SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

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PROJECT VERITAS,

Plaintiff-Respondent,

vs.

THE NEW YORK TIMES COMPANY,

Defendant-Appellant,

and

MAGGIE ASTOR, TIFFANY HSU, and JOHN DOES 1-5,

Defendants.

----------X

Appellate Division Docket No. 2021-09551

Westchester County Index No. 63921/2020

NOTICE OF MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICI CURIAE

PLEASE TAKE NOTICE that, upon the annexed affirmation of Brian Hauss, dated January 10, 2022, and the exhibits annexed thereto, a motion will be made at a term of this Court to be held at 45 Monroe Place, Brooklyn, New York, 11201 on January 24, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order granting the American Civil Liberties Union, the New York Civil Liberties Union, and the National Coalition Against Censorship leave to file the proposed Brief of Amici Curiae in Support of Defendant-Appellant The New York Times Company, attached hereto as Exhibit A. Pursuant to 22 NYCRR §§ 670.4 and 1250.4, this motion will be submitted on the papers and personal appearance in opposition to the motion is neither required nor permitted.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214 [b], answering papers, if any, shall be served upon the undersigned counsel at least two (2) days prior to the return date of this motion.

Dated: New York, New York
January 10, 2022

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Appellate Division Docket No. 2021-09551

Westchester County Index No. 63921/2020

AFFIRMATION OF BRIAN HAUSS IN SUPPORT OF MOTION FOR LEAVE TO FILE PROPOSED BRIEF OF AMICI CURIAE

BRIAN HAUSS, an attorney duly admitted to practice before this Court, affirms under penalty of perjury pursuant to CPLR 2106, as follows:

1. I am a member of the bar of the State of New York. I am a Senior Staff Attorney at the American Civil Liberties Union Foundation ("ACLU"). I am not a party to this action and am in good standing in the Courts of the State of New York.

2. Pursuant to this Court's Rule of Practice 1250.4 [f], the ACLU, the New York Civil Liberties Union, and the National Coalition Against Censorship (together "*Amici*") request permission to appear as amicus curiae in the above-captioned case. *Amici* do not request permission to participate in oral argument.

3. On January 6 and 7, 2022, I communicated with counsel for Plaintiff-Respondent and for Defendant-Appellant to request their consent for *Amici* to seek leave to participate as amicus curiae in this case. Both Plaintiff-Respondent and Defendant-Appellant consented.

Background and Procedural History

4. This case raises the question of whether the lower court's order of a prior restraint against the Defendant-Appellant The New York Times Company (the "Times") violates the First Amendment to the United States Constitution and Article I, § 8 of the New York State Constitution.

5. The Times lawfully obtained attorney–client privileged legal memoranda belonging to Project Veritas. The Times published those memoranda on their website on November 11, 2021.

6. On December 23, 2021, the lower court granted a motion by Project Veritas' seeking a prior restraint against the Times. Among other directives, the lower court ordered the Times to (1) immediately turn over to Project Veritas' counsel all physical copies of the subject legal memoranda; (2) destroy all of copies of the memoranda in their possession; (3) use best efforts to retrieve copies of the memoranda provided to third parties; and (4) refrain from publishing the subject legal memoranda to any persons. The Times now moves this Court for a stay of the lower court's order.

7. Prior restraints are presumptively invalid under both the First Amendment to the United States Constitution and Article I, § 8 of the New York State Constitution. Both constitutional provisions guarantee the freedom of the press and the right of the public to receive information and ideas without regard to their social worth. Prior restraints violate both of these guarantees. Plaintiff-Respondent has not and cannot meet the heavy burden required to justify an order prohibiting the Times from publishing the subject legal memoranda.

8. The lower court erred by issuing the prior restraint based on its own views on whether the memoranda constituted matters of public concern worthy of publication and public debate. Neither the federal nor the state constitution permits courts to interpose their editorial judgments between the freedom of the press and the right of the public to receive information.

9. A public concern litmus test is not only inappropriate in this context, the lower court misapplied it in any event, ruling that attorney–client communications are categorically matters of private concern without regard to the content of the communications. Contrary to the lower court's conclusion, the public may have a strong interest in reporting about documents and communications that are subject to attorney–client privilege.

