RECORD NO. 18-1762

In The

United States Court Of Appeals

For The Fourth Circuit

In re: MURPHY-BROWN, LLC,

Petitioner,

On 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*, No. 7:14-cv-185-BR, and *Artis v. Murphy-Brown, LLC,* No. 7:14-cv-237-BR

CORRECTED BRIEF OF *AMICI CURIAE* NORTH CAROLINA PORK COUNCIL AND NATIONAL PORK PRODUCERS COUNCIL IN SUPPORT OF GRANTING THE PETITIONER'S WRIT OF MANDAMUS AND VACATING THE GAG ORDER OF THE DISTRICT COURT

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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, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Pork Council
(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:

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: Matthew Nis Leerberg Date: August 7, 2018

Counsel for: North Carolina Pork Council

CERTIFICATE OF SERVICE

****

I certify that on August 7, 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:

Matthew Nis Leerberg
(signature)

August 7, 2018
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Pork Producers Council
(name of party/amicus)

who is Amicus, makes the following disclosure:
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Signature: Matthew Nis Leerberg Date: August 7, 2018

Counsel for: National Pork Producers Council

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici file this brief in support of Petitioner's request for a writ of mandamus directing the district court to vacate the district court's gag order. *Amici*, both of which are nonprofit organizations related to the pork industry, have a keen interest in the outcome of these cases, including defending the First Amendment rights of their farmer members subject to the gag order as well as preserving their ability to communicate with their members about this litigation. In addition, both organizations routinely are called upon to communicate with the public both in North Carolina and around the country and sometimes are called upon to provide legislative testimony. *Amici* support the arguments made by Petitioner but write separately to emphasize the specific ways the gag order burdens their First Amendment rights and the First Amendment rights of their members.

The North Carolina Pork Council is a nonprofit North Carolina corporation that was established in 1962. The organization is a 501(c)(5) trade association with the mission to promote and educate to ensure a socially responsible and profitable North Carolina pork industry. The North Carolina Pork Council engages in public policy and advocacy efforts as well as research,

producer education, promotion, and consumer information programs and services. The majority of the Board of Directors is elected by the full membership of the association. In addition to members directly engaged in the pork industry, the Board of Directors of the North Carolina Pork Council has members representing allied industry and meat processors, state officers, representatives of NC State University, NC State University College of Veterinary Medicine, and the NC Department of Agriculture. No single member of the North Carolina Pork Council funds or controls its activities.

The National Pork Producers Council is a 501(c)(5) nonprofit agricultural organization representing forty-two affiliated state associations including the North Carolina Pork Council, serving as the global voice of the U.S. pork industry. The National Pork Producers Council works to ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets. Through public-policy outreach, the organization fights for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of America's 60,000 pork producers.

The National Pork Producers Council is governed by a fifteen-member Board of Directors. Board members are elected from the ranks

of producer-delegates, each of whom is elected by the members of their respective state. Currently, the speech of at least one corporate officer and one board member is restricted by the gag order.

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

SOURCE OF AUTHORITY TO FILE

Amici, with the consent of the parties, have sought leave of this Court to file this brief in support of Petitioner.

SUMMARY OF ARGUMENT

All but the most carefully crafted, narrow gag orders are unconstitutional. After all, a gag order is a prior restraint on speech—imposing a blanket prohibition in advance instead of punishing unlawful speech if and when it actually occurs. The prospective nature of prior restraints is significant: "If it can be said that a threat of criminal or civil

sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Because a prior restraint is "the most serious and least tolerable infringement on First Amendment rights" possible, those defending a gag order must surmount a hefty burden to justify it. *Id.*

The gag order on appeal here fails to overcome that presumption of unconstitutionality for multiple, independent reasons. The order reaches beyond the parties in the underlying litigation, purporting to bind "all potential witnesses" in cases that have not even undergone discovery. Worse, the order leaves members of trade associations like the *amici* in limbo, without clear direction as to whether the order applies to them or not and what it means. This, of course, is one of the hallmarks of a poorly crafted prior restraint—the chilling of a wide swath of otherwise lawful speech that occurs when the restraint contains vague dictates and sweeping scope.

At a minimum, absent narrowly crafted language, a factual record to support each restraint, and reasonable time limitations, no such order should ever be allowed to muzzle those with an interest in speaking about the critical issues in play in the underlying litigation.

