No. 13-0043

In the Supreme Court of Texas

ROBERT KINNEY,

Petitioner,

v.

ANDREW HARRISON BARNES (a/k/a A. HARRISON BARNES, A.H. BARNES, ANDREW H. BARNES, HARRISON BARNES); BCG ATTORNEY SEARCH, INC.; EMPLOYMENT CROSSING, INC.; and JD JOURNAL, INC.,

Respondents.

On Review from the Third Court of Appeals at Austin, Texas
Cause No. 03-10-00657-CV

Post-Submission Brief of Amici Curiae Professors Erwin Chemerinsky and Lyrissa Barnett Lidsky and the Electronic Frontier Foundation in Support of Respondents

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February 6, 2014

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INTEREST OF AMICI CURIAE

Professors Erwin Chemerinsky and Lyrissa Barnett Lidsky and the Electronic Frontier Foundation ("Amici"), experts in First Amendment and Internet law, urge this Court to affirm the long-held rule that "equity will not enjoin a libel." Injunctions against libelous speech, even after a final judicial determination, are prior restraints and can never withstand the rigorous scrutiny due such orders. The fact of Internet publication provides no basis for disturbing this rule.

Professor Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. He has frequently argued matters of constitutional law in front of the nation's highest courts, including a United States Supreme Court decision involving injunctions in defamation cases, *Tory v. Cochran*, 544 U.S. 734 (2005). He also wrote a widely cited law review article on the subject, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157 (2007).

Professor Lyrissa Barnett Lidsky is the Stephen O'Connor Professor of Law and Associate Dean for International Programs at the Levin College of Law at the University of Florida. She is the author of three casebooks: Torts, Mass Media Law and First Amendment Law. Professor Lidsky has written extensively on issues of Internet free speech, cyberbullying, and defamation and other privacy torts. Her

article, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855 (2000), was cited by the petitioner in *Kinney v. Barnes*, No. 13-0043, but Professor Lidsky writes here in support of the *Kinney* respondent.

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 24,000 dues-paying members nationwide, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. EFF is especially concerned about laws and regulations that threaten free expression over the Internet.

Amici respectfully submit this brief in support of Petitioner/Cross-Respondent Allan Chadwick Burbage in *Burbage v. Burbage*, No. 12-0563, and in support of Respondent Andrew Harrison Barnes in *Kinney v. Barnes*, No. 13-0043, both of which were argued on the same day. In compliance with Rule 11(c) of the Texas Rules of Appellate Procedure, Amici state that no fee was charged or paid for the preparation of this brief. Amici submit this brief to address a question raised by the Court during the oral argument in this case: Is a permanent injunction against defamatory speech ever permissible?[1] Amici urge the court to hold that

[1] Oral Argument at 2:40, *Burbage v. Burbage*, No. 12-0563, *available at* http://www.texasbarcle.com/CLE/TSCPlayVideo.asp?sCaseNo=12-0563 (question of Justice Lehrmann, "Are you saying that no injunction would ever be OK?").

even where a statement has been adjudicated false and defamatory, the First Amendment bars a permanent injunction against republication of the statement. Further, Amici respectfully disagree with the conclusion reached in David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1 (2013), which the Respondent/Cross-Petitioner in *Burbage* submitted in a post-argument brief. Hence, this Court should affirm the decision of the lower courts on this issue in both *Burbage* and *Kinney*.

INTRODUCTION

For centuries, courts have adhered to the rule that "equity will not enjoin a libel." This Court should not depart from it now. Such injunctions are prior restraints, which the U.S. Supreme Court has repeatedly held to be anathema to the First Amendment. The richness of the English language and the myriad ways of expressing any thought make it impossible for a trial court to craft an injunction against future defamatory speech that is both effective and does not also bar the publication of constitutionally protected speech. Moreover, defamation is inherently contextual, so even a permanent injunction limited to the exact words found to be defamatory in one context might prohibit speech that is not actionable in another.

