IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10 CV 904

POM WONDERFUL, LLC,

PLAINTIFF-APPELLEE

v.

ALM MEDIA PROPERTIES, LLC
D/B/A THE NATIONAL LAW JOURNAL/LEGAL TIMES,

DEFENDANT-APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION, NO. 2010 C.A. 005533 (THE HON. JUDITH BARTNOFF)

BRIEF OF *AMICI CURIAE* THE WASHINGTON POST, THE AMERICAN SOCIETY OF NEWS EDITORS, THE ASSOCIATED PRESS, DOW JONES & COMPANY, INC., GANNETT COMPANY, INC., NPR, INC., THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS AND THE NEW YORK TIMES

SUPPORTING APPELLANT AND SUPPORTING REVERSAL

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RULE 28(A)(2) STATEMENT

The above-listed *amici curiae* and their counsel, identification of whom is incorporated herein by reference, disclose the following:

(1) The American Society of News Editors has no parent corporation and does not issue any stock.

(2) The Associated Press has no parents, subsidiaries, or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock, and no publicly held company owns 10% or more of its stock.

(3) News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones, and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more Dow Jones stock.

(4) Gannet Company, Inc. has no parent corporation. J.P Morgan Chase & Co. owns more than 10% of Gannet Co., Inc. stock.

(5) The New York Times Company has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

(6) NPR has no parent company and does not issue stock.

(7) The Reporters Committee for Freedom of the Press is an unincorporated association that has no parent and issues no stock.

(8) The Society of Professional Journalists has no parent corporation and does not issue any stock.

(9) WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

In addition, the following parties appeared in the Superior Court and have either appeared or are expected to appear in this Court:

Defendant-Appellant:	ALM MEDIA PROPERTIES, LLC Bruce D. Brown Laurie A. Babinski BAKER & HOSTETLER LLP
Plaintiff-Appellee:	Pom Wonderful, LLC Barry Coburn COBURN & COFFMAN PLLC

INTERESTS OF THE AMICI

Amici curiae The Washington Post, The American Society of News Editors, The Associated Press, Dow Jones & Company, Inc., Gannett Company, Inc., The New York Times, NPR, Inc., The Reporters Committee for Freedom of the Press, and The Society of Professional Journalists (collectively, "*Amici*"), respectfully submit this memorandum of law in support of Defendant-Appellant ALM Media Properties, L.L.C., d/b/a The National Law Journal/Legal Times, and in support of reversal of the July 23, 2010 order issued by the Superior Court of the District of Columbia (Bartnoff, J.).

As stated more fully in the accompanying Motion for Leave to File, *Amici* are members of, and advocates for, the press. They include amongst their ranks some of the largest national and international media outlets who report regularly on proceedings in the nation's courts. They submit this brief in furtherance of their interest in ensuring that journalists maintain the freedom to publish information obtained from public court files without prior restraint.

ARGUMENT[1]

The Superior Court has entered an extraordinary order enjoining a national publication from publishing truthful information lawfully obtained from a public court file—specifically, information regarding the substance of a regulatory proceeding against a corporation and identifying the government agency conducting the proceeding. This prior restraint upon publication is without precedent and without any conceivable justification. It should be reversed immediately.

The prior restraint in this case is particularly suspect because it seeks to enjoin publication of information obtained from one of the most common sources of news—a public court file. Court files are presumptively open to begin with, and reporters look to court records to provide relevant and accurate information about the controversies that citizens bring to the court for resolution. It is an extraordinary thing for a court to prohibit publication of information obtained from its files, and it is no excuse that the information should have been sealed in the first place. Courts, like other agencies of government, can take steps to prevent sensitive information from becoming public (though courts are subject to presumptions of openness to which other agencies are not). But once information is placed on the public record and obtained by a member of the public, the rules change—for good reason. There is nothing more foreign to a system of free expression than an order prohibiting a citizen from saying what he

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[1] Amici incorporate by reference the Statement of Facts contained in Appellant ALM Media Properties, LLC's Motion for Emergency Appeal (hereafter "Mot.") at 2-6.

knows or from publishing what he learns. That, as we explain below, is fundamentally different from withholding the information in the first place.

I. THE FIRST AMENDMENT WAS ADOPTED TO PROHIBIT PRIOR RESTRAINTS UPON PUBLICATION.

Government censorship of the press in the form of a prior restraint on publication constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Indeed, "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283, U.S. 697, 713 (1931) (emphasis added). The purpose was "to prevent all such previous restraints upon publications as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (*quoting Commonwealth v. Blanding*, 20 Mass. 304, 313 (1825)) (emphasis added).

