Received 1/5/2023 10:40:31 PM Supreme Court Middle District

Filed 1/5/2023 10:40:00 PM Supreme Court Middle District
104 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 104 MAP 2022

FREDERICK E. OBERHOLZER, JR. AND DENISE L. OBERHOLZER,

Appellees,

v.

SIMON AND TOBY GALAPO,

Appellants.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLANT

Appeal from the Order of the Superior Court at No. 794 EDA 2020 dated April 18, 2022, Vacating the judgment of the Court of Common Pleas of Montgomery County, Civil Division, by the Honorable Steven C. Tolliver, Sr., entered April 1, 2020, at C.C.P. Docket No. 2016-11267 and Remanding. The order of the Superior Court dated April 5, 2022, withdrew the March 7, 2022, memorandum.

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I. INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization dedicated to preserving and defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its state affiliates. The ACLU of Pennsylvania has a long history of defending Pennsylvanians' right to free speech in federal and state courts, as both counsel for the parties and *amicus curiae*. The ACLU of Pennsylvania files this *amicus curiae* brief to safeguard Pennsylvanians' right to speak free of prior restraint under Article I, §7 of the Pennsylvania Constitution.

[1] *Amicus curiae* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *Amicus*, its members, and its counsel contributed money intended to fund this brief.

II. SUMMARY OF ARGUMENT

The injunction entered and affirmed below is a prior restraint of speech: like the injunction in *Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978), it violates Article I, §7 of the Pennsylvania Constitution. This Court's holding in *Willing* preceded the analysis used by the Court since *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), to independently examine constitutional rights enumerated in both the federal and Pennsylvania Constitution. *Amicus* ACLU of Pennsylvania submits this brief to demonstrate that application of the *Edmunds* analysis confirms the *Willing* Court's holding that Article I, §7 of the Pennsylvania Constitution presumptively bars the use of injunctions to halt peaceful but tortious speech.

This *Edmunds* analysis is overdue. This Court previously performed an *Edmunds* analysis of Article I, §7 with respect to legislative enactments in *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), but has not done so with respect to injunctions against tortious speech. Injunctions differ from legislative edicts in many ways, and advocates on both sides of the question have invoked those differences in arguing for and against abandonment of the traditional maxim that "equity will not enjoin" tortious speech. *Compare* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157, 165 (2007), *with* Eugene Volokh *Anti-Libel Injunctions*, 168 U. Pa. L. Rev. 73 (2019).

The need for an injunction-specific *Edmunds* analysis of Article I, §7 was made clear in this Court's recent analysis of a court order enjoining one parent in a contentious custody battle from making certain public statements about the case out of concern for the privacy and well-being of the child involved. *See S.B. v. S.S. (In re S.S.)*, 243 A.3d 90, 113 (Pa. 2020), *cert. denied*, 142 S.Ct. 313 (2021). The majority opinion authored by then-Justice Baer discussed First Amendment law at length, but dismissed the appellant's §7 arguments with the statement that, "As Appellants have failed to persuade us to the contrary, we conclude that the protections afforded by the First Amendment and Article I, §7 are coextensive as it relates to the particular circumstances presented by this appeal." *Id.* This case, which does not involve statements related to child custody or even an ongoing court proceeding, presents far broader free-speech implications and merits a more thorough evaluation of the proper application of Article I, §7. As Justice Wecht observed in his dissent in *In re S.S.*:

> It does not appear that our Court has addressed the question of whether Pennsylvania's Constitution provides greater protection than the United States Constitution in the particular context before us today. Given the extension of protection and heightened scrutiny that this Court has invoked in past decisions, it appears likely that our Constitution would require application of strict scrutiny to an order like the one before us. However, because … I believe that the instant gag order cannot survive [the federal] test, I do not need to resolve the issue pursuant to the Pennsylvania Constitution. It can await another day.

In re S.S., 243 A.3d at 125-26 (Wecht, J, dissenting).

That day has come. *Amicus* urges this Court to hold that Article I, §7 of our Declaration of Rights precludes the injunction issued below, reverse the decision of the Superior Court, and vacate the injunction.

