SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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CHRISTOPHER BRUMMER, Index No.: 153583/2015

Plaintiff-Respondent,

-against-

BENJAMIN WEY, FNL MEDIA LLC, and NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP,

Defendants-Appellants.

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BRIEF *AMICI CURIAE* OF PROFS. MARTIN REDISH, STEVEN SHIFFRIN, AND EUGENE VOLOKH IN SUPPORT OF DEFENDANTS-APPELLANTS

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Interest of *Amici Curiae*

Martin H. Redish is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law, where he has taught since 1973.

Steven H. Shiffrin is the Charles Frank Reavis Sr., Professor of Law Emeritus at Cornell Law School. He taught from 1977 until his recent retirement, and has been at Cornell since 1987.

Eugene Volokh is the Gary T. Schwartz Professor at UCLA School of Law, where he has taught since 1994.

All three *amici* teach constitutional law and have written, between them, over a hundred law review articles and several books on the First Amendment. Professor Redish, in particular, is the author of *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984), one of the most-cited articles on prior restraint law.

The *amici* are concerned that injunctions such as the one in this case can undermine long-established rights to be free from prior restraints and hope that their perspective as scholars who have no connection with either party can assist this Court in resolving this case.

Accordingly, *amici* believe that this Court erred in its August 1, 2017 Order which retained certain aspects of the injunction entered below, and that the court below erred in its interpretation of that order. They therefore believe that both the injunction and the contempt findings should be vacated.

Concise Statement

Christopher Brummer was, until recently, a Presidential nominee for the Commodities and Futures Trade Commission. Even before that, he was an arbitrator within a government-authorized self-regulatory system that has the power to effectively ban people from a major industry.

Yet the August 1, 2017 decision of this Court ordered a media outlet to remove images that sharply criticized Brummer, and not to repost any similar images. The order was not limited to speech found at trial to have been libelous, or found to fall within the true threats or incitement exceptions to the First Amendment. Instead, it covered, among other things, "any . . . images depicting . . . lynching in association with plaintiff"—even though the images in this case do not *threaten* the lynching of Brummer, but rather *figuratively accuse* Brummer of lynching.

Amici are unaware of any appellate decision in the last 40 years that has imposed this sort of prior restraint on constitutionally protected speech. Instead, the precedents make clear that such injunctions violate the First Amendment; and this applies whether or not the outlet appears to be unreliable and sensationalistic.

But even if the August 1, 2017 order is correct, and those provisions of the injunction that were not stayed by the order are sound, the court below misapplied that order. Instead of treating the injunction as limited to (1) depictions or encouragements of lynching and (2) incitement of violence, the court imposed contempt sanctions based on a finding that certain speech merely "could easily incite anger" or "could . . . in any way incite violence." R. 14. Yet that is not the standard for incitement defined by the U.S. Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969), and implicitly incorporated in the August 1 order's prohibition on incitement.

Moreover, it appears that the court below reincorporated into its later orders the original requirement that Defendants take down all statements about Prof. Brummer, or at least a vast range of statements that

neither depicted lynching nor encouraged or constituted punishable incitement. That too was an error that this Court should correct.

Argument

I. This Court should reverse the trial court's injunction restraining defendants' speech about Brummer

A. The motions panel's decision not to entirely stay the injunction is not law of the case, and may thus be revisited

The motions panel's decision is an "interlocutory action[]" "that do[es] not establish law of the case when the time comes for final decision." Charles Alan Wright, Arthur R. Miller et al., 18B Federal Practice & Procedure: Jurisdiction § 4478.5 (2d ed. 2018) (so stating as to federal law, but with reasoning that would equally apply to New York procedure); *see, e.g.*, *Thompson v. Armstrong*, 134 A.3d 305, 310 (D.C. 2016); *Lambert v. Blackwell*, 134 F.3d 506, 512-13 n.17 (3d Cir. 1998). "[L]aw of the case is not established by . . . denial of a stay." *Thompson*, 134 A.3d at 310 (citing Wright & Miller, § 4478.5).

