EXETER TOWNSHIP, Plaintiff, v. JERRY GELEFF, an adult individual; THE EXETER EXAMINER, an unincorporated business; THE EXETER UNDERGROUND, an unincorporated business; and JERRY GELEFF MEDIA, Defendants.	:	**IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA** CIVIL ACTION—LAW NO. 22-16476

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE INJUNCTION

INTRODUCTION

Exeter Township obtained a patently unconstitutional injunction prohibiting Defendants Jerry Geleff, the Exeter Examiner, the Exeter Underground, and Jerry Geleff Media from reporting on, or even possessing, information lawfully obtained from a confidential source. This injunction is a paradigmatic prior restraint on Defendants' speech, and it flatly violates the First Amendment and the Pennsylvania constitution. Indeed, the order granting the injunction contravenes a near-century of Supreme Court jurisprudence striking down prior restraints on speech. There is no plausible legal theory that comes close to saving the injunction's legality, and the injunction should be dissolved immediately.[1]

STATEMENT OF QUESTIONS INVOLVED

1. Does the Court's order of December 15, 2022, which enjoins Defendants from possessing, publishing, or otherwise disseminating information obtained from a confidential source, violate the First Amendment? *Suggested answer*: Yes.

[1] The Township's failure even to acknowledge—let alone apprise the Court of—relevant First Amendment law in its motion for a preliminary injunction was improper and, undoubtedly, led to the Court's entry of the clearly unconstitutional order at issue.

2. Is the Court's order of December 15, 2022, which requires Defendants both to return and destroy all physical and electronic "descriptions" of the Report, improper and overbroad?

Suggested answer: Yes.

STATEMENT OF THE CASE

On December 14, 2022, Mr. Geleff, a local journalist, obtained from a confidential source in the course of his newsgathering portions of a 43-page report (the "Report") prepared for Exeter Township by the law firm MacMain, Connell and Leinhauser. The Report describes the law firm's investigation into allegations of sexual harassment made against a Township Supervisor—newsworthy information of obvious public interest. That same day, Mr. Geleff read aloud excerpts from the Report on his podcast, The Exeter Underground, and posted images of portions of the Report on the website of The Exeter Examiner.

On December 15, the Township filed a complaint sounding in replevin and equitable relief in the Court of Common Pleas of Berks County, Pennsylvania. Concurrent with said complaint, the Township filed an Emergency Motion for Preliminary Injunction (the "Motion"). The Motion sought an injunction requiring Defendants to (1) return all physical or electronic copies of the Report in their possession; (2) destroy all physical or electronic copies of the Report, "and descriptions thereof," in their possession; and (3) refrain from "publishing or otherwise publicly disseminating the Report or the contents thereof." Motion at 9–10. A true and correct copy of the Motion is attached as Exhibit A.

That same day, the Court (Hon. M. Theresa Johnson) held an emergency hearing on the Motion at which Defendants, by necessity, appeared *pro se*. Following the hearing, the Court granted the Township's motion and entered an order (the "Order") reading as follows:

> Defendants are hereby enjoined from publishing or otherwise disseminating any information in the investigative report commissioned by the Township of Exeter (the "Report"), which Defendants have improperly obtained.

> Defendants are further ORDERED to return any and all physical or electronic copies of the Report in Defendants' possession and destroy all physical and electronic copies of the Report (or descriptions thereof) in their possession, including but not limited to those on The Exeter Examiner Facebook page, The Exeter Examiner website, and The Exeter Underground podcast.

A true and correct copy of the Order is attached as Exhibit B.

ARGUMENT

I. The Order must be dissolved because it violates the Constitution.

A. The Order imposes an unconstitutional prior restraint on Defendants' speech.

The Order violates the First Amendment. It requires Defendants to "suppress[]" the contents of the Report "by enjoining publication." *Near v. Minnesota*, 283 U.S. 697, 712 (1931). It thus imposes a quintessential prior restraint on Defendants' speech. *Id.* Prior restraints on speech are "the most serious and the least tolerable infringement on First Amendment rights," and the damage they inflict "can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("*Stuart*"). Accordingly, prior restraints bear "a heavy presumption against [their] constitutional validity," *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("*Pentagon Papers*") (citation and internal quotation marks omitted). The proponent of a prior restraint bears the burden of overcoming this presumption. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The Township hasn't even tried to meet this heavy burden—and if it did try, it would certainly fail.

