OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1721

TITLE SEATTLE TIMES COMPANY, ET AL. Petitioners v.
KEITH MILTON RHINEHART, ET AL

PLACE Washington, D. C.

DATE February 21, 1984

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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SEATTLE TIMES COMPANY, ET AL. :

Petitioners, :

v. : No. 82-1721

KEITH MILTON RHINEHART, ET AL. :

- -x

Washington, D.C.

Tuesday, February 21, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

EVAN L. SCHWAB, ESQ., Seattle, Washington; on behalf of the Petitioners.

MALCOLM L. EDWARDS, ESQ., Seattle, Washington; on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Seattle Times v. Rhinehart.

Mr. Schwab, you may proceed whenever you are ready.

ORAL ARGUMENT OF EVAN L. SCHWAB, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SCHWAB: Thank you.

Mr. Chief Justice, and may it please the Court:

This is an action for defamation and invasion of privacy. The trial court, the Superior Court of King County, entered a protective order which bars the defendant newspapers and reporters from publishing certain types of information acquired during discovery.

The Washington Supreme --

QUESTION: Where were these papers filed at the time they were sought, Mr. Schwab?

MR. SCHWAB: Most of the discovery had not been completed at that point. Some of the discovery --

QUESTION: Well, was it on file or not?

MR. SCHWAB: Yes. The discovery we had received to that point had been filed. Rhinehart, Mr. Rhinehart had furnished his income tax returns, and they had been filed with the public file in the King County

Clerk's Office.

The Washington Supreme Court upheld the order, and we are asking this Court to reverse and remand because the order violates our clients' First Amendment rights of free expression. The practical effect of the order below, we submit, is to enjoin --

QUESTION: Well, how about the rest of the answer to the Chief Justice's question?

MR. SCHWAB: I'm sorry.

QUESTION: The only things that you sought had been already been filed in the public record?

MR. SCHWAB: Oh, I'm sorry, sir.

The information we had received at that point had been filed. The protective order came up in connection with our motions to compel further discovery, and after long motions over their efforts to resist discovery and our efforts to get discovery, the trial court entered a broad order compelling significant discovery and at the same time entered the protective order in question. We have not received that discovery because the trial court order provided that they did not have to comply with it until judicial review concerning the protective order was finished.

So at this point in time we don't have most of it.

QUESTION: Well, I'm afraid my question wasn't really clear enough.

Ordinarily, the returns on pretrial proceedings, discoveries, interrogatories, are not on file in the clerk's office. They remain in the custody of the lawyers until they are offered in evidence.

Now, were these things that you were seeking in the possession of the clerk or still in the possession of the lawyers?

MR. SCHWAB: Some of what we were seeking was in the possession of the clerk. Most of what we were seeking hadn't been turned over yet and is still with the Respondents.

QUESTION: So that -- so far as that stuff is concerned, your right of access to it really depends on the court order, doesn't it?

MR. SCHWAB: On this court order, that's right, sir.

QUESTION: On the --

MR. SCHWAB: The court below reserved its final judgment on discovery until we completed this.

QUESTION: Well, but your original right of access to it under the discovery rules depended on the decision of the Superior Court in Washington to grant your discovery.

MR. SCHWAB: Yes, it did. And it granted our motion, and it ordered the discovery, and that discovery was deemed relevant by the State Supreme Court. Both orders went to the State Supreme Court, and it affirmed the order compelling discovery and ruled that the material we sought was relevant to their claim in our defenses.

QUESTION: Well, in a sense, the order that conditions your access to the discovery is of the same parcel with the order that granted you discovery, isn't it?

MR. SCHWAB: I think that's right, yes.

QUESTION: If the court had denied you discovery altogether in this order and just said no, you can't have it, would you be here with this argument?

MR. SCHWAB: I think the argument would be quite different. We would be arguing that we should have the discovery, that we needed to defend ourselves. We --

QUESTION: But no First Amendment right to discovery.

MR. SCHWAB: Well, I think that in the context of a defamation action, Your Honor, in which we are being sued on allegations that we have defamed the Respondents, there may be some constitutional overtones

to discovery. This Cou has erected certain tests for the defense of these act ons in cases like New York Times and Gertz, and in rder to defend ourselves, we would need that discove . That might get closer to the Herbert v. Landau kind c --

QUESTION: We , could we take just a little -- let's take a s ecific example. Suppose that you had noticed a depos ion, and you wanted it, and the deposition was taken, c the other side had. Now, do you say that even if th deposition was never filed, never used at court, th you would have the right to publish it?

MR. SCHWAB: e question involves two elements. In a pretria setting, if we had taken the deposition, yes, we do sert that we have a constitutional right to ublish the contents of that deposition.

Now, in the -

QUESTION: Ev if it is just in the possession of the lawye and both lawyers say it is none of your business?

MR. SCHWAB: s, sir.

QUESTION: An I would think -- that position, I take it, that isn't d endent upon your being a defendant in the libel it.

MR. SCHWAB: Oh, access might be dependent. There are access cases going on around the country right now in which the media is seeking access.

QUESTION: What if you weren't a party to this case and it was just any civil case in which a deposition had been taken and the results were in the possession of the lawyers?

I thought your argument was that the press has the right to have access to those depositions?

MR. SCHWAB: No, sir, I don't argue that.

QUESTION: But it is -- but you certainly would say that if a deposition was filed in court, that you had the right of access to it.

