

No. 18-1762

In the
United States Court of Appeals
for the
Fourth Circuit

IN RE: MURPHY-BROWN, LLC

On Petition for a Writ of Mandamus to the
U.S. District Court for the Eastern District of North Carolina,
Nos. 7:14-cv-180, 7:14-cv-182, 7:14-cv-183, 7:14-cv-185, & 7:14-cv-237

**BRIEF OF THE AMERICAN FARM BUREAU FEDERATION
AND NORTH CAROLINA FARM BUREAU FEDERATION
AS *AMICI CURIAE* SUPPORTING PETITIONER
AND A GRANT OF A WRIT OF MANDAMUS**

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Michael B. Kimberly

Date: 08/06/2018

Counsel for: American Farm Bureau Federation

CERTIFICATE OF SERVICE

I certify that on 08/06/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Michael B. Kimberly
(signature)

08/06/2018
(date)

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Counsel for: North Carolina Farm Bureau Fed'n

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INTEREST OF THE *AMICI*

The American Farm Bureau Federation is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 States and Puerto Rico, representing nearly six million member families. Its mission is to enhance and strengthen the lives of rural Americans and to build strong and prosperous agricultural communities throughout the Nation.

The North Carolina Farm Bureau Federation is the State's largest general farm organization, representing approximately 35,000 farm families in every county of North Carolina. NCFBF's volunteer-farmer members raise livestock and poultry and produce myriad crops throughout the State, including tobacco, sweet potatoes, melons, cotton, soybeans, corn, and wheat. Established in 1936, NCFBF primarily advocates for its members before Congress, the North Carolina General Assembly, and federal and state regulatory agencies. The North Carolina Farm Bureau Federation proudly stands as the State's "voice of agriculture."

Amici have an interest in this case because—as we explain in greater detail below—the district court's gag order is directly limiting their speech

¹ Pursuant to Rule 29(a)(4)(E), counsel for *amici* affirm that no party to this appeal, party's counsel, or other third party authored this brief in whole or in part or contributed financially to its preparation. This brief is filed pursuant to Rule 29(a)(2); all parties consent to its filing.

and their ability to associate fully with their members. More broadly, it is limiting their and their members' ability to participate in public discourse concerning matters of surpassing practical importance to the agricultural community. By dint of the district court's gag order, the individuals who have the most to lose or gain from the underlying nuisance suits (the parties themselves) and the individuals who are best informed about them (those who might be called as witnesses, including the people who own and work on the targeted farms) are being prevented from talking about these important issues in any form, in any forum. And yet the gag order is failing to achieve its objective, meaning its censorship is for naught. The gag order thus violates the First Amendment and should be vacated.

ARGUMENT

As a prior restraint on speech, a judicial gag order is “the most serious and the least tolerable infringement on First Amendment rights.” *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Backed by an official threat of “immediate and irreversible sanction,” a gag order like the one at issue here not only “chills” speech, it “freezes” it altogether. *Id.* Any such “prior restraint[] of expression . . . bear[s] a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

Having said that, we recognize that the exercise of First Amendment rights can sometimes threaten the fair administration of judicial proceedings.

“Although litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise” during the course of a judicial proceeding. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984) (quotation marks omitted). Yet no subordination of free-speech, press, or associational rights is tolerable unless “the nature and extent of pretrial [publicity]” presents a significant risk to the fairness of the proceeding, and no “other measures would be likely to mitigate the effects” of unrestrained expression. *Neb. Press*, 427 U.S. at 562. Even then, a gag order violates the First Amendment if it cannot “effectively . . . operate to prevent the threatened danger” or its “precise terms” are vague or overbroad. *Id.*

Petitioner has forcefully explained the many ways in which the gag order in this case falls short of these standards. Among its most glaring defects, it is unsupported by any of the factual findings that a court would need to make to justify a blanket gag in a civil case of such immense public importance. And the order’s terms would remain vague and overbroad even if it were supported by proven facts.

