UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Greenbelt Division

AARON WALKER
[redacted]

Petitioner,

v.

BRETT KIMBERLIN
[redacted]

Respondent.

Civil Case No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

This memorandum is respectfully submitted on behalf of Petitioner Aaron Walker in support of his emergency motion for a preliminary injunction.

PRELIMINARY STATEMENT

This case implicates fundamental First Amendment rights of free speech and press, and the censorship of an investigative journalist for the benefit of a sordid and notorious criminal.

On May 29, 2012, the District Court of Maryland for Montgomery County issued a peace order against Petitioner Aaron Walker, stating Walker may not "contact" Respondent Brett Kimberlin. During the hearing, Judge Cornelius Vaughey defined, "contact" as follows:

> [Aaron Walker] shall not contact [Brett Kimberlin] in person, by telephone, in writing, or any other means. And "any other means" is putting it on a blog, a Tweet, a megaphone, a smoke signals—what else is out there—sonar, radar, laser. Nothing.

5/29/12 Transcript of *Kimberlin v. Walker* attached to Complaint at Complaint Exhibit N

(hereinafter "Transcript") at 59. This definition is impermissibly vague and overbroad in that it censors online journalism news stories discussing Kimberlin, including "Tweets" (short messages published by Walker that are available to readers who request to read his updates) that refer to Kimberlin, and other forms of online communication that are not directed at nor communicated personally to Kimberlin. The Order requires that Walker, as a journalist and writer, not merely refrain from talking *to* Kimberlin, but ordered Walker not to talk *about* Kimberlin. When Walker noted during the hearing that his publications and writing did not incite anyone according to the standard established in the landmark Supreme Court case *Brandenburg v. Ohio*, 395 U.S. 444 (1969), Judge Vaughey said **"Well, forget *Brandenburg*. Let's go by Vaughey right now..."** Transcript at 55 (emphasis added).

Due to the Order's overbroad language, First Amendment constitutional considerations now supersede what had been the lone determination for the state court as to whether Kimberlin felt in danger. Walker does not ask for review of whether the Judge's determination on the merits of the peace order was justified per se. This Court should accept jurisdiction because successful appeal of the Order would not redress Walker's current and ongoing injuries. A Maryland appellate court determination as to whether Walker's conduct does or does not fit within the definition of the Maryland peace order statute is for a Maryland court to decide. But this Court must decide whether the Order's egregious limitation on Walker's First Amendment rights merit federal court attention. A determination on the First Amendment implications of the Order could not have been known until after the Judge issued it, and an emergency enjoinment of the Order is Walker's only practical and available remedy to rectify his current and ongoing constitutional injuries.

Walker is an attorney in good standing in Virginia and Washington, D.C. He is also a journalist, blogger, and media entity in his own right. He contributes to several online media outlets using the pen name "Aaron Worthing." His work has been read on former Governor Mike Huckabee's nationally-syndicated radio show and has been used as the basis for stories on the Fox News cable network.

Walker publishes news and commentary at, among other media, his website "Allergic to Bull" which reaches hundreds of thousands of readers all over the world. It can be accessed at this Internet address: http://allergic2bull.blogspot.com.

Respondent Brett Kimberlin is a convicted domestic terrorist, notorious criminal, and public figure who has been the subject of a 1996 book , and of news stories on a wide array of traditional media outlets including ABC News (*Arlette Saenz, Senator Asks DOJ to Investigate SWAT-ting Attacks on Conservative Bloggers*, June 6, 2012, available at http://abcnews.go.com/blogs/politics/2012/06/senator-asks-doj-to-investigate-swat-ting-attacks-on-conservative-bloggers), Investor's Business Daily (*David Hogberg, Parsing Brett Kimberlin's Arrest Warrant Vs. Aaron Walker*, June 4, 2012, available at http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/7180-brett-kimberlin-arrest-warrant-against-aaron-walker), and the Washington Examiner (*Mark Tapscott, How to kill the First Amendment*, May 24, 2012, available at http://washingtonexaminer.com/opinion/columnists/2012/05/how-kill-first-amendment/650436), and through a large number of internet media news outlets.[1] It is the unsupportable position of Respondent, which the District Court of Maryland for Montgomery County accepted, that writing *about* Kimberlin and his documented and sordid criminal background in news articles and commentary made accessible to the general public via the internet - not communicated to Kimberlin on a personal one-to-one basis -

[1] See, e.g.: (continued on following page)

