SUPREME COURT OF APPEAL
STATE OF LOUISIANA

CIVIL WRIT NO. 2009-CC-1067
THE COUNCIL OF THE CITY OF NEW ORLEANS, JACKIE CLARKSON, ARNIE FIELKOW, CYNTHIA HEDGE-MORRELL, CYNTHIA WILLARD-LEWIS, STACY HEAD, SHELLY MIDURA, & JAMES CARTER

VERSUS

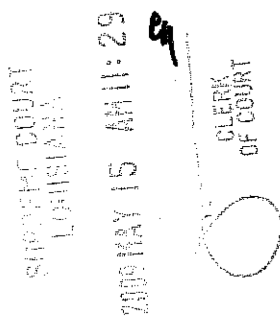
TRACIE WASHINGTON, TIONNE SIMON, & LOUISIANA JUSTICE INSTITUTE

In the Application for Emergency Supervisory Writ From
Civil District Court for the Parish of Orleans, State of Louisiana,
Suit No. 2009-2279, Division D-16,
The Honorable Lloyd Medley, Judge Presiding, and From
Louisiana Fourth Circuit Court of Appeal, State of Louisiana,
C.A. No. 2009-0389

DEFENDANTS TRACIE L. WASHINGTON and LOUISIANA JUSTICE INSTITUTE RESPONSE TO PLAINTIFFS' APPLICATION FOR EMERGENCY SUPERVISORY WRIT

Respectfully Submitted,

William P. Quigley, #7769
Davida Finger, # 30889
Loyola University – School of Law
7214 St. Charles Avenue
New Orleans, Louisiana 70118
Tel: 504.861.5762
Fax: 504.861.5426



Ronald L. Wilson, #13575
909 Poydras Street – Suite 2556
New Orleans, Louisiana 70112
Tel: 504.525.4361
Fax: 504.525.4380

Clarence Roby, Jr., #20345
3701 Canal Street – Floor 4 Suite U
New Orleans, Louisiana 70119
Tel: 504.486.7700
Fax: 504.486.8805

Attorneys for Tracie L. Washington
Louisiana Justice Institute

TABLE OF AUTHORITIES

New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971) 3, 4, 5, 6, 8, 17, 19

In Re Warner, 2005-B-1303, decided April 17, 2009, 2009 WL 1025823....... 3, 11, 12, 18, 23

Police Department v Mosley, 408 US 92, 95 (1972)....... 10

First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 779, 98 S.Ct. 1407, 1417, 55 L.Ed.2d 707 (1978) 11

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826, 120 S.Ct. 1878, 1893, 146 L.Ed.2d 865 (2000)....... 11, 12, 18, 23

Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957)....... I2

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 255, 107 S.Ct. 616, 626, 93 L.Ed.2d 539 (1986)....... 12

Meese v. Keene, 481 U.S. 465, 488-489, 107 S.Ct. 1862, 1875, 95 L.Ed.2d 415 (1987)....... 12

R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992)....... 12, 23

Simon & Schuster, 502 U.S. at 118, 112 S.Ct. at 509....... 12, 23

Consolidated Edison, 447 U.S. at 540, 100 S.Ct. at 2335....... 12

I. INTRODUCTION

Respondents, Tracie Washington and the Louisiana Justice Institute submit the following response to Relators' Emergency Writ Application. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The government thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971).*

Relators, (The Council of the City of New Orleans, Jackie Clarkson, Arnie Fielkow, Cynthia Hedge-Morrell, Cynthia Willard-Lewis, Stacy Head, Shelly Midura and James Carter) ask the Louisiana Supreme Court to dramatically weaken one of the foundational freedoms of our democracy – the First Amendment to the Constitution of the United States. Remarkably, Relators do not cite a single case of any court in any jurisdiction that stands for the authority they seek this Court to confer on them. No court anywhere has justified what this court is being asked to do – allow a government to enjoin a private citizen from publishing or circulating on the internet or sharing in any other way she wants hundreds of thousands of already released public documents. These already released records were produced on public computers and public blackberries by and for public officials while they were in public office.