This Court should also reject the suggestion that the advent of the Internet somehow undermines these bedrock First Amendment[2] protections. If anything, the particular properties of the Internet that allow for the rapid flow of information counsel against allowing permanent injunctions in defamation cases.

Given these constitutional flaws as well as significant concerns about judicial administration of an injunction against defamatory speech, damages are properly the exclusive remedy in defamation cases.

ARGUMENT

I. THE ROLE OF THE INTERNET IN DEFAMATION CASES DOES NOT AFFECT THE CONSTITUTIONAL ANALYSIS OF INJUNCTIONS.

The landscape of communication has been dramatically reshaped by the Internet. Americans rely on digital means of communication for nearly every conceivable purpose in their daily lives. The U.S. Supreme Court has recognized the Internet's importance and made clear that it is entitled to the full protection of the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Indeed, the Internet gives great power to the fundamental First Amendment axiom that "[t]he remedy for speech that is false is speech that is true." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012).[3] Because the cost of online speech is relatively low

[2] In reaching this conclusion, the Court need not address the issue of whether the Texas Constitution provides greater protection than the First Amendment.

[3] The First Amendment embodies the Framers' judgment that it should be "the ordinary course in a free society" to engage false speech with the truth. *Alvarez*, 132 S. Ct. at 2550. "The theory of

compared to traditional media, almost anyone can "speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined." *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated sub nom. Ashcroft v. ACLU*, 535 U.S. 564 (2002). As a result, the Internet is the natural home of the "lonely pamphleteer." *Reno v. ACLU*, 521 U.S. at 870 ("Through the use of Web pages, mail exploders, and newsgroups . . . [an] individual can become a pamphleteer."). The Internet is renowned for its capacity to enable and amplify a vast range of protected political speech, from critiques of government excess to exposés of unsafe or illegal corporate practices. *See generally* Yochai Benkler, *The Wealth of Networks* 212-72 (2006) (discussing the emergence of the Internet as a tool of political expression by private individuals). Thus, just as networked technologies may facilitate the spread of defamatory speech, they can just as quickly allow that speech to be countered.

Ironically, however, it is the very characteristics of the Internet that the U.S. Supreme Court in *Reno v. ACLU* found justified its full First Amendment protection—speed, ease and efficiency of communication, and the ability of the Internet to make any person a global publisher—that often lead to calls for speech on the medium to receive diminished protection. *See, e.g., United States v.*

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our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]'" *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

Cassidy, 814 F. Supp. 2d 574, 582 (D. Md. 2011) (online speech protected "[e]ven though the Internet is the newest medium for anonymous, uncomfortable expression. . . .") (citing *Reno v. ACLU*, 521 U.S. at 870). However, the U.S. Supreme Court has stated clearly that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (citation omitted).

At oral argument in *Kinney*, Justice Lehrmann asked whether defamatory speech on the Internet can be answered effectively with truthful speech.[4] But this concern is not unique to the Internet and is arguably even less compelling in the context of the Internet, given the rapid flow of information. Moreover, in any medium, plaintiffs may be dissatisfied with "more speech" as their non-monetary remedy, but, under the First Amendment, dissatisfaction does not justify imposition of a prior restraint. *Alvarez*, 132 S. Ct. at 2550.

Injunctions against Internet defamation also risk stifling the robustness of political and social speech on the Internet. For example, when powerful entities are targeted for criticism, it is a familiar tactic to answer with a lawsuit, regardless of

[4] Oral argument at 32:25, *Kinney v. Barnes*, No. 13-0043, *available at* http://www.texasbarcle.com/CLE/TSCPlayVideo.asp?sCaseNo=13-0043 (question of Justice Lehrmann, "When something is published negatively about a person, if they respond they're very likely just causing more attention . . . to be paid to that. So is that really a remedy?").

legal merit. *See New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (expressing fear that absent First Amendment protection, "would-be critics of official conduct may be deterred from voicing their criticisms. . . ."). Allowing an injunction in Internet defamation cases would give powerful entities a potential tool to harass their critics, chilling online discourse. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 888-89 (2000) (discussing chilling effects in online context); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (prior restraints, such as injunctions, "freeze" speech before it occurs).

