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 Petition for Review from the Third Court of Appeals

PETITIONER ROBERT KINNEY'S BRIEF ON THE MERITS

Andrew J. Sarne
State Bar No. 00797380
KANE RUSSELL COLEMAN & LOGAN, P.C.
919 Milam, Suite 2200
Houston, Texas 77002
Telephone: (713) 425-7400
Asarne@krcl.com

Martin J. Siegel
State Bar No. 18342125
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566
Martin@siegelfirm.com

Attorneys for Petitioner

IDENTITY OF PARTIES AND COUNSEL

Petitioner:

Robert Kinney

Petitioner's counsel in this Court:

Martin J. Siegel
Law Offices of Martin J. Siegel, P.C.
Bank of America Center
700 Louisiana St., Suite 2300
Houston, TX 77002

Andrew J. Sarne
Kane Russell Coleman & Logan PC
919 Milam, Suite 2200
Houston, Texas 77002

Petitioner's counsel in the court of appeals:

Andrew J. Sarne
Kane Russell Coleman & Logan PC
919 Milam, Suite 2200
Houston, Texas 77002

Petitioner's counsel in the trial court:

Stewart Hoffer
Hicks Thomas LLP
700 Louisiana, Suite 2000
Houston, Texas 77002

Respondents:

Andrew Harrison Barnes
BCG Attorney Search, Inc.
Employment Crossing, Inc.
JD Journal, Inc.

Respondents' counsel in all courts:

Dale L. Roberts
Daniel Byrne
Eleanor Ruffner
Fritz, Byrne, Head & Harrison, PLLC
98 San Jacinto Blvd., Suite 2000
Austin, Texas 78701

TABLE OF CONTENTS

INDEX OF AUTHORITIES

page

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

STATEMENT OF THE CASE

Nature of the case:	This is a suit for defamation brought by Plaintiff Robert Kinney against Defendants Andrew Harrison Barnes; BCG Attorney Search, Inc.; Employment Crossing, Inc.; and JD Journal, Inc.
Trial court and Judge:	The Honorable David Phillips, County Court at Law Number 1 of Travis County, Texas.
Disposition in the trial court:	The trial court granted the Defendants' motion for summary judgment and entered an order dismissing Plaintiff's claims.
Course of proceedings in the court of appeals:	Kinney appealed to the Third Court of Appeals in Austin. All defendants remained parties to the appeal. The panel consisted of Chief Justice J. Woodfin Jones and Justices Diane Henson and Melissa Goodwin. The court of appeals affirmed the trial court's judgment in an unpublished memorandum opinion authored by Justice Goodwin. *See Kinney v. Barnes*, No. 03-10-00657-CV, 2012 WL 5974092 (Tex. App. – Austin, Nov. 21, 2012).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under § 22.001(a)(3) of the Texas Government Code because the construction of Article I, Section 8 of the Texas Constitution is necessary to the determination of this case.

The Court also has jurisdiction over this appeal under § 22.001(a)(6) of the Texas Government Code because the court of appeals has committed an error of law that is of such importance to the jurisprudence of this state that it requires correction by this Court, and the court of appeals' jurisdiction is not final under any statute.

ISSUE PRESENTED

Whether a permanent injunction ordering the removal of statements online that have been found to be defamatory after a full adjudication on the merits is permissible under the Texas Constitution.

INTRODUCTION

Suppose someone posts an outrageously false and offensive description of a private figure on a website. The victim sues and wins a verdict that the statements are defamatory, but the court holds the lies have to remain on the website anyway, and that the only remedy is damages. Never mind that whoever launched the attack might have no money, or so much money that the prospect of serial awards is no deterrent. The smear can remain online *forever* regardless, though all its target really wanted is for it to be taken down so fewer people might see or believe it.

This result seems absurd and would likely dumbfound ordinary citizens, who might assume courts are empowered to stop illegal character assassination. Yet it is endorsed by the court of appeals' decision in this case. Robert Kinney sued Andrew Barnes and his companies alleging that they defamed him in a statement on their websites. The only relief he seeks is a permanent injunction ordering them to remove the defamation and to ask other websites to do the same. But the trial court dismissed the case on summary judgment and the court of appeals affirmed, holding that an injunction against defamation would violate the Texas Constitution even if it is entered after discovery and trial on the merits. The court relied on two decades-old decisions of this Court that do not involve the sort of order

Kinney seeks. It also ignored key authority from the U.S. Supreme Court holding that injunctions against constitutionally unprotected speech such as defamation are permissible if they follow full adjudication on the merits.

The decision below reflects the traditional principle that "equity will not enjoin a libel." But numerous states have abandoned that outdated rule over the last several years, and this Court should now do likewise. Once speech is found at trial to be defamatory, there is no justification for granting it eternal life online. This is particularly true given the power of the internet, which postdates this Court's last consideration of these issues. The internet enables damaging lies to reach millions of readers after only a few moments of effort. It can also facilitate harmful and unprotected expression like cyber-bullying and online hate speech, which are mushrooming. Injunctive relief should be available to address these evils where appropriate.

Justice Stewart once wrote that "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). This Court should uphold this fundamental value, grant the petition, and reinstate Kinney's case.

STATEMENT OF FACTS

BCG employed Kinney as a legal recruiter until 2004, when he left to form his own recruiting firm. App. 003, CR 5.[1] Barnes is BCG's president. CR 3. In 2009, Barnes sued Kinney in California and posted an article or press release about the case on the website JDJournal.com. CR 5-6. Barnes is the President of JD Journal, Inc. CR 4. The article included a three-sentence paragraph accusing Kinney of orchestrating "an unethical kickback scheme" and paying a "bribe" to an associate at a law firm where Kinney hoped to place a candidate:

> The complaint also alleges that when Kinney was an employee of BCG Attorney Search in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston, Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

App. 003, CR 6, 16-17. This statement also appeared on another of Barnes's websites, Employmentcrossing.com. App. 003, CR 3-6.[2]

---

[1] "App." refers to the appendix filed with the petition for review. "CR" refers to the clerk's record. An excerpt of the appendix containing the memorandum opinion of the court of appeals is attached to this brief.

[2] The articles remain online today. *See* http://www.jdjournal.com/2009/08/07/bcg-attorney-search%E2%80%99s-barnes-sues-competitor-kinney-recruiting/ (last visited August 6, 2013); http://www.employmentcrossing.com/lcviewblog.php?id=4220 (last visited August 6, 2013).

Kinney sued Barnes and the other defendants in County Court at Law Number One in Travis County. App. 002, CR 2-25. He alleges that "Barnes knew… [he] had no scheme to pay cash kickbacks to anyone" and therefore asserts that the paragraph accusing him of paying the associate is false and defamatory. CR 6-7. He brings claims for defamation and defamation per se and seeks only injunctive relief. App. 003, CR 7-8, 15. Specifically, Kinney requests a permanent injunction following trial on the merits ordering the defendants to remove the text relating to kickbacks from their websites and to ask other website operators that are republishing the defamatory statements to remove them as well. App. 003-04, CR 7-8.[3]

The defendants moved for summary judgment on the sole ground that the permanent injunction Kinney requests would constitute a prior restraint in violation of Article I, Section 8 of the Texas Constitution. App. 004, CR 24-25. The trial court granted the motion and also denied leave for Kinney to amend his petition. App. 001, CR 76.

