
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003938-25

NEW BRUNSWICK BOARD OF
EDUCATION,

Plaintiff-Respondent,

v.
COUNTY,

NEW BRUNSWICK TODAY,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER
OF THE SUPERIOR COURT OF
NEW JERSEY, MIDDLESEX

CHANCERY DIVISION, DOCKET NO.
MID-C-85-26

Sat Below:
Hon. Thomas Daniel Mcloskey,
J.S.C.

**BRIEF ON BEHALF OF AMICUS CURIAE GOLDWATER INSTITUTE
IN SUPPORT OF PETITIONER NEW BRUNSWICK TODAY**

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INTRODUCTION

The decision below is as clear an example as can be imagined of a prior restraint on speech in violation of both the First Amendment and the New Jersey Constitution. Unfortunately, there appears to be an increasing trend of public-school entities seeking to censor speech in just the manner reflected in this case—for example, by exploiting the Family Educational Rights and Privacy Act (“FERPA”) as a rationale for suing private citizens, even though that law does not create any cause of action on the part of school officials. In fact, Amicus Goldwater Institute has litigated some of these cases, which are so similar to this one that Amicus believes they will aid this Court in reviewing this petition.

First, the law: the U.S. Supreme Court has made quite clear that the media have a First Amendment right to publish “truthful information of public concern” *even if that information was originally acquired illegally*. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001); *accord*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). There is no “privacy” exception to this rule. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

And given that new Jersey’s constitutional speech protections are even broader than the First Amendment, *see State v. Fair*, 256 N.J. 213, 232 (2024), *cert. denied*, 144 S. Ct. 2572 (2024)—indeed, they are “broader than practically all

other[] [free speech clauses] in the nation,” *Green Party of New Jersey v. Hartz Mountain Industries, Inc.*, 164 N.J. 127, 145 (2000)—this Court simply cannot tolerate a Superior Court order that (for months now) has prohibited a newspaper from publishing truthful information of public concern.¹

Sadly, school officials have recently taken an unusually aggressive stand attempting to silence speech they find potentially embarrassing or that they believe will violate statutes protecting student privacy. In Virginia and Rhode Island—to name just two—school officials have attempted either to censor lawful publications or to punish parents who seek information about the operations of schools, often (mis)citing privacy statutes like FERPA. These efforts violate the freedoms of speech and press. This Court should take this opportunity to make clear to lower courts that the publication of truthful information cannot be prohibited—or made contingent on the prior approval of government officials—except in the rarest of

¹ The Superior Court’s July 31 “amplification” of its order actually makes things worse. It emphasizes that the court was not ordering the Defendant to submit its publications to the Court for prior approval before publishing, but instead that Defendant submit its publications *to the School Board for the School Board’s* prior approval before publishing—thus compounding its original prior restraint with a delegation to the school board of unbridled discretion to censor. *Cf. Freedman v. State of Md.*, 380 U.S. 51, 59-60 (1965). As noted below, it is simply irrelevant whether the footage was “proprietary” or not; to require a newspaper to submit get “prior ... approval [from] the School Board” before publishing it is literally the dictionary definition of a prior restraint. *Davis v. New Jersey Dep’t of L. & Pub. Safety, Div. of State Police*, 327 N.J. Super. 59, 78 (Law. Div. 1999); *Oxfeld v. New Jersey State Bd. of Ed.*, 68 N.J. 301, 314-15 (1975) (Clifford, J., dissenting).

circumstances (which aren't present here), and that lengthy delays in adjudication simply *are* prior restraints of speech.

ARGUMENT

I. The press has a constitutional right to publish truthful information of public concern, even if that information was initially acquired unlawfully.

A. A newspaper has a constitutional right to publish even information that was unlawfully leaked to it.

The Supreme Court made clear in the “Pentagon Papers” case that courts may not enjoin newspapers from publishing truthful information of public concern, even if that information was originally *stolen*. *New York Times*, 403 U.S. at 714.

In that case, Daniel Ellsberg stole documents involving military strategy in the Vietnam War, and gave them to the *New York Times* and the *Washington Post*, which published them. When the Nixon Administration tried to enjoin their publication, the Court said such an injunction would violate the First Amendment. *Id.* In other words, the publication of *stolen military documents during wartime* was still protected by the First Amendment.

It follows that information of lesser national significance, such as the video at issue here, is even more constitutionally protected.

