No. 15-_____

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE THE WALL STREET JOURNAL, THE ASSOCIATED PRESS, CHARLESTON GAZETTE, NATIONAL PUBLIC RADIO, INC., AND THE FRIENDS OF WEST VIRGINIA PUBLIC BROADCASTING, INC.,
Petitioners.

Petition for a writ of mandamus directed to the United States District Court for the Southern District of West Virginia

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 29 MEDIA ORGANIZATIONS* IN SUPPORT OF PETITIONERS SEEKING A WRIT OF MANDAMUS

Bruce D. Brown, Esq.
Counsel of Record
Gregg P. Leslie, Esq.
Katie Townsend, Esq.
Tom Isler, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1250
Washington, D.C. 20005
(202) 795-9301

* A full list of *amici* is reproduced on the next page

IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press
American Society of News Editors
AOL, Inc. (Huffington Post)
Association of Alternative Newsmedia
The Association of American Publishers, Inc.
Bloomberg L.P.
The Center for Investigative Reporting
Courthouse News Service
First Amendment Coalition
First Look Media, Inc.
Hearst Corporation
Investigative Reporting Workshop at American University
Journal Sentinel, Inc.
The McClatchy Company
Mine Safety & Health News
Newspaper Association of America
The National Press Club
National Press Photographers Association
NBCUniversal Media, LLC
New England Newspaper and Press Association, Inc.
New England Society of Newspaper Editors
The New York Times Company
North Jersey Media Group Inc.
Online News Association
Reuters America LLC
The Seattle Times Company
Society of Professional Journalists
The Thomas Jefferson Center for the Protection of Free Expression
Tribune Publishing Company
Tully Center for Free Speech

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici file this brief in support of Petitioners' request for a writ of mandamus directing the district court to vacate sealing and gag orders entered in connection with the criminal prosecution of Donald Blankenship pending before it. As representatives and members of the media, *amici* have a strong interest in safeguarding the public's constitutional right of access to court documents in criminal cases, and in preserving their ability to report on criminal trials. *Amici* support the arguments made by Petitioners, but write separately to emphasize a few points.

This case is of nationwide interest and importance. The criminal charges at issue, which stem from a 2010 mine explosion that killed 29 miners, include conspiracy to violate federal mine safety and health standards, and conspiracy to defraud the United States. The American public has a powerful interest in the criminal enforcement of federal safety standards within the mining industry and in allegations of fraud against the United States. And the public's interest in this case is heightened because the defendant is the former CEO of one of the largest coal producers in the United States, a publicly-traded company, and is a prominent public figure who, among other things, has been active in national politics.

The gag and sealing orders entered by the district court impose unconstitutional restrictions on the ability of all reporters and news

organizations—both inside and outside of West Virginia—to keep the public informed about this case. Reporters outside the state and smaller media outlets that do not have the resources to send reporters to cover Blankenship's trial in person are particularly harmed by the orders. Reporters working remotely rely upon electronic access to court documents, as well as interviews with victims' families, among others, in order to produce accurate and insightful reporting.

If all court filings that "contain information or argument regarding the facts or substance of the case" are kept under seal, *see* Order, *United States v. Blankenship*, No. 5:14-cr-244 (S.D.W. Va. Jan. 7, 2015), ECF No. 64, and if reporters may not speak with trial participants, nor anyone who may potentially be called as a witness at trial, the press and the public will be deprived of the most reliable sources of information about Blankenship's trial.

The importance of this Court's resolution of the Petition before it extends beyond this case. It is vital that district courts be required to properly apply the correct legal standards when imposing any limitation on the rights of the press and the public to access court records and information in criminal cases. *Amici* submit this brief to emphasize the First Amendment interests at stake, and the impact that gag and sealing orders like those entered by the district court have on all members of the media.

A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

SOURCE OF AUTHORITY TO FILE

Amici have obtained the consent of the parties to file this brief in support of Petitioners, pursuant to Fed. R. App. P. 29(a).

FED. R. APP. P. 29(c)(5) STATEMENT

Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amici curiae*, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The gag and sealing orders imposed in this case place unconstitutional restrictions on speech and access to court documents, and prevent members of the news media from reporting on a criminal trial of significant public interest and importance. The district court below failed to apply the correct legal standards for determining whether and to what extent the First Amendment rights of the press and the public must yield in order to satisfy the Sixth Amendment requirement that defendant receive a fair trial by an impartial jury. The record in this case does not support a finding that the defendant's fair trial rights are threatened in any way by public access to information about this case—let alone to the extent required to justify curtailing First Amendment rights. Accordingly, the district court's gag and sealing orders must be vacated.

In addition, the district court's sealing order is, on its face, unconstitutionally overbroad. No attempt was made to narrowly tailor its coverage to court records that contain potentially prejudicial material not already in the public domain; it broadly restricts public access to even the most innocuous and well known factual information, as well as the parties' legal arguments. The district court's gag order, too, is overbroad and impermissibly vague. Not only does the gag order purport to restrain speech about matters that are already in the public record, it applies to all trial participants as well as individuals that may be "potential witnesses," including

families of victims of the Upper Big Branch mine disaster, who cannot know what speech the order does and does not prohibit.

