

EXHIBIT A



July 16, 2018

Molly C. Dwyer, Clerk of Court
United States Court of Appeal for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

VIA ECF

Re: *Los Angeles Times Communications v. USDC-CALA*, No. 18-71991

Dear Ms. Dwyer,

The Reporters Committee for Freedom of the Press and 59 news media organizations respectfully submit this letter as *amici curiae* in support of Petitioner Los Angeles Times Communications (the “*Los Angeles Times*”). *Amici* are members of the news media and organizations which advocate on behalf of the press and the public. Many of the *amici* regularly report on court proceedings and therefore have a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to publish information obtained from public court files.

As an initial matter, *amici* request that all pleadings in this matter be made public. *See Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (holding that the First Amendment right of access applies to documents filed in criminal proceedings); *see also Matter of Krynicky*, 983 F.2d 74, 76 (7th Cir. 1992) (Easterbrook, J.) (denying motion to seal appellate briefs and noting that “[p]ublic argument is the norm even, perhaps especially, when the case is about the right to suppress publication of information”).

This matter arises from a routine story published by the *Los Angeles Times* that reported on a plea agreement in *United States v. Balian*. *See* Alene Tchekmedyan, *Glendale police detective pleads guilty to obstruction, lying to feds about ties to organized crime*, L.A. Times, July 14, 2018, <https://lat.ms/2umAICe>. The

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PBS/The NewsHour

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*Affiliations appear only
for purposes of identification.*

Los Angeles Times obtained the agreement from the Public Access to Court Electronic Records (“PACER”) system and reported on it. *See id.*; *see also* Cindy Chang, *Judge orders L.A. Times to alter story about Glendale cop, sparking protest from newspaper*, L.A. Times, July 14, 2018, <https://lat.ms/2uz7IX5>. The plea agreement was supposed to be sealed and had apparently been filed publicly by mistake. Chang, *supra*. In response to an *ex parte* sealed application from the defendant, and without first providing the *Los Angeles Times* an opportunity to be heard, the district court enjoined the *Los Angeles Times* from disclosing the plea agreement or publishing any story about it. *Id.* The district court took the additional extraordinary step of ordering the *Los Angeles Times* to remove any article about the plea agreement published prior to the issuance of its order. *Id.*

The district court order at issue here is an unconstitutional prior restraint. Indeed, the district court’s order goes beyond a prior restraint by requiring the *Los Angeles Times* to remove already published material from a newspaper. *See N.Y. Times*, 403 U.S. at 717 (Black, J., concurring) (stating that under the First Amendment “[t]he [g]overnment’s power to censor the press was abolished so that the press would remain forever free to censure the [g]overnment”). Prior restraints are “the most serious and the least tolerable infringement on First Amendment rights” because they have “an immediate and irreversible sanction,” not only “chilling” speech but “freezing” it, at least for a time. *Stuart*, 427 U.S. at 559. This harm is magnified when a court directs the removal of already published information.

As the Supreme Court has recognized, “it is the chief purpose of the guaranty [of the First Amendment] to prevent previous restraints upon publication.” *Near v. Minnesota*, 283 U.S. 697, 713 (1931). As a result, there is a “heavy presumption against [the] constitutional validity” of a prior restraint, with the burden on the party seeking the prior restraint to overcome that presumption. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). The presumption against prior restraints can be overcome “only in ‘exceptional cases.’” *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (“*Davis*”) (Blackmun, J., in chambers (quoting *Near*, 283 U.S. at 716)); *see also CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1984) (“*CBS, Inc.*”) (stating that “prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances”). Accordingly, beginning in 1931 in *Near*, the Court has without fail rejected prior restraints on the press. 283 U.S. at 713. The Court has struck down

prior restraints in cases where the justifications claimed included the Sixth Amendment rights of criminal defendants, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (“*Stuart*”), and confidential or proprietary business information, *Davis*, 510 U.S. at 1318.

Perhaps most notably, the Court rejected a prior restraint preventing publication of the Pentagon Papers, in spite of the government’s claims that an injunction preventing publication was necessary to protect military secrets. *See N.Y. Times*, 403 U.S. at 713. As Justice Brennan wrote in his concurring opinion, “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.” *Id.* at 726-27 (Brennan, J., concurring).

