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for purposes of identification.*

September 3, 2015

Honorable Judge William H. Orrick
United States District Court for the Northern District of California
San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

**Re: *National Abortion Federation v. Center for Medical
Progress et al.*, No. 3:15-cv-3522**

Dear Judge Orrick:

The Reporters Committee for Freedom of the Press respectfully submits this letter, as *amicus curiae* in support of neither party, to address the temporary restraining order issued by this Court on July 31 in the above-captioned case. As the docket does not indicate when the Court is scheduled to hear objections to the TRO, we are compelled to write at this early juncture because any prior restraint on speech that is issued by a court has the potential to significantly affect the First Amendment rights of the news media and the public at large. The ramifications of having such a restraint in place go well beyond the unique facts of this dispute.

The Reporters Committee is an unincorporated nonprofit association of reporters and editors that has worked to defend and preserve the First Amendment rights and freedom of information interests of the news media since 1970. The Reporters Committee frequently files friend-of-the-court briefs in significant media law cases nationwide and has a strong interest in safeguarding the First Amendment's guarantee of free speech and a free press.

A prior restraint bears "a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963). Temporary restraining orders ("TROs") and preliminary injunctions are "the classic case of a prior restraint." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). Indeed, "the gagging of publication has been considered acceptable only in 'exceptional cases.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994).

Injunctive relief barring speech raises First Amendment questions, even in the context of alleged misconduct or a breach of contract such as that at issue here. For example, in *Davis*, CBS obtained undercover footage of a meat processing plant from a plant employee. *Id.* at 1316. The meat processing company obtained a preliminary injunction to prevent CBS from airing the video, asserting, among other claims, breach of a duty of loyalty. Justice Blackmun, sitting as Circuit Justice, issued an emergency stay of the

injunction and held that the prior restraint doctrine was applicable to a temporary restraining order preventing CBS from airing footage. *Id.* Although “the videotape was obtained through the ‘calculated misdeeds’ of CBS,” Justice Blackmun reasoned, “[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for . . . misdeeds in the First Amendment context.” *Id.* at 1318.

Moreover, it is not only the rights of the speaker that are at stake when a prior restraint is issued. “[W]here a speaker exists, as is the case here, the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). In *Virginia State Board of Pharmacy*, the Supreme Court explained that this precept was “clear from the decided cases,” *id.*, such as *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972), where the Court referred to a broadly accepted right to “receive information and ideas,” and *Martin v. City of Struthers*, 319 U.S. 141 (1943), where the Court wrote:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.

Id. at 143 (internal citations omitted).

Because injunctive relief targeted at publication and other expressive activity has such significant implications for the exercise of First Amendment rights, prior restraints are subject to heightened scrutiny. Thus, the standard for issuing a TRO that restrains pure speech must be, as the Sixth Circuit has held, “substantially higher” than that for ordinary injunctive relief. *Procter & Gamble Co.*, 78 F.3d at 227 (striking down a TRO prohibiting publication of wrongfully obtained trade secrets and sealed court documents). Indeed, “it is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible.” *Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008).

When a prior restraint is in place, “each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975). The proper scope and duration of injunctive relief are therefore constitutional questions the resolution of which should not be deferred. As the Supreme Court has recognized: “The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973). Although the purpose of temporary injunctive relief is to “preserve the status quo,” when First Amendment rights are implicated, a prior restraint “disturbs the status quo and impinges on the exercise of editorial discretion.” *Matter of Providence Journal Co.*, 820 F.2d

1342, 1351 (1st Cir. 1986) *opinion modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987). Put simply, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, it is imperative that any injunctive relief targeted at First Amendment activity be no broader than necessary to address a specific and compelling interest. “An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968); *see also Bank Julius Baer & Co.*, 535 F. Supp. 2d at 985 (“[T]he Court is concerned that an injunctive remedy, if any, that may be available to Plaintiffs should be narrowly tailored and the least restrictive means to achieve the purpose of [the injunction].”).

The Reporters Committee respectfully urges this Court to subject the TRO and any further injunctive relief to the exacting scrutiny demanded by the First Amendment.

Sincerely,

The Reporters Committee for
Freedom of the Press