For all of these reasons, and particularly given the important First Amendment interests at stake, *amici* join Petitioners in urging this Court to issue a writ of mandate directing the district court to vacate its gag and sealing orders.

ARGUMENT

I. Openness and transparency are bedrock principles of our criminal justice system and may not be set aside, except in rare circumstances.

For centuries, openness has been "an indispensable attribute" of the criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). As the Supreme Court has recognized, secrecy breeds "distrust" of the judiciary and its ability to adjudicate matters fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). The benefits of an open and transparent criminal justice system are manifold, both to the defendant 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 public administration of justice also serves "an important prophylactic purpose, providing an outlet for community concern, hostility and emotion" following a "shocking" crime. *Id.* at 571. Indeed, the Supreme Court has stated that "no community catharsis can occur if justice is done in a corner [or] in any covert manner." *Id.* (internal quotation marks omitted).

The nexus between openness and fairness in criminal proceedings and the role of an unfettered press is well-established. "A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard*, 384 U.S. at 350.

> The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. . . . And where there was no threat or menace to the integrity of the trial, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

Id. (internal quotation marks and citations omitted).

For these reasons, the First Amendment guarantees the press and the public a right of access to criminal trials, including pretrial proceedings and related documents. *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999). This constitutional protection gives rise to a strong "presumption in favor of openness." *In re State-Record Co., Inc.*, 917 F.2d 124, 127 (4th Cir. 1990).

Further, with respect to the press, the First Amendment interests extend beyond access to the courtroom and court filings to encompass general newsgathering activities. "The protected right to publish the news would be of little value in the absence of sources from which to obtain it." *CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975) (issuing a writ of mandamus directing the district court to vacate a gag order, finding that the order "directly impaired or curtailed" the media's "ability to gather the news concerning the trial"); *see also United States v. Matthews*, 209 F.3d 338, 344, n.3 (4th Cir. 2000) (recognizing that the First Amendment generally protects "news gathering" activities); *Levine v. U.S. Dist. Court*, 764 F.2d 590, 594 (9th Cir. 1985) ("By effectively denying the

media access to litigants, the district court's order raises an issue under the first amendment by impairing the media's ability to gather news.") (citation omitted).

A. To justify gag or sealing orders, a district court must make specific judicial findings, consider less drastic alternatives, and narrowly tailor the orders to address the identified harm.

Sealed criminal court documents and gag orders implicate weighty First Amendment interests that may be overcome only in rare circumstances. *See Nebraska 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, stating that "[a]ny prior restraint on expression comes to this Court 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"); *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984) (citing *Nebraska Press* and noting "weighty" First Amendment rights of trial witnesses subject to gag order); *see also In re State-Record Co.*, 917 F.2d at 128–29 (articulating exacting standards for sealing orders).

To justify sealing judicial records, the district court must find:

> (1) a substantial probability that irreparable damage to defendant's fair trial right will result from failure to seal the record; (2) a substantial probability that alternatives to sealing will not adequately protect his right to a fair trial; and (3) a substantial probability that sealing the record will be effective in protecting against the perceived harm.

Id. at 129; *see also In re Charlotte Observer*, 882 F.2d 850, 855 (4th Cir. 1989).

In this Circuit, a gag order that restricts the speech of lawyers and trial participants, including witnesses who have been notified that they should anticipate testifying at trial, may issue only when 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, and any restriction must be "no greater than necessary" to achieve the desired result. *In re Russell*, 726 F.2d at 1010; *see also In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999).

This Court has never considered the validity of a gag order like the one at issue here, which restricts the speech of individuals whose participation in a criminal trial is nothing more than a possibility— that is, individuals who have not been informed that they may be called to testify as witnesses. Neither the local rule at issue in *In re Morrissey*, which restricted lawyers from making extrajudicial statements about pending litigation,[1] nor the gag order in *In re Russell*, 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,[2] applied to family members of victims or other 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

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[1] *In re Morrissey*, 168 F.3d at 125–36.

[2] *In re Russell*, 726 F.2d at 1008–09.

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").[3]

If an individual is unlikely to have knowledge bearing directly on the criminal charges,[4] and has not been informed that he or she should anticipate being called as a witness, a more stringent showing—at the very least, a "substantial likelihood" of prejudice—should be required to justify restrictions on their First Amendment rights. *See CBS Inc.*, 522 F.2d at 239–40 (applying a "clear and imminent danger to the fair administration of justice" standard to a gag order 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 represents the criminal defendant).

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[3] The majority in *Gentile* concluded that the "substantial likelihood of material prejudice" test satisfied the First Amendment. *Id.* at 1076. Other Circuits apply a "substantial likelihood" of prejudice standard to determine the constitutionality of restrictions on the extrajudicial statements of lawyers and trial participants. *See, e.g., United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000).