III. ARGUMENT

A. The Application of *Edmunds* to Injunctions Against Tortious Speech.

In *Commonwealth v. Edmunds*, this Court held that where litigants ask this Court decide an issue based on a provision of the Pennsylvania Constitution, "it is important that litigants brief and analyze at least the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." 586 A.2d at 895. *See also Pap's A.M.*, 812 A.2d at 603.

When this Court first applied an *Edmunds* analysis to Article I, §7 in *Pap's A.M. v. City of Erie*, it confirmed its earlier holding that the language of §7 prohibits legislative prior restraints of speech and held that the same analysis applies to restraints on expressive conduct. *Pap's A.M.*, 812 A.2d at 608, 612; *see also William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 61 (Pa. 1961). *Amicus's* analysis of the *Edmunds* factors in the context of injunctions that prohibit tortious speech builds on this Court's analysis of Article I, §7 in *Goldman Theatres* and *Pap's A.M.*

1. *The text and plain meaning of Article I, §7*

As this Court discussed in both *Goldman Theatres* and *Pap's A.M.*, the language of §7 is both broader and more specific than the First Amendment's

prohibition of "laws… abridging the freedom of speech, or of the press" or assembly. U.S. Const. amend. I. Section 7 provides in relevant part:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

Those words first appeared in the State Constitution of 1790 and have remained consistent through every iteration of our state charter since. *Pap's A.M.*, 812 A.2d at 603 n.6. The language of §7 is not derived from the First Amendment. As this Court has repeatedly observed, Article I, §7 "is an ancestor, not a stepchild, of the First Amendment." *Id.*, at 605.

The meaning of §7 is clear on its face. In *Goldman Theatres* this Court addressed Pennsylvania's film censorship regime, which, as Justice Eagan observed in dissent, appeared to comply with the "prior restraint" jurisprudence of the United States Supreme Court. But the *Goldman Theatres* majority held the regime invalid under Article I, §7 because: "[I]t is clear enough that what [Section 7] was designed to do was to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege." *Goldman Theatres*, 173 A.2d at 62. Highlighting the constitutional language "*being responsible for the abuse of that liberty*," the Court observed "this provision is a direct inhibition on previous restraint of an exercise of the protected right…." *Goldman Theatres*, 173 A.2d at 73.

Later, as part of its *Edmunds* analysis, this Court held that §7's prohibition of prior restraints on speech must be read in the context of its inclusion in the Constitution's Declaration of Rights, which commands, in Section 25, that "everything in this article is excepted out of the general powers of government and shall forever remain inviolate." *Pap's A.M.*, 812 A.2d at 603. In its discussion of the fundamental nature of the protections of §7, the *Pap's A.M.* Court invoked the Court's long-standing regard for the rights of free expression:

> The Constitution does not confer the right, but guarantees its free exercise, without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself.
>
> * * *
>
> Since the fundamental law forbids the violation of such a prerogative by the government itself, neither the courts nor any minor tribunal may ignore the inhibition.

Pap's A.M., 812 A.2d 604 (quoting *Spayd v. Ringing Rock* Lodge, 113 A. 70 (1921)).

Goldman Theatres and *Pap's A.M.* held that §7's prohibition of prior restraints was violated by statutes that (1) required films to pass regulatory review as a condition of being shown; and (2) banned nude dancing, even though federal jurisprudence would permit such limits. *See also Ins. Adjustment Bureau v. Ins. Comm'r for Pa.*, 542 A.2d 1317, 1324 (Pa. 1988) ("Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any

governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner.").

Those decisions did not address §7 in the context of an injunction, but injunctions, no less than licensing schemes, impinge on "the free communication of thoughts and opinions" prophylactically rather than by way of "responsib[ility] for the abuse of that liberty."

> [I]njunctions share with licensing schemes an orientation towards preventing rather than punishing allegedly illegal communications. Like a press license, injunctions turn on the determination of a single official; they can be granted with the stroke of a pen. Injunctions interfere with the dissemination of information on the basis of potentially exaggerated threats of possible future harm, rather than on the basis of the results of abuse proven before a jury.

Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 31 (2002). There is no basis in text for treating prior restraints issued by way of injunction differently from those accomplished through licensing schemes under Article I, §7.

