ACCEPTED
10-15-00235-CR
TENTH COURT OF APPEALS
WACO, TEXAS
7/24/2015 3:50:13 PM
SHARRI ROESSLER
CLERK

COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

CASE NO.

10-15-00235-CR

IN RE MATTHEW ALAN CLENDENNEN,
Relator.

Trial Cause No. 2015-1955-2
In the 54th District Court, McLennan County
Honorable Matt Johnson, Presiding

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS* IN SUPPORT OF RELATOR'S PETITION FOR WRIT OF MANDAMUS

Hannah Bloch-Wehba
State Bar No. 24087175
hblochwehba@rcfp.org
Counsel of Record
Katie Townsend
Tom Isler
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, D.C. 20005
Tel.: (202) 795-9300
Fax: (202) 795-9310

* A full list of *amici* is reproduced on the next page

IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press
The Associated Press
The Center for Investigative Reporting
Courthouse News Service
Cox Media Group, Inc.
First Look Media, Inc.
Gannett Co., Inc.
Hearst Corporation
Investigative Reporting Workshop at American University
National Newspaper Association
The National Press Club
National Press Photographers Association
The New York Times Company
Newspaper Association of America
Radio Television Digital News Association
The Seattle Times Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici file this brief in support of Relator Matthew Alan Clendennen's petition for a writ of mandamus directing the 54th District Court, McLennan County, to vacate a gag order it entered in connection with his criminal prosecution. As representatives and members of the media, *amici* have a strong interest in ensuring that any prior restraint on speech imposed by a court meets constitutional requirements, and in preserving their ability to gather news and report on ongoing criminal proceedings.

The importance of this Court's resolution of the petition before it extends beyond this case. It is vital that trial courts properly apply the correct legal standards when imposing any limitation on the rights of the press and the public to access information about criminal cases. *Amici* submit this brief to emphasize the constitutional interests at stake and the impact that gag orders like the one entered by the trial court have on all members of the media. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

FEE DISCLOSURE STATEMENT

Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amici* state that no fee was paid or will be paid for the preparing of this brief.

SUMMARY OF ARGUMENT

The gag order imposed in this case places unconstitutional restrictions on speech and prevents members of the media from gathering the news and reporting on matters of significant public interest. The trial court failed to apply the correct legal standard for determining whether and to what extent the constitutional rights of the press and the public under the First and Fourteenth Amendments and Article I, Section 8 of the Texas Constitution must yield to preserve Relator's ability to receive a fair trial by an impartial jury. The record in this case does not include *any* findings of inflammatory or prejudicial media coverage that would support a determination that Relator's fair trial rights would be threatened in any way by public access to information about his case—let alone findings of prejudice to the extent required to justify curtailing the exercise of state and federal constitutional rights. For that reason alone, the trial court's gag order must be vacated.

Moreover, the gag order is unconstitutionally vague and overbroad. Not only does it purport to restrain the speech of too many individuals, including witnesses and law enforcement officers who do not possess information that could jeopardize Relator's fair trial rights, but the order also restricts too much speech and is of unlimited duration. The order prevents any gagged individual from making any comment whatsoever to the media, without regard to whether the information is innocuous, purely factual, or already a matter of public record.

Unlike gag orders that have passed constitutional muster, the gag order's "no-comment" rule does not preserve for Relator or his counsel the right to assert his innocence, the right to generally discuss legal claims and defenses, or the right to communicate with the media about the status of the proceedings against him. The trial court made no attempt to narrowly tailor the gag order to prevent dissemination only of prejudicial material, or even to limit the order's duration. It is unclear from the language of the gag order what speech—if any—concerning Relator's case or the underlying incident falls safely outside its ambit.

In addition, the trial court failed to give proper consideration to alternatives designed to safeguard the integrity and impartiality of a jury, including *voir dire*, which is normally sufficient to root out prejudice, even in the most high-profile and publicized of criminal trials.

For these reasons, *amici* urge this Court to grant Relator's petition and issue a writ of mandate directing the trial court to vacate its gag order.

ARGUMENT

I. Gag orders impinge on constitutionally protected newsgathering activities and restrict the flow of accurate, newsworthy information about matters of public interest and concern.

Media access to criminal proceedings, court records, and trial participants is essential to the public's understanding and oversight of the judicial system. For centuries, the press has played a critical role in facilitating public oversight of the courts. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

> The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. . . . And where there was no threat or menace to the integrity of the trial, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

Id. (internal quotation marks and citations omitted).

