

No. 18-1762

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

IN RE MURPHY-BROWN LLC,
Petitioner.

Petition for Writ of Mandamus to the
United States District Court for the Eastern District of North Carolina in
McKiver v. Murphy-Brown, LLC, No. 7:14-cv-180-BR,
McGowan v. Murphy-Brown, LLC, No. 7:14-cv-182-BR,
Anderson v. Murphy-Brown, LLC, 7:14-cv-183-BR,
Gillis v. Murphy-Brown, LLC, 7:14-cv-185-BR, and
Artis v. Murphy-Brown, LLC, 7:14-cv-237-BR

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 11 MEDIA ORGANIZATIONS
IN SUPPORT OF PETITIONER SEEKING A WRIT OF MANDAMUS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1762 Caption: In re Murphy-Brown

Pursuant to FRAP 26.1 and Local Rule 26.1,

Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Association of (name of party/amicus) Alternative Newsmedia, Media Law Resource Center, National Press Photographers Association, News Media Alliance, North Carolina Press Association, and Society of Professional Journalists

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Bruce D. Brown

Date: August 6, 2018

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

I certify that on August 6, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Bruce D. Brown
(signature)

August 6, 2018
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1762 Caption: In re Murphy-Brown

Pursuant to FRAP 26.1 and Local Rule 26.1,

The McClatchy Company
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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No. 18-1762 Caption: In re Murphy-Brown

Pursuant to FRAP 26.1 and Local Rule 26.1,

Tully Center for Free Speech
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Tully Center for Free Speech is a subsidiary of Syracuse University.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Bruce D. Brown

Date: August 6, 2018

Counsel for: Amici Curiae

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No. 18-1762 Caption: In re Murphy-Brown LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

WRAL-TV
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
 If yes, identify all parent corporations, including all generations of parent corporations:
 Capitol Broadcasting Company

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
 If yes, identify all such owners:

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Signature: /s/Bruce D. Brown

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, The McClatchy Company, Media Law Resource Center, National Press Photographers Association, News Media Alliance, North Carolina Press Association, Society of Professional Journalists, Tully Center for Free Speech, and WRAL-TV. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Petitioner Murphy-Brown LLC's request for a writ of mandamus directing the district court to vacate a gag order entered in 26 related civil cases. As members or representatives of the news media, *amici* have a strong interest in safeguarding the public's constitutional right of access to the judicial system and in preserving their ability to obtain information from willing speakers in order to report on civil trials. Accordingly, *amici* submit this brief to emphasize the following points.

The underlying cases here are of significant interest and importance to the public. They involve dozens of nuisance challenges to the waste management and environmental practices of hog farms in North Carolina. The gag order entered by the district court imposes unconstitutional restrictions on the ability of reporters and news organizations to keep the public informed about these cases. Journalists

rely upon interviews with those involved in litigation and those who may be called as witnesses to produce accurate and insightful reporting. If reporters are restricted from speaking with trial participants and anyone who may be called as a witness at trial in these cases, the press and the public will be deprived of important sources of information about them.

It is vital that district courts properly apply the correct legal standards when imposing any limitation on the First Amendment rights of the public and press. *Amici* submit this brief to emphasize the important interests at stake and the impact that gag orders like the one entered by the district court have on members of the media and the public.

SOURCE OF AUTHORITY TO FILE

Counsel for Petitioner and Respondents have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The gag order at issue, which applies in 26 civil cases, places an incredibly broad and unconstitutional restriction on the speech of hundreds of trial participants and potential witnesses for the duration of these cases, which are expected to continue for the next several years. The gag order has impeded—and will continue to impede—the ability of journalists to report on these cases, which concern matters of significant public interest and importance related to North Carolina’s \$2.9 billion hog industry and the environmental impact of its waste management practices.¹ The district court failed to apply the correct legal standards for determining whether and to what extent the First Amendment rights of the press and public must yield to the fair trial interests of the litigants. Indeed, the record does not support a finding that the parties’ fair trial rights are threatened in any way by public access to information about these cases—let alone to the extent required to justify the extreme remedy imposed by the district court.