The Third Court of Appeals affirmed the summary judgment and held that Kinney's requested order would violate Article I, Section 8. App. 006-08. The court decided that affirmance was required by two of this Court's

---

[3] Kinney's petition additionally requested that the injunction require defendants to post a copy of the court's order, a retraction, and a letter of apology on their websites, but he does not appeal this aspect of the summary judgment. CR 8, App. 004, 009 n. 6.

decisions invalidating court orders as prior restraints: *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253 (Tex. 1983), and *Ex Parte Tucker*, 220 S.W. 75 (Tex. 1920). App. 006-07. Kinney pointed out that *Hajek* involves temporary rather than permanent injunctions, but the court of appeals concluded that "nothing in the holding of *Hajek* suggests that the rule concerning prior restraint should be limited to temporary injunctions." App. 008. Quoting *Tucker*, the court held that damages are the only permissible remedy for defamation. *Id.*

SUMMARY OF ARGUMENT

There is no constitutional bar to the permanent injunction Kinney requests. This Court's precedent indicates that the question here should be analyzed using First Amendment standards, since the Texas Constitution's free speech guaranty does not impose a different test in these circumstances. Several decisions of the U.S. Supreme Court confirm that an injunction restricting constitutionally unprotected speech such as defamation after a full adjudication on the merits is not a prior restraint and fully complies with the First Amendment. Lower federal and state court decisions hold likewise. Moreover, the requested injunction is constitutional because it does not vest an administrative official with the power to censor protected speech – a hallmark of systems enforcing prior restraints. Indeed, the Supreme Court

has held that even prior restraints are constitutional if the party seeking it proves the speech is unprotected, if any preliminary restriction is brief and maintains the status quo, and if there is a prompt judicial determination on the merits. Kinney's requested injunction meets all these criteria and therefore complies with Article I, Section 8. *See* Point I, *infra*.

Once the constitutional objection is cleared away, no basis remains to prohibit all injunctions in all defamation lawsuits and to dismiss Kinney's case. The traditional rule that "equity will not enjoin a libel" is being abandoned in state after state, and there are sound reasons for the change. The rule stems more from the historical division between law and equity inherited from England than from contemporary legal analysis. And there are several circumstances when denying all possibility of injunctive relief leaves deserving plaintiffs without a remedy, as when defendants cannot pay monetary awards. Moreover, defamation plaintiffs often just want an end to the smears, not money. The advent of the internet provides further justification for allowing injunctions. The internet makes it far easier to defame someone. Cyber-bullying and online hate speech are often forms of defamation that could be addressed by injunctions in suitable cases. The Court should think anew rather than mechanically apply outdated formulas. *See* Point II, *infra*.

The Court should therefore grant the petition and reverse the decision below.

ARGUMENT

I. A Permanent Injunction Removing Speech Found To Be Defamatory Would Not Violate the Texas Constitution

A. First Amendment Standards Should Guide the Court's Decision

Injunctions regulating speech are judged according to the same standards under the Texas Constitution and the First Amendment. The Court should therefore ask whether the First Amendment erects any barrier to Kinney's request for an injunction.[4]

The Texas Constitution provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

TEX. CONST. art I, § 8. This Court has sometimes suggested this provision extends greater rights than the First Amendment. *See, e.g., Davenport v.*

---

[4] The Court reviews the court of appeals' decision on the constitutional question de novo. *See Fin. Comm'n of Tex. v. Norwood*, __ S.W.3d __, 2013 WL 3119481 at * 10 (Tex. June 21, 2013).

Garcia, 834 S.W.2d 4, 8-9 (Tex. 1992); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 402 (Tex. 1988). More recently, however, it has clarified how the two guarantees compare:

> It is possible that Article I, Section 8 may be more protective of speech in some instances than the First Amendment, but if it is, it must be because of the text, history, and purpose of the provision, not just simply *because.* Starting from the premise that the state constitutional provision *must* be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards. To define the protections of Article I, Section 8 simply as one notch above First Amendment protections is to deny state constitutional guarantees any principled moorings whatever. We reject this approach.

Operation Rescue-National v. Planned Parenthood of Houston and S.E. Tex., Inc. 975 S.W.2d 546, 559 (Tex. 1998) (emphasis in original); *accord Tex. Dept. of Transp. v. Barber*, 111 S.W.3d 86, 106 (Tex. 2003), *cert denied*, 540 U.S. 1177 (2004). "The mere assertion that the state provision is broader than the federal means nothing." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (2002).

As for injunctions, "[t]he text, history, and purposes of Article I, Section 8 have been thoroughly examined by this Court," and there is "nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment." *Operation Rescue-National*, 975 S.W.2d at 559; *see also Ex Parte Tucci*,

859 S.W.2d 1, 21-23 (Tex. 1993) (Phillips, C.J., concurring) (protections against prior restraints the same under both constitutions); *Davenport*, 834 S.W.2d at 35 (Hecht, J., concurring) ("The truth of the matter is that all our prior caselaw either assumes a close identity between the First Amendment and article I, section 8, or is silent on the subject").

The Court has also declined to hold that defamation defendants somehow enjoy greater rights under the Texas Constitution. "If anything, in the context of defamation, the First Amendment affords more protection." *Bentley*, 94 S.W.3d at 578. This stems directly from the charter's text. Unlike the First Amendment, Article I, Section 8 refers to speakers "being responsible for abuse of th[e] privilege" of free expression, while Article I, Section 13 guarantees a judicial remedy for damage to reputation. TEX. CONST. art. I, §§ 8, 13; *Turner v. KTRK Television*, 38 S.W.3d 103, 116-17 (Tex. 2000); *Casso v. Brand*, 776 S.W. 3d 551, 556 (Tex. 1989). The Court has therefore repeatedly rejected attempts to use the Texas Constitution to craft broader protections in defamation cases, instead typically weighing claims according to First Amendment standards.[5]

---

[5] *See, e.g., Neely v. Wilson*, __ S.W.3d __, 2013 WL 3240040 at ** 4-6, 17-19 (Tex. June 28, 2013) (noting federal constitutional principles while discussing defamation elements and defenses and declining to ease summary judgment standards); *Hancock v. Variyam*, __ S.W.3d __, 2013 WL 2150468 at ** 3-4 (Tex. May 17, 2013) (applying federal decisions and First Amendment rules to "constitutional framework" governing defamation per se); *Bentley*, 94 S.W.3d at 578-79 (Where there are no apparent, material

Accordingly, the Court should ask whether Kinney's prayer for a permanent injunction violates the First Amendment. If it does not, the lower courts erroneously dismissed the case.

B. The First Amendment Does Not Proscribe Kinney's Requested Injunction

Certain orders precluding speech raise First Amendment concerns because they stifle the speaker before a court can fully adjudicate whether her communication is constitutionally protected, and because they reflect unchecked administrative power. Conversely, the United States Supreme Court and lower federal and state courts have approved injunctions limiting speech when they follow a final judicial determination that the speech is unprotected, and when the procedures involved constrain the decision-maker's discretion. Because the permanent injunction Kinney seeks falls in this latter category, it would not violate the First Amendment.

---

differences in state and federal constitutional guarantees, "we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8"); *Turner*, 38 S.W.3d at 117 (Texas constitution permits public figure to bring defamation claim where publication as a whole is defamatory); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (determining whether plaintiff is limited purpose public figure according to federal law), *cert. denied*, 526 U.S. 1051 (1999); *Casso*, 776 S.W.2d at 556 (Texas Constitution does not compel different summary judgment procedure for public figure defamation cases).