This Louisiana Supreme Court issued an important decision protecting the First Amendment within the last few weeks. *In Re Warner, 2005*-B-1303, decided April 17, 2009, 2009 WL 1025823. That analysis recognizes and details the substantial burdens that governments face when trying to do that they are seeking to do in this case. Relators did not try to distinguish that case or that analysis. Just as important, there is a legendary First Amendment U.S. Supreme Court case exactly on point supporting the rights of citizens which this government effectively asks this Court to set aside – *New York Times v United States, 403 US 713, 91 S Ct 2140, 29 LEd2d 822 (1971).* The Relators ask this Court to overturn prior

decisions of the U.S. Supreme Court and the settled constitutional law of the United States on which this Court recently relied. This Court must recognize the importance of the First Amendment, deny the government request for an emergency writ and dissolve the stay.

II. LAW AND ARGUMENT

A. RELATORS' ARGUMENTS ARE CONTRARY TO LAW

In this matter, the government is trying to silence a private citizen and those with whom she has spoken. The Relators are trying to stop the publication on the internet or otherwise making public hundreds of thousands of already publicly released records generated by public officials on public computers and public blackberries.

The issue before this Court is whether this government has the legal authority to silence a private citizen and prevent her from publishing hundreds of thousands of public records which were released to her in December 2008. The Emergency Writ Application before this Court provides no legal authority at all for the relief requested. Their application makes page after page of arguments about what is and what is not a public record, or what is and what is not a privileged document, or that elected officials have rights to privacy. The application suggests that possible violations of the Public Records Act, or the Code of Civil Procedure, or other laws may have occurred. These concerns, Relators suggest, could or should outweigh the First Amendment. But in the end, in addition to offering underwhelming support for these allegations, they cite no case at all that supports that argument.

The Louisiana Fourth Circuit Court of Appeal simply and clearly told the Relators that what they sought "violates the very foundation of the First Amendment." (Fourth Circuit Opinion, page 5, first paragraph). The Fourth Circuit recognized there are many ways other than violating the First Amendment to

protect the interests that Relators say are its reasons. As the Fourth Circuit noted in their opinion, "Furthermore, if inadvertently disclosed privileged documents, which are by definition not public records, are subsequently disseminated by Relator Washington, ethical and procedural violations will likely be asserted. With regards to the interests of the Louisiana Public Records Law, Code of Civil Procedure, and Rules of Professional Conduct, as compared to First Amendment interests, we find that First Amendment concerns greatly outweigh the former." (See page 5 of Fourth Circuit Opinion, first paragraph, emphasis supplied). Relators then filed an Emergency Writ asking this Court to carve out unprecedented exceptions to the First Amendment.

The First Amendment has long protected private citizens from the powerful but wrong-headed forces of government which seek to limit freedom of speech. Unfortunately governments have occasionally decided that they, as the government, had reasons sufficient to try to set aside the First Amendment and have taken steps to try to curb essential freedoms. This is one of those regrettable occasions. Once again powerful forces of government seek to abridge the freedom of speech of a citizen.

Historically it is the judicial branch and the integrity of the courts which have stood as bulwarks against government efforts to weaken freedom of speech. This Court is facing just such a situation and must respond with a robust defense of the First Amendment. In 1971, the U.S. Supreme Court decided the case of *New York Times v United States,* 403 *US 713, 91 SCt 2140, 29 LEd2d 822 (1971),* which involved the Pentagon Papers. In that case, the Supreme Court was asked by the U.S. government to prohibit the publication of hundreds of thousands of pages of government records because the government said the records were allegedly unlawfully obtained and the government said their publication could compromise

the security of the United States of America. Those papers were designated as top-secret by the U.S. government and were never intended for publication.

The government argument in the 1971 case was simple – allowing the publication of the documents "would pose a grave and immediate danger to the security of the United States." (See Question Presented, Brief for the United States 1971 WL 167581, page 2). Disclosure of state secrets "would endanger troops in combat or otherwise imminently imperil the national security." (See Argument, Brief for the United States 1971 WL 167581, page 20). For these reasons, the government argued that the First Amendment should not apply. However, the decision of the U.S. Supreme Court was to allow the publication of the records because the First Amendment to the U.S. Constitution protected the right to freedom of speech and publication despite warnings of cataclysmic consequences by the government.