"[A] preliminary injunction is a provisional remedy and a decision concerning a preliminary injunction does not become the law of the case," because "[t]he purpose of a preliminary injunction is to preserve the sta-

tus quo until a decision is reached on the merits." *Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 596, 789 N.Y.S.2d 505, 507 (2005) (internal quotation marks omitted). A stay is likewise a provisional remedy with the same purpose of preserving the status quo, and thus likewise does not become law of the case. *See, e.g.*, *Wellbilt Equipment Corp. v. Red Eye Grill, L.P.*, 308 A.D.2d 411, 411 (2003) (describing stay as a provisional remedy tantamount to a preliminary injunction). More broadly, rulings by a court of appeals motion panel "are tentative and subject to reexamination by the merits panel." *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007).

B. A court may not enjoin speech that has not been found to fit within a First Amendment exception (such as the exception for defamation, or perhaps true threats or incitement)

Courts disagree about whether injunctions against future libels are constitutionally permissible. *Compare, e.g.*, *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2011) (holding that such injunctions can be constitutional); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302 (Ky. 2010) (same), *with Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978) (holding that such injunctions are unconstitutional), *and Kinney v. Barnes*, 443 S.W.3d

87 (Tex. 2014) (holding that such injunctions are unconstitutional, though injunctions ordering the removal of already posted libelous statements can be constitutional). In *Tory v. Cochran*, 544 U.S. 734 (2005), the Supreme Court was set to consider the issue, but ended up not deciding it because the plaintiff died while the case was pending.

But even those cases that allow some such injunctions stress that the injunctions must be limited to speech that has been found to be constitutionally unprotected at trial. For instance, the California Supreme Court upheld such an injunction, but only to the extent that the injunction barred the defendant from repeating statements found defamatory at a previous trial. *Balboa Island Vill. Inn*, 156 P.3d at 344-45. While courts can "issu[e] a posttrial injunction after a statement that already has been uttered has been found to constitute defamation," the court held, "preventing a person from speaking or publishing something that, allegedly, would constitute a libel if spoken or published" is an unconstitutional prior restraint on the defendant's speech. *Id.* at 344.

Likewise, the Kentucky Supreme Court held that "defamatory speech may be enjoined only after the trial court's final determination by a preponderance of the evidence that the speech at issue is, in fact, false," and

that any injunction must "be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false." *Hill v. Petrotech Res. Corp.*, 325 S.W.3d at 309.

The Seventh Circuit has similarly held that, "An injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression." *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015). And the Seventh Circuit applied this to strike down the injunction that it was considering:

> The injunction that the district judge issued in this case was of that character [*i.e.*, forbade statements not yet found to be defamatory], owing to its inclusion of vague, open-ended provisions for which there is no support in the jury verdict or, so far as appears, in the district judge's own evaluation of the evidence. We have no jury findings as to which statements were defamatory . . . .

Id.

The same principle applies beyond defamation, to other First Amendment exceptions as well. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 311, 316 (1980) (preliminary injunctions against the showing of films "that have not been finally adjudicated to be obscene" are generally unconstitutional prior restraints); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (injunction of charitable solicitation would

be permitted only "after a final adjudication on the merits that the speech is unprotected"). And this principle would equally apply to speech that allegedly fits within the "true threat" exception or the incitement exception.

C. The enjoined speech does not constitute a "true threat" of violence or incitement of violence

The injunction is thus procedurally flawed, because it was issued before any finding on the merits that the forbidden speech was unprotected. But the injunction is also substantively faulty: the enjoined speech cannot be found unprotected under well-established First Amendment standards.

The injunction, as modified by this Court, orders defendants to

> remove all photographs or other images and statements from websites under defendants' control which depict or encourage lynching; encourage the incitement of violence; or that feature statements regarding plaintiff that, in conjunction with the threatening language and imagery with which these statements are associated, continue to incite violence against plaintiff.

August 1, 2017 Order, at 1-2. It also forbids defendants "from posting on any traditional or online media site any photographs or other images depicting or encouraging lynching in association with plaintiff." *Id.* at 2.

But the lynching images did not say that Brummer should be lynched or will be lynched; rather, they accused Brummer of figuratively lynching the two stockbrokers who were banned by a FINRA NAC decision that Brummer signed. They thus cannot fit within the narrow First Amendment exception for "true threats"—statements through which the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). And certainly the injunction by its terms goes far beyond such true threats.

(One of the comments posted at the Blot might conceivably be found to be a true threat. But there has been no trial finding that the comment was posted by the defendant, and in any event the injunction covers the lynching images, not the comment.)