MR. SCHWAB: Well, the access questions are different. I think I would argue that the right of access might depend on whether or not the deposition was used on a motion or a trial by the court, and that's how the access cases around the country are going.

MR. SCHWAB: And similarly with interrogatories?

MR. SCHWAB: Frequently they are filed as public records in most courts. The answers are filed and placed in the clerk's office, and of course, then they are open to the public and can be published.

QUESTION: Yes, yes.

MR. SCHWAB: In our state that's the practice.

QUESTION: Yes.

MR. SCHWAB: Now, normally, documents aren't filed with the clerk. This case was unique because the Respondents not only gave us the tax returns but immediately filed them with the clerk's office. Subsequently, that order was sealed. The court entered an order sealing the clerk's file in the Superior Court, but the Respondents did not seek an order to seal it in the State Supreme Court or here, and those tax returns are now public records with the clerk of this court.

QUESTION: Let me see if I have got this -- the picture is a little confused because your client is a litigant and is also seeking some information not as a litigant but as a representative of the media.

MR. SCHWAB: Oh, we are seeking it as a litigant, sir.

QUESTION: What about two private parties who have a lawsuit and they are taking depositions pretrial and they are having interrogatories, and none of them are filed; they remain in the possession of the lawyers? Are you suggesting that those are part of the public record until and unless they are offered in evidence?

MR. SCHWAB: I would -- again, I would like to say the access question, but we are not seeking this under rights of access but rather as a litigant, but I think the access questions are different, and I think that the depositions that are in the files of the lawyers that have never been submitted to a court in connection with a summary judgment motion or any other kind of dispositive motion would probably be treated differently. And that's how the lower courts are coming out.

QUESTION: Well, that's what you answered to me before, isn't it?

MR. SCHWAB: I believe so.

But we are seeking this material as a litigant, to defend ourselves, not --

QUESTION: Well, Mr. Schwab, in both your answers to the Chief Justice's question and to Justice Blackmun, you refer to access cases and then intimate this is not an access case.

MR. SCHWAB: Correct.

QUESTION: How do you define an access case?

MR. SCHWAB: The access cases are the cases in which the press as a nonlitigant is seeking access to the discovered information, and that is not this case. I think different tests may well apply, and that has not

been dealt with by this Court in the context of civil discovery and civil proceedings. But we do think it is a different case.

QUESTION: And of course, I suppose if you were just -- if the press were just a litigant in a tax case in which there were depositions, you wouldn't be making the same arguments that you are making here. I suppose the reason you are making these arguments is that you are a defendant in a libel suit.

MR. SCHWAB: We think the argument receives -- is worthy of additional weight in a libel suit, but there would also be situations in other kinds of litigation.

QUESTION: You would not, what -- in a tax case you have a First Amendment right to access?

MR. SCHWAB: Well, not to access, sir.

If we have obtained it through discovery -- if we are a litigant in a tax case and we put out interrogatories --

QUESTION: You have First Amendment right to publish it.

MR. SCHWAB: To publish.

We are arguing that once we receive the information, the First Amendment affects our right to publish that information.

QUESTION: Well, Mr. Schwab, you are not making that argument as a litigant.

MR. SCHWAB: Yes, sir, we are.

QUESTION: Your right to publish, you are making that argument as a litigant?

MR. SCHWAB: We are arguing -- yes, we are arguing that as a litigant we have First Amendment rights in the judicial process and First Amendment rights in --

QUESTION: Well, you mean as a news media litigant?

Suppose you were not?

MR. SCHWAB: The same argument would be made.

QUESTION: It would?

MR. SCHWAB: Although I think the argument has greater force for members of the media and for public interest advocates such as consumer groups, the NAACP, the ACLU and organizations like that.

QUESTION: You have no cases to support you on that from around here, giving the press superior rights to another litigant, do you?

MR. SCHWAB: Well, I'm not asking for superior rights. I think there are a broad category of litigants who have First Amendment interests at stake in litigation.

QUESTION: Well, how does publication further your interests as a litigant?

MR. SCHWAB: There are several ways publication can further our interest. We are being accused of writing false stories. If we obtain information through discovery that corroborates our stories, we have an interest in bringing that to the public's attention. A, it improves public --

QUESTION: Before the trial has been held?

MR. SCHWAB: Before the trial has been held, sir, and that's what we're asking.

QUESTION: Well, then you are asserting right as media, not as a litigant.

MR. SCHWAB: But I think the same right would exist in a nonmedia defendant. If, for example, a consumer group is suing over a polluted stream, chemical wastes, toxic wastes and so on, and they learn through discovery that their claims are true, that that stream is polluted, I think they have the same First Amendment interest in being free from a judicial order that prevents them from publicizing what they have learned.

QUESTION: Publish in what, in their journal?

MR. SCHWAB: I'm sorry, sir?

QUESTION: To publish it where, in their journal?

MR. SCHWAB: Well, I don't think where is as much the test as whether they have a right to disseminate it.

The trial court order in this case gags us from either disseminating it ourselves or giving it to other media or using it in any other way. We are gagged. We are told that once we get this information, we cannct use it for any purposes other than preparation for trial.

QUESTION: You can use it as a litigant, of course, can't you?

MR. SCHWAB: Yes, that's the only -- the only way we can use it.

QUESTION: And you are, I repeat, asking for a special right because your client happens tc be a newspaper.

MR. SCHWAB: We are asking for a right on behalf of anyone who has First Amendment interests at stake in a litigatien, and that would apply equally to, and particularly, the public interest advocates.

