IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

THE BALTIMORE SUN COMPANY,
et al.,

vs. Case No. 1:04-cv-03822-WDQ

ROBERT L. EHRLICH, JR.,
et al.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AGAINST AN UNCONSTITUTIONAL RETALIATION FOR THE EXERCISE OF FREE SPEECH AND PRESS

Dated: December 29, 2004

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

MISCELLANEOUS

Plaintiffs The Baltimore Sun Company, publisher of *The Sun*, David Nitkin, and Michael Olesker file this Memorandum of Law in support of their Motion for entry of a Preliminary Injunction against Defendants Robert L. Ehrlich, Jr., in his official capacity as Governor of Maryland (the "Governor"); Shareese DeLeaver, in her official capacity as a Press Secretary to the Governor; and Gregory Massoni, in his official capacity as Deputy Communications Director and Press Secretary to the Governor.

Introduction

On November 18, 2004, the Governor, through Ms. DeLeaver and Mr. Massoni, banned all state executive department employees from speaking to a reporter and a columnist for *The Sun*. The sole basis cited in the memo communicating the ban is the Governor's view that these journalists are "failing to objectively report on any issue dealing with the Ehrlich-Steele Administration." The Governor, by his own admission, intended to "chill" future reporting and commentary. He adamantly maintains that he has complete authority to punish two journalists by taking away their access to routine public information that used to be available to them and that remains available to others.

The Sun, Mr. Nitkin, and Mr. Olesker are entitled to a preliminary injunction to stop the Governor and his press office from continuing to enforce this unconstitutional policy. Courts have ruled over and over that the First Amendment does not permit a government official to discipline a citizen for exercising the right to speak freely, even if that discipline involves the withdrawal of an accommodation or convenience to which the citizen has no specific right. The government may only penalize a citizen for the content of speech under the extraordinary circumstance where necessary to further a compelling state interest, and control of the message is not a valid state interest. There is a substantial likelihood that *The Sun*, Mr. Nitkin, and Mr. Olesker will succeed on the merits.

Because the policy constitutes a continuous chill of *The Sun*'s and its journalists' (and the public's) First Amendment rights, it constitutes *per se* irreparable harm. Here, however, *The Sun*, Mr. Nitkin and Mr. Olesker already have suffered documented harm, as they have been deprived of access to information from numerous state employees who previously were willing to talk to them. This harm outweighs any speculative harm the Governor could assert if the *status quo* that existed for decades—and which exists at the federal and state level everywhere else in the country—were to be restored.

The issuance of an injunction also serves the public interest because it promotes the free flow of information about governmental affairs by reducing the risk that other citizens will face the same retribution and properly leaves it to the citizens of Maryland to judge for themselves whether the Governor's criticism of the newspaper is valid. All of the requisite elements for a preliminary injunction are present, and the injunction should issue immediately.

Factual Background

The Sun is Maryland's largest daily newspaper, serving more than one million readers each week in Baltimore and its neighboring counties. Now in its 167th year, *The Sun* regularly publishes articles covering state government, as well as Governor Ehrlich and his policies.

The Governor, like many elected officials before him, does not always like what he reads in the newspaper. He repeatedly has charged that the newspaper has a "liberal bias" and has engaged in a "sustained campaign to hurt the administration before it got off the ground." David Folkenflik, Pressing the Issue Ehrlich Speaks His Mind on the Media, The Sun (July 10, 2003). At one point, the Governor proclaimed that he was fed up with *The Sun* and would turn to smaller newspapers, television, and talk radio to communicate with the people of Maryland. Id.

Unsatisfied with these criticisms, which are of course wholly within his right to make, the Governor crossed the constitutional divide on November 18 by completely cutting off access that journalists and the public have relied on for decades. The Governor, through Mr. Massoni and Ms. DeLeaver, issued the following edict to *every* executive department and agency employee throughout the state:

> Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads. Any questions or concerns can be directed to the following contact information:
>
> Gregg Massoni
> Press Secretary to Governor Ehrlich
> 410-974-2316
> gmassoni@gov.state.md.us

See Complaint Exh. A. The policy directive was communicated in a memorandum distributed by e-mail from Ms. DeLeaver to Public Information Offices and the Executive Department.