Both the First Amendment and the Texas Constitution protect newsgathering activities, including the right of a reporter to receive information from a willing speaker. *See Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. App.—San Antonio 1991, no writ) (emphasizing that "news gathering" activities are protected by both the state and federal constitutions); *CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975) (gag order "directly impaired or curtailed" the media's "constitutionally guaranteed right" to gather the news); *Levine v. U.S. Dist. Court*,

764 F.2d 590, 594 (9th Cir. 1985) ("By effectively denying the media access to litigants, the district court's order raises an issue under the first amendment by impairing the media's ability to gather news.") (citation omitted).

Gag orders curtail the exercise of that right, and restrict the flow of accurate, newsworthy information to the public about matters of public interest. They prevent the media and, by extension, the public, from obtaining information about a case from the most knowledgeable individuals, verifying information obtained elsewhere, and clarifying or contextualizing arguments asserted in court documents or proceedings. The effect of such orders is to reduce both the quantity and quality of information flowing to the public about matters vital to self-governance, such as the administration of justice, public safety, and law enforcement activities.

A. To justify a gag order, a trial court must make specific judicial findings, consider less drastic alternatives, and narrowly tailor the order to address the identified harm.

1. The First Amendment requires a finding of "substantial likelihood" of prejudice to the defendant's fair trial rights.

Gag orders are presumptively unconstitutional. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) (orig. proceeding); *Young*, 522 F.2d at 238; *see also Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint"). A gag order that restricts the speech of lawyers and parties may issue only when a court makes specific findings showing that

extrajudicial commentary by those individuals presents a "substantial likelihood of material prejudice" to the court's ability to conduct a fair trial, and the order must be narrowly tailored and the least restrictive means available to preserve the fairness of the trial. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1063 (1991); *United States v. Brown*, 218 F.3d 415, 427–28 (5th Cir. 2000). [1]

Ordinary news coverage of a criminal trial cannot justify a restrictive order. As the U.S. Supreme Court has made clear, the criminal justice system both anticipates and tolerates jurors who have been exposed to pretrial publicity as an inevitable consequence of an informed citizenry. *See Reynolds v. United States*, 98 U.S. 145, 155–56 (1878) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."); *Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975) ("We must distinguish between mere familiarity with petitioner or his past and an actual predisposition

[1] Federal courts have applied "varying standards to review gag orders depending on whom or what is being gagged." *United States v. Scarfo*, 263 F.3d 80, 92 (3d Cir. 2001). For example, reasoning that tighter restrictions on the speech of lawyers—as opposed to witnesses and potential trial participants—may be permissible "[b]ecause lawyers have special access to information through discovery and client communication" and, thus, their extrajudicial statements may pose a greater threat of prejudice, *Gentile*, 501 U.S. at 1074, some federal courts have concluded that restrictions on lawyers' speech must present a "reasonable likelihood" of material prejudice to the fairness of the proceedings to pass constitutional muster. The majority of jurisdictions require a higher showing for such gag orders. *See United States v. Wecht*, 484 F.3d 194, 205–06 (3d Cir. 2007) ("every state, as well as a majority of federal district courts, now apply rules that are more protective of speech than the reasonable likelihood standard").

against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory."). To satisfy the Sixth Amendment's requirement of an impartial jury, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence in court." *Murphy*, 421 U.S. at 800 (quotation marks omitted).

For pretrial publicity to reach the point of interfering with a defendant's right to a fair trial by an impartial jury, the publicity must be so inflammatory that any juror exposed to it could not be expected to render an impartial verdict. *See Skilling v. United States*, 561 U.S. 358, 382–83 (2010) (discussing that publicity must be "the kind of vivid, unforgettable information" that is "particularly likely to produce prejudice"); *United States v. Lipscomb*, 299 F.3d 303, 344 (5th Cir. 2002) (stating that the fair trial right "is violated only if . . . the trial atmosphere [is] utterly corrupted by press coverage") (quotation marks omitted).

To determine whether the nature of pretrial publicity has risen to this level, district courts must consider the circumstances of each case, including, for example: (1) the time elapsed between the coverage and the trial[2]; (2) whether the coverage contains "confessions or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"[3]; and

[2] *Skilling*, 561 U.S. at 383.
[3] *Id.* at 382.