In its First Amendment jurisprudence, the U.S. Supreme Court has carefully shaped protections that ensure breathing space for free speech while allowing appropriate remedies against unprotected speech such as defamation. As such, Amici ask the Court to apply these rules to the case at hand and reject any invitation to craft Internet-specific rules.

II. INJUNCTIONS AGAINST FUTURE DEFAMATORY SPEECH ARE UNCONSTITUTIONAL PRIOR RESTRAINTS.

Historically, courts have consistently held that "equity will not enjoin a libel." *Metropolitan Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001). The rule is one of long standing, and it has gained a constitutional dimension under modern First Amendment jurisprudence. Even speech that is "unprotected" by the First Amendment cannot be subjected to a prior restraint

without a separate holding that the prior restraint is constitutionally permissible. To rule otherwise would be to ignore the "well-established distinction" between permissible "subsequent punishment" of speech that is found after a trial to be defamatory and impermissible prior restraint of future speech. *Alexander v. United States*, 509 U.S. 544, 548-49 (1993).

A. Injunctions Against Future Defamatory Speech Are Prior Restraints.

Any injunction that restrains a defendant in a defamation case from making certain statements in the future is a *prior restraint* on speech. The U.S. Supreme Court has expressly declared that "permanent injunctions . . . that actually forbid speech activities — are classic examples of prior restraints" because they impose a "true restraint on future speech. . . ." *Id.* at 550.

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed 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 (quotations omitted). 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.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices.[5] The Court struck down the injunction as "an impermissible restraint on First Amendment rights." *Id.* at 418. The injunction was premised in part on the lower court's finding that the protestors had invaded Keefe's privacy by disclosing his home phone number and urging others to call him. *Id.* at 417. In words that are particularly apt for this case, the Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 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) (per curiam), the Court invalidated a Texas statute that authorized courts, upon a finding 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. *Id.* at 311. The three-judge District Court in *Vance*, whose decision was affirmed by the U.S. Supreme

[5] Although the Court noted that the injunction in *Keefe* was labeled "temporary" by the trial court, it was treated as permanent because 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.

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. *Id*. at 311-12 & n.3, 316-17 (citation omitted).

As the Third Court of Appeals found in both *Burbage* and *Kinney*, the permanent injunctions sought in both cases would, by their very terms, prevent *future* speech and are thus prior restraints. *Burbage v. Burbage*, No. 03-09-00704-CV, 2011 WL 6756979, at *10 (Tex. App.—Austin Dec. 21, 2011, pet. granted); *Kinney v. Barnes*, No. 03-10-00657-CV, 2012 WL 5974092, at *3 (Tex. App.—Austin Nov. 21, 2012, pet. granted).[6]

B. Each Injunction Is an Unconstitutional Prior Restraint.

Prior restraints are "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n*, 427 U.S. at 559. As a result, any prior restraint "bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

To pass constitutional muster, prior restraints must be *necessary* to further a governmental interest of the highest magnitude. *See Neb. Press Ass'n*, 427 U.S. at

[6] Despite the U.S. Supreme Court's clear statements to the contrary, a handful of courts have found that an injunction issued in a defamation case is not a prior restraint if it follows a trial that determines the speech in question is in fact false and defamatory. *See, e.g.*, *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007). However, despite this semantic distinction, the *Balboa* court subjected the injunction to a high level of scrutiny akin to the test for upholding a prior restraint. *Id.* at 333-34 (discussing narrow tailoring).