The Court opened its historic opinion with these words:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *At 403 US 714.*

Since *New York Times v United States, 403 US 713, 91 SCt 2140, 29 LEd2d 822 (1971),* the law of the United States has been clear that any system of prior restraint of expression on speech or publication bears a heavy presumption against its constitutional validity, and the government carries a "heavy burden" to justify any system of prior restraint. *At 403 US 714, 91 SCt at 2141.*

The Emergency Writ of the Relators asks the Louisiana Supreme Court to overturn this long settled foundational First Amendment decision issued by the United States Supreme Court. For what compelling reasons do they ask this Court to reduce the constitutional rights of citizens? Relators ask this Court to carve out

new exceptions to the US Constitution and trample on the rights of the First Amendment. They seek this authority based on the possibility that, somewhere in the hundreds of thousands of documents publicly released months before by an employee of the same City of New Orleans, there might be some emails which are protected by legislative privilege, or right to privacy of city council members, or some possible attorney client privilege. These privileges they argue, without citation to any case anywhere, trump the long settled rights protected by the First Amendment.

As to the argument that attorney client or other privileged communications may be inadvertently disclosed, it is important to note that the government has repeatedly rejected offers from Ms. Washington and counsel to resolve exactly that issue. Ms. Washington and her counsel have repeatedly asked the City to indicate which emails they think are privileged and offered to sit down to go over each email, one at a time, to determine whether the email is privileged or not. Relators have refused to engage in this individual determination. Instead demanded that all the emails be returned, the non-privileged ones and the ones that they argue may be privileged, to the sole possession of the City and then the city will start a process to decide in their unilateral judgment and in their own time frame which ones should be released and which ones should not be released. It is also worth noting that many other emails of city officials have been found to be erased when it came time for the public to exercise their rights to view them. The offer of Ms. Washington to sit down with the Relators to look at any documents which they contend are privileged eliminates their argument that this might be their compelling reason for which the First Amendment must be ignored.

As noted above, the Fourth Circuit recognized there are many ways other than violating the First Amendment to protect the interests that government says are its reasons. "Furthermore, if inadvertently disclosed privileged documents,

which are by definition not public records, are subsequently disseminated by Relator Washington, ethical and procedural violations will likely be asserted. With regards to the interests of the Louisiana Public Records Law, Code of Civil procedure, and Rules of Professional Conduct, as compared to First Amendment interests, we find that First Amendment concerns greatly outweigh the former." (See page 5 of Fourth Circuit Opinion, first paragraph).

Unable to cite any law to support their requested relief, the New Orleans City Council repeatedly suggests, but carefully does not state, that some improprieties may have occurred. For example, they infer that Ms. White, who released the records did something wrong. They ominously write that she released the documents "under suspicious circumstances." (See page 1, paragraph one). But Ms. White is their employee – an employee of the City of New Orleans. If they think she did something wrong, who more than they should do something about it? Is it because they are the legislative branch and Ms. White works with the executive? If the city legislative branch has a problem with the city executive branch, they should address it. Internal political conflicts within the City of New Orleans elected officials are woefully insufficient reasons to justify cutting down the protections of the First Amendment.

This Court must act to prevent censorship, prior restraint on the First Amendment rights of defendant and potentially hundreds of others, as well as numerous violations of the U.S. Constitution, the Louisiana Constitution and the laws of the State of Louisiana.

When the Pentagon Papers were about to be published and made public, there was much anguish and gnashing of teeth by the government. Government officials warned of the direst consequences to our nation and its ability to defend itself. Yet, the U.S. Supreme Court came down on the side of the First Amendment. The concluding words of their opinion ring true today: "The greater

the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more 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." *At 403 US 719-720.*

A concurring opinion follows the same path. "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate." *At 403 US 724.*

The First Amendment and our nation's history of vigorously protecting freedom of speech do not allow government to prevail over the constitutional rights of citizens in this matter. In order to protect the First Amendment rights of not only the citizen before this Court but all citizens whom the government seeks to silence, this Court must reject the Emergency Writ Application of the government and immediately dissolve the stay which this Court entered to hear from all parties. The First Amendment insists on no less.

B. APPLICATION OF THE FIRST AMENDMENT TO THIS MATTER

Ms. Washington suggests to this Court that the U.S. Supreme Court case of *New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971),* the Pentagon Papers case, is exactly on point.

In that case, the government sought an injunction to prevent the publication of government documents which the government said were illegally obtained, contained highly classified information important to the national security, and

should not be published because publication would cause grave physical harm, even death, to the United States and to its people.