The language of §7 does not distinguish between legislatively and other government actions. In *Willing*, this Court directly applied the Court's prior restraint analysis from *Goldman Theatres* and did not read the text of §7 to apply differently to an injunction. More recently, neither this Court's majority nor the dissent questioned the application of the *Pap's A.M.* analysis of §7 to the decision of an Urban Redevelopment Authority to exercise eminent domain to take a theater showing

adult-content movies. *See In re Condemnation by Urb. Redevelopment Auth. of Pittsburgh*, 913 A.2d 178, 189 (Pa. 2006); *id*., at 191-92 (Saylor, J., dissenting); *see also Vogel v. W.T. Grant Co.*, 327 A.2d 133, 138 (Pa. 1974) (Mandarino, J., concurring) (an injunction against contacting employers and family of credit card purchasers in effort to collect debt was an impermissible prior restraint). Section 7's prohibition of prior restraints should be read to apply with equal force to injunctions against speech.

2. The history of the Article I, §7, including its application by Pennsylvania courts

This Court has "long recognized" that:

> [F]reedom of expression has special meaning in Pennsylvania given the unique history of this Commonwealth…. [F]reedom of expression:
>
> > has special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the "crime" of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury. It is small wonder, then, that the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and "invaluable" rights of man. *Id.* at 1388 (footnote omitted).

Pap's A.M., 812 A.2d at 604–05 (quoting *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981)).

More specifically, this hostility toward prior restraints is deeply rooted in Pennsylvania's history. As early as *Respublica v. Oswald*, 1 Dall. 319, 323, 1 U.S.

319 (Pa. 1788), this Court observed that under the Pennsylvania Constitution, free expression

> is not subject to the tyranny of previous restraints, and, on the other, it affords no sanction to ribaldry and slander; ….4 Black. Com. 150. 151. 152. Here, then, is to be discerned the genuine meaning of this section in the bill of rights,… Every man may publish what he pleases; but, it is at his peril.

So, too after the addition of the "responsibility for abuse" language to the Constitution in 1790, Chief Justice Tilghman observed in *Commonwealth v. Duane*, 1 Binn. 98, 100 (Pa. 1806):[2]

> Let us now examine how this matter has been considered in America. The United States in general have at all times been very much alive to the liberty of the press, and the right of trial by jury; and their constitutions have shewn great jealousy and sensibility on these points… The constitution of Pennsylvania… provides that every citizen may freely speak write and print on any subject, being responsible for the abuse of that liberty…. [It] provides that a man may freely speak write and print, at his own peril, being responsible either to the public or any individual whom he may injure….

And, of course, this Court has repeatedly confirmed that Article I, §7 is more protective of freedom of speech than the First Amendment. *Pap's A.M.*, 812 A.2d at 605; *Com., Bureau of Pro. & Occupational Affs. v. State Bd. of Physical Therapy*, 728 A.2d 340, 343-44 (Pa. 1999); *Tate*, 432 A.2d at 1387-88. This Court has observed: "The Pennsylvania Constitution differs [from the federal constitution] in

[2] The case is appended to a report of *Commonwealth v. Davies*, 1 Binn 97 (Pa. 1804) and is not available in all databases. It can be found at https://cite.case.law/binn/1/97/1787964.

that it has codified the proscription of prior restraints on speech, whereas the federal Constitution prohibits prior restraints in most situations based upon the common law." *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 193 (Pa. 2003) (citing *Goldman Theatres*, 173 A.2d at 61–62).

With respect to injunctions against speech, §7's specific prohibition on prior restraints is also in keeping with the oft-quoted rule, derived from English common law, that equity has no jurisdiction to enjoin defamation. As Dean Chemerinsky has noted, that rule was well established in both England and the American colonies before the American Revolution. Chemerinsky, *supra*, at 168. By the time the text of §7 was reenacted in Pennsylvania Constitution of 1838, most American courts had expressly adopted the rule. *Id.* at 167-68, n.71. There can be no doubt that the members of Pennsylvania's Constitutional Conventions of 1790 and 1838 were aware of the maxim that equity will not enjoin a libel and sought to incorporate it into our fundamental charter. Indeed, this Court, in *Goldman Theatres*, suggested that the language was adopted in 1790 in light of "the vicissitudes and outright suppressions to which printing had theretofore been subjected in this very Colony." *Goldman Theatres*, 173 A.2d at 61. The People of Pennsylvania adopted the Constitution of 1968 without altering the constitutional language.

In *Willing*, the Superior Court took the position that this traditional rule should be supplanted in light of "severe criticism by numerous commentators" and

Justice Frankfurter's proposition that "the phrase 'prior restraint' is not a self-wielding sword" by a rule that "an injunction will not issue when it is not in the public interest to do so." *Mazzocone v. Willing*, 369 A.2d 829, 832 (Pa. Super. Ct. 1976), *rev'd*, 393 A.2d 1155 (Pa. 1978) (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-442, (1957)).

This Court soundly rejected that approach in light of Pennsylvania's history:

> History supports the view that the framers of our state constitution intended to prohibit prior restraint on Pennsylvanians' right to speak.
>
> > "After the demise in 1694 of the last of the infamous English Licensing Acts, freedom of the press, at least freedom from administrative censorship, began in England, and later in the Colonies, to assume the status of a 'common law or natural right.' See State v. Jackson, Or. 1960 [224 Or. 337], 356 P.2d 495, 499. Blackstone so recognized (circa 1767) when he wrote, 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman had an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity....
>
> What Blackstone thus recognized as the law of England concerning freedom of the press came to be, 133 years later, an established constitutional right in Pennsylvania as to both speech and press; Article IX, Section 7, of the Constitution of 1790 so ordained; and, as already pointed out, the provision still endures as Article I, Section 7, of our present Constitution." (Footnote omitted.)

Willing, 393 A.2d at 1157-58 (opinion of Mandarino, J.) (quoting *Goldman Theatres*, 173 A.2d at 62) [3]

That being said, our courts' defense of the right to "freely speak, write and print on any subject" has not always reflected this robust understanding of our constitution's prohibition of prior restraints. Professor Kreimer has written that, "Historically, the record on judicially imposed ex ante restraints on free expression has been mixed in Pennsylvania."

> In the first years after the adoption of the 1790 constitution, it was not uncommon for courts to require authors and editors to post bonds or recognizances which were subject to forfeiture in the case of a published libel.[73] This practice was said to be consistent with the constitutional prohibition on prior restraints on the ground that before forfeiture, a jury was required to find that a libel had occurred, and "a man though bound to his good behavior, may still publish what he pleases, and if he publishes nothing unlawful, his recognizance will not be forfeited."[74] The rule after 1806 was that surety could not be demanded for good behavior before conviction.[75]
>
> In the context of labor struggles during the end of the nineteenth and the first half of the twentieth century, the Pennsylvania Supreme Court regularly upheld injunctions issued against parades, pickets, boycotts, and efforts to persuade employees to withdraw their labor. Many of these labor injunctions were phrased as prohibitions against particular modes of expression that were regarded as coercive.[76] These instances accord with the constitutional text. A prohibition against the assembly of a violent mob might well be seen as no infringement of

[3] Judge Mandarino's reliance on the strictures against prior restraints was joined by Justices Roberts and O'Brien, who both concurred in the result. *Id*. at 1160 (holding that Pennsylvania's constitutional protection of free expression is "based upon an abhorrence of prior restraints"); *id*. (Pomeroy, J., concurring) (incorporating Judge Jacobs' dissenting opinion in the Superior Court, *Mazzocone v. Willing*, 369 A.2d 838 at n.4, which was premised on the proposition that "Article I Section 7 … was designed to … prohibit the imposition of prior restraints").

