraints.

BIVI contends that a permanent injunction issued after a trial is not a prior restraint. Pet. Br. at 12-13. But the United States Supreme Court has clearly and unequivocally held that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. Anne Lemen cannot speak about Balboa Island Village Inn without getting permission from a court. This is the very essence of a prior restraint.

The Supreme Court has expressly declared that "permanent injunctions ... that actually forbid speech activities are classic

examples of prior restraints" because they impose a "true restraint on future speech." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also Id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction"). In *Alexander*, the Court discussed three prior decisions holding that permanent injunctions on speech are inconsistent with the First and Fourteenth Amendments to the United States Constitution. *Id.* at 550. These cases clearly hold that a permanent injunction on speech, such as the injunction in this case, is a prior restraint.

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed from a permanent injunction issued after a case "came on for trial." *Id.* at 705-06. The injunction in that case "perpetually" prevented the defendants from publishing again because, in the preceding trial, the lower court determined that the defendant's newspaper was "'chiefly devoted to malicious, scandalous and defamatory articles.'" *Id.* at 706. As the Court in *Alexander* explained, "*Near*, therefore, involved a true restraint on future speech – a permanent injunction." *Alexander*, 509 U.S. at 550. The *Near*

Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. 283 U.S. at 721.

The Court in *Alexander* also discussed *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in which a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. *Alexander*, 509 U.S. at 550. Although the Court noted that the injunction in *Keefe* was labeled "temporary" by the trial court, it was treated as permanent since its label was "little more than a formality," it had been in effect for years, it had been issued after an "adversary hearing," and it "already had [a] marked impact on petitioners' First Amendment rights." *Keefe*, 402 U.S. at 417-18 & n.1. The Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." *Id.* at 418. In words that are particularly apt for this case, the Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 418-419. The Court stressed that "[n]o 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.*

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the third permanent injunction case cited in *Alexander*, the Court invalidated a Texas statute that authorized courts, upon a showing that the defendant had shown some obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future even if those films had not yet been found to be obscene. *Vance*, 445 U.S. at 311. The three-judge District Court in *Vance*, whose decision was affirmed by the Court, held that, as in *Near*, "the state 'made the mistake of prohibiting future conduct after a finding of undesirable present conduct,'" and that such a "general prohibition would operate as a prior restraint on unnamed motion pictures" in violation of the First Amendment. *Vance*, 445 U.S. at 311-12 & n.3, 316-17 (quoting *Universal Amusement Co. v. Vance*, 404 F. Supp. 33, 44 (S.D. Tex. 1975)).

Injunctions are treated as prior restraints because that is exactly what they are: a prohibition of future expression. As the Supreme Court noted, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v.*

Women's Health Center, Inc., 512 U.S. 753, 764 (1994). Justice Scalia's opinion in *Madsen*, which was joined by Justice Thomas and Justice Kennedy, explained that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797 (Scalia, J., concurring in judgment in part and dissenting in part). Injunctions may be used to "suppress the ideas in question rather than to achieve any other proper governmental aim." *Id.* at 792-93. Injunctions are "the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.* at 793. As Justice Scalia cautioned, "the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards." *Id.*

The California Court of Appeal correctly concluded that a permanent injunction is a prior restraint even if it follows a trial. *Near*, *Keefe,* and *Vance* establish that even when a permanent injunction follows a trial, it is still unquestionably a prior restraint on speech. This was most recently reaffirmed in *Tory*, where the United States Supreme Court described a permanent injunction issued after a

defamation trial as a "prior restraint." *Tory*, 125 S.Ct. at 2111. The permanent injunction in this case is also a prior restraint because, by its very terms, it prevents *future* speech.

This Court's decision in *Aguilar v. Avis Rent A Car System*, 21 Cal. 4th 121 (1999), *cert. denied*, 529 U.S. 1138 (2000), is not to the contrary. In *Aguilar*, a plurality of this Court upheld an injunction issued under the Fair Employment and Housing Act (FEHA) (Gov. C., § 12900, et seq.) enjoining the continuing use of racial epithets in the workplace. The plurality held that "a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." 21 Cal. 4th at 126. Although this Court found that the injunction was permissible, there is no doubt that the injunction still was a prior restraint, albeit one that was allowed. As explained below, the factors that made the injunction permissible in *Aguilar* – to protect a captive audience from offensive speech in the workplace – 21 Cal. 4th at 159-162 (Werdegar, J, concurring) – are not present in this case.

B. The Speech Was Of Public Concern

The Supreme Court often has emphasized the importance of speech that is of public concern. *See, e.g., Bartnicki v. Vopper*, 572 U.S. 514 (2001) (providing protection for broadcast of illegally intercepted conversation because it was of public concern); *Gertz v. Welch*, 418 U.S. 323 (1974) (stressing the importance of limiting defamation liability for matters of public concern). The dispute between Lemen and BIVI was very much of public concern for Balboa Island. The problems surrounding BIVI affected the entire community and repeatedly received public attention over a long period of time. Indeed, the noise related problems regarding BIVI had been in the news since 1989.[5]

BIVI made this a matter of public concern by seeking expansion and by applying for an entertainment permit.[6] This required action by a government body, which as required by law, sought public comment. There were well-attended public meetings in front of the Planning Commission and a meeting lead by the

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[5] *See* note 1, *supra.*

[6] *See* note 2, *supra.*

California Department of Alcoholic Beverage Control. *See* RT (Aug. 26, 2002) at 4:20-5:16; 32:10-22.

Moreover, Lemen obtained signed petitions from approximately 400 of 1,100 residents, which is just over one-third of the residents. *BIVI*, 17 Cal. Rptr. 3d at 356.[7] This, in itself, demonstrates that the matter was of intense public concern on Balboa Island.

II. A COURT ORDER PERMANENTLY ENJOINING SPEECH IS NOT A PERMISSIBLE REMEDY IN A DEFAMATION CASE, PARTICULARLY WHEN THE MATTER IS OF PUBLIC CONCERN

Prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Id.* at 589. There is a "deeply-seated American hostility to prior restraints." *Id.* The United States Supreme Court has stressed that "'*[a]ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance,* 445 U.S. at 317 (emphasis in original, quoting *Bantam Books, Inc. v. Sullivan*,

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[7] *See also* note 3, *supra*

372 U.S. 58, 70 (1963)). The Court has often repeated, in many distinct contexts, its antipathy towards "systems" of prior restraints on speech.[8] "It is because of the personal nature" of the right of free speech that the Court has "rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion) (citation omitted).

The strong presumption against prior restraints is evidenced by the fact that the United States Supreme Court and this Court never

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[8] *See, e.g., CBS Inc. v. Davis,* 510 U.S. 1315, 1317 (1994) (Blackmun, J., Circuit Justice) (finding temporary injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Nebraska Press Ass'n.*, 427 U.S. at 556 (applying prior restraint doctrine to reject gag order on participants in a criminal trial); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam* opinion applying prior restraint doctrine to strike down injunction on publication of confidential government documents, and, in separate opinions, "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraints as presumptively unconstitutional," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting)); *Bantam Books*, 372 U.S. at 70-71 (listing cases striking down prior restraints and rejecting as "informal censorship" local commission's ability to list certain publications as "objectionable" and to threaten prosecution for their sale); *Near*, 283 U.S. at 706, 722-23 (rejecting injunction on future publication of newspaper despite publisher's previous dissemination of defamatory material). *See also Madsen*, 512 U.S. at 798 (Scalia, J., concurring in judgment in part and dissenting in part) (listing cases and observing that the Court has "repeatedly struck down speech-restricting injunctions").

have upheld a prior restraint as a permissible remedy in a defamation action.[9] The absence of a single United States or California Supreme Court decision approving a prior restraint as a remedy in a defamation case reflects the historical condemnation of injunctions in such actions, the inherent adequacy of money damages, and the inevitable futility of crafting an injunction that is both effective and narrowly tailored. Moreover, injunctions especially should never be allowed when the matter is of public concern because of the indisputable importance of social discussion about such topics. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open").

Both under the United States Constitution and under the California Constitution, these propositions are well established and the Court of Appeal decision should be affirmed.[10]

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[9] BIVI, in its brief, quotes repeatedly from a transcript of the oral argument in the United States Supreme Court in *Tory v. Cochran*, 125 S.Ct. 2108 (2005). But questions from Justices at oral argument are certainly not authority establishing any proposition. What BIVI fails to mention is that the Court in *Tory v. Cochran* vacated a California Court of Appeal decision upholding a broad injunction of speech as a remedy in a defamation case.

[10] Although BIVI sued for other causes of action in addition to defamation, this does not change the analysis. First, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court was clear that the label for the cause of action does not affect a First Amendment analysis. A suit challenging

A. Permanent injunctions are not a permissible remedy in defamation cases under the First Amendment to the United States Constitution.

1. Historically, permanent injunctions have not been allowed as a remedy in defamation cases.

The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation. *See* Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 715-16 (1956).

The rule was established in eighteenth-century England, well before the American Revolution. Its earliest statement is found in *Roach v. Garvan*, 26 Eng. Rep. 683 (Ch. 1742), where Lord

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defamatory speech must meet the same constitutional standards even if brought under another cause of action. *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986) (constitutional protections apply to "all claims whose gravamen is the alleged injurious falsehood of a statement"). Second, the injunction in this case specifically focuses on defamatory speech and thus the Court of Appeal properly focused on whether injunctions are a permissible remedy in defamation cases.

Chancellor Hardwicke remarked in a case involving a newspaper that printed commentary that was both libelous and a contempt of court:

> Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the public or private persons, the only method is to proceed at law.

Three-quarters of a century later, Thomas Howell, barrister and editor of the State Trials series, tellingly explained the strong consensus that equity had no power to restrain defamation: "I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly or by inference or analogy." 20 Thomas B. Howell, *A Complete Collection of State Trials* 799 (1816).

Nineteenth and twentieth century American courts, with remarkable uniformity, adopted the traditional English rule. Shipley, *supra*, at 716-21. *See, e.g., Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 176, 179-80 (1876); *Balliet v. Cassidy*, 104 F. 704, 706

(C.C.D.Or. 1900); *Howell v. Bee Publ'g Co.*, 158 N.W. 358, 359 (Neb. 1916); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); Meyerson, *supra*, at 324-330. Free speech concerns were prominent among the reasons given for their position. In the very first American case on the subject, New York's Chancellor Walworth began his opinion refusing to enjoin the publication of a libelous pamphlet by saying:

> It is very evident that this court cannot assume jurisdiction of the case ... or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which ... cannot safely be entrusted to any tribunal consistently with the principles of a free government.

Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

In 1882, the Louisiana Supreme Court issued an elaborate opinion refusing to enjoin a newspaper from printing libelous cartoons. After discussing the constitutional prohibition of prior restraints, the court depicted the traditional common law rule as

central to preventing a legal regime in which "with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed." *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 745 (1882).

And in 1909, a United States Circuit Court interpreted the Alabama constitution as prohibiting equity from restraining defamation, saying:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance.

Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556 (C.C.M.D. Ala. 1909).

The traditional rule that equity does not enjoin defamation is reflected in the briefs submitted to the Supreme Court in *Near v. Minnesota*, 283 U.S. 697 (1931). Near argued that "[t]he general rule

is that equity will not under any circumstances enjoin defamation as such." Appellant's Brief, *Near,* 1930 WL 28681. In supporting this proposition, Near cited three treatises and discussed over twenty cases directly supporting his claim. *Id.* The State, in arguing that "[t]he court has power to restrain by injunction publication of defamatory matter," relied on just two far less apposite cases. Brief of Appellee, *Near*, 1931 WL 30640, at *10. The Court's holding in *Near* was in line with centuries of English and American decisions. The Court explained that the injunction of speech in *Near* – like the injunction issued in this case – was an "unusual, if not unique" imposition on the freedom of speech. *Near*, 283 U.S. at 707.

2. Damages are a sufficient remedy for plaintiffs in defamation cases.

Justice Scalia observed that "[p]unishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct." *Madsen*, 512 U.S. at 794 n.1 (Scalia, J., concurring in judgment in part and dissenting in part). Justice Scalia's observation is based on a wealth of support in the annals of jurisprudence, particularly in the

pages of *Near*, where the Court announced that damages and other methods of punishing past speech – not restraints on future speech – are the appropriate remedies in defamation cases. In *Near*, the Court drew a line between damages as a permissible remedy for past speech and an impermissible system that proscribes future speech: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Near*, 283 U.S. at 718-19.

Courts long have recognized that damages, not injunctions, are the appropriate remedy in a defamation action. In the first days of the Republic, even before the adoption of the First Amendment, the court in *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788), explained that although "libelling [*sic*] is a great crime," it is well-understood that "any attempt to fetter the press" is unacceptable. *Id.* at 324-25. Even though the defendant's "offence [*sic*] [was] great and persisted in," the Court did not enjoin the defendant's future speech. *Id.* at 328.

Similarly, well over a century ago, in *Francis v. Flinn,* 118 U.S. 385 (1886), the Court stressed that damages, not injunctions, are the

proper remedy in defamation actions. In expressing the general rule that equitable relief is not permissible when there are remedies at law, the Court stated: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity can interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts of law." *Id.* at 389.

In other cases, too, the Supreme Court has recognized that damages, not injunctions, are the appropriate remedy in defamation cases. For example, in *Pennekamp v. Florida*, 328 U.S. 331 (1946), the Court reversed a judgment of contempt against a newspaper editor responsible for publishing editorials that purportedly were contemptuous of judges and the administration of criminal justice in pending cases. *Id.* at 350. The Supreme Court of Florida, upholding the lower court's citation for contempt, explained that a newspaper may generally criticize a judge, but "'may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public.'" *Id.* at 343 n.6. Nevertheless, the Court concluded that the contempt citation must be reversed to encourage debate on public issues, and also

because, "when the statements [about a judge] amount to defamation, a judge has such a remedy in damages for libel as do other public servants." *Id.* at 348-49.