"In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech." *Matter of Providence J. Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986), *opinion modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987). Indeed, the Supreme Court's jurisprudence makes unmistakably clear that "prior restraints, if permissible at all, are

permissible only in the most extraordinary of circumstances." *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for Cent. Dist. of California*, 729 F.2d 1174, 1183 (9th Cir. 1983). For example, the Court has hypothesized that a prior restraint might pass constitutional muster if it were necessary to limit dissemination of information about troop movements in wartime, *Near*, 283 U.S. at 716, or to "suppress[] information that would set in motion a nuclear holocaust," *Pentagon Papers*, 403 U.S. at 726 (Brennan, J., concurring). Needless to say, these are interests of the greatest conceivable magnitude. The Township identifies no interest in preventing disclosure of the Report that even approximates them. Any attempt to do so would be risible: the Report, which "detail[s] the results of" an attorney's investigation into sexual harassment complaints made against a Township Supervisor, Motion at 2, ¶¶ 10–12, obviously comes nowhere close to clearing the exceedingly high bar set by the Supreme Court. As Justice Blackmun put it decades ago,

> the gagging of publication has been considered acceptable only in exceptional cases. Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this most extraordinary remedy only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.

CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (internal quotation marks, citations, and brackets omitted); *cf. Stuart*, 427 U.S. at 570 (holding broad imposition of a prior restraint on press coverage violated the First Amendment even when it was entered to protect criminal defendant's right to fair trial). Nothing in either the Report or the Motion can possibly satisfy that standard.

It is not enough that—according to the Township—the Report is "a privileged, nonpublic record." Motion at 9. Courts have repeatedly upheld the right of the press to publish

confidential, nonpublic information.[2] *E.g.*, *CBS, Inc.*, 510 U.S. at 1316 (Blackmun, J., in chambers) (invalidating prior restraint on publication of "confidential and proprietary" information); *Okla. Publ'g Co. v. District Court*, 430 U.S. 308, 311 (1977) (per curiam) (invalidating prior restraint that prohibited press from publishing name of juvenile defendant after name was disclosed in presence of journalists). Tellingly, the Supreme Court has rejected the federal government's efforts to restrain newspapers from publishing even *classified* information—despite the government's contention that disclosing the information "would endanger the national security." *Pentagon Papers*, 403 U.S. at 718 (quoting Br. for the United States at 13–14); *see also Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (describing *Pentagon Papers* as involving "a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, *might seriously impair the security of the Nation*") (emphasis added).

Underscoring the inadequacy of the Township's showing, the Motion concedes that any purported harms which might have flowed from publication of the Report (the Township does not specify them) have already occurred. As the Township puts it, "listeners to [Mr. Geleff's] podcast *cannot unhear what they have already heard* when listening to Geleff read excerpts from the Report," and "viewers of the website on which Geleff posted photos of the Report *cannot unsee what they have already seen*." Motion at 6 (emphasis added). Thus, by the Township's own admission, "the cat is out of the bag." *In re Charlotte Observer (A Div. of Knight Pub. Co.*

[2] For this reason, among others, the Township's repeated observation that the Office of Open Records ("OOR") deemed the Report exempt from disclosure under the Commonwealth's Right to Know Law is wholly irrelevant. *See, e.g.*, Motion at 3, 6, 8, 9. Even assuming, *arguendo*, that the OOR's analysis is correct, it makes no difference. The First Amendment protects a journalist's right to possess and publish information the journalist would not ordinarily have been able to obtain through official channels—as the precedent discussed herein makes clear.

& Herald Pub. Co.), 921 F.2d 47, 50 (4th Cir. 1990) (rejecting prior restraint on further publication of information inadvertently announced in open court). This makes it all the more obvious that the Township has not, and cannot, overcome the heavy presumption of unconstitutionality that applies to prior restraints: "once . . . truthful information [i]s publicly revealed or in the public domain the court [may] not constitutionally restrain its dissemination." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) ("*Daily Mail*") (internal quotation marks omitted).

