No. 18-36043

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA FERGUSON,

Plaintiff/Counter-Defendant, Appellant,

v.

BRIAN WAID,

Defendant/Counter-Plaintiff, Appellee.

On Appeal from the U.S. District Court
for Western Washington
CA No. 2:17-cv-01685-RSM
Hon. Ricardo Martinez

Brief *Amicus Curiae* of Eugene Volokh in Support of Neither Party

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Interest of *Amicus Curiae*[1]

Eugene Volokh specializes in First Amendment law at UCLA School of Law, and has written a textbook and over 40 law review articles on First Amendment law, including *Anti-Libel Injunctions and the Criminal Libel Connection*, forthcoming in the University of Pennsylvania Law Review (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372064). He hopes that his perspective will be of help to this Court in resolving the constitutionality of the injunction in this case.

Summary of Argument

1. Lurking within this case is an important issue: When are injunction against libel consistent with the First Amendment? In *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1234 (9th Cir. 1997), this Court held that such injunctions may sometimes be constitutional; but it did not decide just when this would be so, likely because the

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[1] No party or party's counsel has wholly or partly authored or funded this brief. No person has contributed money intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

defendants apparently argued only that the answer is "never." (This brief does not opine on any of the other issues raised in this case.)

2. An anti-libel injunction, enforceable through the threat of prosecution for criminal contempt, is like a miniature criminal libel law—just for a particular defendant, and just for particular statements about a particular plaintiff. That is its virtue. That is its danger. And that is the key to identifying how the First Amendment constrains such injunctions.

Precisely because they criminalize certain libelous statements, anti-libel injunctions have become a valuable remedy, especially (though not only) for Internet speech. Many Internet libel defendants are judgment-proof. Civil damages are not a meaningful remedy to plaintiffs whom these defendants have libeled—and not a meaningful deterrent to the libelers. In any practical sense of the phrase, many libel plaintiffs thus do not have an adequate remedy of law.

Properly crafted permanent injunctions are also a constitutionally permissible remedy, if they follow a judgment on the merits that certain speech is libelous. This makes sense precisely because of the injunctions' similarity to criminal libel law. The Supreme Court has held that

properly crafted criminal libel laws are constitutionally permissible. Properly crafted anti-libel injunctions should be as well, especially since they chill speech less than criminal libel laws do.

3. But an anti-libel injunction, if not properly crafted, may actually be *more* restrictive than criminal libel law, because it threatens criminal punishment without providing the important procedural safeguards that criminal libel law provides. A speaker generally cannot be punished for criminal libel unless the statement (1) is found to be false beyond a reasonable doubt, (2) by a jury, (3) at the time of the criminal trial, in which (4) an indigent defendant is entitled to a court-appointed lawyer who can argue that the statement is true, opinion, or privileged.

Yet because of the collateral bar rule, a criminal contempt trial for violating an anti-libel injunction that bans specific statements would normally lack these protections. Even if the criminal contempt trial is before a jury, that jury would only be asked to determine whether the defendant violated the injunction, which is to say whether the defendant repeated the statements that he was enjoined from repeating. The finding of falsehood will only have been made at the time the injunction was entered, by

a judge, using a preponderance of the evidence standard, and without a court-appointed lawyer present.

And these procedural gaps in the normal anti-libel injunction enforcement process are especially important for the very reason that anti-libel injunctions are important: Many libel defendants lack money or insurance. They cannot afford a lawyer to defend themselves in the civil case; indeed, they may not be able to meaningfully defend themselves at all. An anti-libel injunction may thus put them in a position worse than that created by criminal libel laws—it may expose them to the threat of criminal punishment without a jury ever having had to find, beyond a reasonable doubt and based on a competent adversary presentation, that the statements are indeed false.

4. Fortunately, it is possible to craft an anti-libel injunction that offers these important procedural protections. Instead of saying "Defendants are enjoined from stating . . .," an anti-libel injunction should (a) say, "Defendants . . . are enjoined from libelously stating . . .," (b) expressly provide that any criminal contempt prosecutions will be conducted before

a jury, and (c) expressly provide that the injunction could not be enforced through threat of confinement for *civil* contempt.