QUESTION: Well, how can you tell whether someone has First Amendment rights at stake in the litigation?

MR. SCHWAB: I think on a case-by-case basis, depending upon the function of the litigation. I am

just arguing that they have a stronger right, but the argument I am making would apply equally to all members.

QUESTION: I thought you just were arguing that any litigant, when he gets discovery, has a First Amendment interest in being able to publish the results of the discovery.

MR. SCHWAB: Exactly. That's our argument.

QUESTION: And just anybody in any kind of a case.

QUESTION: But that isn't the same argument you made two minutes ago.

QUESTION: In any kind of a case.

MR. SCHWAB: Well, I'm trying to say that the public interest litigants might have a stronger argument, Your Honor, but basically I am arguing that any litigant has a protected First Amendment interest in being able to disseminate or use for any purpose --

QUESTION: In any kind of a case, whether it is libel or tax or science or environmental or whatever?

MR. SCHWAB: I think lines can be drawn. We advocate --

QUESTION: Well, does a defamation litigant have a greater First Amendment right than any other

kind?

MR. SCHWAB: Well, it's hard to say people have a greater First Amendment right. I think they all have First Amendment interests. We are suggesting a balancing test in our brief --

QUESTION: Well, this is independently, then, of this being a defamation suit in your argument for a First Amendment right to publish.

MR. SCHWAB: I'm arguing, yes, whenever a trial court presumes to freeze discussion, I'm arguing that the court should be required to weigh the First Amendment interests at stake, much like you did in Nebraska Press v. Stuart, that the First Amendment considerations are entitled to a place on the scale. Now, sometimes they may not carry the balance, but at least they should be taken into account, and the trial court and the Supreme Court didn't do this. This is the thrust of our argument. They gave our First Amendment rights virtually --

QUESTION: And yet you are talking only about a litigant's right, and you are not talking about a litigant's right who just happens to be the defendant in a libel suit, or you are not talking about a litigant's right just because he's a member of the press.

MR. SCHWAB: That's right, Your Honor.

QUESTION: Then it would be your view, if you postulate this hypothetical question, proposition, an individual sues a bank, his own banker for any reason you can conceive of. They take a lot of pretrial discovery by way of testimony an interrogatories, and each lawyer for each side keeps them in his own office, none of them are filed.

Do you say that there is some First Amendment right of someone to publish that information before it is ever offered in evidence?

MR. SCHWAB: I'm saying the litigants themselves are protected by the First Amendment. If they choose to make it available to the press --

QUESTION: Well, then, could one of the litigants take a page ad, let's say, in the Seattle Times, and -- or two pages, even better, and publish all these pretrial depositions over the objection of the other party?

MR. SCHWAB: Yes, Your Honor, that's exactly our argument, and that's happening around the country right now. I am involved in a case like that on the west coast in which the other side did, as soon as the depositions were taken, give them to the press.

QUESTION: Do we have to go that far?

MR. SCHWAB: No, Your Honor, you don't. I'm

not arguing for an absolute rule. I am arguing instead for a balancing test which balances the First Amendment considerations. There will be cases in which an order like the one below can be sustained under constitutional analysis. Trademark cases might be a good example, other instances of commercial inclination. There was a recent decision from the D. C. Circuit in the Tavoulareas case in which the court turned down the Washington Post's request to publish thousands of pages of depositions and documents after the trial was over. Mobil was the party that had obtained the protective order, and they were a nonlitigant. They had been forced to turn over a tremendous amount of discovery for that libel action between their president and the Washington Post. After the trial was -- and they had done so under a protective order.

After the trial was over, the Post sought to unseal all that material. At this points you are dealing with a nonlitigant and a tremendous mass of material that was not relevant to the issues in the case. It was never offered and used in the Tavoulareas court, and the D. C. Circuit said that that material could not be published.

I think that is a different case than the one we had here --

QUESTION: What difference does it make that it was not relevant?

What difference does it make that it was not relevant to the issues if it is material that the public is interested in? If relevance to the issues is the determining factor, then you might as well just wait until the case is tried.

MR. SCHWAB: I think that is a factor, Your Honor. Interest to the public is another factor. The First Amendment interest of the one who wants to publish it is a factor.

And we are only arguing again for something that weighs all of these various considerations. I was using that as an example.

QUESTION: Would you say that a lawyer who is a freelance writer on the side would have the same First Amendment right?

MR. SCHWAB: I think in many cases he would.

QUESTION: He would?

MR. SCHWAB: I think the First Amendment applies equally, and one of the cornerstones of our jurisprudence has been that the First Amendment rights should not be restrained in advance. We -- the courts and your decisions have leaned more towards subsequent punishment. In this case it is more akin to a prior

restraint.

QUESTION: Well, I don't see how you can argue that, Mr. Schwab, because the Superior Court should have -- could have said no, we are not going to give you any discovery in this case. We follow this rule that when you get into very private subjects, we just don't allow discovery.

Why can't the Superior Court equally well say that we will allow discovery here, but as a condition to this access that we are granting you to this information, you are not to publish it? I don't see how you could call that a prior restraint.

MR. SCHWAB: We submit, Your Honor --

QUESTION: When the access that you get is made conditional in the very granting of the access.

MR. SCHWAB: That's correct, and that was part of the reasoning that the D.C. Court went through in Tavoulareas. We submit that that is not sound First Amendment analysis because there are a long line of cases which say that the government cannot both confer a benefit when it is conditioned upon giving up constitutional rights.

