IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

ROBERT R. RILEY, JR., an individual Petitioner, v. ROGER SHULER, as an individual and in his capacity as owner and operator of THE LEGAL SCHNAUZER, a website, and CAROL T. SHULER, an individual and in her capacity as an administrator of and contributor to THE LEGAL SCHNAUZER, a website, Respondents.	)	Civil Action No.: 2013-236

LIBERTY DUKE, an individual Petitioner, v. ROGER SHULER, as an individual and in his capacity as owner and operator of THE LEGAL SCHNAUZER, a website, and CAROL T. SHULER, on individual and in her capacity as an administrator of and contributor to THE LEGAL SCHNAUZER, a website, Respondents.	)	Civil Action No.: 2013-237

MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ALABAMA REGARDING THE COURT'S ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND THE FILING OF ALL PLEADINGS UNDER SEAL

I. BACKGROUND.

This is a case of a blogger's relentless drumbeat of publishing allegations regarding Petitioners on a website on the World Wide Web, allegations which the Petitioners claim are false, defamatory and libelous.[1] This case began when the Petitioners initiated this action against the blogger and his wife ("Respondents").

The Internet has revolutionized the manner in which we communicate. The Internet is without doubt the most vital and active forum where freedom of speech rights are exercised today – a place where citizens can publish their views to be seen by a few close friends or spread around the world; where citizens can engage with others on thousands of bulletin boards and chat rooms on nearly any topic, create new communities of interest, or communicate anonymously about sensitive topics. It is one of our top entertainment mediums. It is the nation's most comprehensive, flexible and popular reference source. It is the closest thing ever invented to a true free marketplace of ideas. Its breathtaking utility, and openness, for communication appears boundless:

> It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."
>
> The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address – "rather like a telephone number." Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text – sometimes images.

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[1] *See*: http://legalschnauzer.blogspot.com/. The ACLU of Alabama takes no view upon the ultimate resolution of Petitioners' claims against Respondents, save to the extent that the relief sought infringes upon the First Amendment as outlined herein.

> Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
>
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web."

Reno v. American Civil Liberties Union, 521 U.S. 844, 852-3 (1997) (footnotes and citations omitted). Through this litigation, Petitioners have found a central point from which information can be blocked from the World Wide Web: a state court's injunction prior to a final decision on the merits.

Petitioners obtained a Preliminary Injunction[2] from this Court ordering the Respondents to, *inter alia*:

> cease and desist immediately from publishing (including oral publication to any third party), posting online, or allowing to be posted online any defamatory statement about Petitioners, including, but not limited to, any statement that Petitioners had an extramarital affair, that Petitioner Riley fathered a child out of wedlock with Petitioner Duke or anyone else, that Ms. Duke had an abortion, that Petitioner Riley paid or was in any way involved in paying to Ms. Duke or anyone

[2] The Preliminary Injunction – publicly available on the Internet – apparently tracked the TRO but added some language broadening the scope of the injunctive relief. We say "apparently" because while the TRO is referenced in documents available on the Internet, the ACLU has been unable to locate the TRO itself on the Internet.

> else any monetary funds from any source related to said alleged extramarital affair or abortion, that any such funds were paid by Petitioner Riley or anyone acting on his behalf in exchange for Ms. Duke having an abortion or were in any way related to an affair or an abortion and/or as part of an effort to conceal an abortion, and that Petitioner Duke received any such funds. The Respondents are ordered to take all efforts to ensure that the subject information is taken off any and all websites that they enable, host, own and/or operate and that said information is not allowed to be posted or in any way published pending further Order of this Court. These efforts shall include, but not be limited to, taking the subject information off of the website known as "Legal Schnauzer," taking the subject information off all Twitter accounts that any Respondent maintains, and removing the subject information from all video-sharing and video-posting websites including, but not limited to, Youtube.

See October 1, 2013, Preliminary Injunction (filed October 4) at p. 3. The Preliminary Injunction further reiterated the TRO, stating:

> In an effort to further limit the dissemination of Respondents' libelous statements, this Court has previously ordered that all filings, pleadings, and exhibits filed in these cases shall be filed under seal and that their contents shall not be published – either in writing or orally – in any medium to any third party. Accordingly, Respondents shall not publish or cause to be published in any medium – either in writing or orally – this Order, any filings, pleadings, and exhibits filed in these cases, or the contents of said filings, pleadings, and exhibits.