(3) whether the coverage invites prejudgment of, or expresses opinions about, a *particular defendant's* guilt.[4]

Any restrictive order must be narrowly tailored, and restrictions on speech must be no greater than essential to prevent the specific harm identified. *See Brown*, 218 F.3d at 427–28; *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987). Because large quantities of speech about a given case carry no risk of prejudicial effect, gag orders that impose a blanket "no comment" rule, without exceptions, are unlikely to satisfy constitutional mandates. *See id.* (concluding that a "no comment" gag order was not narrowly tailored).

For a gag order to be constitutional, it also must be the least restrictive means of preserving the defendant's rights. The power of *voir dire* and other curative measures to negate the effect of any prejudicial publicity should not be understated. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) ("It is fair to assume that the method we have relied on since the beginning [*voir dire*], usually identifies bias.") (citation omitted); *In re Charlotte Observer*, 882 F.2d 850, 855–56 (4th Cir. 1989) ("Increasingly the courts are expressing confidence that *voir dire* can serve in almost all cases as a reliable protection against juror bias however induced.").

---

[4] *Id.* at 383 (considering whether the coverage contains reports of a "smoking gun"); *id.* at 384 n.17 ("[W]hen publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact.") (internal quotation marks omitted); *see also United States v. Wilcox*, 631 F.3d 740, 747 (5th Cir. 2011) (considering whether publicity "probatively incriminated" the defendant); *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004).

2. Article I, Section 8 of the Texas Constitution provides even greater protection than the First Amendment.

The Texas Constitution provides "greater rights of free expression than its federal equivalent." *Davenport*, 834 S.W.2d at 10. And the Texas Supreme Court has formulated an exacting standard to evaluate gag orders, holding that they:

> will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.

Id. at 10. The Texas Supreme Court has criticized federal precedent as insufficiently protective of "the rights of free expression that we believe that the fundamental law of our state secures." *Id.* at 36.

While *Davenport* involved a gag order imposed in a civil case, this Court has made clear that the same standard is fully applicable to criminal cases. *See In re Graves*, 217 S.W.3d 744, 749 (Tex. App.—Waco 2007, no pet.); *see also San Antonio Express-News v. Roman*, 861 S.W.2d 265, 268 (Tex. App.—San Antonio 1993, no writ). As the Court of Appeals in *San Antonio Express-News* explained, "[t]he application of *Davenport* to a criminal proceeding is appropriate as a means of protecting the public's right of access to criminal trials and proceedings and free speech through the dissemination of public information—especially when, as in

this case, the criminal defendant has raised no challenge that without the gag order he will be deprived of a fair trial." 861 S.W.2d. at 268 (citations omitted).[5]

By requiring the risk of prejudice to the defendant to be "imminent and irreparable," rather than just substantially likely, the *Davenport* standard reflects the robust protections afforded freedom of expression by Texas law, and its recognition that, in all but the most extreme cases, any risk of prejudice from pretrial publicity may be cured by less drastic remedial measures. *See Davenport*, 834 S.W.2d at 10–11 (placing more faith in remedial measures than federal case law); *see also Benton*, 238 S.W.3d at 600 ("it is only the occasional case that presents a danger of prejudice from pretrial publicity"). In sum, the Texas Constitution provides even more protection for free expression than the First Amendment, and Article I, Section 8 sets an even higher bar for the issuance of a gag order in criminal cases than the federal constitution. *See Davenport*, 834 S.W.2d at 10; *Benton*, 238 S.W.3d at 597 ("Texas courts have consistently applied a higher standard when reviewing prior restraints of speech").

---

[5] While other Courts of Appeals have failed to apply the *Davenport* standard in criminal cases, or declined to reach the question, they have not articulated an alternative standard. *See In re Benton*, 238 S.W.3d 587, 597 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("we need not determine whether the higher *Davenport* standard applies in this criminal case, because the record and the findings do not support the imposition of a gag order even under the lower standards articulated in *Gentile* [*v. State Bar of Nevada*, 501 U.S. 1030 (1991)] and *Brown*."); *In re Houston Chron. Publ'g Co.*, 64 S.W.3d 103 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (upholding a gag order without explaining the legal basis for the decision).

Texas law requires that publicity be "pervasive, prejudicial, and inflammatory" before it poses a risk to a defendant's right to an impartial jury. *Bell v. State*, 938 S.W.2d 35, 46 (Tex. Crim. App. 1996) (en banc), *cert. denied*, 516 U.S. 946 (1997) ("The mere fact of media attention and publicity do not, however, automatically establish prejudice"). And, for a gag order to survive scrutiny under Texas law, the trial court "must make 'specific findings supported by evidence'" to that effect that detail "the nature or extent of the pretrial publicity," and how the publicity "will impact the right to a fair and impartial jury." *Graves*, 217 S.W.3d at 752–53.

