SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19417

BRIEF OF *AMICI CURIAE*

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STATEMENT OF ISSUE OF AMICI CURIAE

Whether the Superior Court order restraining publication by the Connecticut Law Tribune ("prior restraint"), is absolutely prohibited by the free speech and press sections of the Connecticut Constitution.

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union Foundation of Connecticut (ACLUF-CT) is the litigative arm of the American Civil Liberties Union of Connecticut (ACLU-CT), a state affiliate of the American Civil Liberties Union (ACLU). ACLU is a national non-partisan organization of approximately 500,000 members committed to protecting the civil rights and liberties of all persons. ACLU-CT has six regional chapters, five campus chapters, and over 5,000 members in Connecticut. ACLUF-CT engages in civil rights litigation in Connecticut state and federal courts.

Joining with the ACLUF-CT in this brief are local and state media, journalist, and open government organizations that have a longstanding interest in ensuring that the public has access to documents and information concerning the executive, legislative and judicial branches of government. Access to such information serves multiple salutary purposes, including, but not limited to informing the public about the actions of its government, and enabling the public to evaluate the performance and quality of public officials' actions.

The open government organizations appearing as amici are the Connecticut Council on Freedom of Information ("CCFOI") and the Connecticut Foundation for Open Government ("CFOG"). The mission of the CCFOI is to promote, preserve and protect the public's access to government in this state and in its municipalities and to uphold the constitutional principles of freedom of the press. Similarly, CFOG is dedicated to promoting the open and accountable government essential in a democratic society. It

seeks to achieve this by educating policymakers and citizens in general on the need for a free flow of information on all public policy matters.

The media and journalist organizations joining as amici are: Radio and Television Digital News Association, Connecticut Chapter of the Society of Professional Journalists, and the Connecticut Daily Newspaper Association. All three serve the principals of a free flow of information in a democratic society and the rights of the people to freedom of the press.

Individual news and other organizations joining in this brief are The Hartford Courant, Tribune Publishing; The Day of New London, a privately held company; the Record-Journal of Meriden, a privately held company: the Journal Inquirer of Manchester, a privately held company; the New Britain Herald & Bristol Press, Central CT Communications, a privately held company; The New Haven Register, Middletown Press, Register Citizen of Torrington, Digital First Media/CT, Inc.; The Waterbury Republican-American, a privately held company, William J. Pape II, editor and publisher; the Norwich Bulletin, Gatehouse Media Inc.; The Lakeville Journal and Winsted Journal, the Lakeville Journal Co., a privately held company; The New Haven Independent, produced in conjunction with the nonprofit Online Journalism Project; WNPR, the Hartford affiliate of National Public Radio; News 12 Connecticut of Norwalk, a division of Cablevision Systems Corporation; The Connecticut Mirror, the nonprofit, nonpartisan news website of the Connecticut News Project, Inc.; and Michael J. London and Associates, a privately held marketing and communications company.

Altogether the organizations listed above together with the ACLUF-CT are referred to throughout the brief as “Media Amici.”

This case presents the important question of whether the rights guaranteed by Article I, Sections 4 and 5 of the Connecticut Constitution absolutely bar prior restraint. The Media Amici have a strong interest, as well as experience and expertise, in this matter.

The ACLUF-CT has been direct counsel or amicus in cases involving challenges to prior restraint under both federal and state law. The cases include: *Brown v. Damiani*, 228 F. Supp. 2d 94 (D. Conn. 2002) (direct); *Cologne v. Westfarms Associates, 197 Conn.* 141 (1985) (direct); *State v. Linares,* 232 Conn. 345 (1995) (amicus); *United Food and Com. Workers Union, Loc. 919, AFL-CIO v. Crystal Mall Assoc., L.P.,* 270 Conn. 261 (Conn. 2004) (amicus); *Doe v. Gonzales,* 386 F. Supp. 2d 66 (D. Conn. 2005) (direct).

The competing newspapers have historically come together as amici curiae when they see a threat to freedom of the press. Last year many of the amici here filed as amici in *Commr. of Pub. Safety v. Freedom of Info. Commn.*, 307 Conn. 918 (2012) over state police department refusal to disclose information on a pending criminal case.

In 2004, many of the amici here filed as amici in the United States Court of Appeals for the Second Circuit in *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) over the state courts' then practice of sealing hundreds of civil cases.

The Media Amici hope that their views will be helpful to the Court in this appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The Media Amici defer to the Connecticut Law Tribune's brief for the facts and procedural history in this case. The Media Amici have been told and believe that there is in place an order that prohibits them from receiving information about the proceedings.