[4] Here, family members of victims are unlikely to have personal knowledge of matters bearing on whether the defendant participated in criminal conspiracies to defraud the United States or to violate federal safety regulations.

Regardless of the standard applied, however, ordinary news coverage of a criminal trial—even if "pervasive," "concentrated," and "adverse" to the defendant, *see Nebraska Press*, 427 U.S. at 554, 565—cannot justify a restrictive order. As the Supreme Court has made clear, the design of the criminal justice system both anticipates and tolerates jurors who have been exposed to pretrial publicity; it is an inevitable consequence of an informed citizenry. *See Reynolds v. United States*, 98 U.S. 145, 155–56 (1878) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."); *Skilling v. United States*, 561 U.S. 358, 381 (2010) ("Prominence does not necessary produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*."). To satisfy the Sixth Amendment's requirement of an impartial jury, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence in court." *Murphy v. Florida*, 421 U.S. 794, 800 (1975) (quotation marks omitted).

For pretrial publicity to reach the point of interfering with a defendant's right to a fair trial by an impartial jury, the publicity must be so inflammatory that any juror exposed to it could not be expected to render an impartial verdict. *See Skilling*, 561 U.S. at 382–83 (discussing that publicity must be "the kind of vivid,

unforgettable information" that is "particularly likely to produce prejudice"). In determining whether the nature of pretrial publicity has risen to this level, district courts must consider the particular circumstances of each case, including: (1) the amount of time between the coverage of the alleged criminal conduct and the trial[5]; (2) whether the coverage contains "confessions or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"[6]; (3) whether the coverage invites prejudgment of the defendant's culpability[7]; (4) whether the "media accounts were primarily factual," or whether the community was flooded with "inflammatory editorials or cartoons" expressing opinions about guilt or innocence[8]; and (5) whether the coverage "exceeded the sensationalism inherent in the crime."[9] It is critical that courts distinguish innocuous, factual news coverage of the crime and its consequences from that which is so prejudicial to the *particular defendant* that jurors would not be able to set aside the news accounts and render a verdict based solely on the evidence presented in court. *See Skilling*, 561 U.S. at 384 n.17 ("[W]hen publicity is about the event, rather than directed at individual defendants, this may lessen any

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5 *Skilling*, 561 U.S. at 383.

6 *Id.* at 382.

7 *Id.* at 383 (considering whether the coverage contains reports of a "smoking gun"); *see also United States v. Wilcox*, 631 F.3d 740, 747 (5th Cir. 2011) (considering whether publicity "probatively incriminated" the defendant).

8 *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004).

9 *Wilcox*, 631 F.3d at 747.

prejudicial impact.") (internal quotation marks omitted). A district court must make specific judicial findings about the nature and extent of the media coverage on the record to support a finding of sufficiently likely prejudice to enable appellate review. *In re State-Record Co.*, 917 F.2d at 129.

The analysis does not end there. Even if news coverage is "pervasive, sensational, [and] inflammatory," it does not necessarily justify orders restricting access to documents, trial participants, or "potential" trial participants. *See In re Charlotte Observer*, 882 F.2d at 854 (accepting a magistrate judge's factual finding that publicity had been "pervasive, sensational, [and] inflammatory" but concluding that the closure of the court and sealing of documents was unconstitutional). Before entering a restrictive order, two additional factors must be considered: (1) whether the restrictions will be effective at preventing the perceived harm, and (2) whether alternative measures less injurious to the First Amendment may ameliorate the harm.

Unless a restrictive order would be effective at preventing the prejudice to defendant's fair trial rights that has been found likely to occur, such an order is unconstitutional. *In re Charlotte Observer*, 882 F.2d at 854–55. Where, as here, a community has been viscerally affected by a fatal tragedy, the district court must make findings that the future publicity to be curtailed—as opposed to the pre-existing emotions and opinions held within the community—would prevent a fair

trial in the absence of a restrictive order. *Id.* In other words, to justify a restrictive order, the district court must find that, despite any inherent prejudice against the defendant that exists in the community due to the nature of the criminal allegations against him or his identity, additional prejudicial news coverage would be the but-for cause of the defendant's inability to receive a fair trial. In the absence of such a finding, the restrictive order cannot stand.

In addition, the district court must determine that other remedies less injurious to First Amendment interests would be ineffective at safeguarding the defendant's right to a fair trial by an impartial jury. Courts have many tools at their disposal to preserve the integrity of the jury, including special questionnaires to screen prospective jurors[10]; asking searching direct and open-ended questions to jurors in person (as a group and individually) about their level of exposure to pretrial publicity and whether they nonetheless could be fair[11]; increasing the number of peremptory challenges available to defendants[12]; seating a foreign jury while keeping the matter in the district[13]; and transferring venue to another district.[14] As this Court has made clear, "[*v*]*oir dire* is of course the preferred

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10 *Casey*, 386 F.3d at 902.
11 *Skilling*, 561 U.S at 373–74; *see also Wilcox*, 631 F.3d at 749.
12 *Skilling*, 561 U.S. at 373; *see also Casey*, 386 F.3d at 902.
13 *Harris v. Ricci*, 607 F.3d 92, 94–95 (3d Cir. 2010).
14 *Skilling*, 561 U.S. at 387 n.11.

safeguard against this particular threat to fair trial rights . . . ." *In re Charlotte Observer*, 882 F.2d at 855.