B. Even widespread, adverse publicity does not violate the fair trial rights of criminal defendants.

Pretrial publicity rarely is so unfairly and incurably prejudicial to a particular defendant as to deny to him the right to an impartial jury. In many high-profile criminal cases—including those involving the Watergate defendants, the platoon leader in the My Lai massacre in Vietnam, and Enron executive Jeffrey Skilling—*voir dire* of prospective jurors sufficiently guarded against prejudice.[6]

It is well-settled that even when prospective jurors have been exposed to pervasive, emotional media coverage about a heinous crime, remedial measures

[6] *See United States v. Mitchell*, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976) (stating that 10 of the 12 jurors selected "claimed to have followed Watergate casually, if at all"), *rev'd on other grounds sub nom.*, *Nixon v. Warner Commc'ns*, 435 U.S. 589 (1978); *Calley*, 519 F.2d at 206 ("the exhaustive *voir dire* conducted at trial indicates that there is no likelihood that pretrial publicity prejudiced Lieutenant Calley"); *Skilling*, 561 U.S. at 384 ("the extensive screening questionnaire and follow-up *voir dire* were well suited to that task").

normally provide sufficient safeguards of defendant's rights. Perhaps the best example of this principle is *Calley v. Callaway*, in which Lieutenant Calley, leader of the platoon responsible for the My Lai massacre in Vietnam, was convicted in a military court. 519 F.2d 184, 190–191 (5th Cir. 1975), *cert. denied* 425 U.S. 911 (1976). The massacre, and Lt. Calley's involvement in it, had received "massive" amounts of "intense" publicity. *Id.* at 205. The record contained "volumes of clippings, reports and extracts from written reports on the case, as well as video tapes" of news coverage. *Id.* at 204. The federal district court that reviewed Lt. Calley's conviction found that he "had been persecuted and pilloried by the news media so intent on making prejudicial revelations about the incident" that it was "not humanly possible for the jurors not to be improperly influenced by" the news coverage, which had "lasting emotional impact." *Id.* at 205. The court concluded "it would be sheer fantasy to believe that the jurors did not see, hear and read (the publicity) or that they were not influenced by it," and held that Lt. Calley's Sixth Amendment right had been violated. *Id.*

The Fifth Circuit reversed, holding that the publicity was not prejudicial, and that Lt. Calley had not been deprived of his right to a fair trial by an impartial jury. Stating that it could not "accept the position that 'prominence brings prejudice,'" the Fifth Circuit closely examined the publicity in the record before it and determined that while some of the coverage contained "virulent and oppressive

attacks on Calley," "a good deal of the extensive publicity" contained "objective statements of the facts known and discovered about the My Lai incident." *Id.* at 206. The federal court of appeals distinguished "'straight news stories'" from "'invidious articles which would tend to arouse ill will and vindictiveness,'" and concluded that "there appears to have been no single sentiment regarding the case held by a vast segment of the American public." *Id.* (quoting *Beck v. Washington*, 369 U.S. 541, 556 (1962)).

The Fifth Circuit also found that a "searching and sensitively conducted *voir dire*" eliminated the likelihood that the jurors selected "were other than fair and impartial individuals who would determine Calley's guilt or innocence based solely on the evidence developed before the court." *Id.* at 208–09. As the court explained, "[t]he law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice." *Id.* at 210.

The Fifth Circuit's approach comports with U.S. Supreme Court precedent. *See Patton*, 467 U.S. at 1025, 1029–30 (holding that pretrial publicity did not violate the right to an impartial jury, despite the fact that 77 percent of prospective jurors "admitted they would carry an opinion into the jury box" and eight of the 14 jurors and alternates actually seated "admitted that at some time they had formed

an opinion as to Yount's guilt"); *Skilling*, 561 U.S. at 375, 377, 385 (holding that the district court properly denied a motion to change venue, despite "community passion aroused by Enron's collapse and the vitriolic media treatment" of the defendant, which "wrote of Skilling's guilt as a foregone conclusion").