ARGUMENT

In *State v. Geisler*, 222 Conn. 672 (1992), the Connecticut Supreme Court enunciated six factors to be considered when analyzing whether the Connecticut Constitutional protections "go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court":

> In order to construe the contours of our state constitution and reach reasoned and principled results, the following tools of analysis should be considered to the extent applicable: (1) the *textual approach;* see, e.g., *Stolberg v. Caldwell,* 175 Conn. 586, 597–98, 402 A.2d 763 (1978), appeal dismissed sub nom. *Stolberg v. Davidson,* 454 U.S. 958, 102 S.Ct. 496, 70 L.Ed.2d 374 (1981)("Unless there is some clear reason for not doing so, effect must be given to every part of and each word in the constitution."); (2)*holdings and dicta of this court, and the Appellate Court;* see, e.g., *Doe v. Maher,* 40 Conn.Sup. 394, 448–49, 515 A.2d 134 (1986)(trial court used strict scrutiny to analyze sex discrimination claim based on the equal protection clause of the state constitution, relying, in part, on dicta from the Connecticut Supreme Court regarding what standard would be used once Connecticut's equal rights amendment was adopted); (3) *federal precedent;* see, e.g., *State v. Lamme,* 216 Conn. 172, 184, 579 A.2d 484 (1990) ("The adoption of federal constitutional precedents that appropriately illuminate open textured provisions in our own organic document in no way compromises our obligation independently to construe the provisions of our state constitution."); (4) *sister state decisions* or sibling approach; see, e.g., *State v. Gethers,* 197 Conn. 369, 386–87, 497 A.2d 408 (1985); *Cologne v. Westfarms Associates,* supra, at 58–59, 469 A.2d 1201; (5) the *historical approach,* including the historical constitutional setting and the debates of the framers; see, e.g.,*State v. Lamme,* supra, at 178–80, 579 A.2d 484; *Cologne v. Westfarms Associates,* supra, at 60–62, 469 A.2d 1201; *Palka v. Walker,*124 Conn. 121, 126, 198 A. 265 (1938); and (6) *economic/sociological considerations.* See *State v. Barton,* supra, at 546, 594 A.2d 917; *State v. Dukes,* supra, at 115, 547 A.2d 10; see generally *State v. Jewett,* 146 Vt. 221, 500 A.2d 233 (1985); M. Margulies, "Connecticut's Free Speech Clauses: A Framework

[1] No counsel for any party has written this brief either in whole or in part. No counsel for any party, and no party, has contributed to the cost of its preparation or submission.

and an Agenda," 65 Conn.B.J. 437 (1991) (an analytical framework for state constitutional analysis in the context of the free speech clauses); E. Peters, "State Constitutional Law: Federalism in the Common Law Tradition," 84 Mich.L.Rev. 583 (1986) (book review).

Id. at 684-686. Analysis of the factors set forth in *Geisler* inexorably leads to the conclusion that prior restraint is absolutely barred by Article I, Sections 4 and 5 of the Connecticut Constitution[2].

1. The plain language of Article I, Sections 4 and 5 absolutely prohibits prior restraints.

Sections 4 and 5 are both central to the question of prior restraints. Section 4 provides: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Section 4 affirmatively grants the right to speak, write, and publish any sentiment, without qualification, subject only to punishment in instances of malfeasance. By providing that every citizen is responsible *for abuse* of the liberty of speech or of the press, the text of section 4 makes clear that this responsibility is assessed after the fact, or post-publication.

Section 5 provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Section 5 is a limit on the power of the state and in this way, it echoes the First Amendment's mandate that Congress shall make no law abridging the freedom of speech or of the press. But section 5 is more specific and forceful than its federal counterpart. In addition to prohibiting laws that may "curtail" the liberty, section 5 specifically prohibits any law that could "restrain" the liberty of speech or of the press.

[2] The Media Amici also support the position presumably taken by the Connecticut Law Triune that prior restraint violates the First Amendment of the United States Constitution, but the focus of this brief is to show that prior restraint is absolutely prohibited by the Connecticut Constitution.

In *State v. Linares*, 232 Conn. 345, 380-81 (1995), the Connecticut Supreme Court cited with approval Judge Schaller of the Appellate Court's observation that specific language in Section 5 is stronger than its federal counterpart:

> Article first, § 5, provides that '[n]o law shall *ever* be passed to curtail or restrain the liberty of speech or of the press.' (Emphasis added.) Unlike the first amendment which provides that 'Congress shall pass no law' the use of 'ever' in our state constitution offers additional emphasis to the force of the provision.