Nor can speech be restricted simply on the theory that it "encourage[s] lynching" or "encourage[s] the incitement of violence." August 1, 2017 Order, at 2. Under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), even "advocacy of the use of force or of law violation" cannot be forbidden "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Yet the injunction is not limited to speech "directed to inciting" crime or

"likely to incite" crime, much less "imminent" crime. *See Hess v. Indiana*, 414 U.S. 105, 108 (1973) (making clear that the imminence prong of the *Brandenburg* test precludes punishment for "advocacy of illegal action at some indefinite future time"). *Amici* doubt that defendants' speech is advocacy of illegal action at all; but it is certainly not advocacy of *imminent* illegal action.

The Blot is sensationalistic, hyperbolic, and over-the-top. The posts may well prove to be defamatory at trial. They are certainly racially charged and offensive. No one would want to be the subject of such material. But none of that can justify the injunction involved here, just as the sensationalistic, hyperbolic, over-the-top, likely defamatory, and overtly anti-Semitic content of the newspaper in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), could not justify the injunction in that case.

To be sure, the *Near* injunction was broader than the one in this case, since it closed the entire newspaper. But First Amendment law bars injunctions against particular statements and images as well as against entire publications, at least unless those statements and images are specifically found to fall within a specific First Amendment exception at trial—something that has not happened here.

There is no "hate speech" exception to the First Amendment, and no exception for depictions of lynching. There are exceptions for true threats of violence, and for speech that intentionally incites imminent lawless conduct. But there was no finding, and there could be no finding, that all of the speech enjoined in this case fits within those narrow exceptions.

D. The injunction appears unprecedented, at least in the last 40 years

Amici believe the injunction in this case would have been unconstitutional even if it had covered an individual speaker, rather than an online tabloid, or even if it were limited to speech about an ordinary citizen rather than about a recent nominee to high federal office. But the facts of this case just show how clearly unconstitutional the injunction is. *Amici* are unaware of any appellate decision in recent decades that has allowed an injunction against words or images on facts such as this. Indeed, since the *Pentagon Papers* case (*New York Times Co. v. United States*, 403 U.S. 713 (1971)) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), it has been clear that the U.S. Supreme Court roundly condemns such injunctions.

Today, this injunction just applies to the Blot, Brummer, and the use of images of lynching. But if it is upheld, then similar injunctions could easily be issued against many other publications that criticize many other people—including public officials, public figures, and professionals involved in matters of public concern—in many different ways. All it would take is some court concluding that the speech in some loose sense "encourage[s] the incitement of violence," or even just "depict[s]" violent conduct, with no showing that the usual First Amendment tests for incitement or true threats are satisfied. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943).

II. The trial court's contempt findings applied the wrong legal standard even under the August 1, 2017 version of the injunction

Even if the August 1, 2017 version of the injunction (the trial court's initial injunction as modified by the motions panel's stay decision) is valid, the trial court's contempt findings go well beyond that injunction, and cover speech that is protected by the First Amendment.

The August 1, 2017 order, despite the flaws identified above, forbids only narrow categories of speech: (1) speech that depicts or encourages lynching, and (2) speech that encourages the incitement of violence or actually incites violence against the plaintiff. R. 1525-26. The second part of the order, with its use of the terms "incitement" and "incite"—First Amendment terms of art—clearly aimed at following the U.S. Supreme Court's First Amendment jurisprudence, which carves out a narrow "incitement" exception. Under that exception, the government can punish "advocacy of the use of force or of law violation" "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenburg*, 393 U.S. at 447, so long as the advocacy is actually aimed at producing illegal conduct within hours or at most days, rather than "at some indefinite future time." *Hess*, 414 U.S at 108.

But in the October 11, 2017 order, the trial court concluded that some of the material on TheBlot and related sites violated the injunction because

> The lynching pictures, a picture of the plaintiff under the statement "Black Lives Matter" and a check next to a box saying "NO," a picture of the plaintiff in a box that includes a picture of Adolph Hitler, are amongst many others that . . . could easily incite anger in someone so inclined to act, resulting in harm to Mr. Brummer and his family. Defendants, especially after recent events in Las Vegas,

> have not shown to this Court that the statements and pictures could not in any way incite violence and should be left online to be viewed by defendant Benjamin Wey's 84.9 thousand twitter followers and the websites' consumers.

