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

CHRISTOPHER BRUMMER,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

Index No.: 153583/2015
Hon. Manuel J. Mendez
IAS Part 13

NOTICE OF MOTION TO FILE MEMORANDUM OF LAW OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the affirmation of Andrew Read sworn to on August 31, 2017, and all exhibits attached thereto including a copy of the proposed memorandum of law of amicus curiae, the undersigned will move this Court at 27 Madison Avenue, New York, New York, on Friday, September 8, 2017, at 10:00 AM, or as soon thereafter as is practicable, for an order granting leave to the Electronic Frontier Foundation to file with this Court a memorandum of amicus curiae in support of Defendants-Appellants Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group in the above-styled action.

DATED: August 31, 17
New York, New York

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
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CHRISTOPHER BRUMMER,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

AFFIRMATION OF ANDREW READ IN SUPPORT OF MOTION BY THE ELECTRONIC FRONTIER FOUNDATION TO FILE AMICUS CURIAE MEMORANDUM OF LAW

Andrew S. Read, an attorney admitted to practice before the courts of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney at the firm of Woods Lonergan & Read PLLC. On behalf of the Electronic Frontier Foundation (EFF), I submit this affirmation in support of the motion for leave to file the attached memorandum as amicus curiae in support of Defendants-Appellants Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group in the above-styled action. Defendants-Appellants seek leave to appeal to the Court of Appeals an order of this Court entered on August 1, 2017, which modified an interim stay of a preliminary injunction entered by the Supreme Court, New York County on June 6, 2017.

2. EFF's proposed amicus curiae memorandum is attached as Exhibit A. The August 1, 2017 order of this Court that Defendants-Appellants seek leave to appeal is attached

as Exhibit B. The June 6, 2017 order of the Supreme Court, New York County is attached as Exhibit C.

3. As detailed in the proposed memorandum, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF is especially concerned about laws and regulations that threaten free expression over the Internet. EFF views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. As part of its mission, EFF frequently serves as amicus in First Amendment cases involving injunctions against online speech. *See, e.g., Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014) (amicus in case regarding permanent injunction in defamation case); *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015) (same).

4. EFF seeks to file its proposed amicus memorandum because it presents issues that will assist this Court's analysis and are of great importance to EFF's mission of protecting the constitutional rights of technology users. The injunction in this case requires the removal of statements and images from the Internet and prohibits speech before there has been a full and final adjudication that the speech is not constitutionally protected, or in fact that the plaintiff is entitled to any remedy. It therefore conflicts with longstanding First Amendment precedent regarding such prior restraints on speech.

5. For these reasons and others set forth more fully in the proposed amicus memorandum, EFF respectfully requests that this Court grant this motion and that the EFF be given leave to file the attached memorandum in this appeal.

DATED: August 31, 17
New York, New York

Respectfully submitted,

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Exhibit A

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

CHRISTOPHER BRUMMER,

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-against-

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

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Index No.: 153583/2015
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IAS Part 13

AMICUS CURIAE MEMORANDUM OF LAW OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT BENJAMIN WEY, ET AL.'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Electronic Frontier Foundation ("EFF") is a non-profit, nonpartisan 501(c)(3) organization. EFF has no parents, subsidiaries, or affiliates.

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INTEREST OF AMICUS CURIAE

Amicus curiae Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 38,000 dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF is especially concerned about laws and regulations that threaten free expression over the Internet. EFF views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. As part of its mission, EFF frequently serves as amicus in First Amendment cases involving injunctions against online speech. *See, e.g., Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014) (amicus in case regarding permanent injunction in defamation case); *McCarthy v. Fuller*, 810 F.3d 456 (7th Cir. 2015) (same).

INTRODUCTION

The injunction here is an unconstitutional prior restraint; it prohibits speech before there has been a full and final adjudication that the speech is not constitutionally protected, or in fact that the plaintiff is entitled to any remedy. It cannot withstand the rigorous First Amendment scrutiny due such orders.

Indeed, it is highly doubtful this injunction could be justified after a final adjudication. The long-held rule is that "equity will not enjoin a libel." Injuries to "personal or professional reputation"—the harm Justice Mendez sought to prevent in entering the original preliminary injunction—are addressed by damages remedies.