- Tiffany Gabbay, *Meet Soros-Funded Domestic Terrorist Brett Kimberlin Whose 'Job' Is Terrorizing Bloggers Into Silence*, The Blaze, May 25, 2012, http://www.theblaze.com/stories/readymeet-soros-funded-domestic-terrorist-brett-kimberlin-whose-job-is-terrorizing-bloggers-into-silence/;
- Pamela Geller, *"Speedway Bomber" Brett Kimberlin Threatens Blogger*, Atlas Shrugs, May 25, 2012, http://atlasshrugs2000.typepad.com/atlas_shrugs/2012/05/speedway-bomber-brett-kimberlin-threatens-blogger.html;
- Nick Gillespie, *Patterico, Brett Kimberlin, and the Super-Chilling of Free Speech*, Reason.com, May 25, 2012, http://reason.com/blog/2012/05/25/patterico-brett-kimberlin-and-the-super;
- Bryan Preston, *It's Lying Felon Brett Kimberlin's Day in the Sun*, PJ Tatler, May 25, 2012, http://pjmedia.com/tatler/2012/05/25/its-lying-felon-brett-kimberlins-day-in-the-sun/;
- Michelle Malkin, *Brett Kimberlin fail alert: Criminal charges against Aaron Walker dropped*, June 15, 2012, http://michellemalkin.com/2012/06/15/brett-kimberlin-fail-alert-criminal-charges-against-aaron-walker-dropped/;
- *For Brett Kimberlin, It All Started With A Little Girl*, The Trenches, May 25, 2012, http://thetrenches.us/2012/05/for-brett-kimberlin-it-all-started-with-a-little-girl/;
- William Jacobson, *Criminal charges dropped against Aaron Walker, but gag order remains*, Legal Insurrection, June 15, 2012, http://legalinsurrection.com/2012/06/criminal-charges-dropped-against-aaron-walker-but-gag-order-remains/

constitutes "contact," and therefore impermissible harassment under Md. Code Ann., Crim. Law § 3-803 justifying the issuance of a peace order.

Walker respectfully submits that the Order is an impermissible content-based prior restraint on protected expression by a journalist that is facially unconstitutional under the First Amendment, and certainly as Judge Vaughey applied it to Walker's online news reporting, commentary, and other protected speech activities.

The Supreme Court and federal courts across the country have consistently held content-based restrictions that act as prior restraints on protected First Amendment activities cannot be tolerated and are inconsistent with the First Amendment except under extraordinary circumstances not present here. For the reasons set forth herein, Petitioner respectfully urges this Court to issue an emergency preliminary injunction enjoining Respondent Kimberlin from censoring online commentary and speech activities about him and that enforcement of the Order be enjoined pending the entry of a final judgment in this action.

STATEMENT OF FACTS

Petitioner Aaron Walker is an attorney in good standing in Virginia and Washington, D.C. He also writes commentary and news stories for several websites, including his own website "Allergic to Bull" which reaches hundreds of thousands of readers all over the world. Walker's website can be read only by readers who request access to his website by going to the Web address of http://allergic2bull.blogspot.com. Excerpts of this information, other commentary, and links are also published via Walker's Twitter account, available at http://twitter.com/aaronworthing.

In September 1978, Kimberlin terrorized the city of Speedway, Indiana by detonating a series of explosives and was subsequently convicted of these and other heinous crimes and sentenced to a 50-year term of imprisonment. *United States v. Kimberlin*, 675 F.2d 866 (7th Cir. 1982). One of Kimberlin's bombs tore the leg off Carl Delong, who was "forced to undergo nine operations to complete the amputation of his leg, reattach two fingers, repair damage to his inner ear, and remove bomb fragments

from his stomach, chest, and arm." *Kimberlin v. White,* 7 F.3d 527, 528-529 (6th Cir. Ohio 1993). After Delong later committed suicide, his family sued Kimberlin and won a $1.61 million civil judgment. *Kimberlin v. DeLong*, 637 N.E.2d 121 (Ind. 1994).

The Respondent is listed as the Director of the Justice Through Music Project, an organization which states its mission is to "educate public rights and voting [sic]" in the group's 2010 public filing. *See Form 990: Return of Organization Exempt From Income Tax,* Justice Through Music Project, Nov. 12, 2011, *available at* *http://dynamodata.fdncenter.org/990_pdf_archive/270/270051467/270051467_201012_990.pdf.* The political advocacy group, which lists Kimberlin's home address as the group's business address, recorded $223,739 in contributions and grants in 2010.