The ban came in the middle of a series of *Sun* articles relating to a proposed land transaction between the State of Maryland and Willard J. Hackerman that could have given him millions of dollars in tax breaks. Administration officials had been considering the "no bid" sale of an 836-acre forest to Mr. Hackerman for the same price paid by the state, which used land-preservation funds to make the purchase. Several days after *The Sun* published an October 20 article by Mr. Nitkin relating to the proposed Hackerman land transaction, Governor Ehrlich pulled Mr. Nitkin aside after a press conference. The Governor firmly informed Mr. Nitkin that the Governor did not like the news reports relating to the transaction and viewed them as a personal attack. See Declaration of David Nitkin ("Nitkin Decl."), attached hereto as Exhibit A, ¶9. Less than a month later, only two days after the

Governor's press office had expressed dissatisfaction to Mr. Nitkin about another article, the government imposed the information ban. See Nitkin Decl. ¶10, 11.

The only explanation for the ban contained in the memo is the statement that the Governor believes that "both [journalists] are failing to objectively report" on state government issues. Since the ban was announced, explanations for the draconian measure have morphed somewhat, but all have related directly to the Governor's distaste for the content of the newspaper. For example, at one point the Governor's office shifted its focus entirely away from Mr. Nitkin and Mr. Olesker, and pointed to an editorial—*published during the 2002 election campaign*—critical of the Governor's choice of Lt. Governor Steele as his running mate. Of course, neither Mr. Nitkin nor Mr. Olesker had anything to do with the editorial. Nonetheless, referring to access as "the only arrow in my quiver," the Governor said he will not meet with the newspaper to discuss his gag unless *The Sun* apologizes for the opinion expressed in that editorial. See Laura Loh, Governor Says He is Open to Meeting With Sun Editor, The Sun (Nov. 26, 2004). He then defended the breadth of the ban by calling it "my government" and proclaimed that he specifically intended the gag order to have a "chilling effect" on the journalists.

The next day, the Governor attacked the "level of accuracy" of the newspaper. When pressed for specifics, however, he did not offer examples but instead cited "noncontextual innuendo." See Jennifer McMenamin, Ehrlich Says He Intended 'Chilling Effect', The Sun (Nov. 27, 2004). On other occasions, the Governor and his staff have produced examples, although their connection to the ban appears

tenuous.[1] *The Sun* has never claimed that the newspaper is error-free. Rather, like other newspapers around the state, *The Sun*'s policy is to correct errors brought to the paper's attention.

Yet, instead of bringing concerns to the attention of the newspaper's Public Editor or exercising his own right to criticize the newspaper, the Governor deprived two journalists of information to which they previously had access, and which the state continues to make routinely available to other journalists and to the public, simply because the Governor does not like what *The Sun* and its journalists have said. The Governor has not merely declined to grant an interview or chosen not to speak to the journalists himself. Instead, he has gagged an entire branch of government. Since the policy was adopted, state government employees in the Governor's Office and agencies who previously spoke to Mr. Nitkin when he contacted them for purposes of newsgathering have refused to speak to him. See Nitkin Decl. ¶13-16. Similarly, numerous state government employees have not returned telephone calls from Mr. Nitkin and Mr. Olesker, although messages were left. See Nitkin Decl. ¶17; Declaration of Michael Olesker ("Olesker Decl."), attached hereto as Exhibit B, ¶10.[2] Many of these employees have spoken to Mr. Nitkin and Mr. Olesker in the past, before the ban was imposed. Nitkin Decl. ¶14-16; Olesker Decl. ¶5.

