

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

ULYSSES TORY, ET AL., :

Petitioners :

v. : No. 03-1488

JOHNNIE L. COCHRAN, JR. :

- - - - -X

Washington, D.C.

Tuesday, March 22, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 a.m.

APPEARANCES:

ERWIN CHEMERINSKY, ESQ., Durham, North Carolina; on behalf of the Petitioners.

JONATHAN B. COLE, ESQ., Sherman Oaks, California; on behalf of the Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
ERWIN CHEMERINSKY, ESQ.	
On behalf of the Petitioners	3
JONATHAN B. COLE, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
ERWIN CHEMERINSKY, ESQ.	
On behalf of the Petitioners	49

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 03-1488, Ulysses Tory v. Johnnie L. Cochran.

5 Mr. Chemerinsky.

6 ORAL ARGUMENT OF ERWIN CHEMERINSKY

7 ON BEHALF OF THE PETITIONERS

8 MR. CHEMERINSKY: Good morning. Mr. Chief  
9 Justice, and may it please the Court:

10 The injunction in this case violates the most  
11 basic principles of the First Amendment. It's a prior  
12 restraint. It's a content-based restriction on speech.  
13 It's vastly overbroad. It even restricts the speech of  
14 those who are not a party to the lawsuit, such as  
15 Petitioner Ruth Craft.

16 The injunction in this case is inconsistent with  
17 this country's unique and profound commitment that speech  
18 by public officials and public figures be open, robust,  
19 and uninhibited.

20 One way in which the injunction is clearly  
21 unconstitutional is in restricting the speech of those who  
22 are not a party to the lawsuit. For example, Ruth Craft  
23 is expressly restrained from ever speaking again about  
24 Johnnie Cochran even though she was never named as a party  
25 to the lawsuit. And, in fact, Cochran's attorney admitted

1 at the beginning of trial, she wasn't a part of the  
2 lawsuit.

3 JUSTICE SOUTER: How about you? You're in  
4 trouble too, aren't you?

5 (Laughter.)

6 MR. CHEMERINSKY: Yes, I am, Your Honor. This  
7 injunction is so broad that if I talk about Johnnie  
8 Cochran or this case on the sidewalk in front of this  
9 Court or pass out copies of the brief or speak to any  
10 reporter, I am violating the terms of the injunction and I  
11 could be held in contempt of court.

12 JUSTICE GINSBURG: Mr. Chemerinsky, you speak  
13 about the injunction, and the injunction has three parts.  
14 I thought that you were not challenging -- at least the  
15 question presented doesn't suggest you're challenging --  
16 the first one that concerns distance, the 300 yard from  
17 Cochran or his place of business, and the third one, which  
18 is an anti-harassment provision. Do I understand  
19 correctly that it is only the second one that you're  
20 challenging?

21 MR. CHEMERINSKY: No, Your Honor. The question  
22 presented is that the injunction is unconstitutional.

23 One of the reasons why the injunction is  
24 unconstitutional is that it's based on speech that's  
25 protected by the First Amendment. All of the statements

1 that were uttered by Mr. Tory are opinion protected by the  
2 First Amendment. There is not the requisite actual  
3 malice. And so it's our position that the injunction  
4 itself is unconstitutional.

5 JUSTICE GINSBURG: But your question is  
6 preventing all future speech about an admitted public  
7 figure, and the first and third provisions of this  
8 injunction do not prohibit all future speech.

9 MR. CHEMERINSKY: Yes, Your Honor, that's  
10 correct. It's our position, though, that the injunction  
11 is based on speech that's protected by the First  
12 Amendment, and we believe that the question presented is  
13 that the injunction is impermissible in its restriction of  
14 speech.

15 JUSTICE O'CONNOR: But that isn't what you've  
16 said in the question presented. Why shouldn't we be  
17 limited to answering the question presented? And that  
18 would leave the other parts there.

19 MR. CHEMERINSKY: Well, of course, you're  
20 limited to the question presented. Our position, though,  
21 is that the injunction in its restriction of speech is  
22 unconstitutional. And one of the reasons why the  
23 injunction is unconstitutional is that all of the speech  
24 that occurred in this case is speech that's protected by  
25 the First Amendment.

1 JUSTICE O'CONNOR: Yes, but you understand  
2 Justice Ginsburg's question surely, and I would imagine  
3 that even if you prevail, nothing we would order would  
4 affect the first and third parts.

5 MR. CHEMERINSKY: Well, Your Honor, certainly we  
6 believe that the injunction is most clearly  
7 unconstitutional in its overbreadth.

8 We believe also and separately the injunction is  
9 unconstitutional because injunctions are not a permissible  
10 remedy in a defamation case, especially concerning public  
11 officials and public figures.

12 But it's also our position that the injunction  
13 is based on speech that's protected by the First  
14 Amendment, and thus, the injunction violates the First  
15 Amendment.

16 JUSTICE SCALIA: Well, but that doesn't --

17 JUSTICE O'CONNOR: Mr. Chemerinsky, is it true  
18 that your client intends to go on defaming Mr. Cochran?

19 MR. CHEMERINSKY: No, Your Honor. We don't  
20 believe our client has ever defamed Mr. Cochran. We  
21 believe that all of his speech is just opinion.

22 JUSTICE O'CONNOR: Does he intend to continue  
23 making the same comments that he made before?

24 MR. CHEMERINSKY: His exact words were that  
25 perhaps he would continue to express his view that Mr.

1 Cochran owes him money.

2 JUSTICE O'CONNOR: All right. Now, let me ask  
3 you this. Under your theory, if -- if the defendant is  
4 judgment-proof, does respondent have any remedy at all if  
5 the statements are defamatory?

6 MR. CHEMERINSKY: Yes, Your Honor.

7 JUSTICE O'CONNOR: What is it?

8 MR. CHEMERINSKY: There is, of course, a remedy.  
9 Since we're dealing here with a public figure, there is  
10 the remedy of expressing views which this Court has said  
11 in Gertz v. Welch is available to a public figure. There  
12 is a damage judgment that's available. Certainly, Your  
13 Honor, there can't be a different rule --

14 JUSTICE O'CONNOR: But if -- if the defendant is  
15 judgment-proof, what good does that do?

16 MR. CHEMERINSKY: Your Honor, there is a damage  
17 judgment that forever would be available against the  
18 person. And it cannot be, Your Honor, that those who are  
19 poor will have injunctions --

20 JUSTICE KENNEDY: Well -- well, your -- your  
21 answer should be to Justice O'Connor there is no effective  
22 legal remedy under your theory of the case.

23 MR. CHEMERINSKY: No, Your Honor, I disagree  
24 with that.

25 JUSTICE KENNEDY: I mean, you -- you say he has

1 the remedy of -- of counter-speech. We're talking --  
2 that's really that doesn't answer the question. The  
3 question is, is there anything he can get from the courts  
4 other than a damage remedy, and your answer I think is no.

5 MR. CHEMERINSKY: That's correct, Your Honor.  
6 From the courts, he can get a damage remedy but I don't  
7 accept that a damage remedy is inadequate just because a  
8 person may be poor. The damage remedy will be that they'd  
9 be collected for the person who gets assets in the future.

10 Also, as I was saying to Justice O'Connor, it  
11 can't be --

12 JUSTICE KENNEDY: Well, it -- it seems to me  
13 that that really avoids the problem -- the problem.

14 So suppose we disagree with you about that.  
15 Then it's true that there is no -- there is no legal  
16 remedy that he can get.

17 MR. CHEMERINSKY: But then, Justice Kennedy, it  
18 can't be the rule that poor people have their speech  
19 enjoined, but those with assets can continue to speak in  
20 the future.

