New York County Clerk's Index No. 154060/17

New York Supreme Court

Appellate Division—First Department

IN THE MATTER OF
CENTER ON PRIVACY & TECHNOLOGY

Petitioner-Appellant,

For judgment pursuant to art. 78 of the Civil Practice Law & Rules

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent-Respondent,

NOTICE OF MOTION ON BEHALF OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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PLEASE TAKE NOTICE that upon the annexed affirmation of Professor Eugene Volokh, dated May 12, 2020, and all exhibits attached thereto including a copy of the proposed brief of amici curiae, The Reporter's Committee for Freedom of the Press, by their attorneys Kramer Levin Naftalis & Frankel LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on May 26, 2020 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to serve and file a brief as *amici curiae*. This motion is filed pursuant to CPLR § 2214 and 22 NYCRR §§ 1250.4 and 600.4 and relates to the Center on Privacy & Technology's Motion for Leave to Appeal, and should be heard by the same motions panel assigned to hear that motion.

Dated: May 12, 2020

By: 

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EUGENE VOLOKH, ESQ. (of the
bar of the State of California)
by permission of the Court

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IN THE MATTER OF
CENTER ON PRIVACY & TECHNOLOGY

Petitioner-Appellant,

For judgment pursuant to art. 78 of the Civil Practice Law & Rules

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent-Respondent,

AFFIRMATION OF EUGENE VOLOKH IN SUPPORT OF MOTION ON BEHALF OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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Professor Eugene Volokh, an attorney duly admitted to practice before the courts of the State of California, and admitted *pro hac vice* to practice before this Court in this matter, affirms the following to be true under penalty of perjury pursuant to CPLR §2106:

1. A copy of the brief is attached hereto as Exhibit A.

2. Lead amicus, the Reporters Committee for Freedom of the Press (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 seeking to reveal the identities of confidential news sources, the Reporters Committee today works to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as amicus curiae in cases that concern issues of importance to journalists and news media, including litigation involving the Freedom of Information Law, Pub. Off. L. art. 6. *See, e.g.*, Brief for *Amici Curiae* Reporters Committee for Freedom of the Press and a Coalition of Media Entities in Support of Petitioner-Appellant, *Spectrum News NY1 v. New York City Police Dep't, et al.*, 179 A.D.3d 578 (1st Dept. 2020) (Index No. 150305/16), *available at* https://perma.cc/L644-5RVY;

Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press and 20 Media Organizations in Support of Appellant, *Abdur-Rashid v. New York City Police Dep't, et al.*, 31 N.Y.3d 217 (2018) (APL-2016-00219), *available at* https://perma.cc/MS75-T38S.

3. Other *amici* are prominent news publishers,

- Advance Publications, Inc. (which publishes *GQ*, *The New Yorker*, *Vanity Fair*, *Vogue*, *Wired*, and other publications),
- The Associated Press,
- BuzzFeed,
- The Daily Beast Company LLC,
- Daily News, LP,
- Dow Jones & Company, Inc. (which publishes *The Wall Street Journal, Barron's*, and other publications),
- The E.W. Scripps Company (which operates 60 television stations and other media outlets),
- Gannett Co., Inc. (the largest local newspaper company in the United States),
- Hearst Corporation,
- New York Public Radio,

- The New York Times Company,
- Newsday LLC, and
- ProPublica (a Pulitzer Prize-winning independent, nonprofit newsroom that produces investigative journalism in the public interest).

and professional, trade, and academic groups,

- Committee to Protect Journalists,
- International Documentary Association,
- Investigative Reporting Workshop at American University,
- The Media Institute,
- MPA—The Association of Magazine Media,
- National Press Photographers Association,
- The News Leaders Association,
- Online News Association,
- Radio Television Digital News Association,
- Society of Environmental Journalists,
- Society of Professional Journalists, and
- Tully Center for Free Speech.

4. As news organizations and entities that advocate for the First Amendment rights of the public and the press, *amici* seek to ensure that court orders do not violate First Amendment rights.

5. *Amici* believe that this Court's decision sets a dangerous precedent that threatens the First Amendment rights of journalists who obtain information using the Freedom of Information Law (FOIL), Pub. Off. L. art. 6. A court order barring a media outlet from describing the source of newsworthy material would unjustifiably restrict that media organization's speech, undermine the credibility of its journalism, and limit its ability to act, on behalf of the public, as a check on government.

6. The publishers, coalitions and associations, and news media organizations that join together as *amici* are well-suited to provide a unique perspective on the prior restraint doctrine that is not fully reflected in Petitioner-Appellant's briefing. *Amici* or their members often file public records requests and have a strong interest in ensuring that their ability to publish stories about public records is not limited by orders such as those authorized by this Court's decision in this case.