> the proposition that "every citizen may freely speak, write or print on any subject." Mob violence is not "speaking writing or printing;" indeed, the protection of the right to assembly in Article I, Section 20 was specifically limited in 1790 to "the right in a peaceable manner to assemble together." So long as the injunction leaves open ample opportunity to exercise the constitutional right of "free communication of thoughts and opinions" identified by Article I, §7, it might well be viewed as no prior restraint.
>
> Other labor injunctions issued in the late nineteenth century and early twentieth, however, were directed not at the manner of speech but at its substance; the constitutionally protected "communication of thoughts and opinions" was enjoined because of its unlawful tendencies, an approach in substantial tension with the constitutional hostility to prior restraints.[77]

Kreimer, *supra*, at 31-33 (footnotes collecting cases omitted). As Professor Kreimer recounts, by the middle of the twentieth century, this Court had adopted the view that courts should not enjoin speech related to organized labor in the absence of disorder, intimidation or threats. *Id*. at 33, n.78 (citing *Kirmse v. Adler*, 166 A. 566 (Pa. 1933)). Since that time, decisions upholding injunctions against speech have markedly declined. Kreimer, *supra*, at 33, n.79 (collecting cases).

As noted above, this Court, with two Justices dissenting, recently upheld a family court order forbidding one parent and her counsel in a bitter custody dispute from discussing the case publicly, at least in a manner that could identify the child who was the subject of the proceeding; the trial court had concluded that publicity about the case, and particularly about the allegations of sexual abuse that had been rejected by the court, would harm the child. *In re S.S.*, 243 A.3d at 113. That

decision did not address the distinct language and history of Article I, §7. The majority opinion by Justice Baer dealt primarily with the appellants' First Amendment arguments and held that the injunction satisfied "the intermediate standard of constitutional scrutiny" from *United States v. O'Brien*, 391 U.S. 367, 377 (1968) as well as the similar federal precedent concerning time, place, and manner restrictions. *Id*. at 107-08.

As to the appellants' arguments under Article I, §7, the majority opinion was quite brief:

> However, Appellants have offered no meaningful argument or authority, and this Court has found none, suggesting that Article I, §7 requires the application of a heightened constitutional standard to a content-neutral restriction on a parent's free speech rights, as exercised during a custody proceeding where the trial court has made a specific finding that the speech harms the child's right to psychological and emotional well-being and privacy. As Appellants have failed to persuade us to the contrary, we conclude that the protections afforded by the First Amendment and Article I, §7 are coextensive as it relates to the particular circumstances presented by this appeal.

Id. at 112-13.

Justice Wecht's dissent took issue with the majority's First Amendment analysis, arguing that the injunction was both content-based and a prior restraint. But the dissent, also, did not independently analyze the injunction under §7 because Justice Wecht would have struck down the injunction under the First Amendment. Thus, both the majority and the dissenting opinions in *In re S.S.*

suggest a need for a full *Edmunds* analysis of Article I, §7 in the context of injunctions against speech.

3. The related case-law from other states

Examples abound of state courts that have considered whether their state constitutions permit injunctions against defamatory speech in some, all, or no circumstances. *Amicus* has not found cases addressing the question presented here: whether an injunction against speech is permitted to remedy a tort other than defamation, but many of the same principles apply.

On the defamation question, Dean Chemerinsky observed that "an increasing number of courts have imposed injunctions in defamation actions." Chemerinsky, *supra*, at 157–58 and n.2 (collecting cases). More recently, Professor Volokh collected cases from thirty-four states that have permitted injunctions against libel either generally or in limited circumstances. Volokh, *supra*, at 137 (Appendix A).

On the side of upholding the traditional view, the Supreme Court of Texas held in 2014 that the Texas free speech clause—which is nearly identical to Pennsylvania's—allows for an injunction to remove or retract past libelous statements, but does not permit a court to enjoin future speech:

> To that end, we agree with the district court in *Oakley* that injunctions against defamation are impermissible because they are necessarily "ineffective, overbroad, or both." 879 F.Supp.2d at 1090. That is, "[a]ny effective injunction will be overbroad, and any limited injunction will be ineffective." Chemerinsky, 57 SYRACUSE L.REV. at 171.

> … The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction. … But expanding the reach of an injunction … triggers the problem of overbreadth.