At issue are hundreds of thousands of records already publicly released pursuant to a lawful public records request. These records are from public computers and public blackberries of public officials while they were serving in public office.

The US Supreme Court said that in matters infringing on the freedoms of the First Amendment, the test that the government must meet is simply this: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint."

In the Pentagon Papers case, the government failed that test and the US Supreme Court refused to halt the publication of sensitive government records.

The First Amendment has long been the main protection against the forces of government who seek to limit speech and publication. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v Mosley, 408 US 92, 95 (1972).*

Within the last month, the Louisiana Supreme Court again made it perfectly clear that First Amendment protections apply in Louisiana in matters such as the one before this Court now and again demonstrated the heavy burden that government must bear if it seeks to infringe on freedom of speech. Justice Victory authored the opinion in the First Amendment case of *In Re Warner, 2005-B-1303*, decided April 17, 2009. *2009 WL 1025823.*

The Warner decision analyzed the constitutionality of the confidentiality rule imposed on participants in attorney disciplinary proceedings and concluded that it violated the First Amendment.

Warner started with the acknowledgment that "The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. In a series of cases, the Supreme Court has held, "that the liberty of speech and of the press which the First Amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action." First *Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 779, 98 S.Ct. 1407, 1417, 55 L.Ed.2d 707 (1978).* The Louisiana Supreme Court is a state entity." *In Re Warner, supra, at 4.*

Justice Victory pointed out that what is at stake when the First Amendment is at risk is vitally important no matter the kind of speech at issue. "While the class of information suppressed may seem unimportant to some, we cannot allow this perception to influence our First Amendment analysis. As the Supreme Court has explained, "We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826, 120 S.Ct. 1878, 1893, 146 L.Ed.2d 865 (2000).*

The First Amendment protects, "[a]ll ideas having even the slightest redeeming social importance."*Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957). In Re Warner, supra, at 12.* The Louisiana Supreme Court decision continued to find that the First Amendment comes into play when, as here, the government is trying to suppress or chill speech. "Our review of the jurisprudence of the Supreme Court indicates that a violation of the First Amendment may be found when the record demonstrates that the practical effect of a government action is the suppression or chilling of speech. See *FEC v.*

Massachusetts Citizens for Life, Inc., 479 U.S. 238, 255, 107 S.Ct. 616, 626, 93 L.Ed.2d 539 (1986) (plurality opinion) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities"); *Meese v. Keene, 481 U.S. 465, 488-489, 107 S.Ct. 1862, 1875, 95 L.Ed.2d 415 (1987) (Blackmun, J., dissenting) (same). In Re Warner, supra, at page 9.*

As the Court noted, any government attempts to regulate content-based speech are "presumptively invalid." *R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992)* Except for a few well-defined exceptions, which do not apply in this case, a content-based regulation will survive a constitutional challenge only if it passes the well-established two-part strict scrutiny test. Under strict scrutiny the government bears the burden of proving the constitutionality of the regulation by showing (1) that the regulation serves a compelling governmental interest, and (2) that the regulation is narrowly tailored to serve that compelling interest. *Playboy Entertainment Group, 529 U.S. at 813, 120 S.Ct. at 1886; R.A.V., 505 U.S. at 395-396, 112 S.Ct. at 2549-2550; Simon & Schuster, 502 U.S. at 118, 112 S.Ct. at 509; Consolidated Edison, 447 U.S. at 540, 100 S.Ct. at 2335* (the government must show that the regulation is a "precisely drawn means" of serving a compelling state interest)." *In Re Warner, supra, at page 16.*

In making the decision whether there is a compelling state interest that would allow the government to invade the protected sanctuary of the First Amendment, the Louisiana Supreme Court looked to decisions of other courts, particularly the U.S. Supreme Court. Fortunately, the U.S. Supreme Court has issued a decision on point in the previously mentioned New *York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971).* These authorities, particularly when contrasted to absolute absence of any authority at all presented by applicants for

this Emergency Writ, mandate the dismissal of the writ and the immediate dissolution of the stay.

C. OVERVIEW OF PERTINENT FACTS:

1. On December 3, 2008, Tracie Washington made a perfectly legal request under the Louisiana Public Records Law, La RS 44:1, to the City Attorney and city officials of the City of New Orleans for copies of all the emails generated by a number of elected officials on their publicly owned computers and publicly owned blackberries from July 1, 2006 to the present. These were records created for or by public officials and public employees and were preserved on public computers and public blackberries.

