No. _____

In The Supreme Court of the United States

THE ASSOCIATED PRESS, CBS BROADCASTING INC., DENVER POST CORPORATION, ESPN, INC., FOX NEWS NETWORK, L.L.P., LOS ANGELES TIMES, AND WARNER BROTHERS DOMESTIC TELEVISION,

Petitioners,

v.

DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF COLORADO (HON. W. TERRY RUCKRIEGLE, PRESIDING),

Respondent.

On Application For Stay Of Colorado State District Court Order Pending Certiorari Review

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* THE NEW YORK TIMES COMPANY, GANNETT COMPANY, INC., TRIBUNE COMPANY, INC., THE HEARST CORPORATION, THE COPLEY PRESS, INC., DAILY NEWS, L.P., THE E. W. SCRIPPS COMPANY, FREEDOM COMMUNICATIONS, INC., BLOOMBERG NEWS L.P., CABLE NEWS NETWORK, L.P., LLLP, ADVANCE PUBLICATIONS, INC., NEWSWEEK, INC., THE WASHINGTON POST COMPANY, NBC UNIVERSAL, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, AND COLORADO PRESS ASSOCIATION IN SUPPORT OF PETITIONERS

TO: HONORABLE STEPHEN G. BREYER
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR A STAY

Amici The New York Times Company, Gannett Company, Inc., Tribune Company, Inc., The Hearst Corporation, The Copley Press, Inc., Daily News, L.P., The E. W. Scripps Company, Freedom Communications, Inc., Bloomberg News L.P., Cable News Network, L.P., LLLP, Advance Publications, Inc., Newsweek, Inc., The Washington Post Company, NBC Universal, Inc., Reporters Committee for Freedom of the Press, California Newspaper Publishers Association, and Colorado Press Association hereby move for leave to file an *amici curiae* brief in support of the Application for an Emergency Stay of Colorado State District Court Order Pending Certiorari Review filed by The Associated Press, CBS Broadcasting Inc., Denver Post Corporation, ESPN, Inc., Fox News Network, L.L.P., Los Angeles Times, and Warner Brothers Domestic Televisions ("Petitioners"). The *amici curiae* brief immediately follows this Motion.

Amici are leading newspapers, magazines, broadcasters, and other media-related organizations and professional associations in Colorado and the United States. *Amici* or their members routinely report on issues of public significance, such as the criminal proceedings at issue here, and thus are profoundly concerned about government censorship, particularly in the form of prior restraints against publication. Unlike Petitioners, *Amici* did not receive electronic copies of the hearing transcripts at issue in this proceeding. If the Colorado Supreme Court's decision stands, however, it will have serious consequences for *Amici*, and for others engaged in the gathering and dissemination of information to the public.

In this brief, *Amici* discuss the historical roots of this Nation's constitutional impediments to the use of prior restraints, and examine how this Court's decisions have been a bulwark against government censorship of the media.

Because *Amici* believe that this perspective will help to inform the Court's consideration of this stay application, they respectfully seek leave to file an *amici curiae* brief in support of Petitioners.

Respectfully submitted,

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July 22, 2004

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, and media-related organizations and professional associations who are actively engaged in disseminating information in the United States and abroad.[1] They share Petitioners' fundamental interest in enforcing the First Amendment's strenuous prohibition against governmental interference with a free press. Indeed, many A*mici* have been reporting on the underlying criminal trial in this case, although none received the transcripts that are at issue in this proceeding. Because the Colorado Supreme Court's opinion condones an unconstitutional prior restraint on the publication of lawfully obtained information, in contravention of this Court's unambiguous precedents, *Amici* respectfully submit this brief in support of Petitioners' application for an immediate stay.

SUMMARY OF ARGUMENT

This Court repeatedly has recognized that government censorship in the form of prior restraints against the media constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In granting an immediate stay of one prior restraint, Justice Blackmun noted that such government interference with core free speech protections is a "'most extraordinary remedy,'" which "may be considered *only* where the evil that would

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

result from the reportage is both *great* and *certain* and cannot be militated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (emphasis added).

