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

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY LAW SCHOOL
Science Drive and Towerview Road
Durham, North Carolina 27708
(919) 613-7173

GARY L. BOSTWICK
JEAN-PAUL JASSY
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067
(310) 228-3700

Counsel for Petitioners Ulysses Tory and Ruth Craft

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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]

---

[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,

ERWIN CHEMERINSKY
Counsel of Record
DUKE UNIVERSITY LAW SCHOOL
Science Drive and
Towerview Road
Durham, North Carolina 27708
(919) 613-7173

GARY L. BOSTWICK
JEAN-PAUL JASSY
SHEPPARD, MULLIN, RICHTER
& HAMPTON LLP
1901 Avenue of the Stars,
Suite 1600
Los Angeles, California 90067
(310) 228-3700

Counsel for Petitioners Ulysses Tory and Ruth Craft