Kimberlin is also a director for Velvet Revolution, which states its purpose is "the public welfare and a minority for [sic] political activity" in its articles of incorporation. *See Articles of Incorporation For a Tax-Exempt Nonstock Corporation,* VelvetRevolution.us Inc., Nov. 30, 2004, *available at* http://sdatcert3.resiusa.org/UCC-Charter/ViewDoc.asp?Film=B%2000730&Folio=1555&Pages=0002&Date=11%2030%202004&Ack=100036199062001 9&Domain=Charter&ID=D10327765&Name=VELVETREVOLUTION.US%20INC.&source=1. Both Velvet Revolution and Justice Through Music solicit funds and donations from the general public.

Respondent previously filed for a peace order in state court claiming that Walker has illegally harassed him in part because Walker, as a journalist blogger, published stories about Kimberlin and allegedly assaulted him. A District Court judge granted a final peace order to Mr. Kimberlin solely on the basis of harassment, but declined to find there was clear and convincing evidence of an assault. Mr. Walker appealed that decision to Circuit Court, and the Honorable Eric M. Johnson found there was no evidence of harassment within the meaning of the peace order statute and relevant criminal harassment

statute, and declined to find a basis to order an ongoing peace order based on Kimberlin's allegation of assault. Judge Johnson found in favor of Mr. Walker based on Kimberlin's presentation only.

On May 29, 2012, after a hearing, the District Court of Maryland for Montgomery County issued the Order that Walker may not "contact" Brett Kimberlin. During the district court hearing, Judge Cornelius Vaughey defined "contact" in extremely broad terms:

> [Petitioner Aaron Walker] shall not contact [Respondent Brett Kimberlin] in person, by telephone, in writing, or any other means. And "any other means" is putting it on a blog, a Tweet, a megaphone, a smoke signals—what else is out there—sonar, radar, laser. Nothing.

Transcript at 59. In effect, the Order directs that Walker not only refrain from talking *to* Kimberlin but that Walker may not talk *about* Kimberlin. The record shows there was no evidence Walker threatened Kimberlin. *Id.* at 17-18. Rather, the court found that Walker incited threats against Respondent merely by asserting that Respondent had engaged in reprehensible conduct. *Id.* at 55. During the prior April 11, 2012 hearing, Kimberlin said that Walker, "already Tweeted and blogged that in the last couple of weeks that as soon as this case is dismissed by you, that he's going to come out again after me on his blogs. The only thing that's stopped him is this peace order." See 4/11/12 Transcript of *Kimberlin v. Walker* attached to Complaint as Exhibit M at 87. In response, Judge Johnson noted he was uneasy with Respondent's request to censor Walker's speech:

> [E]ven if [Respondent] had gone to court, filed a petition, and said in [Respondent's] petition that [Walker] is saying things about you online and exposing [Respondent's] history online. Even if [Respondent] had said those things, I don't know that this statute would permit this Court to find that to be clear and convincing evidence of violation of the statute.

Id. at 87-88. Were Walker to violate the Order by publishing a news story about Respondent, he could be subject to both imprisonment and fines. By informing those Twitter users who have chosen to subscribe to Mr. Walker's posts on Twitter (known as Tweets) about new blog posts and his various writing activities, he could be subject to both imprisonment and fines simply for publishing writing on the topic of Respondent and his conduct.

Thus Walker's investigative journalism, commentary, and other speech activities are unconstitutionally prohibited by - and indeed made criminal by - the Order.

ARGUMENT

The Constitution of the United States prohibits the censorship of Walker's investigative journalism. The First Amendment imposes what is effectively a jurisdictional bar, preventing Kimberlin from abusing the mechanism of the state to censor Walker's blog posts and investigative journalism, which constitute core political speech.

I. THE STANDARD FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). As demonstrated below, Petitioner easily meets these criteria for obtaining a preliminary injunction. Petitioner is highly likely to succeed on the merits because the application of the Order to Petitioner's newsgathering and speech activities cannot be reconciled with controlling Constitutional principles or Supreme Court precedent. Indeed, Judge Vaughey disregarded by name controlling Supreme Court precedent raised during the hearing. When Walker noted that his writing did not meet the incitement standard established in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), Judge Vaughey said to "forget *Brandenburg*" (Transcript at 55) and proceeded to formulate his own "Vaughey" test that had the effect of penalizing constitutionally protected speech. There is no evidence that Walker incited anyone; he simply reported on Kimberlin's reprehensible conduct.