The richness of the English language and the myriad ways of expressing any given thought make it impossible for a trial court to craft an injunction against defamatory or offensive speech that is both effective and does not also bar the publication of protected speech.

Even a permanent injunction limited to the exact words found to be actionable in one context might prohibit speech that would not be actionable in another. That the injunction here is a preliminary one issued before a full adjudication on the merits makes the prior restraint even more offensive to the First Amendment. Finally, this Court should reject any suggestion that the advent of Internet publication somehow undermines bedrock First Amendment protections. As a result, it should not allow the injunction in this case to go into effect.

ARGUMENT

I. INJUNCTIONS AGAINST FUTURE DEFAMATORY OR OFFENSIVE SPEECH, PARTICULARLY PRELIMINARY INJUNCTIONS, ARE UNCONSTITUTIONAL PRIOR RESTRAINTS.

Courts have historically and consistently held that "equity will not enjoin a libel." *Metropolitan Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (citing cases, including *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). The rule is one of long standing, and it has gained a constitutional dimension under modern First Amendment jurisprudence. Even speech that is "unprotected" by the First Amendment cannot be subjected to a prior restraint without a separate holding that the prior restraint is constitutionally permissible. To rule otherwise would be to ignore the "well-established distinction" between permissible "subsequent punishments" of speech that is found after a trial to be defamatory, and impermissible prior restraint of future speech. *Alexander v. United States*, 509 U.S. 544, 548-49 (1993); *see also id.* at 554 ("[W]e have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments[.]").

A. Injunctions Against Future Speech Are Prior Restraints.

Any injunction that restrains a defendant from making certain statements in the future

(or republishing past statements) is a prior restraint on speech. The Supreme Court has expressly declared that injunctions—i.e., court orders that actually forbid speech activities—"are classic examples of prior restraints" because they impose a "true restraint on future speech." *Alexander*, 509 U.S. at 550.

It is hardly a new concept that a court might not be able to ban publication by a publisher who had disseminated malicious and defamatory articles about a person in the past. Indeed, it was recognized in the seminal case concerning prior restraints, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The injunction in *Near* prevented the defendants from publishing again on account of the lower court's determination, after trial, that the defendant's newspaper was "chiefly devoted to malicious, scandalous and defamatory articles." *Id.* at 706 (quotations omitted). The Supreme Court held that such an injunction on future speech was an "unconstitutional restraint upon publication." *Id.* at 723.

The bar on prior restraints remains even when the speech targets a particular individual for embarrassment or annoyance. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court struck down an injunction aimed at preventing an ongoing serious invasion of privacy as "an impermissible restraint on First Amendment rights." *Id.* at 418. The injunction barred a group of picketers and pamphleteers from distributing flyers that urged others to call Keefe's home phone number and express their displeasure about his real estate practices. In words that are particularly apt for this case, the Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 419. The Court stressed that "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Id.*

And in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), the Court invalidated a Texas statute that authorized courts, upon a finding that the defendant had shown some obscene films in the past, to issue an injunction of indefinite duration prohibiting the defendant from showing any films in the future, even if those films had not yet been found to be obscene. *Id.* at 311. The three judge District Court in *Vance*, whose decision was affirmed by the Supreme Court, held that, as in *Near*, "the state 'made the mistake of prohibiting future conduct after a finding of undesirable present conduct,'" and that such a "general prohibition would operate as a prior restraint on unnamed motion pictures" in violation of the First Amendment. *Id.* at 311-12 & n.3, 316-17 (citation omitted).

B. The Preliminary Injunction Issued in This Case Is an Unconstitutional Prior Restraint That Poses a Serious Danger to the First Amendment.

As *Near* and its progeny demonstrate, a prior restraint is an "an immediate and irreversible sanction" that "freezes" speech before it can happen. *Nebraska Press*, 427 U.S. at 559; *see also Alexander*, 509 U.S. at 548 (noting a "well-established distinction" between prior restraints and "subsequent punishments" of speech). As a result, the Supreme Court has held that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559. Any prior restraint comes with a "heavy presumption against its constitutional validity." *Keefe*, 402 U.S. at 419 (citations and quotations omitted). Prior restraints must "be couched in the narrowest terms that will accomplish [their] pin-pointed objective." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *Nebraska Press*, 427 U.S. at 593 (prior restraints "must fit within one of the narrowly defined exceptions" that are to be construed "very, very narrowly").

