CASE NO. 09-012-AP

IN THE TRIBAL COURT OF APPEALS FOR THE LITTLE RIVER BAND OF OTTAWA INDIANS

NANCY KELSEY and JOLENE OSSIGINAC,
Petitioners,

v.

HON. MELISSA POPE, IN HER OFFICIAL CAPACITY
AS VISITING JUDGE OF THE TRIBAL COURT FOR THE
LITTLE RIVER BAND OF OTTAWA INDIANS,
Respondent,

JAY SAM, JANINE SAM, SANDRA MEZESKE, et al.,
Real Parties in Interest.

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE FIRST AMENDMENT PROJECT

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On April 27, 2009, The Reporters Committee for Freedom of the Press ("the Reporters Committee") requested leave of Court to file a brief *amicus curiae* in support of petitioners Nancy Kelsey and Jolene Ossiginac. *Amici* now provisionally file this brief pending the Court's decision on leave to file.

INTEREST OF THE AMICI

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 litigation in state and federal courts since 1970.

The First Amendment Project is a nonprofit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The interests of *amici*, and the reporters they serve across the country, are implicated by the trial court's application of a gag order against a working journalist. The central issue before the Court at this time is whether the trial court violated the defendants' right to free expression – a right guaranteed by the Little River Band of Ottawa Indians (LRBOI) Tribal Constitution, the U.S. Constitution, and the Indian Civil Rights Act (ICRA) – when it imposed a prior restraint prohibiting them from speaking or writing about other parties to the case.

SUMMARY OF THE ARGUMENT

On August 5, 2008, the trial court issued a temporary restraining order prohibiting Nancy Kelsey and the other defendants from making or publishing any "statements regarding the legitimacy of the tribal membership of the Plaintiffs, their families and their ancestors." (TRO at

2.) The trial court replaced this order on February 19, 2009 with a preliminary injunction which ordered that the parties "shall not discuss any parties' enrollment in the Little River Band of Ottawa Indians with respect to enrollment fraud, meaning questioning whether any of the parties are properly enrolled; status as a descendant; or blood quantum." (Prelim. Inj. at 2.) It did so without making findings of fact, identifying the reason for the gag order, or considering alternatives to the prior restraint. As if to remove any doubt that its injunction was intended to suppress Ms. Kelsey's news reporting, the court added that "this Preliminary Injunction applies to Defendant Kelsey as a journalist."[1] (*Id.*) *Amici* urge this Court to vacate the trial court's preliminary injunction, because this type of prior restraint against a working journalist is prohibited by the Little River Band of Ottawa Indians (LRBOI) Tribal Constitution, the U.S. Constitution, and the Indian Civil Rights Act (ICRA).[2]

"An order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint." *Evans v. Evans*, 162 Cal. App. 4th 1157, 1167 (2008) (*citing, inter alia, Metropolitan Opera Ass'n v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172, 177 (2nd Cir. 2001)). The public's ability to monitor government is at the heart of an open and enlightened society. For this reason, courts for

[1] Plaintiffs argue that, because defense counsel asked the court to clarify whether its injunction reached Ms. Kelsey's reporting, she cannot challenge the injunction as a prior restraint on the press. (*See* Pls' Brief on the Merits at 15-17.) But the prior restraint issued in this case would be unconstitutional whether or not Ms. Kelsey were a journalist, *see* infra, Section III, and she should not be penalized for asking the court to clarify whether her reporting is covered by the prior restraint. If plaintiffs are willing to exclude Ms. Kelsey's reporting from the prior restraint, they should say so.

[2] Though *amici* are directly concerned with a prior restraint against Nancy Kelsey as a member of the news media, the cases cited in this brief and in Defendants' Memorandum of Law make clear that the First Amendment prohibits the imposition of prior restraint against *any* of the defendants in this case. *See, e.g.*, *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) ("[t]he usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages") (internal citation omitted).

centuries have made clear that imposing a prior restraint on a member of the news media violates the First Amendment in virtually all circumstances. Indeed, the U.S. Supreme Court has *never* upheld a prior restraint against the news media, and has stated that a prior restraint could be justified, if ever, only in truly extreme circumstances, such as to protect troop movements in wartime or prevent nuclear war. This case is not even remotely comparable. It does not involve war or national security, but a civil dispute over the qualifications of tribal leaders and members. Even if the plaintiffs' defamation claims have merit – *amici* take no position on that issue – such a claim alone is never sufficient to justify a prior restraint.

