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 DISTRICT COURT OF APPEALS
AUSTIN, TEXAS
NO. 03-10-00657-CV

RESPONSE TO BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case: This is a suit for injunctive relief only for alleged defamation brought by Petitioner, Robert Kinney ("Kinney") against Andrew Harrison Barnes, BCG Attorney Search, Inc., Employment Crossing, Inc., and JD Journal, Inc. (collectively "Respondents"), each of which is a resident of California.

Trial Court: The Honorable David Phillips, County Court at Law Number 1 of Travis County, Texas.

Course of Trial Court Proceedings: Because the injunctive relief sought by Kinney was a prior restraint that would violate Respondents' free speech rights, and because Kinney could therefore not prevail on his claims, Respondents filed a motion for summary judgment (the "Motion") on the grounds that the Texas Constitution prohibited the injunctive relief sought by Kinney. After consideration of the Motion and Kinney's Response thereto (the "Response"), Respondents' Reply, the trial court granted Respondents' motion and dismissed Kinney's claims in their entirety.

Course of Appellate Court Proceedings: Kinney appealed the summary judgment dismissing his suit to the Third Court of Appeals in Austin, Cause No. 03-10-00657-CV. The Third Court of Appeals concluded that because Kinney did not raise his arguments on appeal in the Response, Kinney waived all them and could not bring raise them for the first time on appeal, and affirmed the trial court's dismissal in an opinion authored by Justice Goodwin, dated November 21, 2012. The panel consisted of Chief Justice J. Woodfin Jones, and Justices Diane Henson and Melissa Goodwin.

RESPONSE TO BRIEF ON THE MERITS

Respondents hereby respond to the Brief on the Merits ("Appellant's Brief") filed by Kinney, and respectfully request that Kinney's Petition for Review be denied.

I. STATEMENT OF JURISDICTION

This Court lacks jurisdiction because no error of law has been committed by the Court of Appeals, much less one that is "of such importance to the jurisprudence of this state that it requires correction." *See* TEX. GOV'T CODE §22.001(a)(6). No conflict exists between the Court of Appeals decision below (Appendix A hereto) and any decisions of this Court and lower courts of the state. Rather, the Third Court of Appeals properly recognized and applied the controlling principles from this Court's decisions in *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979), *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253 (Tex. 1983), and *Ex parte Tucker*, 220 S.W. 75 (Tex. 1920), as well as the decision in *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101 (Tex. App. – Austin 2003, no pet.).

An injunction preventing the continued publication of a defamatory statement constitutes a prior restraint on speech regardless of whether the plaintiff seeks a permanent injunction or a temporary injunction. Accordingly, because the

Court of Appeals' holding below was consistent with this Court's binding legal precedent, this Court lacks jurisdiction to hear this case pursuant to Section 22.001 of the Texas Government Code.

II. REPLY TO ISSUE PRESENTED

The issue raised by Kinney was correctly decided by the Third Court of Appeals. Under well-settled Texas law, a permanent mandatory injunction requiring the removal of alleged defamatory statements from a website is a prior restraint on constitutionally protected speech. Such injunctions are not permissible under the Texas Constitution, and there exists no reason to change long-established law.

III. STATEMENT OF FACTS

Kinney was an employee of Respondent BCG Attorney Search, Inc. ("BCG"), a legal recruiting firm run by Respondent Barnes. Barnes terminated Kinney's employment with BCG because of an improper kickback arrangement between Kinney and an employee of a client of BCG. CR 17-18, 31. After his termination, Kinney posted a variety of statements disparaging Respondents on several different websites using an alias. *Id*. Respondents contended that these statements were defamatory and filed suit against Kinney in California state court for "anonymously maligning Barnes and his companies online." *Id*. In August of

2007, Barnes posted a non-defamatory news item on his website, JD Journal, about the California litigation. *Id*. This news item reported the allegations made in the California suit, including the history of the relationship between BCG and Kinney, Kinney's termination from BCG, Kinney's establishment of a business designed to compete with BCG, and Kinney's decision to post maligning comments about BCG on websites. CR 17. Specifically, the news item read in pertinent part:

> 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.

CR 17.

Claiming that these statements about the California litigation constituted actionable defamation,[1] Kinney initially responded to the statement by filing a lawsuit in Travis County District Court seeking monetary damages. CR 7-8, 31. Kinney then voluntary dismissed that proceeding (to avoid arbitration) and subsequently filed the present case in Travis County Court at Law, asserting the

[1] Although not at issue on this appeal, such statements are covered by the judicial privilege. *See Daystar Residential, Inc. v. Collmer*, 208 S.W.3d 627, 652 (Tex. App. – San Antonio 1996, writ denied) (holding attorney's statements to media repeating allegations made in a lawsuit were privileged); *see also Neely v. Wilson*, No. 11-0228, 2013 WL 3240040 at *6 (Tex. June 28, 2013) (citing TEX. CIV. PRAC & REM. CODE §73.002(b)(1)).

same claims on the same facts but now explicitly seeking injunctive relief only. CR 2-8, 31.

The permanent injunction originally requested by Kinney would have required Respondents to take the following actions:

> - Affirmatively remove the allegedly defamatory statements from the websites where they were originally published;
>
> - Take "commercially reasonable steps" to remove the allegedly defamatory statements from any secondary publication locations;
>
> - Initiate communication with "all website operators, web hosting companies, or ISP's which host any website" containing any secondary publication of the allegedly defamatory statements, as well as Google, Yahoo, and the Internet Archive and request that these entities remove the allegedly defamatory statements; and
>
> - Publish an apology, a retraction, and a copy of the injunction on BCG's and JD Journal's home pages.[2]

CR 7-8.

Respondents filed a motion for summary judgment on the grounds that the proposed injunction would violate the Texas Constitution because it would be a prior restraint on speech. CR 30-38. Because the only relief Kinney sought was

[2] Kinney initially sought an injunction mandating the content of Respondents' websites. However, Kinney seems to have abandoned his request that Respondents publicly apologize.

unavailable as a matter of law, the motion sought dismissal of Kinney's case. CR 36. In response, Kinney asserted that enjoining Respondents from displaying the statements on websites would be permissible subsequent punishment, not a prior restraint. CR 40-49; *see also* Tab 1 of Appendix attached hereto. The trial court granted Respondents' motion. CR 76.