QUESTION: Well, how about the Snepp case?

MR. SCHWAB: Well, I think Snepp is distinguishable. Snepp involved a government employee

and matters of national security, and I think the government as an employer has a much different interest in the fiduciary responsibilities of its employees than a judge has in the behavior of litigants before it. The Seattle Times in this case is an involuntary litigant. It has been dragged into a case against its will, and we submit, by a plaintiff who uses defamation suits to stifle discussion of his affairs, and by getting this order, he in essence has gagged us and enjoined a libel.

I think that is quite different than the power of government to impose reasonable restrictions on its employees. Now, Snepp had signed a contract that he would submit --

QUESTION: Suppose you have two lawyers in some heavy litigation of the kind we are talking about who are dismayed at the prospect of the excessive cost of pretrial discovery and interrogatories, and they agree informally that plaintiff's lawyer will submit a series of informal questions by letter to the defendant's lawyer, and they will reciprocate, and these will be answered informally, and yet with a stipulation both ways that to the extent relevant to the case, if it ever goes to trial, these may be used in evidence as admissions.

Now, this is all in the lawyers' offices.

You say someone has a First Amendment right to publish that?

MR. SCHWAB: The First -- yes, Your Honor, I think so.

QUESTION: Who would have that right?

MR. SCHWAB: Either, either side. In the absence of a protective order --

QUESTION: Either side.

MR. SCHWAB: Either one of them would have a right --

QUESTION: Now, what about, what about demand of the local newspaper to get at those things?

MR. SCHWAB: I think they would have a right to say we don't want to give it to you, and then if the newspaper sought a court order, we would be under the different line of reasoning of the access cases.

QUESTION: But either litigant could take a coupe of pages in the local newspaper and put it all there?

MR. SCHWAB: Yes, Your Honor, again, subject to the laws of defamation, right of privacy, subsequent punishment and so on if he utters falsehoods. But if he has obtained true information and believes that it's important to publish that, I believe he has a First

Amendment right to do so.

But more importantly, we're submitting that a court cannot restrain him, should not restrain him in advance from doing so without giving due consideration to his First Amendment rights on the one hand and all of the other reasons for banning publication on the other hand.

And that's really what this case is about, is whether or not some standards need to be laid down. The courts below used tests and standards which gave virtually no weight to our First Amendment considerations. The trial court basically --

QUESTION: When you say our First Amendment, now, are you speaking --

MR. SCHWAB: I'm sorry, my clients'.

QUESTION: -- as a representative of -- well, are you speaking of your client as the press or as a litigant?

MR. SCHWAB: Both, Your Honor.

QUESTION: Well --

MR. SCHWAB: The press does have a special function.

QUESTION: Are they they same?

MR. SCHWAB: I think they are different. The press has a special function which this Court has

recognized to convey newsworthy information. It is in the business on a daily basis of conveying information. It has been covering the Rhinehart story for eleven years. It started in 1973 and has gone through 1981. The effect of the orders below are to curtail the publication of the story in midstream. The Times has been muzzled. If it publishes anything more now about Rhinehart, it runs the risk that he will hail it into court on a contempt citation and make it prove independent sources. This is the very nature of censorship.

Consequently, there have not been further articles because the long arm of the court may fall down on the newspaper.

So I think that both as a litigant and as a newspaper, it has an interest in advancing these considerations.

Evidence was submitted to the lower courts that the Respondents have made a practice of suing former members and the media whenever they are criticized. They have used litigation very effectively, and there is information in the record that they brought over 20 suits to silence the kind of criticism they have been receiving, the kind of public scrutiny they have been receiving. This is an organization which appeals

to the public for funds. Rhinehart himself goes out of his way to bill himself as one of the most significant gurus on this planet. He has conducted nationwide exhibitions of his powers, his powers as a medium, his powers to communicate with the dead. He claims that he has the power to bestow special powers on colored stones in a way, and then members are allowed to contribute certain sums of money, several thousands of dollars in many cases, to acquire these stones that carry special powers.

The Times has been covering these articles, trying to bring this information to the public, and the effect of the order below is to stop that.

I have got the articles, and I was going to read the titles, but my time is getting short, but I would summarize the articles by saying that they do draw into question the bona fides of the Aquarian Foundation, the question of whether or not Rhinehart has the powers he claims. They question whether or not he is a charlatan, whether or not people are being victimized, whether or not this is a con game.

And as as result of that, he brought this suit.

Now, in the trial court he obtained this order restraining publication, and it says in advance, you may

not publish what you learn. And the test used by the trial court was simply this: parties may be chilled from coming to court if they know that what they say in discovery might be published. And I would contrast that with your decision in Globe Newspapers in which the state argued that minor victims might be chilled from coming forward because they might be chilled, and that was deemed an insufficient reason.

The court speculated about this. It did not make the kind of findings you required in the Press Enterprise decision on the exclusion of the press from voir dire. There are virtually no findings in the trial court and in the State Supreme Court to justify this restraint. The State Supreme Court approached it on a prior restraint analysis under your decision in Nebraska Press and then concluded that the interest of the judiciary in the integrity of its discovery process is sufficient to overcome the strong presumption against prior restraints enunciated in cases since Near, New York Times, Nebraska Press and so on. And the Supreme Court said if any of the harms mentioned in the rule -- and that is Rule 26, which is the same as the federal rule -- they said if any of the harms mentioned in Rule 26 can be avoided, and the major concern -- and since the major concern is the facilitation and protection of

the discovery process and the parties' privacy rights, then the order can issue. And in the ordinary case, this balancing does not require or condone publicity.