21 JUSTICE SCALIA: Well, it also can't be the rule  
22 that poor people can defame ad libitum and -- and people  
23 who have money cannot. I mean, that's -- that's not a  
24 fair rule either.

25 MR. CHEMERINSKY: No, Your Honor, but that's why



1 there would be, of course, the ability of a court to issue  
2 a damage judgment. There are many instances in which  
3 damage judgments can't be collected.

4 JUSTICE SCALIA: It's worthless against a --  
5 against a person who has no assets.

6 MR. CHEMERINSKY: But that's true everywhere in  
7 the legal system, Your Honor.

8 And I would also argue here that none of Mr.  
9 Tory's statements were defamatory. I would point --

10 JUSTICE GINSBURG: Now that's another one that  
11 is in your brief. You say that these were statements of  
12 opinion not fact. But that surely is not presented in  
13 your question. You -- you don't -- there were findings  
14 made that these statements were defamatory, and your  
15 question presented does not seem to me to encompass at  
16 all the question whether these statements were defamatory.

17 MR. CHEMERINSKY: I would disagree, Your Honor.  
18 The question presented is whether this injunction, that  
19 forever stops speech, violates the First Amendment. One  
20 reason why --

21 JUSTICE SCALIA: Not -- not this injunction.  
22 The question presented is whether a permanent injunction  
23 as a remedy in a defamation -- in a defamation action,  
24 preventing all future speech about an admitted public  
25 figure, violates the First Amendment. There's no

1 suggestion in that that you claim that in this particular  
2 case there was no defamation. I -- I just don't think  
3 it's fairly included within the question.

4 MR. CHEMERINSKY: Your Honor, what I am saying  
5 is that the question presented does ask whether this  
6 injunction, which permanently restricts speech --

7 JUSTICE SCALIA: No, it doesn't. It says  
8 whether a permanent injunction as a remedy in a defamation  
9 action preventing all future speech about an admitted  
10 public figure violates the First Amendment.

11 MR. CHEMERINSKY: We would argue --

12 JUSTICE SCALIA: There's nothing about this  
13 particular injunction which is based upon speech that is  
14 not defamation. There's nothing in there about that.

15 MR. CHEMERINSKY: Your Honor, our position is  
16 that question asks whether an injunction violates the  
17 First Amendment, and certainly it is about this case. And  
18 our position is that all of the speech that was expressed  
19 in this case is opinion. And it's important --

20 JUSTICE BREYER: All right. Now, if that's  
21 so --

22 JUSTICE KENNEDY: Well -- well, there really --  
23 there are findings against you, and to say that a lawyer  
24 is a crook, a liar, and a thief and you're trying to tell  
25 us that that's not defamatory, I mean, I -- I think we

1 should just proceed on -- on some other basis for this  
2 argument. We have other questions to discuss.

3 MR. CHEMERINSKY: Sure. But, Your Honor, I want  
4 to just respond to that. The exact statement there was --  
5 and I'll quote it for you and it is on page 54 of the  
6 joint appendix. Johnnie is a crook, a liar, and a thief.  
7 Can a lawyer go to heaven? Luke 11:46. Your Honor, this  
8 Court has said, for example, in Greenbelt Cooperative that  
9 charging somebody with blackmail is expressing opinion.  
10 In Letter Carriers v. Austin this Court said calling  
11 somebody a traitor is opinion.

12 JUSTICE BREYER: All right. That -- that --  
13 what you've quoted many -- much of this I wouldn't repeat  
14 in polite company. You've reported one of the most mild,  
15 and in fact there are two findings. One, this is not just  
16 defamation. It was an action for defamation, as well as a  
17 tort of invasion of privacy. And there is a finding,  
18 first, that this was done intentionally to create a  
19 negatively charged and ominous environment, and this is  
20 not a matter of speech-related issues. It is simply the  
21 use of false and defamatory and privacy-invading  
22 communications, or worse, or attempt to improperly coerce  
23 payment of money in tribute for -- for desisting from that  
24 type of activity. All right. Now, those are the  
25 findings against you.

1           So suppose I agreed with you hypothetically that  
2 that, with all these findings, is nonetheless protected by  
3 the First Amendment. All right? Now, suppose, in other  
4 words, you convince me of that. Now, I want to know how  
5 to write my opinion on that assumption to protect what I  
6 was worried about yesterday, that a woman who has a  
7 boyfriend or a husband is being continuously harassed in  
8 -- with methods similar to this one. See, it's easy to  
9 transpose those two cases which are both on my mind.

10           And I want to know if in your opinion that these  
11 restraining orders, which try to prevent this kind of  
12 thing, among others, are unconstitutional, if there's a  
13 way of distinguishing them, if you could possibly win on  
14 what theory. And what I'm trying to get you to do is to  
15 say is it absolute. Are there limits? If so, what?

16           MR. CHEMERINSKY: I would suggest three  
17 different ways in which you could write the opinion that  
18 distinguished the case.

19           The first is that this injunction is vastly  
20 overbroad, that even if there can be an injunction to say  
21 that Ulysses Tory and Ruth Craft can never again say  
22 anything about Johnnie Cochran in any public forum, that I  
23 can never speak about Johnnie Cochran would violate the  
24 First Amendment.

25           A second way of distinguishing is that

1    defamation is different, that when the First Amendment was  
2    adopted, the clear history was that above all it was to  
3    prevent prior restraints, and that injunctions were not  
4    permitted in defamation actions. That's quite different  
5    than a harassment action.

6           And third, as I've argued, what makes this  
7    different is the basis for this injunction is speech  
8    protected by the First Amendment.

9           With regard to the findings that you referred  
10   to, you mentioned two.

11           The first is invasion of privacy. Your Honor,  
12   the only privacy claim in this case was false light  
13   invasion of privacy. California law is clear. When there  
14   is a defamation action and a false light claim, the false  
15   light claim is automatically dismissed as duplicative when  
16   it's based on the same fact.

17           The second basis you pointed --

18           CHIEF JUSTICE REHNQUIST: Mr. Chemerinsky, this  
19   case comes up to us from a California appellate court.  
20   Surely they know California law better than we do.

21           MR. CHEMERINSKY: Yes, Your Honor, but they did  
22   not base their decision on the privacy claim because  
23   California law is clear that when it's false light  
24   invasion of privacy brought together with a defamation  
25   action, the false light claim is dismissed. That's a

1 California case, Couch v. San Jose Unified School  
2 District.

3 CHIEF JUSTICE REHNQUIST: Well, we're not going  
4 to debate among ourselves over what California law is.

5 MR. CHEMERINSKY: No, Your Honor. All I'm  
6 saying is it's important to be clear about what the  
7 privacy claim is. As I was saying to Justice Breyer,  
8 there may be privacy claims that give rise to injunctions.  
9 Harassment claims may give rise to injunctions, but not  
10 the privacy claim in this case which was just about false  
11 light, which even the California Court of Appeal admitted  
12 is treated together with defamation.

13 JUSTICE KENNEDY: Suppose this picketing had  
14 taken place in front of his house, every day in front of  
15 his house.

16 MR. CHEMERINSKY: Your Honor, under Frisby v.  
17 Schultz, that would be a different situation. Under  
18 Frisby v. Schultz, this Court said --

19 JUSTICE KENNEDY: All right. Well -- well, then  
20 this -- this argument you're making, oh, never, never, the  
21 sky is falling and so forth, I -- I think we have to be  
22 more precise here. I think if it were in front of his  
23 house, it would be different.