We do not repeat those arguments in this brief. Instead, we write to highlight the alarming practical implications that the gag order is having outside the courtroom on *amici*’s expression; the ways in which it is burdening their right to associate with, inform, and advocate for their members; and the ways in which it is thus disrupting critical civic discourse on matters of

great public importance. These concerns fall within the heartland of the First Amendment's protections and call for particularly exacting scrutiny.

We also demonstrate that the judge's order has not prevented the perceived danger that it purports to address. Highly slanted publicity has continued unabated notwithstanding the gag order. All the gag order has achieved is a counterproductive silencing of those who are in the best position to speak intelligently about the cases and the issues they raise.

Finally, we explain why the Court's decision in *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), is no bar to relief in this case.

A. The gag order will inhibit a staggering range of protected speech and inhibit *amici*'s associational activities

1. *The gag order will interfere directly with amici's expressive and associational activities*

The gag order prohibits all plaintiffs and defendants, "their counsel, representatives and agents," and "all potential witnesses" from making any statement or giving any interview to anyone associated with a media outlet *and* from making any statement "that a reasonable person would expect to be communicated to" a media outlet "relating to the trial, the parties or issues in this case." Order 3. The broad scope of the order covers all of the farmers whose operations are targeted in these lawsuits, together with their friends, families, and neighbors—all of whom are "potential witnesses." The gag order expressly prohibits any statements by these individuals "intended to influence public opinion regarding the merits of this case"—a prohibition of

extreme vagueness. *Id.*

The breathtaking scope of the gag order, which concerns issues that lie at the center of *amici*'s institutional missions, is directly interfering with *amici*'s expressive and associational activities.

a. For the past 100 years, AFBF has held an annual convention at which its members gather to discuss pressing topics affecting agricultural communities across the country. The next of these is AFBF's centennial convention in January 2019 in New Orleans, which promises to be AFBF's largest and best attended convention yet. It will include many educational workshops, breakout sessions, and other speaker events, aimed at letting farmers and ranchers throughout the country share their experiences and challenges and discuss public policy solutions that would benefit farmers, ranchers, and rural communities. After two days of education and discussion at the convention, AFBF's voting delegates will meet to discuss and adopt policy positions to be advanced by AFBF throughout the year.

Given the threat that nuisance litigation of this nature poses to farmers and their communities, AFBF has planned a featured session at its convention to focus on the North Carolina hog farm nuisance suits. Such suits, although ostensibly brought by farmers' neighbors, are typically funded and engineered by outside interests who know little of rural communities or the agricultural way of life and are motivated by financial gain, philosophical opposition to agriculture, or both.

The best informed people to speak about the farms and communities affected by these lawsuits are the member-farmers who are themselves in the cross-hairs, along with their spouses, children, extended family, friends, and neighbors. These people know better than anyone the stakes at issue in nuisance lawsuits, the damage they inflict on rural communities, the toll they take on farm families, and the most effective (and ineffective) strategies for dealing with them in and out of the courtroom.

Yet, because of the gag order here, AFBF *cannot* have the farmers involved in the underlying cases speak publicly about the conditions on their farms and the effect of these lawsuits because the press will be in attendance at the convention, and “a reasonable person would expect [his or her statements] to be communicated to” a media outlet (Order 3). Indeed, AFBF cannot even have the farmers’ family members or neighbors speak because they may also be called as witnesses in the underlying cases.

The restriction on the farmers’ and other potential witnesses’ First Amendment rights thus interferes with AFBF’s own First Amendment rights, both because the witnesses are chilled by the gag order and cannot participate in AFBF events, and because even asking them to appear might well be seen as illegally soliciting a violation of a court order. *See Stotler & Co. v. Able*, 870 F.2d 1158, 1164 (7th Cir. 1989) (“a court may find a nonparty in contempt if that person ‘has actual knowledge’ of [a] court order” and “abets” a violation of the order). The gag order thus stifles AFBF’s ability to

fully discuss and deliberate with its members, and ultimately to adopt and pursue well-informed public policy positions on issues of pressing importance to farmers in North Carolina and nationwide.