In addition, the district court’s gag order is, on its face, unconstitutionally overbroad, applying to hundreds of trial participants, attorneys, court personnel, and “potential witnesses,” who have not been identified or notified that they may

¹ See Valerie Bauerlein, *Residents Raise a Stink Over Pig Farms in North Carolina: Trial will help determine how hundreds of other complaints against pork giant Smithfield Foods will be handled, with major implications for the state*, Wall Street J. (May 30, 2018), <https://on.wsj.com/2OHhyj6>.

be called to testify. This Court has rejected a similar gag order in a criminal case, *In re Wall Street Journal*, 601 F. App'x 215 (4th Cir. 2015), and *amici* are unaware of any civil case in which this Court has affirmed a gag order. In fact, this Court has long recognized that gag orders are particularly problematic in the civil context, where cases frequently last multiple years. *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979).

For all of these reasons, *amici* join Petitioners in urging this Court to issue a writ of mandamus directing the district court to immediately vacate its gag order.

ARGUMENT

For centuries, openness has been considered an “indispensable” element of trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597 (1980). As the Supreme Court has recognized, secrecy breeds “distrust” of the judicial system and its ability to adjudicate matters fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). The benefits of an open and transparent legal system, on the other hand, are manifold, both to the parties and the public. Openness gives “assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality.” *Richmond Newspapers*, 448 U.S. at 569.

The nexus between openness and fairness in judicial proceedings and the role of an unfettered press is well-established. “A responsible press has always

been regarded as the handmaiden of effective judicial administration. . . .”

Sheppard, 384 U.S. at 350. For these reasons, the First Amendment guarantees the press and public a right of access to criminal and civil trials. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n.4 (4th Cir. 1988). This constitutional protection gives rise to a strong “presumption” in favor of openness that may be abrogated only in “unusual circumstances.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (internal quotation marks and citations omitted).

The reach of the First Amendment extends beyond access to the courtroom and court filings to protect general newsgathering activities. *Richmond Newspapers*, 448 U.S. at 576 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (recognizing “First Amendment interests in newsgathering”); *CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (finding that newsgathering “qualifies for First Amendment protections”).

Because journalists frequently seek to gather the news by interviewing parties and witnesses to judicial proceedings, gag orders on trial participants are prior restraints that undermine these foundational principles of openness. *See CBS*, 522 F.2d at 238, 239–40. They are particularly offensive to the First Amendment, for they violate not only the rights of those individuals who have been restrained

from speaking, but also the rights of the press and public to receive information from willing speakers. 1 Lee Levine, et al., *Newsgathering & The Law* § 8.01 (4th ed. 2013) (gag orders “plainly burden both the newsgathering activities of the press and the freedom of expression of participants in the judicial process”).

I. The gag order here chills newsgathering, leading to less accurate and complete reporting about these cases and depriving the public of information.

When assessing the propriety of a gag order, courts must consider not only the free speech interests of those subject to the order but also the impact on the First Amendment rights of the press and public to gather and receive information about cases pending in the courts. *See, e.g., CBS*, 522 F.2d at 237–38 (vacating gag order that “directly impaired or curtailed” the media’s “ability to gather the news concerning the trial”);

As the Supreme Court has long held, “[f]ree speech carries with it some freedom to listen” and receive information about the workings of government. *Richmond Newspapers*, 448 U.S. at 576; *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” (internal quotation marks and citation omitted)). The Supreme Court has also repeatedly recognized that the First Amendment includes “a ‘right to gather information,’” because ““without some protection for seeking out the news, freedom of the press could be

eviscerated.” *Richmond Newspapers*, 448 U.S. at 576 (quoting *Branzburg*, 408 U.S. at 681).