In *Linares*, the Supreme Court decided that these state free speech provisions provide greater protection than their federal counterpart. The text of Sections 4 and 5 specifically and expressly supports extending that greater protection to ban prior restraints as well.

2. Holdings and dicta of the Connecticut Supreme Court are consistent with an absolute bar on prior restraints.

Although this issue has not been directly addressed by our Supreme Court, in *Cologne v. Westfarms Associates*, 192 Conn. 48, 63 n.9 (1985), the Court at the very least intimated in dicta by reference to the history of Article I, Sections 4 and 5, that these sections taken together mean that prior restraints on publication are absolutely barred[3]. This intimation that our state constitution will not tolerate a prior restraint is consonant with other holdings and dicta. In *United Food & Commercial Workers Union, Local 919, AFL-CIO* v. *Crystal Mall Associates*, 270 Conn. 261, 282, (2004), our Supreme Court concluded that Sections 4 and 5 "were not subject to the same stringent limitations as would be required under a federal first amendment analysis." In *Linares*, 232 Conn. at 380, our Supreme Court concluded that Sections 4, 5, and 14 indicate that the Connecticut Constitution preserves greater expressive rights than the federal constitution. In particular, the Court noted that the state constitution precludes laws giving officials "unlimited

[3] The history referenced by the Supreme Court in *Cologne v. Westfarms* is fully quoted and discussed, *infra*, in Part 5's discussion of the history factor in the *Geisler* analysis.

discretion to limit freedom of speech," a hallmark of prior restraint. Id., 381. This broader understanding of state constitutional speech and press rights supports the conclusion that prior restraints are absolutely barred.

3. Dissenting federal opinions are the most appropriately illuminating guidance and they support an absolute bar on prior restraints.

As the Connecticut Supreme Court demonstrated in *Linares*, 232 Conn. at 377–87 (adopting position of federal minority), this Court may consider and follow concurring and dissenting federal opinions to "appropriately illuminate" our state constitution with federal precedent pursuant to *Geisler*, 222 Conn. at 685. Here, as in *Linares*, adopting the dissenting approach from federal precedent "will best protect free speech under our state constitution." *Id.* at 384.

Several United States Supreme Court justices have suggested that the First Amendment is a bar to prior restraint. *See New York Times Co. v. U.S.*, 403 U.S. 713, 714–20, 91 S.Ct. 2140 (1971) (*Black*, *J.*, concurring); id., 720–24 (*Douglass*, *J.*, concurring). In addition, in the earliest modern First Amendment decision, United States Supreme Court Justice Oliver Wendell Holmes acknowledged that the "main purpose" of "the prohibition of laws abridged the freedom of speech" may have been to "prevent" previous or prior restraints. *Schenck v. U.S.*, 249 U.S. 47, 39 S.Ct. 247 (1919).

4. Sibling state analysis supports a ban on prior restraints.

In both Washington and Oregon, the states' highest courts have decided that their respective state constitutions, with text similar to Connecticut's sections 4 and 5[4],

[4] The relevant provision from the Oregon Constitution (Revised 2012, but this part was not changed) is: Article I, Section 8. *Freedom of speech and press.* "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this

absolutely bar prior restraints. In *State* v. *Coe*, 101 Wash.2d 364, 679 P.2d 353, 359 (1984), the Washington Supreme Court held that the Washington Constitution "rule[s] out prior restraints under any circumstances." In *State* v. *Ciancanelli*, 339 Or. 282, 121 P.3d 613, 619 (2005), the Oregon Supreme Court decided that the Oregon constitution "precludes . . . laws directed at limiting or restricting any conceivable kind of communication." *Ciancanelli* underscored the continuing vitality of a doctrine established in *State v. Henry*, 302 Or. 510, 732 P.2d 9 (1987) and earlier in *State v. Robertson,* 293 Or. 402, 649 P.2d 569 (1982) that:

> the guarantee of freedom of expression of the Oregon Constitution forecloses the enactment of any prohibitory law backed by punitive sanctions that forbids speech or writing on any subject whatever, unless it can be shown that the prohibition falls within an original or modern version of an historically established exception to the protection afforded freedom of expression by Article I, section 8, that this guarantee demonstrably was not intended to displace.

Henry, 302 Or. 510 at 514 (referring to the opinion in *State v. Robertson*, authored by then Oregon Supreme Court Justice Linde).

The Media Amici urge this Court to follow Oregon and Washington, and not to follow those states, including for example Tennessee, Alaska, New Hampshire and Nevada[5], where the federal standard seems to have been adopted without the rigorous factor-based analysis required under *Geisler.*

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right." Or. Const. art. I, § 8. The relevant portion of the Washington Constitution is: Article I, Section 5 *Freedom of Speech.* "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. art. I, § 5.