Precluding prior restraints does not leave those defamed without remedy, or render the law powerless to deter defamation. The Supreme Court has upheld, with crucial limitations, the ability of even public officials and public figures to recover damages in defamation cases. *Sullivan*, 376 U.S. at 283. The *Sullivan* Court stressed that damage awards, even against major metropolitan newspapers, are a potent weapon for the defamation plaintiff and noted that "[t]he fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277-78.

Despite these cautionary observations about the potential impact of damage awards, damages remain an available remedy in defamation cases if the First Amendment's requirements are met. In this case, the injunction was issued despite the fact that no damages were awarded because the plaintiff sought none.

Monetary damages are the appropriate remedy in a defamation action. Injunctions, such as that issued by the Superior Court in this case, should not be permitted.

3. Effective injunctions in defamation cases are inherently overbroad and inevitably put courts in the role of being perpetual censors determining whether speech can occur.

Injunctions have not been, and should not be permitted in defamation cases for another reason: it is impossible to formulate an effective injunction that would not be extremely overbroad and that would not place the court in the role of the censor, continually deciding what speech is allowed and what is prohibited. Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective.

Prior restraints, such as injunctions, are a "'most extraordinary remed[y]'" to be used "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive means." *CBS*, 510 U.S. at 1317 (Blackmun, J., Circuit Justice). There can be no constitutional justification for such an extreme remedy unless it can be properly tailored and would actually serve its purpose. An injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968);

see also Tory, 125 S.Ct. at 2111. Moreover, the United States Supreme Court has acknowledged that it "must also assess the probable efficacy of [a] prior restraint of publication as a workable method," and "cannot ignore the reality of the problems of managing" such orders. *Nebraska Press,* 427 U.S. at 565. As the axiom goes, "a court of equity will not do a useless thing." *New York Times*, 403 U.S. at 744 (Marshall, J., concurring).

In defamation cases, the injunction must either be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous. Most egregiously, as in the present case, the injunction can go so far as to prevent any future speech about the plaintiff. An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order.

Moreover, even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation

at every point in the future. A statement that was once false may become true later in time. Likewise, even if a defendant in a defamation action once acted with the requisite degree of culpability, he or she may have a different mental state later. Defamatory statements regarding matters of public concern are outside the scope of the First Amendment only when the plaintiff – even if he or she is a private figure – can show that the speech at issue is false *and also* show fault by the defendant. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777-78 (1986). Permitting permanent injunctive relief in a defamation case absolves the defamation plaintiff of his or her burden to demonstrate falsity and culpability each time a purportedly defamatory statement is made. Thus, unlike injunctions on particular obscene motion pictures, enjoining "defamatory" speech will inherently reach too far and be overbroad because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

An injunction that reaches more broadly than the exact words already held to be libelous is overbroad for the very reason that it

restrains communication before a jury determination of whether it is or is not protected by the First Amendment. Because it delays communication that may be non-defamatory and protected by the First Amendment, it is the essence of a prior restraint.

Just as it is "always difficult to know in advance what an individual will say," *Southeastern Promotions*, 420 U.S. at 559, it is also difficult to know in advance *who* will speak. Any injunction designed to restrict speech effectively must encompass others besides the defamation defendant. But that inevitably involves stripping persons not before the court of their First Amendment rights without sufficient due process. *See Hansbury v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (non-parties cannot be bound by judgments). On the other hand, even the most over-reaching injunction on defamatory statements will also be under-inclusive, and therefore ineffective, since a third party, completely unaffiliated with the defendant and not bound by the injunction, can – at his financial peril – repeat the same statements already determined to be defamatory. *See Nebraska Press*,

427 U.S. at 609 n.36 (Brennan, J., concurring) (lamenting the futility of under-inclusive injunctions on speech).

In addition, an injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. This is exactly the nature of the injunction in this case: it prohibits Lemen from saying anything about Balboa Village Inn until and unless she goes back to the court and obtain the judge's permission to speak. That brand of judicial clearance is what the United States Supreme Court in *Near* called "the essence of censorship." 283 U.S. at 713.

In *Near*, the Court emphatically rejected the notion that even one who had previously been found liable for printing defamatory matter could be forced to prove to a judge that future statements "are true and are published with good motives and for justifiable ends." *Near*, 283 U.S. at 713. The injunction in this case, as in any defamation case, is precisely that type of censorship, as those enjoined will not be able to say anything about the subject without first getting permission from a judge. Such restrictions inevitably put the court in

the classic role of the censor and are intolerable under the First Amendment.

B. Injunctions Are Not Permissible As A Remedy Under The California Constitution.

Article I, Section 2 of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In *Dailey v. Superior Court*, 112 Cal. 94 (1896), this Court stated that this language is "terse and vigorous and so plain that construction is not needed." The Court declared that the "right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible for an abuse of that right."

This Court has been explicit that the protection of speech under the California Constitution is broader than the safeguards provided by the First Amendment. For example, in *Wilson v. Superior Court*, 13 Cal.3d 652 (1975), this Court explained that a "protective provision more ... inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Wilson is particularly apposite to this case because this Court expressly rejected an injunction as a remedy for defamation. The

issue was whether a court could enjoin the publication of allegedly libelous statements by a candidate for political office about his opponent. This Court explained: "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." *Id.* at 656. The Court of Appeal in this case properly recognized the importance of *Wilson*: "[T]he Supreme Court rejected the argument that libelous statements do not enjoy constitutional protection thereby demonstrating a judicial determination that statements are defamatory does not in itself mean an injunction prohibiting the defamatory statements would be constitutional." *BIVI*, 17 Cal. Rptr. 3d at 365.

In other cases as well, California courts have rejected injunctions as a remedy in defamation actions. For example, in *Leeb v. Delong*, 198 Cal. App. 3d 47, 58 (1988), the court stated that the California Constitution "clearly [does] not permit the prior restraint of the private publication of libelous material." The court explained that "if there is a remedy for libel in a particular setting, it is an action for damages after publication." *Id.* Thus, the Court of Appeal correctly

held that the injunction in this case independently violates the California Constitution.

This Court's decision in *Aguilar* is not to the contrary. This Court, without a majority opinion, upheld an injunction on speech that created a hostile environment in violation of California's employment discrimination laws. Justice Werdegar, the fourth vote for the majority, stressed the difference between the workplace, the focus in *Aguilar*, and the public sidewalk, the focus of this case: "The workplace is different from sidewalks and parks, however; workers are not so free to leave to avoid undesired messages. When employees are forced to endure racially harassing speech on the job, it is arguable that 'substantial privacy interests are being invaded in an essentially intolerable manner.'" 21 Cal. 4th at 169 (Werdegar, J., concurring). Justice Werdegar described "the several factors coalescing in this case--speech occurring in the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker--support the conclusion that the injunction, if sufficiently narrowed on remand to apply to the workplace only, will pass constitutional muster." *Id.* at 166.

The Court of Appeal engaged in a caseful analysis of *Aguilar* and concluded: "We believe the plurality opinion and concurring opinion in Aguilar should be read to support the principle that a content-based injunction restraining speech is constitutionally valid if the speech has been adjudicated to violate a specific statutory scheme expressing a compelling state interest justifying a prior restraint on speech, or when necessary to protect a right equal in stature to the right of free speech secured by the First Amendment to the United States Constitution." *BIVI*, 17 Cal. Rptr. 3d at 363. The Court of Appeal then properly concluded that *Aguilar* did not justify an injunction in this case: no statute was violated and there is no right involved equal in status to the First Amendment. Moreover, the Court of Appeal noted that there is a long history in this state and across the country of not allowing injunctions as a remedy in defamation cases. *BIVI*, 17 Cal. Rptr. 3d at 365-366. Therefore, under the California Constitution, like under the United States Constitution, the injunction issued by the Superior Court is impermissible.

C. Allowing Injunctions As A Remedy In Defamation Cases Would Be A Radical Change In The Law With A Devastating Effect On Freedom Of Speech.

In 1931, the United States Supreme Court noted the significant fact that, "for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints on publication relating to the malfeasance of public officers;" thus reaffirming the "deep-seated conviction that such restraints would violate constitutional right." *Near*, 283 U.S. at 718. The same certainly holds true today. Neither the United States Supreme Court nor this Court has ever, in all of American or California history, even once upheld a prior restraint in the defamation context. The United States Supreme Court has sanctioned injunctions on speech only in the most "exceptional cases," such as those involving obscenity, incitements to violence and "the publication of the sailing dates of transports or the number and location of troops." *Near*, 283 U.S. at 716. *See also Nebraska Press*, 427 U.S. at 590-91 (Brennan, J., concurring) (explaining that the Court has limited injunctions on speech only to these "three such possible exceptional circumstances").

The few scenarios where the United States Supreme Court has even contemplated prior restraints are readily distinguishable from any case involving defamation. For example, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), the Court explained that injunctions on materials already deemed obscene are "glaringly different" from the injunction of a publication "because its past issues had been found offensive." *Id.* at 445. Reiterating *Near's* admonition that the latter type of injunctions are the "'essence of censorship,'" the *Kingsley* Court "studiously withh[eld] restraint upon matters not already published and not yet found offensive." *Id.*

Similarly, even *Near's* allowance for injunctions on national security grounds was greatly circumscribed in the "Pentagon Papers" case, *New York Times v. United States*, 403 U.S. 713 (1971), where the Court emphasized that the government failed to meet the very heavy burden needed to sustain a court order enjoining speech.

Petitioner places great reliance on the *Pittsburgh Press* case. Pet. Br. at 10-12. In *Pittsburgh Press*, the Court upheld a "narrowly drawn" rule prohibiting the "placement in sex-designated columns of advertisements for nonexempt job opportunities." 413 U.S. 376, at 391. The Court invoked *Near* and "reaffirm[ed]

unequivocally the protection afforded to editorial judgment and to the free expression of views ... however controversial." *Id.* Furthermore, in *Pittsburgh Press*, the Court stressed that the Commission's order preventing sex-based want ads could not be enforced by contempt sanctions because "[t]he Commission is without power to punish summarily for contempt." *Id.* at 390 n.14. That is very different from a court order enjoining speech, such as in this case, where any violations are punishable by contempt.

Consistent with the presumptive invalidity of all systems of prior restraints, most jurisdictions adhere to the maxim that "equity will not enjoin a libel."[11] Smolla, *supra*, at §9.85 at 9-56. This trend

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[11] *See, e.g., Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union,* 239 F.3d 172, 177-78 (2d Cir. 2001); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C.Cir. 1987); *In re Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *American Malting Co. v. Keitel*, 209 F. 351, 354-56 (2d Cir. 1913); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927); *Hobart v. Ferebee*, 692 N.W.2d 509, 513-16 (S.D. 2004); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Greenberg v. Burglass*, 229 So.2d 83, 86-89 (La. 1969); *Mescalero Apache Tribe v. Allen*, 469 P.2d 710, 711 (N.M. 1970); *Schmoldt v. Oakley*, 390 P.2d 882, 884-87 (Okla. 1964); *Prucha v. Weiss*, 197 A.2d 253, 256 (Md. 1964); *Kwass v. Kersey*, 81 S.E.2d 237, 243-46 (W.V. 1954); *Moore v. City Dry Cleaners & Laundry, Inc.*, 41 So.2d 865, 873 (Fla. 1949); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46, 48-50

must be followed in California with a decisive rejection of permanent injunctions in the defamation context, or else "judges at all levels" will be interjected "into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Nebraska Press*, 427 U.S. at 607 (Brennan, J., concurring). Such a result would be an unacceptable and unprecedented abridgment of the First Amendment and the California Constitution.

III. EVEN IF AN INJUNCTION IS EVER PERMISSIBLE IN A DEFAMATION ACTION, THE INJUNCTION IN THIS CASE IS UNCONSTITUTIONAL

A. The Injunction Was Unconstitutionally Overbroad

In *Tory v. Cochran*, the United States Supreme Court recently reaffirmed that injunctions, even if permitted in defamation actions, must be narrowly tailored. 125 S.Ct. at 2511 This is consistent with a long line of authority holding that any injunction restricting speech must "'burden no more speech than necessary' to accomplish its objective." *Madsen*, 512 U.S. at 765. Put another way, an injunction on speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. *Carroll*, 393

(Ill. 1948); *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163, 165-67, 171 N.Y. 384, 391-96 (N.Y. 1902); *Beck v. Railway Teamsters' Protective Union*, 77 N.W. 13, 24 (Mich. 1898).

U.S. at 183. Indeed, the United States Supreme Court and this Court have been clear that *any* restriction of speech is unconstitutional if it regulates substantially more speech than the Constitution allows to be regulated.[12]

The injunction in this case fails this requirement because it was not narrowly tailored. It prevents Lemen from making statements to anyone, any place in the world, at any time about BIVI. The Court of Appeal came to exactly this conclusion and declared:

> Even if paragraph 4.B of the judgment were otherwise constitutionally valid, it is too broad. Paragraph 4.B bears no resemblance

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[12] *See, e.g., Tory*, 125 S. Ct. at 2111; *Houston v. Hill*, 482 U.S. 481 (1987) (declaring unconstitutional an overbroad provision making it unlawful to interrupt police officers in the course of their duties); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (invalidating regulations prohibiting all "First Amendment activities" at airports in Los Angeles); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (striking as overbroad an ordinance prohibiting all live entertainment); *Gooding v. Wilson*, 405 U.S. 518 (1972) (invalidating a fighting words statute); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"); *Welton v. City of Los Angeles*, 18 Cal. 3d 497, 507-08 (1976) (holding that an injunction, which prohibited exercise of "First Amendment rights on all streets, sidewalks, and parkways in all residential areas," was overbroad); *In re Berry*, 68 Cal. 2d 137, 152 (1968) (finding injunction "unconstitutionally overbroad in that it improperly restrict[ed] the exercise of First Amendment freedoms").