2. Prior to and after this specific public records request, Ms. Washington has made numerous other public records requests to the City of New Orleans.

3. City officials promptly complied with the December 3, 2008 request and provided many thousands of emails to Ms. Washington. The City Council in its application for Emergency Writs estimates that the City publicly released "hundreds of thousands" of emails to Ms. Washington. (See page 1 of Emergency Writ Application, first paragraph).

4. Even the City agrees "that Ms. Washington's Public Records Request was a valid exercise of a citizen's right to information." (See page 3 of Emergency Writ Application, last paragraph). The Trial Court Judge also said that the public records request by Ms. Washington was totally consistent with Louisiana law.

5. Ms. Washington had full and unrestricted possession of these hundreds of thousands of public records without any complaint or objection from the City of New Orleans for over two months.

6. During this two month time period while Ms. Washington had full and unrestricted possession of these public records, Ms. Washington publicly discussed these public record emails on at least two radio shows.

7. During this two month time period while Ms. Washington had full and unrestricted possession of these public records, Ms Washington discussed these public record emails with as many as hundreds of individuals while publicly announcing that she was working to publish these emails by posting them on the internet so the citizens of New Orleans could know what public business their elected officials were engaged in on their city blackberries and computers from July 1, 2006 to the present.

8. During this two month time period while Ms. Washington had full and unrestricted possession of these public records, Ms. Washington also shared copies of the public record emails with as many as dozens of other citizens who may each in turn have shared these public record emails with dozens of other citizens.

9. In late February 2009, over two months after producing these public records, counsel for the City Council of New Orleans communicated with Ms. Washington that some of the thousands of public records given to her by the City may be privileged.

10. At no time have the government and elected officials who brought this action even alleged that all the hundreds of thousands of public records received by Ms. Washington are privileged, only that some <u>might</u> be.

11. Since February and repeatedly until the present including in open court and in conferences with the court, Ms. Washington and counsel have repeatedly asked the City to indicate which emails they think are privileged and offered to sit down to go over each email which is considered privileged, one at a time, to determine whether the email is privileged or not. The City has refused to engage in this individual determination instead demanding that all the emails be returned to the City and then the city will start a process to decide in their judgment and in their

own time frame which ones should be released and which ones should not be released.

12. On March 4, 2009, the City Council of New Orleans asked for and received a temporary restraining order prohibiting Ms. Washington from distributing, discussing, or transferring to any other individuals any of the public records given to her by the City. Ms. Washington has complied with that order.

13. On March 12, 2009, oral arguments were heard on the request of the City for a preliminary injunction. The Trial Judge ruled from the bench that Ms. Washington was to continue to be restrained from communicating or distributing the emails she received from the city. Ms. Washington has complied with that order.

14. On March 12, 2009, the Trial Judge ordered Ms. Washington to turn over copies of the emails to the court so the court could review them in camera to determine if there were any privileged documents included in the thousands of emails or not. Ms. Washington has complied with that order.

15. As of the date of the filing of this pleading, the Trial Court has made no determination as to the existence of any documents which contain privileged information. The Trial Court has advised counsel that it may take it as long as a year to do a review of the thousands of documents that were produced for in camera review.

16. On March 17, 2009, the Trial Court issued a written Judgment on the City's request for a preliminary injunction. This written Judgment differed in significant and substantive detail from the oral judgment which the trial court entered on March 12, 2009 and was prepared by counsel for the government and elected officials and submitted to the Trial Judge without final review or input from counsel for Ms. Washington.

17. It is the Judgment of March 17, 2009 which was the subject of the request for relief in the Fourth Circuit Court of Appeal and of the 4-1 decision overturning it.

18. The written Judgment of March 17, 2009 is defective and illegal on numerous grounds including for the following reasons, which will be set out in more detail below:

(a) It violates the First Amendment to the U.S. Constitution in numerous ways including: by imposing a gag order on a private citizen, by engaging in prior restraint of the publication of these records, by chilling the right to association and by infringing on the right to privacy;

(b) It violates the Fifth Amendment to the U.S. Constitution;

(c) It violates the Fourteenth Amendment to the U.S. Constitution;

(d) It violates the Louisiana Constitution;

(e) It violates the Louisiana Public Records Law;

(f) It violates other aspects of the US and Louisiana Constitution and the laws of the State of Louisiana.