24 If he had alleged \$10 worth of monetary damages,  
25 it would be disparaging the quality of his services, which

1 would be a trade libel, and the Restatement at least -- I  
2 don't know California law -- says that you -- would you  
3 agree that you can enjoin a trade libel --

4 MR. CHEMERINSKY: Well, Your Honor --

5 JUSTICE KENNEDY: -- that disparages quality of  
6 goods to the serious injury of a -- of a business?

7 MR. CHEMERINSKY: Actually, Your Honor, the vast  
8 majority of cases have held that you cannot have an  
9 injunction for product defamation. And so I think while  
10 that's a different and more difficult question, most  
11 courts have said no even there.

12 And Your Honor, I'm not saying there can never  
13 be injunctions. But I am saying that this Court has said  
14 there's a very strong and heavy presumption against  
15 injunctions, and that never, not once in the 214-year  
16 history of the First Amendment, has this Court ever upheld  
17 an injunction as a remedy in a defamation action.

18 And, Your Honor --

19 JUSTICE GINSBURG: Well, if -- if this under --  
20 the underlying claim seems to be that Mr. Cochran is  
21 essentially being blackmailed; that is, this -- this --  
22 your client wants tribute to go away. And you say, yes,  
23 but it's defamation. It's a defamation action.  
24 Therefore, damages is the only remedy.

25 Is there nothing that one can do to stop another

1 from engaging in blackmail?

2 MR. CHEMERINSKY: Yes, Your Honor, there is. If  
3 this was blackmail or extortion, Johnnie Cochran could  
4 have filed a criminal complaint with the police. He could  
5 have civilly sued for blackmail or extortion. But, Your  
6 Honor, this wasn't extortion.

7 JUSTICE KENNEDY: What kind of a jurisprudence  
8 is it that a person can go to jail but that he's freed  
9 from an injunction? I mean, why -- why do we do this?

10 MR. CHEMERINSKY: But Your Honor, that's  
11 because this Court has said that injunctions of speech are  
12 even worse than criminal penalties. I would refer this  
13 Court --

14 JUSTICE KENNEDY: But -- but why -- is that true  
15 in every case? I mean, take the timid person who's not  
16 sure -- I know the law doesn't protect the timid person in  
17 the first area, but let's -- let's assume the timid person  
18 is not sure. So he wants -- he wants to get an equitable  
19 ruling first, declaratory judgment. He -- and he would  
20 take an injunction. That's certainly much easier than  
21 going to jail.

22 MR. CHEMERINSKY: But, Your Honor, I'd remind  
23 you of this Court's language in the Vance v. Universal  
24 Amusement where the Court said presumption against prior  
25 restraints is heavier and the degree of protection broader



1 than against limits on criminal penalties.

2 JUSTICE KENNEDY: I know, but I'm asking you why  
3 that -- why that should be. If -- if you asked a person  
4 not familiar with our jurisprudence, which is worse,  
5 having an injunction that you can argue about or going to  
6 jail, I -- I think they would say that going to jail is  
7 worse.

8 MR. CHEMERINSKY: But, Your Honor, in terms of  
9 the First Amendment, there are reasons why an injunction  
10 has always been regarded as worse.

11 JUSTICE BREYER: Always? Do you want to apply  
12 that to an harassment action too against a woman who has  
13 the restraining order? No restraining orders in divorce  
14 cases in case they're against speech because even if  
15 violence is threatened, even if -- et cetera. I mean, how  
16 -- how far do you want to push that principle?

17 MR. CHEMERINSKY: Your Honor, I don't want to  
18 push the principle at all to harassment. I believe that  
19 injunctions are completely appropriate in harassment  
20 actions. I think it is quite important to note that the  
21 California harassment statute expressly excludes speech  
22 which is protected by the First Amendment as being a basis  
23 for harassment.

24 The history of the First Amendment is different.  
25 To go back to Justice Kennedy's question, it's always been

1 thought that an injunction strikes at the very heart of  
2 the First Amendment because, as Justice Scalia pointed  
3 out --

4 JUSTICE SCALIA: Why can't we say that speech  
5 that is -- is being used for extortion is different, just  
6 as speech which is being used for harassment is different?  
7 And just as you can get an injunction for the latter, you  
8 ought to be able to get an injunction for the former. Not  
9 all speech, but only when speech is being used to -- to  
10 extort money.

11 MR. CHEMERINSKY: Yes, Your Honor, there can be  
12 an injunction for extortion, but this was not extortion.  
13 There was never the criminal complaint. There was never  
14 the civil action. And it didn't meet the requirements for  
15 extortion. Your Honor, California law, Penal Code section  
16 518, defines extortion as, quote, the obtaining of  
17 property from another with his consent induced by a  
18 wrongful use of force or fear. There wasn't the wrongful  
19 use of force or fear.

20 Now, it may be that Ulysses Tory was speaking --

21 JUSTICE SCALIA: Here I think there was -- why  
22 isn't there a use of fear when, you know, you're afraid of  
23 this person destroying your business by calling you a liar  
24 and a cheat? Wasn't Mr. Cochran afraid of that -- of that  
25 happening?

1                   MR. CHEMERINSKY: Your Honor, this Court is  
2 required to do an independent review of the record under  
3 Bose v. Consumers Union. There's no indication that Mr.  
4 Cochran suffered that fear from Mr. Tory being outside.  
5 It's true that Mr. Tory may have believed that he was owed  
6 money by Johnnie Cochran and was also trying to encourage  
7 Mr. Cochran to pay. But this Court has said in cases like  
8 NAACP v. Claiborne Hardware speech does not lose its  
9 protective character simply because it may embarrass  
10 others or coerce them into action.

11                   JUSTICE GINSBURG: Mr. Chemerinsky, the district  
12 -- I mean, the trial court made certain findings and I'm  
13 looking at page 42 of the joint appendix. The first is  
14 that these statements were actually made for the purpose  
15 of inducing Cochran to pay Tory amounts of money which  
16 Tory was not entitled. That's one finding. And then  
17 finding 24, despite repeated requests, Tory has refused to  
18 cease picketing unless he was paid money -- a monetary  
19 settlement by Cochran. And then 27 that says this is  
20 simply use of false and privacy-invading communications to  
21 coerce or attempt to improperly coerce payment of money in  
22 tribute for desisting from that type of activity. And  
23 those sound like findings.

24                   It's true that the label of extortion has been  
25 put on it, but it certainly does sound like the -- that

1 the purpose of the speech was to extract money not owed.

2 MR. CHEMERINSKY: But, Your Honor, since this is  
3 a defamation action, not an extortion action, the rules  
4 under the First Amendment for defamation have to apply.  
5 Under the rules of the First Amendment for defamation,  
6 injunctions are not available to public officials or  
7 public figures.

8 JUSTICE KENNEDY: Well, so this finding -- the  
9 court shouldn't have made these findings? It was  
10 irrelevant?

11 MR. CHEMERINSKY: Well, Your Honor, I believe  
12 that the --

13 JUSTICE KENNEDY: Was there an objection to the  
14 testimony that established this?

15 MR. CHEMERINSKY: Yes, Your Honor. Mr. Tory,  
16 who was appearing pro se in the trial court, from the very  
17 outset objected that he was being held liable for speech  
18 protected by the First Amendment.

19 JUSTICE SOUTER: No, but it seems to me -- and I  
20 think what bothers me is -- is what bothers Justice  
21 Kennedy. It seems to me that the argument you just made  
22 is an argument that given the pleadings in this case, the  
23 findings that Justice Ginsburg just quoted really were  
24 irrelevant findings, that they should not have gotten --  
25 that the court should not have gotten into extortion and

1 so on and should not have provided a remedy for extortion,  
2 quite apart from the fact of whether it's an appropriate  
3 remedy, constitutional or otherwise. And that, it seems  
4 to me, is -- is something that we -- we are not here to  
5 touch. That's a question of California law.