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[1] One such example is the Governor's complaint about an erroneous map published along side an article Mr. Nitkin authored relating to the sale of state-owned parks and preservation land. Mr. Nitkin, however, had nothing to do with the map and never even saw it prior to publication in the newspaper. *The Sun* published a prominent correction the day after the map originally was published. Nitkin Decl. ¶11. Another relates to a headline that accompanied Mr. Nitkin's October 20, 2004 article and which was clarified by *The Sun*. See Clarification, The Sun (Dec. 28, 2004). As is customary in newspaper publication, the reporter had nothing to do with writing the headline.

[2] The Governor's Office stated in an interview that the policy does not prohibit government employees from complying with Public Information Act requests. The language of the order does not make that clear, however, and there is no evidence that such a clarification has been communicated to the individual employees gagged by the ban. In addition, on December 16, 2004, after the ban had been in effect for nearly a month, the Governor's Chief Counsel responded to a PIA request from Mr. Nitkin

Footnote continued

The Sun has attempted, both in the weeks before filing this lawsuit and since then, to resolve its dispute with the Governor and to persuade him to lift this unconstitutional embargo. In the first two weeks after imposition of the ban, the Governor rejected several requests to meet with *The* Sun without preconditions, and the newspaper and its journalists therefore brought this lawsuit. Following the filing of the lawsuit, the parties engaged in discussion and the Governor finally agreed to meet with the newspaper's representatives. That meeting took place in Annapolis on December 17, 2004.

Unfortunately, neither the meeting nor subsequent follow-up discussions have led to a repeal of the ban. Without intervention by this Court, the Governor will continue to insist that he has the right to impose chilling punishment on any citizen who publishes something that he does not like.

Argument

The Governor, Ms. DeLeaver, and Mr. Massoni have made retaliation against free expression the official policy of the State of Maryland. To chill two *Sun* journalists' critical examination of their administration, they took away a benefit available to every other citizen—the ability to obtain information with a simple inquiry—because they did not like what the journalists wrote. The government's action flies in the face of bedrock constitutional principle. This case is not about denying a journalist preferred access to a specific individual, "off-the-record" comment, or otherwise confidential information. Rather, *The Sun*, Mr. Nitkin, and Mr. Olesker ask that the Court reassure the citizens of

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with a letter characterizing his requests as "sheer harassment," "overly burdensome," "unwarranted," and an "abuse of process," and declining to search for any responsive documents. See Letter from Jervis S. Finney, Chief Counsel to Governor Ehrlich, to David Nitkin (December 16, 2004), a copy of which is attached as Exhibit C.

Maryland that public officials may not use access to basic information as a weapon against people who disagree with them.

The purpose of a preliminary injunction is to protect all citizens—including *The Sun*, Mr. Nitkin and Mr. Olesker—from irreparable injury and to preserve the district court's ability to render a meaningful decision after a trial on the merits. See Canal Auth. v. Callaway, 489 F.2d 567 (5th Cir. 1974). Absent an injunction in this case, *The Sun*, Mr. Nitkin, and Mr. Olesker will remain unable to speak and listen freely, as is their right, and each citizen in Maryland will fear the Governor's wrath if the Executive does not like what the citizen says.

To obtain a preliminary injunction, the party seeking it must establish the following four factors, all of which easily are satisfied in this case:

1. That there is a substantial likelihood of success on the merits of the case;

2. That irreparable harm will result unless the injunction issues;

3. That the irreparable harm outweighs any injury the defendant will suffer if the injunction is granted; and

4. That the award of the injunction will not disserve the public interest.

See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs., 373 F.3d 589, 593 (4th Cir. 2004); Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 511 (4th Cir. 2002). *The Sun* and its journalists have a clear right not to be punished by the state—through denial of basic information previously made available to them—in retaliation for newspaper content that Governor Ehrlich did not like. Nor may the Governor wield the power given to him by the citizens of Maryland to try to silence those with whom he may disagree. Plaintiffs therefore are likely to succeed on the merits of their First Amendment claim.