19. On May 12, 2009, the Fourth Circuit Court of Appeal in case number 2009-C-0389, The Council of the City of New Orleans et al v Tracie Washington et al, vacated the erroneous trial court judgment and dissolved the erroneous injunction.

20. An Emergency Writ Application was filed by the City Council of New Orleans on May 12, 2009.

21. This Court entered a stay and ordered opposing parties to provide written opposition to the Emergency Writ Application by Friday May 15, 2009 at 12 noon.

D. DETAILED RESPONSE TO RELATORS' ASSIGNMENTS OF ERROR

Relators offer three assignments of error to justify its request to this Court to set aside the First Amendment. First, that in these hundreds of thousands of documents there were some which may be privileged. Second, that the Fourth Circuit wrongfully decided the case based on unsubstantiated facts or testimony of Ms. Washington. Third, that their efforts were not prior restraint of speech.

In evaluating each of the arguments by Relators this Court must recall the two part test that the government must meet – a presumption against its constitutional validity and a heavy burden of showing its justification and see if their arguments measure up. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971).*

1. Response to Relator Assignment One

First Response to Assignment One

First and foremost, even if, for purposes of argument, all the allegations of the government are factually accurate and all their legal arguments in this section are actually correct, there is no case cited nor any authority given to support the proposition that the government has the constitutional authority to impose their will as prior restraint and stop the publication of these records.

The government goes on for pages about what is and what is not possibly privileged and what is and what is not possibly a public record and what is and what is not possibly protected by other laws. Those pages do not address the issue before this Court – whether the government has the right under the First Amendment to stop the publication by a private citizen of properly requested and publicly released records.

The government does not even try to address the First Amendment issue and how much weight the privileges and other considerations should be given when balanced against freedom of speech.

Not one of the cases cited nor the arguments made stands for the proposition that if some publicly released documents are privileged the government

has the right to leap over the First Amendment and stop publication of those and other documents once they have been publicly released to private citizens.

Rather, if there are privileged documents within the hundreds of thousands previously disclosed, there are, as the Fourth Circuit suggested, other less constitutionally intrusive ways to deal with them. Recall that in the Pentagon Papers case, the government said that disclosure would compromise national security and could lead to deaths of soldiers. If that was insufficient to set aside the First Amendment, there is no way at all that considerations of possible privileges are enough to do so.

As the Louisiana Supreme Court has recently pointed out, when protected First Amendment speech is at issue the government must use less restrictive alternatives or prove their ineffectiveness. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entertainment Group, 529 U.S. at 816, 120 S.Ct. at 1888.* "A court should not assume a plausible, less restrictive alternative would be ineffective ..." *Id., 529 U.S. at 824; See also Ashcroft, 542 U.S. at 665, 124 S.Ct. at 2791* ("When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.") *In Re Warner, supra, 27.*

This is precisely what the Fourth Circuit did. The Fourth Circuit acknowledged that there may well be some privileged documents inadvertently disclosed among the hundreds of thousands produced. However, the remedy is not the broad injunction sought by the government. The Louisiana Fourth Circuit Court of Appeal simply and clearly told the government that what they sought "violates the very foundation of the First Amendment." (Fourth Circuit Opinion, page 5, first paragraph).

One option is for the government to seriously respond to Ms. Washington's offer to detail which emails they think are privileged and why and engage in discussion over those emails. (The suggestion by the government that the City of New Orleans with its thousands of employees and with its own in house and outside hired technology experts is powerless and clueless to figure out which emails they gave to her and the whole city government is dependent on one private citizen to tell them what they gave out seems a bit of a stretch).

The Fourth Circuit also recognized there are many ways other than violating the First Amendment to protect the interests that government says are its reasons. As the Fourth Circuit noted in their opinion, "Furthermore, if inadvertently disclosed privileged documents, which are by definition not public records, are subsequently disseminated by Relator Washington, ethical and procedural violations will likely be asserted. With regards to the interests of the Louisiana Public Records Law, Code of Civil procedure, and Rules of Professional Conduct, as compared to First Amendment interests, we find that First Amendment concerns greatly outweigh the former." (See page 5 of Fourth Circuit Opinion, first paragraph, emphasis supplied).