Amici join Petitioner in urging this Court to issue its writ of mandamus directing the district court to vacate its gag and sealing orders.

ARGUMENT

I. THE GAG ORDER FAILS TO MEET MINIMUM CONSTITUTIONAL STANDARDS.

Gag orders, like all prior restraints, are presumptively unlawful. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

A narrow gag order may be appropriate only if the court first makes specific findings: (1) that there is a compelling interest that will be harmed without intervention; (2) that no alternative measures can adequately protect that interest; *and* (3) that the injunction would effectively prevent the threatened harm. *See Neb. Press Ass'n v. Stuart*, 427 U.S. at 562, 570; *cf. N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 716–23 (1931). Each of these findings must be supported by *evidence*, not speculation. *See Neb. Press Ass'n*, 427 U.S. at 565 (finding no record evidence to support finding that alternative measures would be inadequate); *CBS, Inc. v. Davis*, 510

U.S. 1315, 1318 (1994) (explaining that "speculative predictions" of the harm that might result without intervention are insufficient).

To get a sense of where the Supreme Court draws the line on prior restraints, consider:

Case	**Prior Restraint**	**Constitutional?**
Near v. Minnesota, 283 U.S. 697, 716 (1931)	Prior restraint on publication of specific troop movements during wartime	Yes
Id.	Prior restraint on incitements to acts of violence and overthrow by force of the government	Yes
Id. at 712	Prior restraint on "malicious" or "scandalous" newspapers	No
Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)	Prior restraint to stop coercive pamphleteering targeting a particular real estate broker	No
Neb. Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976)	Prior restraint on publication of earlier confession by murder defendant pending trial	No
N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971)	Prior restraint on publication of illegally leaked, classified study of U.S. policy in Vietnam	No

Against that backdrop, the prior restraint here fails.

A. There Is No Compelling Need for a Gag Order.

A criminal defendant has a constitutional right to an impartial jury. Civil litigants, to a lesser extent, are entitled to the same.

An impartial jury, however, is not the same thing as an ignorant jury. Jurors with knowledge of the case, the industry it involves, or even the parties can still be impartial. Before the court can impose a gag order, there must be evidence that news coverage of the trial would make it impossible for a court to seat a jury of twelve people able to render an unbiased verdict based solely on the evidence presented in court.

Presuming such widespread bias is only appropriate in "extreme circumstances." *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987) ("Only in extreme circumstances may prejudice to a defendant's right to a fair trial be presumed from the existence of pretrial publicity itself."). Complainers of pretrial publicity must show activity such as the repeated airing of a defendant "personally confessing in detail to the crimes with which he was later to be charged" to establish the type of prejudice that could lead to a conclusion that court proceedings within that community

would be rendered a "hollow formality." *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

Thus, it is a mistake for a court to latch on to the *volume* of media coverage as support for imposing a gag order. The issue is whether the *content* of that publicity is so prejudicial that it has irredeemably infected the minds of the jury pool, rendering an unbiased trial impossible.

After all, there is no requirement that jurors enter the *venire* oblivious to the facts of a case. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If the pretrial publicity is not so prejudicial as to render the trial a "hollow formality," a juror-by-juror inquiry through *voir dire* can ferret out the existence of irremediable bias. "[V]oir dire examination is the trial court's metric of juror partiality." *Wallace v. Branker*, 354 Fed. App'x 807, 821 (4th Cir. 2009) (*citing Murphy v. Florida*, 421 U.S. 794 (1975); *accord Dobbert v. Florida*, 432 U.S. 282, 303 (1977) ("Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. . . . But under *Murphy*, extensive knowledge in the community of either the

crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair."). Even when jurors have been exposed to pretrial publicity, "defendants must still demonstrate that actual prejudice resulted." *Irvin*, 366 U.S. at 723.

Here, the record and gag order are devoid of any evidence or factual findings demonstrating such prejudice. The trial court did not make any meaningful determination that the integrity of this case or associated cases was in jeopardy. Rather, the order includes cursory references to a "significant increase in trial publicity" and the "volume and scope of prejudicial publicity" during the first two trials. (J.A. 616–17). On that basis alone, the district court concluded that there was a "substantial risk" of "tainting or biasing future jury pools." (J.A. 617). It ordinarily is not proper for a judge to impose restrictions in one trial based on incidents from another. *In re Application of N.Y. Times Co.*, 878 F.2d 67, 67–68 (2d Cir. 1989).