1. Speech May Be Enjoined After a Final Judicial Determination that it Lacks Constitutional Protection

The Supreme Court has repeatedly distinguished between impermissible "prior restraints" that preclude speech before it reaches listeners, and allowable remedial orders after trial that remove preexisting speech found to lie outside First Amendment protection. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotation and emphasis omitted). "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961) (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957)); *accord Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) ("Labeling respondents' action a prior restraint does not end the inquiry"). Rather, courts must apply "closer analysis and critical judgment" to make "a pragmatic assessment of [a restriction's] operation in the particular circumstances." *Kingsley Books*, 354 U.S. at 442 (quotation omitted). This more searching evaluation confirms that post-adjudication, remedial injunctions in defamation cases comply with the First Amendment.

In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, the Supreme Court confronted a court order enforcing a local anti-discrimination ordinance that prohibited a newspaper from running gender-specific help-wanted ads, such as "Jobs – Male Interest." 413 U.S. 376, 379 (1973). The newspaper challenged the order as a prior restraint, but the Court disagreed, noting "it has never held that all injunctions [limiting speech] are impermissible." *Id.* at 390. The Court concluded that the advertisements were properly illegal under the ordinance and, for that reason, were not protected expression. *See id.* at 388. Nor did the rule against prior restraints require reversing the injunction:

> The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.
>
> The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. Cf. *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected

Id. at 390.

The Court reached a similar conclusion in *Kingsley Books*. New York law allowed municipalities to bar "the sale and distribution of written and printed matter found after due trial to be obscene." 354 U.S. at 437. A lower court found certain booklets to be obscene following a trial, enjoined further distribution, and ordered the material destroyed. *Id.* at 439. It refused to enjoin other booklets that had not been found obscene. *See id.* Because the booklets had been "on sale for several weeks when process was served," the Court held that the order constituted permissible "subsequent penalization" akin to prosecution. *Id.* at 1328-29. It distinguished the foundational prior restraint decision, *Near v. Minnesota*, 283 U.S. 697 (1931): "Unlike *Near*, [the statute] is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive." *Id.* at 445.

More recent Supreme Court decisions have also recognized the distinction between prior restraints and post-trial remedial injunctions. For example, the Court wrote approvingly of Georgia's procedure permitting civil injunctions against obscene material in *Paris Adult Theatre I v. Slaton*: "Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally

unprotected." 413 U.S. 49, 55 (1973). The same principle underlay the Court's observation in *Alexander* that "[t]he constitutional infirmity in nearly all of our prior restraint cases involving obscene material... was that the Government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." 509 U.S. at 551. This contrasted with the order in *Alexander*, which was "directly related to petitioner's past racketeering violations." *Id.*; *accord Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316 (1980).

Similar commentary appears in *Nebraska Press Assoc. v. Stuart*, where the Court struck down a "gag order" precluding the press from reporting on a pending case. *See* 427 U.S. 539 (1976). The Court specifically contrasted prior restraints with remedial steps in defamation cases: "A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative." *Id.* at 559. "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction." *Id.*

Finally, Justice Scalia discussed the distinction between prior restraints and remedial injunctions in his dissent from the denial of certiorari

in *Lawson v. Murray*. *See* 515 U.S. 1110 (1995). He faulted the lower court in *Lawson* for enjoining anti-abortion picketing in a residential neighborhood because the protesters had not previously violated any law that might justify curtailing their speech as a remedy:

> The Federal Constitution does not, of course, directly require that an injunction issue only [where there has been a previous violation of a statute or court order]. But where injunctions *that prohibit speech* are concerned, the Free Speech and Free Press Clauses of the First Amendment impose that requirement indirectly. All speech-restricting injunctions are prior restraints in the literal sense of administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. Precedent shows that a speech-restricting "injunction" that is not issued as a *remedy* for an adjudicated or impending violation of law is also a prior restraint in the condemnatory sense, that is, a prior restraint of the sort prohibited by the First Amendment.

Id. at 1113 (emphasis in original, citation omitted); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n. 2 (1994) (endorsing speech-restricting injunction entered because of "prior unlawful conduct").

The Supreme Court has yet to decide a case exactly like this one, where the plaintiff seeks nothing more than a permanent injunction in a defamation case.[6] But its existing decisions leave no doubt such an order passes muster as long as it follows full adjudication and a finding that the

---

[6] The question at issue here was briefed and argued to the Supreme Court in *Tory v. Cochran*, but Cochran's death before the decision issued mooted it. *See* 544 U.S. 734, 735-36 (2005); David McCarthy, *Equity Will Not Enjoin Libel: Was an "Iron Law" Saved by the Death of Johnnie Cochran?*, 21 DCBA BRIEF 8 (July 2009).

affected speech is unprotected. *See Kramer v. Thompson*, 947 F.2d 666, 676 n. 25 (3d Cir. 1991) (Supreme Court's decisions "all appear to agree that a full jury determination as to the protected status of speech is adequate to support the issuance of an injunction"). Decisions from lower courts – including the supreme courts of several states and various federal courts – also make the same distinction between pre- and post-adjudication orders and have approved permanent injunctions curtailing defamatory speech. *See infra.* at Point II(B).

2. Injunctions That Do Not Give Censors Leeway to Ban Permissible Speech Are Constitutional

In addition to limiting speech before a final adjudication on the merits, prior restraints have a second hallmark: they grant constitutionally excessive discretion to officials to prohibit speech. Injunctions concerning specific material that has already been published present no such difficulty.

The essence of a system of prior restraints is a state official's authority to review communication in advance and, wielding his unchecked power, approve or censor it. "In such cases, it is the very existence of unbridled discretion that is constitutionally unacceptable because it 'intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.'" *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir.

1993) (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988)), *cert denied*, 511 U.S. 1069 (1994)

Thus, in *Near*, the infirm order generally forbade circulation of any "malicious, scandalous or defamatory" matter in a newspaper and permitted advance suppression of future issues based solely on a judge's assessment that they met this broad and vague description. 283 U.S. at 706, 712-13. In *Schneider v. State of New Jersey*, the Court invalidated an ordinance prohibiting canvassing without a permit from the chief of police, who first examined the applicant's character and the nature of the material to be distributed. *See* 308 U.S. 147, 149, 152 (1939). The Court struck down the law because a person's "liberty to communicate with the residents of the town at their homes depend[ed] upon the exercise of the officer's discretion." *Id.* at 152. In *Kuntz v. New York*, a statute made it "unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner." 340 U.S. 290, 291 (1951). The Court invalidated the law because it conferred excessive latitude on a government censor:

> We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

Id. at 293; *accord Saia v. New York*, 334 U.S. 558, 560-61 (1948).[7]

On the other hand, the First Amendment authorizes limitations on speech that do not flow from a censor's broad discretion and consequently feature effective procedural protections. Even prior restraints are constitutional if they occur "under procedural safeguards designed to obviate the dangers of a censorship system." *Southeastern Promotions*, 420 U.S. at 559 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)). As long as the party seeking to curtail speech bears the burden of showing it is unprotected, any preliminary restriction is brief and maintains the status quo, and there is a prompt judicial determination on the merits, even prior restraints may be imposed. *Id.*; *see also Alexander*, 509 U.S. at 552 ("Nor were the assets in question ordered forfeited without according petitioner the requisite procedural safeguards, another recurring theme in our prior restraint cases"); *Freedman*, 380 U.S. at 58-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). These procedures help avert the kind of unchecked discretion that can lead to self-censorship, and so alleviate constitutional concerns.

---

[7] Some orders or statutes confer no discretion to decide whether particular speech is allowed but constitute prior restraints because they forbid *all* speech by specific parties in advance. For example, the invalid injunction in *Org. for a Better Austin v. Keefe* operated "to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." 402 U.S. 415, 418-19 (1971). Obviously, Kinney's requested injunction does not present this even graver problem either.