Although *amici* do not know the specific arguments the defendant made in seeking a temporary restraining order, the defendant cannot possibly meet his burden to overcome the First Amendment presumption against prior restraints. Because the defendant has pled guilty, his Sixth Amendment rights are not implicated. And if the government’s national security concerns were insufficient to support the injunctions in *New York Times*, it is difficult to imagine any justification the defendant could offer here to restrain publication of information about his plea agreement for obstruction and false statements. *See CBS, Inc.*, 729 F.2d at 1184 (stating that “[w]hether a prior restraint on the reporting of a judicial proceeding will ever be able to satisfy this extraordinary standard [announced in *New York Times*] remains to be seen”).

It appears that the district court may have entered the temporary restraining order in an attempt to correct the mistaken public filing of the plea agreement, which was meant to be kept under seal. The district court’s desire to correct this *administrative* error, however, cannot justify the imposition of a prior restraint, which has now created a *constitutional* harm. Although courts have the power to enter sealing orders when common law and constitutional standards are met, *see Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), once information is made public, nearly 90 years of constitutional law stand in the way of using prior restraints to prevent a newspaper from communicating the information to its readers.

The Supreme Court has recognized that the press is free to publish information that the government may have intended, but failed, to keep secret. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court explained that the government may not sanction a news organization that accurately published a rape victim’s name obtained from judicial records open to public inspection. Similarly, in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam), the Court reversed an injunction preventing reporting on the name or likeness of a juvenile criminal defendant, after his name and picture were publicly revealed in connection with the prosecution of a crime, in spite of a state law that required juvenile proceedings to be held in private. The United States Court of Appeals for the Fourth Circuit, too, has recognized that a news organization may not be held in contempt for reporting on sealed court records which a court clerk gave to a journalist by mistake. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000).

“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *see also 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))). Accordingly, just as the Constitution would protect the *Los Angeles Times* from punishment for publishing information about a plea agreement it found in court files, it surely protects the newspaper from being enjoined from publishing that information in the first place and forced to remove information it has already published.

For these reasons, *amici* urge this Court to grant the petition and reverse the district court’s entry of the temporary restraining order.

Sincerely,

The Reporters Committee for
Freedom of the Press
(Additional *amici* follow)

ABC, Inc.
Advance Publications, Inc.
ALM Media, LLC
American Society of News
Editors
The Associated Press
Associated Press Media Editors
Association of Alternative
Newsmedia
Atlantic Media, Inc.
Bloomberg L.P.
Boston Globe Media
Partners, LLC
BuzzFeed
Cable News Network, Inc.
California News Publishers
Association
California Newspapers
Partnership
Californians Aware
CBS Broadcasting Inc.
The Center for Investigative
Reporting
Committee to Protect Journalists
Courthouse News Service
The Daily Beast Company LLC
Dow Jones & Company, Inc.
The E.W. Scripps Company
First Amendment Coalition
First Look Media Works, Inc.
Fox Television Stations, LLC
Freedom of the Press Foundation
Gannett Co., Inc.
Hearst Corporation
Inter American Press Association
International Documentary Assn.
Investigative Reporting Program
Investigative Reporting Workshop at
American University
The McClatchy Company
The Media Institute
Media Law Resource Center
MediaNews Group Inc., dba
Digital First Media, LLC
MPA – The Association of Magazine
Media
National Press Photographers
Association
NBCUniversal Media, LLC
The New York Times Company
The New Yorker
News Media Alliance
Newsday LLC
The NewsGuild - CWA
Online News Association
POLITICO LLC
ProPublica
Pulitzer Center on Crisis Reporting
Radio Television Digital News
Association
Reporters Without Borders
Reuters America LLC
Society of Professional Journalists
Student Press Law Center
TEGNA Inc. / KXTV-TV (Sacramento)
KMFB-TV (San Diego)
tronc, Inc.
Tully Center for Free Speech
Univision Communications Inc.
VICE Media
The Washington Post