6           What we are here to touch is, number one,  
7 whether the injunction is overbroad with respect to pure  
8 speech, and maybe we are here -- that we have a question  
9 about the -- the breadth of the case we took. But maybe  
10 we are here to determine whether there can be an  
11 injunction against blackmail or harassing activities.

12           But I -- I think we're not here to decide  
13 whether California could have gotten to the question of  
14 blackmail, harassment, and injunction for that. Do you  
15 agree with that?

16           MR. CHEMERINSKY: No, Your Honor. I certainly  
17 agree with the first point. One issue before this Court  
18 is whether this injunction is overbroad, and it clearly is  
19 in terms of the breadth of speech that's regulated and  
20 whose regulated.

21           But as to the second point that you make, this  
22 is a defamation action, and thus the issue before this  
23 Court, clearly presented in the question presented, is  
24 whether a permanent injunction can be issued in a  
25 defamation case remedy when the plaintiff is a public

1 figure.

2 JUSTICE SOUTER: Well, it can certainly -- the  
3 -- the issue is certainly before us as to whether such an  
4 injunction can be issued with respect to defamation pure  
5 and simple. But the findings that Justice Ginsburg has --  
6 has read and part of the order in question here seems to  
7 go beyond pure defamation. It goes to the kind of  
8 demonstrative activity which plausibly is found to have  
9 been in aid of extortion. And that, it seems to me, is an  
10 entirely different question.

11 We may -- I'm not saying we will, but we may  
12 agree with you that it's overbroad. We may agree with you  
13 that as to pure speech, you can't enjoin it. But that  
14 doesn't necessarily mean that every part of this  
15 injunction is wrong, and it seems to me it is irrelevant  
16 as to whether the -- the State of -- the courts of  
17 California should have reached extortion.

18 MR. CHEMERINSKY: I would disagree in this way,  
19 Your Honor. *Bose v. Consumers Union* makes clear that when  
20 it is a defamation action, this Court and every appellate  
21 court has to do an independent review of the record.

22 JUSTICE SOUTER: With respect to the defamation,  
23 pure and simple. I agree with you. We -- there is a  
24 heightened standard of review, but I don't think that  
25 addresses one way or the other what the standard should be

1 when an action in the State courts has been treated as an  
2 action both for defamation and for extortion or  
3 harassment.

4 MR. CHEMERINSKY: But, Your Honor, it was not  
5 treated here as an action for extortion or harassment --

6 JUSTICE SCALIA: I understand. Mr. Chemerinsky,  
7 let me put the question this way. Suppose a State does  
8 not have a civil action for extortion. It provides  
9 criminal remedies but no civil action for extortion. Why  
10 does the Constitution not permit us to treat, in that  
11 State at least, a civil action for defamation which has  
12 within it elements of distortion differently from pure  
13 defamation?

14 MR. CHEMERINSKY: Your Honor, I would say the  
15 history of the First Amendment is different. A State can  
16 create a civil action then for extortion at the urging of  
17 this Court, but if you open the door to injunctions in  
18 defamation cases, then there's the possibility that in any  
19 defamation case, somebody might plead something about  
20 extortion, and injunctions will not be rare but will be  
21 the norm.

22 JUSTICE STEVENS: May I ask this -- may I ask  
23 this question? Supposing the only thing he did was to  
24 carry a sign that said Johnnie is a crook, a liar, and a  
25 thief, and the trial judge finds that is false, and he's

1 carrying it in a sign, could the trial judge enjoin him  
2 from carrying that sign in front of Johnnie Cochran's  
3 office?

4 MR. CHEMERINSKY: No, Your Honor, because the  
5 law is clear that injunctions are not a permissible remedy  
6 in defamation cases.

7 JUSTICE STEVENS: What's the best authority you  
8 have for that proposition?

9 MR. CHEMERINSKY: Near v. Minnesota would be the  
10 best authority where this Court said clearly that  
11 injunctive relief should not be awarded in a defamation  
12 case.

13 JUSTICE KENNEDY: Add to Justice Stevens' -- add  
14 to Justice Stevens' hypothetical that he shows that he's  
15 losing some clients.

16 MR. CHEMERINSKY: But, Your Honor, even -- yes,  
17 Your Honor. But I don't think that changes the  
18 hypothetical in terms of enjoining the defamatory speech.

19 CHIEF JUSTICE REHNQUIST: Would you add too that  
20 he's judgment-proof?

21 MR. CHEMERINSKY: Well, again, as I said to  
22 Justice O'Connor, I don't think it can matter whether he's  
23 judgment-proof because we can't have a different rule that  
24 we allow poor people's speech to enjoin and not wealthy  
25 people.



1 JUSTICE KENNEDY: You're saying -- you're saying  
2 that a State cannot constitutionally prohibit someone from  
3 making false statements in front of the business that  
4 causes the business to lose money.

5 MR. CHEMERINSKY: Well, Your Honor, there are  
6 other causes of action that may allow that. If it could  
7 be --

8 JUSTICE KENNEDY: So I'm -- my question is, is  
9 this constitutional to prohibit this conduct?

10 MR. CHEMERINSKY: Not in a defamation action,  
11 Your Honor.

12 JUSTICE KENNEDY: That's --

13 JUSTICE GINSBURG: I --

14 JUSTICE KENNEDY: -- that's not the question.

15 JUSTICE STEVENS: But what is your authority for  
16 that proposition?

17 MR. CHEMERINSKY: Well, I would say that the  
18 authority comes from the fact that never in 214 years has  
19 this Court ever upheld an injunction in a defamation case.

20 JUSTICE STEVENS: Have we ever set aside an  
21 injunction that did that?

22 MR. CHEMERINSKY: Well, not under those facts.

23 JUSTICE STEVENS: Have we done it either way?

24 MR. CHEMERINSKY: No. That's correct, Your  
25 Honor.

1 JUSTICE KENNEDY: Have we ever -- have we ever  
2 considered a case where there's a strong element of  
3 extortion involved?

4 MR. CHEMERINSKY: I would say yes, extortion for  
5 Austin v. Keith. There was speech to pressure, and yet  
6 this Court said even though the speech was to pressure,  
7 it's still protected by the First Amendment.

8 I'd like to save the rest of the time for  
9 rebuttal, if that's permissible.

10 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
11 Chemerinsky.

12 MR. CHEMERINSKY: Thank you.

13 CHIEF JUSTICE REHNQUIST: Mr. Cole, we'll hear  
14 from you.

15 ORAL ARGUMENT OF JONATHAN B. COLE

16 ON BEHALF OF THE RESPONDENT

17 MR. COLE: Mr. Chief Justice Rehnquist, and may  
18 it please the Court:

19 For years, Mr. Tory has relentlessly targeted  
20 Johnnie Cochran with a pattern of defamatory speech in a  
21 public forum for purpose of causing Mr. Cochran to pay Mr.  
22 Tory money in tribute for ceasing from this unprotected  
23 activity. He admitted at trial he intended to engage in  
24 this conduct. He was doing it just so he could be paid  
25 money, and when asked if he would continue to do so, he

1 stated he would.

2 JUSTICE SOUTER: Well, do you -- do you defend  
3 the injunction in its entirety?

4 MR. COLE: Yes --

5 JUSTICE SOUTER: In other words, the -- the --  
6 Mr. Chemerinsky didn't have too much chance to -- to get  
7 very far into it, but one of his points was that there was  
8 -- quite apart from any injunction against picketing,  
9 harassment, et cetera, there was an injunction simply  
10 against speech on a given subject directed to a lot of  
11 people with no limit of time. With respect to that last  
12 aspect, do you defend the injunction?