With no evidence to support this conclusion, the gag order fails to adequately show *actual* prejudice. *See Neb. Press Ass'n*, 427 U.S. at 554 ("[P]retrial publicity even pervasive, adverse publicity does not

inevitably lead to an unfair trial."). This reason alone requires vacatur.

B. The Trial Court Did Not Consider Alternatives.

Second, the district court failed to consider alternative means of securing juror impartiality.

The courts have a standard set of tools to protect juror impartiality: *voir dire*, jury instructions, even sequestration in rare cases. Reaching outside that toolbox for the prior-restraint sledgehammer must be the *last* resort, when all other tools will be inadequate. In other words, imposing a gag order is constitutional only where insurmountable prejudice is otherwise unavoidable.

The underlying cases here are, of course, of higher profile than most. But extensive pretrial publicity often attends high-profile cases. After all, it is tautological that the press covers cases in which the public has interest. This is a feature of our democracy, though, not a bug.

Cutting off public access to the impressions and insights of those involved in litigation is almost never the proper response to publicity, especially when the court can address pretrial publicity through less intrusive means like extensive *voir dire*. *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.").

Without question, the breadth of the First Amendment's protection of speech imposes burdens on courts trying high-profile cases. *Voir dire* may take days. Multiply that by twenty-six cases, and courts trying matters like this are facing years of careful management of juror biases. This Court knows that the task isn't easy:

> We can sympathize with the problems of a trial judge handling a number of trials resulting from an ongoing investigation of elected members of a State's legislative body. There is always a tension between First Amendment right to a free press and Sixth Amendment right to a trial by an impartial jury.

In re State-Record Co., Inc., 917 F.2d 124, 128 (4th Cir. 1990).

Without a showing of widespread and unfixable prejudice, though, the district court's dilemma does not arise from the tension between two constitutional provisions. Instead, the district court is called upon to resolve the tension between the constitutional right to free speech on the one hand, and the logistical problems posed by lengthy and repeated *voir dire* on the other. The resolution of *that*

dilemma is clear: in a battle between the Constitution and convenience, the Constitution always wins.

C. The Gag Order Entered Will Not Be Effective.

Third, the gag order entered in this case will not work. This too compels vacatur. *Neb. Press Ass'n*, 427 U.S. at 565–67 (requiring a showing of "probable efficacy" of a prior restraint).

It simply is not reasonable to think that any gag order will reduce coverage of these cases or blunt the public's interest in the subject matter. The litigation has been covered by news media ranging from local publications such as the *News & Observer*[1] and *Indy Week*,[2] to national publications such as the *Wall Street Journal*[3] and *Fortune* magazine,[4] to overseas publications such as *The Guardian*.[5] While some of this coverage has involved factual reporting on trial developments, a significant portion has taken the form of editorials and other commentary.[6] There also has been coverage from advocacy groups such

[1] https://www.newsobserver.com/news/local/article214096384.html
[2] https://tinyurl.com/IndyWeek-VerdictRpt
[3] https://tinyurl.com/WSJ-VerdictRpt
[4] https://tinyurl.com/Fortune-VerdictRpt
[5] https://tinyurl.com/Guardian-Hog
[6] Ned Barnett, with the News and Observer has been a particularly frequent critic of the industry and uses his column to advocate often for

as NC Policy Watch[7] and the Food and Water Watch,[8] and even coverage by the Maryland Risk Management Education Blog.[9] Additionally, there has been extensive coverage and discussion in social media.[10] Some members of the legal academy, including Ryke Longest, director of the Duke Environmental Law and Policy Clinic, have spoken with the media offering serious criticism of the industry.[11]

These speakers, who clearly fall outside the scope of the gag order, can and will continue to speak about the underlying litigation.