The deprivation of *The Sun*'s, Mr. Nitkin's, and Mr. Olesker's First Amendment rights constitutes *per se* irreparable harm, as the government continues to deprive them of a benefit available to every other citizen. Restoring the *status quo* that existed for years, in contrast, will not cause any cognizable injury to the Governor, Ms. DeLeaver, or Mr. Massoni. Finally, the issuance of a preliminary injunction will serve the public interest by ensuring that the public receives information from a variety of sources, and that no Maryland citizen will have his right to speak chilled out of fear that he will be punished by the government. It is essential that this Court enjoin Governor Ehrlich, Ms. DeLeaver, and Mr. Massoni from enforcing the unconstitutional ban on giving public information to Mr. Nitkin and Mr. Olesker.

I. *The Sun* and its journalists will succeed on the merits.

The Governor, Ms. DeLeaver, and Mr. Massoni have prohibited every executive branch employee from speaking with Mr. Nitkin and Mr. Olesker because the Governor does not believe *The Sun*'s coverage of his administration has been objective. In other words, the Chief Executive has punished *The Sun* and its journalists because he does not like the content of the newspaper. As the United States Supreme Court has made clear:

> Discrimination against speech because of its message is presumed to be unconstitutional . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. [ ] Viewpoint discrimination is thus an egregious form of content discrimination.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995) (citation omitted).

Allowing the Governor to penalize Mr. Nitkin and Mr. Olesker under these circumstances will open the door to the punishment of any other citizen who says something a government official does not like. Any citizen will have to think twice before exercising his right to speak about the administration. This chilling effect is precisely what the Governor has said he hopes to achieve with the ban. Both his action and his intentions are unconstitutional.

A. The Constitution forbids the government from retaliating against or depriving a citizen of a benefit because the Chief Executive does not like the content of his speech.

Time and again, the United States Supreme Court and other courts have refused to permit officials like Governor Ehrlich to "deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech." Elrod v. Burns, 427 U.S. 347, 359 (1976) (citation omitted). Even when the benefit is otherwise discretionary, the government is forbidden from taking it away in retaliation for the content of speech. Similarly, otherwise lawful action by a government official becomes unlawful if the motive is to chill expression. The Constitution simply does not recognize squashing free expression as a valid and proper motive for the exercise of official power.

The Fourth Circuit recently reaffirmed this basic principle in Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003), when it held that deputy sheriffs' mass purchase of newspapers constituted an unconstitutional scheme to suppress and retaliate against a publisher because he disagreed with the sheriff's viewpoint. Although the deputies paid for each newspaper, the Fourth Circuit determined that because their express purpose was to suppress the viewpoint of a publisher who disagreed with them, their entirely lawful act—the purchase of newspapers—became an unconstitutional government retaliation against free expression.

> The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own. If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance.

Id. at 527-28.

Rossignol falls in line with the precedent prohibiting public officials from attempting to control expression by removing a benefit as punishment for disagreement with a particular point of view, or

conditioning receipt of a benefit on saying what the government wants to hear. Federal courts consistently find actions that are perfectly permissible in nearly any other context to be unconstitutional when the motive was to suppress or retaliate against speech. The Supreme Court, for example, held in Perry v. Sindermann, 408 U.S. 593 (1972), that a non-tenured state college professor who had no guarantee of a job stated a claim for failing to be hired by alleging that the decision not to rehire him was based on his criticism of the administration.

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' [ ] Such interference with constitutional rights is impermissible.

Id. at 597 (citation omitted). See also Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (municipal contractor stated §1983 claim where municipality refused to renew his contract because he had criticized county commission).

In these cases and others before the Supreme Court in a variety of situations, the Court repeatedly has criticized a government's attempt to control speech by removing a right, privilege, or convenience. Just as California could not require taxpayers, as a condition for obtaining a tax exemption, to certify in writing that they did not advocate the overthrow of the government, Speiser v. Randall, 357 U.S. 513 (1958), and a Connecticut state college could not withhold recognition of a nascent Students for a Democratic Society chapter based on disagreement with the civil rights group's philosophy, Healy v. James, 408 U.S. 169 (1972), Governor Ehrlich cannot punish Mr. Nitkin and Mr. Olesker for writing something he does not like. See Good News Club v. Milford Cent. Sch., 533 U.S.

