

IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO

ALBUQUERQUE JOURNAL, ASSOCIATED PRESS,
KRQE, KOAT, and THE ALBUQUERQUE TRIBUNE,

Petitioners,

v.

No. 26,553

THE HONORABLE TOMMY JEWELL,

Respondent,

STATE OF NEW MEXICO, *ex rel.* CHILDREN YOUTH
AND FAMILIES DEPARTMENT, ANAMARIE MARTINEZ,
a minor child, and ADELLA MARTINEZ AND MIGUEL
MARTINEZ, RESPONDENTS

Real Parties in Interest.

Appeal of the Decision of Judge Tommy Jewell of Bernalillo County

**BRIEF OF AMICUS CURIAE,
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICUS CURIAE

The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The present case raises important issues regarding whether a judge may impose a gag order designed to target the media and whether a judge may close a courtroom when the state legislature has mandated that the court be open. The case also addresses the procedures that must be followed before any closure orders or gag orders may be imposed. The decision by this Court will undoubtedly be considered by other jurisdictions faced with similar issues, and The Reporters Committee urges this Court to consider the significant and fundamental First Amendment issues raised by this case.

This case also raises the issue of whether New Mexico's open courts policy could lead to the denial of federal funds. The Reporters Committee urges this Court to find in favor of the open courts policy, as the identical issue was addressed in Minnesota where the federal government agreed that it would not cut federal funding merely because the state allowed public and media access to child custody proceedings. Furthermore, it is apparent that the provisions of CAPTA were not designed to require court closure, and it is likely that any efforts to require court closure would be deemed unconstitutional.

ARGUMENT

I. The U.S. Supreme Court has recognized a presumption of openness in the U.S. court system.

Open judicial proceedings are an essential element of our legal system and our American way of life. As a matter of constitutional, statutory and common law, courts have consistently held that judicial proceedings must be conducted in public.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court established beyond a doubt that the public and the press have a First Amendment right to attend criminal trials. The Supreme Court reversed an order closing a criminal trial and emphasized the unvarying history of open judicial proceedings in this country:

[T]he historical evidence demonstrates conclusively that at the time when our organic law were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.

Richmond Newspapers, 448 U.S. at 569. The Supreme Court continued:

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.

Id. at 573.

The Supreme Court later noted in *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596

(1982), that there are numerous public policy reasons supporting open judicial proceedings.

"[Access allows] the public to participate in and serve as a check upon the judicial process -- an essential component of our structure of self government." *Globe Newspapers*, 457 U.S. at 606.

The Court also noted that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguard the integrity of the fact-finding process, with benefits to both the defendant and society as a whole." *Id.*

Public scrutiny also promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against "any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1984).

Public confidence in judicial proceedings is also enhanced by openness. In *Press-Enterprise I*, 464 U.S. 501 (1984), the U.S. Supreme Court considered whether the public had a right to attend jury voir dire in a high profile rape/murder trial in California. In holding that the proceedings should be open, the Court explained another benefit of public proceedings:

The value of openness lies in the fact that people not actually attending trials can have confidence that the standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press Enterprise I, 464 U.S. at 509. In that case, the Court held that there was a presumptive right of access to jury selection. Courts have continued to expand the presumption of openness to

virtually all types of proceedings.¹

A. NMSA § 32A-4-20(D) mandates public access to Children's Court proceedings and should be followed.

Given the great weight of court authority in favor of open courts, there is no doubt that the public's presumptive right of access to judicial proceedings is the hallmark of our judicial system and our democratic society. The New Mexico legislature has acted consistently with such policies in enacting a statute, NMSA § 32A-4-20(D), which allows for public access, via the media, to child custody proceedings. Other states, such as Colorado, Michigan and Florida, have