7. Appellant's and Respondent's counsel have been notified of this motion, and consent to it.

8. The order as to which the Motion for Leave to Appeal is filed is attached hereto as Exhibit B.

WHEREFORE, I respectfully request that the Court grant the motion to participate in this appeal as *amici curiae.*

By: _____
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Exhibit A

New York County Clerk's Index No. 154060/17

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NEW YORK CITY POLICE DEPARTMENT,

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BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS IN SUPPORT OF THE MOTION FOR LEAVE TO APPEAL

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* Counsel would like to thank UCLA School of Law students Kendra Delaney, Alyssa Morones, and Abraham Oved for their work on the brief.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are news organizations and organizations that represent the interest of the news media and journalists. Lead *amicus* Reporters Committee for Freedom of the Press, an unincorporated nonprofit association, was founded by leading journalists and media lawyers in 1970 and provides pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the news-gathering rights of journalists.

Other *amici* are prominent news publishers,

- Advance Publications, Inc. (which publishes GQ, The New Yorker, Vanity Fair, Vogue, Wired, and other publications),
- The Associated Press,
- BuzzFeed,
- The Daily Beast Company LLC,
- Daily News, LP,

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

- Dow Jones & Company, Inc. (which publishes *The Wall Street Journal, Barron's*, and other publications),
- The E.W. Scripps Company (which operates 60 television stations and other media outlets),
- Gannett Co., Inc. (the largest local newspaper company in the United States),
- Hearst Corporation,
- New York Public Radio,
- The New York Times Company,
- Newsday LLC, and
- ProPublica (a Pulitzer Prize-winning independent, nonprofit newsroom that produces investigative journalism in the public interest).

and professional, trade, and academic groups,

- Committee to Protect Journalists,
- International Documentary Association,
- Investigative Reporting Workshop at American University,
- The Media Institute,
- MPA—The Association of Magazine Media,

- National Press Photographers Association,
- The News Leaders Association,
- Online News Association,
- Radio Television Digital News Association,
- Society of Environmental Journalists,
- Society of Professional Journalists, and
- Tully Center for Free Speech.

This Court's decision sets a dangerous precedent that threatens the First Amendment rights of journalists who obtain information using the Freedom of Information Law (FOIL), Pub. Off. L. art. 6. A court order barring a media outlet from describing the source of newsworthy material would unjustifiably restrict that media organization's speech, undermine the credibility of its journalism, and limit its ability to act, on behalf of the public, as a check on government.

SUMMARY OF ARGUMENT

The Supreme Court ordered the Center on Privacy & Technology to return certain documents disclosed to it by the New York Police Department under FOIL, because the NYPD claimed they were inadvertently

disclosed. Though the Supreme Court did not bar the Center from discussing the document's contents, it enjoined the Center from "referring to" or "referencing" the documents; and this Court affirmed that injunction. The Center on Privacy & Technology now moves this Court for leave to appeal this Court's decision to the Court of Appeals.

The Supreme Court's order—which effectively enjoins the Center from speaking about where it got certain information—violates the First Amendment. Under *Florida Star v. B.J.F.*, 491 U.S. 524, 533–37 (1989), which this Court's Decision and Order did not cite, speakers are free to discuss information that they lawfully obtained from the government, even if the government released it in error. The NYPD gave the Center certain documents in response to a FOIL request; even if the NYPD was mistaken, it cannot now try to limit the Center's speech about those documents.

Orders like that of the Supreme Court in this case do real harm to the Center and to the press. Researchers and reporters often have to cite the sources of their information to maintain their credibility. The news media must sometimes use unnamed sources—but shielding a source of information should not be turned into a court-ordered compulsion, through

which a journalist could be barred from explaining where she got her information (and thus why the information should be trusted). This case thus presents an issue that is "novel or of public importance," 22 NYCRR Part 500.22(b)(4), and thus "should be reviewed by the Court of Appeals," 22 NYCRR 1250.16(d)(3)(i).

Nor can the restriction on the Center's speech be justified by analogy to the protective orders issued in the context of discovery. Disclosures mandated by FOIL are different from information exchanged between parties in civil litigation. *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80 (1984). With discovery, a private litigant "has no presumptive right . . . to its adversary's files." *Id.* Discovery is "not a . . . traditionally public source of information." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). But under FOIL, "[f]ull disclosure by public agencies is . . . a public right and in the public interest, irrespective of the status or need of the person making the request." *Farbman*, 62 N.Y.2d at 80. The considerations unique to the context of civil discovery, which underlie *Seattle Times*, do not apply to government entities turning over information under FOIL.