The power of *voir dire* and other curative measures to negate the effect of any prejudicial publicity should not be understated. This Court has observed that "[i]ncreasingly the courts are expressing confidence that *voir dire* can serve in almost all cases as a reliable protection against juror bias however induced," and instructed district courts not to give these remedies "too short shrift." *Id.* at 855–56; *see also Patton v. Yount*, 467 U.S. 1025, 1038 (1984) ("It is fair to assume that the method we have relied on since the beginning [*voir dire*], usually identifies bias.") (citation omitted).

If, after undertaking this careful analysis, the district court finds that there is a sufficient likelihood that extensive and inflammatory media coverage would be unfairly prejudicial to the defendant, that a restrictive order would be an effective means to safeguard defendant's fair trial rights, and that no less drastic alternatives would be effective in doing so, any restrictive order must be narrowly tailored to prevent the specific harm identified by the district court. *In re State-Record Co.*, 917 F.2d at 129 ("overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible").

Orders denying the press and the public access to records and proceedings in criminal cases may issue only in "limited circumstances," *Press-Enterprise Co. v.*

Superior Court, 478 U.S. 1, 9 (1986), and must be the least injurious to First Amendment interests as possible while preserving the defendant's right to receive a fair trial. It is vital that district courts follow this analytical framework and apply it properly to the facts, not just in this case, but in future cases, to avoid eroding the strong, traditional presumption of openness in criminal cases.

B. Even widespread, adverse publicity does not violate the fair trial rights of defendants.

As set forth above, preserving a defendant's Sixth Amendment right to a fair trial by an impartial jury may, in appropriate circumstances, constitute a compelling interest that justifies restrictions on the exercise of First Amendment rights. *See In re Morrissey*, 168 F.3d at 140. However, it is rare for pretrial publicity to be so unfairly and incurably prejudicial to a particular defendant as to deny him that right. In many high-profile criminal cases—from those involving the Watergate defendants and the Abscam defendants to that of Enron executive Jeffrey Skilling—*voir dire* of prospective jurors sufficiently guarded against prejudice. *See In re Charlotte Observer*, 882 F.2d at 855; *Skilling*, 561 U.S. at 384. "A presumption of prejudice, our decisions indicate, attends only in the extreme case." *Skilling*, 561 U.S. at 381.

Indeed, even when prospective jurors have been exposed to significant media coverage and have formed preliminary opinions about a case, the defendant is not incapable of receiving a fair trial. In the case of *Patton v. Yount*, for

example, a high-school student was found strangled in the woods near her home, and a man was convicted in part based on a confession obtained in violation of his *Miranda* rights. 467 U.S. at 1025. The case received extensive media coverage throughout the trial and his conviction. Upon retrial, it was revealed in *voir dire* that 77 percent of prospective jurors "admitted they would carry an opinion into the jury box." *Id.* at 1029. Eight of the 14 jurors and alternates actually seated "admitted that at some time they had formed an opinion as to Yount's guilt." *Id.* at 1029–30. Nevertheless, the Supreme Court agreed with the district court that "the *voir dire* testimony and record of publicity do not reveal the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole." *Id.* at 1040.

Similarly, in *Casey v. Moore*, a man stood trial for killing his wife. 386 F.3d at 901. Because the community was small—there were only 60,000 eligible jurors in the county—the defendant twice moved for a change of venue, arguing that he could not obtain a fair trial as a result of widespread newspaper coverage and "small-town gossip." *Id.* at 902. Both motions were denied, even after *voir dire* revealed that approximately 40 percent of the jury pool had "formed some opinion about the case," and two of the final jury panel indicated they regularly read the newspaper that allegedly provided widespread coverage of the crime. *Id.* One juror admitted that she had "prejudged" the defendant, but also stated that she was

"willing to listen and form my opinions as I hear the evidence presented." *Id.* at 903. The Ninth Circuit affirmed denial of the change-of-venue motions, stating that the defendant "has not demonstrated that prejudice could be presumed or that actual prejudice existed as a result of pretrial publicity . . . ." *Id.* at 921.

Enron executive Jeffrey Skilling also argued that his criminal trial should be transferred to another venue because of "community passion aroused by Enron's collapse and the vitriolic media treatment." *Skilling*, 561 U.S. at 377. Newspapers ran "many personal interest stories in which sympathetic individuals expressed feelings of anger and betrayal toward Enron," and the *Houston Chronicle*'s sports page "wrote of Skilling's guilt as a foregone conclusion." *Id.* at 375 n.8 (quotation marks omitted). The *Chronicle* also ran a feature, "Pethouse Pet of the Week," which mentioned that one pet of the week "enjoyed watching those Enron jerks being led away in handcuffs." *Id.* The Supreme Court, after reviewing the nature and extent of the publicity and the transcript of *voir dire*, held that the district court properly denied a motion to change venue. *Id.* at 385.