To pass constitutional muster, prior restraints must be "necessary" to further a

governmental interest of the highest magnitude. *See Nebraska Press*, 427 U.S. at 562. The prior restraint will be necessary only if:

(1) The harm to the governmental interest is highly likely to occur; *see id.* at 563, 565, 567 (approving of the trial court's finding of a clear and present danger of impairment of the defendant's fair trial rights, but cautioning against uncertainty); *see also New York Times v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring) (requiring absence of prior restraint to "surely result" in feared harm); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985) (activity restrained must pose "either a clear and present danger or a serious and imminent threat to a protected competing interest"); *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558 (N.Y. 1986) (New York constitution);

(2) The harm will be irreparable, and, for example, not remedied by a damages award; *New York Times*, 403 U.S. at 730 (Stewart, J., concurring);

(3) No less speech-restrictive alternative exists for preventing the harm; *see Nebraska Press*, 427 U.S. at 563-65; *In re New York Times*, 878 F.2d 67, 68 (2d Cir. 1989) ("no other available remedies would effectively mitigate" harm) (internal quotations omitted); and

(4) The prior restraint will actually prevent the harm. *See Nebraska Press*, 427 U.S. at 565 ("We must also assess the probable efficacy of prior restraint on publication[.]"); *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993).

Prior restraints must meet very exacting scrutiny even when they seek to suppress categorically "unprotected" speech such as obscenity. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

This exacting scrutiny cannot be met in a case involving defamation or other torts involving offensive speech, whether the injunction be temporary or permanent. It is impossible

to craft an injunction that is both efficacious and which does not include constitutionally protected speech within its reach. Any limited injunction will be both constitutionally suspect and ineffective, and any effective injunction will be inherently overinclusive. *See, e.g., Kinney v. Barnes*, 443 S.W.3d 87, 94 (Tex. 2014) (citing Erwin Chemerinsky, *Injunctions in Defamation Cases,* 57 Syracuse L. Rev. 157, 171 (2007)).

1. Injunctions Against Specific Statements Cannot Be an Effective Remedy Because Speech Torts Are Context-Specific.

Injunctions against the publication of specific words or images fail the efficacy requirement from the prior restraint test. *See New York Times v. United States*, 403 U.S. at 744 (Marshall, J., concurring) ("[A] court of equity will not do a useless thing."). An injunction that is limited to preventing repetition of the specific statements already found to be defamatory or otherwise tortious is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order. *See, e.g., Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1091 (C.D. Cal. 2010) ("Here, for instance, Plaintiffs seek to enjoin McWilliams from stating that Plaintiffs 'sent thugs, Blackwater operatives, or military special forces to intimidate him.' But this injunction would be worthless if McWilliams could instead simply claim that Plaintiffs had hired the mafia or a street gang to threaten him."). If such rephrased statements are also defamatory or otherwise tortious, the plaintiff would return to court to get a similarly narrow injunction, leading to revolving-door injunctions. *See Nebraska Press*, 427 U.S. at 565 (the court "must also assess the probable efficacy of [a] prior restraint of publication as a workable method," and "cannot ignore the reality of the problems of managing" such orders).[1]

[1] These problems of judicial administration are likely even more acute with defamation

Injunctions against specific statements are also unconstitutional because defamation and related torts are inherently context-specific. For example, a statement that is defamatory when published in one context at one point in time may not be defamatory in another context. Or it may be published or uttered in a context that cloaks it with a privilege. *See, e.g., Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y.2d 63, 67 (N.Y. 1979) (privilege for substantially accurate report of official, judicial or legislative proceeding). And even if a statement is false and the defendant once acted with the requisite degree of culpability, a different level of culpability may be required in the future. For example, if the plaintiff becomes a public figure, he will have to prove actual malice and falsity, whereas previously he may only have had to demonstrate that the defendant published negligently. *Oakley*, 879 F. Supp. 2d at 1091.

Crucially, if any of these examples of "changed circumstances" occur, an enjoined defendant would have "to seek the trial court's permission before she speaks by moving to modify the injunction." *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 357 (Cal. 2007) (Kennard, J., dissenting). Shifting the burden onto the defendant is "the essence of censorship," which prior restraint doctrine forbids. *Near*, 283 U.S. at 713. All of these changes in circumstances and the corresponding level of First Amendment protection—from a matter of private concern to one of public concern, for example—can happen very rapidly. The First Amendment cannot tolerate restraints on now-protected speech while a court sorts out the changed facts.