Finally, FOIL requests are commonplace, and, because to err is human, mistakes in releasing information will happen. Armed with the precedent set by this Court's decision, government agencies may seek similar gag orders in future cases. The Court of Appeals should therefore have the opportunity to clarify that such orders are improper.[2]

ARGUMENT

I. The decision of this Court, affirming the Supreme Court's order, is an unconstitutional prior restraint on the Center's speech

"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.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993). Temporary restraining orders and permanent injunctions—court orders that actually forbid speech activities—are classic examples of prior restraints. *Id.*; *see also Citizens United v. Schneiderman*, 882 F.3d 374, 386 (2d Cir. 2018).

The Supreme Court's order has the effect of permanently enjoining the Center from identifying the source of the documents disclosed by the

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[2] The part of the Supreme Court's order requiring the return of the records is not at issue in this appeal, but *amici* do not believe that the court could properly require the return of the records once they were inadvertently disclosed.

NYPD. Thus, the order is a prior restraint. *See Alexander*, 509 U.S. at 544.

A. The Center lawfully obtained already-public information about a matter of public interest and is presumptively entitled to use it

If a party "'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.'" *Florida Star*, 491 U.S. at 533 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). And if the government cannot punish publication of truthful information after the fact, as *Florida Star* held, it cannot prohibit publication before the fact by imposing a prior restraint, "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

In *Florida Star*, the police department mistakenly placed in its unrestricted press room a police report that included the full name of a sexual assault victim. 491 U.S. at 527. A reporter copied the report and the newspaper published the victim's name, in violation of Florida law. *Id.* at 528. The Court held that the newspaper remained free to publish the information, even though "the Department apparently failed to fulfill its

[Florida law] obligation not to cause or allow [the victim's] name to be published." *Id.* at 536. "Once the government has placed such information in the public domain, reliance must rest upon the judgment of those who decide what to publish or broadcast." *Id.* at 538 (internal quotation marks omitted).

Likewise, in *Oklahoma Publishing Co. v. District Court*, the U.S. Supreme Court held that a court could not bar the press from publishing information about a defendant in a juvenile proceeding, even though the court was supposed to be closed under state law. 430 U.S. 308, 311–12 (1977) (per curiam). Because media members "were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel," they were entitled to reveal what they learned, even if the judge should not have let them be there in the first place. *Id.* "[O]nce the truthful information [is] 'publicly revealed' or 'in the public domain' the court [cannot] constitutionally restrain its dissemination." *Daily Mail*, 443 U.S. at 103 (citing *Oklahoma Publ'g Co.*, 430 U.S. at 311).

Here, the Center obtained the NYPD's records under FOIL. The NYPD may have disclosed some records by mistake, but the Center still lawfully obtained them, and the information disclosed was still accurate, truthful,

and a matter of public concern. *See* Appellant Br. at 3–4; Respondent Reply Br. at 5–6. The information that the Center learned from the erroneous disclosure—including the source of the information—is thus still public information that the Center is entitled to use.

B. The order is not narrowly tailored to a compelling government interest

As a prior restraint, the Supreme Court's order bears a "heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Moreover, the order is content-based: It restricts the Center from disseminating a specific fact ("referring to the source of unredacted documents inadvertently disclosed by respondent," 2020 N.Y. Slip Op. 01724). *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *see also, e.g.*, *In re Nat'l Security Letter*, 863 F.3d 1110, 1123 (9th Cir. 2017) (holding that a ban on publication of a particular fact, there that the FBI had sought particular information through a National Security Letter, was content-based). The order must thus be set aside unless it is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *see also Florida Star*, 491 U.S. at 533.

There is no compelling government interest in concealing the source of the information in this case. But even if there were such an interest, the Supreme Court's order would not be narrowly tailored to it. Here, as in *Florida Star*, the NYPD failed to use a more limited means to guard against the release of the information. "Where . . . the government has failed to police itself in disseminating information," shifting the blame to the press (or in this case the Center) for publishing that information "can hardly be said to be a narrowly tailored means." *Florida Star*, 491 U.S. at 538. In such a case, it is "most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of [restricting] truthful speech." *Id.*

As the Second Circuit made clear in the context of an erroneously released court opinion, once information has been released, it cannot properly be withdrawn. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004). "The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back." *Id.* The same is so here.