Regardless, even the existing articles and commentaries on the litigation have a lengthy shelf life. Unlike print publications, internet content lasts forever. The greatest risk of prejudice isn't the existence of publicity; it is the existence of the *one-sided* publicity that has resulted

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the Plaintiffs and to attack the Defendants.
https://www.newsobserver.com/opinion/opn-columns-blogs/ned-barnett/

[7] http://pulse.ncpolicywatch.org/?s=murphy+brown+nuisance

[8] https://tinyurl.com/FWWatch-Hog

[9] https://tinyurl.com/MdRiskMgmt

[10] *See, e.g.*, @lisasorg; @NCPolicyWatch; Upper Neuse River Keeper, https://tinyurl.com/UNRK-Post; Waterkeeper Alliance, https://tinyurl.com/WK-Post; New Food Economy, https://tinyurl.com/NewFood-Post; Progress NC Action, https://tinyurl.com/PNNC-Post

[11] https://www.newsobserver.com/news/local/article214096384.html

from the gag order that is at once overbroad and under-inclusive. Someone reading the paper today, who has no reason to know that he may be a juror in a future case, is reading bold headlines reporting multimillion-dollar verdicts. That person, having no idea he or she may later become a juror, may read scathing comments from the first, second, and third trials. Because the court cannot prevent today's readers (tomorrow's jurors) from accessing current and past articles right now, the best way to address that fact is to assure that today's readers are afforded the opportunity to read the broad range of viewpoints, not just one side, coupled with thoughtful voir dire when those next juries are selected. After all, even when there are drawbacks to allowing *some* speech, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927), (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Pork is the world's most-consumed meat,[12] and is the State of North Carolina's top agricultural export.[13] The litigation brought against

[12] https://tinyurl.com/FoodAndAg
[13] https://tinyurl.com/NCDptOfAg

Petitioner already has resulted in verdicts of hundreds of millions of dollars. The public is watching and will be for years. No gag order can change that or curb "additional publicity." It is doomed to fail and should be vacated.

II. THE GAG ORDER IS OVERBROAD AND VAGUE

The gag order is overbroad in both scope and duration.

First, it reaches beyond the parties and their counsel. To be sure, the Supreme Court has permitted a *partial* limitation on public comments by attorneys during a pending case. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1076 (1991). Thus, an order restraining speech that was "substantially likely to have a materially prejudicial effect" on the proceeding was upheld. *Id.*

But even some limits on lawyer speech are disallowed. For example, the Fifth Circuit recently struck down a blanket prohibition preventing a criminal lawyer from giving or authorizing extrajudicial statements or interviews during the pendency of a trial. *In re Goode*, 821 F.3d 553, 561 (5th Cir. 2016). Less draconian measures might have sufficed: "change of venue, jury sequestration, searching *voir dire*, and emphatic jury instructions should have been considered." *Id.*

Here, the gag order allows the covered parties to repeat public information like dates and outcomes but prohibits "*any* elaboration or any kind of characterization whatsoever." (J.A. 618) (emphasis added). This is not a targeted restriction like in *Gentile*—it is a blanket muzzle like in *Goode*.

Moreover, the gag order reaches not just parties and lawyers, but also their representatives and agents, and even *potential* witnesses. The breadth of that last category is staggering, when there are still twenty-three cases to be tried in the coming years.

Indeed, a similar gag order was stricken in *People v. Sledge*, 312 Mich. App. 516, 528–31, 879 N.W.2d 884, 892–94 (Mich. Ct. App. 2015). In *Sledge*, the trial court had entered a gag order forbidding all *potential* trial participants from making any statements to the media. *Id.* at 520, 879 N.W.2d at 888. The appellate court found the order to be an unconstitutional prior restraint, as it effectively eliminated all meaningful sources of information concerning the case. *Id.* at 528–31, 879 N.W.2d at 892–94.

In this case, the order itself is not even clear. The term "representative" is not defined, which will lead to a chilling effect on some

individuals and organizations. While *amici* are not covered by the gag order directly, some members of *amici* here are uncertain as to its potential reach. "Public communications media" is similarly vague, again leading to unintended chilling effects. Third, the phrase "Statements or information intended to influence public opinion regarding the merits of this case" is so broad as to potentially sweep within its scope unintended communications.

Perhaps the segment of the pork industry hardest hit by the gag order is the growers, many of whom are members of *amici*. The growers are farmers. They are small businesses. Their hard work raising hogs is an essential step in the process of getting pork into the food supply in North Carolina, the country, and beyond. Their very livelihood is impacted at an existential level by the pending litigation.

And some are potential witnesses. Depending on how the gag order is interpreted, some farmers may not be able to say anything until all of the dozens of cases are tried. In that event, they would need to remain silent for years about the direct threat these cases pose to their livelihood.

Some growers dare not speak publicly when the order is so vague in its scope. Anything they say publicly "*could* interfere" with fair trial

rights—at least as the plaintiffs would see it. Lacking any concrete direction from the district court or a clearly written order, they must stay silent, robbed of fundamental free-speech and petition rights.

