No. 03-1488

In The
Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

vs.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division One

BRIEF *AMICUS CURIAE* OF MICHELANGELO DELFINO AND MARY E. DAY IN SUPPORT OF PETITIONERS ULYSSES TORY AND RUTH CRAFT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

BRIEF *AMICUS CURIAE* OF MICHELANGELO DELFINO AND MARY E. DAY

INTEREST OF *AMICI CURIAE*[1]

Amici Michelangelo Delfino and Mary E. Day are the defendants in *Varian Medical Systems, Inc. v. Delfino* (Cal. S. Ct. No. S121400), currently pending before the California Supreme Court and set for oral argument on December 7, 2004. Varian, a Fortune 500 company, sued Delfino and Day, former Varian research scientists, for defamation and other torts arising from thousands of colorful, offensive and hyperbolic statements they made over the Internet about Varian and its senior executives. Delfino's and Day's Internet statements expressed displeasure with Varian's corporate management and tactics Varian has employed in an unsuccessful effort to silence them. Delfino and Day lost at trial and were ordered to pay $775,000 in damages.

The trial court also issued a comprehensive injunction barring Delfino and Day from making future statements about Varian and its employees. The California Court of Appeal affirmed the damages award but set aside most of the injunction as an unconstitutional prior restraint. The California Supreme Court granted review, thus vacating the Court of Appeal's decision, in order to determine a narrow jurisdictional question – whether the trial court lacked jurisdiction to conduct the trial. If Delfino and Day prevail in the California Supreme Court, the case will be returned to the trial court for a new trial, where Varian might again seek injunctive relief. Accordingly, Delfino and

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Day have an interest in the outcome of the *Cochran* case as it will shape the law governing the re-trial of their case.

Delfino and Day are also interested in the outcome here because their experience as victims of a lawsuit designed to silence them has pushed them into becoming full-time free speech advocates. They came to this crusade in middle-age. They had spent their professional careers as research scientists in Northern California, and had fully expected to continue those careers. They are named inventors on twenty-five United States patents and between them have written more than 100 scientific papers. After they left Varian, they formed their own technology start-up company, MoBeta Inc. However, since Varian sued them in 1999, their lives have profoundly changed. They have set aside their life's scientific work in order to fight for their right and the right of others to criticize publically-traded corporations over the Internet and elsewhere.

Varian had expected Delfino and Day to act like countless others who have faced a similar situation and simply stopped speaking out once they saw what it would take to fight for their rights. That a major corporation would spend millions of dollars and hire three high-priced San Francisco Bay Area law firms to pursue them has served only to make Delfino and Day more determined to ensure that similar abuse is not inflicted on others. In fighting back, they depleted their entire life savings and are now indigent.

As part of their fight, Delfino and Day created their own website – http://www.geocities.com/mobeta_inc/slapp/slapp.html – as a forum to air their free speech message.

They self-published a book – *Be Careful Who You SLAPP* – which chronicled their ordeal. More than 850 libraries around the world have purchased the book. Some 78 articles and radio stories addressing the Varian litigation have been published statewide and nationally – including on National Public Radio and by the Washington Post, the Wall Street Journal, the Associated Press, USA Today, the San Jose Mercury News, Silicon Valley's Weekly Metro, Bloomberg Newswire, and the Investors Business Journal. The case has also been chronicled in law review articles and other legal publications.

Delfino and Day have learned that it has become commonplace in today's society for powerful forces to attempt to silence those who do not have such deep pockets. With the present case, this Court can help ensure that others will not suffer the same fate as Delfino, Day, Tory and Craft.

SUMMARY OF ARGUMENT

Petitioners Ulysses Tory and Ruth Craft have been barred by court order from making any statement about respondent Johnnie Cochran in any forum at any time. Petitioners' briefs will demonstrate that such an injunction constitutes an unconstitutional prior restraint. *Amici* Delfino and Day agree. This *amicus curiae* brief, however, addresses another fundamental problem with the Court of Appeal's opinion – the foundational holding that petitioners' hyperbolic statements made during their protests outside of Cochran's office constitute actionable defamation. That holding is dramatic evidence that this Court's guidance on the constitutional protection of rhetorical hyperbole is necessary to provide adequate breathing

space for social critics who do not conform to majoritarian sentiments.