R. 14 (internal citations to case docket numbers and motion exhibits omitted). Rather than focusing on what the August 1, 2017 order discussed—depictions of lynching[1] and actual incitements of violence—the trial court also included speech that "could easily incite anger" or "could . . . in any way incite violence." *Id.*

Yet this goes far beyond the narrow First Amendment incitement exception. A vast range of speech that is harshly critical of a person and that is said to a broad audience *could* incite anger or even violence. For instance, even criticisms of the FCC's net neutrality policy have incited such anger that they have led to death threats against FCC Chair Ajit Pai and Rep. John Katko.[2] Harsh criticisms of police officers may have

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[1] The Hitler picture post, R. 1190, does include a link labeled "READ MORE: AFRICAN AMERICAN BROKER TALMAN HARRIS LYNCHED BY FINRA, BECAUSE HE IS BLACK," but that is certainly not a "depiction" of lynching. The Black Lives Matter post, R. 1242-43, does not even mention lynching.

[2] Noah Rothman, *Racist Goons Are Targeting the FCC Chief—And His Family*, N.Y. Post, Jan. 8, 2018, https://nypost.com/2018/01/08/racist-goons-are-targeting-the-fcc-chief-and-his-family/; U.S. Att'y for W.D. N.Y., *Syracuse Man Arrested, Charged With Threatening Death Against A New York Congressman And His Family*, Nov. 29, 2017,

led to some killings of police officers.[3] Most politically motivated violence likely stems from the attackers' listening to political criticisms that could incite anger or violence.

Yet such critical speech is indubitably protected by the First Amendment, unless it is *intended to* and *likely to* yield *imminent* illegal conduct (not just anger). Likewise, harsh criticisms of Prof. Brummer are protected by the First Amendment, unless they are intended to and likely to yield imminent illegal conduct. These limiting terms are conspicuously missing from the trial court's October 11, 2017 analysis.

The trial court's October 11, 2017 contempt order also apparently failed to recognize the differences between the trial court's initial June 6, 2017 order—which required the removal of *all* posts "about or concerning Plaintiff," R. 7—and the order as modified by the August 11, 2017 stay, which was limited to posts that depict or encourage lynching or incite violence. The October 11, 2017 contempt order states that the defendants

> may purge their contempt . . . [by] removing the photographs or other images and statements posted about or concerning plaintiff

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https://www.justice.gov/usao-wdny/pr/syracuse-man-arrested-charged-threatening-death-against-new-york-congressman-and-his.

[3] *See, e.g.*, Gina Cherelus & Erwin Seba, *Dallas Shooting Suspect's Online Posts Reflect Anger, Frustration*, Reuters, July 8, 2016, https://uk.reuters.com/article/uk-usa-police-johnson-idUKKCN0ZO2BK.

> in *TheBlot* and defendants' websites which depict and encourage lynching, encourage the incitement of violence, or that feature statements which depict or encourage lynching or the incitement of violence, *including those previously identified by this Court in the Decision and Order filed on June 6, 2017* and those identified by plaintiff on this motion in the Order to Show Cause . . . .

R. 14 (October 11, 2017 order) (emphasis added; internal citations omitted); *see also* R. 25 (January 8, 2018 order, incorporating by reference the October 11, 2017 order rather than the June 6, 2017 order). And the June 6, 2017 order "identifie[s]" as forbidden "*all* the articles they have posted about or concerning Plaintiff, including those annexed to the Moving Papers as Exhibits 14-24," R. 7 (emphasis added). Even if the June 6, 2017 order is read as "identif[ying]" only the posts in Exhibits 14-24, rather than "all the articles," those posts contain hundreds of pages of material (R. 166-370), most of which does not "depict" and "encourage" lynching or intentional incite likely imminent violence. The same is true of the posts "identified by plaintiff on [the] motion in the Order to Show Cause" addressed by the October 11, 2017 order (R. 1025-1509).

Thus, even if the speech restriction reflected in the August 1, 2017 order is valid, the trial court's contempt orders show that the trial court vastly overread the scope of that restriction. Those orders must therefore be set aside.

Conclusion

The injunction in this case—even as modified by the August 1, 2017 Order—is an unconstitutional prior restraint, because it suppresses speech that has not been (and cannot be) found to be constitutionally unprotected. Moreover, even if the modified injunction were constitutional, the trial court imposed contempt penalties based on speech that does not violate the injunction. Both the injunction and the contempt findings should therefore be reversed.

DATED: May 23, 2018

Respectfully Submitted,

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