Preliminary Injunction at pp. 3-4.

The practical futility in Petitioners seeking the strong arm of a court order, with its concomitant threat of contempt, is underscored by the power of the Internet. The offending allegations are widely available across the Internet, including Court documents retained under seal in the clerk's office. *See, e.g.*: http://www.popehat.com/2013/10/27/alabama-blogger-roger-shuler-arrested-for-violation-of-unconstitutional-injunction/ (last visited November 1, 2013) (quoting extensively from the injunction); http://allergic2bull.blogspot.com/2013/10/roger-shuler-gets-taste-of-brett.html (last visited November 1, 2013) (providing a link to a copy of the injunction). *See also* http://www.justice-integrity.org/index.php?option=com_content&view=article&id=575:corruption-fighting-

reporter-arrested-beaten-jailed-in-alabama-as-deputies-seek-wife-s-arrest&catid=21&Itemid=114 (last visited November 1, 2013) (providing links to several of the documents filed in these cases). Thus, to the extent that Petitioners seek to prevent the dissemination of the allegations and court documents through a Court order, they are, at least in part, responsible for its increased significance of these cases and the spreading availability of documents. Moreover, there is nothing that the Court can do regarding the proliferation of the documents and information sought to be enjoined and shielded from public view – they are spread across the Internet at multiple sites operated by multiple individuals who are not parties to this litigation. The Preliminary Injunction is a futile attempt to put the genie back into the bottle.

Moreover, the Preliminary Injunction is seriously overbroad and sweepingly enjoins Respondents "from publishing (including oral publication to any third party), posting online, or allowing to be posted online any defamatory statement about Petitioners, including, but not limited to," specific allegations. Preliminary Injunction at p. 3 (emphasis added). The injunction thus enjoins, in advance, any speech that may later be determined to be defamatory and where no final judicial determination has been made as to any specific speech.

In the meantime, the remedy for Petitioners lies not in the suppression of speech but in more speech. Indeed, with the proliferation of the discussion of this case on the Internet, even those who raise First Amendment concerns are highly critical of Shuler. *See, e.g.*, http://www.popehat.com/2013/10/27/alabama-blogger-roger-shuler-arrested-for-violation-of-unconstitutional-injunction/ (last visited November 1, 2013) ("There are a few things you should know about Roger Shuler, who blogs at "Legal Schnauzer." First, Shuler is creepy and crazy. (I formed that opinion by reading his blog.). Second, Shuler is a vexatious litigant, a serial pro se abuser of the court system. (I formed that opinion by researching records of his litigation

history.).") (footnote omitted). Plaintiff Liberty Duke's affidavit categorically denying Shuler's allegations is available on the Internet. http://www.scribd.com/doc/174176290/Liberty-Duke-Affidavit (last visited November 1, 2013). And, there is a blog set up to "expose" Shuler's writings on the Legal Schnauzer. *See* "Legal Schnauzer EXPOSED," http://legalschnauzerexposed.com/ (last visited November 1, 2013) ("Background: Roger Shuler is an unemployed slanderer. Defaming innocent people is his only vocation. Fact: Shuler, who uses the oh so clever handle 'the Legal Schnauzer,' spends his days making up hurtful fables – a nice way of saying he blatantly lies about people – many of whom he has never met. Under the guise of 'journalism' he writes these untruths for perverse pleasure and with the intent to blackmail.").

For the reasons set forth below, the injunctive relief afforded Petitioners is simply not permitted by the First Amendment and the injunction should be dissolved.

II. THE INJUNCTION VIOLATES THE FIRST AMENDMENT.

The United States' Constitution and well-established Supreme Court precedent compel the dissolution of the Court's Preliminary Injunction. The analysis to be applied applies to speech on the Internet. *See Reno v. American Civil Liberties Union*, 521 U.S. at 870: "("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [of the internet]."[3]

A. PRIOR RESTRAINT.

[3] "[I]t might be said that the [i]nternet has taken over the role of traditional print media. It can hardly be contested that there is an ongoing shift away from traditional print media toward the internet." *Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 141-2 (Tex. App. 2009) (*citing Ostergren v. McDonnell*, 2008 WL 3895593 *9, n.3 (E.D. Va., Aug. 22, 2008).

