EXHIBIT A

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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February 5, 2019

The Honorable Peter Flynn
Courtroom 2408
Richard J. Daley Center
50 West Washington Street
Chicago, IL 60602

VIA ELECTRONIC FILING

Re: *Better Government Association v. Board of Education of the City of Chicago*, Case No. 17 CH 12403

Dear Judge Flynn,

The Reporters Committee for Freedom of the Press (the "Reporters Committee") respectfully submits this letter in support of the Plaintiff Better Government Association's Emergency Motion to Vacate the Court's February 4 Order, which seeks to vacate an Order of this Court prohibiting publication of the Investigative Report disclosed to the Better Government Association ("BGA") by the Board of Education of the City of Chicago ("CPS").

The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As an advocate on behalf of the news media and the public, the Reporters Committee has a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to publish information in their possession.

This matter arises from CPS's disclosure of a redacted copy of the Investigative Report to BGA. The Investigative Report is newsworthy and relates to a matter of public concern, as it discusses the drowning of a CPS student, an incident that has been the subject of numerous news stories. *See, e.g.*, Katie Drews & Lauren FitzPatrick, *One lapse after another at CPS school where boy with autism drowned*, Chi. Sun-Times (Sept. 8, 2017), https://bit.ly/2SuUHff; Juan Perez Jr., *Chicago school board sued by mother of boy who drowned*, Chi. Tribune (March 3, 2017), https://bit.ly/2RGTKfh; Hilary Shenfeld, *Boy With Autism Drowned While Lifeguard Was on Computer in Office, Lawsuit Alleges*, People (Mar. 6, 2017), https://perma.cc/5ELK-G8NV. After CPS voluntarily disclosed a redacted copy of the Investigative Report to BGA, it asked BGA's counsel to return

the document pursuant to Illinois Supreme Court Rule 201(p), which applies to "information inadvertently produced in discovery"; BGA's counsel refused. CPS then filed Defendant's Motion to Clawback Production of Documents. On February 4, 2019, this Court entered an Order stating that the Investigative Report may not be published until the Court rules "on whether it should be tendered pursuant to the BGA's FOIA request."

The February 4 Order is an unconstitutional prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984))). Even a temporary restriction on publication, like the Court's Order here, is an unconstitutional prior restraint. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) (stating that "even the issuance of an interim restraining order" is considered a prior restraint).

As the Supreme Court has recognized: "[I]t is the chief purpose of the guaranty [of the First Amendment] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they have "an immediate and irreversible sanction," not only "chilling" speech but "freezing" it, at least for a time. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("*Stuart*"). Prior restraints are particularly oppressive because they prevent the restricted information from being heard or published at all and are therefore the most direct attack on the marketplace of ideas. *Id.* The damage of a prior restraint is "particularly great" where, as here, it "falls upon the communication of news and commentary on current events." *Id.*

The party seeking a prior restraint bears the burden to overcome the "heavy presumption against [the] constitutional validity" of a prior restraint. *N.Y. Times Co.*, 403 U.S. at 714 (per curiam). The heavy presumption against prior restraints can be overcome "only in 'exceptional cases.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) ("*Davis*") (Blackmun, J., in chambers (quoting *Near*, 283, U.S. at 716)). "[T]he Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Rather, beginning in 1931 in *Near*, the Supreme Court has without fail rejected all prior restraints on the press. *See, e.g.*, *Near*, 283 U.S. at 716–18 (invalidating prior restraint against defamatory and racist publication that allegedly disturbed the "public peace"); *Stuart*, 427 U.S. at 570 (rejecting prior restraint intended to protect Sixth Amendment rights of criminal defendant); *Davis*, 510 U.S. at 713 (rejecting prior restraint intended to protect "confidential or proprietary business information").

Perhaps most notably, even in the landmark Pentagon Papers case, the Supreme Court rejected a prior restraint despite the government's claim that an injunction preventing publication of a classified study of the Vietnam War was necessary to protect

military secrets. *N.Y. Times*, 403 U.S. at 714 (refusing prior restraint against publication of the Pentagon Papers imposed for what the government claimed was a "grave and immediate danger" to national security). As Justice Brennan wrote in his concurring opinion: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726–27 (Brennan, J., concurring).

It appears that the Court here may have entered its Order in an attempt to cure CPS's alleged mistaken disclosure of the Investigative Report to BGA before the Court's *in camera* inspection of it was complete. The Court's desire to correct CPS's potential error, however, cannot justify the imposition of a prior restraint, which creates a constitutional harm. Once information has been disclosed, nearly 90 years of constitutional law stand in the way of enjoining its publication.

The Supreme Court has repeatedly recognized that the media are free to publish information that others may have intended, but failed, to keep secret. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court explained that the government may not sanction a news organization that accurately published a rape victim's name obtained from judicial records open to public inspection. *See also Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (invalidating a state law the prohibited the dissemination of the names of rape victims and declaring that the government cannot proscribe the publication of "lawfully obtain[ed] truthful information about a matter of public significance"); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979) (invalidating a state law prohibiting a newspaper from publishing the identity of a juvenile defendant and stating that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information" absent an extraordinary countervailing state interest).

Similarly, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Supreme Court held that it was unconstitutional to criminally prosecute a newspaper for publishing information about confidential judicial disciplinary proceedings. As Justice Stewart explained in his opinion concurring with the Court's judgment, the "government cannot take it upon itself to decide what a newspaper may and may not publish"; although "government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." 435 U.S. at 849 (Stewart, J., concurring).

"The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975); *see also Stuart*, 427 U.S. at 589 (Brennan, J., concurring in the judgment) ("The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." (citing *Carroll v. Princess Anne*, 393 U.S. 175, 180–81 (1968))). Accordingly, just as the Constitution would protect BGA from punishment

for publishing the Investigative Report, it surely protects BGA from being enjoined from publishing that information in the first place.

For these reasons, the Reporters Committee urges this Court to grant the Emergency Motion to Vacate and vacate its entry of the February 4, 2019 Order.

Respectfully submitted,

The Reporters Committee for Freedom of the Press

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