3. The Permanent Injunction Kinney Seeks is Consistent With First Amendment Principles Permitting Orders Limiting Speech

The permanent injunction Kinney would obtain if he prevails at trial complies with the two First Amendment tenets described above: it would follow a final adjudication on the merits, and it eschews excessive administrative discretion with its correspondingly lax procedural protections.

First, if the court finds after trial on the merits that the three-sentence passage Kinney targets is defamatory, the speech can be prohibited because defamation is not protected by the First Amendment. "For a prior restraint to violate the First Amendment, it must prohibit protected activity." *Davenport*, 834 S.W.2d at 27 (Hecht, J., concurring). Defamation may be suppressed because "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quotation omitted). "Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). The Supreme Court has maintained a categorical approach to speech that excludes defamation from most First Amendment protection along with other types of

speech like obscenity and "fighting words." *See United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Short of constitutionally dubious measures like the content-based scheme rejected in *R.A.V.* or the deficient procedures condemned in the prior restraint cases, these classes of speech may be proscribed.[8]

Moreover, "speech on matters of purely private concern is of less First Amendment concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985). Where, as here, the defamation does not involve public issues and the plaintiff is not a public figure, "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Id.* (quotation omitted). This fact further distinguishes this case from *Near*, where the infirm statute was "not aimed at the redress of individual or

---

[8] The court of appeals held that Kinney waived any argument that an injunction can be entered because defamation is not constitutionally protected. App. 005-06. But the court of appeals reached the issue itself and rejected Kinney's contention in this regard. It contrasted other forms of unprotected speech, such as misleading commercial speech and threats, with defamation and held that whether Barnes's statements are proved to constitute defamation does not matter because "even if [they are] determined to be defamatory, [they are] still constitutionally protected." App. 008 n. 4. In fact, defamation is *not* constitutionally protected in any sense that would preclude the requested injunction, as Kinney shows herein. Thus, because the court of appeals reached the issue, this Court can consider the effect of defamation's unprotected status on the parties' positions and the constitutional analysis.

private wrongs." 283 U.S. at 628. The *Near* Court contrasted that case with others that raise "questions as to the extent of authority to prevent publications in order to protect private rights according to [equitable] principles," and cited a well-known article urging abandonment of the old rule against equity enjoining libel. *Id.* at 631 and n. 7. (citing Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personalty*, 29 HARV. L. REV. 640 (1916)). Kinney's case is precisely the sort *Near* took pains to distinguish: one where the plaintiff seeks to redress an individual and private wrong through ordinary equitable relief. *See also Keefe*, 402 U.S. at 418-19 (invalid injunction did not operate "to redress alleged private wrongs").

All Kinney seeks is a permanent injunction after a trial on the merits. Such an injunction would thus be permissible – and not considered an invalid prior restraint – under the *Pittsburgh Press* and *Kingsley Books* line of cases discussed above. *See* Point I(A), *supra*. No communication "will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390. The injunction would therefore comport with the First Amendment.

Second, granting the permanent injunction Kinney seeks would not give a censor discretion to ban potentially protected speech. Kinney only

seeks removal of three sentences that have been online for years, and only after they are found defamatory after trial. This is qualitatively different from an open-ended ordinance, administrative decision, or judicial order that generically instructs a speaker to stop engaging in, say, "scandalous or defamatory" speech, leaving him to guess if his future utterances qualify. *Near*, 283 U.S. at 702. Nor does it resemble schemes requiring speakers to obtain advance approval from a state official given free rein to decide if the speech falls into a broad class of prohibited expression, as in *Schneider* and *Saia*. Vesting officials with discretion to suppress speech before it occurs is constitutionally problematic 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*, 420 U.S. at 1246-47. Here, we know what Barnes will say because he has already said it, and no official is granted leeway to suppress anything else.

Similarly, even if the permanent injunction requested in this case somehow amounted to a prior restraint, the procedural protections provided in the trial court would alleviate any constitutional concerns. The three safeguards outlined in *Southeastern Promotions* and *Freedman* are all present. *See* 420 U.S. at 559; 380 U.S. at 58. Kinney would have to prove

the speech is defamatory before any restriction took effect, he does not seek a temporary injunction, and there will be a judicial determination on the merits (it need not be "prompt" since no temporary order is in effect). *See id.* These procedural elements would further insulate any injunction from constitutional objection.

* * * *

The permanent injunction Kinney seeks meets every test imposed by the First Amendment. It would follow trial, affect only unprotected speech, and avoid the problems caused by conferring excessive official discretion coupled with weak procedural safeguards. The courts below therefore erred in holding it would run afoul of the state's constitution.

II. Texas Should Join the Jurisdictions That Have Recently Decided to Permit Permanent Injunctions Against Defamation

Because Kinney's injunction is consistent with the First Amendment, there is no basis to deny it simply because the remedy was traditionally disfavored. Courts around the country have recently abandoned the old view and now permit permanent injunctions in defamation cases, and sound legal and policy reasons support the change. This Court should follow suit.

A. This Court Has Never Faced This Question Before

Initially, the Court's precedent does not preclude granting Kinney's injunction. The court of appeals' view that *Hajek* and *Tucker* control this case is misguided. In *Hajek*, a car dealer obtained a temporary injunction preventing "Hajek from driving his vehicle in the community with a defamatory message painted on all four sides that Mowbray Motors sold him a 'lemon.'" 647 S.W.2d at 254. The Court described the temporary injunction as a "prior restraint" and ordered it dissolved. *Id.* But Kinney does not seek a temporary injunction. An applicant for a temporary injunction "is not required to establish that she will prevail on final trial; the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits." *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). A permanent injunction does require winning on the merits – here, obtaining a factual finding that Barnes's statements are defamatory and therefore constitutionally unprotected. *Hajek* does contain the sweeping statement, "[d]efamation alone is not a sufficient justification for restraining an individual's right to speak freely," but it is *dicta* when applied to requests for relief other than temporary injunctions. 647 S.W.2d at 255.

In *Tucker*, the trial court enjoined union members from "vilifying, abusing, or using opprobrious epithets" to phone company employees. 220 S.W. at 75. When a union member was later held in contempt for insulting an operator, the Court voided the injunction. *Id.* at 76. But *Tucker* is inapplicable for the same reason as *Hajek*: it did not review an order enjoining speech already held unprotected after trial. The trial court in *Tucker* generically enjoined defendants from verbally abusing employees; it did not enjoin specific statements previously found to be defamatory. As a result, no one could be certain his speech would comply with the order, given its generality and breadth. It therefore operated as a true prior restraint: an advance prohibition on speech not yet uttered and a grant of unlimited discretion to sanction unwitting violators through the contempt power. As in *Hajek*, the decision's sweeping language condemning all other kinds of injunctions affecting speech is *dicta*. *See* 220 S.W. at 76.