Argument

I. This Court has not decided when anti-libel injunctions are constitutional

This Court has rejected the argument that anti-libel injunctions categorically violate the First Amendment. *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1239 (9th Cir. 1997). Though the decision drew a sharp dissent, *id.* at 1239 (Kozinski, J., dissenting), and a sharp dissent from denial of rehearing en banc, *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 137 F.3d 1090 (9th Cir. 1997) (Reinhardt, J., joined by Pregerson, Kozinski & Tashima, JJ., dissenting from denial of rehearing en banc), it is the law of this Circuit. And such injunctions are also not precluded by Washington law. *In re Marriage of Meredith*, 201 P.3d 1056, 1064 (Wash. Ct. App. 2009); *see Union Pac. R. Co. v. Mower*, 219 F.3d 1069, 1073 n.4 (9th Cir. 2000) (noting that injunctions are available in diversity cases only if they are proper under state law); *Kramer v. Thompson*, 947 F.2d 666, 676 (3d Cir. 1991)

(refusing to issue an injunction in a libel case because the relevant state law did not authorize such injunctions).

But the *San Antonio Community Hospital* panel did not consider what procedural protections must be present for anti-libel injunctions to be valid. This was likely so because the defendant's briefs did not make the narrower argument that libel injunctions require certain procedural protections.[2]

San Antonio Community Hospital is therefore not binding precedent on that point, which remains open for this panel to decide. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)). "[U]nstated assumptions on non-litigated issues are not prece-

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[2] Appellant's Opening Brief at 21-25, *San Antonio Cmty. Hosp. v. S. Cal. Dist. Counsel of Carpenters*, 125 F.3d 1230 (9th Cir. 1996) (No. 96-56124), 1996 WL 33470187, at *21-25; Appellant's Reply Brief, *id.*, 1996 WL 33470186, at *16-21.

dential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-88 (9th Cir. 1985) (noting that several previous decisions had assumed a particular conclusion—there, that the Commerce Clause applied to Guam—but holding that those decisions were not binding on that point because the issue had not being raised or discussed in those cases); *see also, e.g.*, *Munoz v. Mabus*, 630 F.3d 856, 860 n.3 (9th Cir. 2010) (concluding that a prior decision was not binding precedent on a point that the decision "had no opportunity to decide," citing *Webster v. Fall*); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1046 n.14 (9th Cir. 2007) (concluding that a prior decision was not binding precedent on a point because the decision "did not expressly address [the] issue," and the issue was not "brought to the attention of the court," citing *Webster v. Fall*); *In re Larry's Apartment, LLC*, 249 F.3d 832, 839 (9th Cir. 2001) ("What is significant, however, is the fact that [in prior cases] we did not discuss the question of the propriety of using an Arizona sanction statute in an action in federal court; nor does it appear that the issue was then brought before us. . . . [T]hose cases [therefore] do not require us to hold that it is proper to use the Arizona sanction

statutes in federal litigation. As the Supreme Court has said, '[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having so decided as to constitute precedents.'") (citing *Webster v. Fall*).

And in practice *San Antonio Community Hospital* has not in fact settled the law on this subject in this Circuit. Just focusing on cases from 2016 and 2017, we can see *In re Dan Farr Prods.*, 874 F.3d 590, 596 n.8 (9th Cir. 2017), which noted—though in a case not directly involving a libel claim—that "'[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context'" (quoting *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers)), but did not discuss *San Antonio Community Hospital*, which seemed to take the opposite view. Turning to District Court libel injunctions cases from 2016 and 2017, we see:

- *List Industries, Inc. v. List*, 2017 WL 3749593, *3 n.1 (D. Nev. Aug. 30), which cites various opinions from other courts on the constitutionality of "final injunctions on [libelous] speech after a full trial on the merits," but "takes no position" on the dispute.
- *Vachani v. Yakovlev*, 2016 WL 7406434, *7 (N.D. Cal. Dec. 22), which concludes that, "Despite obvious First Amendment concerns, such an injunction [to remove defamatory allegations and not to repeat them] is permissible in defamation cases."
- *New Show Studios LLC v. Needle*, 2016 WL 7017214, *9 (C.D. Cal. Dec. 1), which concludes that "injunction[s] against defamatory statements" should only be allowed in "exceptional circumstances."
- *Andreas Carlsson Prod. AB v. Barnes*, 2016 WL 11499656, *5 (C.D. Cal. Oct. 11) (citation omitted), which concludes that, "'Injunctions against any speech, even libel, constitute prior restraints' and are therefore 'presumptively unconstitutional.'"