The classic form of a prior restraint is a court order preventing speech. *See Near v. Minnesota,* 283 U.S. 697 (1931) (injunction prohibiting publication that was "chiefly devoted to malicious, scandalous and defamatory articles" held to be unconstitutional). *See also Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints.") (citation omitted). "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976). A prior restraint is "one of the most extraordinary remedies known to our jurisprudence." *Id*. at 563. For this reason, every prior restraint bears a heavy presumption of unconstitutionality. *Id*.; *see also*: *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invalidating prior restraint against publication of the *Pentagon Papers*); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (community organization's distribution of leaflets critical of real estate broker's activities); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968) (injunction against political rally unconstitutional); *Freedman v. Maryland*, 380 U.S. 51 (1965) (statute requiring advance submission of film to State Board of Censors unconstitutional); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (state commissions activities to prevent circulation of certain books unconstitutional).

The proponent of a prior restraint bears a heavy burden to overcome that presumption by demonstrating justification for such a restraint. *Nebraska Press Association v. Stuart*, 427 U.S. at 559. It has been said that the need for prior restraint must be "manifestly overwhelming." *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring). A prior restraint cannot be sustained absent "the highest form of state interest. Prior restraints have

been accorded the most exacting scrutiny in previous cases." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).

"Classic prior restraints have involved judge-issued injunctions against the publication of certain information." *Cooper v. Dillon*, 403 F.3d 1208, 1215 (11th Cir. 2005). "The proper remedy … is found in [state] libel laws." *Id*. at 1218. *See also Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir . 1987) ("[t]he usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages").

Article I, § 4, of the Alabama Constitution – "no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty" – similarly prohibits prior restraint. *Doe v. Roe*, 638 So.2d 826 (Ala. 1994). In *Doe*, "the natural mother of Roe's adoptive children was murdered by their natural father. The man dismembered his wife's body and buried it under a fish pond in the back yard of the family's home. When her body was discovered approximately three years later, the event and the resulting trial received much publicity. The children's natural father was convicted and is now serving a life sentence in the penitentiary." *Id*. at 826-7. "Doe wrote a novel based upon the events of the murder," but could not find anyone to publish the book. *Id*. at 827. When she published the book herself and planned to distribute it, Roe "filed a complaint for an injunction against the distribution of the book" and the trial court enjoined its distribution. *Id*. The Alabama Supreme Court reversed, rejecting "that Doe's right to freedom of speech as guaranteed by the constitution is overcome by the privacy interests raised in this case." *Id*.

These standards do not appear to have been before the Court when the TRO or Preliminary Injunction were entered. The allegations made by the blogger, no matter how shocking, vile, or

scandalous simply cannot, as a matter of law, rise to the level required to enjoin the speech at issue here.[4] Only in an exceptional case is prior restraint permissible. *See Near v. Minnesota*, 283 U.S at 716. The Preliminary Injunction should be dissolved and the case be permitted to proceed in an orderly fashion to final judgment.

B. The SPEECH HERE IS INSUFFICIENT TO JUSTIFY PRIOR RESTRAINT.

In the specific context of cases where the movant is seeking a prior restraint to prevent a party from engaging in defamatory or otherwise tortious speech, the Supreme Court has held that the interest in protecting individuals and businesses from tortious speech is not sufficient to justify the restraint. In *Near v. Minnesota*, the Court examined the constitutionality of a statute that authorized issuance of an injunction against a "malicious, scandalous and defamatory newspaper." 283 U.S. at 701. The defendants in the *Near* case had engaged in extensive defamatory publication before the injunction was requested. Justice Butler, in the dissent, noted that "defendants' regular business was the publication of malicious, scandalous, and defamatory articles concerning the principal public officers, and the Jewish race. It also shows that their purpose at all hazards [is] to continue to carry on the business. In every edition slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are

[4] Indeed, not only were these substantial U.S. Supreme Court cases not presented to the Court, the cases cited in the Preliminary Injunction (*see* p. 2 and n.3) demonstrate that injunctive relief in a defamation case requires a final determination on the merits of the litigation.