[5] *In re Conservatorship of Turner*, No. M2013-01665-COA-R3CV, 2014 WL 1901115, at *8 (Tenn. Ct. App. May 9, 2014) (applying federal standard under state constitution in prior restraint context); *Alsworth v. Seybert*, 323 P.3d 47, 56-57 (Alaska 2014) (same); *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 160 N.H. 227, 242, 999 A.2d 184 (2010) (same); *Deja Vu Showgirls v. State, Department of Taxation*, 334 P.3d 392, 398 n.7, 130 Nev. Adv. Op. 73 (2014) (Nevada Constitution free speech provisions provide no greater protection than federal counterpart).

5. History suggests the purpose of Article I, Sections 4 and 5 was to bar prior restraints.

The Connecticut Supreme Court has made pointed reference to the history of Article I, Sections 4 and 5 that presages the holding urged by the Media Amici: that taken together, these sections bar prior restraints. In *Cologne v. Westfarms Associates*, 192 Conn. at 63, n. 9, the following history was noted:

> The issue of the redundancy of § 4 in view of § 5 was debated at the constitutional convention of 1818: "Mr. Treadwell, would leave out all the article—he considered the whole purpose of it answered in the next section.
>
> > "Mr. Bristol, could not agree with gentlemen, that the article was of no importance. Every citizen has the liberty of speaking and writing his sentiments freely, and it should not be taken away from him; there was a very great distinction between taking *away* a privilege, and punishing for an abuse of it—to take away the privilege, is to prevent a citizen from speaking or writing his sentiments—it is like appointing censors of the press, who are to revise before publication—but in the other case, every thing may go out, which the citizen chooses to publish, though he shall be liable for what he *does* publish—we are *not* to adopt the principles of a Star Chamber-Court, the Sec. was important; it was the very one which he wished to see incorporated—Some further remarks were made by Mr. Bristol, and Mr. Pitkin, and the Sec. was approved and accepted." Connecticut Courant, Sept. 8, 1818, p. 3, col. 1.
>
> The remarks of Mr. Bristol may be construed to indicate that he viewed § 4 (then § 6) as a limitation on § 5 (then § 7) which would authorize the passage of laws or the application of the common law with respect to defamation or sedition, but which would preclude any prior restraint. See *State v. McKee,* 73 Conn. 18, 28–29, 46 A. 409 (1900). A broader proposal which prohibited the molestation of any person for his opinions on any subject whatsoever was considered at the convention but rejected. Id.

This history supports the argument that Sections 4 and 5 taken together absolutely bar prior restraints.

6. Economic and sociological factors weigh in favor of an absolute ban on prior restraints.

The economic and sociological factors weigh heavily in favor of a per se bar on prior restraints. For hundreds of years, post publication punishment has been sufficient to address a host of abuses—criminal speech, contractual misrepresentations, defamation, abuse of process, invasion of privacy, copyright infringement, false advertising, nuisance, and more. Remedies and punishments for these abuses are always subsequent to publication.

By contrast, the irreparable sociological harm and danger from prior restraints has been widely and eloquently recognized, including here:

> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. 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. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.

Nebraska Press Association v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803, 49 L. Ed. 2d 683 (1976). Long ago, Blackstone incorporated the understanding that prior restraints alone can undermine freedom of the press:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

4 William Blackstone, Commentaries 151-152, http://avalon.law.yale.edu/18th_century/blackstone_bk4ch11.asp.

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great

> responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92, 95 S. Ct. 1029, 1044-45, 43 L. Ed. 2d 328 (1975). "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the . . . judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S. Ct. 1507, 1515, 16 L. Ed. 2d 600 (1966).

Prior restraints irreparably harm freedom of the press and ultimately our society itself and should be absolutely forbidden, in accord with our state constitution.

CONCLUSION

All of the *Geisler* factors weigh in favor of the conclusion that the Connecticut Constitution will not admit prior restraints, and they are absolutely barred.

Respectfully submitted,

December 1, 2014

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For the Media Amici.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this application conforms with the relevant requirements of §§ 67-7 and 66-3 of the Connecticut Practice Book.

December 1, 2014

Sandra J. Staub (Juris 432138)

The undersigned further certifies that the Brief of *Amicus Curiae* American Civil Liberties Union Foundation of Connecticut, dated December 1, 2014, conforms with the relevant requirements of §67-2 of the Connecticut Practice Book and does not contain a name or otherwise identifying information prohibited from disclosure, pursuant to §67-1.

December 1, 2014

Sandra J. Staub (Juris 432138)