The same result adheres in Texas courts. In *Bell v. State*, for example, a man who had been convicted multiple times of capital murder charges, sought to challenge one conviction on the grounds of improper denial of a motion for change of venue. 938 S.W.2d at 41, 44. He entered 150 newspaper articles and excerpts from nine television news broadcasts into the record, including one broadcast that intimated his guilt, along with testimony from attorneys who opined that he could not receive a fair trial in Jefferson County. *Id.* at 45–46. Thirty-six of the 60 veniremembers, drawn from a qualified jury pool of less than 130,000, had existing knowledge of his case, including six jurors selected for service. *Id.* at 45–46. Nevertheless, the Court of Criminal Appeals held that the defendant's right to an impartial jury was not violated. *Id.* at 46–47. "The mere fact of media attention and publicity do not," the court reasoned, "automatically establish prejudice or require a change of venue; jurors do not have to be totally ignorant of the facts and issues of a particular case." *Id.* at 46. The Court of Criminal Appeals agreed with the trial court that the news coverage was not sufficiently "inflammatory,

pervasive, or prejudicial" to violate defendant's right to an impartial jury, and that jury panel questionnaires sufficiently guarded against prejudicial influence. *Id.*

In the small number of cases in which the Supreme Court has found such overwhelming prejudice that the defendant was denied his right to receive a fair trial, the inflammatory nature of the media coverage was extreme. *See Rideau v. Louisiana*, 373 U.S. 72, 723–27 (1963) (finding inherently prejudicial multiple television broadcasts of footage of the defendant "in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff"); *Sheppard*, 384 U.S. at 334–36, 358, 363 (declining to hold that months of "virulent" pretrial publicity alone deprived the defendant of a fair trial, even though the media televised a three-day inquest, during which the defendant "was examined for more than five hours without counsel"; vacating the defendant's conviction only after considering factors unrelated to the content of pretrial publicity).

As the foregoing cases illustrate, pretrial publicity must be extraordinary to prejudice to a defendant's rights to a fair trial by an impartial jury. And, even in sensational cases, *voir dire* and other remedial measures are sufficient safeguards.

II. The gag order violates both the First Amendment and Article I Section 8 of the Texas Constitution because it is vague, overbroad, and unsupported by findings of a sufficient likelihood of prejudice.

This case arises out of a gang-related shootout that resulted in nine deaths, 18 injuries and more than 170 arrests. *See* Dane Schiller, *Waco Twin Peaks says it's working with police after biker brawl*, Houston Chron. (May 20, 2015, 8:48 A.M.), *archived at* http://perma.cc/J5Q4-ETNW. The incident received both local and national media coverage when it occurred, because the shooting raised issues of public safety, law enforcement, and gang violence. The nature of the media coverage was immediately praised by law enforcement. *See* Relator's App'x 5, Video File B at 11:15 [7] ("the media assistance that we had here yesterday was very good in getting information out quickly to our public"); App'x 5, Video File C at 24:30 ("the media is doing a phenomenal job as well providing information and getting that out"). Indeed, law enforcement described news coverage of the incident as "responsible," and encouraged members of the media to continue to verify facts with police. *See* App'x 5, Video File C at 2:44 ("I would ask you to continue responsible reporting. If you don't know that it's a fact, please come to me and I will give you that information if I can.").

On June 30, 2015, the McLennan County District Attorney's Office filed a motion for a gag order approximately 10 minutes before the trial court was to hear

[7] All subsequent references to "App'x" refer to Relator's Appendix For Writ of Mandamus, filed July 8, 2015.

a motion to quash Relator's subpoena for surveillance video of the shootout. (Pet. at 2). As a result, neither Relator nor members of the news media had any meaningful opportunity to oppose the gag order prior to its entry.

The only reference to Relator in the news coverage in the record is an online report by KCEN-TV, which describes Relator's efforts to subpoena surveillance footage in connection with this prosecution. App'x 3 at Ex. B. That story refers to Relator as "a man charged in the May 17th Twin Peaks shootings," and quotes Relator's counsel as saying that the police "have repeatedly given the public contradictory information about the events," and that Relator wanted the video footage "to show there was no probable cause to arrest" him and to loosen his bond conditions at a hearing on August 10, 2015. *Id.*

A. The record in this case is devoid of any specific findings to support a substantial likelihood—let alone a serious and imminent threat—of prejudice.

The trial court's conclusion that prejudice was reasonably likely to result from future news coverage was speculative, conclusory, and unsupported by any specific findings, and should be set aside. *Graves*, 217 S.W.3d at 752 (requiring "specific findings"); *Davenport*, 834 S.W.2d. at 10 (same).