These protections empower the press to fulfill its constitutionally recognized duty to inform citizens about matters of public concern such as the high-profile trials at issue here. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”); *Minn. Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (noting that an “untrammelled press” is “a vital source of public information” and “an informed public is the essence of working democracy”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (explaining that the media provides the public with information necessary to “assure unfettered interchange of ideas” which enable “political and social changes desired by the people”).

Gag orders like the one at issue here “choke off important sources of information,” stifling the flow of information about court cases and impeding the press’ right and ability to gather the news. Levine, *supra*, § 8.01. Indeed, “[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it.” *CBS*, 522 F.2d at 236–38. Sources enhance accuracy and credibility in reporting, increase transparency and reader trust, and enrich news stories. Without them, the quality and thoroughness of news coverage of court cases suffers, frustrating the public’s right of access to the courts.

The record makes clear that the district court’s gag order silences willing speakers, including Petitioner and its contract farmers, who seek to convey information to the public but are barred from doing so.² Br. of Pet’r (“Pet. Br.”) 12–13, 33. As a result, the gag order is hampering—and will continue to hamper—news coverage of these cases. The public will continue to be deprived of the perspective of trial participants, who know the most about these cases and are in the best position to identify potential legal errors and other problems as soon as

² See, e.g., Kyle Hanlin, *Lawsuits Continue Against Hog Farms*, WilmingtonBiz (July 27, 2018), <https://perma.cc/9JJV-9JU4> (“Britt issued a gag order following the conclusions of the case, so neither Murphy-Brown/Smithfield Foods nor the plaintiffs are able to comment publicly as they could affect still-pending lawsuits.”); Travis Fain, *Hog Farm Trial Testimony: Crusty Pigs, “Feces in the Air”*, WRAL.com (July 19, 2018), <https://perma.cc/G48E-SRX9> (“The legal teams in these cases are subject to a gag order and can’t give press interviews”); Emery P. Dalesio, *Pork Giant Smithfield Foods Ordered to Pay \$25M in Nuisance Lawsuit*, Ins. J. (July 5, 2018), <https://perma.cc/PAD4-TTK5> (“Smithfield declined to comment after the ruling, citing a judge’s gag order meant to limit pre-trial publicity ahead of the next trials”); Lisa Sorg, *Despite Legislative Wins, North Carolina Pork Giant Loses Again in Court*, NC Policy Watch (July 2, 2018), <https://perma.cc/T9VQ-HZ8N> (“A Murphy-Brown spokeswoman said the company could not comment because of the judge’s gag order on the parties to the lawsuit.”); Anne Blythe, *Jury Awards More Than \$25 Million to Duplin County Couple in Hog-Farm Case*, News & Observer (June 29, 2018), <https://perma.cc/P37L-4SLF> (“[T]he judge issued an order that prohibits any of the parties from talking about the case”); Valerie Bauerlein, *Pork Giant Loses Essential Legal Battle in Manure Case*, Wall Street J. (June 29, 2018), <https://on.wsj.com/2LZ3e6T> (Petition for Mandamus, Ex. 5) (“Representatives of Smithfield and the plaintiffs declined to comment, citing a gag order.”); Travis Fain & Laura Leslie, *Massive Hog Trial Verdict As Elected Leaders Rally for Farmers*, WRAL.com (Aug. 3, 2018), <https://perma.cc/U6UJ-YXQ9> (“Neither legal team nor their clients had comment on the decision Friday. They’re bound by a gag order from U.S. District Judge W. Earl Britt”).

they occur. Journalists will be forced to seek comment from non-trial participants who are less likely to have all the relevant information and may therefore be less reliable. As *The News & Observer* explained, “With the gag order in place, news stories about the cases have relied on courtroom testimony and commentary from outside advocates such as environmentalists and the hog-farming industry, without context and fact-checking that might be elicited from the attorneys.” Craig Jarvis, *Gag Order in Hog Farm Trial Has Pig Producer Hamstrung. Murphy-Brown Wants to Talk.*, *News & Observer* (July 27, 2018), <https://perma.cc/B5KZ-XDZH>. In addition, given its broad scope, covering as-yet-unknown “potential witnesses” until the completion of these cases, the gag order will likely chill the speech of hundreds of people and restrict news coverage for years to come.