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on the Internet. *See* Section II, *infra*.

2. Because There Has Been No Final Determination, the Injunction Very Likely Bans Protected Speech and Is Therefore Unconstitutional.

Although injunctions should not issue in defamation cases, a handful of courts have taken an intentionally narrow, but nonetheless faulty, approach: enjoining only the use of the specific words or statements found to be defamatory. These courts believe that there is no constitutional barrier to enjoining speech that has been fully and finally adjudicated to be defamatory because it is "unprotected." *See, e.g. Balboa*, 156 P.3d at 352-55 (majority opinion) (limiting the injunction to only those statements determined at trial to be defamatory, and to include exceptions, among others, that preserved the defendant's right to "present[] her grievances to government officials"); *Hill v. Petrotech Resources Corp.*, 325 S.W.3d 302, 313 (Ky. 2010).

However, even these courts expressly limited their holdings to permanent injunctions against specific speech determined to be unprotected by the First Amendment *after* a full adjudication.[2] *See Balboa*, 156 P.3d at 352-55; *Hill*, 325 S.W.3d at 313 (limiting holding to "specific and particular statements" found "upon final adjudication of the trial court . . . to be

[2] Courts adopting a rule allowing narrow injunctions base their holding on a misapplication of U.S. Supreme Court precedent regarding other situations, not involving defamation, in which unprotected speech, particularly obscenity, can be subjected to a prior restraint in the form of an injunction. *See Balboa*, 156 P.3d at 346 (discussing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957)). But these precedents are readily distinguishable. For example, in *Kingsley Books*, the Court explained that injunctions on materials already deemed obscene are "glaringly different" from the injunction of a publication "because its past issues had been found offensive." 354 U.S. at 445. The distinction lies in the form of the speech. Unlike injunctions on specific obscene motion pictures, enjoining "defamatory" speech will inherently reach too far because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

false and defamatory").

By contrast, the injunction in this case is a preliminary one, which raises the very real possibility that it will suppress *protected* speech. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) ("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."); *Vance*, 445 U.S. at 316 (striking down statute that "authorizes prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene").

Although the speech at issue in this case may be offensive and distasteful, it may not be legally actionable. The plaintiff's claims include defamation and intentional infliction of emotional distress, but the elements of these torts have yet to be proven, particularly the elements required to satisfy the First Amendment. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (requiring public-figure IIED plaintiffs to prove that the defendant intended others to believe a false statement of fact about them). Indeed, although the trial court issued its injunction after finding a "likelihood of success" on the merits of the plaintiff's defamation claims, the court made no findings about the whether any of the defendant's colorful and figurative language was capable of a defamatory meaning, nor did it consider whether the plaintiff is a public figure for the purposes of this case.

Perhaps more important, the injunction as narrowed by the Appellate Division is not tied to remedying harms to the plaintiff's reputation at all. Instead, the narrowed injunction prohibits "images and statements . . . 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." This is odd, given that the statements portray plaintiff as the perpetrator of lynching, not the victim.

The narrowed injunction therefore raises additional First Amendment concerns, and evidences the complete absence of required constitutional findings. Because there were no findings, it is unclear what, if any, speech is banned by the injunction, except perhaps for photographs of actual lynching. For example, speech advocating violence can be proscribed only "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added). And the First Amendment protects threatening speech up until the point "where the speaker means to communicate a *serious expression of an intent* to commit an act of unlawful violence to a particular individual." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added). By contrast, the use of "harassing, upsetting, or coercive" methods to "exert social pressure" is constitutionally protected unless it fits these narrow exceptions. *Metropolitan Opera*, 239 F.3d at 178 (vacating injunction prohibiting "threatening or harassing" behavior); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. . . . When such appeals do not incite lawless action, they must be regarded as protected speech."). There is no exception from the First Amendment for lynching images—any such ban would have to find specific images to be either inciting or a true threat. *See United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (restrictions on the content of speech allowed only in "well-defined and narrowly limited classes of speech") (internal citations and quotations omitted)

The injunction thus inevitably includes, or by its uncertainty, chills the publication of protected speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (First

Amendment cannot allow "banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process"). It is thus the essence of a prior restraint. *See Oakley*, 879 F. Supp. 2d at 1091 (defendant will have to "1) muzzle his or her now lawful speech, while seeking and awaiting the court's permission to modify the injunction; or 2) speak freely, but risk potentially severe consequences if the court were to disagree about the lawfulness of the speech").