The Order prohibiting Walker from writing about Kimberlin "on a blog, a Tweet, a megaphone, a smoke signals . . . sonar, radar, laser . . . [n]othing" (Transcript at 59) restricts speech based on its content, and denies any alternate means to engage in protected speech. Such restrictions are subjected to

the highest form of Constitutional scrutiny. It is also clear Walker has suffered and will suffer irreparable injury for every day the Order is applied to him. Any interference with the exercise of First Amendment freedoms, according to black letter law, is sufficient to constitute irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (U.S. 1976). When this injury is weighed against the "hardship" of allowing Walker to publish stories about a public figure, it is apparent, as will be demonstrated below, the balance of hardships tips decisively in Walker's favor. Finally, the public interest in free political discussion and the collection and dissemination of information clearly favors Petitioner. For instance, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964), the Supreme Court stated:

> Imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
>
> One would be hard-pressed to think of a greater public interest than vindicating that freedom.

II. PETITIONER IS HIGHLY LIKELY TO SUCCEED ON THE MERITS

A. Petitioner's Speech Activities Are Subject To The Highest Constitutional Protection

Brett Kimberlin is a public, notorious, and newsworthy individual. A Google search on June 19, 2012 for "Brett Kimberlin" returned more than 500,000 results; Kimberlin has been the subject of a major publisher's book (by his own consent); and he has been the subject of many online and traditional media reports[2], all of which demonstrate his relevance as a public figure. According to the principles

[2] *See, e.g.*:

- *Who Is Brett Kimberlin? Meet The 'Speedway Bomber' Turned 'Liberal Activist'*, International Business Times, May 25, 2012, http://www.ibtimes.com/articles/345561/20120525/brett-kimberlin-speedway-bomber-blogger-terrorist.htm;
- Jerry Stratton, *Brett Kimberlin abuses a very abuse-friendly court system*, Mimsy Were the Borogoves, May 25, 2012, http://www.hoboes.com/Mimsy/Editorial/brett-kimberlin-abuses-very-abuse-friendly-court-system/;
- *Brett Kimberlin: Opening a Query into The 1978 Murder of Julia Scyphers*, Macsmind, May 27, 2012, http://macsmind.com/wordpress/2012/05/brett-kimberlin-opening-a-query-into-the-1978-murder-of-julia-scyphers;
- David Weigel, *Opening Act: Blog About Brett Kimberlin Day*, Slate, May 25, 2012, http://www.slate.com/blogs/weigel/2012/05/25/opening_act_blog_about_brett_kimberlin_day.html;

established by the United States Supreme Court, the sordid criminal background of Kimberlin, his political activities, and other issues of public concern on which Petitioner wishes to publish investigative journalism, commentary and news stories receives the highest First Amendment protection. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759 (1985), quoting and citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) and *Carey v. Brown*, 447 U.S. 455, 467 (1980) ("Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.").

Indisputably, the Order restricts Petitioner's ability to speak freely and publish his thoughts for readers who affirmatively choose to subscribe to or otherwise visit Walker's website and Twitter page. The Order therefore acts as a prior restraint on his speech activities.

The fundamental freedom to speak and write about public figures like Kimberlin, politics, and newsworthy events is nevertheless at the core of the First Amendment. "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 (1978).

The Supreme Court has unequivocally stated ordinary citizens enjoy the same rights of expression as the institutional press. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. FEC*, 130 S.Ct. 876, 905 (U.S. 2010). Walker's speech activities thus enjoy the same high constitutional protection as other media entities such as the Washington Post. It would be unconscionable if the Order had banned,

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- Kerry Picket, *Sen. Hatch - 'No surprise' Kimberlin is harassing conservative bloggers-Utah GOP'er had 'run-ins' with Kimberlin before*, The Washington Times, May 25, 2012, http://www.washingtontimes.com/blog/watercooler/2012/may/25/picket-sen-hatch-no-surprise-kimberlin-harassing-c;
- Robert Stacy McCain, *Convicted Terrorist Brett Kimberlin Received $70,000 From Tides Foundation, $10,000 From Streisand, $20,000 from John Kerry's Wife*, The Other McCain, May 17, 2012, http://theothermccain.com/2012/05/17/convicted-terrorist-brett-kimberlin-received-70000-from-tides-foundation-10000-from-streisand-20000-from-kerrys-wife;

instead of Aaron Walker on his website, the Washington Post from publishing the exact same information in its daily newspaper.