To the extent that Ms. Ferguson may have neglected to fully preserve arguments about whether this injunction included the necessary First Amendment procedural protections, by focusing just on the general First

Amendment objection to injunctions and not the specific procedural objections, this Court should nonetheless excuse any such waiver. *Sindi v. El-Moslimany*, 896 F.3d 1 (1st Cir. 2018), took a sensible approach in a closely analogous case: It reached the constitutional objections to an anti-libel injunction, even though the appellants' brief "rel[ied] on conclusory argumentation and, in many respects, fail[ed] to develop relevant points," because "the propriety of the challenged injunction turns on purely legal questions" and "the critical issues are virtually certain to arise in future defamation cases." *Id.* at 27-28.

Indeed, the First Circuit noted, "The fact that the appellants are challenging an injunction is itself a factor that cuts in favor of . . . considering inadequately preserved arguments. After all, it is well-settled that, upon due notice, a court may dissolve an injunction sua sponte (even in the absence of objections from the party enjoined) when the injunction is no longer equitable or consistent with the public interest." *Id.* at 29. "Consistent with this imperative, courts have excused procedural defaults and grappled with arguments against injunctions that implicate issues of

'constitutional magnitude,' even when those arguments were unpreserved." *Id.* at 29 (citation omitted). "Given the special importance of the issues surrounding the injunction and the other factors that we have mentioned, we conclude that a mechanical application of the raise-or-waive principle would work a miscarriage of justice." *Id.* at 30. The same principles apply in this case.

II. Properly crafted anti-libel injunctions can be valuable and constitutional

If a plaintiff is libeled by the *New York Times*, damages might be a tolerable remedy. The *Times* can afford to pay, and in any event likely has insurance. Moreover, at least before the Internet era, the defendant will rarely have even wanted an injunction: Once an article has been written, the damage is done, and most newspapers rarely return to the same topic long after they first covered it (which is when a permanent injunction would likely issue).

But the Internet empowers judgment-proof speakers to publish libels to a potentially broad audience, and these libels can cause enduring damage. Every time someone types a plaintiff's name into Google, the libels

can pop up again. Damages are a meaningless remedy, because the judgment-proof defendant cannot pay them (and because 47 U.S.C. § 230(c)(1) generally immunizes intermediaries, such as search engines or online service providers, that do have money). *See, e.g.*, *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (noting this); *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1158, 156 P.3d 339, 351 (2007) (likewise). In any practical sense, libel law does not leave plaintiffs in such cases with an adequate remedy at law. (Indeed, even plaintiffs suing well-off defendants may well find damages an inadequate substitute for the cessation of the libel.) Some courts do say that the mere existence of a libel cause of action makes it a legally adequate remedy, even if it is practically empty. *See, e.g.*, *Willing v. Mazzocone*, 482 Pa. 377, 383, 393 A.2d 1155, 1158 (1978). But that seems more to assume the conclusion—injunctions should not be allowed because damages are the legally exclusive remedy (whether or not they are practically adequate)—than to justify it.

An injunction, on the other hand, would be a useful remedy, because even judgment-proof speakers are not jail-proof. This may be why most state and federal appellate courts that have recently considered the issue

have held that courts may properly enjoin the continued distribution of material that had been found to be libelous. Volokh, *Anti-Libel Injunctions and the Criminal Libel Connection*, App. A, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372064 (collecting cases, and concluding that over 30 states appear to authorize such injunctions in at least some situations).

Of course, even today, some libel defendants (perhaps including Ms. Ferguson) will have assets or insurance. But, despite the normal equitable inquiry into whether legal remedies are available, if anti-libel injunctions are available against poor speakers, they must be equally applicable against rich speakers.

There cannot be a rule under which "poor people . . . have their speech enjoined, while the rich are allowed to speak so long as they pay damages." Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syr. L. Rev. 157, 170 (2007). "Conditioning the right of free speech upon the monetary worth of an individual is inconsistent" with constitutional principles. *Willing* , 482 Pa. at 383, 393 A.2d at 1158; *see also Kinney v. Barnes*, 443 S.W.3d 87, 100 (Tex. 2014); *Reyes v. Middleton*, 17 So. 937, 939

(1895); *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 176 (1876). But while these sources used this reasoning to reject injunctions against both poor and rich defendants, it can also be a reason to allow properly crafted injunctions as to both.

This Court was therefore correct to hold, in *San Antonio Community Hospital*, 125 F.3d at 1239, that anti-libel injunctions can be constitutional. The Supreme Court has held that courts may properly enjoin the continued distribution of material that had been found to be obscene, or to be unprotected commercial speech. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 443-44 (1957); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). This logic applies to anti-libel injunctions as well.