In the small number of cases in which the Supreme Court has found such overwhelming prejudice that the defendant was denied his right to receive a fair trial, the inflammatory nature of the media coverage was extreme. In *Rideau v. Louisiana*, for example, the defendant robbed a bank, kidnapped three bank employees, and killed one of them. 373 U.S. 72, 723–24 (1963). A local

television station three times aired interview footage of the defendant "in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff." *Id.* at 725. The Supreme Court held that the broadcast of the "kangaroo court proceedings" was inherently prejudicial, and that the defendant deserved "a jury drawn from a community of people who had not seen and heard" the interrogation. *Id.* at 727.

In *Sheppard v. Maxwell*, the Supreme Court overturned a conviction of a man who was accused of brutally murdering his pregnant wife. 384 U.S. at 335–36. Months of "virulent publicity" about the defendant "made the case notorious," and the media aired "[c]harges and countercharges . . . besides those for which Sheppard was called to trial." *Id.* at 354. Three months before trial, the defendant "was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl," which was "televised live from a high school gymnasium seating hundreds of people." *Id.* Despite this coverage, the Supreme Court noted that "we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone . . . ." *Id.* It was only after considering "the carnival atmosphere" created by the media in and around the courthouse *at trial* did the Supreme Court find cause to vacate Sheppard's conviction. *Id.* at 358, 363.

II. The gag and sealing orders do not satisfy constitutional requirements.

A. The record in this case is devoid of any specific findings to support a reasonable or substantial likelihood of prejudice.

Nothing in the record indicates that any news coverage relating to this case has been prejudicial to the defendant. In fact, the district court found that none of the coverage leading up to the indictment was prejudicial. *See United States v. Blankenship*, --- F. Supp. 3d ---, 2015 WL 94586, at *5 (S.D.W. Va. Jan. 7, 2015) ("the coverage prior to the indictment necessarily did not include the particulars that are most likely to prejudice a jury, namely, discussion of this defendant's guilt or innocence of the particular crimes alleged"). The district court also found that the lapse of time between the explosion in 2010 and the indictment in 2014 "created a buffer that reduced the risk of a tainted jury pool." *Id.*

The district court's conclusion that prejudice was reasonably likely to result from future news coverage was purely speculative, unsupported, and, in fact, contradicted, by specific judicial findings. The district court did not identify a single news report as prejudicial, and its only description of the news coverage did not suggest that the publicity was in any way inflammatory:

> Some of these articles include statements made by family members of the victims. Other articles include statements from investigators tasked with determining the cause of the explosion. Some center on statements made by the Defendant.

Id.

The mere fact that news coverage "include[d] statements" by family members of victims, investigators, or the defendant, does not support a conclusion that such coverage was likely to be prejudicial. To the contrary, the district court's neutral description suggests that the coverage was factual and innocuous. The proper inquiry is not whether media coverage "include[d] statements" by interested parties; news coverage leading up to the Skilling trial, for example, contained such statements—and far worse—without causing unfair prejudice. *See Skilling*, 561 U.S. at 375 n.8. Rather, for a restrictive order to issue, a court must make specific findings that news coverage is sufficiently likely to be so prejudicial that nothing short of intruding on First Amendment rights can safeguard defendant's fair trial rights.

Further, the district court's description of the community indicates that the restrictive orders entered would not be effective at preventing prejudice. Specifically, the court wrote:

> [W]e live in coal country. Many of our families depend on coal mining for their livelihood. Many families and communities within the Southern District of this state were impacted by the deaths of the miners in the Upper Big Branch mine explosion referenced in the indictment. Interest in this case is, understandably, heightened by that loss of life.

Blankenship, 2015 WL 94586, at *3. This suggests that, regardless of the nature of any future news coverage, prospective jurors will bring intense emotions and possible preconceptions to the jury box. While this does not mean that the

defendant cannot receive a fair trial in the Southern District of West Virginia, the characteristics of the community make it unlikely that future news coverage *itself* would be the but-for cause of any purportedly incurable prejudice. Particularly given the identity of the defendant and the realities of how the mine explosion itself impacted the community, there is no indication that restraining future news coverage would prevent prejudice.

B. The district court improperly rejected alternative curative remedies in order to justify expansive prior restraints on speech.