Even if a court might eventually decide that the speech at issue is unprotected, it should be punished after the fact, not enjoined. To suppress it in advance causes a serious First Amendment injury. *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (citing *Alexander*, 509 U.S. at 550 and *Nebraska Press*, 427 U.S. at 559). Such a determination is intensely fact-driven, and must be done in final adjudication to avoid turning preliminary injunctions into a tool for prior restraint. *See Pittsburgh Press*, 413 U.S. at 390.

II. THE ROLE OF THE INTERNET IN THIS CASE SHOULD NOT AFFECT THE CONSTITUTIONAL ANALYSIS OF THE INJUNCTION.

The landscape of communication has been dramatically reshaped by the Internet. Americans rely on digital means of communication for nearly every conceivable purpose in their daily lives. The U.S. Supreme Court has recognized the Internet's importance and made clear that it is entitled to the full protection of the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"). In fact, the Supreme Court has taken a definitive stance guaranteeing equal protection for speech over the Internet, holding that "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Citizens United v. Fed. Election*

Comm'n, 558 U.S. 310, 326 (2010).

Indeed, the Internet gives great power to the fundamental First Amendment axiom that "[t]he remedy for speech that is false is speech that is true." *United States v. Alvarez*, 567 U.S. 709, 727 (2012).[3] Because the cost of online speech is relatively low compared to traditional media, almost anyone can "speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined." *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999), aff'd, 217 F.3d 162 (3d Cir. 2000), vacated sub nom. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

As a result, the Internet is the natural home of the "lonely pamphleteer." *Reno v. ACLU*, 521 U.S. at 870 ("Through the use of Web pages, mail exploders, and newsgroups . . . [an] individual can become a pamphleteer."). The Internet is renowned for its capacity to enable and amplify a vast range of protected political speech, from critiques of government excess to exposés on unsafe or illegal corporate practices. *See generally* Yochai Benkler, *The Wealth of Networks* 212-72 (2006) (discussing the emergence of the Internet as a tool of political expression by private individuals). Thus, just as networked technologies may facilitate the spread of defamatory or otherwise offensive speech, they can just as quickly allow that speech to be countered.

Ironically, however, it is the very characteristics of the Internet that the Supreme Court in *Reno v. ACLU* found justified its full First Amendment protection—"the ease and speed by which any person can take on the role of the town crier or pamphleteer"—that often ignite calls

[3] The First Amendment embodies the Framers' judgment that it should be "the ordinary course in a free society" to engage false speech with the truth. *Alvarez*, 567 U.S. at 727. "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]'" *Id.* at 728 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

for online speech to receive diminished protection. *Kinney*, 443 S.W.3d at 100; *see also, e.g.*, *United States v. Cassidy*, 814 F. Supp. 2d 574, 582 (D. Md. 2011) (online speech protected "[e]ven though the Internet is the newest medium for anonymous, uncomfortable expression") (citing *Reno v. ACLU*, 521 U.S. at 870). The Internet has also significantly changed the context of communication. Now that a vast amount of speech can be communicated instantaneously, broadcast to countless strangers, and sent without speaking face-to-face, norms for communication have changed. And this change comes with the increased potential for miscommunication and misunderstanding.

The Supreme Court, however, has clearly stated that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952)). The context of online communication means that courts must be especially careful to discern between speech that is crude and speech that is truly defamatory or threatening, and courts cannot do so without engaging in a full, factual adjudication on the merits.

Some argue that defamatory or offensive online speech cannot be effectively countered with truthful speech. But this concern is not unique to the Internet, and it is arguably even less compelling in the context of the Internet given the rapid flow of information. Plaintiffs armed with a judgment against online defamatory speech can quickly and cheaply respond by posting a copy of the judgment. Moreover, in any medium, a plaintiff may be dissatisfied with "more speech" as a non-monetary remedy, but as the Supreme Court has held, under the First Amendment, dissatisfaction does not justify imposition of a prior restraint. *Alvarez*, 567 U.S. at

728 (rejecting claim "that counterspeech is insufficient").