Second Response to Assignment One

At no point does the government even address the fact that they are demanding an injunction against the publication of hundreds of thousands of public records which, apart from whatever number of emails can be argued are protected, are clearly public records.

In the Pentagon Papers case, discussed above, the government said ALL the records were state secrets and even then the Supreme Court would not set aside the First Amendment to stop their publication. How much less compelling is the argument of the government in this case which never even contests that many of the hundreds of thousands of documents are public records?

Third Response to Assignment One

Third, as is often the case when there is insufficient law to support their argument, the government tries to switch the focus to facts which they hope will bolster their case. Their writ application throws out a series of "facts" which, though irrelevant to this analysis, are calculated to scare or compel the court to consider setting aside the protections of the First Amendment. They will be briefly addressed here.

From the first, the government writ ominously suggests that the documents were released "under suspicious circumstances." (See Emergency Writ Application, page 1, paragraph one). Whether that is factually correct or not is unimportant to the First Amendment analysis – consider that the Pentagon Papers were alleged to have been stolen but the rights of those who sought to publish them were still protected. And recall that counsel agrees "that Ms. Washington's Public Records Request was a valid exercise of a citizen's right to information." (See page 3 of Emergency Writ Application, last paragraph). The Trial Court Judge also said that the public records request by Ms. Washington was totally consistent with Louisiana law. Also, despite the fact that this case is not at all about who released them or why they were released or not, the person who released them is in fact an employee of the government which these applicants govern. So if the elected officials of the city think their employee did something suspicious, it is their obligation to do something about it. This "fact" is not proven nor is it worth proving because it is not grounds to try to set aside the First Amendment rights of others.

The Relators take several gratuitous swings at the Respondents to try to bolster their effort to side step the First Amendment. They erroneously accuse her of contempt of the trial court (See page 2 of Emergency Writ Application, first paragraph) and of possible ethical violations (See page 14 of Emergency Writ Application, third full paragraph). Even if those allegations were true, do they

change the First Amendment analysis? No they do not. Recall that the U.S. accused the plaintiffs in the Pentagon Papers case of illegally receiving stolen property and illegally reviewing classified material yet the Supreme Court ruled that the government had not met its burden. Tellingly, government applicants in this Emergency Writ did not advise this court that there have been no hearings on contempt nor any evidence taken much less any findings of contempt over the deeply contested circumstance over the substance and preparation and signing of the trial court judgment. Likewise, government applicants do not tell this Court that the plaintiff repeatedly offered to sit down with government to go over any documents that they allege are privileged in order to allow the government to protect their asserted privileges.

The Relators' weak efforts to diminish, by implication of unproven facts, the reputations of their own employee and the plaintiff is not justified by this record nor can it ever be allowed to be the basis to side step the First Amendment.

2. <u>Response to Government Assignment Two</u>

The government makes a one page argument that the Fourth Circuit committed reversible error by considering that the emails were publicly available for 90 days and that Ms. Washington had disseminated the emails or discussed them with numerous people. Legally, this is not a real argument as the government cites not a single case from any court in support of their position. (See Emergency Writ Application, page 20-21, all paragraphs). Factually, the government argument is equally insubstantial. First, the government argues that the Fourth Circuit wrongfully decided that Ms. Washington "enjoyed unrestricted access to those records for approximately ninety days." (See Emergency Writ Application, page 20, paragraph three). However, that is not even a contested fact as the government in its own application for writ states that Ms. Washington was provided with hundreds of thousands of documents in December of 2008 (See Emergency Writ

Application, page 3, paragraph two) and counsel did not contact her about them until the end of February 2009 (See Emergency Writ Application, page 8, paragraphs three and four). Perhaps the government objects to the characterization of the time as ninety days instead of eighty, but regardless of the exact number of days, the government cannot dispute the accuracy of the point made by the Fourth Circuit nor can it suggest that this helps their case at all.

Second, the government objects to the conclusion by the Fourth Circuit that some of the information which was publicly released for over 80 or 90 days was discussed by Ms. Washington. This observation by the Fourth Circuit is actually true but not important to their analysis. But even if it were not true it is clearly not central to their decision nor their First Amendment analysis and the government cites no case to indicate that the existence or non-existence of such a fact is important to such an analysis.