562. The prior restraint will be necessary only if: (1) the harm to the governmental interest will definitely occur; (2) the harm will be irreparable; (3) no alternative exists for preventing the harm; and (4) the prior restraint will actually prevent the harm. *See id.*

This test cannot be met in a defamation case. It is impossible to craft an injunction that is both efficacious and does not include within its reach constitutionally protected speech. Any *limited* injunction will be both constitutionally suspect and ineffective, and any *effective* injunction will be inherently overinclusive. *See Neb. Press Ass'n*, 427 U.S. at 562.

1. Injunctions Limited to Statements That Have Been Adjudicated Actionably Defamatory Are Both Ineffective and Unconstitutional.

The handful of courts that have attempted to craft permissible prior restraints have taken the approach sought by the plaintiff-petitioner in *Kinney*: enjoining only the use of the specific words or statements found to be false and defamatory. These courts believe that there is no constitutional barrier to enjoining speech that has been fully and finally adjudicated to be false and defamatory. *See Balboa*, 156 P.3d at 352-55 (limiting the injunction *only* to those statements determined at trial to be false and defamatory, and to include exceptions, among others, that preserved the defendant's right to "present[] her grievances to government officials"); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 313 (Ky. 2010) (limiting its injunction

holding to "specific and particular statements" found "upon final adjudication in the trial court . . . to be false and defamatory . . ."); *see also Lothschuetz v. Carpenter*, 898 F.2d 1200, 1209 (6th Cir. 1990) (opinion of Wellford, J. constituting court's holding on this issue) (limiting possible injunctions to statements judicially found to be "false and libelous"). However, this approach is constitutionally problematic for several reasons.

a. Injunctions Against Specific Statements Cannot Be an Effective Remedy.

Injunctions against the publication of specific words or statements fail the efficacy requirement from the prior restraint test. *See New York Times v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("a court of equity will not do a useless thing. . . ."). As several Justices suggested at argument in *Burbage*, it is glaringly obvious that 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.[7] *See, e.g., Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1091 (C.D. Cal. 2010) ("Here, for instance, Plaintiffs seek to enjoin McWilliams from stating that Plaintiffs 'sent thugs, Blackwater operatives, or military special forces to intimidate him.' But this injunction would be worthless if

[7] Oral argument at 7:50, *Kinney* (question of Justice Boyd, "[What about] when tomorrow he just repeats the statement [in different words]?").

McWilliams could instead simply claim that Plaintiffs had hired the mafia or a street gang to threaten him."). If such rephrased statements are also false and defamatory, the plaintiff would return to court to get a similarly narrow injunction, leading to revolving-door injunctions. *See Neb. Press Ass'n*, 427 U.S. at 565 (the court "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).[8]

b. Injunctions Against Specific Statements Are Unconstitutional Because Defamation Is Inherently Context-Specific.

Courts that have allowed injunctions limited to a republication of a statement found to be false and defamatory at trial are mistaken that they are enjoining "unprotected speech." *Balboa*, 156 P.3d at 357. While a specific instance of defamation in the past is unprotected and open to subsequent punishment, *see Alexander*, 509 U.S. at 548-49, defamation is also inherently context-specific and thus cannot be enjoined permanently. For example, a statement that is defamatory when published in one context at one point in time may not be defamatory in another context. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987) (statement read "in light of surrounding circumstances. . . ."). Or it

[8] These problems of judicial administration are likely even more acute with defamation on the Internet. If, as some argue, the spread of defamation online cannot be tamed with damages, it is clear that, given the wealth of platforms for online speech, an injunction would be ineffective in stopping this spread.

may be published or uttered in a manner that cloaks it with a privilege. Tex. Civ. Prac. & Rem. Code Ann. § 73.002 (fair report and fair comment privileges); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (1942) (recognizing absolute judicial proceedings privilege).