Each day the Order is in effect and Walker is thus censored comprises a discrete infringement of his First Amendment rights. Where a prior restraint is imposed on news reporting, "[E]ach 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 Asso. v. Stuart*, 423 U.S. 1327, 1329 (1975). In a subsequent case, *CBS v. Davis*, Justice Blackmun wrote, "For many years it has been early established that 'any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.'" *CBS v. Davis*, 510 U.S. 1315, 1317 (1994), quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The Order denies Walker the minimum Constitutional guarantees accorded to American citizens. The Constitutional guarantees of freedom of speech and of the press "'embraces at the least the liberty to discuss publicly . . . all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Bellotti* at 776, quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

Walker's investigative journalism, commentary, and news stories falls squarely within the *Thornhill* description and other Supreme Court analyses, and thus deserves the highest First Amendment protection. The Order must accordingly be immediately enjoined.

B. Petitioner's Speech Was Constitutionally Protected

The sole basis for the decision by the District Court of Maryland to award Respondent the Order against Walker was that Walker's writing allegedly incited threats against Respondent by third parties. Even if Respondent, who is a convicted perjurer, is telling the truth about the alleged threats, it would

not bestow upon a court the right to censor Walker and place a prior content-based restraint on his First Amendment speech activities, unless he was actually inciting such conduct. In *Near v. Minnesota*, the Supreme Court rejected a law placing a prior restraint on publishers of "malicious, scandalous, and defamatory" material that provoked violent reactions. 283 U.S. 697, 701 (1931). The plaintiff in the case, Jay Near, published scandalous defamatory articles alleging that a "gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforce[ement] officers and agencies were not energetically performing their duties." *Id.* at 704. In the prior case upholding the prior restraint at issue in *Near* that was later overturned by the Supreme Court, a unanimous Minnesota Supreme Court likened Near's newspaper to "houses of prostitution . . . itinerant carnivals . . . [or] noxious weeds." *State ex rel. Olson v. Guilford*, 174 Minn. 457, 459 (1928) (internal citations removed). Even though Mr. Near published such repugnant material - material far more scandalous than anything Walker has published - the Supreme Court understood that the First Amendment superseded the sensitivities and concerns of those who were the subject of Mr. Near's salacious material.

> There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication.

Near, 283 U.S. at 722.

Walker has done nothing to encourage unlawful action against Kimberlin. Walker has simply publicly discussed Kimberlin in a factually accurate manner, which would be protected under the barest of First Amendment scrutiny. As an example, on May 17, 2012, Walker wrote on his blog:

> [Respondent] has cost me and my wife our jobs because our workplace was frightened that this violent bomber might show up at work. After all, [Respondent] had published my home address and work address in court filings, for no reason other than to harass me. [Respondent] has obtained a peace order (similar to a restraining order) against me in part for supposed "harassment" for having told the truth about him on this blog. And you will learn that after the video emerged, the charges were dropped and the peace order was dismissed on appeal.

Aaron J. Walker, *Summary/Preview of my Post "How Brett Kimberlin Tried to Frame Me for a Crime (And How You Can Help!)"*, Allergic to Bull, May 17, 2012, *available at* http://allergic2bull.blogspot.com/2012/05/summarypreview-of-my-post-how-brett.html.

The District Court of Maryland ruled Walker's speech activities, including online writings alleging that Kimberlin attempted to frame Walker for a crime and Kimberlin's attempt to imperil the lives of Walker and his wife, amounted to unlawful incitement. In so holding, the court ignored controlling Supreme Court precedent in this exchange:

> Q [Judge Vaughey] But you, you are starting a conflagration, for lack of a better word, and you're just letting the thing go recklessly no matter where it goes.
>
> A [Walker] I --
>
> Q I mean, you get some -- and I'm going to use the word -- freak somewhere out in Oklahoma got nothing better to do with his time, so he does the nastiest things in the world he can do to this poor gentleman [Kimberlin]. What right has that guy got to do it?
>
> A He has no right to do that, but Your Honor --
>
> Q Because you incited him.
>
> A But, Your Honor, I did not incite him within the *Brandenburg* standard.
>
> Q Well, **forget *Brandenburg*. Let's go by Vaughey right now**, and common sense out in the world