The court distinguished all contrary authority around the country --

QUESTION: Mr. Schwab, may I ask you this question? Would you concede that any of the information that is gong to be obtained through discovery could be made subject to a protective order if it was properly drafted and made a lot of findings?

MR. SCHWAB: Well, the test -- we are asking for a test, and I can't imagine that some information might meet that test.

QUESTION: Well, as long as some is, isn't it a virtual certainty that we are going to have a federal question in every case in which there is such information?

MR. SCHWAB: Yes. I think --

QUESTION: That we're going to have to -- we're the last court of resort for discovery all over the country if you --

MR. SCHWAB: Whenever parties are seeking orders to gag litigants, because that runs right into their First Amendment right to access.

QUESTION: So every good cause for a

protective order raises a First Amendment issue.

MR. SCHWAB: We believe it does because the First Amendment protects freedom of expression and freedom of the press.

QUESTION: Let me ask you this, too.

How soon will this case be tried? How close are you to a trial date?

MR. SCHWAB: We're not because everything has stopped since this protective order in June 1981. It has been in appellate courts on this issue. We have had no discovery.

QUESTION: Had there not been an appeal from the protective order, how soon do you suppose you would have been ready for trial?

MR. SCHWAB: Oh, probably six months or a year after the protective order had been issued.

QUESTION: And if that had happened, then you could have gone in and asked for all the information to be released. There's no longer any need for secrecy.

MR. SCHWAB: It would have come out at trial.

That's another one of the vices of this protective order. The test we advocate in our briefs asks the Court to consider whether or not the order is effective, and all this is is a temporary prior restraint, which wasn't acceptable in New York Times, in

the Pentagon Papers case. They want to silence it until trial. They don't argue that it won't come out at trial. The lower courts have held that it will be relevant and public at trial. So we have got a temporary restraint to gag us until trial, to stop us from writing articles about them, to stop us from bringing to the attention of the public, from whom they solicit funds, what we have learned about the nature of their organizations.

The courts below were careful to say we can publish what we don't learn in discovery, but this really puts us in a pickle. We -- it's hard to draw that line. How does a reporter decide he can safely publish this and not that when the lawyers have amassed a great deal of information through the discovery process? There is a significant risk that what you have is a stifling effect, that the stories aren't written because of the chilling effect on that order.

QUESTION: What if you just adopted a policy of not having the lawyers turn anything over to their client? Sometimes a discovery order just restricts the access to the information to the lawyers. Then by definition, whatever the newspaper published would be gotten elsewhere. I suppose you couldn't prepare for trial. I suppose that's your problem.

MR. SCHWAB: I think in most cases -- I think in most cases, Your Honor, that really gets in the way of one's ability to prepare for trial. I have always resisted order like that.

QUESTION: This is that tough a case.

MR. SCHWAB: I need to talk to my client. I've got to show him what's going on. It's his lawsuit, not mine. He's got the interest in the case.

QUESTION: Now, to be sure I understand, are we dealing with two different types of materials here, some which haven't yet been produced and some which have been produced before there was any protective order issued.

MR. SCHWAB: That's right, Your Honor.

QUESTION: Okay.

QUESTION: Is there any risk in this process of making it very difficult or even impossible to get a jury that hasn't heard a lot about the evidence before the case comes to trial?

MR. SCHWAB: I think it is a minimal risk. Certainly not -- doesn't rise to the standard of the kinds of fears expressed in Nebraska Press and some of the other cases that this Court has decided. Most civil cases aren't worth much publicity.

QUESTION: Well, but the other cases you're

referring to didn't always have that. Nebraska and Stuart did, but you say that's no risk here.

MR. SCHWAB: I think -- I don't think it's a significant risk. It's something the trial court should take into account, but there are many other ways to deal with possible jury prejudice such as effective examination by the court. There are a variety of things the court can do, and that's one of the things we think a court should do under the tests we ask for, which is consider are there other viable alternatives.

If I can briefly summarize the test we would like the Court to adopt in this, it would be to enunciate that First Amendment considerations cannot be abridged for conjectural reasons and without detailed findings. That happened in this case. Neither of those were entered, and there's really no way for an appellate cort to come to grips with the basis for the lower court decisions.

QUESTION: Mr. Schwab, it would help me if you could tell me whether the issue that is primarily involved in this case is limited to names and amounts of contributors to the defendant -- to the plaintiff organization, names and amounts of money contributed.

MR. SCHWAB: That's the essence of their damage --

QUESTION: That's the essence of what you are interested in.

MR. SCHWAB: Financial affairs and information about the contributors.

QUESTION: Well, if they are tax returns, you are not --

MR. SCHWAB: Well, there would be more. We haven't got the balance sheets or other financial information, but yes.

QUESTION: Well, suppose instead of the party who claimed it had been libeled were one of the nationally known ministries, Protestant, Catholic, Mohammedan, whatever, with millions of subscribers, members and donors, your position would have to be the same, wouldn't it?