The trial court's action departs from the essential requirements of the U.S. Constitution, the LRBOI Constitution, the ICRA, and hundreds of years of common law. Were the trial court's prior restraint to be upheld by this Court, the impact on LRBOI and other Native American journalists would be devastating. This Court's action would provide tribal officials and other critics of news coverage with a powerful tool to silence reporters simply by suing for defamation and – before any adjudication of the underlying case – obtaining a broad and open-ended prior restraint.

The plaintiffs in this case have done just that, silencing Ms. Kelsey for nearly *a year* without showing that a single word she uttered was defamatory. It is imperative that this Court act promptly to lift the unlawful prior restraint imposed by the trial court's Order. With each passing day that the prior restraint remains in effect, Ms. Kelsey suffers a distinct violation of her First Amendment rights. Where "a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers).

This court apparently is the first tribunal to decide whether prior restraints are prohibited under the ICRA and the LRBOI Constitution, which have language identical to the First Amendment to the U.S. Constitution. A decision to muzzle Ms. Kelsey would therefore have effects far beyond this case, posing a grave risk to all journalists covering tribal governments. Accordingly, this Court should act promptly to vacate the trial court's order.[3]

ARGUMENT

I. The "chief purpose" of the First Amendment is to prevent prior restraints against reporters like Ms. Kelsey.

First Amendment jurisprudence has long recognized that prior restraints are incompatible with the notion of a free press. That hostility toward gag orders on the press stems from the news media's critical role in ensuring that the public has sufficient information to monitor its government, as well as the centuries-old commitment to "uninhibited, robust and wide-open" debate. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Indeed, the Supreme Court declared that the "chief purpose" of the First Amendment was "to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Other courts agree, noting that the First Amendment's free press clause "was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon

[3] As argued in the Defendants' Memorandum of Law, review of the preliminary injunction prior to trial is appropriate because a preliminary injunction is a final order. (*See* Defs' Mem. 1-2); *see generally AFSCME v. City of Detroit*, 468 Mich. 388, 622 N.W. 2d 695 (2003) (finding that a preliminary injunction was a final order, creating an appeal as a matter of right where injunctive relief was obtained); *Olivares v. Performance Contracting Group*, 2005 WL 3479817 (Mich. Ct. App. 2005). Even if the court does not agree that the preliminary injunction is a final order, a writ of mandamus is appropriate. A writ of mandamus is available where the party seeking the writ has shown there are no other adequate means to secure the desired relief. *Kerr v. U.S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976). A reporter who is the subject of a judicially ordered prior restraint – a mechanism that has never been upheld by the U.S. Supreme Court against the news media – is left with no other remedy.

their rights and the duties of rulers." *Commonwealth v. Blanding*, 3 Pick. 304, 313-14 (Mass. 1825) (emphasis in original).

The rationale for the hostility to prior restraints is clear – restraining the press in advance is the most dangerous form of government censorship. A "free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

If judges could freely issue prior restraint orders whenever they believed information should not be reported, the benefits of a free press would be decimated. The media's utility as an independent watchdog depends on the fact that it does not answer to judges, prosecutors, and other participants in the judicial process. Largely for these reasons, federal and state courts alike have repeatedly held that *any* intrusion by the government into the process of gathering and reporting the news should be viewed skeptically. "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). Thus, when a judge takes the drastic step of ordering the news media not to publish particular information, it is viewed with extreme disfavor and is nearly always struck down. Indeed, the Supreme Court repeatedly has held that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)

(quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

In this case, neither the plaintiffs nor the trial court disputes that Ms. Kelsey is a working journalist. (*See* Order Granting Preliminary Injunction at 2.) Nor could they, as Ms. Kelsey currently reports for *Reznet* and has worked at the Sioux Falls *Argus Leader*, *The Associated Press* and *The Seattle Times*. *See, e.g.*, http://www.reznetnews.org/article/facebook-not-friendly-natives-29240. Ms. Kelsey must be allowed to do her job free of governmental censorship.

II. The ICRA and LRBOI Constitution – which contain language identical to the First Amendment – should be construed as equally hostile to prior restraints.

Amici recognize that, as separate sovereigns, tribal governments have historically been unconstrained by the Bill of Rights to the U.S. Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). Indeed, it is precisely "[b]ecause the Bill of Rights protections were not available to protect persons falling under the jurisdiction of the tribes from tribal government actions," that Congress enacted the ICRA with language that "substantially tracks the precise language of the Bill of Rights portion of the Constitution, thereby acting as a conduit to transmit federal constitutional protections to those individuals subject to tribal jurisdiction." *Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1997).