> to time, place, and manner restrictions, but enjoins Lemen from making the identified statements--based solely on their content--to anyone, anywhere, at any time, in any context. Paragraph 4.B is not limited in scope to protect a captive audience: Paragraph 4.B prohibits Lemen from making the statements to family, to friends, within her own home, or 1,000 miles away. Paragraph 4.B is not limited to statements made by Lemen to Village Inn patrons. By prohibiting Lemen from making the identified statements to third persons, paragraph 4.B unlawfully infringes on Lemen's right to contact government officials and to petition for redress of grievances. *BIVI*, 17 Cal. Rptr. 3d at 367.

Indeed this injunction is even broader than that found unconstitutional in *Tory v. Cochran.* The injunction in that case prohibited the defendants in a defamation case from saying anything

about the plaintiff in any public forum. 125 S.Ct. at 2510 (describing the injunction). But the injunction issued by the Superior Court in this case prevents Lemen from saying anything about BIVI any place, any time, forever.

Likewise, the portion of the injunction prohibiting Lemen from having contact with BIVI's employees is unconstitutionally overbroad. Again, the Court of Appeal came to exactly this conclusion:

> Paragraph 4.A suffers from similar constitutional infirmities. Paragraph 4.A is a prior restraint on speech because it prohibits Lemen from initiating any contact with persons she knows to be Village Inn employees. Even if paragraph 4.A were a lawful prior restraint, it is too broad to be upheld. The Village Inn has a legitimate interest in making sure its employees are not accosted by Lemen on their way to and from work. But paragraph 4.A, as is paragraph 4.B, is not 'narrowly drawn to achieve that

> end.' Paragraph 4.A. includes no time, place, and manner restrictions but prohibits Lemen from initiating any type of contact with a known Village Inn employee anywhere, at any time, regarding any subject. Paragraph 4.A thus sweeps more broadly than necessary and restrains Lemen from exercising her constitutional right of free speech.

BIVI, 17 Cal. Rptr. 3d at 367.

Thus, the injunction in this case clearly violates the long-standing, fundamental requirement, reaffirmed just this year in *Tory v. Cochran*, that restrictions on speech be narrowly tailored.

B. The Injunction Is Impermissible Because It Was Imposed For Speech Protected By The First Amendment.

In *Bose v. Consumers Union*, 466 U.S. 485, 504, 506 n.25 (1984), the Court stressed that in a defamation action "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden

intrusion on the field of free expression[.]" *Id.* at 508.[13] Consistent with this fundamental precept, the Court held that "[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan*, is a rule of federal constitutional law. ... It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

The speech in this case involved a matter of public concern: the operation of a business which raised important issues for the community and the request by the business of a permit from the government. As a result, the plaintiff must prove, with clear and convincing evidence, that the allegedly defamatory statements – which gave rise to the injunction – were published with actual malice, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), meaning "with 'knowledge that [they were] false or with reckless disregard of whether [they were] false or not,'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (citations omitted);

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[13] *See also Franklin v. Leland Stanford Univ.*, 172 Cal. App. 3d 322, 330-31 (1985) ("[r]eviewing courts have repeatedly observed the obligation to independently evaluate the record in resolving First Amendment issues"); *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1242 (2000).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-57 (1986) ("clear and convincing" evidence is required to show actual malice). The actual malice standard focuses solely on the defendant's subjective state of mind "at the time of publication." *Bose*, 466 U.S. at 512. This Court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.

Contrary to the conclusions of the trial court, the evidence is not clear and convincing that the alleged statements in this case – even if they could be considered verifiable facts, rather than mere opinions or hyperbole – were published with knowledge of falsity or with reckless disregard for their truth or falsity. Indeed, there was no finding of actual malice at all in this case. There was no showing that any statement was uttered with knowledge of falsity or with reckless disregard of the truth.[14]

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[14] Quite the contrary, the testimony at trial explained the basis for her statements. For example, as for the statement that BIVI can be open to 6:00 a.m., former owner Lance Wagner testified that the restaurant portion of BIVI can be open unlimited hours, which is exactly what Anne Lemen claimed. RT (Aug. 20, 2002) at 134:14-20. As for the claim that illegal drugs were distributed on BIVI's premises and that prostitution was

IV. THE COURT OF APPEAL ERRED BY DENYING LEMEN ATTORNEYS' FEES.

California Code of Civil Procedure § 1021.5 permits the court to award attorney fees to a successful party in "any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." The law is clear that free speech rights are included among those "recognized as 'important rights[s] affecting the public interest.'" *Family Planning Specialists Medical Group, Inc. v. Powers* 39 Cal. App. 4th 1561, 1568 (1995).

This Court has stressed that attorneys' fees are available when a party's conduct provides the public with substantial benefits. *Press v. Lucky Stores*, 34 Cal. 3d 311, 321 (Cal. 1983), is on point, as this

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solicited, other neighbors, such as Karen and David Seeber had similar complaints. Deposition of David Seeber ("Seeber Depo."), 5:17-6:7. As for the claim that tainted food was served, Lemen testified that in the past she heard that one person got sick from the food. RT (Aug. 19, 2002) 55:12-56:10. The key point, of course, is that for none of the statements was actual malice proven with clear and convincing evidence.

Court declared: "Moreover, even if the impact of plaintiffs' lawsuit were limited to the access gained at the Santa Monica store, the litigation would still have benefited a 'large class of people.' In addition to the approximately 3,000 persons who signed plaintiffs' petitions, countless others (i.e., nonsigning store patrons) were educated about a contemporary issue of public importance. In addition, while gathering signatures at the Santa Monica store plaintiffs were able to enlist additional volunteers and accept financial contributions. For these reasons, plaintiffs' litigation satisfies the 'substantial benefit' requirement of section 1021.5."

Likewise, here, Lemen's actions provided substantial benefit, addressing concerns expressed in a petition signed by over one-third of Balboa Island's residents. *BIVI*, 17 Cal. Rptr. 3d at 356.[15] As explained above, her speech involved a matter of public concern and the vindication of freedom of expression is a matter serving the public interest, thus warranting attorneys fees under Code of Civil Procedure § 1021.5.

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[15] *See also* note 3, *supra*.

CONCLUSION

The United States Supreme Court has emphasized that the First Amendment protects the rights of the "lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). Correspondingly, affirming the permanent injunction imposed by the Superior Court in this case on a lonely picketer would have profound consequences for all speakers, ranging from the pamphleteer to the largest newspapers and television stations.

Abandoning this Court's historical disapproval of injunctive relief in defamation actions would mean that every court, in every successful defamation case, could enjoin all future speech by the defendant, or its agents, about the plaintiff in any forum. The richness of the English language and the myriad ways of expressing any thought means that the only effective way to enjoin defamation would be, as here, to keep the defendant from ever uttering another word about the plaintiff. Such a result runs contrary to the fundamental precepts of the First Amendment, especially where the enjoined speech relates to a public issue.

The permanent injunction in this case is a broad prior restraint on speech about a matter of public concern, striking at the very heart of the First Amendment's commitment that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. at 270. This Court should affirm the decision of the California Court of Appeal and should reaffirm centuries of jurisprudence: a permanent injunction of speech is not a permissible remedy in a defamation case.

September 21, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of California Rule of Court 14. The brief is proportionately spaced in Times New Roman, 14-point type, and the footnotes are proportionately spaced in Times New Roman, 13-point type. According to the word processing system used to prepare the brief, the word count of the brief is 9,498, including footnotes, but not including the cover page, table of contents, table of citations, this certificate and the certificate of service required for consideration of the brief.

DATED: September 21, 2005

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I am employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, California 90067-6017.

On **September 21, 2005**, I served the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

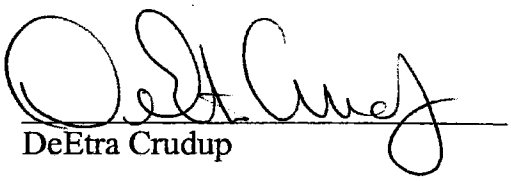
See Attached Service List

☐ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 21, 2005**, at Los Angeles, California.



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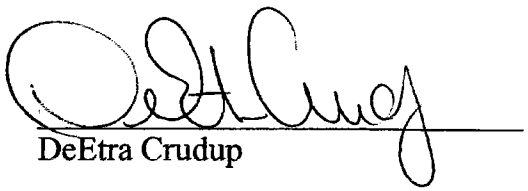

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EXHIBIT B

No. 03-1488

In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

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QUESTION PRESENTED

Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.

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TABLE OF AUTHORITIES – Continued

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division One, is unpublished. (JA 51-61.)*

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review the October 29, 2003 decision of the Court of Appeal of the State of California, following a denial of discretionary review by the Supreme Court of California on January 28, 2004. (JA 51-62.) The petition for a writ of certiorari was filed on April 26, 2004, and was granted on September 28, 2004.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

* Citation to the Joint Appendix will be styled, "JA ___". Citation to the Reporter's Transcript from the trial proceedings in the Superior Court for the State of California will be styled, "RT ___". Citation to the Clerk's Transcript from the trial proceedings in the Superior Court for the State of California will be styled, "CT ___"

STATEMENT OF THE CASE

The California Court of Appeal affirmed a permanent injunction that forever prohibits Ulysses Tory and Ruth Craft from *all* future speech in any public forum – regardless of content or context – about an admitted public figure, Johnnie L. Cochran, Jr. (JA 52, JA 55-56, JA 60.)

This lawsuit arose from the events of earlier litigation where Petitioner Tory was represented by Cochran and his law firm. On February 18, 1983, Tory and one of his employees, Javier Gutierrez, emerged from Tory's Fish Market and were fired upon by law enforcement officials. (RT 6:8-11.) Shortly thereafter, Tory decided to retain Cochran in a personal injury and civil rights lawsuit against various government entities involved in the incident. (RT 6:11-13, 64:2-7; CT 47.) Tory went to Cochran's law office and was interviewed by an attorney named Earl Evans. (RT 64:5-10, 79:4-11.) Evans signed a retainer agreement on Cochran's behalf, establishing the attorney-client relationship between Tory and Cochran's law firm. (RT 64:5-10, 79:16-28, 118:1-8.)

Over the next two years, Tory became increasingly frustrated with what Tory perceived as Cochran's failure to pursue the litigation on his behalf. (RT 215:16-19, 274:2-18.) Tory felt that he was not being adequately represented. (RT 274:2-18, 180:12-27.) By contrast, Cochran was able to secure a substantial settlement for Gutierrez. (RT 36:10-24, 184:20-28, 216:1-5.) Cochran ultimately withdrew from representing Tory. (RT 174:18-174:3.)

During the same time period, Evans, who was still working at Cochran's law office and using Cochran's stationery, handled a divorce proceeding for Tory and child custody proceedings for Tory's putative spouse, Petitioner

Ruth Craft. (RT 6:24-7:2, 63:4-21, 78:12-28.) Tory and Craft paid Evans for his services under the impression that they were paying Evans as an agent of Cochran's law firm. (RT 189:3-7, 253:1-19.) Petitioners were not satisfied with Evans' services and wanted a refund of the monies that they had paid. (RT 6:26-7:2, 81:7-18, 176:21-25.) Tory and Craft testified under oath that Cochran offered to repay such monies to Petitioners. (RT 262:14-263:2.)

Several years later, with no refund forthcoming, Tory began peacefully picketing on the sidewalk outside of Cochran's Los Angeles law office and later in front of the Los Angeles Superior Court. (RT 222:2-16.) He picketed with a group of other people who also were dissatisfied with Cochran, including people Tory understood to be former clients of Cochran and relatives of former clients. (RT 208:22-26, 272:17-20.) Tory testified that he did not pay the other picketers, but that he "might have bought them lunch." (RT 208:27-209:23.) Tory picketed because he believed that he had not been treated fairly by Cochran, that he had not been represented adequately by Cochran, and that he had been deceived by Cochran into thinking that he would be refunded money. (RT 213:17-21, 216:6-12; 222:2-16, 274:2-18.)

Tory and others carried placards bearing various statements expressing opinions about Cochran's performance as an attorney and about the legal system generally, such as:

- "Johnnie is a crook, a liar, and a Thief. Can a lawyer go to HEAVEN? Luke 11:46"[1]

[1] The reference is to Luke 11:46 in the Bible which reads: "And he said: 'Woe to you lawyers also! For you load men with burdens hard to

(Continued on following page)

- "What can I do if I don't receive the Justice the Constitution guarantees ME?"
- "You've been a BAD BOY, Johnnie L. Cochran"
- "Atty COCHRAN, We have no Use for Illegal Abuse"
- "I Know How it Feels to Be Terrorized. God Bless USA"
- "Absolute Discrimination"
- "Attorney Cochran, Don't We Deserve at Least the same Justice as O.J."
- "Unless You have O.J.'s Millions – You'll be Screwed if you USE J.L. Cochran, Esq." (JA 53-54.)

As a result of the picketing activity, Cochran sued Tory and Does for defamation (libel, libel *per se*, slander and slander *per se*) and false light invasion of privacy.[2] (JA 7-22.) The Superior Court for the State of California issued a preliminary injunction, prohibiting Tory from speaking about Cochran, and subsequently tried the suit without a jury. (JA 55.) Tory represented himself in the proceedings. (*Id.*) Cochran admitted at trial that he did not lose any business as a result of the picketing. (RT 55:20-28.)

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bear, and you yourselves do not touch the burdens with one of your fingers."

[2] In California, "[w]hen claims for [false light] invasion of privacy . . . are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed." *Couch v. San Juan Unified Sch. Dist.* 39 Cal.Rptr.2d 848, 856 (Cal.Ct.App. 1995). Cochran's false light claim is based on exactly the same allegations as his defamation claims. (JA 17.)