This assignment of error is factually contradictory to the government's own position and provides no support at all to assist the government to meet its burden under the Supreme Court test for what it is trying to do: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971).*

3. Response to Government Assignment Three

In its third assignment of error, the government says the Fourth Circuit committed reversible error "by its wholesale dismissal of the procedural posture of the case as a preliminary injunction, such that the order being appealed was not actually a prior restraint of free speech." (See Emergency Writ Application, page 5, paragraph three).

In support of this assignment of error, the government provides a three paragraph half page argument which cites no cases from any court on any issue and makes no citation to any part of the record. (See Emergency Writ Application, page 21, paragraphs 3-5).

Clearly the First Amendment applies to injunctions. The Pentagon Papers case involved the government seeking an injunction against the publication of documents. *New York Times v United States, 403 US 713, 714, 91 S Ct 2140, 29 LEd2d 822 (1971).*

If the government is suggesting that the First Amendment does not apply to preliminary injunctions, undersigned counsel has found no cases that agree with that argument.

As the Louisiana Supreme Court recently noted, any government attempt top regulate content-based speech are "presumptively invalid." *R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).* Except for a few well-defined exceptions, which do not apply in this case, a content-based regulation will survive a constitutional challenge only if it passes the well-established two-part strict scrutiny test. Under strict scrutiny the government bears the burden of proving the constitutionality of the regulation by showing (1) that the regulation serves a compelling governmental interest, and (2) that the regulation is narrowly tailored to serve that compelling interest. Playboy Entertainment Group, 529 U.S. at 813, 120 S.Ct. at 1886; R.A.V., 505 U.S. at 395-396, 112 S.Ct. at 2549-2550; Simon & Schuster, 502 U.S. at 118, 112 S.Ct. at 509; Consolidated Edison, 447 U.S. at 540, 100 S.Ct. at 2335 (the government must show that the regulation is a "precisely drawn means" of serving a compelling state interest)." In Re Warner, supra, at page 16.

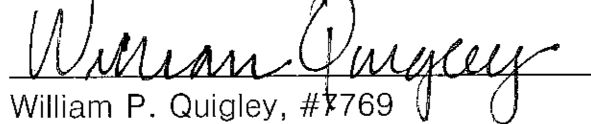
CONCLUSION OF OPPOSITION TO EMERGENCY WRIT APPLICATION

The First Amendment is too important to be diminished in the way sought by the government in this matter. Without the support of a single court decision, the government seeks authority from this Court to chop the First Amendment down to the size they choose and thus be allowed to stop a citizen from publishing records of public officials.

These records are hundreds of thousands of emails of public officials, created or received on public computers and public blackberries, lawfully sought and publicly released months ago. They cannot now be kept from publication by the power of the government. The government has failed in its burden of proof. The First Amendment of the Constitution of the Unites States and the settled law of the United States and the State of Louisiana compel this court to dismiss this writ application and immediately dissolve the stay.

Date: May 15, 2009.

Respectfully submitted,



William P. Quigley, #7769
Davida Finger, # 30889
Loyola University – School of Law
7214 St. Charles Avenue
New Orleans, Louisiana 70118
Tel: 504.861.5762
Fax: 504.861.5426

Ronald L. Wilson, #13575
909 Poydras Street – Suite 2556
New Orleans, Louisiana 70112
Tel: 504.525.4361
Fax: 504.525.4380

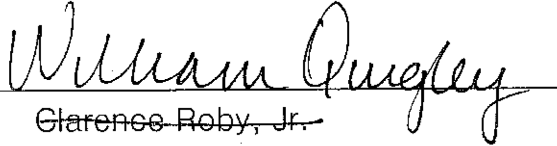
Clarence Roby, Jr., #20345
3701 Canal Street – Floor 4 Suite U
New Orleans, Louisiana 70119
Tel: 504.486.7700
Fax: 504.486.8805

CERTIFICATE OF SERVICE

I hereby certify on May 15, 2009, a true and foregoing copy of the above pleading was sent to the below listed counsel of record for the City of New Orleans and the New Orleans City Council:

Edward R. Washington, III
Evelyn F. Pugh
Penya Moses-Fields
City of New Orleans
1300 Perdido Street – City Hall Fifth Floor
New Orleans, Louisiana 70112

Steven J. Lane
Soren E. Gislelson
Herman, Herman, Katz & Cotlar LLP
820 O'Keefe Avenue
New Orleans, Louisiana 70113-1116



~~Clarence Roby, Jr.~~