Transcript at 55. (emphasis added). If the (state) district court chose not to "forget" *Brandenberg*, that court would have been required to follow these instructions:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

So the court would have to find that Walker: [1] engaged in advocacy directed to inciting or producing imminent lawless action and [2] that such advocacy was likely to incite or produce such action. There is simply put nothing in the record to support either prong of this test. The district court

record yields no instance where he asked others to commit a violent act or to threaten to do so. Indeed, Walker's uncontradicted testimony showed that in fact Walker took steps to *protect* Kimberlin from vigilantism:

> [Walker] I have told the world about what this man did to me, but it's all I've done. Now I know, Your Honor... that when you... say to the world, "Someone has done something evil," that you do obviously have a risk of things like violence and things like that. It's inescapable. But I have never incited violence. I have always told people every time they have said anything violent in my presence, I said, "I don't endorse violence even as a joke."...
>
> On top of that, I put numerous, numerous, numerous primary documents on my website. Many of those documents originally had [Kimberlin's] home address, had his phone number, had his email address, etcetera, etcetera. I carefully redacted every single instance of that. I didn't put any current photos of Mr. Kimberlin on the website[.]

Transcript at 41. And Walker's purpose was not to incite unlawful action, but to obtain justice through the courts:

> [Walker] Look at, for example, what happened with the Trayvon Martin incident, okay? A man named George Zimmerman shot this young man named Trayvon Martin. His parents felt that [Zimmerman] deserved to be charged with a crime. The police did not charge him. So they raised a national uproar. And what happened? They've now charged him.
>
> Now, I disagree with the decision to charge Mr. Zimmerman, but that is the model of what I am trying to do. I'm trying to create enough of a national uproar to create pressure on [Montgomery County State's Attorney] John McCarthy to finally charge [Kimberlin] with the crimes related to him trying to frame me for a crime. I'm trying to get justice. And he wants to shut me up.

Transcript at 50-51. In short, Walker was petitioning the government of Montgomery County for a redress of grievances. Indeed, when informing his readers how they can help, he made the following suggestion:

> **[Y]ou can write to the State's Attorney of Montgomery County.** I did not name the subordinate responsible for the inaction, but ultimately it is the responsibility of John McCarthy, the State's Attorney himself. You might also consider writing to the Governor, or the Attorney General of Maryland. **Be polite.** You will not help me by being foul or insulting. Simply state that you believe a grave injustice has been done to me—if you happen to agree—and ask them politely to see to it that justice be done.

Aaron J. Walker, *Summary/Preview of my Post "How Brett Kimberlin Tried to Frame Me for a Crime (And How You Can Help!),"* Allergic to Bull, May 17, 2012, *available at*

http://allergic2bull.blogspot.com/2012/05/summarypreview-of-my-post-how-brett.html. . In other words Walker cannot be said to have "incited" anything more severe than polite letters to the State's Attorney seeking Kimberlin's prosecution.

Walker's testimony at the District Court demonstrates he did not incite violence against Kimberlin, and reported Kimberlin's behavior in manner consistent with investigative journalistic conventions:

> I have told the world about what this man did to me, but it's all I've done. Now I know, Your Honor... that when you... say to the world, "Someone has done something evil," that you do obviously have a risk of things like violence and things like that. It's inescapable. But I have never incited violence. I have always told people every time they have said anything violent in my presence, I said, "I don't endorse violence even as a joke."...
>
> On top of that, I put numerous, numerous, numerous primary documents on my website. Many of those documents originally had [Kimberlin's] home address, had his phone number, had his email address, etcetera, etcetera. I carefully redacted every single instance of that. I didn't put any current photos of Mr. Kimberlin on the website[.]

Transcript at 43-44. Thus Walker, in writing about his experiences with Kimberlin reported on events in a manner no different than the Washington Post or any other major news organization. He presented factual information complete with citation and documentary evidence. Kimberlin does not and cannot have a legally cognizable claim about the contents of the post. He instead complains about something else, something distinct from Walker's writing: certain readers' reaction to Kimberlin's action. Kimberlin claims to be offended, harassed, threatened or otherwise annoyed by these reactions. But the First Amendment protects Walker's factually accurate reporting and any alleged public reaction to it, no matter how annoyed Kimberlin may be that Walker revealed his questionable past and harassing actions. In fact the Supreme Court has gone much further and found that the First Amendment protects even speech that provokes violent or disturbing reactions. The Supreme Court has found that the First Amendment protected speech far more provocative and controversial than anything Walker wrote about Kimberlin including: students wearing armbands in protest of the Vietnam War during the height of the war, which was feared to disrupt the educational environment, *Tinker v. Des Moines Indep. Cmty. Sch.*