The trial court did not identify a single news report that contained *any* "prejudicial, or inflammatory" coverage—let alone such coverage concerning Relator specifically. *Bell*, 938 S.W.2d at 46. Indeed, the gag order did not discuss

the concept of "prejudice," focusing instead on the *quantity* of coverage. *See* App'x 4 at 1–2. For example, the court commented on "extensive local and national media coverage," and expressed concern about the "volume of pre-trial publicity," the "willingness" of counsel to speak with the media, and the inability of a delay to "lessen the publicity generated by this case." *Id.* at 2. It offered only conclusory statements that "publicity will interfere with the defendant's right to a fair trial" and that the publicity posed a "specific threat to the judicial process." *Id.*

These findings are facially insufficient to support a gag order. The mere fact that news coverage about a particular event has been prevalent does not support a conclusion that such coverage is substantially likely to be prejudicial or poses an imminent threat to a defendant's rights. *See Calley*, 519 F.2d at 206. The proper inquiry is not whether counsel, the parties, or trial participants exhibit a "willingness to give interviews to the media," or whether the resulting news coverage has been "extensive," App'x 4 at 1, but whether the nature and content of the publicity is sufficiently threatening to the ability to seat an impartial jury. Nothing in the record suggests that news coverage of such an inflammatory nature has occurred or will occur in the absence of a gag order. And there is nothing to indicate that the effect of anticipated news coverage would be so irreparably

damaging that no alternative remedial measures could "blunt the impact of pretrial publicity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976).[8]

Moreover, the trial court failed to take into account that any prejudicial effect of media coverage diminishes with time. *See Skilling*, 561 U.S. at 383; *Benton*, 238 S.W.3d at 599 (finding "no substantial likelihood of material prejudice when such a substantial period of time elapses [six months] between the statements and the seating of a jury"). When the trial court entered the gag order, Relator had not yet been indicted, and any criminal trial—if one were to occur—was likely many months away. Indeed, Relator's examining trial is not scheduled to take place until next month. *See* App'x 2. Even if the trial court had jurisdiction to enter the gag order before indictment, which Relator contests, the order contains no findings based on any evidence that the impact of future news coverage is substantially likely to prejudice potential jurors *at the time of trial*, or that jurors would be unable to reach a verdict based solely on the evidence presented in court.

The gag order at issue here resembles those which were found lacking in *Graves* and *Benton*. In *Graves*, the trial court's order noted that pretrial publicity included "local and national newspaper coverage" and stated that "it is necessary

[8] The fact that Relator does not seek a gag order to prevent prejudicial statements from the prosecution or law enforcement—he is in fact challenging the gag order issued by the trial court—should itself counsel against any finding of prejudice. Under the federal constitution, the Sixth Amendment guarantees a fair trial to the individual defendant, and thus it is the defendant who is best positioned to advocate for his own rights. *See Ford*, 830 F.2d at 600.

to enter this Restrictive Order to protect and provide for a fair and impartial trial in this cause of action." *Graves*, 217 S.W.3d at 743. And, in *Benton*, the court determined that the case had "generated extensive media coverage and publicity," and the court previously "admonished trial counsel to try the case in court and not in the media." *Benton*, 238 S.W.3d at 590–91. The court also took note of the fact that the defendant and his counsel exhibited an "extraordinary willingness to grant interviews to the media," and that the parties had discussed the terms of plea-bargain negotiations in detail with the media. *Id.* at 591.

In both cases, these findings were insufficient. In *Graves*, this Court rejected the trial court's conclusory findings, pointed to a lack of evidentiary support for the determination that a gag order was necessary to protect a fair trial, and criticized the trial court for not "detailing the nature or extent of the pretrial publicity . . . or how the pretrial publicity . . . will impact the right to a fair and impartial jury." *Graves*, 217 S.W.3d at 752–73. Similarly, in *Benton*, the Court of Appeals identified only one finding that "potentially . . . may have caused or could cause prejudice"—the disclosure of details of the plea-bargain negotiations—and determined that it, alone, was insufficient. *Benton*, 238 S.W.3d at 597–98. The appellate court faulted the trial court for focusing on the "quantity" of coverage over its "content or even its effects," *id.* at 598, and found no issues with news coverage that contained "defense counsels' assertions of innocence

based on self-defense, reports of trial proceedings, and reasonable inferences from witness testimony," *id.* at 600. Both gag orders, accordingly, were set aside.[9]

The same result is required here. Under either the First Amendment or the Texas Constitution the unsupported findings of the trial court are patently insufficient to sustain the gag order, and it should be vacated.

