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' BRIEF ON THE MERITS

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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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The opinion of the California Court of Appeal, Second Appellate District, Division One, is unpublished.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.

Respectfully submitted,

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