13 MR. COLE: Yes. First of all, I don't believe  
14 it was directed to a lot of people. As this --

15 JUSTICE SOUTER: Well, it was directed, number  
16 one, to a named person who was not a party to the case,  
17 and it was directed to agents and employees of -- of the  
18 named party. So, I -- I assume that Mr. Cochran probably  
19 has a fair number of agents and employees, so it does seem  
20 like a large number of people.

21 MR. COLE: I believe this Court said in Madsen  
22 that that would raise an abstract controversy that Mr.  
23 Tory doesn't have standing to attack the injunction for  
24 other persons who are not before the court. No aider or  
25 abetter has ever been served with this injunction. Ms.

1 Craft has never been served with this injunction. Only  
2 Mr. Tory. So I don't believe --

3 JUSTICE SOUTER: Well, let me ask you a law  
4 school question. In -- given the injunction on its face,  
5 with that breadth, is that injunction defensible with  
6 respect not to picketing, not to harassment, simply to  
7 speech in a public place?

8 MR. COLE: I defend the injunction, and  
9 respondent defends the injunction on the ground that it is  
10 conduct that was being enjoined --

11 JUSTICE SOUTER: I -- I asked you --

12 MR. COLE: -- from the use of unprotected  
13 speech.

14 JUSTICE SOUTER: -- to exclude the -- the issue  
15 of conduct. I said forget the injunction for a moment  
16 with respect to picketing, with respect to harassment, and  
17 we'll say with respect to blackmail, since that has come  
18 up. Forget that. Simply take the portion of the  
19 injunction that enjoins speech by these people,  
20 associates, agents, et cetera. On the subject matter of  
21 the injunction for all time, do you defend that  
22 injunction?

23 MR. COLE: Yes, we defend the injunction.

24 JUSTICE GINSBURG: Let's take specifically the  
25 words of the injunction. It's against orally uttering

1 statements about Cochran, just orally uttering statements  
2 about Cochran.

3 MR. COLE: Yes.

4 JUSTICE GINSBURG: You say that someone can be  
5 enjoined --

6 MR. COLE: Based upon the unique facts of this  
7 case, Justice Ginsburg, I say somebody can be enjoined. I  
8 don't say that in the abstract.

9 JUSTICE O'CONNOR: Well, you can't square that  
10 with the Near case at all. I -- I mean, the -- the  
11 injunction on its face in part 2 has the appearance of  
12 being overly broad.

13 MR. COLE: But in Near, they set forth certain  
14 factors, and those factors included that it was not a  
15 private redress of private wrongs. The information was of  
16 legitimate public concern. Neither of those elements are  
17 present in this action.

18 JUSTICE SCALIA: You don't know that.

19 JUSTICE O'CONNOR: You don't --

20 JUSTICE SCALIA: You don't know what future  
21 speech is going to be. His future thing may be, you know,  
22 Johnnie Cochran shouldn't be elected mayor of San  
23 Francisco. That would be a -- a question of public  
24 concern.

25 MR. COLE: But, Justice Scalia, what I'm relying

1 on is the fact that he has engaged in 3 years in a pattern  
2 of continuing, repetitive conduct.

3 JUSTICE KENNEDY: Well, what -- what you're  
4 saying is that an -- an injunction can be overbroad based  
5 on past wrongful conduct. And there is simply no  
6 authority for that proposition.

7 MR. COLE: I'm not suggesting that this  
8 injunction is necessarily overboard based upon that  
9 proposition because I believe there are --

10 JUSTICE KENNEDY: But we have just pointed out  
11 that it -- that it -- it prohibits lawful, harmless,  
12 truthful speech.

13 MR. COLE: I disagree with that, Justice  
14 Kennedy.

15 JUSTICE O'CONNOR: Well, it does on its face. I  
16 mean, it is clearly overbroad. Now, what should we do  
17 about that?

18 MR. COLE: Well, if you're asking me, based upon  
19 the breadth of the injunction, what I -- if -- if there  
20 was -- are you asking me what I would do to modify the  
21 injunction? You could merely strike -- you could leave  
22 intact paragraph 2 and you could strike simply subsections  
23 (ii) and (iii) as being unconstitutionally overbroad.

24 JUSTICE KENNEDY: Now, let -- let me ask you  
25 about that. Let's -- let's assume, for the moment, that a

1 majority of the Court would find that some of these  
2 provisions are overly broad. Is there any authority that  
3 tells us what to do next? This is not like a statute  
4 where we have to save the statute. Do we have any  
5 obligation to save the injunction? Send it back and let  
6 it be done. Let it be done all over again. I mean, why  
7 -- why should we rewrite it up here? Do you have any  
8 authority that requires us or permits us to do that?

9 MR. COLE: Yes. In -- in Madsen, Justice  
10 Kennedy, you struck -- the Court struck certain provisions  
11 as being unconstitutionally overbroad and left certain  
12 intact. So there's no reason why you can't look at this  
13 injunction, which clearly does not attack paragraph 1.  
14 The -- they do not attack paragraph 1. They do not attack  
15 paragraph 3. They only level their attack at paragraph 2,  
16 and paragraph 2, by striking subsections (ii) and (iii),  
17 would then be limited to the exact conduct in issue, which  
18 is picketing.

19 JUSTICE BREYER: So -- so if -- before leaving  
20 that point, what the injunction prohibits is that Tory and  
21 those acting in concert, cooperation, or participation  
22 with him from, in a public forum, orally uttering  
23 statements about Cochran. All right. That's what it  
24 says.

25 Now, do you think that if Tory or someone acting

1 in cooperation with him says, I've had a change of heart,  
2 Johnnie Cochran is a marvelous person, and he says that on  
3 television -- do you think that individual at that time  
4 has violated this injunction?

5 MR. COLE: Absolutely not.

6 JUSTICE BREYER: Absolutely not. Because?  
7 Because?

8 MR. COLE: First of all, that's --

9 JUSTICE BREYER: It said the words. They  
10 violated the words. It was a statement, but he has not  
11 violated the injunction because?

12 MR. COLE: Because I don't believe that's a  
13 public forum.

14 JUSTICE BREYER: Oh, no, no. He does it in a  
15 public forum. In fact, he hires Disney Hall.

16 (Laughter.)

17 JUSTICE BREYER: And moreover, he gets on stage  
18 and announces it. Okay? There's no problem about a  
19 public forum. So, now, why doesn't it violate the  
20 injunction?

21 MR. COLE: Your -- Your Honor, I believe there  
22 are alternative channels of communication here.

23 JUSTICE BREYER: No. I thought what you were  
24 going to say -- but you're not. So I'm very interested in  
25 that, and I'm glad I asked. I thought you were going to



1 say when it says uttering statements, it means statements  
2 of the kind or identical to those we have identified  
3 earlier in this opinion.

4 MR. COLE: Well, I was --

5 JUSTICE BREYER: But, now, you haven't said  
6 that. I said it, and I think it's too late for you to say  
7 it.

8 (Laughter.)

9 MR. COLE: I think I said it when I said there  
10 was a continuing pattern of repetitive conduct under  
11 Pittsburgh Press, over 3 years that that was the conduct  
12 that he has engaged in. And that was clearly the purpose  
13 of this injunction, Justice Breyer. We know that. And  
14 the purpose of the injunction is to enjoin conduct that's  
15 designed to extort money from Mr. Cochran.

16 CHIEF JUSTICE REHNQUIST: In more than one case,  
17 we've said that an injunction has to be precise and clear  
18 and not leaving things to the imagination.

19 MR. COLE: Well, I think this is precise and  
20 clear. Based upon the breadth of the injunction, it's  
21 very clear. Based upon this man's prior repetitive  
22 conduct of defaming Mr. Cochran with unprotected speech  
23 for the purpose of attempting to extort money from him --

24 JUSTICE SCALIA: Well, it's -- it's --

25 JUSTICE STEVENS: But nothing in the injunction

1 refers to prior conduct.