An injunction against libel in effect criminalizes the enjoined speech, since violating the injunction constitutes criminal contempt. But properly

crafted criminal libel laws (generally speaking, ones that require a showing of "actual malice" on the defendant's part[3]) are constitutionally permissible: Civil and criminal libel cases "are subject to the same constitutional limitations," including when the speech is speech on a matter of public concern about a public figure or official. *Herbert v. Lando*, 441 U.S. 153, 156 & n.1 (1979); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (taking the same view as *Herbert*); *In re Gronowicz*, 764 F.2d 983, 988 & n.4 (3d Cir. 1985) (en banc) (likewise); *Phelps v. Hamilton*, 59 F.3d 1058, 1073 (10th Cir. 1995) (upholding a narrowly drawn criminal libel statute); *People v. Ryan*, 806 P.2d 935, 941 (Colo. 1991) (likewise, as to speech

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[3] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), requires a showing of "actual malice" before punitive damages are recovered, even in lawsuits brought by private figures. It follows that criminal punishment should also require such a showing, even as to libels of private figures.

A similar showing might not be required as a First Amendment matter as to speech about matters of purely private concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (allowing punitive damages without a showing of "actual malice" in such cases). But general principles of criminal liability would in any event usually call for a showing of at least recklessness as to attendant circumstances in criminal cases, *see, e.g.*, Model Penal Code § 2.02(3), which roughly maps to actual malice; and this may reasonably be viewed as a First Amendment requirement when it comes to criminal libel in particular.

on matters of purely private concern). True, many legislatures have repealed criminal libel laws, or declined to reenact them after overbroad criminal libel statutes have been struck down. But fourteen states and one territory still have criminal libel laws,[4] and criminal libel prosecutions continue in most of those states;[5] indeed, after the Minnesota criminal libel statute was struck down as overbroad in *State v. Turner*, 864 N.W.2d 204 (Minn. Ct. App. 2015), the Minnesota legislature reenacted a properly narrowed statute, Minn. Stat. Ann. § 609.765 (2016).

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[4] Idaho Code §§ 18-4801 to 18-4809 (2016); Kan. Stat. Ann. § 21-6103 (2017 Supp.); La. Rev. Stat. Ann. § 14:47-14:50 (2016); Mich. Comp. Laws § 750.370 (2004); Minn. Stat. Ann. § 609.765 (2016); Mont. Code Ann. § 45-8-212 (2017); N.H. Rev. Stat. Ann. § 644:11 (2016); N.M. Stat. Ann. § 30-11-1 (2004); N.C. Gen. Stat. §§ 14-47, 15-168 (2017); N.D. Cent. Code § 12.1-15-01 (2012); Okla. Stat. tit. 21, §§ 771-774, 776-778 (2011 & 2017 Supp.); Utah Code Ann. § 76-9-404 (2017); Va. Code Ann. § 18.2-417 (2014); 14 V.I. Code §§ 1171-1179 (2012); Wisc. Stat. Ann. § 942.01 (2015-16). Two of these statutes have been held unconstitutional as to statements on matters of public concern, but remain valid as to statements on matters of private concern. *State v. Snyder*, 277 So. 2d 660, 668 (La. 1973), *rev'd on other grounds*, 305 So. 2d 334 (La. 1974); *State v. Powell*, 114 N.M. 395, 403, 839 P.2d 139, 147 (Ct. App. 1992).

[5] *See, e.g.*, David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 Comm. L. & Pol'y 303, 313 (2009) (finding, on average, four criminal libel prosecutions per year in Wisconsin from 2000 to 2007).

Nor is there any basis for striking down properly crafted anti-libel injunctions as forbidden "prior restraints" while upholding criminal libel laws on the grounds that they impose mere "subsequent punishments." Both punish speakers only after they speak. Both deter speech before it is said. Indeed, anti-libel injunctions have less of a deterrent effect, because they forbid defendants only from saying particular things about the plaintiffs—criminal libel law threatens defendants with punishment for any false and defamatory statements about anyone.

