IN THE SUPREME COURT OF OHIO

M.R., A CINCINNATI POLICE OFFICER	)	Supreme Court case no. 2020-1131
Plaintiff-Appellee,	)	On Appeal from the First District Court of Appeals, Hamilton County, case no. C-200302
vs.	)	Hamilton County Common Pleas case no. A2002596
JULIE NIESEN, et al.,	)	
Defendants-Appellants.	)	

Merit Brief Amici Curiae of the Ohio Coalition for Open Government, the Ohio News Media Association, and the Ohio Association of Broadcasters

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio News Media Association is a state trade association representing all of Ohio's daily and weekly newspapers.

The Ohio Coalition for Open Government was established by the Ohio News Media Foundation in 1992 and supports activities that benefit those who seek compliance with public access laws.

The Ohio Association of Broadcasters is the state trade association representing the interests of over-the-air radio and television stations in Ohio.

Each of these *amici* have a vested interest in ensuring that Ohio's court system remains open to the public and the press, so that vital information can be shared by their members with Ohio citizens.

II. STATEMENT OF THE FACTS AND CASE

Given the lengthy procedural history of this case and the extensive factual record, in the interest of brevity the Amici adopt Appellants' statement of the facts and case.

III. INTRODUCTION

This Court unanimously held less than one year ago that a temporary order limiting speech is a prior restraint subject to First Amendment scrutiny. *Bey v. Rasawehr*, 161 Ohio St.3d 79, 2020-Ohio-3301, 161 N.E.3d 529, ¶ 25. Notwithstanding the outcome in *Bey*, the First District dismissed Plaintiff-Appellee's appeal on the grounds that it lacked jurisdiction to review the temporary restraining order issued by the trial court that allegedly contained a prior restraint.

Amici support Appellants position that any order containing a prior restraint should be immediately appealable. But even without addressing the propriety of appealing a temporary restraining order the First District had another option which would have allowed it to address the merits of the appeal: the First District could have treated the appeal as an action seeking a writ of mandamus or a writ of prohibition, following *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) and well-established Ohio Supreme Court precedent.

Moreover, given the scope of the proposition of law accepted for review the Court should use this unique opportunity to clarify that writs of mandamus or prohibition are also available remedies to parties when courts issue temporary restraining orders that run afoul of the First Amendment and Article I, Section 11 of the Ohio Constitution, in the same way that they are available to nonparty news media.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1: When a lower court imposes a prior restraint on expression, immediate appellate review is required.

News gathering is unquestionably protected by the First Amendment. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). And as this Court has previously held, broadly restricting the ability of news organizations to access participants in litigation matters violates the First Amendment. *State ex rel. Cincinnati Post*, 59 Ohio St.3d 103, 570 N.E.2d 1101 (1991) (holding that a post-verdict order that "[n]o one is to talk to the jurors about the case, and the jurors aren't to talk to anybody about it" is unconstitutional); see also *State ex rel. Dayton*

Newspapers, Inc. v. Phillips, 46 Ohio St.2d 457, 467, 351 N.E.2d 127 (1976), quoting *Estes v. Texas*, 381 U.S. 532, 541-42, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) ("[i]t is already settled law that freedom of the press includes the right to gather, write and publish the news, and that 'reporters * * * are plainly free to report whatever occurs in open court through their respective media.'").

Yet despite this well-established precedent, the First District's refusal to review the Trial Court's order has effectively prevented Ohio news media members from gathering simple (and true) information from the litigants in this case to provide an answer to this basic, fundamental question: "who filed this lawsuit?" An order restraining access of the news media to this type of "directly impairs or curtails its ability to obtain and publish newsworthy information[,]" in violation of the First Amendment. *State ex rel. Dispatch Printing Co. v. Golden*, 2 Ohio App.3d 370, 442 N.E.2d 121 (10th Dist. 1982), citing *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St.2d at 459.

When courts issue unconstitutional orders restricting access to pending litigation by the news media, then "[p]rohibition is the appropriate action[.]" *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 19, quoting *State ex rel. Plan Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas, Juv. Div.*, 90 Ohio St.3d 79, 82, 734 N.E.2d 1214 (2000). Writs of prohibition are often the only avenue available to members of Ohio's media to challenge such orders, because they are often subject to unconstitutional gag orders as nonparties. As this Court recognized almost fifteen

years ago, "prohibition is the only remedy available to nonparties who wish to challenge an order which restricts the rights of free speech and press of such nonparties." *State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas*, 77 Ohio St.3d 40, 43, 671 N.E.2d 5 (1996); *see also In re T.R.*, 52 Ohio St.3d 6, 556 N.E.2d 439 (1990) paragraph one of the syllabus.

And writs of prohibition are not just available in cases where courts restrict access to courtroom proceedings. They are also proper where courts issue broad orders limiting statements that litigation participants may make to the news media. For instance, in *State ex rel. Dispatch Printing Co.*, 2 Ohio App.3d 370, a trial court issued orders that "were not made directly against the press, but were instead directed to those persons from whom the press would logically obtain most of the information that might be the source of news stories pertaining [to the case]." *Id*, at 372. The Tenth District correctly held that this was a prior restraint on speech that was immediately subject to review through a writ of prohibition and issued a writ. *Id.*, at 375-76.