Moreover, n.5 (p. 3) posits an extremely speculative harm that may befall Petitioners: "Some people in Alabama have very strong opinions about the ethics of abortion, and false statements about the Petitioners and abortion could subject Petitioners to ire, a physical altercation, or serious bodily harm." It is clear that Respondents' speech cannot be enjoined on that basis. *See e.g. Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("the 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") (citations omitted).

so highly improbable as to compel a finding that they are false. The articles themselves show malice." *Id*. at 724 (Butler, J., dissenting).

The Court, however, reasoned that "[t]he preliminary freedom extends as well to the false and to the true" *Id*. at 714 and "whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws." *Id*. at 715. Thus, the Court invalidated the statute at issue because of the threat to freedom of speech posed by injunctions against defamation.

The prevention of alleged tortious interference[5] is as impermissible a justification for prior restraint of speech as is the prevention of alleged defamation. The Supreme Court has unambiguously held that speech tending to interfere with or affect another's business or profit is as strongly protected by the First Amendment as is defamatory or libelous speech. In *Organization For A Better Austin v. Keefe*, 402 U.S. at 419, the plaintiff, a real estate agent, had engaged in "blockbusting" or "panic peddling" in an attempt to convince people to sell their homes so that African Americans could move into the Austin area. The defendants, a racially integrated community organization in the Austin neighborhood opposed plaintiff's actions. To try to persuade plaintiff to change his real estate practices, members of the organization distributed leaflets in plaintiff's neighborhood, at the doors of his neighbors, and to parishioners on their way to or from plaintiff's church describing plaintiff's practices, requesting recipients to call plaintiff at his phone number and urge him to stop his real estate practices, "and accused him of being a 'panic peddler.'" *Id*. at 417. The challenged publications were critical of plaintiff's real estate practices. *Id*.

[5] Petitioners are professionals – an attorney and a lobbyist. Preliminary Injunction at p. 3, n. 4. The Preliminary Injunction relies upon harm to Petitioners' "credibility and ability to gain and retain clients." *Id*.

The Circuit Court of Cook County, Illinois enjoined defendants from distributing leaflets "anywhere" in the plaintiff's town. The Supreme Court reversed, holding that the injunction at issue, which suppressed the distribution of literature including the distribution of the same to the movant's neighbors criticizing his business practices, was an unconstitutional restraint of speech. *See id*. at 419-20.

The Court reasoned that while the petitioners found the practices of the movant to be offensive and the views and practices of the petitioners were no doubt offensive to others, "so long as the means are peaceful, the communication need not meet standards of acceptability." *Id*. at 419. The Court also noted that the claim that the "expressions were intended to exercise coercive impact on respondent does not remove them from the reach of the First Amendment." *Id*.

Subsequent to *Keefe*, the Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), dissolved a permanent injunction entered *after* a jury found the defendants liable for maliciously interfering with the plaintiff's business by engaging in and persuading others to join a widespread boycott of all-white owned establishments until the local government met the demands for equality and justice made by African-American residents of Claiborne county. Promoters of the boycott stood outside the boycotted stores and identified those who traded with the merchants. The names of persons who violated the boycott were read out loud at meetings of the Claiborne County NAACP and violators were labeled as "traitors" and called demeaning names. *Id*. at 903-4. One of the NAACP leaders, Charles Evers, who played the primary leadership role in the organization of the boycott told a crowd of "several hundred people" that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id*. at 902.

After a trial on the merits, the court issued a permanent injunction enjoining petitioners from "stationing 'store watchers' at respondents' business premises; from 'persuading' any person

to withhold his patronage from respondents; from 'using demeaning and obscene language to or about any person' because that person continued to patronize respondents; from 'picketing or patroling' the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property." *Id*. at 893.

In reversing the injunction, the Supreme Court noted that "the boycott was supported by speeches and nonviolent picketing, and [p]articipants repeatedly encouraged others to join in its cause" *Id*. at 907, and "each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and the Fourteenth Amendments." *Id*. The Court reiterated that "peaceful picketing was entitled to constitutional protection" even if the purpose of the picketing is to '"advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.'" *Id*. (*quoting Thornhill v. Alabama*, 310 U.S. 88 (1940)). Put another way, "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." *Id*. The Court concluded that Evers' emotionally charged rhetoric also enjoyed constitutional protection because "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id*. at 928.