Thus, while this gag order may not halt news coverage of these cases entirely—for journalists will continue to try to cover them, despite this order—it could very well lead to less accurate and reliable reporting that has a greater likelihood of misleading potential jurors, thus defeating the order’s purpose.

II. Gag orders are prior restraints and only appropriate in certain narrow circumstances, which are not present here.

Gag orders implicate weighty First Amendment interests that may be overcome only in extreme cases. *See Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (holding unconstitutional an order prohibiting the media from publishing or broadcasting accounts of admissions made by the defendant in a

criminal trial). Indeed, a gag order, like “[a]ny prior restraint on expression” comes “with a ‘heavy presumption’ against its constitutional validity,” and any proponent of such a restriction bears a “heavy burden of showing justification for the imposition of such a restraint.” *Id.* (citation omitted); *see also In re Russell*, 726 F.2d 1007, 1009 (4th Cir. 1984) (citing *Nebraska Press* and noting “weighty” First Amendment rights of trial witnesses subject to gag order); *CBS*, 522 F.2d at 238 (“[P]rior direct restraints by government upon First Amendment freedoms of expression and speech must be subjected by the courts to the closest scrutiny.”).

“Prior restraints are the most drastic . . . judicial tool for enforcing the right to a fair trial.” *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98–99 (3d Cir. 1988) (citing *Neb. Press Ass’n*, 427 U.S. at 572–73 (Brennan, J., concurring)). “If any method other than a prior restraint can effectively be employed to further the governmental or private interest threatened here, then the order is invalid.” *Id.*

A. The gag order does not satisfy constitutional requirements.

This Court has identified certain factors that make gag orders even more suspect in the civil context than they are in the criminal context. *See infra* Part II.B. Yet even assuming, *arguendo*, that the “reasonable likelihood” test adopted by the Fourth Circuit to evaluate the constitutionality of restrictive orders entered in certain criminal cases applies here, the district court’s gag order must be vacated.

Under the “reasonable likelihood” test, a gag order applicable to a trial participant, such as a party, prosecutor, or defense attorney, is permissible only if a court makes specific findings showing a “reasonable likelihood” that failure to issue the order would prejudice the defendant’s right to a fair trial; in addition, any restriction imposed by such an order must be “no greater than necessary” to protect the defendant’s Sixth Amendment rights. *In re Russell*, 726 F.2d at 1010; *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999) (“Under the First Amendment, content-based restrictions on attorney speech are permissible only when they are no greater than necessary to protect an accused’s right to a fair trial or an impartial jury.”) (citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

As an initial matter, the district court here issued a stunningly broad gag order, silencing not only the parties and their “counsel, representatives, and agents,” but also “all courthouse personnel” and “all *potential* witnesses,” Joint Appendix (“J.A.”) 617 (emphasis added)—a group that includes hundreds of people, Pet. Br. 33. The gag order states that it will remain in place for the duration of these 26 cases,³ which are expected to continue for several years. Pet.

³ Although there is some ambiguity, as Petitioners explain, regarding whether the gag order applies to the five test cases captioned above or all 26 related cases, a cautious reading of this order suggests it is intended to apply to all 26 cases. See Pet. Br. 40–41; J.A. 616 n.1 (gag order footnote noting that “[t]here are 26 cases involved in this litigation”).

Br. 5. During this time period, those covered by the order may not make any extrajudicial statements to the media (or to others who may reasonably be expected to convey such statements to the media),⁴ if such statements “could interfere” with or “prejudice” the parties’ fair trial rights. J.A. 617. The gag order broadly defines “information which could prejudice a party” as any “[s]tatements or information *intended to influence* public opinion regarding the merits” of the cases. J.A. 617 (emphasis added).