¹ See *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (extending right of access to civil proceedings); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (First Amendment secures to the public and to the press a right of access to civil proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (policy reasons for granting public access to criminal proceedings apply to civil cases as well); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (First Amendment right of access should apply to documents filed in connection with a summary judgment motion in a civil case); *New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 267 (N.J. 1990) ("The societal and institutional values served by open access to criminal proceedings are also implicated in civil proceedings."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337 (Cal. 1999) (public and media have right of access to civil proceedings); *In re Astri Inv. Management & Sec. Corp.*, 88 B.R. 730 (Bankr. D. Md. 1988) (access to bankruptcy proceedings); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (right of access to plea agreements); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (right of access to suppression hearings); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to civil trial records); *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989) (right of access to change of venue hearings); *United States v. A.D.*, 28 F.3d 1353, 1358 (3d Cir. 1994) (suggesting that under *Globe Newspaper*, "an across-the-board ban on access to juvenile proceedings ... would pose a substantial constitutional issue" - an issue the court avoided by narrowly construing the statute under consideration); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system); *In re Iowa Freedom of Info. Council*, 724 F.2d 658 (8th Cir. 1983) (right of access to contempt proceedings); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (right of access to juror misconduct investigations); *Ogden Newspapers, Inc. v. City of Williamstown*, 453 S.E.2d 631 (W. Va. 1994) (finding a First Amendment right of access to redacted police reports); *In re Times-World Corp.*, 488 S.E.2d 677 (Va. Ct. App. 1997) (right of access to competency hearings); *California First Amendment Coalition v. Calderon*, 956 F. Supp. 883 (N.D. Cal. 1997) (right of access to executions).

similarly provided for access to child custody proceedings because of the importance of the cases being heard.²

A parent's right to care for one's own child is obviously of great importance. As the U.S. Supreme Court has stated, "[f]ew forms of state action are both so severe and so irreversible" as proceedings to remove a child from parental care. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982); *see also, M.L.B. v. S.L.J.*, 117 S. Ct. 555, 557 (1996) (finding that risk of error is considerable in parental rights termination case). Most parents would greatly fear the prospect of having their child taken from them by the state, and a proceeding to remove a child from parental custody is akin to a criminal proceeding in that the state is prosecuting a citizen who is threatened with a penalty. Although the potential penalty in child protection cases is the loss of parental custody rather than the threat of imprisonment, the underlying principles requiring public access to such proceedings remain the same. It is therefore imperative that the public have access to child custody proceedings, such as the one at bar, to help the public ensure that children are not removed from their parents arbitrarily and to ensure that such proceedings are fair.

Openness would enhance child protection proceedings in numerous ways. First, public access would discourage perjury and would encourage full disclosure by witnesses. *Publiker*

² The following states have a statutory presumptive right of access to child protection proceedings:
Colorado: Colo. Rev. Stat. Ann. s. 19-1-106(2) (1998)
Florida: Fla. Stat. Ann s. 985.205 (1998)
Maryland: Md. Code Ann., Cts. & Jud. Proc. s. 3-818 (1998)
Michigan: Mich. Ct. R. 5.925; Mich. Com. Laws s. 712A.17(7) (1998)
Nevada: Nev. Rev. Stat. s. 62.193(1) (1999)

Industries, Inc. v. Cohen, 733 F. 2d 1059, 1068-69 (3d Cir. 1983). Courts have also noted that public knowledge of such proceedings may encourage previously unknown witnesses to come forward. *See, e.g., San Bernadino County Dep't of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 341 (Ct. App. 1991) (reasoning that "open proceedings discourage perjury and might encourage other witnesses to come forward which in turn leads to more accurate fact-finding"). Public access also serves as a check on unfettered government authority in child protection cases where the government usually has substantially more assets for prosecution than the parents do for defending themselves. *See Santosky v. Kramer*, 455 U.S. 745, 763 (1982) ("The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 30 (1981) ("[Dependency court] parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation"). Public access would also heighten procedural regularity in dependency cases, just as it currently does in criminal and other civil cases. "In acting under the public gaze, [officers of the court] are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1983). Finally, public access helps the public ensure that its tax dollars are being used effectively in the administration of justice. *See, e.g., In re T.R.*, 556 N.E.2d 439, 453 (Ohio 1990) ("Since Judge Solove is an elected official, the public

has a right to observe and evaluate his performance in office.").