Tory consistently asserted his constitutional right to free speech in the trial court proceedings. For example, Tory's Answer to Cochran's operative complaint asserted that "the issuance of a preliminary and/or permanent injunction against his picketing activities as proposed in the Complaint would constitute an unconstitutional prior restraint." (JA 24.) Moreover, in his objections to the trial court's Statement of Decision, Tory protested that his picketing was "protected under the First Amendment (Freedom of Expression) to the United States Constitution," and further noted that Cochran "is a public figure and therefore, must be held at a higher standard than a private citizen in a matter or issue of libel, slander and invasion of privacy." (JA 29.)

The Superior Court found in Cochran's favor. (RT 275:4-6.) The Court did not award money damages because such damages were waived by Cochran.[3] The Superior Court noted that Cochran never proved the "existence and amount of damages." (JA 37-38.) But the Court did issue a permanent injunction, which provides, in pertinent part:

> Unless and until this Court, after notice to JOHNNIE L. COCHRAN, JR. ("COCHRAN") and opportunity for him to be heard, modifies or vacates this order, it is ordered that TORY, and his employees, agents, representatives, and all persons acting in concert, cooperation or participation with him, including, but not limited to, Ruth Craft and any other co-conspirator, are permanently enjoined from engaging in any of the following: . . .

[3] *See* Reporter's Transcript of trial court proceedings on April 24, 2002, at 2:7-10 (Cochran's counsel: "We did have a right to proceed for money damages, but we're going to waive that right.")

> *In any public forum*, including, but not limited to, the Los Angeles Superior Court, and any other place at which COCHRAN appears for the purpose of practicing law: (i) picketing COCHRAN and/or COCHRAN's law firm; (ii) *displaying signs, placards or other written or printed material about COCHRAN and/or COCHRAN's law firm*; (iii) *orally uttering statements about COCHRAN and/or COCHRAN's law firm* . . . (JA 34.) (emphasis added)

Craft was not named as a defendant in the lawsuit, nor was she given a chance to defend herself at trial, but her speech rights were explicitly restrained in the permanent injunction. (RT 4:16-5:27; JA 34.) The injunction is not limited to preventing defamatory statements; it prohibits Tory and Craft from saying *anything* about Cochran in *any* "public forum." (JA 34.)

Tory and Craft timely appealed from the permanent injunction. (CT 118, 120.) The appeal focused primarily on the permanent injunction as an overbroad prior restraint on future speech issued in violation of the First Amendment and Article 1, Section 2(a) of the California Constitution. (JA 56-58.) The appeal also raised other issues implicating the First Amendment. The appeal asserted that all of the purported statements are protected opinion and/or hyperbole, and therefore none of the statements can give rise to a cause of action for defamation or false light invasion of privacy. (JA 59.) Also, the appeal submitted that Cochran, a public figure, failed to prove, under the constitutionally-mandated clear and convincing evidence standard, that Petitioners published any of the allegedly defamatory statements with actual malice. (JA 60.)

On October 29, 2003, the California Court of Appeal issued an unpublished decision affirming the injunction. (JA 51-61.) The California Court of Appeal rejected the contention that the permanent injunction represented an overbroad prior restraint in violation of the First Amendment and the California Constitution. (JA 56-58.) The decision states that permanent injunctions on speech are not prior restraints, and that the overbreadth doctrine does not apply to permanent injunctions. (*Id.*)

Tory and Craft timely petitioned the Supreme Court of California for review of the California Court of Appeal's decision. On January 28, 2004, the Supreme Court of California denied review of the California Court of Appeal's decision, with Justices Kennard and Brown voting to grant review. (JA 62.)

Tory and Craft have faithfully abided by the permanent injunction restricting their speech since the injunction was entered by the Superior Court on April 24, 2002. Under the terms of the Superior Court's order, Tory and Craft may speak about Cochran or his law firm only if they first gain permission of the Superior Court through a modification of its order. (JA 34.)

SUMMARY OF ARGUMENT

Never in the almost 213 year history of the First Amendment has this Court approved an injunction as a remedy in a defamation action. In its landmark ruling in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court held that a permanent injunction is a prior restraint; that prior restraints are allowed in only the most limited and compelling circumstances; and that courts

may not enjoin future speech even when they find that defamation has occurred.

Contrary to these basic First Amendment principles, the California Court of Appeal upheld a permanent injunction that forever prohibits Tory and Craft from saying anything about Johnnie Cochran or his law firm in any public forum. The Court of Appeal erred for several key reasons.

First, the Court of Appeal wrongly held that a permanent injunction is not a prior restraint if it follows a trial. (JA 56-57.) This is incorrect because this Court clearly and consistently has ruled that a permanent injunction is a classic prior restraint, even when it is imposed as a remedy after a finding of liability. *See, e.g., Near,* 283 U.S. at 706; *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 311-12 (1980). Injunctions are prior restraints because they prevent future speech and because they require a defendant found liable for prior conduct to obtain a judge's permission before prospective speech occurs. In this case, Tory and Craft cannot say anything about Cochran until and unless they go back to the California Superior Court and have the judge modify the permanent injunction to permit the particular expression. Contrary to the Court of Appeal's holding, this is an obvious prior restraint.

Second, the Court of Appeal erred because it ruled that a permanent injunction is a permissible remedy in a defamation action brought by a public figure. (JA 56-57.) To the contrary, centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See,*

e.g., Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 (1956). Throughout American history, this Court has held that damages, not injunctions, are the appropriate remedy in defamation actions. *See, e.g., Francis v. Flinn,* 118 U.S. 385, 389 (1886); *Near v. Minnesota,* 283 U.S. at 718-19; *Pennekamp v. Florida*, 328 U.S. 33, 346-471 (1946).

Especially, as here, when the defamation plaintiff is a public figure or a public official, injunctive relief should not be a remedy because of the importance of speech about public individuals who hold such prominent positions in American society. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967). As this Court repeatedly has observed, such individuals have exposed themselves to criticism by voluntarily stepping into the limelight and gaining special access to the media to respond to any attacks. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337 (1974). The injunction in this case is unprecedented in preventing any speech about a major national public figure on an issue of great social importance: the performance of lawyers and courts.

Third, the Court of Appeal erred in concluding that a permanent injunction of speech need not be narrowly tailored (JA 57-58) and in upholding an extremely broad prior restraint that prevents *all* future speech by Tory and Craft about Cochran or his law firm in any public forum. The injunction is not limited to enjoining defamatory

speech. Under its terms, Tory and Craft cannot express their opinions or even make factually true statements about Cochran or his firm. Under the injunction, which prevents all speech in any public forum, Tory or Craft could not walk down a sidewalk or through a park and have a conversation with anyone about Cochran, even if they were praising him. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (parks and streets are public forums). The injunction's tremendous overbreadth is reflected in its restrictions on Craft's speech, though she was not even a party to the litigation.

Nor is this just a matter of how the injunction is phrased. If the injunction were to prevent only the repetition of specific statements, it would serve no purpose because the speaker could find countless other ways of expressing the same idea without violating the court's order. If the injunction prohibits all speech by the defendant about the plaintiff, such as the injunction in this case, it is vastly overbroad in forbidding expression protected by the First Amendment.

The stakes here are enormous. The California Court of Appeal's approach would allow every court in the country, in every defamation action, to issue a broad injunction as a remedy. Any act of defamation would mean that the speaker could be barred forever from saying anything – fact or opinion, true or false – about the defendant in any public forum. A newspaper that was found to have defamed a person could be perpetually enjoined from ever publishing anything about that individual. Such a permanent forfeiture of speech rights, especially about public figures and matters of public concern – which is exactly what occurred in this case – has no place in a country governed under the First Amendment. Affirming the Court

of Appeal's decision and relaxing the centuries old ban on prior restraints in defamation cases would lead to prior restraints being frequently, and likely regularly, imposed in defamation actions.

This Court should reaffirm the basic principles announced in *Near v. Minnesota*: injunctions are prior restraints and are not a permissible remedy in defamation cases.

ARGUMENT

I. THE TRIAL COURT PERMANENTLY ENJOINED SPEECH ABOUT A PUBLIC FIGURE INVOLVING A MATTER OF PUBLIC CONCERN.

This Court long has emphasized the importance of robust debate about those who hold public office and positions of great public prominence. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (describing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person.") This Court has explained that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures." *Gertz,* 418 U.S. at 342.

Under this definition, Johnnie Cochran is a quintessential public figure; he is likely the best known and perhaps the most controversial attorney in the world. In his recent autobiography, Cochran stated that his success has "provided [him] with the kind of high-profile celebrity and visibility few attorneys have ever enjoyed." Johnnie Cochran, *A Lawyer's Life* 7-8 (2003). Indeed, Cochran's description of himself shows that he is the classic public figure: "Court TV hired me to cohost a nightly TV show. Characters in movies made reference to me. . . . I appeared as myself in the Robert DeNiro/Eddie Murphy film *Showtime*. I appeared often as a guest on shows ranging from the very serious *Nightline* to Larry King's show to sitcoms like *The Hughleys*. *Saturday Night Live* and *Seinfeld* parodied me." *Id.* As the *Los Angeles Times* noted in a 2002 interview, "his face and name are known everywhere there is CNN. He may be the first private citizen in history to have such a huge worldwide recognition factor." Benjamin Levine, *A Cause Celebre*, L.A. Times, Sept. 29, 2002, at Part 5, Page 1. The website for his law firm, "The Cochran Firm: America's Law Firm," describes itself as "one of America's largest personal injury plaintiff law firms." (http://www.cochranfirm.com (last visited, Nov. 4, 2004)). As the Court of Appeal observed, Cochran "willingly concedes" his status as a public figure. (JA 60.)

The trial court's order is simply unprecedented in permanently enjoining Petitioners Tory and Craft from ever saying anything about a major national public figure in any public forum ever again. Moreover, the injunction is antithetical to the First Amendment's commitment to debate about important issues of public concern. The speech restrained in this case was not idle gossip about a

celebrity; it was about the practice of law and the operation of the legal system. This Court has recognized that there is an "extremely important" public interest concerning the conduct of lawyers. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 793 (1975) (citation omitted) ("lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'") Those who have been involved in the legal system must be encouraged to speak to inform the press and the public of their experiences, including how they were treated by lawyers and judges.

This Court has recognized that "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (citations omitted). All of the speech that gave rise to this lawsuit expressed Tory's opinions about Cochran's conduct as a lawyer and how Tory was treated by the legal system. (JA 53-54.) The permanent injunction upheld by the California Court of Appeal thus has the effect of forever silencing speech – critical or praising, fact or opinion – about the performance of a lawyer who holds a prominent position in the American legal system and American culture.

II. COURT ORDERS PERMANENTLY ENJOINING SPEECH ARE PRIOR RESTRAINTS.

Astoundingly, the California Court of Appeal held that a permanent injunction on speech is not a prior restraint. (JA 56-57.) The Court of Appeal said that the very broad permanent injunction on Tory's and Craft's future speech was not a prior restraint because there was an adjudication that some of Tory's prior speech was unprotected. (*Id.*) The Court of Appeal's conclusion cannot be reconciled with this Court's decisions that clearly and unequivocally hold that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. Nor can the Court of Appeal's conclusion that there is no prior restraint be reconciled with the fact that the permanent injunction allows Tory and Craft to speak about Cochran or his law firm only if they first get the Superior Court judge's permission. (JA 34.)

This Court has expressly declared that "permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints" because they impose a "true restraint on future speech." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction.") In *Alexander*, the Court discussed three prior decisions of this Court holding that permanent injunctions on speech are inconsistent with the First and Fourteenth Amendments to the United States Constitution. *Id.* at 550. These cases clearly hold that a permanent injunction on speech, such as the injunction in this case, is a prior restraint.

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed from a permanent injunction issued after a case "came on for trial." *Id.* at 705-06. The injunction in that case "perpetually" prevented the defendants from publishing again because, in the preceding trial, the lower court determined that the defendant's newspaper was "'chiefly devoted to malicious, scandalous and defamatory articles.'" *Id.* at 706. As the Court in *Alexander* explained, "*Near*, therefore, involved a true restraint on future speech – a permanent injunction." *Alexander*, 509 U.S. at 550. The *Near* Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. 283 U.S. at 721.

The Court in *Alexander* also discussed *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in which a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. *Alexander*, 509 U.S. at 550. Although this Court noted that the injunction in *Keefe* was labeled "temporary" by the trial court, it was treated as permanent since its label was "little more than a formality," it had been in effect for years, it had been issued after an "adversary hearing," and it "already had [a] marked impact on petitioners' First Amendment rights." *Keefe*, 402 U.S. at 417-18 & n.1. This Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." *Id.* at 418. In words that are particularly apt for this case, this Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 418-419. The Court stressed that "[n]o 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.*

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the third permanent injunction case cited in *Alexander*, this Court invalidated a Texas statute that authorized courts, upon a showing that the defendant had shown some obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future even if those films had not yet been found to be obscene. *Vance*, 445 U.S. at 311. The three-judge District Court in *Vance*, whose decision was affirmed by this Court, held that, as in *Near*, "the state 'made the mistake of prohibiting future conduct after a finding of undesirable present conduct,'" and that such a "general prohibition would operate as a prior restraint on unnamed motion pictures" in violation of the First Amendment. *Vance*, 445 U.S. at 311-12 & n.3, 316-17 (quoting *Universal Amusement Co. v. Vance*, 404 F. Supp. 33, 44 (S.D. Tex. 1975)).