The gag order also impedes NCFBF's state and county policy development activities in similar ways. NCFBF's policy making process begins with meetings of various advisory committees, which work statewide to surface current policy issues that are relevant to farmers and their communities. Covering many subject matter areas—including swine, poultry, dairy, and cattle production—these advisory committees comprise farmers from all corners of the State to ensure that a broad range of viewpoints and ideas are represented. Typically, the most valuable and relevant discussions in these meetings originate with comments from farmers about current events on their farms and in their regional communities.

Based in large part on these advisory committee deliberations, the Farm Bureau leadership ultimately makes policy recommendations that are discussed and voted upon by the delegates at NCFBF's annual meeting. NCFBF then submits its official policy positions to AFBF, which engages in a similar policy review process to develop its national policy positions.

NCFBF held its 2018 State Advisory Committee meetings on July 26, 2018—one month after the gag order was imposed. By silencing NCFBF members who may be called as witnesses in these cases from participating in the organization's long-standing policy development process, the gag order

has thus deprived and will continue to deprive NCFBF—and, by extension, AFBF—from fully discussing matters of significant interest to their farms and communities in 2018 and into the future.

b. In addition to education and policy development, *amici* also advocate for agricultural interests before federal, state, and local legislative bodies. Among their many legislative initiatives is support for right-to-farm laws, which generally protect farmers who use accepted and standard farming practices from lawsuits that would otherwise threaten farm viability.

Among the more recent examples of such laws is the North Carolina Farm Act of 2018, enacted over Governor Roy Cooper's veto in response to the very lawsuits at issue in this proceeding. *See* Anne Blythe, *Hog farmers win new protections as lawmakers override Roy Cooper's veto*, News & Observer (June 27, 2018), perma.cc/9HM4-M7PK (media coverage of N.C. Sen. Bill 711, which was enacted June 27, 2018).

NCFBF played a critical role in the statute's enactment and continues to lobby state and local authorities to protect hog farmers from devastating nuisance verdicts. There are no better witnesses to testify before a legislative body, and no better faces for a public advocacy campaign, than the farmers who are themselves targeted by the underlying nuisance suits. Yet *amici* have been unable to get the targeted farmers or other potential witnesses to testify or make statements about these lawsuits, even though many of them are *amici*'s members. The reason why is clear: The press is likely to cover

legislative hearings and Farm Bureau rallies, just as media outlets are likely to report on any advocacy materials that reproduce statements made by targeted farmers concerning the lawsuits.

This is an ongoing problem. *Amici* remain actively involved in advocacy efforts even after passage of the North Carolina Farm Act, which will help protect farmers implicated in future nuisance suits but may not have retroactive effect. As a result, some counties have shown openness to local regulations and resolutions supporting targeted hog farmers (*see, e.g., Michael Praats, Pender County resolution calls hog farm lawsuits 'frivolous' and sides with state legislators, Port City Daily (July 24, 2018), perma.cc/Y4YF-EQKZ*). Furthermore, there is reason to believe that farmers outside North Carolina may soon be targeted, necessitating Farm Bureau advocacy in other States. AFBF and NCFBF should not be prevented from recruiting to their education and advocacy efforts those member-farmers who can testify most knowledgably about the circumstances that they believe led them to be targeted by the suits, the tactics used against them, and the losses they have suffered as a result.

c. These injuries to First Amendment rights are made worse by the near certainty that the gag order will last many years. By its terms, the order applies until a “final verdict” is reached in the final case. Order 3. There are many trials yet to come, and at the present pace, it is likely to take a couple of years or more before the final verdict is reached in the final case.

Worse still, appeals in these cases are likely to drag on for years longer. To be sure, the order expires following the “final verdict.” Order 3. But the parties will no doubt appeal each verdict, and each appeal may ultimately require a retrial and thus a new verdict. The gag order will thus likely apply beyond the final *initial* verdict, during the parties’ appeals, and through any retrials. Unless this Court intervenes, therefore, the interference with *amici*’s First Amendment rights will be unduly burdensome not only in its substance, but also in its duration.

Against this backdrop, the gag order is indefensible. It is stifling *amici*’s associational and expressive activities in clear and troubling ways, and, without a grant of mandamus, it will continue to do so for years to come. Neither AFBF nor NCFBF will be able to effectively educate its members on these issues, or effectively advocate for legislative solutions to lawsuit abuse aimed at responsible livestock farms, if it cannot hear and disseminate the words of its own members who have personally experienced these suits.