II. This case is not governed by *Seattle Times*

In affirming the Supreme Court's order, this Court relied on *Seattle Times*, characterizing its holding as allowing a narrowly tailored restriction on "a litigant's use of information obtained through litigation as long as the restriction 'furthers an important or substantial governmental interest unrelated to the suppression of expression,'" 2020 N.Y. Slip Op. 01724. Yet *Seattle Times* is not applicable here; rather, *Florida Star*, which is described above (at 7-8) but was not discussed in this Court's Decision and Order, is the governing precedent.

The Court of Appeals has explicitly held that FOIL requests are "quite different" from discovery. *Farbman*, 62 N.Y.2d at 80. With discovery, a litigant "has no presumptive right . . . to its adversary's files." *Id.* But under FOIL, "[f]ull disclosure by public agencies is . . . a public right and in the public interest, irrespective of the status or need of the person making the request." *Id.*

Unlike discovery, FOIL is rooted in the policy that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *In re Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). FOIL thus makes "[a]ll government records . . . presumptively

open for public inspection and copying." *In re Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 (1996). FOIL imposes a broad duty on government agencies to make their records available to the public to promote open government and public accountability. *See* Pub. Off. L. § 84; *In re Abdur-Rashid v. New York City Police Dep't*, 31 N.Y.3d 217, 224 (2018).

In contrast, the holding of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), is limited to documents exchanged between civil litigants in discovery. The Court's decision in *Seattle Times* is based on the notion that discovery was "not a . . . traditionally public source of information," 467 U.S. at 33; the Court in that case upheld a trial court order that restrained a party from publishing information revealed to it in discovery, because the "petitioners gained the information they wished to disseminate only by virtue of the trial court's discovery processes." *Id.* at 31–32. The Court was concerned that the potential exposure of private information, after the government compelled a private party to provide it in discovery, could deter parties from bringing cases to court. *Id.* at 27. And because discovery is a means of obtaining private—not public—information, "an order prohibiting dissemination of discovered information"

merely exchanged between private parties in litigation "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 33.

None of this applies to the government records released to a member of the public not through discovery, but as a result of a court order requiring the NYPD to comply with its FOIL obligations stemming from its status as a government entity. Because the documents here were not private information merely exchanged by private litigants in civil discovery, *Seattle Times* is inapplicable.

III. This Court's decision sets an unsound precedent that should be reviewed by the Court of Appeals

A. The decision could lead to repeated First Amendment violations

The facts of this case may recur in future cases. FOIL requests are made regularly: In 2018, the NYPD received over 1,100 requests for body camera footage alone.[3] Searching for "NYPD" on OpenRecords shows

[3] Alison Fox, *NYPD Will Stop Citing Legal Loophole to Deny Freedom of Information Law Requests*, AMNY, (Apr. 1, 2019), https://www.amny.com/news/nypd-foil-domestic-abuse-1-29257412/.

more than 2,300 requests have been made since June 2016.[4] And mistakes are sure to happen, as in all human processes.[5] The Supreme Court's decision, and this Court's decision upholding it, would encourage government agencies to react to such mistakes by seeking similar prior restraints.

This is therefore an issue that is "novel or of public importance," 22 NYCRR Part 500.22(b)(4), and thus "should be reviewed by the Court of Appeals," 22 NYCRR 1250.16(d)(3)(i). "[I]t would be intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [a law] could only further harm the operation of a free press." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 484–85 (1975) (citation omitted).

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[4] OpenRecords, https://a860-openrecords.nyc.gov/request/view_all (search "NYPD") (last visited Apr. 18, 2020).

[5] *See, e.g.*, Sarah Matthews, *Press Freedoms in the United States 2019* at 35 (April 2020), available at https://www.rcfp.org/wp-content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf (reporting that in February 2019 the Cook County Circuit Court vacated a prior restraint prohibiting the publication of public records inadvertently disclosed to the Better Government Association, an investigative watchdog group).

B. The decision will seriously harm both the Center's credibility and effectiveness, and that of academics, journalists, and policymakers

This decision also harms the Center and others like it practically, and not just as a matter of free speech principle. To remain trustworthy, speakers must be able to cite the sources of information on which they rely. The ability to cite sources is especially important to journalists, given the public's growing skepticism of media reporting.[6] A Gallup/Knight Foundation study found that 69% of Americans "say their trust in the news media has declined in the past decade."[7] Of those who have lost trust, 69% say it can be restored.[8]

An organization's "fact-checking resources," "links to research," and "facts to back up its reporting" are key to credibility with the public.[9] "Transparency" is "a way of increasing trust."[10] And while anonymous

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[6] *See* Media Insight Project, *A New Understanding: What Makes People Trust the News,* American Press Institute 27 (Apr. 17, 2016), https://www.americanpressinstitute.org/publications/reports/survey-research/trust-news/single-page.