MR. SCHWAB: I think it would depend on whether they injected that issue into the lawsuit. If they are making an issue --

QUESTION: Well, let's suppose a newspaper made the sort of claims that have been made according to the pleadings here in this case, they were sued for libel --

MR. SCHWAB: We would -- if it was something we needed to pursue discovery in to defend, yes, then I am arguing that we have a right also to disseminate that

information.

QUESTION: So the fact that this particular sect, Rhinehart's organization, is as you characterize it something of a charlatan really doesn't make any difference, does it, in terms of your theory?

MR. SCHWAB: No. No, Your Honor.

QUESTION: None whatever.

MR. SCHWAB: We would argue that at least a court should balance the First Amendment rights of expression that are at stake, and then it should closely examine and scrutinize the alleged harm. Why is the party seeking a protective order? What harm is it trying to avoid? Detailed findings are required because you do have First Amendment considerations on the other side. The court should ask whether the order is effective. If it is going to come out at trial anyway, then the order will not be effective; it is merely a temporary or prior restraint. If one says my privacy rights are being trod upon and yet he has chosen to bring suit on that information which will become public at trial, he necessarily has already decided to let that go public. Litigants make that choice every day in deciding whether to bring suit.

QUESTION: In what you postulate, he means to have it go public when, as, and if it gets into the

courtroom but not before, necessarily, isn't that so?

MR. SCHWAB: Well, he means -- puts it at issue. Discovery will ensue.

QUESTION: You are not suggesting that all of the material that is covered by pretrial discovery goes in evidence in a lawsuit?

MR. SCHWAB: No, of course it doesn't.

QUESTION: A fraction of it goes in.

MR. SCHWAB: That's right, Your Honor.

I would like to save the balance of my time for rebuttal, if I may.

QUESTION: May I just ask one question? I am sorry, I hate to use -- is it perfectly clear we have a final judgment here? This case hasn't been tried has it?

MR. SCHWAB: No, I think we do have final judgment, Your Honor, because the order, restraining order is final and effective. It restrains us from publishing what we have already learned or may learn through discovery. We sought interlocutory review, which was granted, and the State Supreme Court dealt with it as a final order and has affirmed the protective order. We are not restrained, and we are asking this court to lift the restraint.

We are operating under a form of an injunction

right now.

QUESTION: You will not be charged with that time, counsel.

Mr. Edwards?

ORAL ARGUMENT OF MALCOLM L. EDWARDS, ESQ.

ON BEHALF OF RESPONDENTS

MR. EDWARDS: Chief Justice Burger, members of the Court, I would like to address a few of the concerns that were discussed in opening argument, namely, what kind of information are we dealing with here to which this protective order will apply.

It does apply to some information that is a matter of -- that was filed in a court file, and let me explain how that happened.

A deposition of Reverend Rhinehart was taken by the Seattle Times. In that deposition questions were asked about financial matters relating to the foundation and to Reverend Rhinehart. There was in that deposition a promise that this information, financial information, would not be disclosed, it would not be used for any purpose other than for the lawsuit.

As a result of that --

QUESTION: A promise made by whom?

MR. EDWARDS: By counsel for the Seattle Times.

As a result of that promise, the income tax returns of Reverend Rhinehart were turned over to the Seattle Times. Reverent Rhinehart at that time was represented by a different counsel who thought he had to also file them, and he did file them.

Once it was discovered that the income tax returns were filed by this counsel, we moved to have those income tax returns removed from the public record so that the policy and the theory behind the production of those income tax returns, namely, that they are to be used only for the purposes of this lawsuit, would be implemented.

QUESTION: The preceding counsel thought he was obligated as a result of discovery to file --

MR. EDWARDS: Yes.

QUESTION: Mr. Rhinehart's income tax returns with the clerk of the court?

MR. EDWARDS: With the clerk of the court, which obviously he wasn't.

Okay. Thereafter, the Seattle Times sent cut a substantial number of interrogatories and requests for production. We then resisted the disclosure of some of the information that they requested, and we asked if that information was compelled to be disclosed, that a protective order be entered on it. The trial court

entered a protective order after directing us to provide this information in answer to the interrogatories.

Now, what kind of information does this protective order apply to? It applies to a very limited class of information. It applies only to the names of the members and donors to the Aquarian Foundation and its spiritual leaders, and financial information relating to the foundation and its spiritual leaders.

The order -- and I think this is critical -- does not gag the Seattle Times in any way. The Seattle Times is free to publish anything it cares to publish as long as it has a source that is independent of court-compelled discovery.

So all we are dealing with is whether the court can, when it orders a party to reveal or disclose information, make that a limited disclosure of information, and that's exactly what the trial court did. The Aquarian Foundation, Reverent Rhinehart, other plaintiffs, you are required to provide this information, but your disclosure will be limited, limited to the purpose of this lawsuit.

And that's what we're dealing with here.

This order also applies only to parties. This order does not purport to gag any member of the press or the public about anything. It simply says that as a

party to this process, you used your rank as a party to get access to this information; you must limit your use to the purpose for -- that you used to obtain it. Now, that's all we're talking about.

There are no cases of this Court which relate to that kind of a problem. The Landmark case in which a newspaper acquired information about a judicial discipline proceeding involved a nonparty to that judicial discipline proceeding, and the Court held that that party could not be restrained from publishing. The Court went to great lengths to note that it was not deciding that a party to the proceeding could not be compelled to maintain the secrecy of the proceeding.