Injunctions against Internet defamation also risk stifling the robustness of political and social speech on the Internet. For example, when powerful entities are targeted for criticism, it is a familiar tactic to answer with a lawsuit, regardless of legal merit. *See New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (expressing fear that absent First Amendment protection, "would-be critics of official conduct may be deterred from voicing their criticism"). Allowing an injunction in Internet defamation cases would give powerful entities a potential tool to harass their critics, chilling online discourse. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 888-89 (2000) (discussing chilling effects in online context); *Nebraska Press*, 427 U.S. at 559 (prior restraints, such as injunctions, "freeze" speech before it occurs).

In its First Amendment jurisprudence, the Supreme Court has carefully shaped protections that ensure breathing space for free speech while allowing appropriate remedies against "unprotected" speech, such as speech that has been adjudicated as defamatory. These long-held rules are outlined above. Amicus asks the Court to apply these pre-existing rules to the case at hand and reject any invitation to craft Internet-specific rules.

CONCLUSION

U.S. Courts have long held that "prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify." *Nebraska Press*, 427 U.S. at 592. It is impossible for a preliminary injunction to meet this exceptional burden. This is especially true when the narrow exception calls for a heavily contextual review of the statements made. The lower court's concerns, while understandable, upset the First Amendment's fundamental rules against prior restraint.

For the forgoing reasons, this Court should not allow the preliminary injunction to go into effect.

DATED: August 31, 17
New York, New York

Respectfully submitted,

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Attorneys for Amicus Curiae
Electronic Frontier Foundation[4]

[4] Amicus thanks law student Delbert Tran for his assistance in preparing this memorandum of law.

EXHIBIT B

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on August 1, 2017.

Present: Hon. Barbara R. Kapnick, Justice Presiding,
Marcy L. Kahn
Cynthia S. Kern
Peter H. Moulton, Justices.

Christopher Brummer,
Plaintiff-Respondent,

-against-

M-3328
Index No. 153583/15

Benjamin Wey, FNL Media LLC, and NYG Capital LLC, doing business as New York Global Group,
Defendants-Appellants.

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about June 6, 2017,

And defendants-appellants having moved, pursuant to CPLR 5519(c), to stay the aforesaid order which, without an evidentiary hearing, granted plaintiff's motion for a preliminary injunction and temporary restraining order: (1) enjoining defendants from posting any article about plaintiff to the website TheBlot.com for the duration of the action; and (2) ordering defendants to remove from TheBlot.com all articles they have posted which concern plaintiff,

And an interim order of a Justice of this Court, dated June 15, 2017, having stayed the entirety of the Supreme Court's order,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

Ordered that the interim stay of this Court, dated June 15, 2017, should be lifted to the extent of directing 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. The interim stay is also lifted so as to prohibit defendants from posting on any traditional or online media site any photographs or other images depicting or encouraging lynching in association with plaintiff. The issue of the amount of the undertaking is presently being addressed in the motion Court.

ENTERED:

CLERK

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

CHRISTOPHER BRUMMER,
Plaintiff,
-against-
BENJAMIN WEY, FNL MEDIA LLC, and NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP,
Defendants.

INDEX NO. 153583/2015
MOTION DATE 01-20-16
MOTION SEQ. NO. 015
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for TRO and Preliminary Injunction:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ____cross motion	4- 5
Replying Affidavits	6 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff's motion for a preliminary injunction and temporary restraining order pursuant to CPLR §6301 is granted.

Plaintiff commenced this action on April 22, 2015 asserting three causes of action for defamation, defamation per se, and intentional infliction of emotional distress. Plaintiff is a professor of law at Georgetown University Law Center and the sole African-American on the National Adjudicatory Council (herein "NAC"). He was part of a panel that upheld a decision by the Financial Industry Regulatory Authority, Inc. (herein "FINRA"), issuing a lifetime ban from the security industry against two African-American stockbrokers: non-parties William Scholander and Talman Harris. Defendant NYG Capital LLC d/b/a New York Global Group (herein "NYGG") is a U.S. and Asia based strategic market entry advisory, venture capital, and private equity investment group that services clients worldwide. Defendant FNL Media, LLC (herein "FNL") is described in the Complaint as a division or subsidiary of NYGG, and the owner of *TheBlot*, a website and online digital magazine that claims to combine investigative journalism with reader-submitted comments. The Complaint alleges that Benjamin Wey (herein "Wey") is the CEO of NYGG, a publisher and contributor to *TheBlot*.