98 (2001) (school's exclusion of Christian children's club from access after school hours, based on its religious nature, was unconstitutional viewpoint discrimination); Rosenberger, 515 U.S. at 831 (Supreme Court reverses Fourth Circuit and holds public university cannot deny Christian student newspaper funding based on content); Elrod, 427 U.S. at 372-73 (Chicago sheriff may not fire non-policymaking employees solely for refusal to affirm allegiance to the Democratic Party).

Other federal courts, including the Fourth Circuit, also have emphasized that the First Amendment simply does not allow public officials to retaliate against a citizen for the content of speech. For example:

- The Fourth Circuit held a religious organization was entitled to a preliminary injunction when excluded from a public school forum based viewpoint. Child Evangelism Fellowship, 373 F.3d at 594-602.

- The Fifth Circuit held that a towing company owner stated a §1983 claim when the city revoked his permission to use the police radio frequency because he spoke out on a matter of public concern. Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995).

- The First Circuit held that a municipal officer unconstitutionally withheld a land use permit based on the applicant's political expression. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 40-41 (1st Cir. 1992).

As these cases all make clear, the government has no business conditioning access, or any other benefit or convenience that it makes available, on expression of a specific point of view. The First Amendment simply does not permit those in power to retaliate against its citizens because it does not like what they have said.

B. Journalists are entitled to the same rights as any citizen to be free from government retaliation.

Retaliatory conduct aimed at a journalist is no less insidious than when the government targets another citizen or a community group. Federal courts from coast-to-coast routinely strike down

retaliatory restrictions that are designed to punish journalists for the content of the publications, treating these measures as they have any other form of government retaliation against speech. For example:

- In Chicago Reader v. Sheahan, 141 F. Supp. 2d 1142 (N.D. Ill. 2001), the court held that corrections officials, who previously had allowed a reporter to enter a jail, could not bar her access based on an article they did not like about litigation over strip searches. The court concluded that a content-based denial of access to the jail itself violated the First Amendment. "The DOC may not have had a legal obligation to admit Marlan. But it may not refuse to do so because she exercised her First Amendment rights." Id. at 1146.

- In McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996), in retaliation for her stories about the mishandling of public funds, village officials ordered a reporter to leave the press table in the council's chambers and told her newspaper to assign someone else. The Sixth Circuit noted the "consistent condemnation by the Supreme Court and by this court of all governmental reprisals against such individuals for improper purposes[.]" Id. at 461. The village officials were not immune for "allegations that involve intimidation, harassment, and retribution directed toward McBride solely to punish her for choosing to exercise one of the basic freedoms upon which our society is founded[.]" Id. at 462.[3]

- In Borreca v. Fasi, 369 F. Supp. 906, 907 (D. Haw. 1974), the court granted a preliminary injunction against a mayoral directive denying a reporter access to news conferences, based on his belief that the reporter was "irresponsible, inaccurate, biased, and malicious in reporting on the mayor and the city administration." The court held the mayor's restrictions were punishment for content and served no compelling state interest.

- In Westinghouse Broadcasting Co. v. Dukakis, 409 F. Supp. 895 (D. Mass. 1976), the court restrained the Boston city council from excluding certain television and radio stations from meetings. The court recognized that government officials need not furnish information, other than public records to any news organization. It concluded, however, that once given,

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[3] Of course, government officials also have a right to express, or not to express, their own individual ideas and positions. McBride, 100 F.3d at 462. As Chief Judge Motz noted in Snyder v. Ringgold, 40 F. Supp. 2d 714 (D. Md. 1999), officials often provide favored journalists with off-the-record interviews and extra information beyond that routinely given to the rest of the public. This case, however, is not about the Governor expressing his own ideas or positions or simply refusing to grant Mr. Nitkin or Mr. Olesker a favored interview. Instead, it is about the official retaliation he ordered based on the content of *The Sun*, taking away a benefit that Mr. Nitkin and Mr. Olesker had enjoyed for years and placing them in an inferior position to that of any other member of the public.