In the absence of specific findings to support likely prejudice, the district court was too quick to dismiss alternative remedies for addressing pretrial publicity in this case as "not feasible options at this time." *Blankenship*, 2015 WL 94586, at *8. Specifically, concluding that *voir dire* or a change of venue could not prevent prejudicial coverage from "tainting" the prospective jury pool before the case progressed to trial, the district court found that no "alternative" to secrecy was presently available, and that the First Amendment right of access and freedom of speech must be broadly curtailed to preserve the defendant's right to a fair trial in the Southern District of West Virginia. *Id.* at *9 ("[L]imiting access to the docket [and to potential trial participants] was, and remains the most effective method to protect against prejudice, while still allowing the public to follow the case.").[15]

[15] It does not appear that the district court seriously considered change of venue as an alternative to the gag and sealing orders. The court stated that the law prefers

This analysis is flawed. The district court's opinion wrongly suggests that a court presiding over any criminal trial that generates media attention may issue a restrictive order at any time before a jury is selected because the *voir dire* process is incapable of preventing media coverage in the first instance. Because the district court found that no prejudicial news reports had yet been published or broadcast, and offered no support for the finding that prejudice was likely to result from future publicity, the district court effectively ruled that any possibility (however unlikely) of prejudicial publicity related to a trial of widespread public interest is sufficient to justify an order that prevents any media coverage at all. This turns the First Amendment presumption of openness on its head.

Simply because a criminal case generates media coverage, even extensive media coverage, does not mean that every potential juror will have been exposed to it. Nor does it mean that every potential juror will have formed inalterable opinions as to the defendant's guilt or innocence and be incapable of making a decision based solely on the evidence presented at trial. As set forth above, courts have long recognized that *voir dire* is a powerful tool capable of weeding out those jurors with existing prejudice. Indeed, in "almost all cases," *voir dire* will provide adequate protection "against juror bias however induced." *In re Charlotte*

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a defendant to be tried in the district where he is indicted, and that victims and their families have "the right to attend trial." *Id.* at *3, *9. Yet, these factors, which exist in virtually all criminal trials, cannot be sufficient to render the change-of-venue remedy unavailable.

Observer, 882 F.2d at 856. While courts need not "capitulate" to inflammatory press coverage, *id.* at 855, neither may they escape the presumption that prior restraints on speech, and restrictions on the public's right to access court documents, are unconstitutional.[16] Here, the record contains no basis for concluding that *voir dire* is incapable of protecting defendant's fair trial rights.

III. The district court's sealing order is unconstitutionally overbroad.

The district court's sealing order, as modified, mandates that "all documents, except those authored by the Court, that contain information or argument as to the facts and substance of the case . . . be restricted to case participants and court personnel." Order, *United States v. Blankenship*, No. 5:14-cr-244 (S.D.W. Va. Jan. 7, 2015), ECF No. 64. This broad restriction on public access is insufficiently narrowly tailored to satisfy the First Amendment.

First, it is unclear how news coverage of factual matters and legal arguments contained in court documents creates a "substantial likelihood" of incurable

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[16] Nor may the district court issue a gag or sealing order merely because it is "the most effective method to protect against prejudice . . . ." *Blankenship*, 2015 WL 94586, at *9. Prior restraints on speech, sealed court documents, and closed courtrooms will almost always be effective at restricting the free flow of information about a trial. The proper inquiry is whether *alternatives* to these extraordinary measures are insufficient to preserve the defendant's rights, not whether more drastic measure are more effective. *See In re State-Record Co.*, 917 F.2d at 128 (directing courts to state "why no less drastic alternatives" to closure are feasible); *In re Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 294 (4th Cir. 2013) (stating that courts "must consider alternatives to sealing the documents" to maximize public access).

prejudice to defendant's fair trial rights. Courts have recognized that factual reporting tends not to produce the kind of publicity that prejudices a defendant's rights. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (stating that jurors are not required to be "totally ignorant of the facts and issues involved"); *Casey*, 386 F.3d at 907 (stating that "primarily factual" accounts "tend to be less prejudicial than inflammatory editorials or cartoons"). Here, the district court made no attempt to restrict access to only those documents substantially likely to lead to unfair prejudice. *See CBS Inc.*, 522 F.2d at 239 (finding a gag order overbroad when it did not separate the "prejudicial" from the "innocuous," the "subjective" from the "objective," or the "reportorial" from the "interpretive").

In addition, while the district court's sealing order was based primarily on a concern about the ability to "seat a jury,"[17] the order provides that the "restrictions will be lifted upon adjudication of the Defendant's guilt or innocence." The order provides no justification for keeping documents that contain facts or arguments

[17] *Blankenship*, 2015 WL 94586, at *4 (stating that the order "prevents the press from filling publications with quotes and accounts . . . that would likely influence or taint potential jurors and impede the Court's ability to seat a jury within the district").

under seal even after they have been presented in open court, and long after a jury has been selected. *Blankenship*, 2015 WL 94586, at *8 n.2.[18]

The press and the public depend on court documents as a reliable source of information about criminal proceedings. Reporters rely on party filings to better understand the facts of a case, and the legal positions of the parties, so that they can accurately convey that information to the public. Freelance reporters and smaller media outlets, particularly those outside the district where the trial is being held, are especially harmed when access to court documents is denied. For example, *amicus Mine Safety & Health News*, a legal reporting service for the U.S. mining industry based in upstate New York, depends on access to court documents to report on legal proceedings around the country that it cannot cover in person. Prohibiting public access to all party filings in this case effectively bars that publication from producing original reporting about a case of importance to its readers. Because the sealing order causes substantial harm to First Amendment interests, urgent relief from this Court is warranted.