Kinney appealed the dismissal of his claims to the Third Court of Appeals, asserting that the trial court erred in dismissing his claim because the injunction would not, in fact, violate the Texas Constitution. Appellant's Brief at Appendix 002-010. The three arguments that Kinney offered in support of his position were as follows:

- The statements at issue were false or misleading commercial speech and were therefore not constitutionally protected;
- The statements at issue were private, defamatory speech and were therefore not constitutionally protected; and
- The injunction would not be a prior restraint but a subsequent punishment on speech already adjudged to be defamatory.

Id. at Appendix 005 and 006-07. The Court of Appeals determined that Kinney waived his first two arguments because he failed to raise the issue of whether the speech was constitutionally protected to the trial court. *Id*. at Appendix 005-06.

Applying *Hajek* and *Tucker*, the court then further determined that Respondents had demonstrated 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." *Id*. at Appendix 009. The Third Court of Appeals therefore correctly affirmed the trial court's ruling. This appeal followed.

IV. SUMMARY OF THE ARGUMENT

Kinney's arguments are entirely without merit. First, Kinney's main argument to this Court – that the speech at issue is not protected by the Texas Constitution – has been waived, because Kinney failed to present this argument to the trial court, and the summary judgment cannot be overturned on that ground.

Even if Kinney had not waived that issue, the protections of the Texas Constitution extend even to defamatory speech. As such, this Court and all Texas courts of appeals addressing the issue have repeatedly confirmed that even defamatory speech may not be enjoined. Because the Texas Constitution specifically protects even defamatory speech, case law from other jurisdictions, including federal case law, is neither persuasive nor relevant. Finally, the policy concerns raised by Kinney are neither live concerns in this case, nor compelling general concerns warranting reversal of a century of consistent jurisprudence.

Accordingly, this Court should either deny Kinney's petition for review or affirm the trial court's ruling and the holding of the Third Court of Appeals.

V. ARGUMENT

A. KINNEY FAILED TO PRESERVE FOR APPEAL ANY ARGUMENT THAT THE SPEECH AT ISSUE IS NOT CONSTITUTIONALLY PROTECTED.

Because Kinney failed to raise the issue of whether the Texas Constitution protects the speech at issue at the trial court level, Kinney waived any argument to overturn the summary judgment on that basis.[3] As the Third Court of Appeals noted, "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." Appellant's Brief at Appendix 006. The court correctly found that waiting until his appeal to raise the unprotected speech issue constituted waiver. *Id*.

For the same reason, Kinney cannot now rely upon that argument as a basis for reversal of the trial court's decision. TEX. R. CIV. P. 166a(c) ("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. APP. P. 33.1(a)(1) ("As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the

[3] The only issue Kinney successfully preserved for appeal is whether the injunction constituted a subsequent punishment rather than a prior restraint.

complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint").[4]

Because Kinney had waived the issue before reaching the court of appeals, the issue of whether Barnes's speech was constitutionally protected is not now properly before this Court. Moreover, Kinney does not challenge the Third Court of Appeals' explicit holding that Kinney waived these issues in either his petition for review or his brief on the merits.[5] Nevertheless, much of argument tacitly assumes that the speech he seeks to enjoin is constitutionally unprotected.[6]

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[4] *Accord City of Houston*, 598 S.W.2d at 678 (affirming grant of summary judgment and stating that non-movant "may not urge on appeal as 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"); *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982); *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co.*, Ltd., 300 S.W.3d 740, 743 (Tex. 2009).

[5] Kinney does not argue that the court's determination of waiver was improper. However, he claims that despite the Third Court of Appeals' explicit finding that he waived the argument he now seeks to advance–that defamation is not constitutionally protected–the court actually reached and determined this issue in a footnote in its decision. Appellant's Brief at 20 n.8. Thus, Kinney claims, this issue has now been revived.

However, the footnote to which Kinney refers discussed Kinney's argument that permanent injunctions differ from temporary injunctions and therefore do not constitute prior restraints – the sole issue Kinney preserved for appeal. In that footnote, the court noted Kinney's misunderstanding of Texas case law on this point and demonstrated that the cases on which he sought to rely involved commercial speech, private publication, stalking, threats, assault, abuse of process, and interference with contractual relations – all of which were factually distinguishable from defamation cases because of the content of the speech at issue. Appellant's Brief at Appendix 008 n.4.

The appellate court's correct explanation of Kinney's misapplication of Texas case law does not resurrect the issues he waived. In fact, the court left no doubt in its next footnote, which flatly stated, "Kinney waived his challenge that the speech was not protected." Appellant's Brief at

Accordingly, Kinney is barred from arguing that the speech he seeks to enjoin is not entitled to protection under either the Texas Constitution or the United States Constitution. The only issue properly before this Court is whether the injunction Kinney sought was an impermissible prior restraint on speech or merely a subsequent punishment. As with his intermediate appeal, he cannot now seek to overturn the trial court's grant of summary judgment on the grounds that the speech about which he complained may not be protected speech.

As such, the bulk of Kinney's brief – specifically, his evaluation of federal case law regarding various types of constitutionally unprotected speech – is irrelevant. Barnes's motion for summary judgment asserted that the speech at issue was protected by the Texas Constitution, and Kinney did not challenge that assertion. CR 33 ("An injunction on speech – even defamatory speech – constitutes a prior restraint that unlawfully infringes upon Defendants'

Appendix 009 n.5. Kinney's attempt to relitigate this issue on appeal to this Court is therefore improper.

[6] For reasons discussed more fully below in Section V.B.1 below, Kinney has not merely waived this claimed point of error; he is wrong on the law. Defamatory speech is in fact constitutionally protected, despite Kinney's repeated claims to the contrary. *See, e.g.*, Appellant's Brief at 2 (discussing U.S. Supreme Court authority regarding "injunctions against constitutionally unprotected speech" and musing on the internet's facilitation of "harmful and unprotected expression"); 5 (discussing federal authority in support of injunctions "restricting constitutionally unprotected speech"); 6 ("prior restraints are constitutional if the party seeking it proves the speech is unprotected"); 15-16 (referring to the need for a judicial finding that speech affected by a proposed injunction is unprotected); 18 (discussing the need for the party seeking to enjoin the speech to show it is unprotected); *and* 28 (stating that the *Pittsburgh Press* case "endorsed injunctions after a determination that the speech involved is unprotected").

constitutional liberties"); CR 40-49. Kinney opposed Barnes's motion on the sole ground that a permanent injunction was not a prior restraint. That single issue therefore represents the only basis on which Kinney may now seek to overturn the trial court's grant of summary judgment.