Because there is a presumptive right of access to court proceedings, and because there are important policy reasons backing the presumptive right of access to court proceedings, and because New Mexico has expressly authorized a right of access to the proceedings in this case, it was erroneous for Judge Jewell to close the courtroom and exclude the media in the present case.

B. CAPTA does not require closed courtrooms, nor should public access to child protection proceedings affect New Mexico's ability to obtain federal funding.

This Court has asked whether a memorandum from the U.S. Department of Health and Human Services (a copy of which is attached hereto as Appendix A) should affect this Court's decision in the present case. *Amicus* presumes that this Court is concerned that permitting public access to child protection hearings might lead the federal government to cut funding to New Mexico.

Allowing public access to child protection proceedings should not result in a loss of funding. First, the memorandum at issue does not prohibit an open courts policy. It states, "The confidentiality requirements of . . . CAPTA do not prohibit open courts per se." The memorandum states that open proceedings may be held, but *if* any confidential information should be relevant and must be discussed, then *that* portion of the case, and *only* that portion of the case, must be held in private, such as in the judge's chambers. See Memorandum attached hereto as Appendix A at page 3.

In this case, there is no evidence, nor are there any findings, that any information that

CAPTA has deemed confidential is relevant to the issues in this case or that such information would need to be discussed at all. It is extremely difficult for *Amicus* to guess what confidential information might possibly be discussed in this case, but it seems clear that the trial court should, at a minimum, hold a hearing to consider whether any confidential information would need to be discussed before making a decision to close the courtroom entirely.

Furthermore, the courts in Minnesota have already dealt with the issue of whether they would lose federal funding if they allowed public access to child protection proceedings. The federal government stated that it would not withhold federal funding if Minnesota allowed public access to child custody proceedings, notwithstanding the provisions of the HSS Memorandum. See Newspaper articles from the Minneapolis Star Tribune dated July 28, 1998 and July 17, 1998, attached hereto as Appendix B. The Supreme Court of Minnesota also issued a press release stating that the state's open court policy for child protection proceedings did not violate the federal law.³

This Court, therefore, should not ignore the fundamental constitutional principles allowing for public access to court proceedings out of fear that the state will lose federal funding. And, given the strong principles in favor of public access to court proceedings, it is likely that a

³ See Minnesota State Supreme Court Information Officer, Press Release Regarding U.S. DHHS June 29, 1998 Memorandum (July 16, 1998) (on file with Minnesota State Supreme Court Information Officer); *see also*, The Honorable Heidi S. Schellhas, Children in the Law Issue: Contributors Open Child Protection Proceedings In Minnesota, 26 Wm. Mitchell L. Rev. 631 (2000) (advocating an open court policy and describing how Minnesota adopted an open court policy and how the state and federal governments agreed that the program would not violate CAPTA).

court faced with the issue would find a federal mandate to close court proceedings to be unconstitutional. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984).

II. The gag order imposed by Judge Jewell was an unconstitutional prior restraint on newsgathering.

Prior restraints are government actions that "forbid speech activities." *Alexander v. United States*, 509 U.S. 544, 550 (1993). The Supreme Court has described a prior restraint as "the most serious and least tolerable infringement on First Amendment rights" and "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

In the present case, Judge Jewell issued a gag order, prohibiting the parties from speaking to the media about this case. Such action is a *de facto* prior restraint on the media and is unconstitutional, especially under the facts of this case.