IV. The gag order is unconstitutionally vague and overbroad.

The district court's gag order is likewise overbroad, and impermissibly vague. First, it is overbroad because it is not limited to attorneys, parties, and trial

[18] It is no response to say that because not *all* court records relating to this case are sealed, the order is narrowly tailored. *See id.* at *7–*8 (suggesting that because the docket itself is not sealed, the public will remain sufficiently informed).

participants. It purports to apply to anyone "who may appear during some stage of the proceedings as parties or as witnesses," and all "family members" of victims, who may or may not participate in some phase of the proceedings, are unlikely to have knowledge bearing directly on the defendant's culpability, and whose statements are unlikely to incurably prejudice prospective jurors. A gag order that restricts any and all such individuals from speaking about the facts or substance of a criminal case is "an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment . . . ." *CBS Inc.*, 522 F.2d at 240.[19]

Further, the order makes no exception for speech concerning matters already in the public record. *See Brown*, 218 F.3d at 418 (affirming a denial of a motion to modify a gag order, when the order made exceptions "for matters of public record and matters such as assertions of innocence"). The district court made no attempt to narrowly tailor its gag order to statements likely to threaten the integrity of the trial. *Cf. In re Morrissey*, 168 F.3d at 140 (holding that a rule restricting lawyers'

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[19] To be clear, the gag order violates the First Amendment rights of those individuals restrained from speaking, as well as the rights of the press and public to receive information from them. The record makes clear that there are speakers willing to convey information to the public who are unable to do so because of the court's gag order. *See* Emergency Mot. and Mem., *United States v. Blankenship*, No. 5:14-cr-244 (S.D.W. Va. Jan. 22, 2015), ECF No. 69; *see also Stephens v. Cnty of Albemarle*, 524 F.3d 485, 492 (4th Cir. 2008) ("[T]o have standing to assert a right to receive speech, a plaintiff must show that there exists a speaker willing to convey the information to her.").

speech is narrowly tailored because it "prohibits only the statements that are likely to threaten the right to a fair trial and an impartial jury").

The gag order is overbroad in its duration. Notwithstanding its stated purpose to preserve the ability to seat an impartial jury, the gag order is not addressed to that concern. The order's restrictions on speech will continue until "adjudication of the Defendant's guilt or innocence," long after a jury has been selected. *Blankenship*, 2015 WL 94586, at *8 n.2.

The gag order is also unconstitutionally vague. Speculative and undefined terms such as "those who may appear during some stage of the proceedings as parties or as witnesses" make it impossible to determine to whom the order's restrictions apply. *Blankenship*, 2015 WL 94586, at *3 n.1. Indeed, while this Court upheld a gag order on one occasion that directed "potential witness[es]" not to make extrajudicial statements relating to the testimony they were to give, that order expressly limited the scope of "potential witness[es]" to those "who ha[d] been notified by the government or by defendants that he or she may be called to testify in the case, or any person who has actually testified in this case." *In re Russell*, 726 F.2d at 1008–09. Without any apparent limitation on "who may appear" at trial, the gag order at issue here is simultaneously vague and overbroad.

Additionally, the gag order is vague because it does not clearly define what a person subject to the order may say. Although the district court explained that the

"order does not apply like a blanket covering all statements and documents that may have anything to do with the facts or substance of this case," *Blankenship*, 2015 WL 94586, at *10, the gag order prohibits "any statements of any nature, in any form . . . regarding the facts or substance of this case." Amended Order, *United States v. Blankenship*, No. 5:14-cr-244 (S.D.W. Va. Jan. 7, 2015), ECF No. 65. If indeed the order permits individuals to speak about the case, the contours of its prohibition are undefined, and it thus presents "an unacceptable risk that speakers will self-censor . . . ." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to grant the writ of mandamus and vacate the gag and sealing orders of the district court.

Respectfully submitted,

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
Gregg P. Leslie, Esq.
Katie Townsend, Esq.
Tom Isler, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1250
Washington, D.C. 20005
(202) 795-9301
bbrown@rcfp.org

* Additional counsel for *amici* are listed in Appendix B

Dated: February 20, 2015
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6,881 words, excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Time New Roman font.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Dated: February 20, 2015
Washington, D.C.

No. 15-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE THE WALL STREET JOURNAL, THE ASSOCIATED PRESS, CHARLESTON GAZETTE, NATIONAL PUBLIC RADIO, INC., AND THE FRIENDS OF WEST VIRGINIA PUBLIC BROADCASTING, INC.,
Petitioners.

Petition for a writ of mandamus directed to the United States District Court for the Southern District of West Virginia

APPENDICES A & B TO THE BRIEF OF *AMICI CURIAE*

Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
Gregg P. Leslie, Esq.
Katie Townsend, Esq.
Tom Isler, Esq.
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1250
Washington, D.C. 20005
(202) 795-9301

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors working to defend and preserve 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 Act litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases.

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.