"The special vice of a prior restraint is that communication will be suppressed . . . *before an adequate determination that it is unprotected* by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390 (emphasis added). *After* speech is conclusively judicially determined to be unprotected, a permanent injunction should be no more troubling on constitutional grounds than a civil or criminal penalty, because "the order will not have gone into effect before [the court's] final determination that the [speech was] unprotected," *id*. "An 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 v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). The Court's occasional dicta suggesting that all injunctions are prior restraints are therefore somewhat erroneous overgeneralizations.[6]

The Texas Supreme Court has held that anti-libel injunctions are impermissible, partly because the injunctions would either be pointlessly narrow (if they are read as forbidding only the literal repetition of particular statements) or unconstitutionally vague, if read as forbidding paraphrased repetition as well. *Kinney*, 443 S.W.3d at 97. But criminal libel laws can be constitutional if they include the constitutionally mandated *mens rea* requirements, even though they ban all knowingly false and

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[6] *Compare Alexander v. United States*, 509 U.S. 544, 550 (1993) ("permanent injunctions . . . are classic examples of prior restraints"), *with Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 , 764 n.2 (1994) (holding that certain content-neutral injunctions are not prior restraints), *Pittsburgh Press*, 413 U.S. at 389-90 (same as to injunction barring sex-segregated want ads), *and Kingsley Books*, 354 U.S. at 441-45 (same as to injunction against obscenity).

defamatory statements. An injunction that bans repeating, or even paraphrasing, particular statements would be less broad and less vague than those laws.

Professor Tribe also suggested that injunctions may especially deter speech because they "affirmatively singl[e] out the would-be disseminator." Lawrence H. Tribe, *American Constitutional Law* 1042 n.2 (2nd ed. 1988). But the same "affirmative[] singling out" can happen when a prosecutor warns a speaker that continuing to make a particular statement would lead to a criminal libel charge. Such prosecutorial threats are not unconstitutional, *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71-72 (1963); *State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400, 1402 (1st Cir.1970); similarly targeted injunctions should not be, either.

Of course, none of this can justify overbroad injunctions that go beyond libelous statements. *See, e.g.*, *Baldinger v. Ferri*, No. 3:10-cv-03122-PGS-DEA, 2012 WL 13075670, at *1 (D.N.J. July 10, 2012) (barring defendant from "disseminating any statement . . ., whether in the form of fact, alleged fact, opinion or otherwise, regarding Plaintiff . . . in any way and at any time"), *aff'd as to other matters*, 541 F. App'x 219 (3rd Cir. 2013); *see*

also Hutul v. Maher, No. 1:12-cv-01811, 2012 WL 13075673, *9 (N.D. Ill. Dec. 10, 2012) (similar); *Khayyan LLC v. Santamaria*, No. 1:15-cv-01910, 2015 WL 1137703 (S.D.N.Y. July 2, 2015) (similar).

Likewise, preliminary injunctions and temporary restraining orders in libel cases are also unconstitutional, precisely because they are entered based on a mere showing of likelihood of success on the merits, and often without adequate discovery. *See, e.g.*, *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 303 (Ky. 2010); *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984); *Sid Dillon Chevrolet v. Sullivan*, 51 Neb. 722, 732, 559 N.W.2d 740, 747 (1997); *Metro. Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172, 176, 178 (2d Cir. 2001); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 39 (2013). (This Court in *San Antonio Community Hospital*, 125 F.3d at 1239, upheld such a preliminary injunction, but without considering whether preliminary anti-libel injunctions and permanent anti-libel injunctions should be treated differently for First Amendment purposes, because the defendant did not make such an argument.) But

properly crafted permanent injunctions limited to speech found to be libelous should be constitutional.

III. Anti-libel injunctions lack certain important procedural protections

Yet unless they are properly crafted, injunctions against libel may deny speakers certain procedural protections that even criminal libel law would provide. Before speakers are jailed for speech under a criminal libel law,

1. Their statements must be found to have been false when the statements were made.
2. This finding of falsehood must be based on proof beyond a reasonable doubt.
3. This finding must be made by a jury—a Sixth Amendment requirement in those states where the criminal libel statute authorizes more than six months in jail,[7] but also a state law requirement in

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[7] *See* Kan. Stat. Ann. §§ 21-6103, 21-6602 (2017 Supp.)); Minn. Stat. Ann. § 609.765 (2016); N.M. Stat. Ann. §§ 30-1-6, 30-11-1 (2004); N.D. Cent. Code §§ 12.1-15-01 (2012), 12.1-32-01 (2012 & 2017 Supp.); Wisc. Stat. Ann. §§ 939.51, 942.01 (2015-16).

all the other states (except Louisiana) that authorize jail time for criminal libel.[8]

4. This finding must be made after a trial in which an indigent defendant is entitled to a court-appointed defense lawyer, who can argue that the statements were true, opinion, privileged, or otherwise not libelous.