Injunctions are treated as prior restraints because that is exactly what they are: a prohibition of future expression. As this Court noted, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994). Justice Scalia's opinion in *Madsen*, which was joined by Justice Thomas and Justice Kennedy, explained that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797 (Scalia, J., concurring in judgment in part and dissenting in part). Injunctions may be used to "suppress the ideas in question rather than to achieve any other proper governmental

aim." *Id.* at 792-93. Injunctions are "the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.* at 793. As Justice Scalia cautioned, "the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards." *Id.* Violations of an injunction, even an unconstitutional injunction, are punishable by contempt, while violations of unconstitutional laws never can be punished. *Walker v. City of Birmingham,* 388 U.S. 307, 320-321 (1967) (upholding collateral bar rule precluding those violating an injunction from later challenging its constitutionality).

The California Court of Appeal incorrectly concluded that a permanent injunction is not a prior restraint if it follows a trial. (JA 56-57.) But *Near*, *Keefe,* and *Vance* establish that even though a permanent injunction follows a trial, it is still unquestionably a prior restraint on speech. The permanent injunction in this case, by its very terms, prevents *future* speech. It is not limited to preventing repetition of false statements of fact that are of and concerning the plaintiff and uttered with actual malice – defamatory speech beyond the reach of the First Amendment; the injunction prevents *any* future statement by Tory or Craft about Cochran. Under the terms of the court's order, Tory and Craft can speak about Cochran and his law firm only if they first go to the Superior Court and receive its permission through a modification of the court order. (JA 34.) As in *Near, Keefe*, and *Vance*, this unquestionably makes the permanent injunction a prior restraint.

III. A COURT ORDER PERMANENTLY ENJOINING SPEECH IS NOT A PERMISSIBLE REMEDY IN A DEFAMATION CASE, PARTICULARLY WHEN THE PLAINTIFF IS A PUBLIC FIGURE.

Prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Id.* at 589. There is a "deeply-seated American hostility to prior restraints." *Id.* This Court has stressed that "'[a]*ny* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance*, 445 U.S. at 317 (emphasis in original, quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This Court has often repeated, in many distinct contexts, its antipathy towards "systems" of prior restraints on speech.[4] "It is because of the personal nature"

[4] *See, e.g., CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., Circuit Justice) (finding temporary injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Nebraska Press Ass'n,*, 427 U.S. at 556 (applying prior restraint doctrine to reject gag order on participants in a criminal trial); *New York Times Co. v. United States*, 403 U.S. 714 (1971) (*per curiam* opinion applying prior restraint doctrine to strike down injunction on publication of confidential government documents, and, in separate opinions, "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraints as presumptively unconstitutional," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting)); *Bantam Books*, 372 U.S. at 70-71 (listing cases striking down prior restraints and rejecting as "informal censorship" local commission's ability to list certain publications as "objectionable" and to threaten prosecution for their sale); *Near*, 283 U.S. at 706, 722-23 (rejecting injunction on future publication of newspaper despite

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of the right of free speech that this Court has "rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion) (citation omitted).

The strong presumption against prior restraints is evidenced by the fact that this Court never has upheld a prior restraint as a permissible remedy in a defamation action. The absence of a single Supreme Court decision approving a prior restraint as a remedy in a defamation case reflects the historical condemnation of injunctions in such actions, the inherent adequacy of money damages, and the inevitable futility of crafting an injunction that is both effective and narrowly tailored. Moreover, injunctions especially should never be allowed when the plaintiff is a public official or public figure because of the indisputable importance of social discussion about these individuals and because such individuals generally have other remedies, such as access to the media to respond to any attacks on their reputation.

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publisher's previous dissemination of defamatory material). *See also Madsen*, 512 U.S. at 798 (Scalia, J., concurring in judgment in part and dissenting in part) (listing cases and observing that this Court has "repeatedly struck down speech-restricting injunctions"); *Avis Rent A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1140 (2000) (Thomas, J., dissenting from denial of certiorari) (urging granting of certiorari to "address the troubling First Amendment issues raised" by an injunction imposing "liability to the utterance of words in the workplace").

A. Prior Restraints Are Not A Constitutionally Permissible Remedy In Defamation Cases.

1. Permanent Injunctions Historically Have Not Been A Permissible Remedy in Defamation Actions.

The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation. *See* Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 715-16 (1956).

The rule was established in Eighteenth-Century England, well before the American revolution. Its earliest statement is found in *Roach v. Garvan*, 26 Eng. Rep. 683 (Ch. 1742), where Lord Chancellor Hardwicke remarked in a case involving a newspaper that printed commentary that was both libelous and a contempt of court:

> Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the public or private persons, the only method is to proceed at law.

Three-quarters of a century later, Thomas Howell, barrister and editor of the *State Trials* series, tellingly explained the strong consensus that equity had no power to restrain defamation: "I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be

deduced, either directly or by inference or analogy." 20 Thomas B. Howell, *A Complete Collection of State Trials* 799 (1816).

Nineteenth and Twentieth Century American courts, with remarkable uniformity, adopted the traditional English rule. Shipley, *supra*, at 716-21. *See, e.g., Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 176, 179-80 (1876); *Balliet v. Cassidy*, 104 F. 704, 706 (C.C.D.Or. 1900); *Howell v. Bee Publ'g Co.*, 158 N.W. 358, 359 (Neb. 1916); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Meyerson*, *supra*, at 324-330. Free speech concerns were prominent among the reasons given for their position. In the very first American case on the subject, New York's Chancellor Walworth began his opinion refusing to enjoin the publication of a libelous pamphlet by saying:

> It is very evident that this court cannot assume jurisdiction of the case . . . or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government.

Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

In 1882, the Louisiana Supreme Court issued an elaborate opinion refusing to enjoin a newspaper from printing libelous cartoons. After discussing the constitutional prohibition of prior restraints, the court depicted the traditional common law rule as central to preventing a legal regime in which "with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."

State ex rel. Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741, 745 (1882).

In 1909, a United States Circuit Court interpreted the Alabama Constitution as prohibiting equity from restraining defamation, saying:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance.

Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 556 (C.C.M.D. Ala. 1909).

The traditional rule that equity does not enjoin defamation is reflected in the briefs submitted to this Court in *Near v. Minnesota*, 283 U.S. 697 (1931). Near argued that "[t]he general rule is that equity will not under any circumstances enjoin defamation as such." Appellant's Brief, *Near*, 1930 WL 28681 (page numbers not available). In supporting this proposition, Near cited three treatises and discussed over twenty cases directly supporting his claim. *Id.* The State, in arguing that "[t]he court has power to restrain by injunction publication of defamatory matter," relied on just two far less apposite cases. Brief of Appellee, *Near*, 1931 WL 30640, at *10. This Court's holding in *Near* was in line with centuries of English and American decisions. The Court explained that the injunction of speech in *Near* – like the injunction issued in this case – was an "unusual, if not unique" imposition on the freedom of speech. *Near*, 283 U.S. at 707.

2. Damages Are A Sufficient Remedy For Plaintiffs In Defamation Cases.

Justice Scalia observed that "[p]unishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct." *Madsen*, 512 U.S. at 794 n.1 (Scalia, J., concurring in judgment in part and dissenting in part). *See also Aguilar*, 529 U.S. at 1143 (Thomas, J., dissenting from denial of certiorari) ("money damages" for future use of unprotected language in the workplace is preferable to an injunction on the same words).

Justice Scalia's observation is based on a wealth of support in the annals of jurisprudence, particularly in the pages of *Near*, where this Court *already* has announced that damages and other methods of punishing past speech – not restraints on future speech – are the appropriate remedies in defamation cases. In *Near*, this Court drew a line between damages as a permissible remedy for past speech and an impermissible system that proscribes future speech: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Near*, 283 U.S. at 718-19.

Courts long have recognized that damages, not injunctions, are the appropriate remedy in a defamation action. In the first days of the Republic, even before the adoption of the First Amendment, the court in *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319 (1788), explained that although "libelling

[*sic*] is a great crime," it is well-understood that "any attempt to fetter the press" is unacceptable. *Id.* at 324-25. Even though the defendant's "offence [*sic*] [was] great and persisted in," the Court did not enjoin the defendant's future speech. *Id.* at 328.

Similarly, well over a century ago, in *Francis v. Flinn*, 118 U.S. 385 (1886), this Court stressed that damages, not injunctions, are the proper remedy in defamation actions. In expressing the general rule that equitable relief is not permissible when there are remedies at law, the Court stated: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity can interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts of law." *Id.* at 389.

In other cases, too, this Court has recognized that damages, not injunctions, are the appropriate remedy in defamation cases. For example, in *Pennekamp v. Florida*, 328 U.S. 331 (1946), this Court reversed a judgment of contempt against a newspaper editor responsible for publishing editorials that purportedly were contemptuous of judges and the administration of criminal justice in pending cases. *Id.* at 350. The Supreme Court of Florida, upholding the lower court's citation for contempt, explained that a newspaper may generally criticize a judge, but "'may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public.'" *Id.* at 343 n.6. Nevertheless, this Court concluded that the contempt citation must be reversed to encourage debate on public issues, and also because, "when the statements [about a judge] amount to defamation, a judge has such a remedy

in damages for libel as do other public servants." *Id.* at 348-49.

Precluding prior restraints does not leave those defamed without remedy, or render the law powerless to deter defamation. This Court has upheld, with crucial limitations, the ability of public officials and public figures to recover damages in defamation cases. *Sullivan*, 376 U.S. at 283. The *Sullivan* Court stressed that damage awards, even against major metropolitan newspapers, are a potent weapon for the defamation plaintiff and noted that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277-78.

Despite these cautionary observations about the potential impact of damage awards, damages remain an available remedy in defamation cases if the First Amendment's requirements are met. In this case, the injunction was issued despite the fact that no damages were awarded because the plaintiff, Johnnie Cochran, waived his right to seek damages and conceded at trial that he could show no special damages. (RT 55:20-28.) The Superior Court found that Cochran never proved the "existence and amount of damages." (JA 37-38.) In such a situation, there is hardly the irreparable injury warranting equitable relief.[5]

[5] An opinion from the Supreme Court of Pennsylvania, with facts remarkably similar to those at bar, persuasively reasoned that damages are the sole remedy available to plaintiffs in defamation actions. *Willing v. Mazzocone*, 393 A.2d 1155, 1156-58 (Pa. 1978). In *Willing*, the Court struck down as unconstitutional an injunction preventing an individual from picketing her former lawyers (claiming that the lawyers "stole" her money and "sold her out"), even though the former client was demanding the repayment of money that she clearly was not owed. *Id.*

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Monetary damages are the appropriate remedy in a defamation action. Injunctions, such as that issued in this case, should not be permitted.

3. Effective Injunctions In Defamation Cases Are Inherently Overbroad and Inevitably Put Courts In The Role of Being Perpetual Censors Determining Whether Speech Can Occur.

Injunctions have not been, and should not be permitted in defamation cases for another reason: it is impossible to formulate an effective injunction that would not be extremely overbroad and that would not place the court in the role of the censor, continually deciding what speech is allowed and what is prohibited. Any *effective* injunction will be overbroad, and any *limited* injunction will be ineffective.

Prior restraints, such as injunctions, are a "'most extraordinary remed[y]'" to be used "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive means." *CBS*, 510 U.S. at 1317 (Blackmun, J., Circuit Justice). There can be no constitutional justification for such an extreme remedy unless it can be properly tailored and would actually serve its purpose. An injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President*

The *Willing* Court also soundly rejected the contention that injunctive relief was the only adequate remedy because the picketing former client could not afford to pay a money judgment, and thus, practically, there was not an adequate remedy at law. *Id.* at 1158.

and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968). Moreover, this Court has acknowledged that it "must also assess the probable efficacy of [a] prior restraint of publication as a workable method," and "cannot ignore the reality of the problems of managing" such orders. *Nebraska Press*, 427 U.S. at 565. As the axiom goes, "a court of equity will not do a useless thing." *New York Times*, 403 U.S. at 744 (Marshall, J., concurring).

In defamation cases, the injunction either must be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous. Most egregiously, as in the present case, the injunction can go so far as to prevent any future speech about the plaintiff. An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order.

Moreover, even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation at every point in the future. A statement that was once false may become true later in time. Likewise, even if a defendant in a defamation action once acted with the requisite degree of culpability, he or she may have a different mental state later. Defamatory statements about public figures are outside the scope of the First Amendment only when the plaintiff can "prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine*, 485 U.S. at 52 (emphasis

in original). Permitting permanent injunctive relief in a defamation case absolves the defamation plaintiff of his or her burden to demonstrate falsity and culpability each time a purportedly defamatory statement is made. Thus, unlike injunctions on particular obscene motion pictures, enjoining "defamatory" speech will inherently reach too far and be overbroad because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

An injunction that reaches more broadly than the exact words already held to be libelous is overbroad for the very reason that it restrains communication before a jury determination of whether it is or is not protected by the First Amendment. Because it delays communication that may be non-defamatory and protected by the First Amendment, it is the essence of a prior restraint.

Just as it is "always difficult to know in advance what an individual will say," *Southeastern Promotions*, 420 U.S. at 559, it is also difficult to know in advance *who* will speak. Any injunction designed to restrict speech effectively must encompass others besides the defamation defendant, such as Ruth Craft in this case. But that inevitably involves stripping persons not before the court of their First Amendment rights without sufficient due process. *See Hansbury v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (non-parties cannot be bound by judgments). On the other hand, even the most

over-reaching injunction on defamatory statements will also be under-inclusive, and therefore ineffective, since a third party, completely unaffiliated with the defendant and not bound by the injunction, can – at his financial peril – repeat the same statements already determined to be defamatory. *See Nebraska Press*, 427 U.S. at 609 n.36 (Brennan J., concurring) (lamenting the futility of under-inclusive injunctions on speech).

In addition, an injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. This is exactly the nature of the injunction in this case: it prohibits Tory, and even Craft who was not a party to the litigation, from saying anything about Cochran in any public forum until and unless they go back to the court and obtain the judge's permission to speak. That brand of judicial clearance is what this Court in *Near* called "the essence of censorship." 283 U.S. at 713.

