Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS,

Plaintiff,

v.

NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, and JOHN DOES 1–5,

Defendants.

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 50 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANTS AND IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

Index No. 63921/2020

The Reporters Committee for Freedom of the Press and 50 news media organizations respectfully submit this brief as amici curiae in support of Defendants The New York Times Company, et al. (collectively, the "Times"). Amici are members of the news media and other organizations committed to defending the First Amendment and newsgathering rights of the press. Amici have a direct interest in ensuring that journalists and news organizations remain free from unconstitutional restrictions on their ability to gather and publish newsworthy information for the benefit of the public.

BACKGROUND

On November 11, 2021, the Times published a news article regarding memoranda prepared by an attorney for Project Veritas. Adam Goldman and Mark Mazzetti, *Project Veritas and the Line Between Journalism and Political Spying*, N.Y. Times (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html. The article contained excerpts of the memoranda. *Id.* The memoranda were not obtained through discovery in the defamation action currently pending before the Court, nor do

they appear to be related to or address this litigation in any way—indeed, as the reporting itself makes clear, the memoranda predate the instant matter by years. *See id.*

On November 17, Project Veritas responded to the Times' reporting by filing a motion in the instant case for an Order to Show Cause pursuant to CPLR §3103, asserting that the memoranda excerpted in the Times' article were subject to the attorney-client privilege. The motion requested that the Court order the Times to show cause why, *inter alia*, it should not be ordered to "remove all references to or descriptions of [Project Veritas'] privileged attorney-client information published on The New York Times' website on November 11, 2021, and to return and/or immediately delete all copies of Project Veritas' attorney-client privileged materials that are in The New York Times' possession." Doc. No. 164; *see also* Plaintiff's Memorandum of Law in Support of Plaintiff's Motion Pursuant to CPLR § 3103 for an Order to Show Cause ("Pl's Br.") 11, Doc. No. 168. On November 18, the Times requested six days in which to respond to Project Veritas's motion. Doc. No. 169.

On November 19, the Court granted Project Veritas's motion and entered an Order to Show Cause. Doc. No. 170 (the "Order"). The Order requires the Times to show cause as to why:

1. an order should not be entered directing Defendant The New York Times to remove all references to or descriptions of Plaintiff Project Veritas's privileged attorney- client information published on The New York Times' website on November 11, 2021, and to return and/or immediately delete all copies of Project Veritas' attorney-client privileged materials that are in The New York Times' possession;

2. an interim order should not be entered directing The New York Times to sequester and refrain from further publishing any of Plaintiff Project Veritas' attorney-client privileged materials, and to cease further efforts to solicit and acquire Project Veritas' attorney-client privileged materials; and,

3. Plaintiff should not have other and further relief as may be just, proper, and equitable.

Id. In addition, the Order requires the Times to "immediately sequester, protect, and refrain from further disseminating or publishing any of Plaintiff Project Veritas' privileged materials in the possession of The New York Times, or its counsel, and that The New York Times and its counsel shall cease further efforts to solicit or acquire Plaintiff Project Veritas' attorney-client privileged materials" pending the Court's resolution of the Order. *Id*.

On November 19, the Times appealed under CPLR 5704 to the Appellate Division, Second Department, requesting relief from the interim portion of the Order. The Appellate Division denied the Times' request. Order, App. Div. Dkt. No. 2021-08368 (Nov. 19, 2021).

The Court has scheduled a hearing on the Order for November 23.

ARGUMENT

The restrictions on publication and newsgathering contemplated by the Order—as well as the interim restrictions currently imposed by it—violate the First Amendment's prohibition on prior restraints. The restrictions described in the Order would censor the Times' reporting on information that plays no part in the instant litigation; it was not obtained through, or in connection with—or to secure an advantage in—any litigation. This result, in addition to being foreclosed by the First Amendment, would have grave ramifications for journalists' ability to gather and report newsworthy information in the public interest. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (explaining that even when a court enters a protective order governing information obtained through discovery, a "party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes"); *Bridge CAT Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 946 (2d Cir. 1983) (while a court has the power to oversee the discovery process, First Amendment concerns prohibit the use of this power to restrict the use of information that "has been gathered independently of judicial processes"). For these reasons, amici urge the Court to

reject the restraints contemplated by the Order and dissolve the restraints the Order has already imposed, which have caused cognizable harm to First Amendment interests. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

As the Supreme Court has recognized, "it 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). As a result, there is a "heavy presumption against [the] constitutional validity" of a prior restraint, with the burden on the party seeking the prior restraint to overcome that presumption. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). This presumption 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)); *see also CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1984) ("*CBS, Inc.*") (stating that "prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances").

Accordingly, beginning in 1931, the Court has without fail rejected prior restraints on the press. *Near*, 283 U.S. at 713. For instance, the Court has struck down prior restraints in cases where the claimed justifications included the Sixth Amendment rights of criminal defendants, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) ("*Stuart*"), and the protection of confidential or proprietary business information, *Davis*, 510 U.S. at 1318. Perhaps most notably, the Court rejected a prior restraint preventing publication of the Pentagon Papers, in spite of the government's claims that an injunction preventing publication was necessary to protect military secrets. *See N.Y. Times*, 403 U.S. at 713; *see also id.* at 726-27 (Brennan, J., concurring) ("[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.")

Here, the Order's contemplated provisions go beyond even a paradigmatic prior restraint. The Order would not only prohibit the Times from further publishing information in its possession and curtail its efforts to gather and report newsworthy information about Project Veritas, but also it would override the Times' editorial judgment and require the newspaper to remove an article that it has already published. *See N.Y. Times*, 403 U.S. at 717 (Black, J., concurring) (stating that under the First Amendment "[t]he [g]overnment's power to censor the press was abolished so that the press would remain forever free to censure the [g]overnment"). As the Supreme Court has explained, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they are "an immediate and irreversible sanction," not only "chilling" speech but also "freezing" it, at least for a time. *Stuart*, 427 U.S. at 559. This constitutional harm is magnified when a court directs the removal of already published information. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that the First Amendment forbids government intrusion into the editorial process, which would "dampen[] the vigor and limit[] the variety of public debate").

When a plaintiff files suit against a newspaper (or any other organization that disseminates information to the public), the plaintiff does not thereby acquire the right to censor that organization's reporting by asserting an evidentiary privilege. Such a result would be wholly incompatible with foundational First Amendment law, not least because it would provide litigants—and courts—with a potent method of controlling public discourse through judicial channels. Indeed, it would grant the subjects of news reporting an incentive to file frivolous and vexatious lawsuits that seek not to vindicate an aggrieved right but instead to muzzle future

reporting by the press defendant during the pendency of the litigation. To conclude that a news organization like the Times can be prohibited by court order from gathering and reporting newsworthy information about an entity that has filed a lawsuit against it, merely because the parties are in litigation, is not only constitutionally intolerable, but would work a serious harm to the news media's ability to inform the public.

CONCLUSION

For the foregoing reasons, amici urge the Court not to impose the restraints contemplated by the Order and to dissolve the restraints that the Order has already imposed.

Dated: November 22, 2021

Respectfully submitted,

s/ Katie Townsend

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