2 JUSTICE SCALIA: That's right. It's --

3 JUSTICE STEVENS: The injunction just speaks for  
4 itself. It doesn't say what -- doing what you used to do  
5 or anything like that.

6 MR. COLE: The injunction --

7 JUSTICE STEVENS: You cannot picket Cochran or  
8 Cochran's law firm. Period.

9 MR. COLE: If we restricted the injunction to  
10 specific words used such as you cannot picket Johnnie  
11 Cochran's law firm and say he's a crook, liar, and thief,  
12 the response will be that he'll come up with five new  
13 words to defame Mr. Cochran for purposes of extorting --

14 JUSTICE STEVENS: Well, maybe there are  
15 different grades of specificity. Maybe it doesn't meet  
16 precisely the same words, but I think there are other ways  
17 to draft it that say no picketing. Period.

18 MR. COLE: Well, there could be no picketing for  
19 purposes of -- no -- which contains defamatory speech for  
20 purposes of extorting Mr. Cochran. But --

21 JUSTICE STEVENS: All I'm suggesting is just  
22 draft it -- just excising (ii) and (iii) from paragraph 2  
23 would not necessarily solve the problem completely.  
24 Because subparagraph (i) says picketing Cochran or  
25 Cochran's law firm, which is a pretty broad prohibition.

1           MR. COLE: Well, I would disagree based upon the  
2 prior -- continuing course of -- of repetitive conduct and  
3 the fact that this -- over a period 3 years, once a week,  
4 this man spent 3 to 4 hours a day of his time defaming Mr.  
5 Cochran at his law office. When we enjoined him from  
6 doing so at his law office, he moved it to the Los Angeles  
7 Superior Court.

8           And I think the fact that Mr. Cochran is a  
9 public figure actually favors the breadth of this  
10 injunction. If this was not a public figure, then the  
11 public forum issue would not be as effective. But because  
12 Mr. Cochran is a public figure, the only way he gets  
13 protection is in the public forum because this gentleman  
14 could move his picketing down to west L.A., Santa Monica  
15 Boulevard, nowhere near a courthouse, and to a public  
16 figure he can inflict the same damage to reputation. And  
17 that is the problem we were contending with in attempting  
18 to draft an injunction that was not overbroad and yet  
19 could control Mr. Tory --

20           JUSTICE GINSBURG: You -- you did draft this  
21 injunction. It wasn't the -- an inspiration from the  
22 judge unaided by your advocacy. Is that so?

23           MR. COLE: It --

24           JUSTICE GINSBURG: This -- the terms of this  
25 injunction.

1 MR. COLE: Were aided -- were aided by my  
2 advocacy, Your Honor.

3 CHIEF JUSTICE REHNQUIST: Aided and abetted.

4 MR. COLE: Well said, Justice Rehnquist.

5 What I'm suggesting here is Mr. Cochran would  
6 have been faced with -- he has no remedy. Injunctive  
7 relief is the only remedy. And he would be faced with a  
8 multiplicity of actions --

9 JUSTICE SCALIA: Why? Why couldn't he just be  
10 enjoined from -- from similar defamation? I mean, this --  
11 this enjoins him from -- from true speech. At least he  
12 could -- he could have been enjoined from in the future  
13 defaming Cochran in the same manner. And if he did that,  
14 then -- then he could be punished.

15 MR. COLE: I think we would be -- that  
16 injunction then would be attacked on being vague or  
17 ambiguous, that Mr. Tory wouldn't have sufficient notice  
18 as to what he was allowed to say and not allowed to say.  
19 I guarantee you that was --

20 JUSTICE KENNEDY: Well, if -- if that's so, then  
21 maybe Mr. Chemerinsky is right. We -- we shouldn't have  
22 injunctions. If you're saying that injunctions can't be  
23 narrowly tailored, it seems to me that you're playing  
24 right into the argument that the petitioner is making.

25 MR. COLE: No. I think they can be tailored. I

1 just don't think they can be that narrowly tailored. And  
2 I don't think in this case, which I believe that the test  
3 we should be applying if we're going to balance, is this  
4 -- there's no need for this injunction to be drafted in  
5 the least restrictive means.

6 I also continue to advance the argument that  
7 this -- the facts of this case are unique. It's the use  
8 of speech to engage in unprotected conduct. This -- this  
9 conduct is not protected by the First Amendment. The  
10 conduct of attempting to extort money from Mr. Cochran is  
11 not protected. If that is not protected, then I believe  
12 we can craft --

13 CHIEF JUSTICE REHNQUIST: You can -- you can  
14 certainly have, you know, some unprotected speech in  
15 connection with extortion, like give me \$5 million or I'll  
16 shoot you. But that -- this was a far cry from that. In  
17 other words, it isn't just addressing the victim and  
18 saying give me something. It's denouncing the victim,  
19 which gets into free speech here.

20 MR. COLE: It certainly does, Justice Rehnquist.  
21 But what I am suggesting is there was no remedy for Mr.  
22 Cochran that would have avoided a multiplicity of actions  
23 other than to draft the injunction in a form that would  
24 preclude Mr. Tory from engaging in the same conduct  
25 without regard to whether it was -- and to let him know

1 clearly -- give him a safe harbor as to what he could and  
2 could not say.

3 CHIEF JUSTICE REHNQUIST: But the injunction  
4 isn't limited to the same conduct.

5 MR. COLE: But I don't think it needs to be  
6 because of the pattern and practice that this man has  
7 engaged in over 3 years.

8 And if we take the example, which is so he has a  
9 change of heart and suddenly he now wants to praise Mr.  
10 Cochran and that's become his -- and he's going to promote  
11 him as mayor of San Francisco, he can certainly go into  
12 the court and modify the injunction.

13 CHIEF JUSTICE REHNQUIST: I thought he lived in  
14 L.A.

15 (Laughter.)

16 JUSTICE SCALIA: I think he'd like to get him up  
17 to San Francisco.

18 (Laughter.)

19 MR. COLE: He can certainly seek to modify the  
20 injunction, and that, as I pointed out in a subsequent  
21 letter brief, there's -- California doesn't adopt the  
22 collateral bar rule. And therefore, he has a check and  
23 balance in this case. Under *People v. Gonzales*, 12  
24 Cal.4th 805, the collateral bar rule has no application in  
25 the State of California. So in the unlikely event that

1 Mr. Tory was engaged in speech praising Mr. Cochran, one,  
2 and two, in the -- in the more unlikely event that someone  
3 was going to attempt to cite him for contempt for engaging  
4 in protected speech, he could contest, under First  
5 Amendment grounds, the enforcement of this injunction in  
6 the State of California because the collateral bar rule  
7 has no impact.

8 JUSTICE KENNEDY: Well, I'm -- I'm baffled by  
9 that. What you're saying is that the injunction -- we're  
10 just all wasting our time? The injunction doesn't mean  
11 anything?

12 MR. COLE: No, no, no, no. Justice Kennedy, all  
13 I'm saying is --

14 JUSTICE KENNEDY: I -- I fell off the track  
15 here.

16 MR. COLE: All I'm -- all I'm saying is that if  
17 the collateral bar rule was in effect, you would waive  
18 your right to contest. You don't have a right to contest  
19 the constitutionality of the injunction on First Amendment  
20 grounds or constitutional grounds when it's seek to be  
21 enforced against you. That's not a defense in a contempt  
22 proceeding. California does not adopt that rule.  
23 Therefore, Mr. Tory can always -- if he is engaged in  
24 protected speech, he can easily contend --

25 JUSTICE KENNEDY: Oh, yes, but he's different

1 from other citizens because he's at -- he's at risk of a  
2 contempt citation.