The court of appeals was therefore wrong to conclude its hands were tied by *Hajek* and *Tucker*.[9]

---

[9] While some lower courts have also read *Tucker* and *Hajek* to preclude injunctions in all defamation cases, others have affirmed orders restricting unprotected expression, including defamation accompanied by other harm such as damage to a business. *See, e.g.,* TEX. CONST. art. I, § 8, Interpretive Commentary (Vernon's 2007) ("Holdings have also emanated from the Texas courts that an injunction directed to restrain utterances may issue in a proper case without a denial of the guarantee [of free speech]," citing cases); *Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Southeast, Inc.*, 326 S.W.3d 352, 362 (Tex. App. – Houston [1st Dist.] 2010) (enjoining lawyer from disclosing privileged

B. The Increasingly Widespread "Modern Rule" Would Permit the Injunction

Although the issue is new to this Court, many others have recently elected to permit remedial permanent injunctions in defamation cases. "The role of equitable relief in defamation, privacy, and related litigation is evolving. There is a traditional maxim that 'equity will not enjoin a libel.' This maxim, however, is giving way to more nuanced analysis suggesting that, in appropriate circumstances, equitable relief may be appropriate." Rodney A. Smolla, LAW OF DEFAMATION § 9.95 (2d ed. 2013). Hence, "[o]ver the past thirty years, several state courts of last resort have upheld injunctions restraining defamatory speech. So have federal appellate

---

information); *Allen-Burch, Inc. v. Tex. Alcoholic Beverage Comm'n*, 104 S.W.3d 345, 353 (Tex. App. – Dallas 2003) (affirming permit cancellation due to "lewd sexual conduct"); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 394-95 (Tex. App. – Austin 2000) (affirming injunction against misleading commercial speech); *Karamchandani v. Ground Tech., Inc.*, 678 S.W.2d 580, 582 (Tex. App. – Houston [14th Dist.] 1984) (affirming order enjoining "private communication" to coerce recipients into boycotting appellee); *Locke v. State*, 516 S.W.2d 949, 954-55 (Tex. Civ. App. – Texarkana 1974) (affirming order suppressing obscene films); *Kelley v. Tex. State Bd. of Med. Examiners*, 467 S.W.2d 539, 545-46 (Tex. App. – Ft. Worth 1971, writ ref'd n.r.e.) (affirming injunction against book that endangered consumers), *cert. denied*, 405 U.S. 1073 (1972); *Carpenters and Joiners Union of Am., Local No. 213 v. Ritter's Café*, 149 S.W.2d 694, 699 (Tex. Civ. App. – Galveston 1941, writ ref.) (affirming order enjoining labor picketing violating Texas antitrust law), *aff'd* 315 U.S. 722 (1942); *Hawks v. Yancey*, 265 S.W. 233, 239 (Tex. Civ. App. – Dallas 1923) (enjoining conduct, including speech, that harassed and humiliated plaintiff, and rejecting claims that equity will not protect personal rights and that Article I, Section 8 precludes order). Libel has been restrained in cases where it is accompanied by commercial conduct, such as unfair competition, that is subject to injunctive relief. *See* C.C.S., *Recent Case, Injunction – Restraint of Libel to Preserve Business*, 16 TEX. L. REV. 111, 111-12 (Dec. 1937) (collecting cases).

courts." Stephen A. Siegel, *Injunctions for Defamation, Juries and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 657 (July 2008).

For example, the Kentucky Supreme Court recently confronted a case featuring online defamation and embraced what it called "the modern rule" permitting injunctions against defamatory speech. *See Hill v. Petrotech Resources Corp.,* 325 S.W.3d 302, 309 (Ky. 2010). The court acknowledged the traditional approach and its remaining supporters but was persuaded to join what "appears to be an emerging modern trend toward permitting such injunctions upon a *final* adjudication that the speech under question is false." *Id.* (emphasis in original).

The California Supreme Court also undertook an exhaustive survey of the subject and embraced the modern rule. *See Balboa Island Village Inn, Inc. v. Lemen*, 156 P. 3d 339 (Cal. 2007). Analyzing English and American precedent beginning in the nineteenth century, the court held that "an injunction, issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression. 'Once specific expressional acts are properly determined to be unprotected by the first amendment, there can be no objection to their subsequent suppression or prosecution.'" *Id.* at 349 (quoting Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW § 12-37 (2d ed. 1988)).

The Minnesota Supreme Court reached the same conclusion in affirming a permanent injunction barring a manufacturer from continuing to publish material disparaging a rival. *See Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1 (Minn. 1984). The court acknowledged that decisions like *Near* and *Keefe* "may once have stood for the proposition that any injunction against speech activity was a 'prior restraint' on speech," but it held that other case law including *Pittsburgh Press* endorsed injunctions after a determination that the speech involved is unprotected. *See id.* at 11. Because the defendants had "circulated their material for a number of years" and a "judicial tribunal ha[d], after full adversarial proceedings," found it libelous, the court affirmed the injunction. *See id.* Other state supreme and intermediate appellate courts have also adopted the modern rule.[10] Notably, many have constitutional provisions that are essentially identical to Article I, Section 8.[11]

---

[10] *See, e.g., St. James Healthcare v. Cole*, 178 P.3d 696, 705 (Mont. 2008) (approving post-adjudication injunctions for unprotected speech); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62-63 (Ga. 1975) (citing *Pittsburg Press* and affirming permanent injunction after jury found defendant committed "repetitive" defamation); *O'Brien v. University Comm. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975) (approving post-adjudication injunction); *Chambers v. Scutieri*, 2013 WL 1337935 at ** 13-14 (N.J. Super. Ct. App. Div. April 4, 2013) (same); *DePuis v. Kemp*, 2006 WL 401125 at * 3 (Mich. Ct. App. Feb. 21, 2006) (same); *Nolan v. Campbell*, 690 N.W.2d 638, 652-53 (Neb. App. 2004, rev. overruled) (same); *but see, e.g., The Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus.*, 999 A.2d 184, 194-97 (N.H. 2010); *Weiss v. Weiss*, 5 So.3d 758, 760 (Fl. Dist. Ct. App. 2009); *Kramer*, 947 F.2d at 677 (though court found "reasons and policies undergirding" cases adopting modern rule to be "quite persuasive," it predicted Pennsylvania would adhere to traditional rule in applying state constitution).

Federal courts have done the same. Citing *Pittsburgh Press*, the First Circuit noted that "[a]n injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." *Auburn Police Union*, 8 F.3d at 903. The court upheld a Maine law that authorized injunctions limiting solicitation from claims it effected a prior restraint. *See id.* at 903-04. The Sixth Circuit enjoined a defamation defendant for the same reason: "In view of Carpenter's frequent and continuing defamatory statements, an injunction is necessary to prevent future injury to Carolyn Hill's personal reputation and business relations." *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1209 (6th Cir 1990). One district court recently noted that the traditional rule "has been subject to criticism by legal scholars and reevaluation by the courts," and so employed "the modern approach" to permanently enjoin continued defamation under the federal and New Mexico constitutions. *Wagner Equip.*, 893 F. Supp. 2d at 1160-63; *accord Am. Univ. of Antigua Coll. of Med. v. Woodward*, 837 F. Supp. 2d 686, 701-02 (E.D. Mich. 2011); *Saadi*

---

[11] For example, the Kentucky and California analogs to Article I, Section 8 contain language that is more or less identical to the Texas clause's first sentence. *See Tucci*, 859 at 37 (Phillips, C.J., concurring) (Appendix, Compendium of State Free Speech Clauses); *Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1164 (D.N.M. 2012) (adopting modern rule and noting similarity of New Mexico, Kentucky and California provisions). The New Mexico provision is worded differently but is substantively similar. *See id.*

v. Maroun, 2009 WL 3617788 at ** 2-3 (M.D. Fl. 2009); *Schussler v. Webster*, 2009 WL 648925 at * 10 (S.D. Cal. 2009).

The reasons why these state and federal courts have endorsed remedial injunctions in defamation cases are discussed more fully below. In general, this Court "should examine the development of the law in the other states and the federal system and benefit from their experiences." *Tucci*, 859 S.W.2d at 59 (Gonzalez, J., concurring).

C. Sound Legal and Policy Reasons Support Adopting the Modern Rule

Once the constitutional objection to issuing remedial permanent injunctions in defamation cases falls by the wayside, there is no reason left to maintain the old rule, and several persuasive reasons to change course.