Indeed, the LRBOI Constitution and ICRA contain language functionally *identical* to the First Amendment. In the absence of a decision interpreting the permissibility of prior restraints under the LRBOI Constitution and ICRA, *amici* respectfully suggest that the Court should do what other tribal courts have done – look to the centuries of experience that federal and state courts have had interpreting the identical text of the First Amendment.[4]

[4] The ordinances governing this Court likewise suggest benefiting from the experience of other jurisdictions, providing that the Court "shall apply the laws, regulations, or policies of the Little

The LRBOI Constitution protects freedom of the press and freedom of speech, providing that "The Little River Band in exercising the powers of self-government shall not . . . [m]ake or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." LRBOI Const., Art. III, Sec. 1(a). The ICRA does the same, providing that "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances." 25 U.S.C. § 1302. Both of these documents mirror the protections set out in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Thus, even if the First Amendment is not directly applicable, it is analogous to the free speech and free press clauses contained in both the LRBOI Constitution and the ICRA. Several tribal courts have found the U.S. Supreme Court's First Amendment jurisprudence instructive for that reason. "While the First Amendment is inapplicable in tribal courts, cases arising thereunder are applicable to the free speech and free press clauses of the Mohegan Constitution and ICRA." *Bauer v. Mohegan Council of Elders*, 1 M.T.C.R. 89 (Mohegan Tribal Ct. App. 2009). When confronted with a similar issue, the Navajo Supreme Court used First Amendment cases of the U.S. Supreme Court to analyze the meaning of the free press in a tribal context, concluding that

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River Band of Ottawa, or any applicable laws or regulations of the United States," and that "[a]ny matters not covered by the laws or regulations of the Little River Band of Ottawa, or by applicable federal laws or regulations, may be decided by the Courts according to the laws of the State of Michigan." LRBOI Ord. # 97-300-01, Sec. 8.

"the Navajo Bill of Rights, and the Indian Civil Rights Act [guarantee] the right of the press to be free of governmental intervention." *Chavez v. Tome*, 14 Indian L. Rep. 6029 (Nav. Sup. Ct. 1987) (citations omitted).[5]

While few tribal courts have faced the same kinds of press freedom issues now before the Little River Band of Ottawa Indians Court of Appeals, other tribal courts have turned to federal case law when looking for guidance on cases that implicate rights under tribal constitutions and the ICRA similar to those granted U.S. citizens under the federal constitution.

In examining a due process claim, for example, the Crow Court of Appeals began its inquiry with decisions of the U.S. Supreme Court. "Although this court is not required to apply the ICRA in precisely the same manner as the corresponding provisions of the U.S. Constitution, we have nevertheless looked at the decisions of the U.S. Supreme Court on federal constitutional rights as the starting point for interpreting specific provisions of the ICRA." *One Hundred Eight Employees v. Crow Tribe of Indians*, 2001 Crow 10, 14 (Crow Ct. App. 2001) (citations omitted). Several courts, without announcing the principle, have simply started their inquiry with federal case law and then applied the rules drawn out of those cases through the ICRA. For example, in a pair of cases involving the right to a speedy trial under the ICRA, the Fort Peck Court of Appeals used federal case law to guide its decisions. *See Fort Peck Tribes v. Hawk*, 2001 ML 4756 (2001); *Hunkapiller v. Fort Peck Tribes*, 1993 Mont. Fort Peck Tribe LEXIS 12 (Fort Peck Ct. App. 1993). Similarly, the Eastern Band of Cherokee Supreme Court used U.S. Supreme Court cases interpreting the equal protection clause of the U.S. Constitution as the

[5] Both the Mohegan Constitution and Navajo Nation Bill of Rights contain clauses that protect free speech and free press rights in a manner similar to the ICRA and the LRBOI Constitution. *See* Mohegan Const. Art. XI, Sec. 1(a); Navajo Nation Bill of Rights § 4.

starting point to understand how equal protection applies in a tribal case under the ICRA. *Jacobsen v. E. Band of Cherokee Indians*, 2006 N.C. Cherokee Sup. Ct. LEXIS 13 (2006).