Kinney v. Barnes, 443 S.W.3d 87, 97–98 (Tex. 2014)

Many of the states that have abandoned the prohibition on injunctions against defamatory speech have allowed such injunctions only after a verdict—some a jury verdict—on the defamatory nature of the speech. *See, e.g., Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 310 (Ky. 2010). Those courts reason that defamatory speech deserves no constitutional protection and therefore can be enjoined. That approach is illustrated by the decision of the Supreme Court of Kentucky holding that the Kentucky Constitution—which has language similar to Pennsylvania's Article I, §7[4]—permits a court to enjoin defamatory speech only after a final judgment. *Id*.

> While the unmistakable clarity of Section 8 may compel, in certain instances, greater protection to speech than the First Amendment … it

[4] Section 8, titled "Freedom of speech and of the press," provides as follows: "Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. *Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty*." (emphasis added).

Hill, 325 S.W.3d at 312.

> must also be recognized … that some categories of speech are undeserving of any constitutional protection at all, including false, defamatory speech. In this vein, we conclude that Section 8 may be interpreted consistently with the modern rule that defamatory speech may be enjoined following a judicial determination of falsity.

Hill, 325 S.W.3d at 312. The Kentucky court noted the historical context of its constitutional protection for speech: "[T]here is a long-standing cause of action, predating our 1891 Constitution, permitting a plaintiff to seek remedy through the courts against those spreading false information about him. It follows that Section 8 must be interpreted with this principle in mind, and with the recognition that its drafters understood this limitation on speech." *Hill*, 325 S.W.3d at 312.

The problem with applying this reasoning to Article I, §7 is that the framers of the Pennsylvania Constitution of 1790—like the framers of the Kentucky Constitution of 1890—were certainly aware of both the laws against libel and the by then well-established rule against enjoining libel. With that knowledge, they selected language that forbids the prior restraint of speech, not exempting defamatory or otherwise tortious speech, and without distinguishing between injunctions issued pre- or post-verdict.

The framers of these constitutions did not write that speech that offends no one. Indeed, there would seem little call for a constitutional provision prohibiting injunctions against speech that meets with public—or judicial—approval. The only speech that needs protection from prior restraints is the speech deemed unacceptable

by the ruling authorities. The very point of prior restraint doctrine is to ensure that prior restraints are unavailable even if subsequent punishment might be constitutional:

> Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

N.Y. Times Co. v. United States, 403 U.S. 713, 732 (1971) (White, J. concurring).[5]

Again, these cases address injunctions against speech found to be defamatory. Their reasons for approving injunctions against defamatory speech do not necessarily apply to speech that is not adjudicated defamatory but is deemed, as in this case, to intrude otherwise on another's rights. It is not clear that all tortious speech is unprotected.

[5] The premise that false and defamatory speech is *unprotected* is not precisely correct. As Justice Breyer wrote: "[T]his Court has frequently said or implied that false factual statements enjoy little First Amendment protection. … But these judicial statements cannot be read to mean 'no protection at all.'" *United States v. Alvarez*, 567 U.S. 709, 732-33 (2012) (citations omitted) (Breyer, J. concurring). For instance, libel involving matters of public concern can be subjected to compensatory but not punitive damages in the absence of actual malice. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760-61 (1985). And regimes limiting libel cannot be viewpoint-based. *R.A.V. v. St. Paul*, 505 U.S. 377, 384-85 (1992).

4. Policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence

As with the caselaw from other jurisdictions, there has been much policy discussion as to the advisability of permitting permanent injunctions as a remedy for defamation, but far less attention to the question accepted for review by this Court: Whether an injunction against speech is permitted to remedy a tort other than defamation.

From a legal perspective, the language of Article I, §7 does not mention libel or suggest any distinction in the treatment of prior restraints that would turn on the type of claim asserted. Many of the policy concerns that are advanced about injunctions that target defamatory speech are equally applicable to injunctions against other tortious speech.

The most powerful argument against allowing such injunctions is that they create criminal or quasi-criminal liability where our legislature has not. In Pennsylvania, the legislature has not adopted criminal penalties applicable to the torts alleged in this case. But violation of an injunction can be punished, either civilly or criminally, with incarceration. Indeed, that is the feature of injunctions against defamation that attracts Professor Volokh: they permit criminal punishment for those who are judgment-proof. Volokh, *supra*, at 76 ("If libelers who lack money are to be deterred, the threat of criminal punishment is the one tool that can do the job.").