First, the rule that equity will not enjoin a libel is a product of the long-buried division between courts of law and courts of equity, but there is no basis for the rule now. In England, libel claims were originally heard in courts of law and the Star Chamber, but abolition of the Star Chamber in the seventeenth century left subsequent courts of equity without jurisdiction to hear defamation cases. *See Balboa Island Village Inn*, 156 P.3d at 1156; *Kwass v. Kersey*, 81 S.E.2d 237, 242-45 (W.Va. 1954); Michael I. Myerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L.

REV. 295, 308-11 (2001). Because we inherited the English division between law and equity, earlier American decisions like *Tucker* apply the rule that equity will not enjoin a libel. "Thus, an extraordinarily important rule was created more as an offshoot of a jurisdictional dispute than as a calculated understanding of the needs of a free press." Myerson, *supra.* at 311; *see also* Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?* 48 BROOK. L. REV. 231, 238 (Winter 1982) (criticizing "formalistic reliance on an age-old equitable maxim, rather than doing justice").[12]

Second, damages are sometimes inadequate to remedy defamation. When they do suffice, permanent injunctions will be unavailable. *See Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 284 (Tex. 2004). When they don't, the traditional prohibition of injunctions in defamation cases leaves plaintiffs without redress. "[T]here has always been a serious anomaly in trying to convert damage to reputation in the absence of proof of specific pecuniary loss and injury to feelings into exact monetary figures." RESTATEMENT (SECOND) OF TORTS § 623, Special Note on Remedies for Defamation Other Than Damages at 326; *see also* Smolla, LAW OF DEFAMATION, *supra* at § 9:87. The Dallas court of appeals recognized this

---

[12] Ironically, English procedure now permits injunctive relief against libel. *See Kwass*, 81 S.E.2d at 245.

almost a century ago: "the personal rights of citizens are infinitely more sacred and by every test are of more value than things that are measured by dollars and cents." *Hawks*, 265 S.W. at 237. And damages are often irrelevant to defamation plaintiffs anyway. Their goal is not remuneration but simply an end to the embarrassment and social harm caused by someone spreading lies about them. As the California Supreme Court put it, "[t]he Inn did not want money from Lemen; it just wanted her to stop." *Balboa Island Village Inn*, 156 P.3d at 351.

Beyond the difficulty in assigning a monetary value to the personal distress caused by defamation, damages can also fail to deter certain people bent on campaigns of personal destruction. "[I]f the threat of potential liability did not deter the defendant's tortious speech in the first instance, there is no guarantee then that an unfavorable judgment would deter a continuing defamation, especially if the defendant were unbalanced and motivated by vindictive feelings toward the plaintiff." Gold, *supra* at 259; *see also Murphy v. Daytona Beach Humane Soc., Inc.*, 176 So. 2d 922, 927 (Fla. Dist. Ct. App. 1965) (Wiggington, J., concurring) (damages will not necessarily deter "the offending party from continuing his slanderous attacks upon the injured party, or prevent continued personal embarrassment").

There is also the problem of defendants unable to pay defamation damages – or too wealthy to care. In either case, there is no good reason for refusing to consider a simple order to remove the defamation. The California Supreme Court rejected arguments against injunctive relief on this ground:

> Accepting Lemen's argument that the only remedy for defamation is an action for damages would mean that a defendant harmed by a continuing pattern of defamation would be required to bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing the tortious behavior. This could occur if the defendant either was so impecunious as to be "judgment proof," or so wealthy as to be willing to pay any resulting judgments. Thus, a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation.

Balboa Island Village Inn 156 P.3d at 351; *see also Schussler*, 2009 WL 648925 at * 9 (no adequate remedy at law in part because of defendant's insolvency).

Overall, permitting injunctive relief can provide a more tailored, discrete, and effective remedy. "Supplementing reasonable damages with a narrowly-framed injunction would shield the defendant from arbitrary verdicts, compensate the plaintiff for his injuries, and at the same time afford precisely the relief sought – freedom from a further besmirching of reputation." Gold, *supra* at 260. The alternative is a series of lawsuits based

on the questionable hope that new and higher damage awards will eventually achieve deterrence, with the plaintiff bearing the up front costs of bringing suit each time and the amount of damages left to a fact-finder's uncertain evaluation. Injunctions represent a less costly and more efficient way to address the precise injury in question.

The traditional rule has suffered more than a century of scholarly criticism, predating even Pound's prominent article in the Harvard Law Review in 1916. *See* Pound, *supra* at 668 ("the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion"); *Note, The Restraint of Libel by Injunction*, 15 HARV. L. REV. 734 (1902). "Pound's work has spawned a considerable body of literature over the years which has criticized the common-law rule, lamented the inadequacy of money damages as a remedy for defamation, and advocated a variety of alternative equitable remedies." *Kramer*, 947 F.2d at 671 n. 13 (citing seventeen law review articles critical of the traditional rule); *see also* W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 716 (1956) (traditional rule "severely criticized by legal scholars").[13]

---

[13] *But see* Robert D. Sack, SACK ON DEFAMATION § 10:6.1 (4th ed. 2010); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157 (2007); Myerson, *The Neglected History of the Prior Restraint Doctrine, supra.*

The Restatement now favors injunctive relief "[w]hen it has been formally determined by a court that a statement is both defamatory and untrue and the defendant persists in continuing to publish it." RESTATEMENT (SECOND) OF TORTS § 623, Special Note, *supra*, at 326. So do other prominent sources. *See, e.g.,* 42 AM. JUR. 2d *Injunctions* § 96 (2000); 43A C.J.S. *Injunctions* § 255 (2004); Smolla, LAW OF DEFAMATION, *supra.*, § 9:86. This Court should join them and repudiate the old rule barring permanent injunctions in any and all defamation cases.

D. The Internet's Role in Facilitating Defamation Further Supports Allowing Permanent Injunctions

The case for injunctive relief is all the more compelling given how the internet enables someone to defame his target to a vast audience in a matter of seconds. It is also strengthened by the need to address the new phenomena of cyber-bullying and online hate speech.

When the traditional rule took hold, defaming someone to more than a handful of people took a substantial investment of time and effort. Few were willing to paint their car with negative messages and drive around town, *see Hajek*, 647 S.W.2d at 254, or picket a business. *See Farah Mfg. Co. v. Amalgamated Clothing Workers of Am.*, 483 S.W.2d 271 (Tex. Civ. App. – San Antonio 1972). Handbilling, giving speeches, mailing material to numerous addresses – the sort of conduct typically adjudged in most of

the earlier defamation cases – demand a far greater commitment than posting something on a website. And few had the money or access to publish defamation in books or newspapers.

But today, defaming someone to the entire world takes only a few moments. It costs nothing and can be accomplished with a few taps on a computer keyboard or a cell phone. Unless enjoined, defamatory messages on the internet can live on in perpetuity, unlike newspapers replaced the next day or books that go out of print:

> Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum.

Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L. J. 855, 863-64 (Feb. 2000).

The relatively new practices of online harassment and cyber-bullying – which are novel forms of defamation – are also noteworthy. "[A] 2006 Pew Internet study found that one-third of online teenagers had been victims of online harassment and that thirty-nine percent of social network users have been cyber-bullied." Jacqueline D. Lipton, *Combating Cyber-*

Victimization, 26 Berkeley Tech. L.J. 1103 (2011). The most extreme variants of this behavior may result in criminal prosecution. *See, e.g.*, Greg Abbott, *Preventing Bullying and Cyber Bullying* (June 1, 2011), www.oag.state.tx.us/alerts/alerts_view.php?id=260&type=3 (describing criminal statutes addressing cyber-bullying). More prosaic examples of these damaging attacks on younger users of the internet and other electronic media may justify post-trial civil injunctive relief.