The First Amendment cases of the state and federal courts should serve as a guide for this Court in protecting a free press, unfettered by governmental intrusion. Just as other tribal courts have turned to federal case law when examining issues of first impression for the tribal court, the Court can and should rely upon the well-developed free press and free speech jurisprudence of the federal and state courts. And as these decisions make clear, courts simply may not restrain members of the news media in order to prevent alleged defamation.

III. This case does not present the "extraordinary" circumstances necessary to justify "the most serious and the least tolerable infringement on First Amendment rights."

Despite countless cases emphasizing that prior restraints should be an absolute last resort, imposed only on the basis of specific findings that no other alternative exists to prevent a great harm, the trial court here did not even attempt to identify any governmental interest that allegedly justifies the prior restraint in this case. And the only conceivable interest at stake here – suppressing allegedly defamatory statements about the plaintiffs' qualifications for tribal membership – falls well short of the required "state interest of the highest order" in this case.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). The Supreme Court thus made clear that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419. A court-ordered prior restraint therefore must undergo "the most exacting scrutiny." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979); *see also Near*, 283 U.S. at 716. A gag order is a "most extraordinary remedy" that may be used only in "exceptional cases" where "the evil that would result from the reportage is both great and certain and cannot be mitigated by less

intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted).

Because prior restraints are presumptively unconstitutional, "a proponent has a heavy burden." *Evans*, 162 Cal. App. 4th at 1167. He or she must show: (1) that "the countervailing interest is compelling"; (2) that "the prior restraint is necessary and would be effective in promoting this interest"; (3) that "less extreme measures are unavailable"; and (4) that the order is "couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order." *Id*. (*citing, inter alia, Nebraska Press*, 427 U.S. at 561-568; *Carroll*, 393 U.S. at 183-184).

Most important, the proponent of a prior restraint on news publication must demonstrate that suppressing the speech is strictly necessary to further "a state interest of the highest order." *Smith*, 443 U.S. at 102. History teaches that this standard is almost impossible to satisfy. The U.S. Supreme Court has *never* approved a prior restraint against the news media. It has suggested that it would consider doing so only in circumstances akin to those when the nation "is at war," *Schenck v. United States*, 249 U.S. 47, 52 (1919), such as if the government sought to prevent "publication of the sailing dates of transports or the number and location of troops." *Near*, 283 U.S. at 716.

a. Prior restraints – which are unconstitutional in all but the most extraordinary circumstances such as preventing "a nuclear holocaust" – may not be imposed simply to prevent allegedly defamatory statements.

In a statement that dramatizes how rarely prior restraints could ever be justified, Justice Brennan suggested in the Pentagon Papers case that a prior restraint could be justified to suppress "information that would set in motion a nuclear holocaust." *New York Times Co. v. U.S.*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

More recently, the U.S. Court of Appeals for the Sixth Circuit added that publication "must threaten an interest more fundamental than the First Amendment itself" before a prior restraint can be imposed. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Thus, for example, a properly crafted gag order on a party may be issued in response to a "clear and present danger" of prejudicing a criminal defendant's fair trial rights or otherwise tainting a jury. *U.S. v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987); see also *Nebraska Press*, 427 U.S. at 561; *Davis v. East Baton Rouge Parish School Bd*., 78 F.3d 920, 929 (5th Cir. 1996) (denying gag order in civil case in part because "[t]here is no possibility that publicity will prejudice potential jurors").

By contrast, an accusation of defamation is nowhere near sufficient to justify a prior restraint and "courts have long held that equity will not enjoin a libel." *Metropolitan Opera Ass'n v. Local 100*, 239 F.3d at 177 (discussing many cases); *c.f. Keefe*, 402 U.S. at 419 ("[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court").

The Supreme Court explained why prior restraints are so disfavored, noting that while "[a] criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted," a prior restraint on speech, "by contrast and by definition, has an immediate and irreversible sanction." *Nebraska Press*, 427 U.S. at 559. The Second Circuit added that libel injunctions also are forbidden because they are unnecessary, holding that "injunctions are limited to rights that are without an adequate remedy at law, and … ordinarily libels may be remedied by damages." *Metropolitan Opera Ass'n*, 239 F.3d at 177.

Indeed, "the universal rule in the United States" is that "[e]quity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be." *American Malting Co. v. Keitel*, 209 F. 351, 354 (2nd Cir. 1913); *see also Metropolitan Opera Ass'n v.*, 239 F.3d at 177 ("for almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases"); *Pierce*, 814 F.2d at 672 ("[t]he usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages") (internal citation omitted).