In *Near*, this Court emphatically rejected the notion that even one who had previously been found liable for printing defamatory matter could be forced to prove to a judge that future statements "are true and are published with good motives and for justifiable ends." *Near*, 283 U.S. at 713. The injunction in this case, as in any defamation case, is precisely that type of censorship, as those enjoined will not be able to say anything about the subject without first getting permission from a judge. Such restrictions inevitably put the court in the classic role of the censor and are intolerable under the First Amendment.

4. Allowing Injunctions As A Remedy In Defamation Cases Would Be A Radical Change In The Law With A Devastating Effect On Freedom Of Speech.

In 1931, this Court noted that, "for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints on publication relating to the malfeasance of public officers;" the Court thus reaffirmed the "deep-seated conviction that such restraints would violate constitutional right." *Near*, 283 U.S. at 718. The same certainly holds true today almost three-quarters of a century later. This Court has never, in all of American history, even once upheld a prior restraint in the defamation context. This Court has sanctioned injunctions on speech only in the most "exceptional cases," such as those involving obscenity, incitements to violence and "the publication of the sailing dates of transports or the number and location of troops." *Near*, 283 U.S. at 716. *See also Nebraska Press*, 427 U.S. at 590-91 (Brennan, J., concurring) (explaining that this Court has limited injunctions on speech only to these "three such possible exceptional circumstances").

The few scenarios where this Court has even contemplated prior restraints are readily distinguishable from any case involving defamation. For example, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), this Court explained that injunctions on materials already deemed obscene are "glaringly different" from the injunction of a publication "because its past issues had been found offensive." *Id.* at 445. Reiterating *Near*'s admonition that the latter type of injunctions are the "'essence of censorship,'" the *Kingsley* Court "studiously withh[eld] restraint upon matters not already published and not yet found offensive."

Id. In this case, by contrast, the court has enjoined Tory and Craft from saying anything about Cochran, and thus has restrained speech that has not yet been "published and not yet found offensive."

Similarly, even *Near*'s allowance for injunctions on national security grounds was greatly circumscribed in the "Pentagon Papers" case, *New York Times v. United States*, 403 U.S. 713 (1971), where this Court emphasized that the government failed to meet the very heavy burden needed to sustain a court order enjoining speech.

In *Pittsburgh Press*, this Court upheld a "narrowly drawn" rule prohibiting the "placement in sex-designated columns of advertisements for nonexempt job opportunities." 413 U.S. 376, at 391. The Court invoked *Near* and "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views . . . however controversial." *Id.* Furthermore, in *Pittsburgh Press*, the Court stressed that the Commission's order preventing sex-based want ads could not be enforced by contempt sanctions because "[t]he Commission is without power to punish summarily for contempt." *Id.* at 390 n.14. That is very different from a court order enjoining speech, such as in this case, where any violations are punishable by contempt.

Consistent with the presumptive invalidity of all systems of prior restraints, most jurisdictions adhere to the maxim that "equity will not enjoin a libel."[6] Smolla,

[6] *See, e.g., Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172, 177-78 (2d Cir. 2001); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C.Cir. 1987); *In re Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986); *United States v. Doe*, 455 F.2d 753, 760 n.4 (1st

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supra, at §9.85 at 9-56. Unfortunately, several jurisdictions already have departed from the sound reasoning in *Near*.[7] This trend must end with a decisive rejection of permanent injunctions in the defamation context, or else "the constitutional limits of free expression in the Nation [will] vary with state lines," *Pennekamp*, 328 U.S. at 335, and "judges at all levels" will be interjected "into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Nebraska Press*, 427 U.S. at 607 (Brennan, J., concurring). Such a result would be an unacceptable and unprecedented abridgment of the First Amendment.

Cir. 1972); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963); *American Malting Co. v. Keitel*, 209 F. 351, 354-56 (2d Cir. 1913); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983); *Willing v. Mazzocone*, 393 A.2d 1155, 1157-58 (Pa. 1978); *Greenberg v. Burglass*, 229 So.2d 83, 86-89 (La. 1969); *Mescalero Apache Tribe v. Allen*, 469 P.2d 710, 711 (N.M. 1970); *Schmoldt v. Oakley*, 390 P.2d 882, 884-87 (Okla. 1964); *Prucha v. Weiss*, 197 A.2d 253, 256 (Md. 1964); *Kwass v. Kersey*, 81 S.E.2d 237, 243-46 (W.V. 1954); *Moore v. City Dry Cleaners & Laundry, Inc.*, 41 So.2d 865, 873 (Fla. 1949); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees*, 79 N.E.2d 46, 48-50 (Ill. 1948); *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163, 165-67, 171 N.Y. 384, 391-96 (N.Y. 1902); *Beck v. Ry. Teamsters' Protective Union*, 77 N.W. 13, 24 (Mich. 1898).

[7] *See, e.g., San Antonio Cmty. Hosp. v. Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50-51 (5th Cir. 1992); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206-09 (6th Cir. 1990); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.*, 352 N.W.2d 1, 11 (Minn. 1984); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975); *O'Brien v. Univ. Comty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); *Guion v. Terra Mktg. of Nevada, Inc.*, 523 P.2d 847, 848 (Nev. 1974); *Carter v. Knapp Motor Co.*, 11 So.2d 383, 385 (Ala. 1943); *Menard v. Houle*, 11 N.E.2d 436, 437 (Mass. 1937).

B. At A Minimum, Injunctive Relief Should Not Be Available To Public Figure Plaintiffs In Defamation Cases.

The only way to adequately safeguard free expression is to mandate that no kind of civil defamation plaintiff may obtain injunctive relief, but the point takes on an added urgency where, as here, the plaintiff is a public official or a public figure. Public figures "are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help' "; they "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). There is no indication that Cochran resorted to "self-help" by publicly countering Tory's criticisms; nor any indication that Cochran suffered real injury since Cochran waived his right to seek money damages and conceded at trial that he had no evidence Tory's activities caused him to lose any business. (RT 2:7-10, 55:20-28.)

"[M]ore importantly," this Court has held that "public figures are less deserving of protection than private persons because public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Wolston*, 443 U.S. at 164. Put simply, even if private individuals were entitled to injunctive relief in defamation cases, the purposes and history of the First Amendment and prior restraint jurisprudence do not support the notion that public figures should be able to enjoy the benefits of such a remedy.

This Court has recognized the importance of speech about public figures, especially those, such as Johnnie

Cochran, who play such an important role in the American legal system. As Chief Justice Earl Warren observed in words that are particularly apt for this case:

> [I]t is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

Butts, 388 U.S. at 164 (Warren, C.J., concurring); *see also Milkovich v. Lorain Journal*, 497 U.S. 1, 15 (1990) (quoting Chief Justice Warren's concurring opinion in *Butts*). Public figures, such as Johnnie Cochran, must accept that a consequence of their celebrity – here plainly sought and embraced – is that they may be subjected to "vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270. This is an inherent consequence of the First Amendment because "freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S.

485, 503-04 (1984). This is especially important here where the criticism was targeted not just at Cochran, but also at lawyers and the legal profession, subject matter about which robust debate should be encouraged.

Even if, under some limited circumstance, injunctions on future speech about private persons could be considered consistent with the First Amendment – which Petitioners dispute – the paramount importance of an open and free discourse regarding public persons imposes a constitutional bar on their ability to obtain injunctive relief in the defamation context.

IV. ANY PERMISSIBLE PRIOR RESTRAINT MUST BE NARROWLY TAILORED, BUT THE PERMANENT INJUNCTION IN THIS CASE IS EXTREMELY BROAD.

A. If A Prior Restraint Is Ever Permissible, It Must Be Narrowly Tailored.

Consistent with this Court's abhorrence of prior restraints, it has ruled that any injunction restricting speech must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765. Put another way, an injunction on speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. *Carroll*, 393 U.S. at 183.

The Court of Appeal upheld the permanent injunction in this case based on its expressed premise that the overbreadth doctrine does not apply to permanent injunctions. (JA 56-57.) This is plainly wrong. This Court has made clear that *any* restriction of speech is unconstitutional if it regulates substantially more speech than the

Constitution allows to be regulated. *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). *See also Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (invalidating overbroad regulations prohibiting all "First Amendment activities" at airports in Los Angeles); *Houston v. Hill*, 482 U.S. 451, 481 (1987) (declaring unconstitutional an overbroad provision making it unlawful to interrupt police officers in the course of their duties); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 61-2 (1981) (striking as overbroad an ordinance prohibiting all live entertainment); *Gooding v. Wilson*, 405 U.S. 518 (1972) (invalidating a fighting words statute). If they are permitted at all, prior restraints in defamation actions brought by public figures must be narrowly tailored and be limited to defamatory statements outside the scope of First Amendment protection: false statements of fact uttered with actual malice.[8]

[8] Given these constitutional principles, lower courts consistently reject overbroad permanent injunctions on speech. *See, e.g., CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461-63 (4th Cir. 2000); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. 2003). For instance, in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), the Second Circuit struck down a permanent injunction, issued after a defamation trial, prohibiting "any" report or statement about a businessman or his brother. The court determined that the injunction was an unconstitutional prior restraint, but further observed that the injunction was defective because it precluded "any" remarks, and was not, at a minimum, "directed solely to defamatory reports, comments or statements." *Id.* at 485.

B. The Prior Restraint Imposed On Tory and Craft Is Unconstitutionally Overbroad.

The prior restraint entered by the trial court and affirmed by the Court of Appeal is breathtaking in its scope and sweep; it is the antithesis of a narrowly drawn order preventing speech.

First, the injunction is not limited to enjoining defamatory expression. In many ways, it extends far beyond restricting defamatory speech because:

- It prohibits Tory and Craft from making any statement about Cochran or his law firm, even if they are just expressing opinion. Opinion, even if unflattering, is, of course, protected by the First Amendment and cannot be deemed defamatory. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Gertz*, 418 U.S. at 339 ("The First Amendment recognizes no such thing as a 'false' idea.")[9]

- In addition to preventing Tory and Craft from opining about Cochran, the injunction also prohibits other forms of protected speech. For example, it prohibits speech that otherwise would be protected by the litigation privilege concerning pending cases. *See, e.g.*, Cal. C. Civ. Proc. §47(b) (defining California's litigation privilege).

- The injunction is also not limited to preventing false statements of fact that would be injurious to Cochran's

[9] In fact, the statements which gave rise to this lawsuit were expressions of opinion and were not defamatory at all. Many of the signs were not directed at Cochran, such as "What can I do if I don't receive the Justice the Constitution guarantees me." The ones that mentioned Cochran were just expressing opinion, such as "Attorney Cochran, Don't We Deserve at Least the same Justice as O.J." and "Unless You have O.J.'s Millions – You'll be Screwed if you USE J.L. Cochran, Esq."

reputation. Under the terms of the injunction, even speech praising Cochran is prohibited. Completely true factual statements about Cochran also are enjoined.

• The injunction continues forever, even if Johnnie Cochran dies or his law firm dissolves. The law, of course, does not recognize defamation claims for those who are deceased. *See, e.g., Gruschus v. Curtis Publ'g Co.*, 342 F.2d 775, 776 (10th Cir. 1965). But for the rest of their lives, Tory and Craft never can utter a word about Cochran or his law firm.

Second, the injunction is vastly overbroad in that it applies to speech in *any* "public forum." The Petitioners could not walk down a sidewalk or through a park and say anything to anyone about Johnnie Cochran. *See, e.g., Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (affirming that parks and streets are public forums). For example, Tory and Craft seemingly would violate the injunction, and be subject to punishment for contempt, if either walked down a sidewalk or through a public park, and said to a friend, "I think Johnnie Cochran did a good job in representing O.J. Simpson," or "I saw Cochran being interviewed on television."

Third, the startling overbreadth of the injunction is most clearly manifest in its application to Ruth Craft and Tory's other "agents" and "representatives." Craft never was named as a defendant in the underlying lawsuit, she never had an opportunity to defend herself at trial, and yet she is one of only two people in America who may never mention Cochran in public.[10] The wholesale stripping of Craft's First Amendment rights is inconsistent with any notions

[10] In contrast, Cochran's firm never was named as a plaintiff in the lawsuit, yet it is still shielded from critical speech.

of equity or due process. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) ("'guilt by association alone' . . . is an impermissible basis upon which to deny First Amendment rights"). *See also Martin v. Wilks*, 490 U.S. at 761 (1989), *Hansbury v. Lee*, 311 U.S. at 40 (due process prevents non-parties from being bound by judgments). The permanent injunction is so overwhelming in scope that even this brief violates its terms since it is authored by Tory's "agents" and "representatives," it mentions Cochran, and it is distributed in public fora.

CONCLUSION

This Court has emphasized that the First Amendment protects the rights of the "lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). Correspondingly, affirming the permanent injunction imposed in this case on a lonely picketer would have profound consequences for all speakers, ranging from the pamphleteer to the largest newspapers and television stations.

Abandoning *Near v. Minnesota*'s disapproval of injunctive relief in defamation actions would mean that every court, in every successful defamation case, could enjoin all future speech by the defendant, or its agents, about the plaintiff in any public forum. The richness of the English language and the myriad ways of expressing any thought means that the only effective way to enjoin defamation would be, as here, to keep the defendant from ever uttering another word about the plaintiff. Such a result runs contrary to the fundamental precepts of the First Amendment,

especially where the enjoined speech relates to a public person and a public issue.

The permanent injunction in this case is a broad prior restraint on speech about a public figure, on a matter of public concern, striking at the very heart of the First Amendment's commitment "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. at 270. This Court should reverse the decision of the California Court of Appeal and should reaffirm centuries of jurisprudence and the holding in *Near v. Minnesota*: permanent injunctions of speech are not a permissible remedy in defamation cases.