2. *The gag order will block broad public discussion of matters of significant social and political concern*

It is reason enough to vacate the gag order that it is interfering directly with *amici*’s First Amendment rights and that it will continue to do so into the indefinite future. But invalidation of the order is all the more warranted because the issues at stake in these lawsuits are matters of enormous public concern, open discussion of which is essential to the proper functioning of our

democratic institutions.

“Speech on matters of public concern is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (quotation marks and alteration marks omitted). “That is because speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Id.* at 452 (quotation marks omitted). Thus, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Id.* (quotation marks omitted).

a. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Snyder*, 562 U.S. at 453 (quotation marks and citations omitted). Even if all that is at stake here were the viability of hog farming in North Carolina, the issues undeniably would be matters of great civic interest.

North Carolina is home to about nine million hogs on nearly 2,300 hog farms. See Anne Blythe, *Jury awards more than \$25 million to Duplin County couple in hog-farm case*, News & Observer (June 29, 2018), perma.cc/73LS-4RKK. Those farms provide 46,000 full-time jobs for North Carolina workers and result directly in \$11 billion in economic productivity for the State. Greg Barnes, *Suits against Smithfield could leave hog industry in doubt*, Fayetteville Observer (June 16, 2018), perma.cc/2VRU-P6T5.

Yet the viability of these hog farms as going concerns, and of the tens of thousands of jobs they support, is now threatened as a result of these nuisance suits and the enormous awards being handed down. As Smithfield's CEO stated before the gag order was entered, "If we keep losing these suits, it is going to be very difficult to continue to do business in North Carolina," leaving eastern North Carolina's economic future gravely in doubt. See Greg Barnes, *supra*, perma.cc/2VRU-P6T5.

Of course, it is not just the farming operations themselves that are imperiled by the North Carolina lawsuits; other businesses like restaurants and catering businesses that depend on a local supply of fresh pork are also jeopardized. See, e.g., Mike McHugh, *Elected officials say 'enough is enough' with hog farm lawsuits*, Star News Online (July 10, 2018), perma.cc/Y64Y-LM68 (owner of a North Carolina barbecue catering business stating that, if the lawsuits run hog farmers out of eastern North Carolina, "he'd be through"). And, of course, if 46,000 workers lost their jobs, the broader local economy would crater.

Beyond North Carolina, these suits have implications for livestock operations everywhere. Similar nuisance actions could equally be filed against other kinds of livestock farming operations in North Carolina and States all across the country. There are approximately 3.2 million farmers in the United States (U.S. Dep't of Agric., *Farm Demographics – U.S. Farmers by Gender, Age, Race, Ethnicity, and More* (May 2014) perma.cc/5KEB-BETW)

who employ an additional 1.5 million agricultural workers (Bureau of Labor Statistics, *Employment by major industry sector* (Oct. 24, 2017), perma.cc/DK8Q-VZQC). Those farmers and their workers are raising nearly 90 million cattle, more than 66 million pigs and hogs, and more than 1.85 billion chickens all across the country. U.S. Dep't of Agric., *2012 Census of Agriculture: United States Summary and State Data*, 19, 22, 25 (May 2014), perma.cc/NPF7-KVSB. These livestock have a total value of sales that exceed \$182 billion annually (*id.*), playing a critical role in the Nation's economy and putting food on the Nation's tables.

These nuisance suits are fundamentally at odds with the agricultural way of life and the economic benefits it brings locally and nationally. The potential practical and economic consequences of successful nuisance suits like the underlying cases here are beyond measure. Whether such suits are an appropriate method for penalizing lawful agricultural practices that are consistent with all prevailing regulations—and thus whether the standards for agricultural practices should be set prospectively by lawmakers or retroactively by juries—is a matter of self-evident public concern.

b. The three jury verdicts handed down to date also raise serious questions about the wisdom and constitutionality of outsized punitive damages awards. In the most recent *Artis* trial, the jury awarded the six plaintiffs an astonishing total of \$23.5 million in compensatory damages and \$450 million in punitive damages. In the *McKiver* trial, the jury awarded

each of the ten plaintiffs \$75,000 in compensatory damages and \$5 million in punitive damages, for almost \$51 million in total damages. And in *McGowan*, each plaintiff was awarded \$65,000 in compensatory damages and \$12.5 million in punitive damages.