Michigan state courts agree, finding that "equity will not enjoin libel and slander, rather, the sole remedy for defamation is an action for damages, and there is a heavy presumption that prior restraints on expression are unconstitutional under the First Amendment's guarantee of free speech." *Dupuis v. Kemp*, 2006 WL 401125 at *2 (Mich. App. Feb. 21, 2006) (unpublished).[6] This is because of "an abhorrence of previous restraints on freedom of speech" and the fact "that there is an adequate remedy at law, i.e., an action for damages, and that the defendant in a

[6] The *Dupuis* court distinguished a prior restraint of the type issued here from a permanent injunction against statements proven at trial to be libelous. *See id.* ("[o]nce speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper") (quotation omitted); *see also Balboa Island v. Lemen*, 40 Cal. 4th 1141, 1149, 1162 (2007) (First Amendment bars prior restraints against alleged defamation, but "a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant's right to free speech"). This idea seems to underlie plaintiffs' claim that the preliminary injunction is permissible because it bans allegedly defamatory speech. (*See* Pls' Brief on the Merits at 15.) But the speech in this case has not been *proven* defamatory, it has simply been *alleged* to be defamatory. While *amici* would argue that even injunctions against speech proven to be defamatory are problematic, it is clear that this pre-trial prior restraint against speech not proven defamatory is flatly prohibited by the First Amendment. *See, e.g.*, *Dupuis*, 2006 WL 401125 at *2 (no prior restraints on alleged libel because "there is a heavy presumption that prior restraints on expression are unconstitutional under the First Amendment's guarantee of free speech").

defamation action has the right to a jury trial which would be precluded by granting of an injunction." *McFadden v. Detroit Bar Ass'n*, 4 Mich. App. 554, 558 (1966).

In this case, there is no claim that a gag order is necessary to preserve the right to an impartial jury or prevent harm on the order of a nuclear holocaust. Rather, the only conceivable interest to be served by the prior restraint is protecting the plaintiffs' reputation. This plainly is insufficient to support a prior restraint against *any party* without violating the First Amendment – and, by analogy, the identical language in the ICRA and the LRBOI Constitution. Issuing this injunction against a member of the news media simply piles error on top of error.[7]

b. To the extent that it prohibits truthful coverage of tribal court proceedings, the court's order is impermissible under *any* circumstances.

Plaintiffs have accused Ms. Kelsey of making false statements regarding their qualifications for tribal membership. (Complaint, ¶ 13.) But the court's prior restraint sweeps far more broadly. By broadly prohibiting Ms. Kelsey "as a journalist" from discussing "any parties' enrollment," the order appears to enjoin her even from accurately reporting on the substance of the trial itself. This is prohibited by the First Amendment under *any* circumstances.

The Supreme Court repeatedly has made clear that "[a] trial is a public event" and "[t]hose who see and hear what transpired can report it *with impunity*." *Craig v. Harney*, 331 U.S. 367, 374 (1947) (emphasis added). In 1975 it added that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for

[7] Plaintiffs apparently have attempted, after the issuance of the prior restraint, to add causes of action for invasion of privacy and intentional infliction of emotional distress. (*See* Brief of Petitioner-Appellant at 17 n.2.) But these grounds likewise are insufficient to justify a prior restraint. *See, e.g., Keefe*, 402 U.S. at 419 (vacating prior restraint against picketers because party claiming invasion of privacy failed to meet his "heavy burden of showing justification for the imposition of such a restraint"); *Alvarado v. KOB-TV*, 493 F.3d 1210, 1214 (10th Cir. 2007) (dismissing invasion of privacy and intentional infliction of emotional distress claims against television station and noting that an order prohibiting the station from broadcasting the plaintiffs' names "would have been an unconstitutional prior restraint").

publishing it." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975). Likewise, in *Nebraska Press*, 427 U.S. at 568, the Supreme Court struck down an order prohibiting the news media from reporting on a confession, finding that "[t]o the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles." *Id.* And in *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308, 311 (1977) (*per curiam*), it reversed an injunction against reporting the name of a juvenile obtained in open court, reiterating that once "a public hearing had been held, what transpired there could not be subject to prior restraint." *Id.* (quotation omitted).