The Complaint alleges that almost a month after the NAC panel upheld the FINRA lifetime ban on non-parties William Scholander and Talman Harris, *TheBlot*, began publishing numerous articles defaming the Plaintiff. Defendant Wey has testified previously that he is TheBlot's publisher and that Defendant FNL owns *TheBlot* (Moving Papers Ex. 1). Defendant Wey also testified that as the sole owner of NYGG he has the power to take down or remove articles that appear on *TheBlot*, and write articles for *TheBlot* under his own name and pseudonyms (id). Plaintiff claims that he is a private individual that had an excellent professional and personal reputation which has been damaged by the Defendants' defamatory statements that resulted in the loss of work together with other damages.

Plaintiff now seeks an Order pursuant to CPLR §6301 for a temporary restraining order and preliminary injunction to remove and prevent articles about Plaintiff from appearing on *TheBlot*. The Defendants oppose this motion.

CPLR §6301 grants this court the power to issue an order directing the Defendants to perform an act for the benefit of Plaintiff, or to refrain from performing an act that would be injurious to the Plaintiff (CPLR § 6301). The issuance of a preliminary injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show: "(i) the likelihood of ultimate success on the merits; (ii) irreparable injury to him absent granting of the preliminary injunction; and (iii) that a balancing of the equities favors his position" (Doe v Axelrod, 73 NY2d 748, 532 NE2d 1272, 536 NYS2d 44 [1998]; Nobu Next Door, LLC v Fine

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Arts Housing, Inc., 4 NY3d 839, 833 NE2d 191, 800 NYS2d 48 [2005]). An injunction maintains the status quo until a full hearing can be had on the merits. It should not be granted unless its necessity and justification is clear based on undisputed facts (Residential Board of Managers of the Columbia Condominium v Alden, 178 AD2d 121, 576 NYS2d 859 [1st Dept. 1991]).

A cause of action for defamation is stated when a Complaint contains allegations of: (i) a false and injurious statement of fact concerning the plaintiff, that exposes the plaintiff to hatred, contempt, aversion, or would cause an unsavory opinion of the plaintiff in the minds of a substantial number in the community; (ii) the statement has been published or spoken to a third party; and (iii) damages have been accrued (Frechtman v Gutterman, 115 AD3d 102, 979 NYS2d 58 [1st Dept. 2014]). The pleadings of damages is not necessary when the pleadings allege defamation per se (Lieberman v Gelstein, 80 NY2d 429, 590 NYS2d 857, 605 NE2d 344 [1992]). Defamation per se is alleged when the defamatory statement: (i) charged plaintiff with a serious crime; or (ii) tends to injure the plaintiff in his or her trade, business or profession (id).

Plaintiff demonstrates the likelihood of ultimate success on the merits for defamation and defamation per se regarding Defendants references to criminal affiliation and fraudulent activity by Plaintiff. The offending statements alleged in the Complaint and annexed in Plaintiff's exhibits tend to injure Plaintiff's reputation and good name, and otherwise "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [him] in the minds of right-thinking persons, and to deprive [him] of their friendly intercourse in society" (Dillon v City of New York, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). In the articles published by *TheBlot* Defendants continuously refer to Plaintiff as a "phony law firm dropout, imbecile, being caught up in fraud, an Uncle Tom," and asserts that Plaintiff had sexual affairs and engaged in lewd conduct including being a "suspect in a rape case" (Moving Papers Ex. 14-24).