The need for clarity in the protection of rhetorical hyperbole has taken on greater significance with the advent of a new medium of communication – the Internet – which has become a powerful tool in democratizing both the content of and access to information. In the past, people with little or no money had difficulty finding a broad audience. Their options were to hand out mimeographed handbills on a street corner or to speak out to a few passerbys at the local "village green." Tory and Craft pursued such a strategy in their small protests against Cochran. Now such persons can reach millions by posting commentary on the Internet, which can be readily accessed by anyone on a computer. The Internet has provided a platform for all to speak out on issues of concern to them.

The Internet has also spawned a new means of communication – the "flame war" – where posters (often anonymous) use vitriolic language and engage in ad hominem attacks. For instance, during this past presidential election campaign, one or both of the major candidates were described on the Internet as a "liar"; "war criminal"; "murderer"; "idiot"; "moron"; "douchebag"; "asshole"; and similar to "Hitler." *E.g.*, *The Politburo Diktat*: *Shrill Meter, at* http://acepilots.com/mt/archives/001343.html (last visited Nov. 8, 2004). While many deplore this lack of civility, the question for this Court is whether uncivil discourse should be chilled by defamation lawsuits or whether freedom of speech demands that unconventional and unpopular modes of expression are tolerated.

There has also been an increase in lawsuits filed by corporations and others who have become subjects of

widespread criticism as a result of the Internet's rise. Scores of lawsuits are now being filed by large corporations like Varian against individuals like Delfino and Day. The goal of these lawsuits – like the goal of Cochran's lawsuit in this case – is to silence the speaker by threatening a crushing legal battle that the individuals cannot afford. Greater clarity on the protections afforded to rhetorical hyperbole would make plain that such lawsuits are disfavored.

LEGAL ARGUMENT

THIS COURT SHOULD CLARIFY THE PROTECTION AFFORDED TO RHETORICAL HYPERBOLE AND HOLD THAT PETITIONERS' SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

A. The Court of Appeal should never have reached the injunction question because petitioners' speech is protected rhetorical hyperbole.

In defamation cases, appellate courts must conduct "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 503-05 (1984).

A statement is not defamatory if it "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Thus, a statement that is "no more than rhetorical hyperbole, a vigorous epithet" is constitutionally protected

expression and cannot constitute defamation even if the statement, when reviewed out of context, might otherwise be an actionable statement of fact. *E.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). "This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Notwithstanding the above principles, the California Court of Appeal in this case found that the statements Tory and Craft placed on their placards and shouted during their picketing "'crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentation of fact.'" (Joint Appendix at 59.) Thus, the Court of Appeal found falsity rather than mere rhetorical hyperbole in statements such as "Attorney Johnnie Cochran I Know What You, the Country and the city did to my case"; "Hey Johnnie How Much Did They Pay $$ You to F_ _ k Me?"; and "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46." (Joint Appendix at 11.)

The Court of Appeal was wrong. The average audience at a demonstration involving placard-wielding protesters would not take the above to be provably true statements of fact, but would recognize that, in the context of a noisy protest featuring loose and colorful language, such statements are just rhetorical hyperbole. *See, e.g.*, *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283-284 (1974) (use by union of "intemperate, abusive, or insulting language" during a labor dispute is protected speech because "'to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies'" does

not convey provably true statements of fact); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (statement that Falwell had sex with his mother was a parody which "could not 'reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated' ").