The proposition of law accepted by the Court is whether when a "lower court imposes a prior restraint on expression, immediate appellate review is required." Given the breadth of this proposition, the Court should use this opportunity to confirm established precedent that non-parties can challenge prior restraints by seeking a writ. Moreover, if the Court were to hold that a temporary restraining order is not immediately appealable even when it arguably contains a prior

restraint, the Court should recognize that parties also should be able to seek relief through a writ of prohibition or mandamus.

This was the approach taken by the Sixth District in *Blair Assocs. Ins. Agency v. Pompora*, Sixth Dist. Ottawa No. OT-97-032, 1997 Ohio App. LEXIS 4693 (1997). There, a dispute arose among business partners going through a typical business divorce when they began fighting over existing clients. The trial court entered a preliminary injunction, ordering two of the partners to "cease and desist" from contacting certain former clients. *Id.*, at *2. The affected partners appealed the preliminary injunction directly to the Sixth District, alleging that the preliminary injunction was an unconstitutional prior restraint of their speech. *Id.*, at *4.

The court recognized that the First Amendment requires immediate appellate review of prior restraints under *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96, (1977) but struggled with its belief that, notwithstanding *Skokie*, the preliminary injunction was not a final, appealable order. *Blair Assocs. Ins.,* 1997 Ohio App. LEXIS 4693 at *8-9. The court resolved the question by turning to *News Herald* and finding that an original action seeking a writ of prohibition was the appropriate remedy to challenge the cease and desist order. *Id.*

The court stated, "[i]n this approach, it is recognized that such an order is not final and appealable immediately, and that since immediate review by direct appeal is not available, an original action in the form of a Petition for a Writ of Prohibition may be utilized to immediately challenge the preliminary injunction. We find that

this satisfies the *Skokie* holding that the state must afford immediate review of these preliminary injunctions." *Id.*, at *9.

This approach is consistent with federal law. In the case of *In re King World Productions, Inc.*, the Sixth Circuit addressed a temporary restraining order that acted as an unconstitutional prior restraint. 898 F.2d at 59. Following the unconstitutional order, the affected party filed for a writ of mandamus. In addressing the merits of the request, the Sixth Circuit stated, "[a] temporary restraining order is not a final appealable order and in the context of a first amendment prior restraint, a direct appeal after the conclusion of the proceedings in the district court would be meaningless." *Id.* The court continued, "[i]ndeed, mandamus is the only vehicle for obtaining appellate review of an improperly issued temporary restraining order when the first amendment runs afoul of a conflicting right and prior restraint may result." *Id.*, citing *CBS v. U.S. District Court of the Central District of California*, 729 F.2d 1174, 1177 (9th Cir. 1983).

While the Sixth District in *Blair Assocs. Ins. Agency* dismissed the appeal after confirming that the parties could seek a writ of prohibition, that was not the court's only option. Where parties directly appeal unconstitutional temporary orders in lieu of seeking a writ of prohibition or mandamus, courts can still treat the direct appeal as a request for a writ. See *P&G v. Bankers Trust Co.*, 78 F.3d 219, 228 (6th Cir. 1996) (Martin, concurring) (noting that a prior appeal in the case had been dismissed by the appellate panel, and stating that, "[a]t that state, the nature of the appeal should have been converted to a mandamus action under *In re King World*

Productions, Inc., [citation omitted], and the panel should have exercised its discretion to set the prior restraint aside.").[1]

Immediate access to courts of appeal when litigants encounter unconstitutional prior restraints of speech furthers longstanding Ohio public policy, as well. American citizens have a right to know what occurs in their courtrooms, a right that has been vindicated repeatedly. *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L. Ed. 1546 (1947) ("[w]hat transpires in the court room is public property."). This is particularly true where, as here, the underlying matter involves a public official, acting within the course of his duties, at a public event.

Nonparties such as the amici and their members fulfil a vital role in American democracy, standing in the shoes of the public to monitor and report on these public proceedings. Validation from this Court of the availability of writs of mandamus or prohibition to challenge unconstitutional prior restraints of speech that impede the news gathering process will increase transparency, faith in Ohio's judicial system, and the likelihood that justice is administered fairly without regard to a particular litigant's status. Indeed, as the Fifth Circuit recently acknowledged (quoting English philosopher and judge Jeremy Bentham), "publicity is the very soul of justice." *Binh Hoa Le v. Exeter Fin. Corp*., 5th Cir. No. 20-10377, 2021 U.S. App. LEXIS 6663, *13 (Mar. 5, 2021).

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[1] While the Eighth District questioned whether mandamus is the proper vehicle for similar cases in *State ex rel. White v. Koch*, 8th Dist. Cuyahoga No. 80426, 2001 Ohio App. LEXIS 5009 (a case that the Court held did not involve a restriction on speech), it also simultaneously agreed that a writ of prohibition *is* the appropriate remedy where a prior restraint of speech violates the First Amendment. *Id*., at *11-12.

V. CONCLUSION

Given Ohio's strong protections for the freedom of speech and of the press, this Court should clarify that immediate appellate review of unconstitutional prior restraints is *always* available – if not by direct appeal (even of a temporary order), then by seeking a writ of mandamus or prohibition.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief of Amicus Curiae the Ohio Coalition for Open Government, the Ohio News Media Association, and the Ohio Association of Broadcasters* has been electronically filed with Supreme Court of Ohio on May 3, 2021 and has been separately served by electronic mail upon the following:

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