What we have here in this particular case is an order which applies to normally private information. Indeed, the information to which this order applies is ordinarily constitutionally protected. This Court has held in NAACP v. Alabama, in Brown v. Socialist Workers Party, in Detroit Edison v. NLRB, and in Shelton v. Tucker that certain private kinds of information about members and donors of minority faiths or minority associations is entitled to constitutional protection. The party is not required to disclose it because to do so would subject the party to reprisal or oppression.

And that is what we are dealing with here. We

have a minority faith who wishes to protect the names of its donors and of its members. They have rights of free exercise of religion, rights of free association, rights of privacy that are guaranteed by the Constitution just as is freedom of the press. And these rights need to be protected by the courts to the same extent as do the press rights, and the trial court held that the way to do that was to enter a protective order.

QUESTION: Of course, your clients were plaintiffs in this lawsuit, weren't they, Mr. Edwards, and to a certain extent they do give up rights of -- to a very large extent they give up rights of privacy when you bring a lawsuit for libel.

MR. EDWARDS: They give up rights of privacy when they are plaintiffs only for the purposes of that lawsuit, and the fact that they are plaintiffs I think is something that you can make too much of, Your Honor.

A party has a right of access to the courts. They aren't worse than a defendant because they go to court. They are not worse than a plaintiff because they are a defendant.

QUESTION: Well, now, just a minute.

You say a party has a right of access to the courts.

MR. EDWARDS: Mm-hmm.

QUESTION: Now, are you saying that is some kind of an independent, federal, constitutional right to go into the Superior Court of King County and plead a case?

MR. EDWARDS: I am saying that perhaps the most fundamental right that anyone has in our society is to go into court and redress a grievance.

QUESTION: Well, okay, now.

Where does one -- from what source does one get a right to go into the Superior Court of King County and sue a newspaper for libel or sue anybody for anything else?

MR. EDWARDS: Okay. I think it is a part of the due process rights that every citizen of this nation has, and it is not just my idea. In Marbury v. Madison in 1803 the Chief Justice noted that that was the most fundamental civil liberty that anybody had, was the right to seek redress for grievances in the courts.

QUESTION: Well, did he say that was a -- did the Chief Justice say that was a federal constitutional right?

MR. EDWARDS: The Chief Justice was not talking in terms of a libel case in the King County Superior Court. The Chief Justice was talking in terms of --

QUESTION: He was talking natural law.

MR. EDWARDS: Yes. He could have even been talking natural law. He had very few precedents on this case.

QUESTION: Well, isn't one answer to the question posed to you that the legislature of the State of Washington at least gave that right to all the people in Washington?

MR. EDWARDS: That is right.

QUESTION: And that's -- you don't need to go beyond that to find it in the federal constitution, do you?

MR. EDWARDS: I don't think so, but I --

QUESTION: You wouldn't, you wouldn't, you wouldn't say that -- you wouldn't say that as a plaintiff furnishing discovery under this protective order that if information was actually relevant and was introduced at trial that the protective order would prevent publication?

MR. EDWARDS: No, Your Honor, and the opinion of our State Supreme Court --

QUESTION: Even though, even though, even though technically you could say the information would be -- if it were published, would be used for something besides litigation.

MR. EDWARDS: That is correct.

QUESTION: But you say once it is actually legitimately filed in court or used in the litigation, it is open to the public then.

MR. EDWARDS: I think the public interest in --

QUESTION: Unless there is something special. I suppose in trade secret cases and whatnot there's a lot of things that remain sealed forever.

MR. EDWARDS: That's possible. There are juvenile court --

QUESTION: But you don't claim any of this information would be sealed forever if it were used in defense, legitimately used in defense or in prosecution of that.

MR. EDWARDS: That is correct. We have another petition for certiorari pending in which we assert that the trial court was in error in compelling us to disclose the lists of names and donors. That petition was filed at approximately the same time as the one that is now being argued, and it hasn't been acted on, and it's our position that the order compelling the Respondents here to provide this information was erroneous because it infringed upon their rights of free exercise.

QUESTION: Even subject to the -- even subject to the secrecy order?

MR. EDWARDS: Yes. That is our position.

QUESTION: Well, Mr. Edwards, if your position in your petition for certiorari is correct that all these constitutional privacy interests are invaded by a discovery order, and Mr. Schwab's position that his clients' and all sorts of other clients' First Amendment interests are invaded if there is a protective order, then isn't Justice Stevens' earlier question to Mr. Schwab brought about in double, so to speak, that every single discovery order that a court makes is now a matter of federal constitutional import?

MR. EDWARDS: I think there is not any question but that the position being advanced here by the petitioner is that the rule this Court should announce should apply to all litigation and all parties without regard to whether they are newspapers or pamphleteers or anyone, and that if the rule advanced by Petitioner is supported, that you will constitutionalize all protective order questions.

QUESTION: Well, let me -- suppose the newspaper had published a story that the main supporters to this sect or this group are the following people, and you sued them and said that's a lie, that's libelous.

And the newspaper then said, well, gee, we at least, in order to prove truth or falsity, we need your membership, your contribution list.

MR. EDWARDS: Mm-hmm.

QUESTION: Now, would you say that they weren't entitled to get the contribution list?

MR. EDWARDS: That isn't the context in which this case arises, but --

QUESTION: I know, but.

MR. EDWARDS: Under those circumstances, they would have a more compelling reason to get the contribution lists than they do here.

QUESTION: You might still be -- you might still win on a protective order, though, and say that we have to furnish it if we want to be a plaintiff in this case, but it should be furnished under a protective order.

