

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

SEMINOLE TRIBE OF FLORIDA,

Plaintiffs,

v.

CONSOLIDATED CASE
CASE NO.: 4:15-CV-516-RH/CAS

STATE OF FLORIDA,

Defendant.

**POLITICO LLC’S MOTION TO INTERVENE FOR THE
LIMITED PURPOSE OF OPPOSING SEMINOLE TRIBE’S
EMERGENCY MOTION FOR PROTECTIVE ORDER & SUPPORTING
MEMORANDUM OF LAW**

Politico LLC, publisher of *POLITICO* (“POLITICO”), seeks leave to intervene in this action for the limited purpose of opposing Plaintiff Seminole Tribe of Florida’s (“Seminole Tribe’s”) Emergency Motion for Protective Order (“Emergency Motion”) [D.E. 24] which seeks to have this Court impose an unconstitutional prior restraint on the news media prohibiting dissemination of information that was lawfully obtained through a public records request. Further, POLITICO requests argument before the Court on this matter. Grounds for this Motion to Intervene are set forth in the following Memorandum of Law.

MEMORANDUM OF LAW

BACKGROUND

The Emergency Motion was filed on the night of May 11, 2016, apparently in response to the State of Florida informing the Seminole Tribe that, pursuant to a lawful public records request made by POLITICO, it had released a copy of the deposition transcript of James F. Allen, a witness in this matter. The Seminole Tribe avers in the Emergency Motion that the disclosure violated an agreement between the parties to permit it to review transcripts of depositions taken in this case, before they are released in response to a public records request, and to designate portions of deposition testimony as containing confidential or trade secret information. Emergency Motion at 2-3.

The Emergency Motion now seeks to have this Court issue an order that would, among other things, “prohibit anyone” – including POLITICO, *which obtained this information lawfully pursuant to a routine records request* – from disseminating or disclosing the contents thereof to third parties, except pursuant to a court of competent jurisdiction.” *Id.* at 6.

ARGUMENT

The Emergency Motion seeks to have this Court impose an unconstitutional prior restraint on POLITICO. Orders that restrain the press from publishing or broadcasting lawfully obtained information “are classic examples of prior

restraints.” *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 2771 (1993). As the United States Supreme Court has stated emphatically, prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). For this reason, the Court has held that a prior restraint “comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); accord *Nebraska Press Ass’n*, 427 U.S. at 561 (“the barriers to prior restraints remain high”).

The barrier to obtaining a prior restraint barring the publication of news information is so high because such restraints are “the essence of censorship.” *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir.), *modified*, 820 F.2d 1354 (1st Cir. 1986). Indeed, the Supreme Court is even reluctant to approve a prior restraint in the name of national security or to protect a competing constitutional right:

Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this “most extraordinary remed[y]” only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted) (quoting *Nebraska Press Ass’n*, 96 S. Ct. at 2804) (alteration in original); *see also, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219,

225 (6th Cir. 1996) (prior restraint, “under all but the most exceptional circumstances, violates the Constitution”). This presumption against enjoining publication of news information is so strong that the Supreme Court has not *ever* affirmed the imposition of a prior restraint.

Seminole Tribe cannot overcome the “heavy presumption against” the “constitutional validity” of the order it seeks. *New York Times Co.*, 403 U.S. at 714. The deposition transcript was released to POLITICO in response to a lawful public records request. And the information in it that Seminole Tribe has informed POLITICO that seeks to keep secret – generally, the Tribe’s annual revenues and annual gaming revenues – is plainly a matter of legitimate public interest. *See, e.g., Seminole Tribe of Fla. v. Times Publ’g Co. Inc.*, 780 So. 2d 310, 316 (2001) (Fla. 4th DCA 2001) (“the manner in which the Tribe operates its existing casinos is a matter of public concern”).

The law is clear that the press cannot be punished for publishing information that was lawfully obtained and concerns a matter of public interest. As the U.S. Supreme Court has held, “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish the publication of the information, absent a need to further a state interest of the highest order.” *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)). Since POLITICO has a

constitutionally protected right to publish this information to begin with, a prior restraint order *enjoining* it from such publication in advance would plainly be unconstitutional.

Because the relief sought in the Motion would directly violate the First Amendment rights of POLITICO to publish the contents of this deposition transcript, it has standing to intervene in this matter. *See, e.g., Miami Herald Publ'g Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976) (“It has been recognized in Florida and elsewhere that the news media, even though not a party to litigation below, has standing to question the validity of an order because its ability to gather news is directly impaired or curtailed.”). *See also County Security Agency v. Ohio Dept. of Commerce*, 296 F.3d 477 (6th Cir. 2002) (recognizing journalist could intervene to challenge prior restraint on publishing).

CONCLUSION

For the foregoing reasons, POLITICO requests that this Court grant its motion to intervene and provide to it the opportunity to be heard more fully on the issues raised by Plaintiff’s Emergency Motion.¹

LOCAL RULE 7.1(B) CERTIFICATION

Counsel for POLITICO hereby certifies that it has conferred with all parties in good faith to resolve the issues raised in this motion through meaningful

¹ POLITICO will expeditiously file a separate opposition brief more fully addressing the unconstitutional relief Seminole Tribe seeks.

conference and has been unable to do so. Specifically, on May 12, 2016, counsel for POLITICO, Ashley I. Kissinger, Esq., contacted counsel for both parties by telephone regarding the relief sought in this Motion. Counsel for the Seminole Tribe consents to the relief sought herein. Counsel for the State of Florida, however, advised that the State is not prepared to take a position on this Motion at this time.

Respectfully submitted,

THOMAS & LOCICERO PL

/s/ Mark R. Caramanica

Mark R. Caramanica

Florida Bar No. 110581

601 South Boulevard

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

Email: mcaramanica@tlolawfirm.com

Ashley I. Kissinger (*pro hac vice
forthcoming*)

Levine, Sullivan, Koch & Schulz, LLP

1888 Sherman Street, Suite 370

Denver, CO 80203

Telephone: (303) 376-2407

Facsimile: (303) 376-2401

Email: akissinger@lskslaw.com

Attorneys for Movant

Politico, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2016 a true and correct copy of the foregoing has been furnished via CM/ECF and served via electronic mail to all counsel of record:

Barry Richard
Mark H. Moody
Greenberg Traurig
101 East College Avenue
Tallahassee, FL 32301
richardb@gtlaw.com
moodym@gtlaw.com

Joseph H. Webster
Hobbs Straus Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
jwebster@hobbstrauss.com

Anne-Leigh Gaylord Moe
Carter Andersen
1801 North Highland Avenue
Tampa, FL 33601-3913
amoe@bushross.com
candersen@bushross.com

Jason L. Maine
William N. Spicola
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399
Telephone: (850) 488-0063
jason.maine@myfloridalicense.com
william.spicola@myfloridalicense.com

Robert W. Stocker II
Dickinson Wright PLLC
215 S. Washington Square, Suite 200
Lansing, MI 48933
rstocker@dickinsonwright.com

Dennis J. Whittlesey
Dickinson Wright PLLC
1875 Eye Street NW, Suite 1200
Washington, DC 20006
dwhittlesey@dickinsonwright.com

/s/ Mark R. Caramanica
Attorney