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EXHIBIT C

No. 03-1488

In The Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division One

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Believing he was treated badly by prominent attorney Johnnie L. Cochran, Jr. and the legal system, Ulysses Tory exercised his First Amendment right to express his opinion in a public forum by carrying signs on a public sidewalk. Although expressing opinions about a national public figure and a matter of public concern is clearly protected by the First Amendment, the trial court issued an injunction which prevents Tory and Ruth Craft, who was not even a party to the lawsuit, from saying anything ever again about Cochran or his law firm in any public forum. This injunction is a prior restraint, which violates the First Amendment.

In an effort to avoid centuries of precedents holding that injunctions are not permissible in defamation cases and that any restriction on speech must be narrowly tailored, Cochran attempts to recharacterize this case as being about extortion and not defamation. In fact, Cochran's brief really makes just one argument: Tory was engaged in extortion unprotected by the First Amendment.

Cochran's claim of extortion is simply unsupported by the record. First, Cochran's suit was for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy. Cochran did not bring a civil cause of action for extortion; nor did he sue for harassment, intrusion, or any of the other claims he presents in his brief. Although in California, it is possible to sue for civil extortion and recover money damages, *see, e.g., Leeper v. Beltrami*, 53 Cal.2d 195, 203 (1959), Cochran presented no such claim in his complaint or at the trial court. Nor did Cochran ever file a complaint with the police alleging that Tory was engaged in extortion or even disturbing the peace, though Cochran certainly knows how to do this and the police surely would take seriously a complaint from Johnnie Cochran.

Second, contrary to the assertion in Cochran's brief, the trial court never found that Tory was engaged in extortion; indeed, the trial judge's opinion never mentions that word or anything like it. This is not surprising because nowhere at trial did Cochran claim that Tory was engaged in the crime of extortion. The trial judge's injunction was based on the erroneous conclusion that there was libel, slander, and false light invasion of privacy, the only claims Cochran raised before the trial court.

Third, the California Court of Appeal decision does not mention extortion. The Court of Appeal upheld the injunction as an appropriate remedy for defamation by erroneously concluding that permanent injunctions are not prior restraints and that permanent injunctions need not be narrowly tailored.

Thus, this case is not about, and never has been about, extortion. Rather, this case concerns whether injunctions are a permissible remedy in public figure defamation cases and, if so, whether they must be narrowly tailored. On this issue, Petitioners Tory and Craft maintain that the injunction issued by the California Superior Court, as a remedy in a defamation action, clearly violates the First Amendment.

I. THE INJUNCTION WAS IMPOSED AS A REMEDY FOR DEFAMATION OF A PUBLIC FIGURE AND NOT FOR EXTORTION, AND THUS MUST MEET THE FIRST AMENDMENT'S REQUIREMENTS FOR REMEDIES IN DEFAMATION ACTIONS.

A. The Injunction Was For Speech Protected By The First Amendment.

Cochran insists that this Court must accept the factual findings of the trial court and the Court of Appeal. But in *Bose v. Consumers Union*, 466 U.S. 485, 504, 506

n.25 (1984), this Court stressed that in a defamation action "[w]e must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression[.]" *Id.* at 508. Consistent with this fundamental precept, the Court held that "[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan*, is a rule of federal constitutional law.... It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

1. The Injunction Was Issued For The Expression Of Opinion About A Public Figure On A Matter Of Public Concern.

Cochran concedes, as he must, his status as a public figure. Respondent's Brief on the Merits (hereafter "RBM") at 46. Nor does he dispute that the statements were about the court system and the performance of an attorney and that there is an "extremely important" public interest in the conduct of lawyers. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

Crucially, Cochran concedes that the placards carried by "Tory and his recruits *did not contain factual information*," but instead "contained distasteful and inflammatory slogans." (RBM at 17; emphasis added). This, in itself, demonstrates the error of the lower courts. This Court repeatedly has held that statements which cannot reasonably be interpreted as asserting actual, verifiable facts about an individual are constitutionally protected opinion, especially in the context of speech concerning public figures and matters of public concern. *See Milkovich v.*

Lorain Journal Co., 497 U.S. 1, 17-21 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

All of the purported statements at issue are constitutionally protected opinion or hyperbole. For example, one of the placards on which the injunction is based innocently read, "What can I do if I don't receive the Justice the Constitution guarantees ME?" (Joint Appendix ("JA") 54.) Even taken at their worst, none of the purported statements convey verifiable assertions of fact. For instance, the alleged remarks that Cochran is unethical, has conflicts of interest or is a bad lawyer are matters of opinion.[1] An assertion that Cochran is a "crook, a liar and a thief" is not actionable because it does not convey information that can be proven true or false, as many courts have similarly held. (JA 53-54.)[2]

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[1] *See, e.g., Partington v. Bugliosi*, 56 F.3d 1147, 1157-58 (9th Cir. 1995) (evaluations of a lawyer's performance are "inherently subjective" and not actionable); *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 7-15 (Cal.Ct.App. 1993) (calling public defender an "unethical" lawyer who used "sleazy tactics" and went to "extreme lengths" to illegally obtain evidence from an alleged molestation victim's school was not actionable); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401-1406 (Cal.Ct.App. 1999) (description of an attorney as a "loser wannabe lawyer," a "creepazoid attorney," and a "Kmart Johnnie Cochran" who files "frivolous" lawsuits and motions is not actionable); *Savage v. Pacific Gas & Elect. Co.*, 21 Cal. App. 4th 434, 444-45 (Cal.Ct.App. 1993) (accusing another of having a "conflict of interest" is not actionable)

[2] *See, e.g., Willing v. Mazzocone*, 393 A.2d 1155, 1156-58 (Pa. 1978) (striking down injunction on attorneys' former client who falsely accused attorneys of stealing her money); *Greenberg v. Burglass*, 229 So.2d 83, 84-87 (La. 1969) (lawyer who prevailed in a defamation suit after being labeled a "crook" was not entitled to a permanent injunction); *Kwass v. Kersey*, 81 S.E.2d 237, 242-47 (W.V. 1954) (rejecting an injunction prohibiting the defendant, who claimed to be a former client of plaintiff, as well as defendant's "agents, servants, employees and representatives," from "making public or circulating any libelous or slanderous statements of any kind . . . concerning the plaintiff").

2. The Injunction Was Based On Statements That Were Not Made With Actual Malice.

As an admitted public figure, Cochran must prove, with clear and convincing evidence, that the allegedly defamatory statements – which gave rise to the injunction – were published with actual malice, meaning "with 'knowledge that [they were] false or with reckless disregard of whether [they were] false or not.'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986). The actual malice standard focuses solely on the defendant's subjective state of mind "at the time of publication." *Bose*, 466 U.S. at 512. This Court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.

Contrary to the conclusions of the trial court and the Court of Appeal, the evidence is not clear and convincing that the alleged statements in this case – even if they could be considered verifiable facts, rather than mere opinions or hyperbole – were published with knowledge of falsity or with reckless disregard for their truth or falsity.

First, Tory testified that he subjectively believed that Cochran mishandled Tory's original, underlying civil rights case.[3] Second, the evidence is not clear and convincing that Petitioners knew their demands for a refund from Cochran were based on false premises, or that they acted recklessly in demanding a refund from Cochran, even though the

[3] Reporter's Transcript of the trial proceedings in the Los Angeles County Superior Court ("RT") 174:9-17; 180:16-27; 215:16-19; 274:1-18.

money that they paid went to attorney Earl Evans, rather than to Cochran. To the contrary, a great deal of evidence indicates that Petitioners did not act with actual malice in demanding a refund from Cochran because they rationally, even if incorrectly, believed that Evans and Cochran worked as partners or agents of one another, that money paid to Evans flowed to Cochran, and that Cochran promised to refund them money.[4]

3. Cochran's Other Descriptions Of The Statements Do Not Make Them Unprotected Under The First Amendment.

Cochran colloquially labels some of Tory's purported statements "obscene" (RBM 18, 29), but they cannot be considered obscene as the Court has defined that term in the First Amendment context. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1971) (jacket bearing a profanity is not an "obscene expression" because "such expression must be, in some significant way, erotic"). Cochran also

[4] Evans admitted that he worked in the same office as Cochran, and that he used Cochran's stationery in corresponding with Petitioners. (RT 63:4-6, 78:12-28.) Cochran testified at trial that Evans had "been with the law firm a number of years," and it was clear that Evans frequently did work for Cochran and even made court appearances in Cochran's stead. (RT 74:14-16, 78:12-25.) When Tory first approached Cochran for representation in 1983, Evans did the "intake" for Cochran and Evans counter-signed the retainer agreement on Cochran's behalf. (RT 64:8-10, 79:4-28, 117:17-118:8.) Tory testified that, from that point forward, he believed Cochran's whole firm was handling his matters, and that his later checks to Evans were to Cochran's law firm. (RT 168:4-18, 188:27-189:7.) Tory also testified that Cochran promised to recompense Tory for checks that Petitioners wrote to Evans, and that Tory's later picketing was, in part, an effort to get Cochran to acknowledge this promise. (RT 176:21-178:22, 216:6-12, 222:2-16.) Craft also testified that she heard Cochran make such a promise, and that she, too, believed Evans was part of Cochran's law firm. (RT 253:17-19, 262:14-263:2.)

calls Tory's purported statements "harassing," "bizarre," "derogatory," and "distracting" (RBM 6, 18, 38), but this Court has made clear that "vehement, caustic, and sometimes unpleasantly sharp attacks," about public figures are constitutionally protected. *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

B. The Injunction Was For Defamation And False Light Invasion Of Privacy, Not For Extortion.

The trial court based its permanent injunction on findings (albeit incorrect ones) of defamation and false light invasion of privacy. (JA 33-50.) Contrary to Cochran's repeated assertions (*e.g.*, RBM 8, 33, 35), neither the trial court nor the Court of Appeal "established," "found" or "recognized" that Tory or Craft committed extortion. In fact, the words "extort" and "extortion" do not appear in the trial court's Statement of Decision or Permanent Injunction; nor do they appear in the Court of Appeal's opinion. (JA 33-61.)

Moreover, even if Cochran had properly raised an extortion claim and the trial court had found that Tory and Craft had committed extortion, such a finding could not stand. Under California law, "extortion" is "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear, or under color of official right." Cal. Pen. C. § 518. Extortion is only committed where the perpetrator does not have a legitimate claim to the requested property, and *knows* that he or she is not entitled to such property. *See Evans v. United States*, 504 U.S. 255, 277 (1992) (Kennedy, J., concurring) ("modern jurisprudence" requires *mens rea* for extortion); *see also United States v. Strum*, 870 F.2d 769, 774 (1st Cir. 1989) ("the term 'wrongful' requires the government to prove, in

cases involving extortion based on economic fear, that the defendant knew that he was not legally entitled to the property that he received"). As they testified at trial, Tory and Craft believe that they have a legitimate right to be reimbursed by Cochran. (RT 176:21-178:22, 216:6-12, 222:2-16, 253:17-19, 262:14-263:2.)

C. Petitioners' Alleged Motivations For Speaking About A Public Figure And A Matter Of Public Concern Do Not Affect The First Amendment Protection For Such Speech.

Speech that has properly been ruled extortionate is not protected by the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (Stevens, J., concurring). But not all speech that is designed to pressure the listener or change the listener's conduct to benefit the speaker is unprotected extortionate speech. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (Souter, J., concurring) (1994) ("Conduct alleged to . . . [be] extortion . . . may turn out to be fully protected First Amendment activity"); *see also United States v. Jackson*, 180 F.3d 55, 67 (2d Cir. 1999) ("plainly not all threats to engage in speech that will have the effect of damaging another person's reputation, even if a forbearance from speaking is conditioned on the payment of money, are wrongful").

This Court's decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), is illustrative. In *Keefe*, a trial court enjoined the future speech of the petitioners, an organization of residents that had been distributing leaflets critical of the respondent in response to the respondent's refusal to sign an agreement not to solicit property in the organization's neighborhood. *Id.* at 415-17. The appellate court affirmed the injunction on the ground that the petitioners' leafleting activities were "coercive and intimidating," invasive of respondent's

privacy and therefore "not entitled to First Amendment protection." *Id.* at 418. This Court reversed, explaining that "the claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id.* at 419 (citations omitted). The Court went on to state, in words that are exactly on point for this case, that "[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.*

Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court was clear that speech seeking to pressure economic behavior is protected by the First Amendment. *Claiborne Hardware* involved an injunction designed to end an economic boycott, where "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism." *Id.* at 909-10. This Court invalidated the injunction, ruling that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action;" indeed "'offensive' and 'coercive' speech" is "protected by the First Amendment." *Id.* at 910-11.

Even if Petitioners' motives in criticizing the professionalism and ethics of a prominent public figure such as Cochran could be considered offensive, coercive or otherwise questionable, Petitioners' criticisms are still entitled to constitutional protection. *See Hustler Magazine*, 485 U.S. at 53 ("in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment").

II. THE PERMANENT INJUNCTION IS A PRIOR RESTRAINT.

Cochran concedes that there is a "heavy presumption" against the "constitutional validity" of a prior restraint. (RBM 20-21). Nevertheless, Cochran contends that the injunction in this case is not a prior restraint. (RBM 20-31.)

Cochran confuses two questions: whether Tory's past speech is protected and whether the restriction of future speech is a prior restraint. Even if Tory's past speech was not protected, the injunction is still a prior restraint because it restricts future speech and because it requires judicial approval before any future speech occurs. (JA 33-34.)

Cochran contends that the injunction is merely a "subsequent punishment" for Tory's past speech and thus not a prior restraint. (RBM 28-29.) But this assertion is undermined by this Court's unequivocal statement in *Alexander v. United States*, 509 U.S. 544, 550 (1993), that "permanent injunctions . . . that actually forbid speech activities are classic examples of prior restraints" because they impose a "true restraint on future speech."