Aside from their standalone shock value, these awards raise serious constitutional concerns. The roughly 20-fold and 67-fold ratio of compensatory damages to punitive damages, respectively, in *Artis* and *McKiver* are manifestly unconstitutional. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003). In *McGowan*, the nearly 200-fold multiplier is even more plainly unlawful.

To be sure, North Carolina's statutory cap on punitive damages will reduce the punitive damage awards to at least some extent. See *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004) (upholding N.C.G.S. § 1D-25, which limits the amount of punitive damages recoverable in civil actions to three times compensatory damages or \$250,000, whichever is greater). But even with that limitation, the magnitude of the punitive awards stretches the limits of constitutional acceptability. See *State Farm*, 538 U.S. at 425. And regardless of how their constituent parts are denominated or limited, the propriety of such extraordinary awards should be fully discussed in open public debate—especially given even less protective, or altogether absent, punitive damages caps in other States. *E.g.*, Iowa Code Ann. § 668A; Ky. Rev. Stat. Ann. § 411.186.

Yet the gag order in this case is stifling an informed discussion about all of these issues. The people who have the most at stake and the most to offer to the public discourse—those whose livelihoods are on the line and whose communities have been fractured—are forbidden from talking about these matters every time there is a risk that their statements might make their way into news reports. The risk of punishment for contempt will encourage them and many others to “choose simply to abstain from protected speech” across the board, “harming not only themselves but society as a whole.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). This kind of silencing of speech is at loggerheads with our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Snyder*, 562 U.S. at 452 (quotation marks omitted).

B. The gag order is proving ineffective at achieving its purpose

At the same time that the gag order is silencing those individuals who are best situated to speak on these matters of significant public concern, it is failing miserably to achieve its goal of reducing potentially prejudicial publicity. This matters because, when it comes to judicial gag orders (like other First Amendment restraints), the Court must ask “how effectively [the gag] order would operate to prevent the threatened danger.” *Neb. Press*, 427 U.S. at 562. The answer here is clear: not effectively at all.

In the first 33 days since the district court entered its gag order on June

27, 2018, we have counted an equal number of articles covering the lawsuits: 33. See Appendix (collecting news media and opinion articles). That these post-gag-order articles avoid on-the-record quotes from the parties and witnesses does not make them any more evenhanded and does not keep them from influencing potential future jurors. Indeed, unsurprisingly, the articles are often slanted, as media coverage often is.

Some are sympathetic to the individual hog farmers caught in the cross-hairs of these lawsuits. One, for example, recounts a statement by the North Carolina Pork Council that the jury awards are “heartbreaking” because a “hardworking farmer stands to lose everything.” Gary Baise, *Smithfield getting beat up in costly court cases*, Farm Futures (July 3, 2018), perma.cc/P7YX-UAFP. The same article reports that “the judge would not allow testimony from an odor expert,” which would have been “absolutely critical in proving that odors from any [large hog farm] do not travel far.” *Id.* Another pro-farmer opinion piece published in *Bladen Online* describes the plaintiffs’ attorney as a “smooth talk[ing]” and “silver tongued” outsider interested only in “big monetary payouts” rather than the interests of the community or its citizens. Charlotte Smith, *OPINION: Hog trial misleading; living high on the hog isn’t for everyone*, Bladen Online (July 14, 2018), perma.cc/NFC4-4CNG. The writer laments “the detriment the lawsuits are having on our farmers and the potential [effect] it could have on the way of life as we know it.” *Id.*