Statement of Interest of Proposed Amici

10. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before courts throughout the country in cases involving the exercise of First Amendment rights, both as direct counsel and as *amicus curiae*. (*See, e.g.*, *Hague v. Congress of Industrial Organizations*, 307 US 496 [1939]; *Bartnicki v. Vopper*, 532 US 514 [2001]; *Snyder v. Phelps*, 562 US 443 [2011]; *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S Ct 2038 [2021].) The New York Civil Liberties Union (NYCLU) is the statewide affiliate of the ACLU and has approximately 82,000 members across New York State. Both the ACLU and the NYCLU have long supported the press's right to publish, and the public's right to receive information and ideas, free from government interference. The proper resolution of this case is therefore a matter of substantial interest to the ACLU, the NYCLU, and their members.

11. The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. The organization's purpose is to promote freedom of thought, inquiry and expression and oppose censorship in all its forms. It therefore

has a longstanding interest in assuring the continuance of robust First Amendment protections.

Request to File Proposed Brief

12. Pursuant to this Court's Rule of Practice 1250.4, *Amici* respectfully request to file the proposed Brief of Amici Curiae, a true and correct copy of which is included with this submission as **Exhibit A**.

13. As required by this Court's Rule of Practice 1250.4, a true and correct copy of the Notice of Appeal with proof of filing is included with this submission as **Exhibit B**.

14. As required by this Court's Rule of Practice 1250.4, a true and correct copy of the Decision and Order appealed from with proof of filing is included with this submission as **Exhibit C**.

WHEREFORE, the proposed *Amici* respectfully requests that they be permitted to file their proposed brief.

Dated: New York, New York
January 10, 2022

Brian Hauss

EXHIBIT A

Appellate Case No. 2021-09551

New York Supreme Court

Appellate Division – Second Department

PROJECT VERITAS,

Plaintiff-Respondent,

- against -

NEW YORK TIMES CO., et al.,

Defendant-Appellant,

and

MAGGIE ASTOR, TIFFANY HSU, and JOHN DOES 1–5,

Defendants.

PROPOSED BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION & NATIONAL COALITION AGAINST CENSORSHIP IN SUPPORT OF DEFENDANT-APPELLANT THE NEW YORK TIMES COMPANY

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Counsel for Proposed Amici Curiae

Dated: January 10, 2022
New York, NY

Westchester County Clerk's Index No. 63921/2020

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INTRODUCTION

This appeal arises from a decision of the Supreme Court, Westchester County ordering the New York Times to cease reporting on information contained in certain legal memoranda providing legal advice to Project Veritas, and further ordering the Times to relinquish possession of those documents. *Amici* curiae submit this brief to advise the Court about the public's right to access information free from judicial censorship.

In the Pentagon Papers case, the U.S. Supreme Court rejected the federal government's request for a prior restraint against reporting on a classified study about the then-ongoing Vietnam War, holding that the government's asserted national security interests failed to meet the "heavy burden of showing justification for the imposition of such a restraint." (*N.Y. Times Co. v United States*, 403 US 713, 714 [1971 per curiam].) Here, the lower court held that Project Veritas' privacy interests justify the imposition of a prior restraint. The difference between these rulings appears to hinge on the lower court's conclusion that the legal memoranda at issue here, or any documents covered by the attorney–client privilege, are not legitimate subjects of public concern.

As an initial matter, the lower court erred in allowing its own views about what constitutes a matter of public concern to dictate the Times' reporting. The Court of Appeals has long recognized that determining what constitutes a legitimate matter

of public concern is primarily a job for editors. Judicial interference with the editorial judgment of newspapers abridges not only freedom of the press, but the right of the public to receive information and ideas. Although courts must occasionally review the press's exercise of editorial judgment, that review is exceedingly deferential. It does not properly extend to the imposition of prior restraints on the press, which are particularly disfavored because they give courts unilateral authority to freeze public debate before appellate review has been exhausted. This grave judicial power should not be predicated on the public concern test's open-ended legal standard, which gives too much room to individual judges' subjective beliefs and biases. Both the New York State Constitution and the United States Constitution provide that the press and the public are the proper arbiters of whether and to what extent information is worthy of their concern, not the courts.