3 MR. COLE: I don't dispute that.

4 JUSTICE KENNEDY: I mean, his speech is being  
5 chilled with -- with respect to protected speech.

6 MR. COLE: But there's nothing unusual --

7 JUSTICE KENNEDY: So the collateral bar rule  
8 doesn't help you at all because he's subject to a contempt  
9 citation.

10 MR. COLE: He's subject to it, but there's a  
11 check and balance there in terms of when you balance, the  
12 potential remedy for Mr. Cochran -- what -- what is going  
13 to give Mr. Cochran the remedy he needs? And if we  
14 balance that against the -- the breadth of this  
15 injunction, I think we have to look at -- one of the  
16 biggest concerns about prior restraints, when analyzed in  
17 terms of injunctions, is the collateral bar rule.

18 JUSTICE BREYER: But it would be so easy. I  
19 mean, it's virtually no burden. I take it what you're  
20 saying is that this injunction in paragraph 2 at its heart  
21 is aimed at in public forums, keeping insults suggesting  
22 he was a crook against Johnnie Cochran unless you pay me  
23 \$10,000. Then I'll stop. Okay? Now, at its heart,  
24 that's what it's aimed at.

25 MR. COLE: That's exactly --



1 JUSTICE BREYER: And you are saying if in fact  
2 it's ever enforced outside that heartland, you can have a  
3 defense. It would violate the First Amendment.

4 But since it's so easy just to write those words  
5 we just said right in paragraph 2, why shouldn't the judge  
6 have to do it? It's so easy. Say this is aimed at the  
7 heartland just as I said it and you said it, and it  
8 doesn't apply outside of it.

9 MR. COLE: And I have no dispute with that,  
10 Justice Breyer. I agree that was the whole purpose for  
11 the injunction. That's the basis of the injunction. And  
12 you could always remand for further proceedings,  
13 consistent with any opinion you would write, that the  
14 injunction has to be tailored to -- to deal with  
15 defamatory conduct, which is designed to extort or with  
16 the intent to extort. And I --

17 JUSTICE SCALIA: That's what he's arguing.  
18 You're -- you're conceding that it's overbroad.

19 MR. COLE: I'm saying if this Court -- well, I'm  
20 gleaning the impression that this Court thinks it's  
21 overbroad.

22 JUSTICE SCALIA: Ah, you're very perceptive.

23 (Laughter.)

24 MR. COLE: And having gleaned that perception,  
25 I'm trying to suggest that, number one, there was no

1 attack on paragraphs 1 and 3, and now we're focused on  
2 paragraph 2. And paragraph 2 can be tailored, as you have  
3 indicated, Justice Scalia, I think consistent with First  
4 Amendment issues.

5 And I think it's important to point out that if  
6 we take away injunctive relief in a defamation action in  
7 this day -- modern age --

8 JUSTICE STEVENS: You're sort of saying the  
9 opposite of what your opponent said. If we take it away,  
10 has it ever been there?

11 MR. COLE: It's never been there.

12 JUSTICE STEVENS: What are we taking away?

13 MR. COLE: I -- I agree it's never -- you've  
14 never found it there and you've never said it can't be  
15 there.

16 JUSTICE BREYER: How does California work in  
17 that respect? Because what I've been thinking of in my  
18 mind is that maybe we shouldn't decide this in terms of  
19 State law boxes, that California seems to have an action.  
20 Let's call it a buzz action to get away from words. And  
21 what that action is it's a defamation but a certain kind.  
22 It's defamation accompanied by extortion. And when you  
23 have defamation accompanied by extortion -- call it  
24 whatever you want -- an injunction is proper in these  
25 circumstances.

1           Now, can we decide it in such a way that we're  
2 not talking about all defamation actions? We are talking  
3 about this beast in California which uses the word  
4 defamation but also finds injunction and therefore issues  
5 -- also finds extortion and therefore issues an  
6 injunction.

7           MR. COLE: Yes, I think that you could limit the  
8 injunction to defamatory speech of a similar nature  
9 designed to extort.

10           JUSTICE SCALIA: Would -- would that make Mr.  
11 Cochran happy? What -- what's the big deal about  
12 extortion? I mean, suppose this same conduct occurs in  
13 the future, but he doesn't say I'll stop if you give me a  
14 lot of money. He just pickets every day and says Cochran  
15 is a shyster, don't do any business with Cochran. Do you  
16 think Mr. Cochran would be any -- any happier simply  
17 because the guy says I'll -- hasn't said I'll stop if you  
18 pay me \$10,000?

19           MR. COLE: No, and I think that would be subject  
20 to the same injunctive relief. I think this case is  
21 unique with the extortion element, but I don't disagree,  
22 Justice Scalia, that that is why any decision that says  
23 injunctions in defamation actions would be improper. I  
24 think people would start defaming with impunity.

25           JUSTICE SCALIA: You've got to give us some

1 line. I mean, the only reason we're grabbing onto  
2 extortion is that -- that there's reluctance to say you  
3 can issue injunctions in all defamation actions. Now,  
4 what -- what limitation do you want to place upon the  
5 ability to issue an injunction if it is not defamation  
6 combined with extortion?

7 MR. COLE: I don't think you need to place a  
8 limitation other than you can enjoin the defamatory  
9 conduct. Take, for example, the Internet. A posting goes  
10 on of a -- of a business that -- a startup company. It  
11 can't -- damages of -- for a startup company -- they're  
12 very difficult to prove.

13 JUSTICE BREYER: But then you run into the  
14 public figure. I mean, that's a much more dangerous kind  
15 of rule of law, isn't it? I mean, a pure defamation  
16 action against a public figure, which they want to say  
17 this is. You can write all kinds of things about public  
18 figures. People can and do, for better or for worse. Do  
19 -- is there any authority for issuing in a pure defamation  
20 action an injunction?

21 MR. COLE: There's no authority, but there's no  
22 authority that says you can't do it.

23 But what I am suggesting is in -- is in a pure  
24 defamation action that's not tied to any specific wrongful  
25 conduct, there's no reason why you couldn't enjoin. For

1 example, if you found that a specific item was defamatory  
2 on its face, such as a posting on the Internet, the only  
3 way to get that posting off the Internet would be to  
4 enjoin it because damages aren't going to solve the  
5 problem. And if it's -- even if it's purely defamatory,  
6 you could restrict it to that purely defamatory posting,  
7 similar to -- to the obscenity cases where you've reviewed  
8 a film, you found it to be obscene, and then you preclude  
9 it. There are procedural safeguards and you preclude it  
10 in the future.

11 JUSTICE GINSBURG: But you've just said  
12 something that I think that's inconsistent with your  
13 earlier presentation. You said you could enjoin that  
14 posting. Here you said it wouldn't be effective just to  
15 enjoin the particular placards that were used, the  
16 particular words because then there would be other words.  
17 So the same question could come up with an Internet  
18 posting if you had an injunction not simply on what was  
19 posted but anything about this particular individual that  
20 might be posted in the future.

21 MR. COLE: Well, Justice Ginsburg, I think where  
22 that leaves us is you'd have to engage in some sort of  
23 balancing about the -- how narrowly tailored the  
24 injunction is and does it provide a sufficient remedy and,  
25 you know -- and -- and in this -- and what test we would

1 analyze it under, strict scrutiny, intermediate scrutiny,  
2 or the Ward test. And -- and I think that in applying  
3 those tests, you'd have to come to a balance, and if the  
4 balance is that you're going to limit it to a specific  
5 type of speech or -- then that -- that would be a -- a  
6 reasonable limit, and if it creates a multiplicity of  
7 actions, well, so be it. But at least there's a remedy  
8 for that posting or postings of a similar nature. So --

9 JUSTICE GINSBURG: Now, you -- you -- to the  
10 extent that you're complaining about extortion-like  
11 conduct, something else that you drafted -- I'm looking at  
12 the complaint on page 7 of the joint appendix. You have  
13 identified all defamatory, including with the false light  
14 invasion of privacy, but you don't have any claim that  
15 looks like blackmail.