Amicus is not aware of the specifics of the gag order, in large part, because the gag order was never put into writing. The only information available to *Amicus* is the Affidavit of Troy Prichard, the attorney for Adela Martinez-Regino. His Affidavit was attached as an exhibit to the media entities' Motion to Request Review of Taped Proceedings Relating to Entry of Gag Order, and such Affidavit has been copied and attached to this brief for reference purposes as Appendix B.

The Affidavit specifies that the gag order was raised only in the context of discussing

media coverage of the case. See Appendix B at paragraph 2-3. It therefore appears that the judge's order was directed at thwarting the media and the public from learning about the case. There does not appear to be any concern that media coverage or public access would affect anyone's right to a fair trial or that it would harm the integrity of the judicial system. The Judge's order appears to target the media directly.

A similar issue was addressed in *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986). In that case, Judge Mechem told jurors that they should not speak to the media after the trial had ended. The Albuquerque Journal challenged the judge's gag order on the jurors, arguing that the order infringed on its First Amendment right to gather news, denied the public the opportunity to know the basis of the jury's verdict, and violated the jurors' First Amendment rights.

The court held, first, that the newspaper had standing to challenge the judge's order. *Id.* at 1236. The court then held that the media's interest in newsgathering was protected by the First Amendment:

News gathering is an activity protected by the First Amendment. . . . Even though the First Amendment does not invalidate every burdening of the press, . . . or provide an unrestrained right to gather information, . . . any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint. . . . If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible. . . . A court may impose a prior restraint on the gathering of news about one of its trials only if the restraint is necessitated by a compelling governmental interest. . . . Moreover, the court must narrowly tailor any prior restraint and must consider any reasonable

alternatives to that restraint which have a lesser impact on First Amendment rights. . . .

Id.(citations omitted). The court concluded that the judge's order was impermissibly overbroad and stated, "the court's power to impose prior restraints on First Amendment rights is limited and that with few exceptions it must be exercised in response to specific compelling reasons." *Id.* at 1237. *See also, CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (judge's order that parties could not speak to the media about the case was improper and violated the First Amendment rights of both the parties and the media); *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38 (D. Conn. 1987) (holding that a gag order directed at the trial attorneys constituted a prior restraint on the right to gather news and derivatively on publication and was therefore unconstitutional).⁴

The gag order in this case is similar to the order in *Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000). In that case, various media entities opposed a gag order entered in litigation against the tobacco companies. The trial judge entered a gag order that prohibited all parties and their agents from holding public meetings, press conferences, or briefings, and from making public statements. The media groups argued that the order persuaded the parties and their

⁴ In 1931, the U.S. Supreme Court stated in *Near v. Minnesota*, 283 U.S. 697 (1931), that government attempts to censor the media are presumed unconstitutional. In the intervening 70 years, the Court has repeatedly recognized that courts can only attempt to restrain the dissemination of information if the information to be published presents a clear and present danger or a serious and imminent threat to the administration of justice. In fact, the Supreme Court in *Near* articulated only one hypothetical circumstance under which a prior restraint would be permissible: an order barring publication of the movement of troop ships during war time. This case does not concern national security or the administration of justice. Although the Court in *Near* was concerned with direct censorship of the press rather than infringements on the newsgathering process, the principle that information should be disseminated freely should remain strong.

attorneys not to talk, hampering plaintiffs' news-gathering efforts. The court found that the media had standing to challenge the gag order because, "[t]he newspaper publishers demonstrate an injury to their First Amendment rights by showing that, but for Judge Kaye's gag order, parties to the Engle litigation would talk to their reporters." *Id.* at 1352.

The court also considered the constitutionality of the gag order. The court noted that gag orders are generally disfavored, but they may be constitutionally permissible *only if* the injury to any First Amendment right is outweighed by the Sixth Amendment right to a fair trial. *Id.* at 1359.