Courts likewise have refused to gag even reporters who, like Ms. Kelsey, are parties to the underlying case. Thus, Justice Blackman stayed a lower court order gagging a media defendant, finding that "if CBS has breached its state-law obligations, the First Amendment requires that [the plaintiff] remedy its harms through a damages proceeding rather than through suppression of protected speech." *Davis*, 510 U.S. at 1317. Lower courts have followed suit. In *Freedom Communications v. Superior Court*, 167 Cal. App. 4th 150, 152 (2008), the California Court of Appeal overturned "an order enjoining [a media company] from reporting on trial testimony in a case in which it is the defendant." The Iowa Supreme Court likewise overturned an injunction that prohibited a newspaper which had been sued for libel "from making public any information concerning the filing of this petition" or the subsequent proceedings. *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 92 (Iowa 1985). Another court reversed as an impermissible prior restraint an order that prohibited a defendant newspaper from "writing editorials or editorializing" about a libel suit against the paper. *Cooper v. Rockford Newspapers, Inc.*, 339 N.E.2d 477, 482 (Ill. App. Ct. 1975). And an Alabama federal court likewise refused to

issue a prior restraint against a party's website. *U.S. v. Carmichael*, 326 F. Supp. 2d 1267, 1301 (M.D. Ala. 2004).

The reasoning behind these decision is simple – if parties could obtain prior restraints against reporters simply by suing them, the centuries-old rule prohibiting prior restraints on the media would be meaningless. Still, in this case the trial court prohibited the parties from making any statements – even truthful statements – about qualifications for membership. This is both illogical and flatly prohibited by the First Amendment.

c. Even if it were otherwise permissible, the order must be reversed because the trial court made no findings and failed to consider less restrictive alternatives.

The trial court also failed to make *any findings at all* in support of its order. The prior restraint must be immediately quashed for that reason alone.

The First Amendment requires a "state interest of the highest order" to justify suppression in advance of a publication. *Smith*, 443 U.S. at 102. Even court orders that might otherwise be valid have been rejected when the court fails to articulate the compelling interest in closure. For this reason, a federal court in Indiana issued an injunction prohibiting a state court from enforcing a protective order. *Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 385 (N.D. Ind. 1992). "Pivotal" to its decision was the fact that the order "cited absolutely no justification for the imposition of the order, contrary to *Nebraska Press Ass'n*, 427 U.S. at 559." *Id.* The federal court thus concluded that the state court "erred when it failed to articulate facts which would warrant the presumptively unconstitutional prior restraint which it imposed." *Id.* A Florida court similarly quashed a prior restraint in part because "the judge's written order made no findings as to the need for the restraint of the press." *Florida Pub. Co. v. Brooke*, 576 So.2d 842, 846 (Fla.App. 1 Dist. 1991).

The trial court in this case also apparently failed to consider any alternatives to issuing a prior restraint. That omission, too, violated law established in *Nebraska Press*, 427 U.S. at 565. In that case, the Supreme Court struck down a prior restraint where there was "no finding that alternative measures would not have protected [a defendant's] rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate." *See also Times Publishing Co. v. State*, 632 So. 2d 1072, 1076 (Fla. 4th DCA 1994) ("[r]ather than exploring alternatives, the trial court simply used the draconian measure of prior restraint as a first resort instead of an absolute last resort").

Ultimately, there is no justification whatsoever for the trial court's prior restraint order. Prior restraints are options of the last resort, to be issued (if ever) only when absolutely required by state interests of the highest order. *See Smith*, 443 U.S. at 102. Without considering alternatives or making findings, the trial court issued an order that restrained the publication of information by a reporter. That action should not be allowed to stand.

CONCLUSION

Amici take no position on the defamation claim underlying this case. There is no need to do so, because even a well-founded defamation claim is insufficient to justify a prior restraint on anyone, let alone a member of the press like Ms. Kelsey. Prior restraints on the news media are permissible, if ever, only in "exceptional cases" where "the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *Davis*, 510 U.S. at 1317 (citations omitted). The plaintiffs did not – because they cannot – show a "great and certain" harm in the defendants' statements that that "cannot be mitigated by less intrusive measures."

The Court should strike down the injunction against Ms. Kelsey and the other defendants. Plaintiffs would remain free to pursue their defamation claim and to collect damages if they are successful. This has been the rule for centuries under the First Amendment, and *amici* ask the Court to make clear that it remains the rule under the identical language of the ICRA and LRBOI Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been mailed first class, U.S. Mail, postage prepaid, to the following individuals on this the 15th day of July, 2009:

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