AOL, Inc. (NYSE: AOL) is a media technology company with a mission to simplify the internet for consumers and creators by unleashing the world's best builders of culture and code. As the fourth largest online property in the U.S., with

more than 200 million monthly consumers of its premium brands, AOL is at the center of disruption of how content is being produced, distributed, consumed and monetized by connecting publishers with advertisers on its global, programmatic content and advertising platforms. AOL's opportunity lies in shaping the future of the digitally connected world for decades to come.

The 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 Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service world-wide and is syndicated to more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to millions of readers and listeners each day, and has published more than one hundred million stories.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany* (N.Y.) *Times Union*; nearly 300 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing,

including a joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Journal Sentinel, Inc., is a wholly owned subsidiary of Journal Communications, Inc., which was founded in 1882 and is headquartered in Milwaukee, Wisconsin. We are a diversified media company with operations in television and radio, publishing and interactive media. We publish the Milwaukee Journal Sentinel, which serves as the only major daily newspaper for the Milwaukee metropolitan area, and several community publications in Wisconsin. Through Journal Broadcast Group, we own and operate 15 television stations and 35 radio stations in 12 states. Our interactive media assets build on our strong publishing and broadcasting brands.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 29 daily newspapers and related websites as well as numerous community newspapers and niche publications.

Mine Safety & Health News is an award-winning, independent, legal newsletter and website covering the Mine Safety & Health Administration, federal mine safety and mine safety law throughout the United States. It is published by Ellen Smith d/b/a Legal Publication Services.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

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.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

New England Newspaper and Press Association, Inc. ("NENPA") is the regional association for newspapers in the six New England States (including Massachusetts). NENPA's corporate office is in Dedham, Massachusetts. Its purpose is to promote the common interests of newspapers published in New

England. Consistent with its purposes, NENPA is committed to preserving and ensuring the open and free publication of news and events in an open society.

The New England Society of Newspaper Editors (NESNE) has, since 1955, served as the premier organization comprising editors at newspapers, broadcast stations, and Internet sites throughout the six New England states. NESNE advocates on behalf of its more than 1,000 members to provide training through workshops and seminars, help them grow their audience, present awards to recognize excellence in our industry and lend assistance and with Open Meeting and First Amendment and public records law issues.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters

publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

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 Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in this and other federal courts, and in state courts around the country.

Tribune Publishing Company is one of the country's leading publishing companies. Tribune Publishing's ten daily publications include the Chicago Tribune, Los Angeles Times, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, Daily Press, Capital Gazette, and Carroll County Times. Popular news and information websites, including www.chicagotribune.com and www.latimes.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

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.

APPENDIX B

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors and Association of Alternative Newsmedia

Regina Thomas
Assistant General Counsel
AOL Inc.
22000 AOL Way
Dulles, VA 20166

Jonathan Bloom
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Counsel for The Association of American Publishers, Inc.

Randy L. Shapiro
Global Media Counsel
Bloomberg LP
731 Lexington Avenue
New York, NY 10022

Judy Alexander
Chief Legal Counsel
The Center for Investigative Reporting
2302 Bobcat Trail
Soquel, CA 95073

Peter Scheer
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

Lynn Oberlander
General Counsel, Media Operations
First Look Media, Inc.
162 Fifth Avenue
8th Floor
New York, New York 10010

Jonathan Donnellan
Kristina Findikyan
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Mary Hill Taibl
Senior Vice President, General Counsel, Secretary and Chief Compliance Officer
Journal Sentinel, Inc.

Karole Morgan-Prager
Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Rachel Matteo-Boehm
Bryan Cave LLP
560 Mission Street, Suite 2500
San Francisco, CA 94105
Counsel for Courthouse News Service

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Counsel for National Press
Photographers Association

Beth R. Lobel, Esq.
Vice President, Media Law
NBCUniversal Media, LLC
30 Rockefeller Plaza
New York, NY 10112

Robert A. Bertsche (BBO #554333)
Prince Lobel Tye LLP
100 Cambridge Street
Boston, MA 02114
Counsel for New England Newspaper
and Press Association, Inc.

Robert A. Bertsche
Prince, Lobel, Glovsky & Tye LLP
100 Cambridge Street
Boston, MA 02114-1024
Counsel for New England Society of
Newspaper Editors

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Charles D. Tobin
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006
Counsel for The National Press Club

Michael Kovaka
Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
Counsel for Online News Association

Gail C. Gove
Chief Counsel, News
Katharine Larsen
Counsel, News
Reuters America LLC
3 Times Square, 20th Floor
New York, NY 10036

Bruce W. Sanford
Laurie A. Babinski
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional
Journalists

Karen H. Flax
Tribune Publishing Company
435 North Michigan Ave.
Chicago, IL 60611

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for the Newspaper Association of America

Jennifer A. Borg
General Counsel
North Jersey Media Group Inc.
1 Garret Mountain Plaza
Woodland Park, NJ 07424

Jeff Glasser
Tribune Publishing Company
202 W. 1st Street
Los Angeles, CA 90012

J. Joshua Wheeler
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Dr.
Charlottesville, VA 22911