The court stated:

Prior to enjoining the speech of trial participants, a trial court must specifically find, based on the available evidence, that the fairness of the trial is seriously threatened by publicity and that nothing short of a gag order will suffice to protect the litigants' right to a fair trial. . . . When a gag order is challenged by someone whose speech it does not directly prohibit -- like the newspaper publishers in this case -- it will be upheld if it prohibits speech that is reasonably likely to prejudice the fairness of the trial.

Id. at 1359-60 (citations omitted). However, the court concluded that the record lacked any evidence that the gag order was necessary to ensure a fair trial.

Specifically, there is no finding that the publicity, the press release, or anything else seriously threatened the fairness of the trial. There are also no findings as to whether measures short of a gag order would suffice to combat the perceived threat. Even assuming that all speech that "could conceivably have a detrimental effect" on the fairness of a trial can ever constitutionally be proscribed, it cannot be done on this record.

Id. at 1360.

In the present case, there is no evidence that there was a threat to a fair trial. In fact, it is unclear that there could possibly have been a threat to the trial where the finder-of-fact was the judge and not a jury. Without a jury pool to "taint", there should be no restrictions on the media's ability to gather the news. Trials that are decided by a judge alone should be subject to more scrutiny as there is a greater concern for fairness and impartiality in such cases. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13 (1986) ("The absence of a jury, long recognized as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," makes the importance of public access to a preliminary hearing even more significant").

Finally, other courts have held that gag orders are impermissible when they prevent the public from learning about court proceedings of public interest. The Supreme Court of Montana, for example, has recognized that the First Amendment protects all aspects of communication:

The primary purpose of the First Amendment to the United States Constitution is to encourage and protect an "unfettered interchange of ideas for the bringing about of political and social changes. . . ." . . . In other words, the First Amendment protects not just speech itself but the entire process of communication, including the exchange of ideas and information between speaker and listener.

* * *

[T]he public has a right to receive information about the entire criminal law process. We hold that the right to know extends to receiving any information which pertains to the criminal law process, regardless of whether that information emanates directly from the courthouse or indirectly from those who are participating in the system as law enforcement officers, attorneys, parties or witnesses and who may wish to communicate with the public or the press about the process.

Montana ex rel. The Missoulian v. Montana Twenty-First Judicial District Court, 933 P.2d 829, 839-40 (Mont. 1997).

The gag order in the present case targeted the media and constitutes an unconstitutional prior restraint on newsgathering and therefore should be reversed.

III. Even if Judge Jewell could, in theory, close the courtroom or impose a gag order, due process requires a fair and full hearing before such actions may be taken.

Even if this Court believes that gag orders or orders to close a courtroom are constitutionally permissible, there are due process considerations that must be addressed before such orders may be entered. Courts have consistently held that due process requires evidentiary findings before a judge may close a courtroom or issue a gag order.

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See generally* C. Thomas Dienes et al., *Newsgathering and the Law* § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the litany of U.S. Supreme Court right of access decisions). "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a courtroom. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the

public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

If a trial court wants to close its courtroom following the hearing, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

These principles have been followed by the courts in New Mexico. In *Twohig v. Blackmer*, 1996-NMSC-23, 121 N.M. 746, 918 P.2d 332 (N.M. 1996), this Court indicated that a gag order may not be imposed until certain procedural requirements have been met. The court stated:

We conclude that to have allowed the gag order to stand in the face of a complete lack of factual findings to support the conclusion that such an order was necessary to preserve the parties' right to a fair trial would have done serious injustice to the principle that post-speech remedies are favored over prior restraints.

Twohig, 121 N.M. at 755. Such language indicates that a court must, at a minimum, make a factual finding of necessity before a gag order may be imposed. *See also, State ex rel. New Mexico Press Association v. Kaufman*, 98 N.M. 261, 265 P.2d 300 (1982) (stating that restrictive orders were improper where judge failed to make any findings to support them).