Those restraints had indeed been extensive:

> In the American colonies, the concept of freedom of the press began slowly, but eventually evolved into a treasured ideal worth fighting for. The colonial experience taught that assaults on liberty of the press could come from any of the three branches of government: the legislative, executive, or judicial.
>
> During the Seventeenth Century, colonial governments followed the English example and used licensing laws to restrict printed material. In 1668, a pamphlet written by Thomas à Kempis was approved by the official censor but then banned by the Massachusetts Bay Colony Governor because Kempis was a "popish minister." In Virginia, John Bucknew was imprisoned for printing without authority in 1682.

> The first newspaper in the colonies was published in Boston on September 25, 1690 and was entitled Publick Occurrences Both Forreign and Domestick. Although the publisher, Benjamin Harris, had stated that the paper was to be "furnished once a month (or if any Glut of Occurrences happen, oftener)," the paper lasted only one issue. Harris had criticized the Maqua tribe, allies of the English in the French and Indian Wars, because they "brought home several Prisoners, whom they used in a manner too barbarous for any English to approve." The Massachusetts Governor and legislature were angered both by the hint of journalistic disapproval and by the fact that the publication was issued without license. Four days later, noting that the paper contained "reflections of a very high nature," the Legislature voted to forbid, "any thing in print, without license first obtained from those appointed by the government to grant the same." Harris published no further . . .

Michael I. Meyerson, *The Neglected History of Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 314-15 (2001); *see also id.* at 298-313 (documenting restraints in English common law system); *id.* at 313-20 (same in the American colonies).

It was to reject such practices—indeed, to drive them to extinction—that the First Amendment was adopted.[2] This "distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." *Southeastern Promotions, LTD. v. Conrad*, 420 U.S. 546, 553 (1975). Even in those cases where the First Amendment does not mandate that the Government release information to the press, it holds inviolate the

[2] The English system of licensing and censorship also ended in the late 1600s, and freedom from prior restraint became recognized as a common law right. T. Emerson, *The System of Freedom of Expression* 504 (1970). Blackstone defined the "liberty of the press" as one which "consists in laying no previous restraints upon publication." 4 Blackstone, Commentaries 151-52.

press's independent efforts to obtain that information for themselves, and their right to publish the information once they have it. As Justice Stewart has explained:

> So far as the Constitution goes, the autonomous press may publish what it knows, and it may seek to learn what it can.

Potter Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 636 (1975).

II. THERE IS NO JUSTIFICATION FOR A PRIOR RESTRAINT IN THIS CASE.

There is a "heavy presumption against [the] constitutional validity" of a proir restraint, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), and that presumption can be overcome "only in 'exceptional cases,'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers (quoting *Near*, 283 U.S. at 716)). So powerful is the presumption that the Supreme Court has never affirmed the imposition of an order enjoining the press from publication of information—not even in cases where the countervailing interests included the protection of military secrets,[3] the Sixth Amendment rights of criminal Defendants,[4] or confidential and proprietary business information.[5] Indeed, three Justices have expressed the view that only military imperative in a time of war could ever justify such a restraint. *See Nebraska Press Ass'n*, 427 U.S. at 591 (Brennan, J., with whom Stewart and Marshall, J.J., joined, concurring in the judgment).

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[3] *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the "Pentagon Papers").

[4] *Nebraska Press Ass'n*, 427 U.S. at 570.

[5] *CBS, Inc. v. Davis*, 510 U.S. at 1318. (Blackmun, J., in chambers); *see also Coulter v. Gerald Family Care*, 964 A.2d 170, 186 (D.C. 2009) ("[A] prior restraint on speech that is premised merely on protecting business interests fails first amendment scrutiny.").

The Court in this case evidently issued the prior restraint to correct a mistake. The Court had ordered certain documents sealed, but the Clerk's office placed them in a public file, where they were reviewed and copied by a reporter. Presumably to accomplish the objective of the initial sealing order, the Court ordered that the information not be published. As explained below, however, a prior restraint is not a mere extension of a sealing order, and the desire to correct a mistake is not a justification for a prior restraint.

Courts, like other agencies of government, can take steps to prevent sensitive information from becoming public. Courts, of course, are subject to constitutional and common law presumptions of openness. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (recognizing First Amendment right of the public to attend criminal trials); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606-07 (1982) (same). Court records themselves are presumptively open to the public, protected by common law and First Amendment rights of access. *See, e.g., Nixon v. Warner Commc'ns,* 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Mokhiber v. Davis,* 537 A.2d 1100, 1115 (D.C. 1988) ("The circuit courts of appeal that have ruled on the issue have affirmed a presumptive right of access to a broad range of court records in civil cases."). Upon a showing of "good cause" to prevent "specific harms," however, court records in civil cases may be sealed. *Mokhiber,* 537 A.2d at 1115.