Cf., Willing, 393 A.2d at 1158 ("We cannot accept the Superior Court's conclusion that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right. … In Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law.").

And unlike the safeguards of juries available in damage actions, civil contempt for a violation of a court's order is limited only by the discretion of the trial court. *Commonwealth v. Bowden*, 838 A.2d 740, 761 (Pa. 2003) ("In reviewing a claim that such a contempt sanction is improper… the appellate court must affirm the trial court's order unless that court has committed an abuse of discretion."); *Bata v. Cent.-Penn Nat. Bank of Philadelphia*, 249 A.2d 767, 768 (Pa. 1969) ("Because of the nature of these [contempt] standards, great reliance must be placed upon the discretion of the trial judge."); *cf. Commonwealth v. Cromwell Twp.*, 32 A.3d 639, 653 (Pa. 2011)("it goes without saying that the courts possess the inherent power to enforce their orders for noncompliance through imposition of penalties and sanctions, *Commonwealth ex rel. Beghian v. Beghian*, 408 Pa. 408, 184

A.2d 270 (Pa. 1962)" but holding "failure herein to utilize less restrictive means prior to imposing sentences of incarceration compels reversal").[6]

The prospect of a single judge adopting what is effectively an individually tailored censorship statute enforceable by unlimited sanctions raises the most serious concerns under a constitution that affirms that "the free communication of thoughts and opinions is one of the invaluable rights of man." That is one of the reasons that Justice Scalia observed, concurring and dissenting in *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 792-94 (1994), that "a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is at least as deserving of strict scrutiny as a statutory, content-based restriction." He elaborated:

> The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim. But that same danger exists with injunctions. … [A] speech-restricting injunction … lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably…

[6] The legislature attempted to constrain the penalties for criminal contempt, but this Court declared those constraints unconstitutional. *Commonwealth v. McMullen*, 961 A.2d 842, 850 (Pa. 2008) ("Section 4136(b) provides maximum penalties the court may impose; thus, § 4136(b) unconstitutionally restricts the court's ability to punish for contempt.").

> The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: They are the product of individual judges rather than of legislatures -- and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman.
>
> And the third reason is that the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards. [When injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule … eliminates the defense that the injunction itself was unconstitutional. …Thus, persons . . . who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings.

Id.

Dean Chemerinsky has argued that injunctions against future speech are impossible to tailor and enforce:

> In defamation cases, the injunction must either be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous. … An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words . . .
>
> [A]n injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory. That brand of judicial clearance is what the Court in *Near* called "the essence of censorship."

Chemerinsky, *supra,* at 172.

Professor Volokh has countered with the argument that, particularly in the context of speech on the Internet, damages no longer serve to deter or stop libel, and recommends the use of injunctions enforced through criminal contempt to allow for meaningful punishment for defamation, but with the maximum due process protections for the alleged defamer. Volokh, *supra*, at 76.

But this Court has already weighed the risk of undeterred libel against Article I, §7's protections and decisively chosen the latter: "We cannot accept the Superior Court's conclusion that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right. … In Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law." *Willing*, 393 A.2d at 1158. This Court should not upend that balance now.

As Dean Chemerinsky writes, "It, of course, is difficult to defend any absolute position, even this one that injunctions never should be permitted in defamation cases. … It is possible to imagine hypothetical situations where the absence of an injunctive remedy is troubling, but the law … should not be based on such as possibilities." Chemerinsky, *supra*, at 172-73. As the next

section demonstrates, this case is not one that should merit an exception to Article I, §7's prohibition on prior restraints of speech.

B. Application of Article I, §7 in this case.

The injunction entered and upheld by the courts below is "a classic example of a prior restraint on speech." *Willing*, 393 A.2d at 1159. The courts below sought to distinguish *Willing* on the grounds that the injunction was not a prior restraint because the speech was ongoing; that it did not "enjoin" the speech at all because the Galapos were not required to take down their signs, only required to render them purposeless; and that the injunction was intended to remedy torts other than defamation, and particularly to protect the Oberholzers' privacy and right to seclusion.