Similarly, a statement that was once false may become true later in time. *Balboa*, 156 P.3d at 357 (Kennard, J., dissenting in part.). Closely related, even if the statement is false and the defendant once acted with the requisite degree of culpability, a different level of culpability may be required in the future. For example, if the plaintiff becomes a public figure, he will have to prove actual malice and falsity, whereas previously he may only have had to demonstrate that the defendant published negligently. *Oakley*, 879 F. Supp. 2d at 1091; *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (statements made 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").

Crucially, if any of these examples of "changed circumstances" occur, the *Balboa* rule would require an enjoined defendant "to seek the trial court's permission before she speaks by moving to modify the injunction." *Balboa*, 156 P.3d at 357 (majority opinion). To Justice Guzman's point at oral argument,[9]

[9] Oral argument at 2:38, *Kinney* (question of Justice Guzman).

shifting the burden onto the defendant is "the essence of censorship," which prior restraint doctrine forbids. *Near*, 283 U.S. at 713. All of these changes in circumstances and the corresponding level of First Amendment protection—from a matter of private concern to one of public concern, for example—can happen very rapidly. The First Amendment cannot tolerate restraints on now-protected speech while a court sorts out the changed facts.

c. The U.S. Supreme Court's Obscenity Jurisprudence Is Not Applicable Outside of the Category.

Courts adopting a rule allowing narrow injunctions base their holding on a misapplication of U.S. Supreme Court precedent regarding other situations, *not* involving defamation, in which unprotected speech, particularly obscenity, can be subjected to a prior restraint in the form of an injunction. *See Balboa*, 156 P.3d at 346 (discussing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) and *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973)). These precedents are readily distinguishable. For example, in *Kingsley Books*, the Court explained that injunctions on materials already deemed obscene are "glaringly different" from the injunction of a publication "because its past issues had been found offensive." 354 U.S. 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.*

Pittsburgh Press, the other case relied on by the *Balboa* court, is also distinguishable based on the type of order involved. The case concerned a "narrowly drawn" rule by the Pittsburgh Commission on Human Relations prohibiting the "placement in sex-designated columns of advertisements for nonexempt job opportunities. . . ." 413 U.S. at 391. Despite upholding the order, the U.S. Supreme Court invoked *Near* and "reaffirm[ed] unequivocally the protection afforded to editorial judgment and to the free expression of views . . . however controversial." *Id.* Furthermore, the Court stressed that the Commission's order preventing gender-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. This is entirely different from a permanent injunction issued by a court and backed up by the threat of sanctions for contempt.

It may seem superficially consistent with *Kingsley* and other obscenity cases to allow injunctions against speech found to be defamatory, but the distinction lies in the form of the speech. U.S. Supreme Court precedent on obscenity "ha[s] never been read to authorize such broad limits on speech outside the category . . . . [T]he high court's approval of injunctive relief for obscenity must be viewed in the larger context, in which it has permitted other forms of government regulation of obscene

and sexually explicit speech that would likely be found unconstitutional if applied to other forms of speech." *Balboa*, 156 P.3d at 363 (Werdegar, J., dissenting). Thus, unlike injunctions on particular obscene motion pictures, enjoining "defamatory" speech will inherently reach too far 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." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). As discussed above, this is true even where an injunction is limited to the specific statement found at trial to be false and defamatory.

2. Effective Injunctions Are Inherently Overbroad.

In order to address the efficacy problem, some courts craft a broader injunction that includes not only specific words and phrases but unspecified words and phrases that communicate the same ideas. The trial court in *Burbage* adopted an injunction of this type. *Burbage*, 2011 WL 6756979, at *2 (trial court issued injunction that prohibited the defendant from making "any statement or representation that states, implies or suggests in whole or in part" anything "of the same or similar nature as [the representations] at issue in this lawsuit.").