In short, the district court’s order bars a broad swath of current and “potential” trial participants from making any statements “intended to influence” public opinion about these cases, an impossibly vague restriction. It is unclear how the district court might determine a speaker’s subjective intent and thus enforce its own order. And, since public statements are generally in some way aimed at influencing public opinion, this order will chill those with even remote involvement in these cases from making any public comments in order to avoid possible criminal contempt penalties. In fact, as Petitioner makes clear, this order has already chilled its speech and that of its independent contract farmers who are also involved in these cases. Pet. Br. 33.

⁴ Adding to its impermissible breadth and vagueness, the gag order refers to “any public communications media” (without defining this term) and also bars covered individuals from making extrajudicial statements “that a reasonable person would expect to be communicated to a public communications media.” J.A. 617.

Although the order makes certain limited carve-outs for categories such as “information contained in” public records, these exceptions are largely meaningless, as the order forbids covered individuals from offering any “elaboration or any kind of characterization whatsoever” of that publicly available information. J.A. 617–18. This overly broad, vague language, as Petitioners demonstrate, runs afoul of settled Supreme Court jurisprudence. Pet Br. 38–41.

Despite the fact that its gag order is expected to restrict the speech of hundreds of people for several years, the district court failed to make any specific findings justifying its sweeping edict. Instead, the district court only made vague and conclusory references to “the volume and scope of prejudicial publicity” observed in two of the cases that have been tried to verdict and “the substantial risk of additional publicity tainting or biasing future jury pools.” J.A. 617. Nothing in the record indicates that any news coverage relating to these cases has been prejudicial to either party. Pet. Br. 25. Nor did the district court consider any narrower restrictions or less drastic alternatives—as it is constitutionally required to do—such as possible remedial steps through the *voir dire* process or the issuance of jury instructions. Pet. Br. 27–32.

The gag order at issue is a plainly unconstitutional prior restraint. It imposes broad, vague restrictions on hundreds of people (many of whom have neither been identified nor notified) and will restrain their speech for what is likely to be several

years; and it rests on no specific findings whatsoever. *See In re Morrissey*, 168 F.3d at 140 (“[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”) (quoting *Procunier*, 416 U.S. at 413).

This Court has never accepted the validity of such a broad gag order. Indeed, it has never permitted restrictions on the speech of individuals whose participation in a trial is nothing more than a possibility—that is, individuals who have not been informed that they may be called to testify as witnesses. In fact, this Court has explicitly rejected such a broad gag order in a criminal case, where this Court, if anything, would be *more likely* to uphold a gag order. *See infra* Part II.B. In *In re Wall Street Journal*, 601 F. App’x 215, a district court issued a similar order gagging all potential witnesses who had not even been informed that they may be called to testify. This Court swiftly and summarily vacated that order. *Id.*

Neither the local rule at issue in *In re Morrissey*, which restricted lawyers from making extrajudicial statements about pending litigation, 168 F.3d at 135–36, nor the gag order in *In re Russell*, 726 F.2d at 1008–09, which applied to individuals who had either already testified or had been notified by the prosecution or defense that they should anticipate being called as witnesses, applied to individuals who had no expectation of being called as witnesses.

This distinction is significant, because statements from non-trial participants carry a much lower risk of prejudice than those from trial participants or lawyers. *United States v. Scarfo*, 263 F.3d 80, 92 (3d Cir. 2001) (“The Supreme Court and Courts of Appeal have announced varying standards to review gag orders depending on who or what is being gagged.”); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (justifying restrictions on lawyers’ speech because “lawyers have special access to information through discovery and client communications” and their “statements are likely to be received as especially authoritative”).