But when a speaker is prosecuted for criminal contempt for violating an anti-libel injunction, these protections are absent. Even if the defendant has a court-appointed lawyer (available if the defendant is facing the risk of jail) and the case is tried before a jury, the jury must only find beyond a reasonable doubt that the defendant said what the injunction forbade. The jury is not asked to decide beyond a reasonable doubt that the statement was false, and the court-appointed lawyer cannot argue to the jury about the statement's falsehood.

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[8] *See, e.g.*, Idaho Crim. R. 23(b) (right to jury trial for all misdemeanors); Mich. Ct. R. 6.401 (likewise); N.C. Gen. Stat. § 15A-1201 (2017) (likewise); Mont. Const. art. II, § 7 (jury in criminal libel cases); Okla. Const. art. II, § 22 (likewise); Utah Const. art. I, § 15. New Hampshire criminal libel law does not authorize jail time. N.H. Rev. Stat. Ann. §§ 644:11 (2016), 651:2(III) (2016 & 2017 Supp.).

This is an especially serious problem for defendants who could not afford a lawyer when the injunction was first sought. Because injunction proceedings are civil cases, these defendants would not be entitled to a court-appointed lawyer. They might therefore have been unable to effectively argue that the statement was true, or privileged.

If they lost at trial, they would find it very hard to effectively appeal. Indeed, they might have felt so hamstrung by the lack of a lawyer that they might not have contested the injunctions in the first place.[9] The injunctions may also have been entered far from where they lived, making it even harder for them to effectively litigate the case.[10] And when a defendant is absent, unrepresented, or practically unable to appeal, there will often be reason to doubt the accuracy of the factfinding at the initial civil injunction hearing. *See, e.g.*, *Baker v. Kuritzky*, 95 F. Supp. 3d 52,

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[9] *See, e.g.*, *Baker*, 95 F. Supp. 3d at 59 (entering anti-libel injunction following default judgment).

[10] *See id.* (lawsuit brought in Massachusetts against poster who apparently lived in Georgia). Courts in the state where plaintiff resides will sometimes have personal jurisdiction even over faraway defendants. *See, e.g.*, *Abiomed, Inc. v. Turnbull*, 379 F. Supp. 2d 90, 95 (D. Mass. 2005).

56-59 (D. Mass. 2015) (issuing injunction following default judgment banning defendant from stating, among other things, that the plaintiff is "dishonest," though such allegations would often be seen as nonactionable opinion, *see, e.g.*, *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 75 (4th Cir. 2016); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995)).

This might be an unavoidable reality as far as the civil justice system is concerned. Defendants who lack the resources to defend themselves may find themselves subject to civil judgments—though this is constrained, at least when it comes to lawsuits for damages, by the reluctance of most plaintiffs to spend money suing judgment-proof defendants.

But when courts issue injunctions against libel, they turn that reality into something with criminal law consequences: Defendants might be threatened with jail for repeating certain statements without ever having had lawyers who could effectively argue that the statements were not actually libelous.

To be sure, in this particular case Ms. Ferguson was represented by a lawyer, and in any event is a lawyer herself; and she expressly waived a

jury trial, Counter-Defendant's Pretrial Conf. Memo. Waiving Trial, ECF No. 158, at 2 (Nov. 5, 2018). But the First Amendment procedural protections provided by libel injunctions should recognize that in many cases there will be no such express waiver, and no lawyer representing the defendant. And beyond this, Ms. Ferguson is still facing the risk of jail time should she repeat her statements about Mr. Waid, without any requirement that the statements be found false beyond a reasonable doubt. Such a requirement is a protection that speakers would have if they were prosecuted for criminal libel. They should not lose this protection just because the libel is instead criminalized by an injunction that is enforceable through criminal contempt.

Moreover, injunctions against false statements risk forbidding true statements and opinions as well. First, a statement may be libelous in one context, but hyperbole in another. *See, e.g.*, *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (so holding as to allegations that a developer was engaged in "blackmail"). Yet an injunction simply barring repetition of a statement will prohibit the statement regardless of context.

Second, "[u]ntrue statements may later become true; unprivileged statements may later become privileged." *Kinney*, 443 S.W.3d at 98 (giving this as a reason to reject anti-libel injunctions); *Sindi v. El-Moslimany*, 896 F.3d at 33-34 (likewise). An injunction might, for instance, bar a self-styled consumer watchdog from repeating his allegations that a business has defrauded consumers, because the court concludes that the business has not indeed done so. But say the business does defraud a consumer after that: The injunction will still remain, and will still forbid the watchdog from repeating the specified statement.