But these injunctions run headlong into the very problem the injunctions discussed above sought to avoid: They prohibit the publication of words and phrases that have not been adjudicated to be false and defamatory or otherwise

deserving of diminished First Amendment protection. As a result, these injunctions are clearly overbroad. The First Amendment cannot allow "banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). Indeed, this was the very fault identified in *Near*. 283 U.S. at 718-19. Such an injunction 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. *See Oakley*, 879 F. Supp. 2d at 1091 (defendant will have to "1) muzzle his or her now lawful speech, while seeking and awaiting the court's permission to modify the injunction; or 2) speak freely, but risk potentially severe consequences if the court were to disagree about the lawfulness of the speech").

Moreover, any injunction that requires determining whether a defendant has implied something defamatory will "make it exceptionally difficult to determine whether a particular utterance falls within an injunction's prohibition." *Balboa*, 156 P.3d at 356 (Kennard, J., dissenting). For example, the injunction will sweep in nonactionable speech, such as protected opinion or hyperbole, which may "suggest[]" or "impl[y]" something actionable. *Cf. Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 20 (1990).

As Justice Kennard explained dissenting in *Balboa*, it is impossible to formulate an effective injunction that would not be extremely overinclusive and that would not place the court in the role of the censor, continually deciding what speech is allowed and what is prohibited. *Balboa*, 156 P.3d at 354–55 (Kennard, J., dissenting). It is an inescapable conclusion, therefore, that an injunction in a defamation case is an unconstitutional prior restraint no matter how it is crafted.

C. Damages Are the Proper Remedy for Defamation.

Precluding prior restraints does not leave those defamed without remedy. Successful defamation plaintiffs have the ability to recover damages. In *Sullivan*, the U.S. Supreme 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." 364 U.S. at 277-78. In the case of private individuals, the Constitution places a lower bar to the recovery of damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, 350 (1974).

The U.S. Supreme Court's precedent makes clear that in light of the dangers of prior restraints, damages are the correct remedy in a defamation case. In *Near*, the Court drew a line between damages as a permissible remedy for past speech and an impermissible system that proscribes future speech: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find

their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Near*, 283 U.S. at 718-19.

The minority of courts that have allowed the issuance of injunctions in defamation cases have pointed to the possibility that damages are insufficient to deter very poor, "judgment-proof" defendants, or very rich defendants for whom damages are a mere annoyance. *Balboa*, 156 P.3d at 351. These courts posit that absent an injunction, they will be powerless to stop such individuals from repeatedly defaming a helpless plaintiff. *Id*. Indeed, at oral argument the concern was raised of an impoverished "serial defamer" who can only be deterred with an injunction.[10]

As a preliminary matter, this is a troubling argument, since it potentially links defendants' constitutional protections to their relative financial status. There is no precedent for such disparate treatment. Moreover, it is doubtful that such a person would be deterred by the threat of contempt and fines. A judgment-proof serial defamer will likely be as disinclined to pay a contempt fine as he would a damages award. Finally, it casts the court in the role of speech-police, continually monitoring an enjoined defendant's behavior.

[10] Oral argument at 33:40, *Burbage* (discussion of Burbage petitioner's pauper's affidavit and deterrence of damages remedy).

Ultimately, the traditional rule that equity will not enjoin a libel embodies a judgment that in order to preserve free speech, some objectionable statements cannot be prevented before they occur. "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).

CONCLUSION

As the U.S. Supreme Court has recently reaffirmed, the First Amendment at times requires that even demonstrably false speech not be suppressed. *Alvarez*, 132 S. Ct. at 2550. As a result, courts should not alter the rule barring injunctions in defamation cases out of a concern that damages are insufficient. Such a concern, while understandable, upsets a fundamental premise of the First Amendment.

For the foregoing reasons, the judgments of the appellate court should be affirmed on this issue.

Dated: February 6, 2014 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned hereby certifies that this amicus brief complies with the applicable word count limitation because it contains 5,040 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word- count function in Microsoft Word 2010, which was used to prepare this brief.

Dated: February 6, 2014 /s/ *Marc A. Fuller*

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2014, a true and correct copy of the foregoing motion was served on the following counsel of record through an authorized electronic service provider:

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