B. EVEN DEFAMATORY SPEECH IS CONSTITUTIONALLY PROTECTED.

1. Article I, Section 8 of the Texas Constitution Extends to Defamatory Speech.

Kinney seeks an injunction compelling Respondents to withdraw prior statements and restrict the content of Respondents' websites. That injunction would constitute an impermissible prior restraint under the Texas Constitution. This Court has consistently interpreted Texas's constitutional recognition of free speech rights more broadly than its federal counterpart.[7] *See Davenport v. Garcia*,

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[7] Kinney acknowledges that "[t]his Court has sometimes suggested that [Article 1, Section 8 of the Texas Constitution] extends greater rights than the First Amendment" (Appellant's Brief, page 7) and cites in support controlling case law such as *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992) and *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397 (Tex. 1988). Kinney then claims that the Court recently clarified its position and that injunctions regulating speech should be judged according to the same standards under the Texas Constitution and its federal counterpart, the First Amendment, citing *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546 (Tex. 1998).

However, *Operation Rescue-National* involved a content-neutral injunction on speech, rather than a content-specific injunction. As a result, this Court appropriately concluded that cases analyzing content-specific speech are distinguishable:

> *Davenport* involved a content-specific gag order that the trial court imposed on a guardian ad litem in pending civil litigation. . . .

834 S.W.2d 4, 8-9 (Tex. 1992) ("[O]ur free speech provision is broader than the First Amendment. . . . Under our broader guarantee, it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs. . . . The presumption in all cases under section eight is that pre-speech sanctions or 'prior restraints' are unconstitutional."). Accordingly, speech that, due to its content, may not enjoy protection under federal law can nevertheless be protected in Texas. *Id.* at 10-11 (additional protection for freedom of expression was required under the Texas Constitution that was not required under the United States Constitution).

For these reasons, even a finding of defamation cannot support an injunction under Texas law. Rather, under the Texas Constitution, defamatory speech is entitled to constitutional protection, even if the speaker may be liable for damages. *See Hajek*, 647 S.W.2d at 255. As Art. I, §8 of the Texas Constitution states:

> 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.

> [B]ecause *Davenport* dealt with a content-based restriction, it provides no guidance to us here.

Id. at 558 (internal citations omitted). *Davenport*, not *Operation Rescue National*, is controlling here because Kinney is seeking a content-specific injunction, not a content-neutral one. Because Kinney is asking this Court to determine the contours of content-specific restrictions on speech, and because Texas courts have consistently held that the Texas Constitution's protections on the content of speech extend beyond those of the First Amendment, federal cases are not relevant.

Thus, although a defendant may be responsible to a plaintiff for money damages, he cannot be enjoined from uttering defamatory statements. *See, e,g., Hajek,* at 255; *Tex. Mut. Ins. Co. v. Surety Bank, N.A.*, 156 S.W.3d 125, 128 (Tex. App.—Fort Worth 2005, no pet.); *Brammer*, 114 S.W.3d at 107.

For that reason, even were there an adjudication that the speech in question here is defamatory[8] does not diminish the protections that the Texas Constitution affords that speech. Decades of case law on Art. I, § 8 of the Texas Constitution echoes this analysis. *See Hajek,* 647 S.W.2d at 255 ("Defamation alone is not a sufficient justification for restraining an individual's right to speak freely"); *Tex. Mut. Ins. Co.*, 156 S.W.3d at 128 ("The Texas Constitution protects the right to speak, even to speak defamatory words, although damages are recoverable for such defamatory speech"); *Brammer*, 114 S.W.3d at 107 ("Although the specific damages sustained from defamation and business disparagement-related activity is often difficult to measure, it is nonetheless well established that this type of harm does not rise to the level necessary for the prior restraint to withstand constitutional scrutiny"). Because the long-standing case law in Texas is clear, and because the

[8] As discussed in footnote 1 above, Respondents do not by any means concede that the speech in question in this case is defamatory, but simply assume so for purposes of this appeal. The judicial privilege permits accurate reference to pending litigation, which is precisely the nature of the speech about which Kinney complains. Given the applicability of the privilege, there exists no reasonable possibility of the speech at issue being found to be defamatory.

Third Court of Appeals correctly applied Texas law, this Court should not disturb the lower courts' disposition of this case.

2. Kinney's Federal Case Law Is Not Applicable or Persuasive.

Because no Texas case authorizes the injunction Kinney seeks, he relies largely on federal authority. However, there is also no federal case authorizing a permanent injunction on allegedly defamatory speech. As Kinney concedes in his Brief, the United States Supreme Court has not decided a case like this even once. Appellant's Brief at 15. Rather, the cases on which Kinney relies are about other types of speech warranting distinguishable constitutional treatment.

For example, *Kingsley Books, Inc. v. Brown* addressed obscenity, not defamation.[9] 354 U.S. 436, 437 (1957). Additionally, the petitioner in *Alexander v. U.S.* sought reversal not of an injunction but of a forfeiture of assets under RICO because it "effectively shut down his adult entertainment business" and thus "constituted an unconstitutional prior restraint on speech." 509 U.S. 544, 549 (1993). The Court rejected this argument and specifically acknowledged that

[9] Notably, in distinguishing its ruling in *Kingsley Books* from a prior ruling striking down a similar injunction, the Court noted that "the proceeding in [the prior case] involved not obscenity but matters deemed to be derogatory to a public officer." 354 U.S. at 445. The issue in this case, defamation, is more similar to derogatory speech, not obscenity.

nothing would prevent him from selling identical inventory the next day.[10] *Id*. at 551. Similarly, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* addressed commercial speech, not defamation, and addressed the order of a Commission without the power to issue contempt citations, not a court that could hold the enjoined party in contempt. 413 U.S. 376, 379, 390 n.14 (1973).

Because this case involves defamation, not obscenity or commercial speech, and because Kinney's proposed injunction would prohibit Respondents from ever publishing the speech in question on their websites, none of Kinney's cases support the remedy he seeks. Kinney cites no cases, and Respondents are aware of none, in which the U.S. Supreme Court authorized, endorsed, or tacitly permitted a content-specific injunction prohibiting defamatory speech.