[7] Knight Foundation, *Indicators of News Media Trust* (2018), https://knightfoundation.org/reports/indicators-of-news-media-trust/ (last visited Apr. 20, 2020).

[8] *Id.*

[9] *Id.*

[10] Media Insight Project, *What Americans Know, and Don't, About How Journalism Works*, American Press Institute (June 11, 2018), https://www.americanpressinstitute.org/publications/reports/survey-research/what-americans-know-about-journalism/ (last visited Apr. 29, 2020).

sources do sometimes play a legitimate role in press reporting,[11] forcing the press to cite to anonymous sources unnecessarily undermines its credibility.[12] That is especially so because prohibiting the press and other researchers from citing sources also prevents third parties from fact-checking that information—thus stripping away another tool for promoting public trust.[13]

Prohibiting the Center from referring to the NYPD as the source of its information, then, will undermine the Center's credibility and its ability to effectively convey its findings. And once such a precedent is set, similar orders may be entered in future cases, damaging the credibility of other think tanks, academic centers, and media organizations.

CONCLUSION

The protective order imposed on the Center—which effectively forbids it from citing to the NYPD as the source of the information obtained from

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[11] *See, e.g.*, Phillip B. Corbett, *How the Times Uses Anonymous Sources*, N.Y. Times (June 14, 2018), https://www.nytimes.com/2018/06/14/reader-center/how-the-times-uses-anonymous-sources.html.

[12] Liz Spayd [N.Y. Times Public Editor], *The Risk of Unnamed Sources? Unconvinced Readers*, N.Y. Times (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/public-editor/the-risk-of-unnamed-sources-unconvinced-readers.html.

[13] Darrell M. West, *How to Combat Fake News and Disinformation*, Brookings (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/.

the records inadvertently disclosed under FOIL—is an unconstitutional prior restraint. *Florida Star* and *Oklahoma Publishing Co.* make clear that such restraints must survive strict scrutiny, which this order cannot. And *Seattle Times* cannot justify a lower standard of scrutiny; unlike discovery proceedings, FOIL requests impose an obligation on the government to produce presumptively public records.

The order also gravely affects the Center's ability to convey its message. For the Center to maintain credibility and public trust, it must be allowed to cite the source of its information. And the same is true for the many other organizations, including media organizations, that may be targeted for similar restrictions in the future. *Amici* therefore urge this Court to grant the Center leave to appeal.

Dated: May 12, 2020

Respectfully Submitted,

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PRINTING SPECIFICATION STATEMENT

Pursuant to 22 NYCRR § 1250.8(f) and (j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules and regulations, etc. is 3203 words.

Exhibit B

Friedman, J.P., Kapnick, Oing, González, JJ.

11278N In re Center on Privacy & Technology, Index 154060/17
Petitioner-Appellant,

-against-

New York City Police Department,
Respondent-Respondent.

_____

Vladeck, Raskin & Clark, P.C., New York (Rachel L. Fried of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 11, 2019, which, inter alia, precluded petitioner from referring to certain unredacted documents inadvertently disclosed by respondent New York City Police Department in response to petitioner's request for documents pursuant to the Freedom of Information Law (FOIL), unanimously affirmed, without costs.

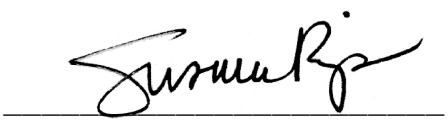
The court did not impose an unconstitutional prior restraint by precluding petitioner from referring to the source of unredacted documents inadvertently disclosed by respondent in the course of this FOIL proceeding, which were a small portion of the thousands of pages of records respondent has disclosed in response to petitioner's FOIL request (*see e.g. Laura Inger M. v*

Hillside Children's Ctr., 17 AD3d 293, 295-296 [1st Dept 2005]). "[A]n order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny" (*Seattle Times Co. v Rhinehart*, 467 US 20, 33 [1980]). Instead, a court may restrict a litigant's use of information obtained through litigation as long as the restriction "furthers an important or substantial governmental interest unrelated to the suppression of expression," and "the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved" (*id.* at 32 [internal quotation marks and brackets omitted]). Respondent had a substantial government interest in preventing the inadvertent disclosure of records. Furthermore, the protective order was narrowly tailored in expressly allowing petitioner to disseminate any information it had gleaned from the materials at issue, and requiring respondent to provide petitioner with replacement

records bearing redactions that are not challenged on the merits on the instant appeal.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 12, 2020



CLERK