If an individual has not been informed that he or she should anticipate being called as a witness, a more stringent showing than “reasonable likelihood”—at the very least, a “substantial likelihood” of prejudice, if not a “clear and imminent danger”—should be required to justify restrictions on that person’s First Amendment rights. *See CBS*, 522 F.2d at 240 (applying a “clear and imminent danger to the fair administration of justice” standard to a gag order in a civil case that applied to all parties, their relatives, close friends and associates); *Scarfo*, 263 F.3d at 93–94 (applying the “substantial likelihood of material prejudice” standard to speech of an attorney who no longer represented the criminal defendant). This more stringent standard of review is also more appropriate in the civil context here for the reasons set forth below.

- B. The gag order is particularly offensive to the First Amendment because it applies to dozens of civil cases that are expected go on for years.

This Court has long recognized that gag orders in civil cases are particularly problematic. *Hirschkop*, 594 F.2d at 373. Indeed, to *amici*'s knowledge, this Court has never upheld a gag order in a civil case. In *Hirschkop*, this Court accepted a state ethics restriction on lawyers' speech in *criminal* cases where such speech was reasonably likely to prejudice the criminal defendant's Sixth Amendment rights, but notably struck down a provision which restricted lawyers' comments about *civil* litigation. *Id.* at 364–71, 373. In a thoughtful analysis, this Court recognized that civil litigants are entitled to a fair trial but identified “many significant differences between criminal jury trials and civil cases” that warrant increased skepticism of gag orders in the latter context. *Id.* at 373.

First, the Court noted that civil litigation “is often more protracted than criminal prosecution,” meaning a gag order “could prohibit comment over a period of several years.” *Id.* That is certainly the case here, where the gag order applies to 26 cases brought by more than 500 plaintiffs. Petitioner estimates that final resolution of all of these cases will take several years. Pet. Br. 5.

Second, the Court explained that “[c]ivil actions may also involve questions of public concern,” and “[t]he lawyers involved in such cases can often enlighten public debate.” *Hirschkop*, 594 F.2d at 373. Here, the 26 civil cases at issue

concern matters of public importance, as they could have significant consequences for the pork industry at large and raise environmental concerns related to how industrial hog farms deal with waste. *See, e.g.,* Bauerlein, *Residents Raise a Stink Over Pig Farms in North Carolina*, *supra* n.1; Bauerlein, *Pork Giant Loses Essential Legal Battle in Manure Case*, *supra* n.2.

Third, the Court noted the lack of any “empirical data” or evidence in the record demonstrating the need for such restrictions to protect the fairness of civil trials. *Hirschkop*, 594 F.2d at 373. The Court aptly stressed the fact that the “prejudicial publicity cases” such as *Sheppard* involved criminal proceedings; that it was unaware of any decisions reversing a judgment in a civil action due to prejudicial publicity; and that “the principal case imposing a gag on lawyers during a civil trial was reversed because the order infringed the first amendment.” *Id.* (citing *CBS*, 522 F.2d 234). And indeed, since *Hirschkop*, the Supreme Court has only clarified the high bar for prejudicial publicity in another criminal case, *United States v. Skilling*, 561 U.S. 358, 381 (2010).

Fourth, the Court noted that narrower means to preserve confidentiality, where appropriate, were already available, since district courts could easily issue orders “protecting trade secrets, other confidential information, and the privacy of individuals.” *Hirschkop*, 594 F.2d at 373. Here, the district court did not consider any alternative options.

Fifth and finally, the Court explained that it “is no answer to say that the comments can be made after the case is concluded, for it is well established that the first amendment protects not only the content of speech but also its timeliness.” *Id.* (citation omitted). Indeed, it may be of significantly less value for the public to know the thoughts of the attorneys and parties after these cases are over. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”); *Neb. Press Ass’n*, 427 U.S. at 561 (“[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”).