Given this Court's antipathy toward prior restraints, it is not surprising that the Court "has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Indeed, this Court has declared that prior restraints may be justified, if at all, only in the most exceptional circumstances, such as to prevent the dissemination of information about troop movements during wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931), or to "suppress[ ] information that would set in motion a nuclear holocaust." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring). Accordingly, this Court has rejected the use of prior restraints, even where substantial governmental or private interests would be affected by the publication sought to be restrained, or where the information at issue was confidential by law. *See*, *e.g.*, *Near*, 283 U.S. at 716-18 (invalidating prior restraint of defamatory and racist statements that allegedly disturbed the "public peace" and provoked "assaults and the commission of crime"); *Nebraska Press*, 427 U.S. at 556-561 (invalidating prior restraint against publication of information about criminal defendant's confession, despite alleged risk to Sixth Amendment rights); *New York Times*, 403 U.S. at 714 (invalidating prior restraint against publication of the "Pentagon Papers," despite the government's argument that disclosure of that information posed a "grave and immediate danger" to national security).

Earlier this week, however, a bare majority of the Colorado Supreme Court defied this Court's proscriptions against prior restraints and upheld a state district court's

order barring seven news organizations from publishing information about a pending criminal prosecution. Remarkably, the Colorado court did not even attempt to justify its infringement on First Amendment rights by pointing to a competing constitutional interest or a legitimate threat to national security. Instead, the court concluded that a state statute making certain evidence inadmissible in sexual assault trials, coupled with the alleged victim's privacy interest, were sufficient bases for the trial court's extraordinary order, even though the majority conceded that the information was lawfully obtained and relates to a matter of public concern. *See In re Colorado v. Bryant*, No. 04SA200 at 22, 33 (Colo., July 19, 2004) ("*Bryant*").

But neither the state's interest reflected in its rape-shield law, nor the privacy interests of the alleged victim in this case rise to the level necessary to justify a prior restraint, particularly since considerable information about the alleged victim's sexual history already has been disclosed in public court filings and elsewhere. *See Bryant*, dissent at 1, 3. In *Florida Star v. B.J.F.*, 491 U.S. 524, 526, 537, 539 (1989), this Court held that the State of Florida's interest in preserving rape victims' privacy and encouraging rape victims to report crimes, codified in a state statute barring the media from publishing a victim's identity, did not permit the state to punish a newspaper that published a rape victim's name that its reporter obtained from a sheriff's report that was inadvertently made available to the public. *Id.* at 526, 537, 539. Importantly, the Colorado court's prior restraint in this case is subject to even more rigorous scrutiny than the post-publication civil judgment in *Florida Star*. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (recognizing that prior restraints are greater threat to First Amendment rights than post-publication penalties and subject to higher scrutiny). If the State of Florida

could not meet its burden in *Florida Star*, then it is clear that the State of Colorado cannot meet its even heavier burden here.

With each passing day that this unconstitutional order remains in force, it has and will cause irreparable harm to news organizations' and the public's First Amendment rights. *Nebraska Press*, 427 U.S. at 559 (a prior restraint order is an "immediate and irreversible sanction"). Without prompt and decisive action from this Court, the Colorado decision may invite other government attempts to interfere with editorial freedom, especially in connection with reporting about pending criminal prosecutions. As Justice Brennan declared in *New York Times*, "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order" against the media. 403 U.S. at 726-27 (Brennan, J., concurring). This is not such a case. The fact that the defendant is a prominent sports figure, or that his prosecution for rape necessarily turns on matters of a sexual nature, does not justify a suspension of constitutional rights, nor does the trial court's evident interest in ameliorating an error made by one of its own employees. *See ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004) (recognizing that "[t]he mere fact of intense media coverage of a celebrity defendant" does not justify a restriction on First Amendment rights).

Amici, therefore, respectfully request that this Court intervene immediately and grant the Petitioners' Application To Stay The Prior Restraint Order Of The Colorado District Court's Order Pending Certiorari Review.

ARGUMENT

I. This Court's Immediate Intervention Is Necessary To Prevent The Continued Enforcement Of An Unconstitutional Prior Restraint.

This Court has not hesitated to grant immediate stays to dissolve prior restraints against the media. *See, e.g., CBS*, 510 U.S. at 1316-18 (Blackmun, J., in chambers); *Capital Cities Media v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers). Justice Blackmun summarized the need for immediate action in such cases, explaining that when a "prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press*, 423 U.S. at 1329. As discussed below, it is difficult to conceive of a situation where an immediate stay would be more appropriate than here, where the trial court's order causes Petitioners to suffer ongoing and irreparable harm to a fundamental constitutional right.

A. Prior Restraints Are Antithetical To The First Amendment Rights That Are At The Core Of Our Democratic System.

This Court has reminded us that "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost." *Nebraska Press*, 427 U.S. at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1943)). Thus, "[r]egardless of how beneficent-sounding the purposes of controlling the press might be," the Court has "remain[ed] intensely skeptical about those measures that would allow government to insinuate itself into the

editorial rooms of this Nation's press." *Id.* at 560-61 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)). The Court's long-standing hostility towards prior restraints is the most important manifestation of that skepticism.

At its core, the prior restraint doctrine expresses a constitutional aversion to censorship of the media and individuals by the government. This Court has explained that prior restraints against speech must be held to an even stricter standard than post-publication penalties because

> a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, 420 U.S. at 559.

When a branch of government, including the judiciary, restrains the publication of information that has been obtained lawfully by the media, it undermines the "main purpose" of the First Amendment, which is "to prevent all such previous restraints upon publications as [have] been practiced by other governments." *Nebraska Press*, 427 U.S. at 557 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)). It is widely agreed that "[t]here is, indeed, something peculiarly totalitarian about government systems of prior restraint." Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 15:10 (2004). This Court has "learned, and continue[d] to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Nebraska Press*, 427 U.S. at 560 (quoting *Tornillo*, 418 U.S. at 259 (White, J., concurring)). It is

important that this lesson is not forgotten in this case because "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

This Nation's condemnation of prior restraints on speech can be traced back to the sixteenth century. It was then that the English Church first required that all religious books be approved by the diocese before publication. *See* Michael I. Meyerson, *Neglected History of the Prior Restraint Doctrine: Rediscovering The Link Between The First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 302 (2001). The Star Chamber, meanwhile, implemented its licensing scheme of all books and began persecuting "those 'wicked and evil disposed persons' who had published without prior approval." *Id.* (quoting Star Chamber Decree of 1637, reprinted in 2 *Complete Prose Works of John Milton* 793 (1959)). Blackstone was among the first English commentators to speak out against prior restraints on speech, arguing "'[t]he 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.'" *Id.* at 311 (quoting 4 William Blackstone, Commentaries 152 (Wayne Morrison ed., 2001)); *see also Near*, 283 U.S. at 713 (relying on Blackstone and comparing the system of restraint in *Near* to the English licensing schemes).

It was the Founders' rejection of the English licensing schemes that led to the drafting of the First Amendment, and while there was debate over the extent of the protection, "one element of liberty of the press was well-understood: no governmental official – not licensor, not censor, not judge – should be involved in restricting expression before it is communicated." Meyerson, *Neglected*

History, 34 Ind. L. Rev. at 313. Since its inception, this Court unwaveringly has protected this core First Amendment right. As Chief Justice Hughes explained in *Near v. Minnesota*, "[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose [prior restraints] . . . is significant of the deep-seated conviction that such restraints would violate constitutional right." 283 U.S. at 718.

This antipathy toward prior restraints is especially profound when the government prohibits the press from publishing information about public affairs, including the criminal justice system. *Nebraska Press*, 427 U.S. at 559; *see also Florida Star*, 491 U.S. at 526. This Court expressly has recognized that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings[.]" *Id.*; *see also Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 309-312 (1977) (invalidating prior restraint barring media from identifying an eleven-year-old defendant in a murder case, where the state presented no evidence that the media obtained the child's name unlawfully); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) (invalidating West Virginia statute prohibiting the media from publishing the identity of a juvenile defendant without first obtaining a court order; reiterating that state cannot restrain press from reporting information that it obtains lawfully); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law restricting publication of rape victim's name; television station had lawfully obtained information).

The rationale behind this protection is simple: public scrutiny of and discourse about the conduct of criminal trials is essential to maintaining public confidence in our criminal justice system. As this Court has explained, "[t]he 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." *Nebraska Press*, 427 U.S. at 560 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). The same principles inform this Court's repeated holdings that court proceedings and court records are presumptively open to the public under the First Amendment. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). For this additional reason, this Court consistently has found that lawfully obtained information about court proceedings may not be censored.

Applying this Court's precedents, other state and federal courts also have acted to protect the First Amendment against government censorship. For example, in *Procter & Gamble Co. v. Bankers Trust Co.*, the Sixth Circuit Court of Appeals held that a district court could not prohibit a national news magazine from publishing court documents that had been filed under seal, but that were lawfully obtained by the media. 78 F.3d at 227. The Sixth Circuit concluded that the district court had not established that publication of the information "posed such a grave threat to a critical government interest or to a constitutional right as to justify the District Court's [prior restraint] orders." *Id.* at 225; *see also Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 293, 301 (4th Cir. 2000) (reversing contempt order against reporter who published amount of confidential court settlement, where court clerk had "inadvertently" provided document to reporter); *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993) ("[a]n order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech"); *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987) (even a temporary restraint on pure speech is improper "absent the most compelling circumstances").

B. The Trial Court's Order Is A Classic Prior Restraint That Is Presumptively Unconstitutional.

Even the narrow Colorado Supreme Court majority acknowledged that the trial court's order in this case presents an archetypal prior restraint because it prohibits the media from publishing specific, newsworthy information. *Bryant*, at 20-21. *See also Alexander v. United States*, 509 U.S. 544, 549 (1993) (noting that court orders that actually forbid speech activities "are classic examples of prior restraints"). The Colorado Supreme Court's acceptance of this "extraordinary" remedy – a remedy that this Court never has seen fit to uphold – is sufficient by itself to warrant this Court's immediate scrutiny.

Swift action also is essential because of the magnitude of the harm to the media and the public. As Justice Black stated in his vigorous concurrence in *New York Times*, "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." 403 U.S. at 714-15 (Black, J., concurring). In other decisions, this Court has recognized that a prior restraint is an "immediate and irreversible sanction," *Nebraska Press*, 427 U.S. at 559, and that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). While "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press*, 427 U.S. at 559.

Without a prompt stay of the trial court's order, the seven news organizations face an unconstitutional and intolerable choice: either continue to submit to government censorship or risk contempt charges. Because, as set forth below, the prior restraint does not satisfy the

rigorous constitutional standards promulgated by this Court, it should be stayed immediately.

C. This Case Does Not Present The "Extraordinary" Circumstances Necessary To Justify "The Most Serious And The Least Tolerable Infringement On First Amendment Rights."

The trial court's order is an unwarranted and extreme violation of the news organizations' First Amendment rights, and defies nearly a century of precedent from this Court. *See, e.g., Patterson*, 205 U.S. at 462; *Near*, 283 U.S. at 716. If this Court allows the order to stand, it will be the first time in its history that it has sanctioned a prior restraint of the media. *See, e.g., In re Providence Journal*, 820 F.2d at 1348 (noting that the United States Supreme Court "has never upheld a prior restraint on speech"). Nothing in the present case, however, justifies any such dramatic departure from the Court's constitutional jurisprudence.

This Court consistently has required the government to carry an exceptionally onerous burden to support a prior restraint, which "comes to th[e] Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)). As another court explained, a "publication must threaten an interest more fundamental than the First Amendment itself" before a prior restraint may be imposed. *Procter & Gamble Co.*, 78 F.3d at 227. As this Court has emphasized, "the barriers to prior restraint [must] remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." *Nebraska Press*, 427 U.S. at 561.

To keep these barriers high, this Court has held that a prior restraint may be considered only where its proponent demonstrates that the restriction is necessary "to further a state interest of the highest order." *Smith*, 443 U.S. at 102. In articulating this standard, this Court has instructed that prior restraints must be supported by evidence of a "clear and present danger" of harm to a paramount state interest, and that "speculati[on]" or "factors unknown and unknowable" never can justify such an abridgement of the First Amendment. *Nebraska Press*, 427 U.S. at 563.

Although this Court never has approved a prior restraint against the media, it has suggested that if a prior restraint ever were justified, the circumstances must be akin to those when the Nation "is at war," *Schenck v. United States*, 249 U.S. 47, 52 (1919), when "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near*, 283 U.S. at 716. In *CBS*, Justice Blackmun reiterated that prior restraints on speech may be upheld "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." 510 U.S. at 1317. The rationale offered for the Colorado court's prior restraint does not even approach the "high" barrier established by this Court.

1. The Absence Of Any Findings By The Trial Court Warrants An Immediate Stay Of The Prior Restraint.

Because a prior restraint is such an exceptionally disfavored remedy, this Court has insisted that any such order be supported by specific factual findings. *See Nebraska Press*, 427 U.S. at 562, 565. Because the trial court did not offer *any* findings to support its June 24 prior

restraint, the order should be stayed for that reason alone. *See, e.g., Florida Publishing Co. v. Brooke*, 576 So. 2d 842, 846 (Fla. 1991) (dissolving prior restraint order that was not supported by specific factual findings); *Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379, 385 (N.D. Ind. 1992).

2. The Colorado Supreme Court's *Post Hoc* Rationales Do Not Satisfy The "Heavy Burden" Necessary To Justify A Prior Restraint.

a. The State's Interest In Its Rape Shield Law Cannot Overcome The Strong Presumption Against Prior Restraints.

The Colorado Supreme Court majority concluded that the state's interest was of the highest order because it sought "to provid[e] a confidential evidentiary proceeding under the rape shield statute." *Bryant* at 36. That decision is a striking departure from this Court's precedents. In any case analyzing a prior restraint, the government almost always will offer a legitimate state interest as a rationale for suppressing information. But this Court has held that even the existence of a significant state interest is not enough; the government must identify an "extraordinary" state interest to ensure that the press is censored only in "exceptional cases." *Near*, 283 U.S. at 716; *accord CBS*, 510 U.S. at 1317.

While Colorado's rape shield law may further legitimate state interests, those interests do not support the prior restraint. Indeed, this Court repeatedly has held that state statutes protecting sexual assault victims do not justify restricting the media's First Amendment rights. For example, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 601 (1982), the Court held that the

Commonwealth of Massachusetts' interest in reducing the trauma suffered by minor sexual assault victims who testify in court, and thereby to encourage reporting of sexual assaults, did not outweigh the public's and press' First Amendment right of access to court proceedings, such that the commonwealth could not automatically exclude the public from courtrooms during those victims' testimony. Similarly, in *Florida Star*, this Court held that the State of Florida's interest in preserving rape victims' confidentiality to encourage the reporting of sexual assaults did not outweigh a newspaper's First Amendment right to publish a rape victim's name and telephone number that the newspaper had obtained through a sheriff department's negligence. 491 U.S. at 526, 537. These decisions cannot be reconciled with the Colorado Supreme Court's decision.

Moreover, Colorado's rape shield law is a statutory evidentiary rule that cannot overcome competing constitutional rights. Yet, the Colorado Supreme Court majority uses the admissibility of the underlying evidence as a litmus test, ordering the trial court to make a determination about the relevancy and materiality of the information contained in the transcript. *Bryant* at 37. Although the majority's decision is not explicit, the order presumably intends to suggest that any information deemed admissible can be released to the public, while the rest may remain subject to the prior restraint order. *Id*. at 37-38. It is not, however, the constitutional rule that the public only may learn information that has been deemed by a court to be admissible evidence in a judicial proceeding. If the Colorado Supreme Court majority's reasoning were permitted, then the same rationale could be used to censor all information that is deemed inadmissible as evidence at trial. As a matter of course, such a rule would permit courts to restrain the media from publishing

information found inadmissible because of the exclusionary rule, the attorney-client privilege, or a vast array of other state law privileges and evidentiary rules. All of these legal rules serve comparable state interests, but none allows a court to impose a prior restraint such as the one in this case.

b. The Alleged Victim's Privacy Interest Is Inadequate To Overcome The Strong Presumption Against Prior Restraints.

According to the Colorado Supreme Court majority, the prior restraint is constitutional because publication of information from the transcripts *might* harm the alleged victim's privacy interest. *Bryant* at 35. As Petitioners point out in their Application, this concern is purely speculative, and ignores the amount of information already made public about the alleged victim's sexual history. (Petitioners' Application at 25-27.) Although *Amici* are not privy to the contents of the sealed transcripts, published reports suggest that the closed-door proceedings were focused on the alleged victim's conduct immediately before and after the alleged assault, rather than inquiring broadly into her sexual history. (*Id.* at 26-27.) That conduct, however, already has been widely discussed in the media. (*Id.*)

The majority's reasoning also defies this Court's precedents. As discussed above, this Court expressly held in *Florida Star* that the state's "interest [in protecting] the privacy of victims of sexual offenses" did not justify punishing a newspaper that published a rape victim's name and telephone number, where the newspaper did nothing wrong to obtain the information, even though a state law prohibited its release. 491 U.S. at 526, 537. This Court explicitly recognized the state's strong interest in protecting an assault victim's privacy: "At a time when we are

daily reminded of the tragic consequences of rape, it is undeniable that these are highly significant interests." *Id.* at 537. Yet, despite these significant interests, this Court held that the First Amendment protected the publication of the victim's identity for two reasons that are squarely applicable here.

First, this Court found that the information had been given to the media by the government, albeit inadvertently. *Id.* at 539-540; *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845-46 (1978) (holding that the First Amendment protected the publication of information from confidential judicial disciplinary proceeding that was released to the public). Similarly, the transcripts in this case were unintentionally released to the media entities by the court reporter. *Bryant* at 3. As the Colorado Supreme Court dissent points out, "[w]hen the government loses control of confidential information in its possession, either through deliberate leaks or inadvertent error, the government may not require the media to take over the state's responsibility except in highly unusual circumstances which are not present here." *Id.* at 16 (Bender, J., dissenting). Justice Stewart observed that "[t]hough government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." *Landmark Communications*, 435 U.S. at 849 (Stewart, J., concurring).

Second, in *Florida Star*, this Court found that the state's prohibition against revealing a rape victim's name failed to take into account "whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern." *Florida Star*, 491 U.S. at 539. The Colorado Supreme

Court majority likewise fails to take into account that much of the information at issue *already has been* disclosed publicly, including in some court filings. The dissenting Colorado justices aptly note that "most of the private details of the alleged victim's sexual conduct around the time of the alleged rape, which is also the subject matter of the confidential hearings in this case, are already available through public court documents and other sources and have been widely reported by the media." *Bryant* at 5 (Bender, J., dissenting). Because much of this information has been publicized through other means, its dissemination by the media will not "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea" necessary to support a prior restraint. *New York Times*, 403 U.S. at 726 (Brennan, J., concurring). The privacy argument thus cannot justify the trial court's order.