Sealing orders, while requiring justification, are not particularly uncommon. Prior restraints, on the other hand, are exceedingly rare. The showing of harm required

to seal court records—good cause—is significantly less onerous than the showing required to issue a prior restraint. A prior restraint may be entertained "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc.*, 510 U.S. 1317. In other words, once information is placed on the public record and obtained by a member of the public, the rules change.

The rules change when the press possesses information because there is a fundamental difference between keeping information secret and prohibiting publication of information that is no longer secret. The difference is not merely one of degree; it is one of kind—a kind that reflects the nature of the Free Press guarantee. As Justice Potter Stewart has explained, the First Amendment confers "autonomy" on the press "to do battle against secrecy . . . in government." Stewart, *supra*, at 636. As a general matter, the press "cannot expect from the Constitution any guarantee that it will succeed" in obtaining information from the government, but it can count on being free to publish what it finds out: "So far as the Constitution goes, the autonomous press may publish what it knows . . . ." *Id.*

A prior restraint, therefore, cannot be justified as a mere extension of an order placing documents under seal. It imposes a different restraint upon the press and cannot be justified by the "good cause" that may have justified the sealing order in the first place.

Nor can a prior restraint be justified by the assertion that the information was released by mistake—in other words, that the intent or desire was that the information

remain confidential. In a variety of settings and circumstances, the Supreme Court has repeatedly confirmed that the press is free to publish information that the government may have intended, but failed, to keep secret.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court addressed the publication of the identity of a rape victim whose name had appeared in a public court file. The Government's sole opportunity to protect the victim's identity, the Court explained, was before it was received by the press, not after:

> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.

Id. at 496.

In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), members of the news media learned and published the identity of a juvenile criminal defendant, notwithstanding a provision of state law that required juvenile proceedings to be held in private. *Id.* at 309. After the first such reports had been published, the trial court entered an injunction preventing further reporting on the name or likeness of the defendant. *Id.* at 309-10 & n.1. The Oklahoma Supreme Court affirmed. *Id.* at 308. The Supreme Court granted the news media's petition for a writ of certiorari and summarily reversed. Relying on *Cox* and *Nebraska Press*, the Court explained:

> There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were publicly revealed in connection with the prosecution of the crime, much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain. Under these circumstances, the District Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.

Id. at 311-12 (internal citations omitted).

Thereafter, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court applied these decisions to hold that Virginia could not punish a newspaper for publishing truthful information it had received about confidential proceedings by the Virginia Judicial Inquiry and Review Commission. Once again the Court emphasized the Government's need to prevent the *release* of information it does not want to see published, because the press has a right to publish what it learns. *Id.* at 845 ("[M]uch of the risk [from disclosure of sensitive information regarding judicial disciplinary proceedings] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.").

In summarizing the combined import of those decisions in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court announced a principle that ultimately governs the parties' rights here:

> [These cases] all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.

Id. at 103-04 (internal citations omitted); *see also id.* at 105-06 (finding state interest in maintaining secrecy of juvenile trials insufficient to justify prior restraint); *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .").

If, as these cases hold, the press may not be punished for publishing information that the government failed to protect, it surely cannot be enjoined from publishing the information in the first place. *See Southeastern Promotions, LTD.*, 420 U.S. at 558-59 ("The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: 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."); *Nebraska Press Ass'n*, 427 U.S. at 589 (Brennan, J., concurring in the judgment) ("The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." (citing *Carroll v. Princess Anne*, 393 U.S. 175, 180-181 (1968))).

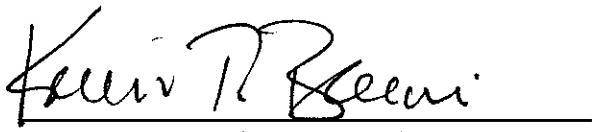
Indeed, if prior restraints were available to "cure" the unwanted release of information, such restraints would be commonplace. It is not at all unusual for

information to be provided by government officials who are not authorized to release the information—indeed, who are under prohibitions against the release of such information. When that occurs, the government cannot seek to "cure" the unauthorized release by seeking a prior restraint. There is no reason to treat a "mistaken" release any differently. In both instances, the time to protect the information is through the exercise of care before it is released. And the Government's incentive to exercise care before release comes from the knowledge that if it fails to prevent release, it cannot, absent the most extraordinary circumstances, cure the failure with a prior restraint upon publication.

CONCLUSION

For the foregoing reasons, the order of the Superior Court should be reversed.

Respectfully submitted,
WILLIAMS & CONNOLLY LLP



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CERTIFICATE OF SERVICE

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