The lower court's misapplication of the public concern test demonstrates the danger of allowing courts to enjoin reporting on the basis of their own determinations about newsworthiness. Contrary to the court's conclusion that attorney–client communications are categorically matters of private concern, the public may have an interest in reporting about documents and communications that are subject to attorney–client privilege. For example, the public undoubtedly had a strong interest in the Panama Papers leak, which involved the disclosure to the press of millions of attorney–client documents describing shady business dealings by

prominent public figures and officials. The First Amendment fully protects the right to report on such documents, so long as they were lawfully obtained by the press outside the discovery process. Any other conclusion would radically undermine the New York and United States Constitutions' guarantees of press freedom and the public's right to receive information.

Accordingly, this Court should vacate the lower court's Decision and Order imposing a prior restraint against the Times' reporting.

INTERESTS OF PROPOSED AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before courts throughout the country in cases involving the exercise of First Amendment rights, both as direct counsel and as *amicus curiae*. (*See, e.g.*, *Hague v Comm. for Indus. Org.*, 307 US 496 [1939]; *Bartnicki v Vopper*, 532 US 514 [2001]; *Snyder v Phelps*, 562 US 443 [2011]; *Mahanoy Area Sch. Dist. v B. L.*, 549 US ___, 141 S Ct 2038 [2021].) The New York Civil Liberties Union (NYCLU) is the statewide affiliate of the ACLU and has approximately 82,000 members across New York State. Both the ACLU and the NYCLU have long supported the press's right to publish, and the public's right to receive information and ideas, free from government interference. The proper

resolution of this case is therefore a matter of substantial interest to the ACLU, the NYCLU, and their members.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups. The organization's purpose is to promote freedom of thought, inquiry and expression and oppose censorship in all its forms. It therefore has a longstanding interest in assuring the continuance of robust First Amendment protections. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

ARGUMENT

I. A Prior Restraint on the Press Is a Presumptively Unconstitutional Restriction on Public Debate.

It is a "fundamental principle of our constitutional system" that democracy depends on "uninhibited, robust, and wide-open" public debate. (*N.Y. Times Co. v Sullivan*, 376 US 254, 269–70 [1964].) "The First Amendment respects the right of citizens to enjoy the free flow of information and ideas, a right which necessarily encompasses the correlative rights to receive and to communicate." (*Westchester Rockland Newspapers, Inc. v Leggett*, 48 NY2d 430, 452 [1979, Fuchsberg, J., concurring].) "[T]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." (*Mills v Alabama*, 384 US 214, 219 [1966].) The press has not shrunk from its vocation. Newspapers and other

members of the press have long "shed . . . more light on the public and business affairs of the nation than any other instrumentality of publicity." (*Grosjean v Am. Press Co.*, 297 US 233, 250 [1936].) The continued independence of the press is necessary to ensure that "informed public opinion" remains an "effective restraint[] upon misgovernment." (*Id.*)

Recognizing that a free press is indispensable to our system of self-government, the Supreme Court has consistently rebuffed attempts to infringe the press's editorial autonomy. These intrusions have taken many forms over the years: restrictions on the publication of sensitive information (*Bartnicki v Vopper*, 532 US 514 [2001]; *N.Y. Times Co. v United States*, 413 US 713 [1971]); financial restraints on certain publications (*Minneapolis Star & Trib. Co. v Minn. Comm'r of Revenue*, 460 US 575 [1983]; *Grosjean*, 297 US at 249–50); and compelled publication of third-party speech (*Miami Herald Publ'g Co. v Tornillo*, 418 US 241 [1974]). Despite their variety, these cases all reached the same conclusion—the government's restrictions were deemed incompatible with the "preserv[ation of] an untrammeled press as a vital source of public information." (*Grosjean*, 397 US at 250.)

Never are these concerns more powerful than when the press is subjected to a prior restraint. "A 'prior restraint' on speech is 'a law, regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech's content and in advance of its

actual expression.'" (*Ash v Bd. of Mgrs. of the 155 Condo.*, 44 AD3d 324, 324 [1st Dep't 2007] (quoting *United States v Quattrone*, 402 F3d 304, 309 [2d Cir 2005]); *see also, e.g.*, *Alexander v United States*, 509 US 544, 550 [1993] ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints.").)