True, a defendant could go to court to modify the injunction, *see Balboa Island Vill. Inn*, 40 Cal.4th at 1161, 156 P.3d at 353, but that is expensive and time-consuming. Or a defendant could ask the court to exercise its discretion not to initiate criminal contempt proceedings in light of the changed facts, *see, e.g.*, *Brandt v. Gooding*, 636 F.3d 124, 135 (4th Cir. 2011), but the judge may of course not agree that the facts have changed, or may think that in any event the defendant should have complied with the injunction. And, more generally, speakers should not have to "request

the trial court's permission to speak truthfully in order to avoid being held in contempt," *Kinney*, 443 S.W.3d at 98.

In these respects, a criminal contempt prosecution for violating an anti-libel injunction is much like pre-Revolutionary libel prosecutions, such as in the notorious John Peter Zenger trial: The judge decides whether a statement is libelous, and then the criminal jury decides only whether the defendant had published the statement.[11]

American law roundly rejected this approach for criminal libel, even when criminal libel prosecutions were common, and instead insisted that the criminal jury must determine whether the statement was indeed false.[12] The law should likewise take the same approach to anti-libel injunctions, given that they are enforced through criminal prosecution. *See*

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[11] *See, e.g.*, Ardia, *supra*, at 23 (describing this history); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 107 & n.93 (1984) (likewise); *Kramer*, 947 F.2d at 672 n.15 (likewise).

[12] *E.g.*, *Montee v. Commonwealth*, 26 Ky. 132, 151 (1830) (denouncing the older English approach—leaving the jury to only decide the fact of publication—as "odious" and "subversive of personal security"); *People v. Croswell*, 3 Johns. Cas. 337, 364-65 (N.Y. 1804) (Kent, J.) (likewise concluding that jurors must determine whether the defendant's publication

Willing, 482 Pa. at 384, 393 A.2d at 1159 (Roberts, J., concurring) ("One of the underlying justifications for equity's traditional refusal to enjoin defamatory speech is that . . . [an injunction] deprives appellant of her right to a jury trial on the issue of the truth or falsity of her speech."); *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 124-25 (Del. Ct. Ch. 2017) (refusing to enjoin libel because of the "longstanding preference for juries addressing defamation claims"); *see also, e.g., Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 392, 64 N.E. 163, 165 (1902) (taking the same view).[13]

Anti-libel injunctions are also unlike the content-neutral buffer zone injunctions that the Supreme Court has upheld in *Madsen v. Women's*

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was libelous, not just whether the defendant had published it). Though Chancellor Kent's position in *Croswell* lost, because the court was equally divided, it quickly prevailed both in the New York Legislature, An Act Concerning Libels, ch. 90, 1805 N.Y. Laws 232, and in American law more broadly.

[13] Some may be skeptical about whether juries are indeed great protectors of free speech. But American libel law has long treated jury decisionmaking as important, *see supra* p. 24; this historical judgment should not be lightly set aside. And jury decisionmaking coupled with judicial gatekeeping may provide better protection than either jury decisionmaking or judicial decisionmaking alone.

Health Center, Inc., 512 U.S. 753 (1994), and *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *see also Sindi*, 896 F.3d at 35 (distinguishing the injunctions in *Madsen* and *Schenck* from anti-libel injunctions on the grounds that those cases involved only narrow content-neutral place restrictions); *Snyder v. Phelps*, 562 U.S. 443, 457 (2011) (stressing that *Madsen* involved a picketing ban "that the Court has determined to be content neutral"). Anti-libel injunctions are content-based, and categorically forbid particular statements everywhere, rather than just neutrally restricting speech in a particular place. They must thus be subject to the procedural protections outlined in this section, even if the content-neutral injunctions in *Madsen* and *Schenck* lacked those protections.