Other articles are sympathetic to the plaintiffs. Some reporters have described trial testimony that likened the smell of the hog farms to “a decayed human body” and accused the defendants of “shooting the feces, stuff, [into] the air.” Travis Fain, *Hog farm trial testimony: Crusty pigs, ‘feces in the air’*, WRAL (July 19, 2018), perma.cc/7GSM-W273. Other reports relaying trial testimony have described “odors so putrid that they would make most people retch” and “the stench, flies, buzzards [and] truck traffic” that undermine the plaintiffs’ quality of life. Lisa Sorg, *Powerful new hog trial testimony puts Smithfield back on the defensive*, NC Pol’y Watch (July 19, 2018), perma.cc/AW5W-CWM5. A pro-plaintiff opinion piece characterizes Murphy-Brown as engaging in “industrialized hog farming” and accuses it of “degrad[ing] . . . eastern North Carolina” and “refus[ing] to invest in technology that could greatly reduce the nasty smell and pollution.” Ned Barnett, *Hog industry doesn’t want nuisance suits? Try not being a nuisance*, News & Observer (July 12, 2018), perma.cc/B3JS-8JGA.

These articles would probably be prejudicial if seen by prospective members of the jury in any of the trials that have yet to be held. But that is exactly the point: The gag order is utterly failing to achieve its goal. The First Amendment rights of parties and potential witnesses are being restricted, but to no benefit—slanted media coverage has continued unabated.

None of this is to say that the district court is powerless to minimize juror bias. As petitioner explains at length (Opening Br. 27-32), there are

other traditional tools for dealing with situations like this, including a thorough jury *voir dire*, proper jury instructions, and enforcement of the rules of professional conduct. It just happens that the tool that the district court chose in this case—silencing the parties and potential witnesses—is as ineffective as it is unconstitutional.

C. *In re Russell*—a criminal case—provides no basis for upholding an overbroad civil gag order like this one

Respondents may rely on *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), to defend the district court’s gag order, but *Russell* was a criminal case, and this Court stressed that fact in its analysis. *Russell* involved “a federal criminal prosecution in the Middle District of North Carolina brought against several alleged Ku Klux Klansmen and/or Nazi Party members for putative civil rights violations arising out of a shooting . . . that resulted in the deaths of five individuals.” *Id.* at 1008. “After noting that the trial was the subject of intense local and national publicity, [the district court] determined that the proscription of certain extrajudicial communications by prospective witnesses was necessary in order to protect the right of the defendants to a fair trial based solely on admissible evidence.” *Id.* at 1009 (quotation marks omitted). This Court upheld that gag order because there was evidence of “highly prejudicial statements” and because the district court expressly determined that numerous “considered alternatives” would be “ineffective[]” for addressing the potential for unfairness. *Id.* at 1010.

This Court stressed the importance of the “sixth amendment rights of a criminal defendant.” 726 F.2d at 1010-11. And this Court relied heavily on *Nebraska Press*, which likewise stressed that it was dealing with a criminal case, in which “protection against prior restraint should have particular force.” 427 U.S. at 559. Indeed, the order below in this case specifically justifies itself by referring to “Sixth Amendment rights” (Order 2)—but, of course, the Sixth Amendment is not implicated in this civil case.

Although the Due Process Clause protects property in civil actions, the stakes are far higher—and the constitutional protections greater—when personal liberty is on the line. *Cf. United States v. Harris*, 582 F.3d 512, 515 (3d Cir. 2009) (“A person subject to criminal contempt is entitled to greater procedural protections than a person subject to civil contempt.”); *Big Bear Super Mkt. No. 3 v. INS*, 913 F.2d 754, 757 (9th Cir. 1990) (laxer due process standards apply to statutes that “merely impose civil, as opposed to criminal[,] penalties”). Because the rights of a criminal defendant must be protected with greater zeal than those of a civil litigant, there is more justification for limiting First Amendment rights as to criminal trials—and, conversely, less justification for such suppression of speech pertaining to civil cases. *See generally* Amicus Br. of the Nat’l Ass’n of Mfrs.

Perhaps more importantly, the order in *Russell* was accompanied by a 10-page memorandum detailing the judge’s findings of fact and conclusions of the law that supported his decision to impose a gag. 726 F.2d at 1009. The

order here, by contrast, is perfunctory and wholly unsupported. Acting *sua sponte*, and apparently without considering substitute measures, the district court jumped straight to a sweeping, years-long gag order that is already stifling public discourse on matters of great concern to the affected communities—at the same time that it is failing to achieve its purpose. In light of these differences, *Russell* offers no support for respondents’ position.