Applying these principles, numerous other courts have found harsh statements directed at lawyers' qualifications and competence to be nondefamatory. *See*, *e.g.*, *Partington v. Bugliosi*, 56 F.3d 1147, 1150-58 (9th Cir. 1995) ("an incompetent attorney"); *Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998) (plaintiff "is a very poor lawyer"); *Quilici v. Second Amendment Found.*, 769 F.2d 414, 418 (7th Cir. 1985) ("plaintiff's presentation before this court was poor, and may have 'sunk' the appeal; . . . plaintiff's presentation was 'rambling and often pointless' "); *Lewis v. Time Inc.*, 710 F.2d 549, 556 (9th Cir. 1983) (plaintiff is a " 'shady practitioner' "); *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 28 (D.D.C. 1995) (plaintiff is "an incompetent, overpaid lawyer who required substantial assistance from his client"); *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 851 (Ct. App. 1999) (plaintiff's suit was " 'stupid,' 'laughed at,' 'a joke,' 'spurious,' and 'frivolous' " and plaintiff was a " 'Kmart Johnnie Cochran,' " a " 'creepazoid attorney,' " and a " 'loser wannabe lawyer' "); *James v. San Jose Mercury News, Inc.,* 20 Cal. Rptr. 2d 890, 896 (Ct. App. 1993) (plaintiff "is a member of a class of lawyers that engages in, and his conduct in this instance is an example of, sleazy, illegal, and unethical practice"); *Kirsch v. Jones*, 464 S.E.2d 4, 6 (Ga. App. 1995) (plaintiff "took over and bungled the . . . case; . . . is directly responsible for the problems of [his former clients] and should be liable for . . . the malpractice suit"); *Hopewell v.*

Vitullo, 701 N.E.2d 99, 105 (Ill. App. Ct. 1998) (plaintiff was "fired because of incompetence"); *Allen v. Ali*, 435 N.E.2d 167, 169 (Ill. App. Ct. 1982) (plaintiff was "partially incoherent"); *Guarneri v. Korea News, Inc.,* 214 A.D.2d 649, 649-50 (N.Y. App. Div. 1995) (plaintiff was "unprepared and negligent" and "lost an opportunity to appeal").)

Thus, in the present case, the Court of Appeal should never have reached the injunction issue because the challenged speech was protected rhetorical hyperbole. That the court did so demonstrates a need for clear guidance from this Court as to the contours of protected rhetorical hyperbole to ensure against uncertainty in the lower courts and insufficient protection for speech.

B. This Court should elucidate what constitutes rhetorical hyperbole in order to ensure greater breathing space for free expression.

A commentator recently noted that

> the United States Supreme Court has given lower courts little guidance on how the reasonable person standard should be applied to statements claimed by defendants to be only rhetorical hyperbole. Because of this lack of guidance, lower federal and state courts have addressed rhetorical hyperbole in a variety of ways, leaving declarants with little warning concerning what kinds of statements will be protected. Additionally, the lack of uniformity among courts has sometimes led to different treatment of similar statements made in similar contexts.

Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard*: *Drawing the Line Between Figurative*

Expression and Factual Defamation, 38 Ga. L. Rev. 717, 723 (2004).

Thus, for example, the Ninth Circuit does not view rhetorical hyperbole as a separate category of speech subject to protection, but as simply one factor in examining what constitutes "whether a statement implies a factual assertion." *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). By contrast, the Eleventh Circuit recognizes rhetorical hyperbole as a separate category of protected speech which "'"reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse."'" *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). Each court that considers the question seems to examine different factors. *See* Fulcher, *supra*, at 736-44 (collecting cases).

As a sound solution for clarifying what constitutes rhetorical hyperbole, the commentator proposes a formal three-part inquiry: (1) "Does the statement, when read literally, assert or imply objectively provable facts?"; (2) "Do the content and language of the statement negate the impression of fact?"; and (3) "Does the context in which the statement is made negate the implication of fact?" *Id.* at 755-67. The proposal sets forth additional questions as to whether the content and language negate the implication of fact: (1) "Are the Facts Implied or Asserted by Reading the Statement Literally Fantastic, Impossible, or Highly Improbable?"; (2) "Does the Statement Convey a Metaphor, Analogy, or Other Mode of Comparison?"; (3) Does the Statement Use Language Indicating That Something Connected to the Subject Is Approaching a Negative Extreme?"; (4) "Does the Statement Use Loose Language or Colloquialisms?"; and (5) "Do the Significant Words in the Statement Have Slang Meaning in Addition to Their

Customary Meaning?" *Id.* at 757-62. Finally, the proposal sets forth additional questions as to whether the context negates the implication of fact: (1) "Does the Statement Arise from or Relate to a Debate on a Controversial Issue?"; (2) "Does the Medium Through Which the Statement is Communicated Support the Application of the Rhetorical Hyperbole Defense?"; and (3) "Does the Interaction Between the Parties When the Statement Is Made Support the Application of the Rhetorical Hyperbole Defense?" *Id.* at 764-766. The commentator derives this matrix of questions from an analysis of numerous cases from many lower courts attempting to make sense of the meaning of rhetorical hyperbole.