B. The gag order is unconstitutionally overbroad and vague.

The gag order is overbroad, and therefore not narrowly tailored, for at least three reasons. ***First***, the order restricts innocuous speech that poses no risk of prejudice to the Relator. The gag order creates a sweeping "no comment" rule, ordering that "[a]ll attorneys, their staffs, and law enforcement officers involved in the case *shall not discuss this case* with the media." App'x 4 at 2 (emphasis added). The order similarly directs witnesses "not [to] discuss this case with the media." *Id.* These provisions make no exception for willing speakers to discuss factual matters already in the public domain or to correct misunderstandings, rumors or inaccuracies being disseminated about the case. The gag order does not

[9] The gag order in this case is similar to one upheld in *In re Houston Chronicle Publishing Co.*, 64 S.W.3d at 108. In that case, however, the Court of Appeals in Houston (14th District) did not discuss—or even identify—the legal standard it applied, and therefore the case lacks persuasive value. In any event, that case is distinguishable in at least two key respects. First, in *Houston Chronicle*, no individual subject to the gag order challenged its validity. Second, the defendant in that case, Andrea Yates, had already been indicted and the parties warned about prejudicial publicity before the court entered a gag order, after circulating a proposed order and seeking requests for modifications. *Id.* at 105. Here, the Relator had not yet been indicted when the order was entered, the trial court gave no notice that a gag order might be imposed, and neither Relator nor the media had an opportunity to challenge the gag order prior to its entry.

even permit Relator or his counsel to inform the media about logistical matters, such as the date, time and location of upcoming hearings. Because the gag order restricts speech that does not carry a sufficient risk of prejudice, the gag order is unconstitutional. *See Graves*, 217 S.W.3d at 748 (requiring the gag order to be "the least restrictive means to prevent" an imminent and irreparable harm); *Ford*, 830 F.2d at 599 (discussing "no comment" gag orders and stating that "such broadly based restrictions on speech in connection with litigation are seldom, if ever, justified," particularly in criminal cases).

Second, the gag order is overbroad because it extends to all law enforcement, witnesses, or counsel's staff without adequate justification. The trial court's conclusory findings about the necessity of gag order relate only to counsel. *See, e.g.*, App'x 4 at 1 ("*counsels'* willingness to give interviews . . . would only serve to increase the volume of pre-trial publicity") (emphasis added); *id.* at 2 ("if *counsel for the parties* continue to grant interviews to the media, the pre-trial publicity will interfere with the defendant's right[s]") (emphasis added); *id.* ("an order restricting extra-judicial commentary *by counsel for the parties* is necessary to preserve all venue options") (emphasis added). The trial court made no

findings, whatsoever, and offered no explanation for the restrictions it placed on statements by law enforcement, witnesses, or counsel's staff.[10]

Third, the gag order is overbroad because its duration is unlimited. Notwithstanding its purpose to preserve the ability to seat an impartial jury, App'x 4 at 2, the gag order is not addressed to that concern. The order's restrictions on speech will remain in place long after a jury is seated and long after the jury returns its verdict—assuming this matter ever reaches trial. For all of these reasons, the gag order is unconstitutionally overbroad and must be set aside.

The order also is unconstitutionally vague. The order does not make clear whether the speech restrictions apply to any discussion of the underlying incident generally, including the other pending criminal cases, or to Relator's civil lawsuit. And to the extent this Court determines that the order permits some nonprejudicial speech about the case or the underlying incident, it is unclear what speech is permissible. The gag order should be vacated on vagueness grounds as well.

C. The trial court improperly rejected alternatives to its expansive prior restraint on speech.

In rejecting remedial alternatives, the trial court improperly focused on the *volume* of publicity, asserting that less restrictive measures, such as delaying trial, "would not lessen the publicity generated by this case." App'x 4 at 2. Instead, the

[10] As explained above, *see supra* Part II.A, the trial court's findings related to counsel are insufficient to support a gag order.

trial court should have inquired whether remedial measures are incapable of curing any unfair *prejudice* from pretrial publicity. *See Benton*, 238 S.W.3d at 598.

Moreover, the trial court failed to explain why *voir dire* would be incapable of rooting out any incurable prejudice, as it has done in so many high-profile cases. Indeed, in "almost all cases," *voir dire* will provide adequate protection "against juror bias however induced." *Charlotte Observer*, 882 F.2d at 856. The trial court's discussion of alternatives is insufficient to sustain a gag order under the First Amendment or the Texas Constitution.[11] *See id.; Davenport*, 834 S.W.2d at 11 (requiring trial courts to explain "why such harm could not be sufficiently cured by remedial action").