"opportunities to cover official news sources must be the same for all accredited news gatherers." The court further stated: "All representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience to official news sources."

- In United Teachers of Dade v. Stierheim, 213 F. Supp. 2d 1368 (S.D. Fla. 2002), a union newspaper claimed that it was denied access to a press room provided to the "general-circulation media" in retaliation for the newspaper's opposition to administration policies. The district court stressed that the defendant could not discriminate against the union newspaper because of the viewpoint it expressed. Id. at 1373.

"No Supreme Court or Fourth Circuit case has held that reporters have a constitutional right of equal or nondiscriminatory access to government information *that need not otherwise be made available to the public.*" Snyder v. Ringgold, 133 F.3d 917, 1998 WL 13528, at *3 (4th Cir. Jan. 15, 1998) (unpublished) (emphasis supplied).[4] On the other hand, where the highest government official in the state has invoked the entire machinery of the state to take away a benefit that remains available to all other journalists and citizens, the case "presents an entirely different question" than one involving "preferential treatment that is not afforded to all other members of the media." See Snyder v. Ringgold, 40 F. Supp. 2d 714, 718 (D. Md. 1999) ("Snyder II").[5]

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[4] Although neither the Supreme Court nor the Fourth Circuit have decided this issue, other courts have determined that the media is entitled to nondiscriminatory access. See Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (finding television networks must be granted equal access to post-election activities at candidates' headquarters); Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095, 1102 (C.D. Cal. 2003) (finding Telemundo had right to nondiscriminatory access to ceremony commemorating Mexican War). Indeed, the key is not whether the information must be disclosed, but rather whether it was disclosed. If the government chooses to make information available, then it must do so in a nondiscriminatory manner. See Quad-City Cmty. News Serv. v. Jebens, 334 F. Supp. 8, 13-16 (S.D. Ia. 1971) (finding once police department released confidential records, it must do so in a nondiscriminatory manner).

[5] See also Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1176 (3d Cir. 1986) (finding on equal protection challenge that government cannot discriminate "between newsseekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly"); Times-

Footnote continued

Indeed, even in the context of a commercial transaction, courts have denied government officials the ability to withdraw a discretionary benefit from select newspapers based on disagreement over news coverage. In El Dia, Inc. v. Rossello, 165 F.3d 106 (1st Cir. 1999), for example, the court held the Governor of Puerto Rico was not entitled to qualified immunity from a §1983 claim where his administration terminated advertising in a newspaper the day after publication of an unfavorable article. Similarly, in North Mississippi Communications, Inc. v. Jones, 951 F.2d 652 (5th Cir. 1992), the court held that a county's termination of newspaper advertising, in response to negative stories, was presumptively retaliatory and, therefore, violated the First Amendment.

These cases all recognize that, in many instances, the law does not require the government to grant journalists the benefit or convenience of access to specific types of information or to a specific location to gather news. The precedent is uniform, however: once the government opens up its records, environs, and employees to the public and press, it cannot selectively shut access down because it does not like what a journalist writes.

Picayune Publ'g Corp. v. Lee, 1988 WL 36491, Case No. 88-1325, *9 (E.D. La. April 15, 1988) ("The First Amendment guarantees a limited right of access to news regarding activities and operations of government. This right includes, at a minimum, a right of access to information made available to the public or made available generally to the press."); Stevens v. N.Y. Racing Assoc., 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (noting that "the state cannot arbitrarily impose limits on other press representatives' access to the news"); Westinghouse, 409 F. Supp. at 896 ("The opportunities to cover official news sources must be the same for all accredited new gatherers . . .").

C. Governor Ehrlich, Ms. DeLeaver, and Mr. Massoni have retaliated against *The Sun*, Mr. Nitkin, and Mr. Olesker based on the exercise of their First Amendment rights.