C. BECAUSE DEFAMATORY SPEECH IS PROTECTED, KINNEY'S INJUNCTION WOULD BE AN UNCONSTITUTIONAL PRIOR RESTRAINT.

1. Injunctions Are Prior Restraints.

Texas courts have consistently declined to temporarily or permanently enjoin defamatory speech because such injunctions run afoul of the Texas Constitution's free speech guarantees in Article I, Section 8. Despite Kinney's arguments to the contrary, defamatory speech is protected by the Texas

[10] As discussed in more detail in footnote 14 below, application of *Alexander* to the instant case would prohibit, not support, the issuance of the injunction Kinney seeks.

Constitution. A prior restraint is a restraint placed on speech before the speech is uttered. *See Davenport*, 834 S.W.2d at 8-9 *and* 9 n.14. Any injunction on defamation, whether temporary or permanent, constitutes a prior restraint on speech because it dictates the content of the speech prior to its publication.

The foremost case on defamation and injunctive relief is *Hajek*. In *Hajek*, the defendant expressed his dissatisfaction with the car he purchased from the plaintiff by writing on his car that the plaintiff sold him a "lemon." *Hajek*, 647 S.W.2d at 254. The plaintiff sought an injunction requiring the defendant to remove the allegedly defamatory speech from the side of his car. This Court properly characterized the desired injunction as an unconstitutional prior restraint on speech, even though it would only prevent the further display of the allegedly defamatory speech. *Id*. at 255.

Hajek demonstrates that dictating the removal of allegedly defamatory speech from public display is a directive that the defendants discontinue making the statements at issue. Similarly, ordering Respondents to remove specific language from websites is a directive regarding what speech Respondents can and cannot publish on their websites in the future.[11] Because requiring Respondents to

[11] Kinney's argument that the single publication rule dictates that an injunction requiring the removal of materials from a website misses the mark. The single publication rule concerns only when the statute of limitations begins to run on a defamation claim. The rule is intended to

remove speech from websites is the functional equivalent of requiring Mr. Hajek to remove his speech from his car, Kinney's requested injunction would likewise be unconstitutional.

2. A Permanent Injunction Is Still a Prior Restraint.

Notwithstanding *Hajek*, Kinney claims the injunctive relief he requests does not constitute a prior restraint because it would occur after trial on the merits. That interpretation of the term *prior restraint* has no basis in Texas law, and Kinney cites none. In fact, Texas courts have consistently found that distinctions between temporary and permanent injunctions – that is, injunctions issued before and after trial on the merits – are immaterial to whether the injunctions are unconstitutional. For example, in *Brammer*, a plaintiff sought both temporary and permanent injunctive relief from the defendants' allegedly defamatory statements. 114 S.W.3d at 104. When the trial court granted the temporary injunction, the defendant appealed. *Id*. at 104-05. The court of appeals dissolved the injunction to the extent that it restricted the content of the defendants' speech because "the only remedy for defamation is an action for damages" and "the injunction constitutes an unconstitutional prior restraint on the Brammers' free speech." *See id*., at 105 and

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prevent plaintiffs from sitting on their rights following the publication of the allegedly defamatory content and filing multiple lawsuits. *See Holloway v. Butler*, 662 S.W.2d 688, 691 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.). The single publication rule has no bearing on whether an order requiring the continued display of statements on a website constitutes a prior restraint.

114 n.6 (sustaining the defendants' second point of error that "the only remedy for defamation is an action for damages" and third point of error that "the injunction constitutes an unconstitutional prior restraint on the Brammers' free speech").[12]

Brammer addressed both temporary and permanent injunctions. Rather than adopt the position that Kinney is pressing here, the court specifically held that damages, not injunctive relief, is the only available remedy for a successful defamation plaintiff and found the temporary injunction unconstitutional on those grounds.[13] Furthermore, as exemplified by *Brammer*, because a plaintiff must prove a probable right to relief before a temporary injunction may issue, cases involving temporary injunctions for defamatory speech bear directly on whether the plaintiff would have a right to a permanent injunction on the same terms. The Texas Constitution explicitly protects speech from court-imposed restraints *even though* it is defamatory, not *unless* it is defamatory.

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[12] The fact that most Texas cases addressing injunctions in defamation cases are dealing with temporary injunctions is simply a consequence of the fact that temporary injunctions are subject to interlocutory appeals, not evidence of the propriety of permanent injunctions that restrain speech.

[13] This result is consistent with the Third Court of Appeals' decision in *Burbage v. Burbage*, No. 03-09-00704-CV, 2011 WL 6576979 (Tex. App.—Austin Dec. 21, 2011, pet. filed) In that case, the trial court issued a permanent injunction after a jury found in favor of the plaintiff on charges of defamation. Citing *Alexander*, *Davenport*, *Hajek*, and *Brammer*, the Third Court of Appeals affirmed the compensatory and exemplary damages award with modifications but vacated the permanent injunction as unconstitutional. *Id*. at *10.

3. Kinney's Federal Case Law Further Confirms that Injunctions Are Prior Restraints.

Although Kinney's federal cases are not instructive regarding the protections afforded defamation by the Texas Constitution, they nonetheless confirm that Kinney's requested injunction is a prior restraint on speech. For example, in *Alexander*, the United States Supreme Court unequivocally held that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. The Court 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." 509 U.S. at 550 (1993); *see also id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction").[14]

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[14] *Alexander* also afforded the Supreme Court the opportunity to discuss three prior decisions holding that permanent injunctions on speech are constitutionally impermissible:

> In *Near v. Minnesota ex rel. Olson*, [283 U.S. 697 (1930)], we invalidated a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from producing any future "malicious, scandalous or defamatory" publication. *Id.*, at 706, 51 S.Ct., at 627. *Near*, therefore, involved a true restraint on future speech—a permanent injunction. So, too, did *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), and *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) *(per curiam)*, two other cases cited by petitioner. In *Keefe*, we vacated an order "*enjoining* petitioners

Another seminal U.S. Supreme Court case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, which addressed a newspaper's appeal from a permanent injunction issued after a case "came on for trial." 283 U.S. 697, 705-06 (1930). 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. The *Near* court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. *Id*. at 722-23.

Similarly, in *Organization for a Better Austin v. Keefe*, a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. 402 U.S. 415 (1971). The Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." *Id*. at 418. The Court

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> from distributing leaflets anywhere in the town of Westchester, Illinois." 402 U.S., at 415, 91 S.Ct., at 1576 (emphasis added). And in *Vance*, we struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be obscene. 445 U.S., at 311, 100 S.Ct., at 1158–1159. See also *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971) *(per curiam)* (Government sought to enjoin publication of the Pentagon Papers)). These cases all hold that a permanent injunction on speech is a prior restraint.

509 U.S. at 550.

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.*, the Court invalidated a Texas statute that authorized courts, upon a showing that the defendant had shown 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. 445 U.S. 308, 311 (1980) (*per curiam*). The Supreme Court affirmed the decision of the trial court in *Vance*, which had held that "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" in violation of the First Amendment. *Id*. at 311-12.

As noted above, even Kinney acknowledges that no federal court has issued a content-specific injunction prohibiting purportedly defamatory speech, even after a trial on the merits. Furthermore, application of the operative principles in the U.S. Supreme Court cases Kinney cites in his Brief demonstrates that the decisions by the trial and appellate courts in this case have been correct. The relief Kinney seeks is literally unprecedented.

D. POLICY CONSIDERATIONS DO NOT SUPPORT CHANGING TEXAS'S CONSTITUTIONAL JURISPRUDENCE.

1. The Remedy Kinney Seeks Is Heavily Disfavored by Texas and Federal Courts.

Neither federal nor Texas law looks kindly upon injunctions on constitutionally protected speech. This Court has stated that such injunctions, as with other prior restraints, are disfavored because Texas law sanctions speakers after speech occurs, rather than before. *See Davenport*, 834 S.W.2d at 9. [15] This Court has therefore treated prior restraints as presumptively unconstitutional. *Id*. Similarly, the United States Supreme Court has stressed that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance*, 445 U.S. at 317 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). That Court has also declared that prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S.

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[15] *See also Burbage*, 2011 WL 6576979 at *10:

> A prior restraint is a "judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur. Such orders are highly disfavored under federal law and even more highly disfavored under Texas law. Thus, defamatory speech is not sufficiently injurious to warrant prior restraint. We therefore vacate the permanent injunction entered by the trial court.

(Internal citations, quotations, and parentheticals omitted).

539, 559 (1976). That Court has also noted that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994).[16, 17] Given that both Texas and the U.S. Supreme Court have expressed such distaste for the remedy Kinney seeks, no policy warrants his requested infringement on constitutional rights.

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[16] In *Madsen*, Justice Scalia further explained that "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id*. at 797 (Scalia, J., concurring in part and dissenting in part).

[17] For additional cases expressing disfavor of injunctions on speech, *see, e.g.*, *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (finding temporary injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Neb. Press Ass'n*, 427 U.S. at 556 (applying prior restraint doctrine to reject gag order on participants in a criminal trial); and *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (*per curiam*) (applying prior restraint doctrine to strike down injunction on publication of confidential government documents).

In separate opinions, the Supreme Court has also stated that "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press*, 413 U.S. at 396 (Burger, C.J., dissenting)); *Bantam Books*, 372 U.S. at 70-71 (listing cases striking down prior restraints and rejecting as "informal censorship" the local commission's ability to list certain publications as "objectionable" and to threaten prosecution for their sale); *Near*, 283 U.S. at 706, 722-23 (rejecting injunction on future publication of newspaper despite publisher's previous dissemination of defamatory material).

See also Avis Rent A Car Sys. v. Aguilar, 529 U.S. 1138, 1140-41 (2000) (Thomas, J., dissenting from denial of certiorari) (urging granting of certiorari to "address the troubling First Amendment issues raised" by an injunction imposing "liability to the utterance of words in the workplace"); *Madsen*, 512 U.S. at 798 (Scalia, J., concurring in part and dissenting in part) (listing cases and observing that the Court has "repeatedly struck down speech-restricting injunctions"); *and Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (plurality opinion) ("It is because of the personal nature" of the right of free speech that the Court has "rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial") (internal citations omitted).

2. Most State Courts Do Not Follow the So-Called "Modern Rule."

Almost all jurisdictions follow Texas and federal disfavoring injunctions in defamation cases. In fact, the traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation. *See* Rodney A. Smolla, *Law of Defamation*, at § 9:85 n.1 (2d ed. 1999); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers*, 34 IND. L. REV. 295, 308-11 n.1 (2001); 43A C.J.S. Injunctions §255 (2006); W.E. Shipley, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715, 715-16 (1956). This long-standing rule was established in eighteenth-century England, well before the American Revolution.

Although Kinney presents his proposed alternative to this well-settled area of Texas law as the "modern rule," a slim minority of jurisdictions have adopted this rule. Only a handful of state supreme courts – Kentucky, Ohio, Georgia, Minnesota, and California – have concluded that speech may be enjoined after a final determination that the speech constitutes defamation. Labeling it the "modern rule" is not an argument in favor of Texas voiding centuries of case law, limiting the protection its constitution has always afforded its citizens, and joining

a few other states in redefining the extent to which courts can dictate the content of communications by citizens.

3. Kinney's Other Policy Concerns Do Not Justify Limiting Constitutional Rights.

Kinney advances a number of policy considerations, but none of them warrant reversing course on decades of case law and encouraging judicial curtailment of constitutional guarantees of free speech. First, although Kinney's discussion of a series of lawsuits resulting from continued defamation might be a subject for an interesting law review article, that rationale nonetheless stands in direct opposition to black-letter Texas law, which limits sanctions for defamation to monetary damages only. As this Court stated almost a century ago:

> [T]here is no power in courts to make one person speak only well of another. The [Texas] Constitution leaves him free to speak well or ill; and if he wrongs another by abusing this privilege, he is responsible ***in damages*** or punishable by the criminal law.

Tucker, 220 S.W. at 76 (emphasis added). Nowhere does Texas law authorize limiting constitutional free speech principles in the interest of judicial economy.

Likewise, Kinney's concern with additional damages from ongoing display of defamatory speech is likewise unwarranted. Courts regularly award damages

for future events, such as future pain and suffering or future lost earnings,[18] and can easily award damages for future harm from display of defamatory speech. Nonetheless, in the trial court, Kinney made a conscious decision to seek *only* injunctive relief and to forgo monetary compensation for the damage he allegedly suffered. The court of appeals properly recognized that the relief available to Kinney in his cause of action was money damages, which Kinney did not seek, not a court order restricting Respondents' speech.

Kinney also raises concerns about "harmful and unprotected expression like cyber-bullying and online hate speech, which are mushrooming," as well as harassment, anti-Semitism, racism, homophobia, and Islamophobia. Appellant's Brief at 2 and 36-37. However, the instant case does not involve any of the specters Kinney discusses. For that reason, the instant case does little to illuminate concerns raised by these examples. As such, this case does not present these speculative issues and is an inappropriate vehicle for judicial evolution.

Kinney's speculation about "judgment-proof" defendants likewise does not justify constitutional revision. Collection difficulties on judgments are not

[18] In fact, a defamation plaintiff can request and receive damages for the loss of future income, earnings, benefits, and/or earning capacity. *See, e.g., Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Peshak v. Greer*, 13 S.W.3d 421, 427-28 (Tex. App.—Corpus Christi 2000, no pet.); *Houston Belt & Terminal Ry. v. Wherry*, 548 S.W.2d 743, 753 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

problems unique to defamation, but are encountered in many types of lawsuits. Similarly, difficulties in quantifying damages are common across many causes of action, such as claims involving pain and suffering or emotional distress.[19] Kinney charitably concedes that when damages are available and adequate to remedy the defamation, permanent injunctions should be unavailable. Appellant's Brief at 31. However, Kinney essentially proposes that less wealthy "judgment-proof" defendants should be entitled to diminished constitutional rights because of their comparative financial means.

Finally, although plaintiffs in defamation lawsuits may merely want "an end to the embarrassment and social harm" that they perceive to be caused by the defendants' speech, showing economic harm is an essential element of a defamation plaintiff's case. Whether a statement is defamatory is but one of several elements for demonstrating a right to any judicial relief for defamation. *See, e.g.*, *Bantam Books*, 376 U.S. at 279-280; *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369,

[19] This Court recently acknowledged the difficulty of a plaintiff in demonstrating damages in many defamation cases in *Hancock v. Variyam*. 400 S.W.3d 59 (Tex. 2013). In that case, this Court expressed a reticence to ease the burden on defamation plaintiffs to recover damages. *Id*. at 71. Though the plaintiff in that case argued that have to prove damages actually caused by the allegedly defamatory statement was unfair, the court noted that the law was an artifact of "reconciling the federal and state constitutional rights of free speech and the Texas constitutional right to recover for reputational torts." *Id*. That case did not involve the additional constitutional considerations raised by a prior restraint on protected speech such as an injunction on purportedly defamatory speech.

374 (Tex. 1984). If a plaintiff cannot demonstrate any pecuniary harm capable of economic quantification, even if such quantification is imperfect, then a defamation plaintiff is simply not entitled to relief. If, however, a plaintiff can demonstrate such harm, then clearly an economic remedy is available.

Kinney's dissatisfaction with the available remedies for defamation stems from the fact that he lives in a state where the free speech rights secured in the Texas Constitution limit those remedies. Kinney's speculation about the practicability of proving or collecting damages, deterrence of future potentially defamatory speech, or the ability for other plaintiffs who face bullying, harassment, or hate speech, does not justify reversal of the sound decisions below. Rather, this Court should reaffirm the well-established principles established by over a century of Texas jurisprudence, on this issue and confirm the breadth of the free speech rights secured by the Texas Constitution.

IV. CONCLUSION AND PRAYER

The Court of Appeals correctly affirmed the trial court's grant of Respondents' motion for summary judgment and dismissed Kinney's claims in their entirety. If Kinney could prove he was defamed, then he could be entitled to seek monetary compensation under Texas law. He is not entitled to judicially dictated speech from Respondents. The strong free speech protections of the Texas

Constitution forbid such injunctions. The summary judgment must be affirmed as a result. Respondents Andrew Harrison Barnes, BCG Attorney Search, Inc., Employment Crossing, Inc., and JD Journal, Inc. believe this Court should deny Kinney's petition or, in the alternative, affirm the Court of Appeals' decision upholding the trial court's dismissal of all claims as to all parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document reply petition was prepared with Microsoft Word 2010, and that, according to the program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 6,564 words.

/s/ Daniel H. Byrne
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has this 26th day of ***September***, ***2013***, been forwarded to counsel of record ***by certified mail, return receipt requested,*** as follows:

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RESPONDENTS' APPENDIX

Tab 1 Plaintiff's Response to Defendants' Motion for Summary Judgment

CAUSE NO. C-1-CV-10-004331

ROBERT KINNEY,	§	**IN THE COUNTY COURT**
Plaintiff,	§	
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.	§	**AT LAW NO. 1**
Defendants.	§	**OF TRAVIS COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff **Robert Kinney** ("Kinney") readily admits that Article 1, Section 8 of the Texas Constitution grants every person the liberty and privilege "to speak, write or publish his opinions on any subject,..." TEX. CONST. art. 1, § 8. However, that very same sentence also holds every person "responsible for abuse of that privilege,...." TEX. CONST. art. 1, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege...*") (emphasis added). Because of this provision, Texas courts prefer "to sanction a speaker after, rather than before, the speech occurs," and, consequently, Texas courts generally condemn *prior* restraints on free speech. *Davenport v. Garcia,* 834 S.W.2d 4, 9 (Tex. 1992). However, even a cursory glance of Kinney's pleadings demonstrates that Kinney has not asked for a *prior* restraint on Defendants' free speech rights. Rather, Kinney requests a permanent injunction to remedy the effects of Defendants' prior defamatory statements after, and

only after, the Court determines that Defendants have actually defamed Kinney. This is a material distinction between this case and the opinions upon which Defendants rely in their Motion for Summary Judgment; specifically, the cases cited by Defendants involve litigants seeking a *preliminary* injunction prior to a trial on the merits. Kinney readily admits that the Texas Constitution precludes preliminary injunctions to prevent harm from statements that have not been judicially determined to be defamatory. But, as shown below, the Texas Constitution does not prohibit injunctive relief designed to remedy the harm from statements already made and already adjudicated to be defamatory. Accordingly, the Court must deny Defendants' Motion for Summary Judgment in its entirety.

I.
BACKGROUND

At present, this is a defamation case in which Kinney seeks injunctive relief due to defamatory publications made by Defendants **Andrew Harrison Barnes** ("Barnes"), **BCG Attorney Search, Inc.** ("BCG"), **Employment Crossing, Inc.** ("ECI") and **JD Journal, Inc.** ("JDJ") (collectively "Defendants"). Specifically, Kinney requests that, after a full trial on the merits, the Court order Defendants and their agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, to:

a. remove the false statements of material fact set forth in the Petition, and to take commercially reasonable steps to remove any secondary publications of such information on Defendants' website, on any public domain, website, blog site, intranet or extranet under the care, custody or control of Defendants or that Defendants directly or indirectly caused to be disclosed on any blog site, message board, private message or website;

b. send electronic email, make telephone calls and transmit certified letters, as necessary and at Defendants' sole cost and expense, to all website operators, web hosting companies or ISP's which host any website that contains a secondary publication of the false statements of material fact set forth in the Petition (including Google and Yahoo to have such

information removed from any cache), as well as the Internet Archive site http://www.archive.org/, and request that such information be removed at Defendants' sole cost and expense, and provide each such third party website or hosting company a copy of the Permanent Injunction; and

c. conspicuously post a copy of the Permanent Injunction, a retraction of the statements and a letter of apology, on the home pages for "www.jdjournal.com" and "www.bcgsearch.com" for six continuous months following entry of the Permanent Injunction.

[Docket Entry No. 1, Plaintiff's Original Petition (the "Petition"), at ¶ 16].

Defendants have moved for summary judgment on Kinney's request for injunctive relief and, in the process, have mischaracterized Kinney's request for injunctive relief and misconstrued the Texas Constitution and its common law. Defendants erroneously invoke the "prior restraint" doctrine commonly used to defeat a litigant's request for **preliminary** injunctive relief to prevent any future defamatory statements. But, as noted above, Kinney does not seek a preliminary injunction; Kinney merely seeks a permanent injunction to ameliorate the effects of Defendants' prior defamatory speech and only after the Court determines that the publications were, in fact, defamatory. Requiring those who practice defamation to essentially retract their defamatory speech abridges no constitutional rights, and is, in fact, the very embodiment of the Texas Constitution's guarantee that those who abuse their free speech rights shall be held responsible for it.

Here, Defendants have not cited the Court to one case – not one – that specifically precludes post-verdict injunctive relief for defamation cases. And, while there are no Texas cases directly on point, Kinney can point the Court to persuasive authority from other jurisdictions that specifically approve post-verdict injunctions in defamation cases. Because Kinney's requested relief is legally permissible, and because Defendants fail to meet their summary judgment burden to negate an element of Kinney's request for permanent injunction, the Court must deny Defendants' Motion for Summary Judgment in its entirety.

II.
FACTUAL BACKGROUND

Kinney is a former employee of Defendant BCG, a legal recruiting company owned and operated by Barnes. In 2004, Kinney ventured out on his own and created a competing legal recruiting firm.

On August 7, 2009, Barnes, both individually and in his capacity as an officer of BCG, ECI and JDJ, posted, or caused to be posted, the alleged "news" item on "www.jdjournal.com" as attached to the Petition. JD Journal published the statement on the worldwide web, which was then published worldwide, and which can still be found at the same addresses set forth in Kinney's pleadings. These "articles" make the following false statements of material fact about Kinney (and others), which constitute defamation *per se* in Texas:

> 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.

The article also republishes (through an internet link) Defendants' petition in a lawsuit filed in California by Defendants against Kinney, which contains defamatory statements about Kinney. A California court has since dismissed the California action to which the defamatory "news item" refers, but the defamatory statements nevertheless remain on the Defendants' website.

In the present case, Kinney alleges that Barnes knew at the time of his dismissal that Kinney had no scheme to pay cash kickbacks to anyone and, in fact, Barnes was aware that Kinney had repeatedly refused to participate and cooperate in the multiple unethical business practices of Defendant BCG while employed at BCG. Despite multiple prior requests, Defendants have refused to retract the defamatory material, which led to this Lawsuit.

III.
ARGUMENTS & AUTHORITIES

A. Kinney's Request For An Injunction Requiring Defendants to Remove Defamatory Material from Public Sources Does Not Constitute a Prior Restraint on Defendants' Speech.

At its core, Kinney's request for injunctive relief asks this Court, *inter alia*, to require Defendants to perform two removal actions: (1) remove the defamatory publication made by Defendants from any public source, such as the internet sites at issue, that Defendants control; and (2) for public domains outside Defendants' control, to take commercially reasonable steps to request removal of the defamatory publications and provide these publishers with a copy of the permanent injunction that Kinney seeks from the Court. Neither of these requested injunctive actions constitutes a prior restraint on Defendants' speech, but rather a subsequent punishment for defamatory publications. *See generally Alexander v. United States*, 509 U.S. 544, 549-50, 553-554, 113 S.Ct. 2766, 2771, 2773, 125 L.Ed.2d 441 (1993) ("By lumping the forfeiture imposed in this case after a full criminal trial with an injunction enjoining future speech, petitioner stretches the term "prior restraint" well beyond the limits established by our cases. To accept petitioner's argument would virtually obliterate the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments.").

Although Texas case law is largely silent on this point, multiple courts, including the California Supreme Court and the United States Supreme Court, have specifically found that an injunction based on statements already found to be defamatory does not offend a defendant's constitutional right against a prior restraint on speech. For instance, in *Balboa Island Village Inn, Inc. v. Lemen*, the California Supreme Court distinguished between an injunction that prevents speech not yet determined to be defamatory, and an injunction that prevents someone from repeating or republishing a statement that a jury has already found to be defamatory:

> The attempt to enjoin the initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press.... In contrast, an injunction against continued distribution of a publication which a jury has determined to be defamatory may be more readily granted. .... Since the constitutional problems of a prior restraint are not present in this situation, and the defendant has not been deprived of a jury determination, injunctions should be available as ancillary relief for ... personal and political defamations.

40 Cal. 4th 1141, 57 Cal. Rptr. 3d 320, 156 P.3d 339, 342 (Cal. 2007). The California Supreme Court then upheld the trial court's permanent injunction that enjoined future speech of the same type the jury found was defamatory. *Id.* Further, the *Balboa* court specifically rejected the argument that the only remedy for defamation is an action for damages, because that "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 ... behavior." *Id.* at 351. The court consequently recognized that "a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation." *Id.* at 351. Consequently, the court held that "following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." *Id.* at 349.

In *Kingsley Books, Inc. v. Brown*, the United States Supreme Court upheld a state law authorizing a "limited injunctive remedy" prohibiting "the sale and distribution of written and printed matter found after due trial to be obscene." 354 U.S. 436, 437, 441, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). The Court rejected the very argument that Defendants raise here – namely that issuance of that type of an injunction "amounts to a prior censorship" in violation of the First Amendment. *Id.* at 440 (quoting *Near v. Minnesota*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 for the proposition that "the protection even as to previous restraint is not absolutely unlimited."). The Court recognized that the term "prior restraint" was "not a self-wielding

sword" that could "serve as a talismanic test" to be indiscriminately applied. *Id.* The Court pointed out that the defendants in *Kingsley Books* "were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." *Kingsley Books, Inc.*, 354 U.S. at 441. Relying on this fact, the Court distinguished its holding from the ruling in *Near v. Minnesota* where the Court struck down the abatement of a newspaper as a public nuisance as being an invalid prior restraint. *Kingsley Books*, 354 U.S. at 445 (noting that *Near* "enjoin[ed] the dissemination of **future** issues of a publication because its past issues had been found offensive" which was "'the essence of censorship.'") (emphasis added). The Supreme Court in *Kingsley Books* observed that the injunction was "glaringly different" from the prior restraint in *Near*, because it "studiously withholds restraint upon matters not already published and not yet found to be offensive." 354 U.S. at 445.

The present case presents facts analogous to *Kingsley Books* and *Balboa*. Kinney has not requested that the Court issue a temporary injunction for the very reason that such an injunction would likely constitute an impermissible prior restraint. Instead, Kinney has requested the Court to adjudicate the claims and, if it finds that Defendants' publications were in fact defamatory, then the Court should issue an injunction requiring Defendant to take steps to ameliorate the harm resulting from the defamatory statements – *i.e.*, by ordering Defendants to cease publication of statements on their websites that the Court finds to be defamatory and to take commercially reasonable steps to retract the defamatory statements from the public domain. Furthermore, Kinney's requested injunction would not restrain Defendants from publishing future statements that may or may not be defamatory, but only those particular statements theretofore published and adjudged to be defamatory, which is the very injunction that the U.S. Supreme Court upheld in *Kingsley Books* – albeit in the obscenity context. 354 U.S. at 441. As

such, Kinney's request does not compel the Court to issue an impermissible prior restraint because a prior restraint on speech is defined as "an administrative or judicial order 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, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441 (1993).

Finally, it should be noted that some Texas courts have upheld injunctions even though they affect speech in some way. For instance, in *Ex parte Warfield,* 50 S.W. 933 (Tex. 1899), the plaintiff sued the defendant for alienation of spousal affections and obtained an injunction that precluded the defendant from speaking to or communicating with the wife of the plaintiff. The defendant subsequently violated the injunction and was jailed for contempt of court. The defendant challenged the incarceration through a habeas corpus proceeding, arguing that his incarceration was unlawful because the injunction violated his rights to freedom of speech. *Ex Parte Warfield,* 50 S.W. at 934-35. The Court of Criminal Appeals affirmed the order of contempt and found the injunction was not inconsistent with the defendant's freedom of speech. *Id.*

B. <u>Defendant's Cited Case Law Does Not Pertain to the Facts of this Case</u>.

The opinions that Defendants cite to support their Motion are clearly distinguishable from the present case. Not a single case Defendants cite actually covers a fact pattern in which a Court has already found the statements at issue to be defamatory. Instead, nearly all of the opinions upon which Defendants rely possess a common theme – the plaintiff seeks a temporary injunction against the publication of statements before the Court actually determines the statements are defamatory. *See e.g. Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 917-18 (Tex. App. – Dallas 2006, no pet.); *Texas Mutual Ins. Comp. v. Surety Bank, N.A.*, 156 S.W3d 125, 128-29 (Tex. App. – Fort Worth 2005, no pet.) (noting that a "prior restraint on

speech is an 'administrative and judicial order [ ] forbidding certain communications *when issued in advance of the time that such communications are to occur*" (emphasis added)); *Brammer v. KB Home Lone Star, L.P.*, 11 S.W.3d 101, 106-07 (Tex. App. – Austin 2003, no pet.) (temporary injunction case); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (temporary injunction case). The case at bar is clearly distinguishable because Kinney does not seek a preliminary injunction. Instead, Kinney requests a "subsequent punishment" for past speech adjudged to be defamatory, which the U.S. Supreme Court explicitly permitted in *Alexander* and *Kingsley Books*, and which was persuasively approved by the California Supreme Court in the *Balboa* case. While there are no Texas cases directly on point, the Texas Constitution explicitly permits a court to sanction the speaker for the "abuse" of free speech rights, and that is all Kinney seeks at this juncture. TEX. CONST. art 1, § 8; *Davenport,* 834 S.W.2d at 9 ("[I]t has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs."). Furthermore, Kinney's request is strictly limited to Defendants' statements made the basis of this case. If the Court were to adopt Defendants' position, it would require Kinney to file a succession of lawsuits to deter Defendants from continuously republishing the statements deemed to be defamatory. This result would be an affront to judicial economy, and is the very harm the California Supreme Court sought to avoid through its ruling in *Balboa. See Balboa Island Village Inn, Inc.*, 156 P.3d at 351. Consistent with *Kingsley Books* and *Balboa*, and due to the absence of binding case law that addresses the narrow issue before the Court, the Court should deny Defendants' Motion for Summary Judgment and allow the Court of Appeals or Texas Supreme Court to address this issue if and when Kinney prevails on his defamation claims.

IV.
PRAYER

This case appears to be one of first impression in Texas in the internet age in which we find ourselves. When a party deliberately posts defamatory content on a website under his control, the Court should have the power to remedy that conduct by requiring removal of that defamatory content, as other courts have recognized and as the Texas Constitution permits. Consequently, Kinney respectfully requests that the Court deny Defendants' Motion for Summary Judgment.

DATE: September 2, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

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