Simply because a criminal case generates media coverage, even extensive media coverage, does not mean that every potential juror will have been exposed to it. Nor does it mean that every potential juror will have formed inalterable opinions as to the defendant's guilt or innocence and be incapable of making a decision based solely on the evidence presented at trial. Here, the record contains

[11] Prior restraints on speech, like sealed court documents and closed courtrooms, will almost always be effective at restricting the free flow of information about a trial. However, the district court must consider whether *alternatives* to these extraordinary measures are insufficient to preserve the defendant's rights, not whether drastic measures are effective. *See Graves*, 217 S.W.3d at 748 (requiring judicial action to be "the least restrictive means to prevent that harm"); *see also Davenport*, 834 S.W.2d at 11 ("'the argument of convenience can have no weight as against those safeguards of the constitution which were intended by our fathers for the preservation of the rights and liberties of the citizen.'")

no basis for concluding that *voir dire* or other corrective measures are incapable of protecting Relator's fair trial rights, and the gag order should be set aside.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully urge this Court to grant Relator's petition and issue a writ of mandamus directing the district court to vacate the gag order imposed in Relator's case.

Respectfully submitted,

/s/ Hannah Bloch-Wehba

Hannah Bloch-Wehba, Esq.
Counsel of Record
Katie Townsend, Esq.
Tom Isler, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

* Additional counsel for *amici* are listed below in Appendix B

Dated: July 24, 2015
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 9.4(i)(3)

This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(3) because this brief contains 6,299 words, excluding the parts of the brief exempted Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Hannah Bloch-Wehba
Hannah Bloch-Wehba
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Dated: July 24, 2015
Washington, D.C.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend and preserve 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, and it frequently files friend-of-the-court briefs in significant media law cases.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that

make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications and more than 100 digital services.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Gannett Co., Inc. is an international news and information company that publishes 93 daily newspapers in the United States, including The El Paso Times and USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of 9 million readers and the websites associated with the company's publications serve online content to 95 million unique visitors each month.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38

weekly newspapers, including the Houston Chronicle, San Francisco Chronicle and Albany (N.Y.) Times Union; nearly 300 magazines around the world, including Good Housekeeping, Cosmopolitan and O, The Oprah Magazine; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Columbia, Missouri.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year,

the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The **National Press Photographers Association** ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic, Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington state.

APPENDIX B

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Judy Alexander
Chief Legal Counsel
The Center for Investigative Reporting
2302 Bobcat Trail
Soquel, CA 95073

Rachel Matteo-Boehm
Bryan Cave LLP
560 Mission Street, Suite 2500
San Francisco, CA 94105
Counsel for Courthouse News Service

Lance Lovell
Managing Attorney, Disputes
Cox Media Group, Inc.
6205 Peachtree Dunwoody Road
Atlanta, GA 30328

Lynn Oberlander
General Counsel, Media Operations
First Look Media, Inc.
162 Fifth Avenue
8th Floor
New York, New York 10010
(347) 453-8111

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703) 854-6951

Jonathan Donnellan
Kristina Findikyan
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Tonda F. Rush
CNLC, LLC
200 Little Falls Street, Suite 405
Falls Church, VA 22046
(703) 237-9801 (p) (703) 237-9808 (fax)
tonda@nna.org
Counsel to National Newspaper Association

Charles D. Tobin
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006
Counsel for The National Press Club

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Counsel for National Press Photographers Association

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for the Newspaper Association of America

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

CERTIFICATE OF SERVICE

I, Hannah Bloch-Wehba, certify that, on this 24th day of July, 2015, I caused copies of the foregoing Brief of Amici Curiae to be served electronically, via eFile Texas, on:

F. Clinton Broden
Broden, Mickelsen, Helms & Snipes, LLP
2600 State Street
Dallas, Texas 75204
Counsel for Relator Matthew Alan Clendennen

Honorable Matt Johnson
54th District Court
501 Washington Ave., Suite 305
Waco, Texas 76701
Respondent

-and-

Abel Reyna
McLennan County District Attorney
219 N. 6th Street
Waco, Texas 76701
Counsel for The State of Texas, Real Party in Interest

/s/ Hannah Bloch-Wehba
Hannah Bloch-Wehba
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS