

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

ARGUMENT 3

I. THE GOVERNOR’S EDICT VIOLATES THE FIRST
AMENDMENT 4

II. THE GOVERNOR’S EDICT HARMS THE PLAINTIFFS, THE
AMICI, AND THE PUBLIC. 10

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	7
<i>Con. Ed. Co. of N.Y. v. Public Serv. Comm'n of N.Y.</i> , 447 U.S. 530 (1980).....	8
<i>Grosjean v. American Press Co.</i> , 297 U.S. 233 (1936)	5
<i>Miami Herald Publ'g. Co. v. Tornillo</i> , 418 U.S. 241 (1974)	11
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966).....	4-5, 11
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	9
<i>Pacific Gas and Elec. Co., v. Public Utilities Comm'n of Cal.</i> , 475 U.S. 1 (1985).....	12
<i>Police Dep't of Chicago v. Mosley</i> , 408 U.S. 92 (1972)	6-7
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 518 U.S. 819 (1995)	6
<i>Rossignol v. Voorhaar</i> , 316 F.3d 516 (4th Cir. 2003).....	8
<i>Snyder v. Ringgold</i> , 40 F. Supp. 2d 714 (D. Md.)	8-9

MISCELLANEOUS

<i>Potter Stewart, "Or of the Press,"</i> 26 Hastings L.J. 631, 636 (1974-75)	7
9 Writings of J. Madison 103 (G. Hunt ed., 1910)	6

INTEREST OF THE *AMICI*

The Maryland-Delaware-District of Columbia Press Association (“MDDC”) is a nonprofit organization of 164 newspapers in Maryland, Delaware and the District of Columbia. Founded in 1908, MDDC represents all 14 daily newspapers and 113 non-daily newspapers in Maryland. The press serves as the eyes and ears of the public when it reports on state government. MDDC promotes the interests of the newspaper industry and its readers by, among other things, seeking to preserve and protect the public’s access to government information.

The Radio-Television News Directors Association (“RTNDA”) is the world’s largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries. RTNDA encourages excellence in the electronic journalism industry and works to uphold and promote the First Amendment freedoms of the news media.

The American Society of Newspaper Editors (“ASNE”) is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Association of Capitol Reporters and Editors (“ACRE”) is a national organization of journalists who cover state governments. It exists to advance public understanding of state government and the issues before state

government, and to educate and share information with its members and the public on best practices, tools and techniques in state government reporting.

The Society of Professional Journalists (“SPJ”) is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

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

The six groups participating as *amici* are concerned about the impact of the executive order that is the subject of this case. Their members report regularly on the conduct of Maryland state government. The Governor’s order at issue in this case is a threat to their independence and to the principles of freedom of the press upon which their journalistic activities are based. For example, although newspapers and journalists other than the plaintiffs are not immediately subject to the Governor’s order, their own reporting is inevitably chilled by it.

Indeed, newspapers and journalists that are not immediately subject to the order have a perspective that is broader than that of the plaintiffs. And because most newspapers are much smaller than *The Sun*, they have an interest that is, at the same time, potentially more acute than that of *The Sun*.

ARGUMENT

There is nothing new about a government official's trying to control the content and "spin" of the news. Politics involves a contest of ideas, and government involves a contest of politicians. Politicians routinely seek to define the contours and content of public debate, and those in power routinely seek to ensure favorable coverage of their actions. But there is something fundamentally different—and alarming—about the Governor of Maryland's attempt to control news coverage through an organized, official boycott of a news reporter and columnist based on nothing more than their claimed lack of objectivity.

The Governor's edict instructs that "no one in the Executive Department or Agencies is to speak" with two journalists, or to "return calls or comply with any requests," because the Governor's Press Office "feels that currently both are failing to objectively report" on the Ehrlich Administration. Complaint Exh. A. Thus, all employees of the Executive Branch have been ordered to engage in a group blackball of two journalists whose job—and constitutionally protected role—is to report and comment on the affairs of the Executive Branch. Any Executive Branch employee who violates that order is presumably subject to discipline.

This official boycott is offensive to the most basic principles of the First Amendment. It punishes two journalists based on the content of their coverage. It compromises, if not destroys, their ability to perform their constitutionally assigned and protected function. It seeks to coerce the largest newspaper in the State to assign to the Statehouse only those journalists who are pleasing to the Governor. It coerces all who report on the affairs of state government to avoid criticism of the Governor's administration, lest they too be subject to an administration-wide boycott. And it seeks to install the Governor as the arbiter of what is and what is not objective journalism. This kind of official control of the press is characteristic of repressive regimes, but it is alien to nations founded on principles of free speech and free press. It is abhorrent to our Constitution and should be repudiated by this Court.

I. THE GOVERNOR'S EDICT VIOLATES THE FIRST AMENDMENT.

Governor Ehrlich's edict offends the bedrock principles of American democracy. The Constitution places sovereignty in the hands of the people, not those who hold the reins of power, and it establishes a free press as a vehicle to inform the people about the affairs of their government. That informative role, in turn, has a twofold effect: it simultaneously guards against abuse by government officials and provides the people with the means to control their government and its policies. As the Supreme Court observed in *Mills v. Alabama*, 384 U.S. 214, 219 (1966):

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus

the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

The Supreme Court elaborated upon the press's informative role in *Grosjean v.*

American Press Co., 297 U.S. 233, 250 (1936):

The predominant purpose of [the free press guarantee] was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

As James Madison wrote: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both." 9 Writings of J. Madison 103 (G. Hunt ed., 1910).

One of the fundamental corollaries to these principles is that the government may not punish the press, or discriminate against members of the press, based on the content of their reports or the viewpoints they express. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "Discrimination against

speech because of its message is presumed to be unconstitutional.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 518 U.S. 819, 828 (1995).

Thus, for example, the government need not, as a general matter, provide access to its facilities, but it may not deny access based on the content of a speaker’s message. See, e.g., *Rosenberger*, 515 U.S. 819 (holding that while the government did not have to open a limited public forum, once it did so, the state could not “discriminate against speech on the basis of its viewpoint” and holding that the principles are applicable even when the forum is one in a “metaphysical” more than a “spatial” sense). The Supreme Court has recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). That means, at the very least, that a reporter may not be denied access to the normal channels of newsgathering based on the content of his reporting.

The State seeks to avoid the principles that control this case by overstating what is claimed and exaggerating the consequences of the Court’s upholding the claim. And so, it is important to underscore what this case does not involve—and to recognize the prerogatives that any government official does have.

There is no general First Amendment right of access to government information—and no constitutional right to have one’s phone calls returned. There is no prohibition against a government official’s granting an exclusive interview and no constitutional rule against leaking to a selected journalist—even when the motivation is favorable coverage. A government official may take affirmative steps

to promote his message and to cultivate relationships with journalists and others to that end. And journalists may compete with each other to gain better access to those who are in a position to inform the public. There is, and always will be, a struggle to obtain information from the government, and in that struggle there is no guarantee that the press in general, or that any reporter in particular, will succeed. Potter Stewart, “Or of the Press,” 26 *Hastings L.J.* 631, 636 (1974-75).

It is equally clear, however, that the government may not exclude a reporter from the normal channels of information that are available generally, based on the content of his reporting. And that is what has occurred here. Executive branch officials who customarily return reporters’ telephone calls have been instructed not to return the phone calls of two particular journalists. The same officials have been instructed not to comply with “any requests” from these journalists—even requests of a kind with which they would ordinarily comply. If these journalists request a copy of a report or document that is generally available for distribution, their request is to be denied. If they ask a routine question of the kind that reporters customarily ask, and that officials customarily answer, the response is to be one of silence—even if the official who is asked would like to answer! Recently, it appears, the Governor has even taken the step of excluding these journalists from press conferences by the novel device of making press conferences “by invitation only.” And this generic blackball is imposed for no reason other than that the Governor questions their objectivity.

When “regulation is based on the content of the speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” *Con. Ed. Co. of N.Y. v. Public Serv. Comm’n. of N.Y.*, 447 U.S. 530, 536 (1980). As the Fourth Circuit recognized in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003), otherwise legitimate actions rise to the level of constitutional violations when the government actor seeks to discriminate based on the content or viewpoint of a member of the press. Here, Governor Ehrlich is withholding from two reporters information otherwise available to the press and public, based solely on the content and viewpoint of those reporters’ writings.

This case is unlike *Snyder v. Ringgold*, 40 F. Supp. 2d 714 (D. Md.), in which this Court vacated an injunction that required the defendants to give a reporter access to “any [police department] information or interviews that are given to *any* other members of the media.” *Id.* at 716 (emphasis added). No reporter can demand access to any interview or information given to “any other member” of the press. What reporters can demand, however, is that they not be excluded from the normal channels of communication based on the content of what they write. As Chief Judge Motz emphasized, that kind of exclusion presents “an entirely different question.” *Id.* at 718.

It is no excuse for the Governor to say that the journalists in question “are failing to objectively report” on his administration. Objectivity is often in the eye of the beholder, and it is a dangerous thing to let the chief executive be the

arbiter of objectivity. Elected officials in a democracy do not claim that right. Indeed, objectivity is not required to trigger the protections of the First Amendment. The Constitution protects expressions of opinion as much as it protects the reporting of fact, even when the opinions are harsh and unfair. As the Supreme Court has emphasized, “debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment also protects inaccuracies: “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72.

In short, a reporter does not lose the protection of the First Amendment by lack of objectivity or by inaccuracies. And the Governor of a State cannot cite such alleged failings to assign himself the right to decide who may cover his administration. These reporters are entitled to the basic protections of the First Amendment, whatever Governor Ehrlich thinks of their reporting. And among those basic protections is the right to be included in the normal channels of communication that are open to the press generally—the right, put simply, to perform their constitutionally assigned role without the interference of an official, state-wide boycott.

II. THE GOVERNOR'S EDICT HARMS THE PLAINTIFFS, THE *AMICI*, AND THE PUBLIC.

The Governor's edict inflicts more than mere theoretical harm. It directly injures the plaintiffs, indirectly threatens other journalists, including members of the *amici*, and ultimately disserves the public.¹

Plaintiff David Nitkin is the State House Bureau Chief for *The Sun*. He depends upon access to Executive Department officials to learn the news and information that it is his job to report. Without access to information about the operations of government, he has nothing to report. And, as all reporters can attest, reporting that is restricted to the content of official releases and proceedings is of limited value. Such reporting cannot possibly fulfill the press's function of "keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. at 219. To perform that function, reporters must go beyond the administration's agenda and behind its official releases. They need to uncover *all* the facts, not just those that the administration touts, and they need to examine *all* the implications of government actions, not just those that are officially announced. They need, in short, *to talk* to government officials—to ask them questions, to seek explanations, and to obtain information. A press that is inhibited in doing those things cannot perform its function, and a reporter who cannot do them cannot do his job.

¹ Our purpose in this section is to explain briefly how the Governor's order affects the two journalists, the *Sun*, other journalists, and the public—not to repeat the plaintiff's legal analysis of standing and other related issues.

Plaintiff Michael Olesker is a columnist who writes about a wide variety of subjects, including the affairs of the Executive Department. He cannot write effectively about such subjects as education, law enforcement and the administration of justice if he is unable to speak to government official responsible for those areas. It is no answer to say that he can write about other subjects, because the freedom of press necessarily embraces the decision about what subject to cover. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Sun is harmed in its ability to assign reporters of its choosing to the State House and to publish commentary from columnists of its choosing on subjects of their choosing. *The Sun's* freedom is violated when the Governor tells it who it can and cannot assign to cover him and his administration. *Id.*

Other journalists – including members of the *amici* – are also threatened by the Governor's edict. If *The Sun's* reporters can be excluded from the normal channels of communication, then so can other reporters. And if *The Sun* can be forced to reassign disfavored reporters, then so can other newspapers. Many MDDC member newspapers have very small staffs, and they can ill afford to have the Governor blackball anyone they assign to the State House. As a result of the Governor's edict, all reporters and all newspapers in the State are on notice that they too can suffer retaliation if the Governor chooses to question their objectivity. All have effectively been warned that if they are critical of the Governor or his administration, they too can be denied access to information that they need to do their jobs. In short, the retaliation against *The Sun's* reporter and columnists has

an undeniable chilling effect on all those who report on the affairs of government in this State.

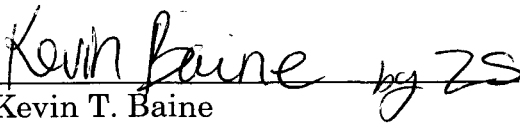
Ultimately, it is the public that suffers the harm inflicted by the Governor's unlawful act, for they are the intended beneficiaries of the First Amendment. "The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving the information." *Pacific Gas and Elec. Co., v. Public Utilities Comm'n. of Cal.*, 475 U.S. 1, 8 (1985) (internal citations omitted). It is the members of the public who depend upon the press's success in obtaining information about the affairs of government. They are the ones who benefit from independent reporting and criticism. And they are the ones who need the courts, in cases like this, to remind their leaders of who is answerable to whom.

CONCLUSION

The motion for a preliminary injunction should be granted.

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By:  by ZS
Kevin T. Baine
Bar No.12696

725 Twelfth Street, N.W.
Washington, D.C. 20009
(202) 434-5000 (tel)
(202) 434-5029 (fax)
kbaine@wc.com

Attorneys for the *Amici Curiae*

Of Counsel:

Kevin M. Goldberg

COHN & MARKS LLP
1920 N St., N.W.
Suite 300
Washington, DC 20036
(202) 452-4840 (tel)
(202) 293 -4827 (fax)
Kevin.Goldberg@cohnmarks.com

Attorneys for the American Society of Newspaper Editors; and
The Association of Capitol Reporters and Editors

Lucy A. Dalglish
Gregg P. Leslie
1101 Wilson Blvd, Suite 1100
Arlington, VA 22209
(703) 807-2100

Attorneys for Reporters Committee for Freedom of the Press

James B. Astrachan
Bar No. 03566

ASTRACHAN GUNST & THOMAS, PC
217 E. Redwood Street, Suite 2100
Baltimore, Maryland 21202
(410) 783-3521

January 12, 2005

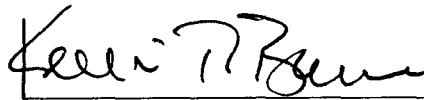
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused true and correct copies of the foregoing BRIEF OF THE MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATION OF CAPITOL EDITORS AND REPORTERS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF THE MOTION FOR A PRELIMINARY INJUNCTION to be served by first-class mail and facsimile on this 12th day of January, upon the following:

Margaret Ann Nolan
Cynthia G. Peltzman
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6324

Charles D. Tobin
Kara L. Daniels
Holland & Knight LLP
2099 Pennsylvania Ave., N.W. Suite 100
Washington, DC. 20006

Stephanie Abrutyn
Tribune Company Law Department
Publishers' Office
The Sun
501 N. Calvert Street
Baltimore, MD 21202



Kevin T. Baine
Bar No.12696