The same is true for hate speech on the internet, much of which qualifies as defamatory. As the head of the Anti-Defamation League wrote recently, "the Internet is a viral breeding ground for anti-Semitism, racism, homophobia, Islamophobia and many other categories of attacks on people. Despite the schoolyard adage about 'sticks and stones,' hate speech does cause hurt, and, as we have witnessed too many times in society, can and does have its real-world victims." Abraham H. Foxman, Christopher Wolf, Letter to the Editor, *Internet Hate Speech*, N.Y. TIMES, June 3, 2013, *available at* http://www.nytimes.com/2013/06/04/opinion/internet-hate-speech.html?_r=0. Websites promoting hate based on race, religion, or other characteristics have proliferated dramatically in recent years and now number in the thousands or tens of thousands. *See* Julian Baumrin, *Internet Hate Speech and the First Amendment, Revisited*, 37 RUTGERS COMPUTER &

TECH. L.J. 223, 226, 233-34 (2011). One research effort analyzed Twitter and identified a vast swath of messages containing hate speech – "150,000 insults aggregated over the course of 11 months." Matt Peckham, *The Geography of U.S. Hate, Mapped Using Twitter*, TIME, May 20, 2013, *available at* http://newsfeed.time.com/2013/05/20/the-geography-of-u-s-hate-mapped-using-twitter/. When this sort of communication is proven at trial to be defamatory, injunctive relief can furnish a valuable weapon to combat and redress it.

Ultimately, greater ease in perpetrating defamation, cyber-bullying, and online hate calls for more effective remedial power by courts, not the rote application of rules fashioned in a very different time. "[T]he framers and ratifiers would not have us apply one of our great freedoms in the same way to modern circumstances as they might have applied it to their own problems a century ago." *Tucci*, 859 S.W.2d at 32 (Phillips, C.J., concurring). Once harmful content is shown at trial to be constitutionally unprotected, there is no valid reason for continuing to treat it as sacrosanct and maintaining it in perpetuity on the internet.

CONCLUSION AND PRAYER

The Court should grant the petition, reverse the decision below, and permit Kinney's case to proceed.

August 6, 2013

Respectfully Submitted,

/s/ Martin J. Siegel
Martin J. Siegel
Texas State Bar No. 18342125
LAW OFFICES OF MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana St., Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566
Martin@Siegelfirm.com

Andrew J. Sarne
State Bar No. 00797380
KANE RUSSELL COLEMAN & LOGAN, P.C.
919 Milam, Suite 2200
Houston, Texas 77002
Telephone: (713) 425-7400
Asarne@krcl.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice of appeal was served on counsel of record for Plaintiffs on August 6, 2013 by electronic means:

Dale L. Roberts
Daniel H. Byrne
Eleanor Ruffner
Fritz, Byrne, Head & Harrison, PLLC
98 San Jacinto Blvd., Suite 2000
Austin, TX 78701

/s/ Martin J. Siegel
Martin J. Siegel

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of TEX. R. APP. P. 9.4(i)(2) because this brief contains 9,110 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Martin J. Siegel
Martin J. Siegel

Dated: August 6, 2013

Appendix Excerpt:
Memorandum Opinion of the Court of Appeals

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-10-00657-CV

Robert Kinney, Appellant

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., Appellees

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-10-004331, HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Robert Kinney sued Appellees Andrew Harrison Barnes and BCG Attorney Search, Inc., Employment Crossing, Inc., and JD Journal, Inc., companies owned by Barnes (sometimes collectively "Barnes"), for defamation and defamation per se based on a statement made by Barnes and published on his companies' websites. The only relief Kinney sought was an injunction requiring Barnes to remove the allegedly defamatory content from his companies' websites, take steps to have it removed from the websites of third-party republishers, and post a retraction, apology, and copy of the injunction on the homepages of his companies' websites for a specified amount of time. Barnes filed a motion for summary judgment claiming the injunction is unavailable as a matter of law because it would constitute a prior restraint on and an unconstitutional

compulsion of speech.[1] The trial court granted Barnes's motion for summary judgment. For the reasons set forth below, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Kinney was an employee of BCG, a legal recruiting company run by Barnes. In 2004 Kinney left BGC to create a competing legal recruiting firm. Barnes subsequently sued Kinney in California state court for "anonymously maligning Barnes and his companies online." In August of 2007, Barnes posted on his website, JD Journal,[2] as part of a "news item" the following statement summarizing the allegations in the California action:

> The complaint also alleges that when Kinney was an employee of BCG Attorney Search, in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

Kinney responded to the statement by filing a lawsuit in Travis County district court asserting that the statement made by Barnes constituted defamation and defamation per se and requesting monetary damages. Kinney later filed a voluntary notice of nonsuit in that proceeding and filed the present case. In this suit, the only relief Kinney requests is a permanent injunction that would require Barnes

---

[1] Barnes has maintained, and continues to maintain, that the complained-of statement is not defamatory. However, Barnes's motion for summary judgment was based solely on the grounds that regardless of the nature of the statement, Kinney could not obtain the remedy he sought as a matter of law and therefore the claim should be dismissed.

[2] The statement was republished on Barnes's other website, Employment Crossing.

to (a) remove the false statements from his websites, (b) contact third-party republishers of the statement to have them remove the statement from their publications, and (c) conspicuously post a copy of the permanent injunction, a retraction of the statement, and a letter of apology on the home pages of Barnes's websites for six continuous months.

Barnes filed a motion for summary judgment claiming the injunction Kinney sought would violate the Texas Constitution since it would act as a prior restraint on and compulsion of Barnes's speech. Barnes asserted that because the only relief Kinney sought is unavailable as a matter of law, Kinney's complaint should be dismissed. Kinney, in his response to Barnes's motion, asserted that the injunction is constitutionally permissible as it would act not as a prior restraint, but instead as a subsequent punishment. The trial court granted Barnes's motion, and this appeal followed.

STANDARD OF REVIEW

A court of appeals reviews a trial court's decision to grant summary judgment de novo. *Valance Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When a court reviews a summary judgment, all evidence favorable to the non-movant is taken as true, *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009), every reasonable inference is indulged, *Nixon v. Mr. Prop. Mgmt. Co*, 690 S.W.2d 546, 549 (Tex. 1985), and any doubts are resolved in the non-movant's favor, *id.*

At trial and on appeal, the movant has the burden of showing that there was no genuine issue of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon*, 690 S.W.2d at 548. The non-movant has no burden to respond to the motion for

summary judgment unless the movant conclusively establishes his cause of action or defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). The trial court may not grant summary judgment by default because the non-movant did not respond to the motion for summary judgment if the movant's summary judgment proof is legally insufficient. *Id.* at 223.

DISCUSSION

Commercial or Private Speech

Kinney presents one issue on appeal—that the trial court erred in dismissing his claim because the injunction would not violate the Texas Constitution. Among the arguments Kinney asserts in support of this position are that (1) the statement Barnes made was false or misleading commercial speech and therefore not subject to the protections of the constitution and (2) Barnes's statement was not protected since "[t]he Texas Constitution does not protect private, defamatory speech." Barnes contends that because Kinney did not raise these arguments in his response to Barnes's motion for summary judgment, they have been waived, and Kinney cannot bring them up for the first time on appeal. We agree.

"Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c); *see also* Tex R. App. P. 33.1(a) ("As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ."). The non-movant "may not urge on appeal as a reason for reversal of the summary judgment any and every *new* ground that he can think of, nor can he resurrect grounds that he

abandoned at the hearing." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (emphasis in original). The rule summarily stated is as follows:

> With the exception of an attack on the legal sufficiency of the grounds expressly raised by the movant in his motion for summary judgment, the non-movant must expressly present to the trial court any reasons seeking to avoid the movant's entitlement. . . . [T]he movant [need not] negate all possible issues of law and fact that *could* be raised by the non-movant in the trial court but were not. . . . *[T]he non-movant must now . . . expressly present to the trial court those issues that would defeat the movant's right to summary judgment and failing to do so, may not later assign them as error on appeal.*

Id. at 678–79 (second emphasis added). One of the bases for Barnes's motion for summary judgment was an assertion that the injunction Kinney seeks would constitute a prior restraint on speech. Kinney's sole argument in his response to Barnes's motion was that the injunction would act as a subsequent punishment not a prior restraint. For the first time on appeal Kinney raises the additional argument that the speech he seeks to have enjoined is not even protected speech, making the prohibition against prior restraint inapplicable. Since Kinney failed to raise this issue at the trial court, he cannot now raise it on appeal. *See Clear Creek*, 589 S.W.2d at 678–79; *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613, 618 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (cross-appellants challenging reliability of expert's testimony waived additional basis presented for first time on appeal).

Prior Restraint

As part of his issue, Kinney also contends the injunction that he seeks would not act as a prior restraint on speech but rather as a subsequent punishment for speech already adjudged to

be defamatory. A prior restraint is "an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur." *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393 (Tex. App.—Austin 2000, no pet.).[3] Essentially, it is Kinney's position that since the alleged defamatory speech has already taken place, the injunction would not be "in advance of the time" when the communication would occur. We do not find this argument persuasive.

In *Hajek v. Bill Mowbray Motors, Inc.*, the plaintiff sought to enjoin the defendant from "driving his vehicle in the community with a defamatory message painted on all four sides that [stated the plaintiff] sold him a 'lemon.'" 647 S.W.2d 253, 254 (Tex. 1983) (per curiam). The trial court issued a temporary injunction, which the court of appeals upheld. *Id.* In reversing this decision, the supreme court stated that the temporary injunction constituted a prior restraint on speech. *Id.* at 255. The situation here is very similar. As in *Hajek*, the alleged defamatory statement has already been published. By seeking to have it removed, Kinney is essentially trying to obtain the same relief the plaintiff in *Hajek* sought—i.e., the prevention of the continued publication of the defamation every time someone new reads the message.

Kinney seeks to distinguish *Hajek* and the other cases cited by Barnes on the basis that they all involved temporary injunctions, whereas he is seeking a permanent injunction. Kinney contends that in the case of a permanent injunction the only speech to be enjoined is speech already adjudged to be defamatory. Therefore, Kinney claims the injunction would act as a subsequent

---

[3] *See Davenport v. Garcia*, 864 S.W.2d 4, 9–10 (Tex. 1992) (prior restraint only permissible when "essential to the avoidance of an impending danger").

punishment.[4] However, while *Hajek* dealt with a temporary injunction, nothing in the holding of *Hajek* suggests that the rule concerning prior restraint should be limited to temporary injunctions. *See generally* 647 S.W.2d 254. An examination of the authority upon which *Hajek* is based further supports this conclusion. As the court in *Ex parte Tucker* observed, "[t]he Constitution leaves [a person] free to speak well or ill; and if he wrongs another, he is responsible in *damages* or punishable by the criminal law." 220 S.W. 75, 76 (Tex. 1920) (emphasis added); *see also Tackett v. KRIV-TV (Channel 26)*, No. CIV. A. H-93-3699, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994) ("[The plaintiff] may not obtain equitable relief from defendants in the form of a retraction, public apology, or permanent injunction. Defendants cannot be compelled to publish or be enjoined from publishing future materials regarding [the plaintiff], regardless of their nature, as equity does not enjoin a libel or slander and the only remedy for defamation is an action for damages."); *Brammer*,

---

[4] Kinney further asserts that his "requested relief pose[s] less of a threat to the Constitution than the injunction this Court upheld in *Minton*." Essentially, Kinney argues that the injunction he seeks here is less offensive to the constitution than the injunctions approved in *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387 (Tex. App.—Austin 2000, no pet.), *Jenkins v. TransDel Corp.*, No. 03-04-00033, 2004 WL 1404364 (Tex. App.—Austin June 24, 2004, no pet.) (mem. op.), *Karamchandani v. Ground Technology, Inc.*, 678 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd), and *Hawks v. Yancey*, 265 S.W.233 (Tex. Civ. App.—Dallas 1924, no writ) because in those cases, the injunction was a temporary injunction, and there had been no determination of fault, whereas here, the injunction would issue only upon a determination of fault on the part of Barnes.

This view, however, misses the point. In all those cases, the courts determined the language to be enjoined was not constitutionally protected and therefore not subject to the prohibition against prior restraints either because it was false or misleading commercial speech, *see Minton*, 33 S.W.3d at 394; *Jenkins*, 2004 WL 1404364, at *5, private communication, *see Karamchandani*, 678 S.W.2d at 582, or dealt with instances of stalking, theft, threats, assault, abuse of process, and interference with contractual relations, *see Hawks*, 265 S.W. at 234–36. Here, none of the exceptions to the general protection of speech are applicable, so the statement, even if determined to be defamatory, is still constitutionally protected. *See Hajek*, 647 S.W.2d at 254 ("Defamation alone is not sufficient justification for restraining an individual's right to speak freely.").

114 S.W.3d at 107 ("Texas courts will not grant injunctive relief in defamation or business disparagement actions if the language enjoined evokes no threat of danger to anyone, even though the injury suffered often cannot easily be reduced to specific damages."). Therefore, the supreme court's holding in *Hajek* that an injunction preventing the continued publication of a defamatory statement would constitute a prior restraint on speech is equally applicable to a permanent injunction as it is to a temporary injunction. Consequently, we conclude that Barnes satisfied his summary judgment burden to show that a permanent injunction requiring the removal of the alleged defamatory statement from Barnes's website would act as a prior restraint on constitutionally protected speech.[5] *See* Tex. R. Civ. P. 166a(c); *Hajek*, 647 S.W.2d at 255. We overrule Kinney's issue.[6]

CONCLUSION

Having overruled Kinney's single issue, we affirm the trial court's summary judgment.

---

[5] Because Kinney waived his challenge that the speech was not protected and we have determined that an injunction requiring its removal would constitute a prior restraint, we need not reach the policy arguments raised by Kinney. *See* Tex. R. App. P. 47.1.

[6] In his motion for summary judgment, Barnes argued that the parts of the injunction requiring Barnes to speak would constitute compelled speech in violation of the Texas Constitution. Because Kinney has not challenged this argument, we need not address it. *Leffler v. JP Morgan Chase Bank, N.A.*, 290 S.W.3d 384, 386 (Tex. App.—El Paso 2009, no pet.) ("When a ground upon which summary judgment may have been rendered, whether properly or improperly, is not challenged, the judgment must be affirmed."); *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 206 (Tex. App.—Dallas 2005, no pet.) (holding that because appellant presented arguments on appeal seeking reversal of summary judgment as to only some of his claims, summary judgment was proper as to judgment on claims he did not argue on appeal should be reversed).

Melissa Goodwin, Justice

Before Chief Justice Jones, Justices Henson and Goodwin

Affirmed

Filed: November 21, 2012