On its face, the November 18 memo takes information previously available to Mr. Nitkin and Mr. Olesker, and freely given to any other citizen, out of their reach solely because the Governor and his press office made a unilateral, subjective judgment about the content of publications in *The Sun*. The chronology of events, and the Governor's and his aides' admissions, make clear that these journalists have been singled out because the Governor did not like what they and the newspaper have published. Unquestionably this case involves repressive government retaliation for a citizen's free expression.

In the midst of *The Sun*'s news coverage of the controversy surrounding the proposed deal to sell state land to Willard Hackerman, Governor Ehrlich firmly informed Mr. Nitkin that he did not like the news articles and considered them to be a personal attack. Nitkin Decl. ¶¶7-9. Several weeks later, the Governor's Press Office expressed dissatisfaction to Mr. Nitkin about his November 16, 2004, article. Id. at ¶10. Two days later, the Governor's Press Office issued the edict, which contained the forthright explanation that executive officials are no longer to speak with Mr. Nitkin and Mr. Olesker because the Press Office "feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration." See Complaint Exh. A. This admission itself is sufficient to demonstrate the unconstitutionality of the ban.

The Governor, however, did not rest on that explanation. In public appearances following the edict, members of the Ehrlich administration have made clear that in taking away from these journalists previously available avenues of information, they intended to coerce others to write stories in ways that will meet with official approval. The Governor has invoked combat metaphor, referring to the journalists' access to information as "an arrow in my quiver" and stated that he intended to "chill" future speech by Mr. Nitkin and Mr. Olesker. See Laura Loh, Governor Says He is Open to Meeting With Sun

Editor, The Sun (Nov. 26, 2004). On another occasion, Governor Ehrlich demanded that the newspaper apologize for an editorial before he will consider lifting the ban. Id.

The ban already is having the effect the Ehrlich administration desired. Since it was imposed, Mr. Nitkin and Mr. Olesker have been greeted with silence by employees of the executive branch who previously had been willing to speak to them and share basic information. See Nitkin Decl. ¶¶13-18; Olesker Decl. ¶¶5, 10. But the retaliatory withdrawal of access to information from these two reporters has done more than chill their and *The Sun*'s ability to report the news. It has put at risk the free speech rights of every citizen who does not wish to lose the ability to obtain basic information from state government. If not stopped here and now, the Governor, Ms. DeLeaver, and Mr. Massoni will be empowered to retaliate against journalists and other citizens one at a time, incrementally moving news coverage and public discourse toward a *de facto* licensing system, where only those who say things the administration likes may obtain any information at all. The challenged actions constitute a clear violation of the First Amendment. *The Sun*, Mr. Nitkin, and Mr. Olesker therefore are likely to succeed on the merits of this action.

II. *The Sun* and its journalists will suffer irreparable harm if the Court does not enter a preliminary injunction.

The law is well settled that a deprivation of First Amendment rights for even a minimal period of time constitutes irreparable harm. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) (loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury) (quoting Elrod v. Burns); Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.") (citing Elrod v. Burns); Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.") (citing Elrod v.

Burns); Cate v. Oldham, 707 F.2d 1176, 1189 (11th Cir. 1983) (sufferance of First Amendment retaliation "'unquestionably constitutes irreparable injury.'") (quoting Elrod v. Burns).

The Governor's, Ms. DeLeaver's, and Mr. Massoni's edict impermissibly chills the exercise of *The Sun*'s, Mr. Nitkin's, and Mr. Olesker's free speech. The fact that other reporters for *The Sun* can obtain the information does not ameliorate the harm, as any other journalist necessarily must fear the same reprisals if the Ehrlich administration does not like his coverage. Likewise, any member of the public, and any group of citizens that comes together to promote a public policy initiative, must worry that they too may be banned from receiving basic government information. The result of an executive gag order like this one is that speech on matters of public concern—especially speech that questions Maryland government—is chilled, precisely as the Ehrlich administration intended. Once speech is chilled, the damage cannot be undone. Irreparable harm will continue each day that the edict remains in effect.

III. The irreparable injury that *The Sun* and its journalists will suffer outweighs any theoretical harm to the Governor.