When the Plaintiff seeks to enjoin a Defendant's expressions and speech, additional rules govern as they implicate a Defendant's First Amendment rights. The court's analysis begins with the "confrontation between the constitutional guarantee of freedom of speech and its restraint in the face of an offensive intrusion as part of coercive action upon a captive audience in a private dispute" (Trojan Elec. & Mach. Co., Inc. v Heusinger, 162 AD2d 859, 557 NYS2d 756 [3rd Dept 1990]). There is a distinction between protected speech "intended to encourage debate on public issues," and "defamatory speech [that does not advance such societal interests and, indeed, concerns a private individual" (Bingham v Struve, 184 AD2d 85, 591 NYS2d 156 [1st Dept 1992]). Likewise, a court has upheld a preliminary injunction against a defendant arguing about his First Amendment rights by finding "the words and conduct of the defendant were obviously designed and put into effect for the purpose of intimidating the plaintiff and coercing settlement of a claim by adversely affecting [the plaintiff's] business venture" (Trojan Elec. & Mach. Co. v Heusinger, 162 AD2d 859, 557 NYS2d 756 [3rd Dept. 1990]). Thus, an injunction will lie to restrain libel when the publication is "part and parcel of a course of conduct deliberately carried on to further a fraudulent or unlawful purpose" (Ansonia Assoc. Ltd. Partnership v Ansonia Tenants' Coalition, 253 AD2d 706, 677 NYS2d 575 [1st Dept 1998]).

Plaintiff establishes that he will suffer irreparable harm if the Defendants are allowed to continue to post and maintain offensive articles on *TheBlot*. The harm caused by continuing offensive communication is irreparable when "it is capable of injuring [plaintiff's] standing and reputation in all aspects of [his] personal and professional life, and of inflicting serious psychological and emotional damage to [plaintiff]" (Bingham, supra).

The Plaintiff has annexed numerous articles as exhibits that are offensive in nature (Moving Papers Ex. 14-24). Defendant Wey continues to link offensive articles about the Plaintiff to Defendant Wey's personal twitter account, including as recent as the 26th of May, 2017 (twitter.com/WeyBenjamin). These articles currently on *TheBlot* can be viewed directly by any of Defendant Wey's 84.9 thousand "followers" on Twitter along with *TheBlot*'s normal consumers. It is clear that if these posts continue to be displayed, they are capable of injuring Plaintiff's standing and reputation in his professional life as a professor of law at Georgetown University, and a member of NAC.

The equities balance is in Plaintiff's favor. There is little to no harm to Defendants in being enjoined from posting articles about the Plaintiff, or from temporarily removing the articles annexed to Plaintiff's Exhibits for the duration of trial (Moving Papers Ex. 14-24). Plaintiff could face extreme harm to both his personal and professional reputation and his current employment if these articles continue to be available to the public.

Accordingly, it is ORDERED, that Plaintiff's motion pursuant to CPLR §6301, seeking a temporary restraining order and preliminary injunction is granted, and it is further,

ORDERED, that Defendants are enjoined and restrained from posting any articles about the Plaintiff to *TheBlot* for the duration of this action, and it is further,

ORDERED, that the Defendants are to immediately upon being served with a copy of this Order with Notice of Entry remove from *TheBlot* all the articles they have posted about or concerning Plaintiff, including those annexed to the Moving Papers as Exhibits 14-24.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: June 5, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

CHRISTOPHER BRUMMER,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

Index No.: 153583/2015
Hon. Manuel J. Mendez
IAS Part 13

PROPOSED ORDER GRANTING MOTION TO FILE MEMORANDUM OF LAW OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION

Upon the affirmation of Andrew Read sworn to on August 31, 2017, proposed amicus curiae Electronic Frontier Foundation, having duly moved for an order permitting it to enter their Memorandum of Law of Amicus Curiae Electronic Frontier Foundation in support of Defendants-Appellants Benjamin Wey, FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group in the above-styled action and in the Court of Appeals, and granting such other relief as the Court deems appropriate,

IT IS HEREBY ORDERED that Electronic Frontier Foundation's Motion to file Memorandum of Law of Amicus Curiae is GRANTED, and that the docket in the above-styled appeal and the Court of Appeals be amended to add Electronic Frontier Foundation as amicus curiae.

ENTER,

_____

Index No. 153356/2015

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

Christopher Bearemer,

Plaintiff-Respondent,

-against-

Benjamin Wey, FNL Media, LLC, and
NYC Capital LLC d/b/a New York
Global,

Defendants-Appellants.

NOTICE OF MOTION WITH SUPPORTING PAPERS

Signature (Part 130-1.1)

Andrew S. Read, Esq.

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