CONCLUSION

The petition for a writ of mandamus should be granted, and the case should be returned to the district court with instructions to dissolve the gag order in its entirety.

Dated: August 6, 2018

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

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APPENDIX

- <http://www.ncpork.org/category/beyond-bacon-the-blog/>
- <https://www.charlotteobserver.com/news/state/north-carolina/article215404475.html>
- <https://www.heraldsun.com/opinion/article213992774.html>
- <https://bladenonline.com/hog-farm-lawsuit-key-plaintiff-misleading-defendants-want-to-talk/>
- <http://www.swineweb.com/jury-award-25-million-to-a-couple-in-smithfield-foods-second-no-carolina-lawsuit/>
- http://www.wilmingtonbiz.com/more_news/2018/07/27/lawsuits_continue_against_hog_farms/17781
- <http://www.kswo.com/story/38720039/pender-county-commissioners-support-hog-farmers-with-resolution>
- <https://www.wral.com/hog-farm-trial-testimony-crusty-pigs-feces-in-the-air-/17709361/>
- <https://www.wral.com/gop-officials-show-hog-farmers-love-as-next-nuisance-suit-heads-to-court/17688327/>
- <https://www.wral.com/general-assembly-overrides-governor-on-hog-farm-suits-early-voting/17658716/>
- <https://www.newsobserver.com/opinion/article214759670.html>
- <http://www.ncpolicywatch.com/2018/07/19/powerful-new-hog-trial-testimony-puts-smithfield-back-on-the-defensive/>
- <https://bladenonline.com/opinion-hog-trial-misleading-living-high-on-the-hog-isnt-for-everyone/>
- <https://www.farmfutures.com/commentary/smithfield-getting-beat-costly-court-cases>
- <https://www.newsobserver.com/news/local/article214096384.html>

- <http://www.witn.com/content/news/Hundreds-rally-for-hog-farms-following-lawsuits-487828641.html>
- <https://www.feedstuffs.com/news/jury-awards-25m-north-carolina-hog-farm-odor-lawsuit>
- <http://www.starnewsonline.com/news/20180710/update-elected-officals-say-enough-is-enough-with-hog-farm-lawsuits>
- <https://www.wral.com/third-hog-farm-trial-starts-in-raleigh-pitting-pork-v-property-rights/17691051/>
- <https://www.insurancejournal.com/news/southeast/2018/07/05/494178.htm>
- <https://www.porkbusiness.com/article/another-smithfield-hog-farm-found-guilty-jury>
- <http://www.jdnews.com/news/20180702/second-hog-farm-verdict-has-some-squealing-for-justice>
- <https://www.indyweek.com/news/archives/2018/06/27/big-pork-rallies-as-the-general-assembly-protects-chinese-owned-smithfield-foods-from-nuisance-lawsuits>
- <https://portcitydaily.com/local-news/2018/07/24/pender-county-resolution-calls-hog-farm-lawsuits-frivolous-and-sides-with-state-legislators/>
- <https://whoradio.iheart.com/content/2018-07-03-another-nuisance-lawsuit-succeeds-against-hog-farm/>
- https://www.journalnow.com/news/local/jury-awards-more-than-million-to-duplin-county-couple-in/article_9ec28e69-0e38-5e6a-9993-8201e7ac1e4f.html
- <https://www.usnews.com/news/healthiest-communities/articles/2018-07-02/fighting-hog-farm-pollution-in-north-carolina>
- <http://www.wfae.org/post/changes-early-voting-hog-nuisance-lawsuits-now-law#stream/0>

- <https://www.provisioneronline.com/articles/106446-second-smithfield-lawsuit-results-in-25-million-verdict-to-hog-farm-neighbors>
- <https://nclawyersweekly.com/2018/07/10/forest-troxler-visit-eastern-nc-to-warn-about-hog-farm-lawsuits/>
- <http://longleafpolitics.com/nc-farm-act-2018/>
- <http://www.chicagotribune.com/news/sns-bc-us--hog-smells-lawsuits-20180629-story.html>

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