In *Bartnicki*, private citizens illegally acquired a recording of a telephone call between members of a labor union and gave it to a radio station, which broadcast portions of it; newspapers also published a transcript. 532 U.S. at 519.

The parties who were recorded sued these media entities for damages, but the Court ruled that violations of wiretapping laws should be penalized by “impos[ing] an appropriate punishment on the person who engages in [illegal conduct]”—*not* by “suppress[ing]” the “speech [of] a law-abiding possessor of information.” *Id.* at 529-30.

Indeed, *Bartnicki* made clear that “privacy concerns give way when balanced against the interest in publishing matters of public importance.” *Id.* at 534.

This rule applies even where the privacy interests are those of minors. In *Smith, supra*, a newspaper obtained the names of two accused criminals who were juveniles. 443 U.S. at 99. The papers learned their names through monitoring police radio signals and asking witnesses and a prosecuting attorney. *Id.* State law made it illegal for the media to disseminate the names of juveniles accused of crimes. But the Court held that such a restraint was unconstitutional.

“[T]he constitutional right [of free press] must prevail over the state's interest in protecting juveniles applies with equal force here,” It said. *Id.* at 104. That right clearly prohibited the state from “punish[ing] the truthful publication of an alleged juvenile delinquent’s name lawfully obtained by a newspaper.” *Id.* at 106.

Likewise, in *Oklahoma Publ'g Co. v. Dist. Ct. in & for Oklahoma Cnty.*, 430 U.S. 308 (1977) (per curiam), the Court reiterated that the First Amendment protects the right of the media to publish information about juveniles accused of crimes, notwithstanding the privacy interests of juveniles generally.

It's worth reiterating one point about *Bartnicki*: that even publication of information that was *illegally obtained* is shielded by the First Amendment, at least as long as the publisher did not himself illegally acquire it. The Superior Court in this case was therefore correct to state that *even if* the video was unlawfully obtained, the newspaper is constitutionally entitled to publish it.² Yet that court erroneously went on to hold that it has the authority to “balance the juvenile’s statutory right to confidentiality against the severe constitutional presumption against censorship.” Op. at 37 (internal citation omitted). Not so. Neither *Bartnicki* nor any other case permits a court to censor the publication of information already in the media’s hands—indeed, which has *already been published*.

² There is not now, and never has been, any evidence that the *New Brunswick Times* obtained the video recording illegally. That is all the more reason why the decision below should be reversed.

B. The constitutional calculus is different where, as here, the information has *already been published*.

Another critical detail in this case is that the video here has *already been disseminated*. This is crucial because there is a qualitative difference between barring publication in the first instance, and ordering a media organization to delete or remove information that has already been published.

The term “claw-back” is typically used to refer to situations where a party can be required to return inadvertently disclosed documents or information—as, for example, in certain Freedom of Information Act cases. *See, e.g., Club v. U.S. Env’t Prot. Agency*, 505 F. Supp.3d 982, 988 (N.D. Cal. 2020). But “claw-back” is employed only where the disclosure would affect the proper operation of the *courts*, which is not true here; it is not appropriate where the information has already been made public. *See id.* at 991 (claw-back of published documents was improper because it “would not prevent disclosure of the information at issue.”)

Further, “claw-back” is not permitted if it would constitute a prior restraint. In *Ground Zero Center for Non-Violent Action v. U.S. Department of Navy*, 860 F.3d 1244, 1261-62 (9th Cir. 2017), the government inadvertently disclosed confidential information, and upon realizing that, asked the court to bar the recipients from disseminating it. The court said this could be authorized only where the government provided ““a compelling reason [to impose the restriction] and articulate the factual basis for its ruling, without relying on hypothesis or

conjecture,” which the government had failed to do. *Id.* at 1261 (citation omitted).³

Where information has already been published, courts virtually never require a publisher to withdraw it or censor it. In *In re Charlotte Observer*, 921 F.2d 47 (4th Cir 1990) (per curiam), for example, newspaper reporters heard the name of a person who was under investigation, because the name was uttered at a court hearing they attended. The trial judge issued an order barring them from publishing the person’s name. But the Fourth Circuit reversed, noting that the name had been uttered in a public court proceeding: “the cat is out of the bag,” it said. “Once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction to two reporters.” *Id.* at 50. To censor it, therefore, would be “the type of prior restraint condemned in [First Amendment precedents].... Once the name has been made public ... the First Amendment protection of a free press comes into play.” *Id.*