The Township's insistence that it is the "sole owner" of the Report, and that Defendants' possession of the report is "unlawful," is wrong and, in any event, irrelevant to the First Amendment analysis. *See, e.g.*, Motion at 8. There is no dispute that Mr. Geleff obtained portions of the Report from a confidential source—a "routine newspaper reporting technique[]." *Daily Mail*, 443 U.S. at 103. Nor can there be any question that the First Amendment protects a journalist's right to possess and publish information acquired from a source even when that source is not authorized to share said information. *Bartnicki*, 532 U.S. at 535. For example, if a source leaves a copy of a newsworthy, illegally recorded meeting in a radio host's mailbox, the First Amendment protects the radio host's right to play the recording on air. *Id*. Likewise, if a source steals classified documents from the Pentagon and hands them over to a newspaper, the First Amendment protects the newspaper's right to publish the documents' contents. *Pentagon Papers*, 403 U.S. at 714; *see also CBS, Inc.*, 510 U.S. at 1318 (observing that the Supreme Court had "refused to suppress publication of papers stolen from the Pentagon by a third party," and concluding that prior restraint on publication of a videotape "obtained through the 'calculated misdeeds'" of a newsroom was unconstitutional). In other words, the First Amendment protects journalists' ability to receive and publish information given to them by their sources *even if* their

sources were not permitted to disseminate—or even access—the information themselves. *Pentagon Papers*, 403 U.S. at 714. That rule governs here: the First Amendment protects Mr. Geleff's right to possess and publish the portions of the Report he received from his confidential source no less than it protected the journalists who obtained and published the classified Pentagon Papers.

B. Penalizing Defendants for possession, publication, or dissemination of the Report would be unconstitutional.

Penalizing Defendants for their possession and publication of portions of the Report would violate the Constitution. Here, again, the controlling law could not be clearer: when a journalist "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103. This standard is as demanding as it sounds: the Supreme Court has repeatedly struck down efforts to impose liability on journalists for publishing acutely sensitive information. *See, e.g.*, *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845–46 (1978) (prohibiting criminal sanctions against newspapers for divulging information on judicial proceedings that were confidential under state constitution); *Daily Mail*, 443 U.S. at 98 (prohibiting liability for publishing the name of "a youth charged as a juvenile offender"); *The Florida Star v. B.J.F.*, 491 U.S. 524, 529 (1989) (prohibiting liability for publishing the name of person who was raped). Because well-established law prohibits imposing sanctions on journalists for publishing truthful information in all but the narrowest of circumstances, none of which applies here, any effort by the Township to punish Defendants for possessing or publishing portions of the Report (by, for instance, moving for contempt sanctions) would be frivolous.

II. The Order also must be dissolved because it is vague and overbroad.

The Order also must be dissolved for the separate and independent reason that it is impermissibly vague and overbroad. Even "[w]here the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury."[3] *Matenkoski v. Greer*, 213 A.3d 1018, 1027 (Pa. Super. 2019). An order granting an injunction, therefore, "should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it." *Id.* (quoting *George F. Mayer and Sons v. Com., Dep't. of Env't Res.*, 18 334 A.2d 313, 315 (Pa. Comm. Ct. 1975). The Order fails that test.

The Order requires Defendants to destroy and return not only copies of the Report in their possession, but also "descriptions thereof." Even assuming that the Order's requirement that Defendants destroy and return copies of the Report is lawful (it is not), the term "descriptions thereof" is far too indefinite and imprecise. *See Matenkoski*, 213 A.3d at 1027. It sweeps in official government documents that are indisputably public yet contain descriptions of the Report, including the Motion itself and the OOR's Final Determination in AP 2022-2244. Defendants' possession of such records inflicts no redressable injury on the Township and cannot give rise to a claim for relief, in replevin or otherwise. The Order's overbreadth would require its dissolution even if it were not unconstitutional—but it is, and the Court should so hold.

[3] Of course, the "essential prerequisites" of an injunction are *not* satisfied here, because (at minimum) the injunction imposes an unconstitutional prior restraint and the Township concedes that the harms contemplated by publication of the Report have already occurred.

CONCLUSION

The injunction violates settled constitutional law. It should never have been granted, and Defendants respectfully request that it be dissolved immediately.

Respectfully submitted,

Dated: December 23, 2022

/s/Paula Knudsen Burke

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify service of the foregoing Memorandum of Law in Support of Motion to Dissolve Preliminary Injunction, as well as all attachments thereto, upon the persons, in the manner, and on the date indicated below:

BY EMAIL

Tucker R. Hull (PA 306426) Law Office of Tucker R. Hull, LLC tucker@tucker-hull-law.com *Counsel for Plaintiffs*	J. Chadwick Schnee (PA 306907) Law Office of Tucker R. Hull, LLC chadwick@tucker-hull-law.com *Counsel for Plaintiffs*

I further certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
Signature: */s/Paula Knudsen Burke*
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Date: December 23, 2022