Dist., 393 U.S. 503, 508 (1969) ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); a leader of a Ku Klux Klan group publicly advocating force and violence during the Civil Rights Era, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); and a pornographic magazine describing a nationally known minister as "having engaged in a drunken incestuous rendezvous with his mother in an outhouse." *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (U.S. 1988). Clearly, the Supreme Court has protected speech that is much more controversial, more provocative, and more offensive than anything Walker came remotely close to writing and accordingly Walker's speech cannot be unlawful. However, in disregarding the *Brandenburg* standard, the state court found that merely portraying Kimberlin in a negative light amounted to unlawful incitement. By the state court's logic, courts could subject a newspaper to a prior restraint preventing the Washington Post from reporting on the "Watergate" scandal or the more recent "Fast and Furious" scandal, if their reporting led third parties to make threats against persons involved in either scandal. One of the major purposes of the freedom of the press is to allow people to air their grievances, while in the instant case the state court would effectively outlaw such criticism.

This cannot be squared with the decision in *Near* or with the facts in that case. In *Near*, the United States Supreme Court rejected prior restraints on publication, noting that:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications . . . [e]very freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press. . .

395 U.S. at 713-714 (quoting Blackstone's Commentaries). Walker's only alleged "incitement" against Kimberlin was to state Kimberlin had engaged in reprehensible conduct, just like the publisher did in *Near*. Since this was insufficient to justify a prior restraint in *Near*, logically speaking it cannot be sufficient in the instant case. Because it violates the First Amendment and directly contradicts

Supreme Court precedent, enforcement of the peace order should be immediately enjoined. To hold otherwise does violence to the fundamental liberties that are supposed to be enjoyed by all citizens of this nation.

C. The Ban On Petitioner's Speech Is Not Narrowly Tailored To Accomplish A Compelling Government Interest And Is Not The Least Restrictive Means Available

The Order is a content-based restriction because it prevents Walker from making "contact" with Kimberlin, where Judge Vaughey defined "contact" as writing blogs and news reports or making Tweets about Kimberlin. Content-based restrictions on protected speech must survive strict scrutiny. *See Cassidy,* 814 F. Supp. 2d at 583. The Order is also a speaker-based restriction because it prevents Walker, and only Walker, from publicly discussing Kimberlin. Kimberlin has not filed peace orders against those who speak of him approvingly on the internet.[3] To withstand strict scrutiny, the burden of proof can only be met by demonstrating the content-based restriction - in this case, the restraint on Walker speaking about Kimberlin - is necessary to serve a compelling state interest. *Id.* at 584.

The concern about incitement referenced by the state court and by Kimberlin does not survive constitutional strict scrutiny and does not constitute a compelling interest when viewed in the light of controlling Supreme Court precedent, specifically *Brandenburg* and *Near*. The Order impermissibly interferes with Walker's press and commentary pursuits, which are protected First Amendment activities. The Order could have legitimately directed Walker to refrain from allegedly harassing Kimberlin by one-on-one communication, but it went far beyond the least restrictive means necessary and instead chilled and censored protected speech by a journalist and writer. The First Amendment does not allow a person to "stop the flow of information... to the public" except under extraordinary circumstances which are not present in this case. *Organization for a Better Austin v. Keefe*, 402 U.S.

[3] *See, e.g.*, Brad Friedman, *Karl Rove Goes Memorial Day Shopping, Poses for Photo With Anti-War Activist, Gets Told About 'Regime Change Here at Home'*, The Brad Blog, May 31, 2007, *available at* http://www.bradblog.com/?p=4617; *Liberal Activist Brett Kimberlin Engages Right Wingers In a Battle of High-Stakes Hard Ball*, Breitbart Unmasked, June 8, 2012, *available at* http://www.breitbartunmasked.com/latest-news/liberal-activist-brett-kimberlin-engages-wingers-battle-high-stakes-hard-ball;

415, 419-420 (1971). Stopping the flow of information is precisely what Kimberlin is attempting to accomplish with the Order at issue and thus, it must be enjoined.