Here, the Superior Court acknowledged that “the video was already published and in the public domain,” and indeed that the juvenile’s identity is already publicly available. *Op.* at 52. The fact that they “remain sensitive” is

³ Here, the Superior Court relied entirely on hypothesis and conjecture. It concluded that publication of the video “*could*” adversely affect the minor and “*could* foreseeably invite” harms such as the disclosure of school safety protocols. *Op.* at 45 (emphasis added).

simply not enough to overcome the overwhelmingly strong presumption against the validity of prior restraints. *Id.*

II. Public school officials are increasingly abusing their power to censor information critical of themselves.

A. Courts should not allow school officials to obtain even temporary prior restraint orders.

Amicus Goldwater Institute is alarmed by what appears to be a growing trend of public-school officials violating the First Amendment by suing people or entities who are exercising their constitutionally protected speech rights. Some of these cases may be instructive to the Court.

In *Fairfax County School Board v. Tisler*, No. 2021-13491 (Fairfax Cnty. Cir. Ct. filed Sept. 27, 2021), two parents living in the Fairfax County School District in Virginia submitted requests under that state's public records laws, seeking receipts to show how much the school district spent on its lawyers. The district complied by providing redacted versions of the receipts. The parents reviewed them, and published some of them on a website, adding comments to the effect that the school district spent money irresponsibly.

After that, however, the district filed a lawsuit against the parents, demanding that they remove the receipts from the website and return them. It claimed it had accidentally failed to fully redact the documents, and insisted it had the right to take the receipts back, demand their de-publication, and redact them a

second time, and then return them. Shockingly, the trial court agreed, issuing a temporary restraining order compelling the parents to remove the documents from the internet, despite the fact that they had already been widely seen and commented upon.

The parents, represented by amicus Goldwater, then filed a motion for relief from that order, arguing that since they had obtained the documents through no wrongdoing on their part, they had a constitutional right to publish them, and that the order forcing them to remove the documents from the website was an unconstitutional prior restraint. The Circuit Court, reconsidering its initial opinion, agreed. The original TRO, it said, was “about as much a prior restraint as there ever could be.... No question about it.” Transcript of Hearing, *Fairfax Cnty. Sch. Bd. v. Tisler*, No. 2021-13491 (Fairfax Cnty. Cir. Ct., Nov. 16, 2021) at 9. Relying on *B.J.F., supra*, the court observed:

The information wasn’t stolen.... It was obtained quite lawfully, and it’s clearly also about a matter of public significance.... [P]ermissible redactions are simply not relevant anymore.... What we’re doing here is—what the defendants are doing is enforcing their rights under the First Amendment, and those rights, enforcing their rights under the First Amendment, is about as high in the public interest scale as you can get.

Id. at 10-16.

That was a victory for free speech, but there is an important caveat: the school board had obtained its initial TRO on September 30, 2021, and the Circuit

Court only vacated that order on November 16, 2021, meaning that for six weeks, the parents' free speech rights were violated, and the public was deprived (or at least limited) in its right to know. The violation of free speech was fast, and the court's realization of its error was slow. Likewise here, the Superior Court's initial order forcing the newspaper to "un-publish" occurred on May 9, 2026, and only on July 9 did that court reconsider and (partially) revise its order. Yet even now, months later, the prior restraint of the newspaper's speech remains in place.

The U.S. Supreme Court has said that "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times*, *supra* (emphasis added)). Yet **by censoring first and asking questions later, trial courts can, and too often do, silence speech for weeks or months before admitting they were wrong—at which point, the damage from the censorship may well have already been completed.**

Unfortunately, school officials seem increasingly willing to abuse the legal process in just this way to silence their critics. For example, in *National Education Association Rhode Island v. Solas*, No. C.A. PC 21-05116 (Providence/Bristol Cnty. Super Ct., filed Aug. 2, 2021 (pending)), the plaintiff is the parent of a child in a Rhode Island school district. She asked school officials for information about the curriculum that would be taught to her daughter. Those officials replied that

she could only obtain that information by submitting a public records demand under state law. She did so—whereupon the National Education Association’s local branch sued her, seeking to block the production of the documents by the school district.

That lawsuit was filed in 2021. Today, five years later, it still remains pending, with amicus Goldwater representing her in the Rhode Island courts.