These petition rights are not hypothetical, either. Over the past two years, hog farmers and others provided critical feedback to the North Carolina General Assembly as it considered, debated, and passed the Farm Act of 2018—addressing some of the very issues raised by this litigation. Considering the importance of the pork industry to the economy of North Carolina, legislative issues no doubt will continue to arise. Indeed, on Friday, August 3, 2018, both U.S. Senator Thom Tillis and Congressman David Rouzer (N.C. 7th District) expressed interest in introducing Federal legislation similar to the Farm Act of 2018.[14] As that debate proceeds, covered growers will not be able to participate or otherwise petition their government for redress, even though they are among the most qualified individuals to provide relevant and probative testimony.

[14]https://tinyurl.com/Greensboro-N-R; see also https://tinyurl.com/WSJ-Verdict3

Some growers and others who *might* be witnesses in future trials now must refrain from important work within their industry. This loss too is not hypothetical. For example, last Friday, August 3, 2018, a Congressional Roundtable was held to discuss the impact that the lawsuits have on livestock farming in North Carolina and around the country. David Herring, the President-Elect of *amicus* National Pork Producers Council and a North Carolina pork producer, was slated to participate on that panel. He removed himself from that role out of an abundance of caution due to the gag order. Because members of the press were present for the Congressional Roundtable, Mr. Herring's voice was not heard at an event organized by his elected members of Congress that included numerous state and federal officials.

Other witnesses who are members of *amici* have refrained from participating even in internal communications. Take, for example, the environmental committee of *amicus* the National Pork Producers Council. The committee's work unavoidably involves issues at the core of this litigation, such as reduction of air emissions. Kraig Westerbeek, one of the main witnesses in the first three trials, who also will be a witness in future trials, is also a Board member of the organization and

Chair of the National Pork Producers Council environment committee. Mr. Westerbeek was required to withdraw from a committee meeting he chaired, due to the gag order, when the members of the committee began to discuss the status of the North Carolina litigation.

Amicus the N.C. Pork Council has been sought for comment by multitudes of media outlets throughout these trials. At least four of its Executive Committee members and several more of its full board members have declined to participate in conference calls convened to discuss and formulate the organization's position and statements on trial outcomes because of the "potential witness" provisions. These actions have robbed the N.C. Pork Council of crucial and valuable insight and input from directors elected to serve the industry.

In these situations, members of *amici* withdrew from participation out of an abundance of caution. But remaining silent "out of an abundance of caution" is the defining characteristic of the "chilling effect" of a prior restraint. Because the gag order is written in both vague and overly broad terms, that dramatic chilling effect will persist for years to come.

While some growers and farmers are left with no alternative other than to remain silent, other groups speak and write freely, offer opinions, and criticize members of the pork industry. Indeed, it is unclear whether the gag order, entered on June 27, 2018, purports to govern and restrict plaintiffs in the first trial, whose case was concluded with a jury verdict on April 26, 2018. If not, the disparity among parties grows even more significant. Growers who might be potential witnesses in future cases are restricted from speaking or defending themselves related to their operations, while plaintiffs from the first case and jurors are able to speak freely and cast aspersions on fundamental aspects of the growers' livelihood.

The N.C. Pork Council is also harmed because it is restrained as a *recipient of information* by the court's gag order. Gag orders that abrogate the First Amendment right "to *receive* speech" from willing speakers are subject to challenge. *E.g.*, *In re Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988) (emphasis added); *see also CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) ("The protected right to publish the news would be of little value in the absence of sources from which to obtain it.").

Throughout this litigation, the N.C. Pork Council has served as both a news gatherer and a news distributor, providing information and updates to its members, who will be affected significantly by the outcome of the litigation. But now, with several important members and information sources covered by the gag order, the council cannot obtain the information it needs to keep its members informed about arguably the most significant issue at work in the industry today.

The duration of the order is likewise oppressive. Courts have held that the existence of a prior restraint—for even a moment—constitutes irreparable harm to the speaker enjoined. *N.Y. Times Co. v. United States*, 403 U.S. at 714–15 (Black, J., concurring) ("[E]very moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."); *Neb. Press Ass'n*, 427 U.S. at 559 ("The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint . . . ."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

CONCLUSION

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

Respectfully submitted,

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