The Court was not presented with the patent First Amendment issues in granting the TRO and the Preliminary Injunction and did not address them. The granting of injunctive relief was contrary to well established law and cannot be allowed to stand. The Court should vacate the Preliminary Injunction and permit the litigation to proceed to final judgment.

III. THE SEALING OF THE RECORD IS CONSTITUTIONALLY SUSPECT.

Under settled First Amendment law, there is a strong presumption that court proceedings must be open to the public and members of the press. That presumption can be overcome only if: (1) there are compelling reasons to close some portion of hearing; (2) the judge articulates those specific reasons on the record; and (3) the closure is narrowly tailored to address those particularized concerns. *See Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 13-14 (1986). *See also*: *Ex parte Consolidated Pub. Co., Inc.*, 601 So.2d 423 (Ala. 1992) (reversing trial court's granting of a "Motion to Seal File and for Closure of All Proceedings Prior to Jury Sequestration.") (relying on U.S. Supreme Court cases); *Thompson v. State*, --- So.3d ----, 2012 WL 520873, *7 (Ala. Crim. App., Feb. 17, 2012) ("[o]nly the most compelling reasons can justify non-disclosure of judicial records.") (citation omitted); *Riley v. State*, --- So.3d ----, 2013 WL 4710493, *27 (Ala. Crim. App., Aug 30, 2013) ("While each case must be decided on its own facts, there is a presumption in favor of openness. …The trial court may order closure *only* when 'the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced.'")[6] (emphasis in original) (citations omitted).

Ours is an open democracy, with a long history of only the most grudging and limited tolerance for secrecy in court hearings. Indeed, "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 n.17 (1980) (plurality); *see also id.* at 596 (Brennan, J., concurring in judgment) (emphasizing value of open

[6] While the *Riley* court was speaking about the closure of pretrial proceedings, the sealing of the record in this case effectively operates as a closure of trial proceedings. Without access to the public docket, no individual outside the parties and their attorneys would, or could, know when a proceeding like the contempt hearing that was scheduled in this case was to take place.

civil proceedings); *id.* at 599 (Stewart, J., concurring in judgment) (First Amendment provides a right of access to civil trials).

Unanimous circuit court authority holds that the same interests requiring presumptively open criminal trials also warrant presumptively open civil trials. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *see also, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (discovery documents submitted to court); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (special litigation committee report).

Such right of public access may be denied only if "the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Moreover, the blanket sealing of *all* documents in these cases simply cannot be justified. The cases are not accessible for public view in any way. Even Shuler's motion to quash service, which contains no mention of the underlying allegations, is sealed. A simple motion for an extension of time would be shielded from public view.

Compounding the problem is the fact that both the motion to seal (which does not contain the offending allegations) and the Court's order to seal the records are themselves under seal and, although the motion is available on the Internet, the order is not. It is thus difficult for the ACLU to know whether its actions with regard to submitting its motion and memorandum are restricted by any of the Court's orders. Indeed, the ACLU seeks involvement with some trepidation because of the realization that by entering an appearance, it may be subjecting itself to Court orders that are not publicly available. By entering its appearance, the ACLU risks running afoul of a sealed

Order when it is contacted by the media regarding this case.[7] However, the ACLU enters this fray to underscore its commitment to the principles of the First Amendment which limit the relief that this Court may order in a defamation case. The ACLU's entry of appearance in this matter is not to support the content of any of the speech at issue here but to assert that until there is a final determination based upon the facts of this case, the best gag is none at all.

For the same reasons set forth above regarding the Preliminary Injunction, the record in this case does not rise to the extraordinary level necessary to remove this case from public view.

IV. CONCLUSION.

The TRO and Preliminary Injunction in this action are constitutionally prohibited by established First Amendment standards. While Petitioners are entitled to their day in court on the underlying claims, they are not entitled to enjoin speech prior to a final determination on the merits of the case. The American Civil Liberties Union of Alabama urges this Court to *sua sponte* dissolve the Preliminary Injunction and unseal the record.

Respectfully Submitted,

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[7] The ACLU's First Amendment rights are chilled because in an abundance of caution to avoid running afoul of a secret order, the ACLU has decided not to publicly release its motion or this memorandum. The ACLU routinely makes its pleadings available to the press and public.

CERTIFICATE OF SERVICE

I certify that on November 1, 2013, a copy of the foregoing was mailed, and an electronic copy e-mailed, to:

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