It is telling that Cochran cites no authority for the proposition that a permanent injunction on speech is a "subsequent punishment," save the Court of Appeal's opinion being challenged in this case. (RBM 29 (citing JA 56).) It is not surprising that Cochran could find no authority to support his position because, as Justice Scalia observed, "I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment should be the sanction for misconduct." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 794 n.1 (1994) (Scalia, J., concurring in judgment in part and dissenting in part).

III. INJUNCTIVE RELIEF IS NOT A PERMISSIBLE REMEDY IN A DEFAMATION CASE.

Cochran sued Tory for defamation (libel, libel per se, slander and slander per se) and false light invasion of privacy based on the same set of alleged facts. (JA 7, 13-17.) A false light invasion of privacy claim based on the same facts as a defamation claim must meet the same constitutional standards as the defamation claim. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). In California, "[w]hen claims for [false light invasion of privacy] . . . are based on the same factual allegations as those of a simultaneous libel claim, they are superfluous and must be dismissed." *Couch v. San Juan Unified Sch. Dist.*, 33 Cal. App. 4th 1491, 1504 (1995). Contrary to Cochran's repeated suggestions and implications (*e.g.*, RBM 8, 35), he made no other type of privacy claim, nor did he make any claim for harassment or extortion. Thus, despite Cochran's many attempts to recast the nature of this dispute, it is, fundamentally, a defamation case.

A. Cochran Concedes That Prior Restraints Have Historically Been Rejected In Defamation Cases.

Cochran concedes that "in the eighteenth, nineteenth and early twentieth centuries, the 'traditional rule . . . that equity has no jurisdiction to enjoin a libel' was often applied[.]" (RBM 35.) Notwithstanding this concession, Cochran reads *Near v. Minnesota*, 283 U.S. 697 (1931), and *Keefe* to permit injunctions to "redress individual or private wrongs." (RBM 25). *Near* and *Keefe* cannot be read as narrowly as Cochran contends. *Near* emphatically rejected the notion that injunctive relief is ever a permissible remedy in defamation cases, calling it the "essence of censorship," even though the injunction in that case followed a finding of defamation and involved false and

anti-Semitic epithets – speech of minimal, if any, public value. *Near*, 283 U.S. at 704-06, 713-18.

Even if *Near* and *Keefe* could be read as narrowly as Cochran suggests, the speech in this case is not merely a matter of private concern, but instead addresses matters of public concern: the professional conduct of Cochran, a prominent attorney and admitted public figure, and Petitioners' experiences in the legal system. (*See* Petitioner's Brief on the Merits (hereafter "PBM") at 11-13.)

Cochran does not – because he cannot – dispute that this Court has never upheld an injunction in a defamation case. Instead, Cochran cites cases that did not involve defamation. (RBM 21-23, 27-28, 30-34). *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973), *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957), and *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961), all involved narrow injunctions of material that courts had previously adjudged obscene. *See Near*, 283 U.S. at 716 (prior restraints are allowed only in "exceptional cases," such as enjoining obscenity.)

This case is also very different from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973), which involved a "narrowly drawn" rule prohibiting advertising of illegal activity, not a court injunction of speech. Again, in *Pittsburgh Press* the Court distinguished and "reaffirm[ed] unequivocally" *Near*'s rule, which does not allow injunctions on the "free expression of views . . . however controversial." *Id.*

B. Damages Are The Appropriate Remedy In Defamation Cases.

Cochran makes no effort to address the ample authority presented by Petitioners holding that damages are a sufficient remedy for plaintiffs in defamation cases. (*See* PBM 23-26.) Cochran also does not contend that damages

would have been an inadequate remedy in this case.[5] Instead, Cochran again turns to inapposite authority to suggest that his remedy is "not limited to damages." (RBM 34-37.)

Cochran's reference to injunctions in privacy cases is misplaced because neither decision cited by Cochran involved an injunction based on false light invasion of privacy, which is the only type of privacy claim at issue in this case. (RBM 35) Even if Cochran had advanced some other brand of privacy claim – which he clearly did not – the instant injunction still could not stand. *See Keefe*, 402 U.S. at 419-20 (injunction to prevent the peaceful distribution of literature critical of an individual's business practices was unconstitutional even though the conduct was alleged to be an "invasion of privacy").

Cochran's reliance on labor picketing cases is equally misplaced because the labor context has consistently been treated distinctly by this Court. (RBM 35-36.) In *American Steel Foundries v. TriCity Central Trades Council*, 257 U.S. 184, 205-06 (1921) – a case that pre-dates *Near* – this Court recognized the particular problems attendant to "strikers and sympathizers engaged in the economic struggle," especially where "one or more assaults or disturbances ensued" creating an "intimidating" atmosphere. *Id.* at 205. Cochran also cites to *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), but in that case the trial court "declined to enjoin the distribution" of the allegedly libelous leaflets. *Id.* at 734. The final labor case cited by Cochran, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309

[5] Cochran waived his right to seek damages, and he conceded that he did not actually suffer any damages. (JA 37-38; RT 55:20-28; Reporter's Transcript of trial court proceedings on April 24, 2002, at 2:7-10.)

n.16 (1979), addressed the special nature of direct appeals by labor to consumers, but it did not explicitly permit injunctions even in that context. Moreover, this Court specifically acknowledged that such a circumstance is distinct from defamation claims. *Id.*

Finally, without the benefit of any authority, Cochran wrongly contends that his remedy is not limited to damages because he is entitled to an injunction because of the purported "ongoing extortion attempts recognized by the trial court." (RBM 35.)[6] As discussed above, this case is not about extortion, and the trial court never recognized any attempted or consummated extortion. (JA 33-50.) Moreover, crimes, such as extortion, cannot be enjoined. *See generally New York Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("it is a traditional axiom that equity will not enjoin the commission of a crime"). Instead, perpetrators of extortion may be criminally prosecuted. In California, it is possible to sue for civil extortion and recover money damages, *see, e.g., Leeper v. Beltrami*, 53 Cal.2d 195, 203 (1959), but Cochran never brought such a claim.

C. Injunctions Are Not An Appropriate Remedy In Defamation Cases.

In their Brief on the Merits, Petitioners explain why an injunction in a defamation case can never be crafted in a fashion consistent with the First Amendment: any effective

[6] The one case cited by Cochran to support his position, *United States v. Sasso*, 215 F.3d 283 (2d Cir. 2000), did not approve an injunction to prevent extortion. (RBM 35.) Rather, the court only noted in passing that the government had commenced a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and had included in one paragraph a request to enjoin an allegedly corrupt labor union's and "organized crime's extortion of construction businesses." *Id.* at 285.

injunction will be overbroad and any limited injunction will be ineffective. (PBM 26-29.) Put another way, any injunction in a defamation case will always be either under-inclusive or over-inclusive, and it will never be narrowly tailored, as the law requires. Cochran defends the scope of the injunction by championing its clarity. (RBM 38.) Petitioners agree that the injunction is painfully clear – it clearly prevents, as Cochran puts it, "all discussion about Cochran" in any public forum. (RBM 37.) Petitioners do not object to the injunction on clarity or vagueness grounds, but instead challenge its unconstitutional overbreadth. The regulation in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), which prohibited all "First Amendment activities" at airports in Los Angeles, was also clear; but, as this Court held, it was unconstitutionally overbroad. *Id.* at 574-75. Clarity is no defense to unconstitutional overbreadth.

IV. EVEN IF INJUNCTIONS ARE ALLOWED IN DEFAMATION CASES, SUCH INJUNCTIONS MUST BE NARROWLY TAILORED; BUT THE INJUNCTION IN THIS CASE IS UNCONSTITUTIONALLY OVERBROAD.

A. The Permanent Injunction Is Content-Based Because, As Respondent Concedes, It Bars Discussion On The "Subject" Of Johnnie Cochran.

Cochran argues that the injunction is content-neutral because it "does not distinguish between 'good' and 'bad' expression about Cochran; any public communication on the *subject* of Cochran is prohibited." (RBM 9 (emphasis added); *see also* RBM 42 ("Petitioners are as much in violation of the Injunction if they publicly praise Cochran as if they publicly criticize him").) He is mistaken because the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints,

but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its *subject matter*, or its content") (emphasis added).

This Court disapproved an argument, nearly identical to Cochran's, in *Carey v. Brown*, 447 U.S. 455 (1980). *Carey* involved an ordinance which prohibited picketing in residential neighborhoods, except for labor protests related to a place of employment. This Court invalidated the law, explaining that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," and it is "of course, no answer to assert that the . . . statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Id.* at 462 & n.6.

Cochran relies on several inapposite decisions that did not involve restrictions on speech based on viewpoint or subject matter. (RBM 39-43.) In *Madsen v. Women's Health Center*, 512 U.S. at 763, for example, this Court upheld an injunction establishing a buffer zone around abortion clinics, concluding that such an injunction applied regardless of viewpoint or subject matter, even if it had a disproportionate impact on individuals, anti-abortion protestors, expressing a particular viewpoint. Here, unlike in *Madsen*, no one disputes that the purpose of the injunction is to stymie discussion on a particular subject matter. Therefore if the injunction is to be permitted at all, it "must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

B. The Permanent Injunction In This Case Is Enormously Overbroad.

Even if the Court determines that the injunction is content-neutral, it still must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

The injunction is tremendously overbroad. Even Cochran describes the injunction as a "wholesale proscription of speech about a specific person in the public forum." (RBM 48.) The injunction is "wholesale," as Cochran puts it, because it prohibits all forms of protected speech about Cochran and his law firm, including opinions, true statements of fact and praising speech. It applies to "any" "utterance" – from organized picketing to a whisper in the park – in "any public forum". (JA 34). The injunction applies to all of Tory's "agents" including Craft, who was never given an opportunity to defend herself at trial. Even this brief violates the terms of the injunction because it is written by Tory's agents and will be communicated in public forums.

Cochran's only defense to the staggering scope of the injunction is that it applies only in public forums. (RBM 45.) This is really no limitation at all. Public forums – such as the public areas around Cochran's office and the Los Angeles Superior Court, which are specifically mentioned in the injunction (JA 34) – "occup[y] a special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Cochran does not advance any countervailing government interest that is "compelling" – or even "significant" – enough to warrant overlooking the dramatic breadth of the injunction. Cochran invokes his business and privacy interests (RBM 43-44), but this Court has acknowledged that, even where a plaintiff asserts that speech has invaded his privacy and damaged his business,

there is no authority supporting injunctive relief. *Keefe*, 402 U.S. at 419 (rejecting an injunction on speech based on a claimed "invasion of privacy"). Moreover, Cochran and the trial court acknowledged that Cochran was not actually damaged at all. (RT 55:20-28; JA 37-38.)

Cochran also argues that the injunction helps protect the integrity of the legal profession. (RBM 44.) There is, however, a higher interest in allowing criticism of the legal profession, and its most prominent members, in order to expose flaws in the system and deficient practitioners. *See Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036, 1038 (9th Cir. 2000) (holding that an article that was highly critical of Johnnie Cochran and his handling of the famous O.J. Simpson case was protected opinion).

Finally, Cochran contends that there is an overriding interest in preventing crime. (RBM 44). But there was no crime committed in this case. Tory was never arrested or charged with any crime. Cochran acknowledged as much at trial when he testified: "*If* you had broken the law, Mr. Tory, I'm sure you would have been arrested." (RT 61:22-23 (emphasis added).)

C. The Court Should Declare The Injunction Unconstitutional, Not Rewrite It.

Cochran asserts that the "only" effective remedy in this case is to proscribe "*all* discussion about Cochran by Petitioners in the public forum." (RBM 37 (emphasis in original).) Nevertheless, Cochran asks this Court, as an alternative, "to modify the order as necessary," but he does not articulate how the order could or should be modified. The Court should not entertain Cochran's suggestion.

First, as discussed above, the injunction is predicated on speech that is – and should have been deemed – constitutionally protected. Tory never should have been held

liable for defamation or false light invasion of privacy for expressing opinions about a public figure in a public forum, and Craft – who was never a defendant – should not have been named in the injunction.

Second, injunctions are not permissible as remedies in defamation actions. Centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See, e.g.*, Rodney Smolla, *Law of Defamation* § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001).

Third, modifying the injunction would be an extraordinary measure never before undertaken by this Court. Cochran cites no authority, because there is none, where this Court ever upheld an injunction of speech by rewriting it. *See, e.g., United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 581 (1971) (striking down an injunction because "upon its face it abridges rights guaranteed by the Constitution.")

Finally, rewriting the injunction is inappropriate because no limitation could satisfy First Amendment standards. In *Board of Airport Comm'rs*, 482 U.S. at 575-76, this Court declined to narrow an overbroad regulation prohibiting "all First Amendment activities," because even a modified version of such a rule would violate the First Amendment. The same is true here. As Petitioners have explained, there is not a way to craft an injunction in defamation cases that would meet First Amendment scrutiny.

CONCLUSION

Never in American history has this Court upheld a permanent injunction as a remedy in a defamation action. Upholding the injunction in this case would dramatically change the law and open the door to broad injunctions of speech as a routine matter in defamation cases across the country. This Court should follow its unbroken line of authority since *Near v. Minnesota* and overturn the injunction which prevents Tory and Craft from ever saying anything about Cochran or his law firm in any public forum.

Respectfully submitted,

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PROOF OF SERVICE
Case No. S235968

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 505 Montgomery Street, Suite 800, San Francisco, CA 94111. On July 19, 2017, I served the following document(s):

MOTION FOR JUDICIAL NOTICE; DECLARATION OF ROCHELLE L. WILCOX WITH EXHIBITS A-C; [PROPOSED] ORDER

as follows:

[x] U.S. Mail: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at San Francisco, California addressed as set forth below:

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Superior Court of California, County of San Francisco
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Clerk of the Court
California Court of Appeal, First District
350 McAllister Street
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 19, 2017, at San Francisco, California.

Aysha D. Lewis