Journalists in Maryland, including Mr. Olesker and more recently Mr. Nitkin, have been covering the State House for decades without demonstrable harm from allowing them to obtain basic information from any executive branch employee who voluntarily chooses to give it to them. The only purported injury the Governor, Mr. Massoni, and Ms. DeLeaver could possibly assert is that Mr. Olesker and Mr. Nitkin may write, and *The Sun* may publish, articles that do not meet the Governor's subjective standards. That type of purported injury is not judicially cognizable. Even if it were, it is far outweighed by the potential harm to Mr. Nitkin, Mr. Olesker, and *The Sun* from allowing the ban to remain in place and impede their daily newsgathering efforts.

IV. The award of an injunction will not disserve the public interest.

Whenever government officials chill First Amendment rights, the harm ultimately flows to members of the general public, as they are the ones who are deprived of the uncensored information about their elected officials. See e.g., Am. Broad. Cos., Inc. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) ("We rather think that the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded. And thus we think it is the public which would lose."); Times-Picayune Publ'g Corp. v. Lee, 1988 WL 36491, Case No. 88-1325, *11 (E.D. La. April 15, 1988) ("Speech concerning public affairs is the essence of self government.") (citing Garrison v. Louisiana, 379 U.S. 611 (1964)). The First Amendment rests on the fundamental notion that citizens should receive as much information as possible and make judgments for themselves about public officials and institutions. See generally 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 569-70 (J. Elliot ed. 1881) (James Madison explains that the speech-press clause in the First Amendment serves as a restraint upon the abuse of power by public officials). For the marketplace of ideas to function as an effective check on government, officials cannot use the power of their office to punitively limit access to the basic information that is vital to public discussion and debate. Instead, when a public official such as Governor Ehrlich disputes an article or column in the newspaper, he should say so, as loudly and as often as he likes, and leave it to the public to decide. Entry of an injunction here will serve the public interest because it will allow the citizens of Maryland to have the information to make those judgments for themselves.

The Ehrlich administration's edict also derogates the First Amendment rights of executive branch employees by mandating that they refrain from all discussion with Mr. Nitkin and Mr. Olesker. See

Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998) (Second Circuit upholds injunction against enforcement of state agency directive that required all agency officials to consult press office before making any public comment; court holds that directive violates workers' First Amendment rights); Laurentano v. Spada, 339 F. Supp. 2d 391 (D. Conn. 2004) (district court enjoins enforcement of media policy requiring pre-clearance of state trooper's public comments about an investigation). See also Walsh v. City of Auburn, 942 F. Supp. 788 (N.D.N.Y. 1996) (finding government employee had standing to assert the rights of other employees who were banned from speaking to him). An injunction will serve the interest of the public employees who have been gagged, as well as the interest of members of the public who would like to hear what they might have told Mr. Nitkin or Mr. Olesker.

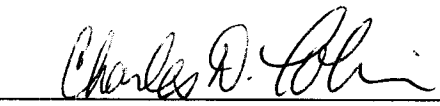
Finally, entry of an injunction will serve the public interest because it will ensure that every citizen may speak freely while this case is pending without fear of being next on the Governor's censorship hit list.

Conclusion

The Governor, Mr. Massoni, and Ms. DeLeaver have retaliated against *The Sun* and its journalists because the government officials do not like what has been said in the newspaper. In so doing, the Ehrlich administration purposefully intended to chill the public's rights of free speech and placed an impermissible burden on core First Amendment rights. Therefore, *The Sun*, Mr. Nitkin, and Mr. Olesker respectfully request that the Court grant this motion and issue a preliminary injunction enjoining the enforcement of this blatantly unconstitutional edict.

Dated: December 29, 2004

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of December, 2004, I caused the foregoing Memorandum in Support of Motion For Preliminary Injunction Against An Unconstitutional Retaliation For The Exercise Of Free Speech And Press to be served by first class mail upon:

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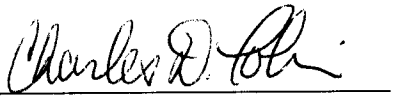

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