The whole theory of “chilled” speech is that the *in terrorem* effect of a lawsuit can effectively prevent speech, not just by the speaker, but by bystanders who—witnessing the litigation and fearful of being sued themselves—choose to keep their heads down rather than to exercise their rights. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). That’s why courts are open to arguments about third-parties’ rights in “chill” cases: because the punishment, or even process, against one person might cause others to self-censor. *See, e.g., Eatough v. Bd. of Med. Exam’rs*, 191 N.J. Super. 166, 186 (App. Div. 1983).⁴

⁴ In *Davis, supra*, the court held that a police department regulation that required pre-approval by supervisors before police officials could disclose information or disseminate documents to the public was unconstitutional for just this reason. To “condition the exercise of speech rights on the prior permission of a government official,” said the court, “is itself likely to chill the public speech of State Police employees before it happens.... The danger of self-censorship in this instance is self-evident. Such a pre-clearance requirement may even have an inhibiting effect on those who might ultimately receive permission to speak.” 327 N.J. Super. at 78-79 (citations omitted).

New Jersey courts have recognized that the “process is the punishment,” so to speak—and that the slowness of litigation can itself accomplish the censorship goals of pro-censorship plaintiffs, even if they ultimately lose their cases. For example, in *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982), journalists asserted the right under the state’s “Shield Law” not to disclose their sources in a case involving libel. The court paused in the midst of its analysis to remark on this problem: “The desultory pace of this three-year-old litigation gives little comfort to those who would assert their constitutional right to free speech,” it said. “The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.” *Id.* at 196. The reason is that lawsuits themselves pose a “threat ... to aggressive journalism” that can cause the media “to engage in self-censorship.” *Id.* at 197-98.

In short, “press freedom [can] be chilled by the attendant cost of and delays in litigation,” *Molin v. Trentonian*, 297 N.J. Super. 153, 160 (App. Div. 1997), because onlookers will engage in self-censorship to avoid the risks of even frivolous lawsuits. “The threat of prolonged and expensive litigation has a real potential for chilling journalistic criticism and comment.... [T]he prospect of delay ... no matter how expeditiously handled, may inhibit the full and free exercise of constitutionally-protected activities.” *Kotlikoff v. The Cmty. News*, 89 N.J. 62, 67 (1982). This Court should not tolerate such an outcome.

B. FERPA does not give schools any right of action here.

One of the bases the school district asserts for censoring the newspaper here is that the FERPA (20 U.S.C. § 1232g) forbids schools from disclosing certain private information to the public. True enough, but “FERPA does not confer an enforceable right or provide for suppression in the event of a violation.” *State v. J.S.G.*, 456 N.J. Super. 87, 100 (App. Div. 2018). As the U.S. Supreme Court has squarely held, “there is no question that FERPA’s nondisclosure provisions fail to confer enforceable rights.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). FERPA tells schools what *they* may and may not do. Nothing in that statute empowers schools to sue others (let alone the media) or to force them to remove information from the public eye. *See also Woodruff v. Hamilton Twp. Pub. Schs.*, 305 F. App’x 833, 837 (3d Cir. 2009) (“there is no private cause of action under FERPA’s confidentiality provisions.”).

The only provision in that statute that approaches such a requirement is Section 1232g(b)(4)(B), but that provision only says that if a school district discloses confidential information to a third party who permits public access, *the school* may be penalized. It does *not* say—and nothing in FERPA says—that publishers of leaked information can be censored. That’s for good reason: because that would violate the Constitution.

In short, FERPA “imposes mandatory obligations and restrictions *on educational institutions.*” *United States v. Miami Univ.*, 91 F. Supp.2d 1132, 1145 (S.D. Ohio 2000), *aff’d*, 294 F.3d 797 (6th Cir. 2002). It does not confer any right of action on educational institutions or entitle them to censor private parties who have constitutionally protected expressive rights.

CONCLUSION

The Superior Court’s order should be vacated in its entirety and the case remanded with orders to dismiss.

Respectfully submitted: September 2, 2026

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2. On September 2, 2026, I caused to be sent an Original and three copies of Brief on Behalf of Amicus Curiae Goldwater Institute via Federal Express for delivery on September 2, 2026 to:

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4. I hereby certify that the foregoing statements are true and correct. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 2, 2026

By: Justin Meyers

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