D. This Court Should Act Immediately To Eliminate The Dangerous Precedent Set By The Colorado Supreme Court.

The Colorado Supreme Court majority's opinion will have a corrosive effect on press freedoms. Indeed, the majority turns the First Amendment on its head by asserting that the state's interest in suppressing speech is actually heightened because there is widespread public and media interest in the underlying criminal case. *Bryant* at 30. Under the majority's reasoning, the greater the public interest is in a matter, the more justified the government may be in restricting the publication of information about it. This perverse logic is contrary to this Court's entire "public concern" jurisprudence, which recognizes an even greater First Amendment interest in obtaining and disseminating information about matters

of public concern. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (one of the "core purposes of the First Amendment" is to prevent "sanctions on the publication of truthful information of public concern"); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940) ("freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment"). Common sense dictates that a heightened public interest in information makes the presumption in favor of the right to publish stronger – not weaker.

The Colorado Supreme Court majority also insists that the possible harms that would flow from publication of the information in this case are stronger than usual because the statements at issue are in the form of court testimony and were taken under oath. *Bryant* at 33-34. Again, the majority's reasoning is inverted. This Court made clear in *Richmond Newspapers*, 448 U.S. at 574, that court proceedings carry a greater presumption of openness, and the need for transparency for court decisions that could be outcome determinative, as here, is even more compelling.

Finally, the majority fails to make a principled distinction between its ban on the publication of these transcripts by the media and its recognition of an individual's or the press' right to publish the exact same information obtained through other means. The majority admits that any information the press "has obtained or obtains by its own investigative capacities is not limited by the District Court's order or our judgment, even though such information may also be spoken of or referred to in the transcripts." *Bryant* at 40-41. This Court, however, rejected on First Amendment grounds this type of "facial underinclusiveness" in *Florida Star*. 491 U.S. at 540. This Court explained that "[w]hen a State attempts the extraordinary

measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* In this case, it is only the publication of information from the transcripts that is prohibited. Yet the same information could be disseminated by anyone else with impunity. As this Court held, "[w]ithout more careful and inclusive precautions against alternative forms of dissemination," *id.* at 541, such an order is unconstitutional.

For all of these reasons, this Court's immediate intervention is warranted. This Court's unwavering hostility toward prior restraints has discouraged other courts from trying to censor the media and has helped to make prior restraints exceedingly rare in this Nation. But the Court's continued vigilance is essential. If allowed to stand, the Colorado Supreme Court's decision will invite other courts to issue prior restraints – without making specific findings, without holding a hearing, and without deferring to this Court's long-standing mandate that such censorship is almost never permissible. If this Court does not act, *Amici* envision a variety of contexts in which core First Amendment values would be threatened. In high-profile cases, *Amici* anticipate that some trial courts will be tempted to issue prior restraints to delay publication, even if only temporarily, to manage intense public interest. In sexual assault cases, some trial courts may be emboldened to bar the media from reporting on evidence that might not be admissible, but may be essential to public understanding of an alleged crime or to informed debate about the merits of rape shield laws in general. Even in ordinary suppression hearings, some trial courts may interpret the *Bryant* decision as authorizing prior restraints to prevent the media from reporting on potentially inflammatory information that, regardless of its admissibility, may be of manifest public interest. By intervening

now, this Court will avert these dangers, and will remind other courts that prior restraints may be contemplated, if at all, only in the most exceptional circumstances.

CONCLUSION

The trial court's order and the Colorado Supreme Court's majority opinion violate the media's constitutional rights and the public's right to be informed. Over the last century, this Court steadfastly has limited the government's authority to prohibit the media from publishing newsworthy, lawfully obtained information. The Court should not retreat from that principle in this case, which falls far short of the "extraordinary" circumstances that would be necessary to justify a prior restraint against these news organizations.

Amici, therefore, respectfully request that this Court grant the Application for Stay pending consideration of the Petition for Writ of Certiorari.