The first proposition is simply erroneous. The injunction prohibits Appellants from using their signs to speak to their neighbors today, and it will prevent them from doing so again tomorrow. The fact that Appellants wish to say the same thing day-to-day does not change the fact that they, like Ms. Willing, wish to express themselves anew each day. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (cleaned up). A prior restraint "prevents publication of information or material in the possession of the press and is presumed unconstitutional." Kreimer, *supra*, at 30-31 (quoting *Philadelphia Newspapers, Inc.*

v. Jerome, 387 A.2d 425, 432 (Pa. 1978)). "Injunctions are treated as prior restraints because that is exactly what they are: a prohibition of future expression." Chemerinsky, *supra*, at 165.

As Dean Chemerinsky has explained:

> Courts that have held that injunctions are not prior restraints if they follow a trial, or if they are directed to unprotected speech, are confusing the question of whether the injunction is a prior restraint with the issue of whether the injunction should be allowed. Injunctions are inherently prior restraints because they prevent future speech.

Chemerinsky, *supra*, at 165–66.

The second contention—that the injunction does not enjoin speech because it does not require Appellants to take down their signs, only to turn them around—is likewise meritless. The injunction below forbids the Galapos from expressing their views on antisemitism and the Oberholzers' behavior to the one audience that matters to them: the Oberholzers. The Galapos' signs were not intended to derogate the Oberholzers in the eyes of the community: they were intended to communicate directly to the Oberholzers. Those communications to the Oberholzers were entirely enjoined.

The final argument is one the Court must consider seriously. The right to speak is not absolute when it potentially impinges on other protected interests. It is well established that an injunction may issue against speech that is paired with violence or that threatens certain kinds of harm. *See* Kreimer, *supra*, at 32 n.76

(collecting cases). This Court has noted that the right to use and enjoy one's property is, like the right to speak, enumerated in our Declaration of Rights, and the Court must find balance between those rights. *Tate*, 432 A.2d at 1389. Property rights cannot be presumed to override freedom of speech. *Id*., at 1390 ("Mindful of both this Commonwealth's great heritage of freedom and the compelling language of the Pennsylvania Constitution, we likewise hold that, in certain circumstances, the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition.").

But the Appellants here, as well, have a right to the use and enjoyment of their property, which the injunction takes away. The U.S. Supreme Court has recognized the heightened interest a person has in being able to speak their mind on and from their own property: "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (*citation omitted, emphasis in original*).

> Displaying a sign from one's **own residence** often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' ...Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.

Gilleo, 512 U.S. at 56-57 (emphasis added).

This case does not present the kind of extraordinary circumstances that would justify departure from the presumption that injunctions against speech are forbidden by Article I, §7. Appellants' speech, while certainly directed toward Appellees, was not violent or threatening or harassing. It did not literally intrude upon Appellees' property, either physically or for instance through the use of sound amplification. Appellants' messages may upset Appellees, but there is nothing in that speech that threatens the neighbors with anything but more speech, *e.g.*, "Racism will be met with signs of defiance."

Denying Appellants the right to post these passive signs on their property is certainly not the least restrictive means of protecting their neighbor's interest in the quiet enjoyment of their property. Appellees are not required to look at the signs. If they find it difficult to ignore the signs, they can plant trees or build a fence to block the view of their neighbors' yard. The Appellees' right to privacy and the quiet enjoyment of their property cannot trump Appellants' right to express themselves on their property, particularly when Appellees can easily avoid seeing the messages to which they object. This Court should vacate the injunction below and allow Appellants to turn their signs around.

IV. CONCLUSION

For the foregoing reasons, *Amicus* urges this Court to hold that Article I, §7 of our Declaration of Rights precludes the injunction issued below, reverse the decision of the Superior Court, and vacate the injunction.

Dated: January 5, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this *Amicus* Brief was prepared in word-processing program Microsoft Word 365 (for Windows), and I further certify that, as counted by Microsoft Word 365, the body of this *Amicus* Brief contains 6953 words, and complies with Pa. R.A.P. 531(b)(3).

Dated: January 5, 2023

s/ Mary Catherine Roper
Mary Catherine Roper

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 5, 2023

s/ Mary Catherine Roper
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