MR. EDWARDS: That is the position we took at trial. If you are going to make us give this information, then at least let's limit its use for the reason you are ordering us to produce it, namely, the litigation itself.

QUESTION: Well, then, once the deposition or the interrogatory is offered in evidence, it would lose any right of privacy, would it not?

MR. EDWARDS: That's what the State Supreme Court opinion says, and we re not arguing that.

QUESTION: Unless, as suggested, it was a patent case or a national defense case, something of that type.

QUESTION: You just agreed that your position is that if it were used at the trial legitimately, then it is open to the public.

MR. EDWARDS: That is correct. That's not the issue here.

The State Supreme Court in adopting the rule that one, in order to have a protective order entered, must show good cause under Civil Rule 26, I am sure had some of the same concerns that have been expressed here about constitutionalizing the process of discovery. It is already sufficiently complex and protracted that to make every protective order a matter of constitutional rights certainly is not going to help.

The State Supreme Court held essentially that if you subject a party as the price of going to court with the cost of publication of private information obtained through court-compelled discovery, that you are going to chill a party's access to the courts, and that is a real concern when you are dealing with a party that is a minority religion, as is the Aquarian Foundation,

or a party that may be a minority political party, or a group such as the NAACP that may be operating in an area where its objectives are ones that would subject people to scorn.

QUESTION: Well, you don't have to find a federal right of access to courts to sustain the position of the Supreme Court of Washington in this case because they found as a matter of state policy that the access to courts was all-important.

MR. EDWARDS: That the access to the court was what?

QUESTION: Was all-important, or very important.

MR. EDWARDS: Yes, that the access to the court was a fundamental concern of theirs, and essentially what they said is the only alternative the Seattle Times has really presented that is realistic is denial of discovery altogether, and obviously if you deny discovery, they don't have anything to publish, so they don't have any reason to have a protective order, and we would all be happy and could go home, because that's what we'd like, too, is that they not be able to give this information. But the court said that is not a realistic alternative because of the importance of the discovery process in the just resolution of disputes.

Given that, the State Supreme Court said that whatever limited interest there may be in the right to publish this material obtained through court-compelled disclosure is far outweighed by the need of the state to have a system to resolve disputes, and it is very easy when we read the briefs, particularly of the petitioner here, to forget the central fact, and that is that we are in that court right now and we have been here in this court and other courts trying to vindicate rights. And without an effective, functioning court system, none of these rights are going to be very meaningful.

And the Washington Supreme Court held, as I think this Court should, that that interest is paramount to any right of anyone to publish court-compelled discovery.

QUESTION: Do you have anything further, Mr. Schwab?

You have three minutes remaining.

ORAL ARGUMENT OF EVAN L. SCHWAB, ESQ.

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. SCHWAB: Thank you, sir.

I think that the question of whether or not we are going to constitutionalize pretrial discovery if this Court adopts the balancing test we are advocating, and if it requires lower courts to enter findings and

give justifications for these restraints on speech, is a question that was really decided by the framers of our Constitution and the drafters of the First Amendment.

The First Amendment has been expanded by this Court already to in essence constitutionalize or make federal questions out of courtroom closure cases, out of the ability of the press to publish information that the judicial system is trying to keep secret, such as the judicial probe in the Landmark case, the names of minor victims in the Globe case. The Court has constitutionalized the question of whether or not the fair trial interests of the press -- excuse me, the fair trial interests of a defendant, in Globe -- in Nebraska Press, justify protective orders against the press like the one that was entered there. In Smith v. Daily MNail this Court held that a newspaper could not be punished for violating a state statute and publishing the names of minor offenders. There are a whole range of cases in which these issues have come up.

And yes, we do argue that whenever government, by whatever form, attempts to suppress speech, particularly in advance of that speech, then the First Amendment is called into question, federal questions are present, and we believe that in most cases orders that suppress speech in advance cannot pass muster under the

First Amendment.

Mr. Chief Justice Hughes started us down this line in Near v. Minnesota. The exceptions there to prior restraints were basically obscenity, fighting words and national security cases. After the Pentagon Papers case it appears that there is not a lot left of the national security exception. When one reads this Court's opinion dealing with the public administration of justice, the right of the public to know how its courts are administered, how justice is administered and the protections it has afforded those who disseminate information about the administration of justice, then we submit that one can only conclude that there are significant First Amendment interests at stake here, and they need to be balanced.

We are not arguing for an absolute test. We are arguing for a balancing test that gives First Amendment considerations a place on the scale. The lower court didn't do that, and basically said protective orders are per se constitutional so long as they avoid embarrassment and the other things listed in Rule 26.

QUESTION: Do you think the public is entitled to be present at the hearings, at pretrial discovery depositions?

MR. SCHWAB: I'm a trial litigater most of the time, and I would say no. I don't want the public and the press in most of these depositions. Now, that is taken care of in the antitrust field because there is a statute that government prosecutions involve right of open depositions. But short of that, I think not.

QUESTION: Why does -- if you concede, as you seem to, that there is no pulic right of access to the actual taking of the deposition, what's the difference between that and access to the record of that deposition hearing?

MR. SCHWAB: I think the difference, sir, is that when a litigant comes into possession of it rightfully, he has a right to disseminate it, and he has come into it rightfully. He was there. The party was in the room and heard the deposition.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in Capital Cities Cable v. Crisp.

(Whereupon, at 1:47 o'clock p.m., the case in the aove-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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