This Court has explicitly held that rhetorical hyperbole is constitutionally protected speech, but has not yet provided guidance to lower courts for determining what constitutes rhetorical hyperbole. The above matrix gives teeth to that protection and guidance to lower courts for how to ensure it.

For better or worse, our culture is becoming increasingly more coarse. We are bombarded with public images and statements that would have shocked prior generations. *See, e.g.*, Jeffrey Rosen, *The Privatization of our Public Discourse*: *Essay Privacy in Public Places*, 12 Cardozo Stud. L. & Lit. 167, 176-77 (2000). But, when it comes to speech, the law values freedom over subjective notions of offensiveness, for it is "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). The above test, clarifying the scope of protection afforded to

rhetorical hyperbole, allows greater breathing space for speech.

C. This case is part of a wave of litigation filed by powerful figures in an effort to silence unconventional social critics who lack the resources to resist such lawsuits.

One consequence of the lack of a clear definition of protected rhetorical hyperbole is a new wave of lawsuits and a chill on free expression. This case is exemplary: A powerful public figure has used his considerable resources to bring to bear the full weight of the law on two indigent and powerless persons who dared to express their opinions in a colorful and caustic manner.

This is not the only example of such a lawsuit. *Amici* are victims of a similar lawsuit filed by a large public corporation seeking to silence their Internet criticisms of the company.

Corporations are increasingly filing defamation lawsuits in retaliation for statements made about them by individuals on websites and Internet message boards and in e-mail. *See* Lyrissa Barnett Lidsky, *Silencing John Doe*: *Defamation & Discourse in Cyberspace,* 49 Duke L.J. 855, 858 n.6 (2000). These lawsuits are proliferating because the protection of rhetorical hyperbole is still unclear.

> One of the most striking features of these new cases is that, unlike most libel suits, they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment. Why, then, do plaintiffs, many of whom are wealthy corporations, choose to sue relatively impecunious John Does? The goals of

> this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.

Id. at 858-59.

These lawsuits will continue to increase unless checked by this Court, because of the increasing popularity of a unique Internet-based form of expression: the "flame war." A flame war is an Internet message-board phenomenon in which "disagreeing speakers lash out at each other by spewing forth in vitriolic and ad hominem attacks." Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks*: *The First Amendment In An Online World*, 28 Conn. L. Rev. 1137, 1143, n.23 (1996). Flame wars have quickly become ubiquitous in cyberspace. *See, e.g.*, April Mara Major, *Norm Origin and Development In Cyberspace*: *Models of Cybernorm Evolution*, 78 Wash. U. L.Q. 59, 85 (2000) ("Due to a certain amount of anonymity that cyberspace affords, flaming has become a popular form of expression for many users."); K. Weng, *Type No Evil*: *The Proper Latitude Of Public Educational Institutions In Restricting Expressions Of Their Students On the Internet*, 20 Hastings Comm. & Ent. L.J. 751, 810 (1998) ("This anonymity and ease of 'speaking' on the Internet have also dulled senses of decor in that it is more commonplace and even accepted to be rude and insulting. A term called 'flaming' has even sprung into being; it indicates a vicious tongue-lashing."); Thomas W. Temple, *Marching Bandwidth*: *Advancing Information Exchange At Stability's Expense,* 6 J. Contemp. Legal Issues 409, 421 (1995) (disputes "often escalate into absurd 'flame wars,' in which masses of messages filled with exaggerated ill will are exchanged."). The phrase has even made its way into recent dictionaries. *See, e.g.*, Merriam-Webster's Collegiate

Dictionary, 441, col. 2 (10th ed. 2003) (defining "flame" as "to send an angry, hostile, or abusive electronic message").

> Flaming is rarely defamatory.
>
> > [A] flame is a common way to vent on the Internet, even among grown-ups and Harvard professors. People say things on the Internet they wouldn't say otherwise. In turn, people do not treat what they read, hear, or receive on the Internet the same way they would something told them in-person, on the phone, in a letter or that they read in a newspaper or see on television.