All of the concerns with gag orders in civil matters that this Court identified in *Hirschkop* are evident here. The gag order entered by the district court will likely last several more years absent this Court’s intervention. Unlike the rule considered in *Hirschkop*, it applies not only to lawyers’ comments, but to parties—at least two of whom would otherwise speak publicly about these cases, Pet Br. 12-13, 33—as well as court personnel, and hundreds of “potential witnesses” who have not been identified or notified.

Other federal courts of appeals have also rejected gag orders in civil cases, finding that concerns about tainting the jury pool did not outweigh First

Amendment protections for free speech and newsgathering. *See generally* Levine, *supra*, § 8. In *Chicago Council of Lawyers v. Bauer*, the Seventh Circuit rejected a “no-comment rule” that applied to attorneys in civil cases, based on reasoning that was largely the same as that cited in *Hirschkop*, which later relied in part on *Bauer*. 522 F.2d 242, 257–48 (7th Cir. 1975).⁵ In *Bailey*, the Third Circuit vacated a gag order that was narrower than the one at issue here. 852 F.2d at 101. It limited only *litigants’* speech (and not that of “potential witnesses”), only statements regarding certain categories of information (*e.g.*, relevant evidence), and only where there was “a reasonable likelihood that such dissemination [would] interfere with a fair trial”; the gag order at issue here, in contrast, effectively bars any statement

⁵ The Seventh Circuit, explaining why a gag order may be more likely to be acceptable in the criminal context, stated:

[A]lthough we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity against the possibility of interference with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment’s requirement of an ‘impartial jury’ in criminal cases whereas the Seventh Amendment guarantees only ‘trial by jury’ in civil cases. The point to be made is that the mere invocation of the phrase ‘fair trial’ does not as readily justify a restriction on speech when we are referring to civil trials.

Chi. Council of Lawyers, 522 F.2d at 257–48.

“intended to influence public opinion regarding the merits of this case.” *Id.* at 96; J.A. 617. The Third Circuit determined that the gag order amounted to an unconstitutional prior restraint under *Nebraska Press* and stressed that ““the entry of a prior restraint on publication or speech,”” is ““one of the most extraordinary remedies known to our jurisprudence.”” *Id.* at 99 (quoting *Neb. Press Ass’n*, 427 U.S. at 562).⁶

In *CBS v. Young*, the Sixth Circuit vacated an order gagging not only all parties, but their relatives, close friends, and associates from discussing the civil action. 522 F.2d 234. In doing so, the Sixth Circuit explained that ““relatives, close friends and associates’ are given no definition with the result that a news reporter covering the trial would be at a loss to know with any degree of certainty what persons were embraced by these terms.”” *Id.* at 239. The district court’s gag order in this case is similarly vague and overbroad, as it applies to hundreds of trial participants and “potential witnesses” who have neither been identified nor notified.

⁶ *Nebraska Press* requires courts to consider the following factors in deciding whether to uphold a prior restraint: “(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.” *Neb. Press Ass’n*, 427 U.S. at 562.

CONCLUSION

For the foregoing reasons, *amici* agree with Petitioner that this Court should grant a writ of mandamus and order the district court to vacate its unconstitutional gag order.

Dated: August 6, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae* complies with:

- 1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,611 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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THE REPORTERS COMMITTEE FOR
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Dated: August 6, 2018
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system on August 6, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and

Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as The Charlotte Observer, The (Raleigh) News and Observer, the Miami Herald, The Kansas City Star, The Sacramento Bee, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as

policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

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 News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-

daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The North Carolina Press Association is a trade association of 150 daily and weekly newspapers across the state. Since 1873 NCPA has supported North Carolina newspapers, readership and advertising. NCPA works to protect the public's right to know through the defense of open government and First Amendment freedoms, and NCPA helps maintain the public's access to local, state and federal governments.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WRAL-TV provides broadcast and online coverage of news about Raleigh and the surrounding area. It is owned by Capitol Broadcasting Company, Incorporated ("CBC"), a North Carolina corporation located in Wake County.

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