III. PETITIONER WILL SUFFER IRREPARABLE HARM UNLESS INJUNCTIVE RELIEF IS GRANTED

The U.S. Supreme Court has held "[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); see also, e.g., *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011); *Brown v. California Department of Transportation*, 321 F.3d 1217, 1226 (9th Cir. 2003); *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005). Because the Order so severely constricts and censors Walker's rights under the First Amendment, it constitutes an irreparable injury to Walker's First Amendment rights and this Court must immediately enjoin the peace order.

Further, the Order constitutes a "direct penalization, as opposed to incidental inhibition, of First Amendment rights," making it the sort of action that cannot be remedied without an injunction. *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). Furthermore, monetary damages alone are not adequate reimbursement for the loss of First Amendment rights, a principle that provides additional support for Walker's emergency request for enjoinment of the Order. *See Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

Because the Order is such an affront to the Constitution and fundamental First Amendment rights, the "irreparable injury" factor weighs decidedly in favor of granting Petitioner's emergency motion for a preliminary injunction.

IV. THE BALANCE OF HARDSHIPS TIPS IN PETITIONER'S FAVOR

As previously established, Petitioner will suffer irreparable injury if the Order is applied to his reporting, writing, blogging, and other various activities protected by the First Amendment.

Even if Petitioner's claim of an impermissible prior restraint on his First Amendment rights were merely "colorable," he could be deemed to have established irreparable injury. *Warsoldier*, 418 F.3d at 1001 ("[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.") (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (internal citations omitted).

On the other side of the hardships balance, the requested injunctive order will cause no harm from which Kimberlin may lawfully be protected within the confines of the United States Constitution. Reporting on and writing about Kimberlin's background and political engagement efforts are activities explicitly protected by the First Amendment. Kimberlin committed a notorious series of bombings; he injected himself into the national spotlight by claiming to sell marijuana to then-U.S. Vice Presidential Candidate Dan Quayle in 1988; he participated in a series of interviews with a New Yorker reporter, which resulted in a book released by a major New York City-based publisher detailing Kimberlin's nefarious criminal and dishonest behavior; he is involved with two non-profit organizations that actively solicit donations from the general public. In short, Kimberlin is a man who thrust himself into the public spotlight, has actively sought publicity, and never shied from promoting himself or his various political activities. The requested injunctive order will only return the parties to the status quo, whereby Walker will be one in a long list of individuals and media entities who continue to write and report on Kimberlin's pursuits. There is no reason to believe permitting Walker to write about Kimberlin on a public forum as a journalist blogger will cause Kimberlin any legally cognizable harm.

V. THE PUBLIC INTEREST FAVORS PETITIONER

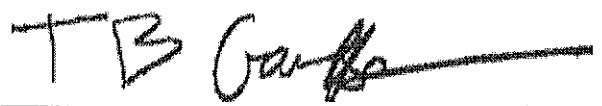
The public interest would be greatly served by granting Walker the requested relief. The citizens of Maryland and of the United States have an interest in the robust and free debate of public issues, specifically about issues and persons of public interest such as Kimberlin and his use and alleged abuse

of civil and criminal court systems in Maryland, all of which are public acts. All citizens have an interest in uncensored communication and commentary about issues of public concern, including the functioning of their judiciary. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Roth v. United States*, 354 U.S. 476, 484 (1957) (the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"). More speech about public figures and about politics - especially with the upcoming election of which so many Americans will take part - and not less speech, is in the public interest. Accordingly, Walker's petition meets the "public interest" factor and the Order must immediately be enjoined.

VI. CONCLUSION

For the foregoing reasons, a preliminary injunction should be issued immediately enjoining the Order from censoring Petitioner's writing, reporting, and other First Amendment-protected activities.

Respectfully submitted,



Dated June 22, 2012

T. Bruce Godfrey
USDC District of Maryland
Bar #24596
Law Office of Bruce Godfrey
10451 Mill Run Circle, Suite 400
Owings Mills, MD 21117
(410) 561-6061
godfrey@brucegodfrey.com
facsimile: (888) 241-3135

Dan Backer, Esq.*
Stephen M. Hoersting, Esq. *
DB Capitol Strategies PLLC
209 Pennsylvania Avenue SE
Suite 2109
Washington, DC 20003
(202) 210-5431
dbacker@dbcapitolstrategies.com

Attorneys for Plaintiffs

*Motions for *Pro Hac Vice* to be filed.

TABLE OF EXHIBITS