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APPENDIX A

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in 26 cities and weekly business journals in over 40 cities throughout the United States. Advance Publications, Inc. also owns The Condé Nast Publications, Inc. and Fairchild Publications, Inc., which publish more than 20 magazines with nationwide circulation, including *Vanity Fair, Vogue*, and *The New Yorker*.

Bloomberg News, L.P. operates a 24-hour global news service that supplies business, financial and legal news to more than 200,000 subscribers world-wide through the Bloomberg Professional Service, an electronic real-time desktop delivery system. Bloomberg also operates as a wire service, serving more than 350 newspapers and magazines world-wide. Bloomberg also maintains eleven 24-hour cable television news channels around the world, and WBBR, an all-business news radio station in New York City. Bloomberg also produces and distributes daily radio programming throughout the world through its 750 radio affiliates. Bloomberg also publishes two monthly magazines, and its Bloomberg Press division publishes more than 50 titles each year.

Cable News Network L.P., LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined

branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

The California Newspaper Publishers Association is a nonprofit trade association representing about 500 daily and weekly newspapers in California. CNPA has stood in defense of the rights guaranteed by the First Amendment for well over a century.

Colorado Press Association is an unincorporated association of approximately 150 newspapers throughout Colorado, including the state's ten largest daily newspapers, all having a combined circulation in excess of 1,000,000 copies

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news, and operates an international news service.

Daily News, L.P. publishes the *New York Daily News*, which is one of the largest newspapers in the United States and has a circulation of more than 700,000, primarily in the New York City metropolitan area.

Freedom Communications, Inc., headquartered in Irvine, Calif., is a privately-owned diverse media company of newspapers, broadcast television stations and interactive media businesses. The company publishes 28 daily and 37 weekly newspapers, with a combined daily circulation of more than 1.2 million subscribers. The broadcast division includes eight stations, including five CBS and three ABC network affiliates.

Gannett Company, Inc. is an international news and information company that publishes 101 daily newspapers

in the United States with a combined daily paid circulation of 7.6 million, including *USA TODAY*, which has a circulation of 2.2 million. Gannett publishes a variety of non-daily publications, including *USA WEEKEND*, a weekly newspaper magazine with a circulation of 22.7 million. The company also operates more than 130 web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines (including *Esquire*) and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

NBC Universal, Inc., and its NBC News division, produce and distribute news programming through, among others, the NBC and Telemundo television networks, NBC Universal's owned and operated television stations, MSNBC and CNBC. NBC Universal gathers and reports news daily through broadcast and cable television and the Internet.

Newsweek, Inc., publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation

of 1.1 million daily and more than 1.7 million on Sunday. The company also owns *The Boston Globe* and *The International Herald Tribune,* as well as 17 regional newspapers and eight television stations.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that work to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The E. W. Scripps Company, publisher of *The Rocky Mountain News* and *Boulder Daily Camera*, is a diverse media company with interests in newspaper publishing, broadcast television and national television networks. The company operates 21 daily newspapers, with a combined paid daily circulation of 1.1 million; 15 broadcast television stations, including six ABC affiliates and three NBC affiliates; and four cable and satellite television programming networks and a television retailing network totaling more than 84 million subscribers.

Tribune Company, Inc. operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households, and is the only media company with newspapers, television stations and web sites in the nation's top three markets. In publishing, Tribune operates 12 market-leading daily newspapers, including the *Los Angeles Times*, *Chicago Tribune*, *Newsday*, *Baltimore Sun*, *The Hartford Courant*, *South Florida Sun-Sentinel* and *Orlando Sentinel*, plus a wide range of targeted publications including Spanish-language newspapers. In broadcasting, Tribune properties include 26

television stations and Superstation WGN on national cable. These publishing and broadcasting interests are complemented by high-traffic news and information web sites in 18 of the nation's top 30 markets.

The Washington Post Company publishes the newspaper *The Washington Post,* a leading newspaper with a nationwide daily circulation of 778,000 and a Sunday circulation of over 1.05 million.

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