This case is directly analogous to *Care and Protection of Edith & Others*, 659 N.E.2d 1174 (Mass. 1996). In *Edith*, a district court judge entered a gag order in a child protection case,

limiting the parent's ability to speak to the media. The parent challenged the order, alleging that it was unconstitutional. In particular, the parent objected to any restriction on his asserted right to criticize the way that the government handled his case in particular and the way it handles all such proceedings in general.

The court found that the gag order was a form of prior restraint, which would be unconstitutional absent a showing of compelling need and an absence of any less restrictive means to achieve that end.

It is apparent that any order seeking to enjoin speech must be based on detailed findings of fact that (a) identify a compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available.

Id. at 1177.

The court also noted that in order to impose a gag order, there would have to be a hearing to determine whether there is adequate evidence to support such findings. Absent evidence and findings, a gag order may not constitutionally be imposed.

From what we have said it is clear that the February 22, 1995, order was and is an unlawful prior restraint on the right of the children's father to comment on the judicial proceedings and on the conduct of the department. The department has not identified a compelling State interest that needs protection. . . . There must be evidence and findings as to what effect the disclosure of the names of the particular children will or might have on them. . . . In short, there are no findings of fact and rulings that demonstrate a compelling State interest that could only be met by the order entered in this case.

Id. at 1177.

Similarly, a gag order was reversed due to the trial court's failure to make any findings in *Montana ex rel. The Missoulian v. Montana Twenty-First Judicial District Court*, 933 P.2d 829 (Mont. 1997). In *The Missoulian*, a newspaper challenged a gag order imposed in a criminal case. The Montana Supreme Court reversed the gag order, finding that it was improperly imposed.

Primarily, the court noted that the lower court failed to take any evidence or make any factual findings with regard to the restrictive orders. *Id.* at 832. In criticizing the court's secrecy orders, the court cited its prior statement of policy regarding access to court proceedings:

Closure of judicial proceedings breeds suspicion and mistrust in the minds of the public and representatives of the media. Such closure is simply censorship at the source -- a denial of the right to know.

Id. at 836.

The court went on to hold that a gag order may not be imposed unless the court properly evaluates due process considerations:

[W]e hold that . . . a gag order may issue only when the following conditions have been met: (1) the press and general public must be given an opportunity to be heard on the question before issuance of the order; (2) the court describes what reasonable alternatives have been considered and explains why those reasonable alternatives cannot adequately protect the defendant's fair trial rights; (3) the order is narrowly tailored to serve the interest of protecting the defendant's fair trial rights; and (4) the court has made specific findings that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that the gag order would otherwise prevent.

Id. at 841. *See also, Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000) (holding that gag order was improper where court failed to make findings based on evidence that a gag

order was necessary); *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986) (holding that a gag order may be imposed only where there is a finding of compelling need).

Similarly, the Ohio Supreme Court rejected a sweeping gag order imposed without any finding of necessity in *State ex rel. National Broadcasting Company, Inc. v. Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990). The court held that "a gag order cannot issue unless 'specific, on the record findings' are made demonstrating that a gag order is 'essential to preserve higher values and is narrowly tailored to serve that interest'." *Id.* at 1125. The court further ruled that representatives of the press and general public must be given an opportunity to be heard on the question. *Id.* See also, *State v. Clifford*, 733 N.E.2d 621 (Ohio App. 1999) (finding that a court must make a finding of necessity before closing a trial).

If the public has a constitutional right of access to court proceedings, per *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and its progeny, then it is mandatory, under principles of constitutional law, that courts provide for due process before denying the public their right of access. Courts around the country have consistently recognized such fact and have consistently held that gag orders or orders to close courtrooms may not be imposed unless certain procedures are followed to ensure compliance with the principles of due process. *Amicus* urges this Court to require, at a minimum, a public hearing and on-the-record findings based on evidence before a gag order or closure order may be imposed.

CONCLUSION

For the reasons stated herein, this Court should find that Judge Jewell erred in his closure of the courtroom and the imposition of the gag order in this case.

Respectfully submitted,

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