16 MR. COLE: If you'd -- if I could direct you,  
17 Justice Ginsburg, to page 12 of the joint appendix at  
18 paragraphs (j) and (k) of the verified complaint, you will  
19 see that we alleged in a verified complaint that he'd  
20 engaged in three previous efforts of this same type of  
21 conduct, one. And two, paragraph (k), that Tory is in the  
22 business of professionally extorting monies from innocent  
23 persons and business --

24 JUSTICE KENNEDY: I -- I was going to ask you  
25 about that. Were there findings to substantiate the

1 allegations?

2 MR. COLE: Findings to substantiate --

3 JUSTICE KENNEDY: Specifically about the  
4 extorting money from the bank and the oil company.

5 MR. COLE: No, Justice Kennedy, there were not.

6 JUSTICE KENNEDY: No findings.

7 MR. COLE: There was some testimony only on one  
8 of those issues, which was the oil company. There was no  
9 findings on this issue.

10 But then I would refer you to paragraph (k)  
11 which specifically refers to extorting of monies. And  
12 also in my opening statement, as is reflected in the  
13 trial's transcript, the -- the first thing I said is this  
14 is speech designed for an improper purpose. It's  
15 unprotected speech designed to extort money from Mr.  
16 Cochran. That was the whole theme --

17 JUSTICE GINSBURG: But what -- what I mean is  
18 could you have -- without using the label defamation, have  
19 stated a claim for extortion or blackmail? I'm not  
20 looking at your particular allegations but how you  
21 described on page 1 of the complaint what you were suing  
22 for: libel, libel per se, slander, slander per se, and  
23 invasion of privacy.

24 MR. COLE: I think we could have pled extortion  
25 had we chose to. We could have pled inference with

1 advantageous business relations. We probably could have  
2 pled California's --

3 JUSTICE KENNEDY: Does California law require  
4 you to label the type of the cause of action or is it  
5 notice pleading based on facts?

6 MR. COLE: Notice pleading based on facts, but  
7 we do label the causes of action. The -- the point I'm  
8 trying to make is whether every cause of action was pled,  
9 if the conduct is extortion, which is what the judge  
10 implicitly found by findings 20 and 27, that conduct is  
11 not protected. And whether we named the cause of action  
12 correct in the complaint or we sued for that specified  
13 cause of action, doesn't change what it is that we were  
14 seeking relief for, which is stopping this man from  
15 defaming Mr. Cochran until he was paid money.

16 We attempted to achieve that. We thought we did  
17 a fair job in paragraphs 1 and 3, which they don't attack  
18 and I agree is not fairly included within the question  
19 which has been certified here, nor is an attack on the  
20 underlying finding.

21 But we attempted in paragraph 2, broadly I  
22 agree, to avoid a multiplicity of actions and to give Mr.  
23 Tory other channels of communication other than the public  
24 forum where he is engaged in a continuing course of  
25 repetitive conduct to defame Mr. Cochran.



1           He -- and -- and this is -- one point that I  
2    want to stress. We don't view this injunction as being  
3    violated if he went on TV, he went on the radio, he went  
4    in the newspapers. We don't view those as public forums  
5    under the definition that this Court has provided. Those  
6    are not public forums. We are not concerned about that.  
7    We do not believe that those events will occur. We did  
8    not seek to protect them. So we have given Mr. Tory an  
9    unlimited venue to speak, but we said you can't do this in  
10   the public forum because of your continuing course of  
11   repetitive conduct, 3 years, once a week, 52 times a year,  
12   over 150 times, 4 hours a day.

13           And with that, I would submit that while the  
14   injunction is broad, I don't believe it's a  
15   unconstitutional prior restraint, and to the extent this  
16   Court believes it is overbroad, I believe striking  
17   subparagraphs (ii) and (iii) of paragraph 2 would solve  
18   the problem, or alternatively, that in conjunction with a  
19   suggestion that it needs to be narrowed to deal with the  
20   speech and conduct in issue.

21           Thank you.

22           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.  
23           Mr. Chemerinsky, you have 4 minutes remaining.

24           REBUTTAL ARGUMENT OF ERWIN CHEMERINSKY

25                           ON BEHALF OF THE PETITIONER

1 MR. CHEMERINSKY: Thank you.

2 Justice Breyer kindly invited my thoughts about  
3 how an opinion might be written, and there are three  
4 different ways not mutually exclusive.

5 One is that this injunction is vastly overbroad  
6 for all the reasons that have been identified. Mr. Cole  
7 said a couple of things. One, he said that Mr. Tory can  
8 go to court and ask for modification of the injunction,  
9 but that's what makes this a prior restraint, that Mr.  
10 Tory can only speak again if he goes to court and gets  
11 permission.

12 Also, he said at the end that Mr. Tory can go  
13 before the media. However, under California law, under  
14 Damon v. Ocean Hill, the media is defined as a public  
15 forum.

16 A second way the opinion could be written is  
17 that this for speech protected by the First Amendment.  
18 Justice Ginsburg, you asked me at the outset whether  
19 that's in the scope of the question presented. Well, it  
20 is directly relevant to what Mr. Cole was saying. Because  
21 it's all opinion, all hyperbole it is protected by the  
22 First Amendment and can't be the basis for an extortion  
23 claim.

24 JUSTICE GINSBURG: Yes, but you're asking us now  
25 to -- the -- the trial court found there was defamation,

1 and now you want to argue, no, it wasn't defamation. It  
2 was mere opinion. I really don't see how that's included  
3 in the question presented.

4 MR. CHEMERINSKY: I think it is because it goes  
5 to the question whether the injunction is permissible.

6 But I go on to the third way that the opinion  
7 could be written, and that's that injunctions are not  
8 permissible as a remedy in a defamation case. We agree  
9 that if there is a cause of action for extortion, it can  
10 have an injunction as a remedy. We agree if the cause of  
11 action is for harassment, there can be an injunction as a  
12 remedy. But those have specific elements that have to be  
13 met. Those elements weren't met in this case.

14 History is clear that injunctions aren't allowed  
15 in defamation cases, and also, Your Honor, it's quite  
16 important that Mr. Cole even said you can't craft a narrow  
17 injunction in a defamation case. Any injunction is either  
18 too narrow or too broad.

19 In *Near v. Minnesota*, this Court said that it  
20 was telling that in 150 years of the history of the First  
21 Amendment, there had never been an injunction approved by  
22 this Court in a defamation case. We're now 70 years later  
23 than that. To approve an injunction in a case like this,  
24 even though it's called defamation plus extortion, will  
25 open the door to injunctions as a routine matter in

1     defamation cases across the country.  No --

2                     JUSTICE GINSBURG:  There have been -- there have  
3     been injunctions against harassing conduct, threatening,  
4     stalking.

5                     MR. CHEMERINSKY:  Yes, Your Honor, and we have  
6     no objection to injunctions of that sort.  What we object  
7     to is an injunction as a remedy in a defamation case and  
8     an injunction that is directed at speech.  That's what the  
9     First Amendment prohibits.

10                    Thank you.

11                    CHIEF JUSTICE REHNQUIST:  Thank you, Mr.  
12     Chemerinsky.

13                    The case is submitted.

14                    (Whereupon, at 11:11 a.m., the case in the  
15     above-entitled matter was submitted.)

16

17

18

19

20

21

22

23

24

25