Weng, *supra*, at 810 (citations and internal quotation marks omitted). The point is that "in the context of a 'flame war,' it would be unreasonable for anyone to believe that the facts asserted in this war were true and not hyperbole." Michael Hadley, *The Gertz Doctrine and Internet Defamation*, 84 Va. L. Rev. 477, 498 (1998). But flaming is nevertheless becoming a rich source of litigation.

Overturning the injunction in the present case will not by itself stop this wave of litigation, since lawsuits could still be filed with the purpose of bankrupting unpopular speakers in a war of attrition over money damages that may not even be recoverable. There will still be a significant chill on expression unless this Court addresses the root of the problem – the ability to sue at all.

D. This Court should protect free expression from the danger posed by defamation lawsuits targeting unconventional speech.

Lawsuits designed to silence Internet criticism pose a dangerous threat to free speech on the Internet. "Many corporate plaintiffs that sue for Internet libel seek to send

a message to the public that they will pursue aggressively anyone who criticizes them online, and these plaintiffs seem to be using libel law to squelch not just defamatory falsehoods but legitimate criticism as well. . . ." Lidsky, *supra*, at 883. "There is some danger, therefore, that the growing popularity of the new Internet libel suits may chill more than defamatory falsehoods – it may also chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas." *Id.* at 890. "The chief threat posed by the new cases is that powerful corporate plaintiffs will use libel law to intimidate their critics into silence and, by doing so, will blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse." *Id.* at 945.

The Internet is today's dominant public forum. It has been described as "the new 'village green' for voicing ideas and persuading one's listeners." Robert Kline, *Freedom of Speech on the Electronic Village Green*: *Applying the First Amendment Lessons of Cable Television to the Internet*, 6 Cornell J.L. & Pub. Pol'y 23, 58 (1996). "[T]he Internet – as 'the most participatory form of mass speech yet developed,' [citation] – is entitled to 'the highest protection from governmental intrusion." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 863 (1997), quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

Some courts have held that anonymous hyperbolic statements in the context of a flame war on an Internet message board did not constitute defamation because the average audience would not take the speech to contain provably true statements of fact. *See ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 643 (Ct. App. 2001); *SPX*

Corp. v. Doe, 253 F. Supp. 2d 974, 981-82 (N.D. Ohio 2003); *Rocker Mgmt. LLC v. John Does 1 Through 20*, No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277, at *3-8 (N.D. Cal. May 29, 2003); *Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001). Other courts, however, like the California Court of Appeal in *Varian Medical Systems, Inc. v. Delfino* and the court below in this case, have failed to protect unconventional speakers who employ rhetorical hyperbole to make their points.

Until rhetorical hyperbole is better defined, speech will continue to be chilled – on the Internet, at sidewalk protests, and in a myriad of other fora.

CONCLUSION

In the past, on the basis of supposed offensiveness, public officials sought to censor the novels of James Joyce and Theodore Dreiser, the poems of Walt Whitman and Allen Ginsberg, the comedy of Lenny Bruce, and the films of Louis Malle and Bernardo Bertolucci – all of which have since become part of our cultural mainstream. In every one of those notorious cases of government censorship, the right of free speech has ultimately been vindicated, whether by the courts or with the passage of time. Far-seeing judges recognize that the law must reflect, not shape, the contours of popular culture.

Some of America's most respected jurists have observed that the right of free expression includes vulgar and offensive speech. Judge Learned Hand defended the right of public criticism "either by temperate reasoning, or by immoderate and indecent invective." *Masses Publ'g Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y. 1917). Justice Oliver

Wendell Holmes warned "we should be eternally vigilant against attempts to check the expression of opinions that we loathe." *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Hugo Black championed the "prized American privilege to speak one's mind, although not always with perfect good taste." *Bridges v. California*, 314 U.S. 252, 270 (1941). Justice Warren Burger cautioned that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Found.,* 438 U.S. 726, 745 (1978).

Four decades ago, Justice John Marshall Harlan said of the right of free speech:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen, 403 U.S. at 24-25.

This Court, standing on the shoulders of the giants who uttered these pronouncements, should vindicate them here.

For the above reasons, and for the reasons set forth in petitioners' briefing on the merits, this court should

reverse the California Court of Appeal and hold that, as a matter of law, petitioners engaged in protected speech, and that even if petitioners' speech was defamatory the injunction constitutes an unconstitutional prior restraint.

Respectfully submitted,

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