IV. Anti-libel injunctions can be made constitutional

There is, fortunately, a simple revision that can allow anti-libel injunctions to provide the procedural protections necessary for criminalizing speech. First, the injunction should not simply ban specific statements (e.g., "Defendant shall not state *X* about the plaintiff") but should also expressly include the libelous nature of the statements as an element of

the forbidden behavior (e.g., "Defendant shall not *libelously* state *X* about the plaintiff"). Second, the injunction should expressly provide that any criminal contempt prosecutions should be conducted with a jury (unless the defendant waives the jury trial at the time of the criminal contempt hearing). *See also* Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 Buff. L. Rev. 655, 729-30 (2008); Ardia, *supra*, at 63. Third, the injunction should provide that it cannot be enforced through the threat of jail for civil contempt; this is needed to enforce the principle that speakers can only be jailed for their speech if the full protections of the criminal law are provided. *Cf. Kramer*, 947 F.2d at 668-69 (describing the trial judge's use of civil contempt proceeding to jail the libel defendant until he wrote a confession and apology).

Because the revised injunction would ban only libelous statements, the defendant could not be punished unless the plaintiff or the prosecutor, in the criminal contempt proceeding, shows that the statement is libelous. (For extra clarity, the injunction might so state expressly.) This means:

1. Before the defendant is criminally punished, the statement would have to be proved libelous beyond a reasonable doubt—which would require proof of falsehood and of the requisite *mens rea* on the defendant's part, and would allow the defendant to show that the statement was privileged.
2. The defendant would have a court-appointed lawyer (at least if there is a risk of jail time) who can effectively argue about whether the statement is indeed libelous.
3. The finding that the statements were indeed false would have to be made by a criminal jury, if the defendant so wishes.
4. If the facts or context have changed, and the statements are no longer libelous (for instance, because they are now true) or not libelous in context, the defendant would be entitled to acquittal. This would also obviate the main objection to anti-libel injunctions that the First Circuit recently expressed in *Sindi*, 896 F.3d at 33: "The cardinal vice of the injunction entered by the district court is its failure to make any allowance for contextual variation."

Of course, this would make criminal contempt hearings more time-consuming, and more expensive for plaintiffs (who would likely assist the prosecutor) and for the court system. But that is a necessary consequence of the procedures required to protect speech.

And the extra expense need not be great. While the findings in the civil case would of course not have collateral estoppel effect on the criminal case, the evidence and argument assembled for the civil case could be reused with a minimum of extra discovery and investigation.

The injunctions would continue to powerfully deter speakers. Only rare speakers would continue speaking after a court has found (albeit by a preponderance of the evidence) that their speech is false, and specifically ordered them—on pain of criminal punishment—to stop. Once the speakers know that a judge's attention has focused on them, and continuing to make the forbidden statements will be seen as undermine the judge's authority, they will likely get the message. (Criminal libel law would have the same effect, once a speaker gets a warning from a prosecutor.) But if a few speakers do think that they can prevail at a criminal

contempt trial, they should be entitled to the customary protections provided by the criminal justice process.

There is one important procedural difference between criminal libel prosecutions and criminal contempt proceedings for violating anti-libel injunctions. In criminal libel prosecutions, a prosecutor exercises discretion about whether to prosecute. In criminal contempt proceedings, a judge would normally refer the case to the U.S. Attorney's office, but if that office declines to act, the judge may appoint a special prosecutor. Fed. R. Crim. P. 42(a)(2).

Still, the availability of prosecutorial discretion should not be seen as a necessary First Amendment protection, the way that jury trial, proof beyond a reasonable doubt, and the availability of counsel would be. Prosecutorial discretion is not necessarily good in free speech cases: Though it diminishes the likelihood that speech will be prosecuted, it also introduces an extra risk of viewpoint discrimination. Enforcement of injunctions without a prosecutorial veto would decrease this risk. Prosecutorial discretion cannot save an overbroad law, *see United States v. Stevens*, 559

U.S. 460, 480 (2010); the absence of prosecutorial discretion should not invalidate a narrowly crafted injunction.

Conclusion

Anti-libel injunctions may be constitutional. Criminal libel law is constitutional; injunctions against specific statements that have been found libelous have a narrower chilling effect than criminal libel law does, and thus can be constitutional as well.

But unless properly crafted, anti-libel injunctions omit some important procedural protections that criminal libel law would provide—chiefly, a finding by a jury beyond a reasonable doubt that the statements are indeed libelous, following an adversary presentation in which poor speakers are entitled to court-appointed lawyers. Anti-libel injunctions must therefore be written to include such protections. This Court should vacate the injunction and, assuming it rejects Ms. Ferguson's substantive arguments, remand so that the District Court can revise the injunction to make it constitutional.

Respectfully submitted,

s/ Eugene Volokh

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This brief complies contains 6,495 words, excluding the parts exempted by Fed. R. App. P. 32(f); this complies the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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Dated: May 6, 2019

s/ Eugene Volokh

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