Whereas "[a] criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring impact of the judgment until all avenues of appellate review have been exhausted," a prior restraint "has an immediate and irreversible sanction" that effectively prevents publication while the order remains in effect. (*Neb. Press Ass'n v Stuart*, 427 US 539, 559 [1976] (*Neb. Press Ass'n II*).) "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time," which is especially dangerous "when the prior restraint falls upon the communication of news and commentary on current events." (*Id.*)

A prior restraint violates "the right of citizens to enjoy the free flow of information and ideas." (*Westchester Rockland Newspapers, Inc.*, 48 NY2d at 452 [Fuchsberg, J., concurring].) Without timely access to information, "the constant stream of [public] thought and discourse may be slowed to an intermittent trickle." (*Id.*) Such an extraordinary intrusion on the public's access to information comes bearing "a 'heavy presumption' against its constitutional validity." (*Org. for a Better*

Austin v Keefe, 402 US 415, 419 [1971].) "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." (*Se. Promotions Ltd. v Conrad*, 520 US 546, 558–59 [1975].)

The Supreme Court has upheld prior restraints only in "exceptional cases." (*Near v Minnesota*, 283 US 697, 716 [1931].) "Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, [the Court has] imposed this 'most extraordinary remed[y]' 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 US 1315, 1317 [1994 Blackmun, J., in chambers] (alteration in original) (internal citations omitted).)

In *New York Times Co. v United States* (403 US 713 [1971]), the Supreme Court held that the government's attempt to suppress the publication of the Pentagon Papers during the Vietnam War failed to satisfy this exceedingly demanding standard, notwithstanding the assertion by the United States that publication would cause grave and irreparable damage to the nation's security. The Court reached this conclusion "despite the fact that a majority of the Court believed that release of the documents, which were classified 'Top Secret-Sensitive' and which were obtained surreptitiously, would be harmful to the Nation and might even be prosecuted after

publication as a violation of various espionage statutes." (*Neb. Press Ass'n II*, 427 US at 591–92 [Brennan, J., concurring].)

The protections afforded under New York's Constitution are even more robust. "New York has a long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press." (*Matter of Holmes v Winter*, 22 NY3d 300, 307 [1st Dep't 2013].) This tradition originated with the trial of John Peter Zenger, who was prosecuted after he refused to disclose the source for an article criticizing New York's colonial governor. (*Id.*) Zenger's acquittal "acknowledg[ed] the critical role that the press would play in our democratic society, [and] New York became a hospitable environment for journalists and other purveyors of the written word, leading the burgeoning publishing industry to establish a home in our state during the early years of our nation's history." (*Id.*)

Article I, § 8 of the New York Constitution provides that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press." This text reflects a conscious decision on the part of the drafters "not to model our provision after the First Amendment, instead deciding to adopt more expansive language[.]" (*Matter of Holmes*, 22 NY3d. at 307.) It affords broader free speech and free press protection than the First Amendment to the U.S. Constitution, "in keeping with the consistent tradition in this State of providing the broadest possible protection to 'the

sensitive role of gathering and disseminating news of public events." (*Id.* at 308 (internal quotation marks omitted); *see also Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 250 [1991].)

New York courts require "a showing on the record that [ ] expression will immediately and irreparably create *public* injury" before a prior restraint may issue. (*People ex rel. Arcara v Cloud Books*, 68 NY2d 553, 558 [1986] (emphasis added).) Injuries that are "limited to [the] plaintiff alone" do "not create the type of imminent and irreversible injury to the public that would warrant the extraordinary remedy of prior restraint." (*Porco v Lifetime Ent. Servs., LLC*, 116 AD3d 1264, 1266 [3d Dep't 2014].)

II. The Lower Court's Prior Restraint Rests on an Incorrect Application of the Public Concern Test.

A. The Public Concern Test Is Not Part of the Prior Restraint Analysis.

The lower court did not conclude that the Times' reporting on Project Veritas' legal memos would cause immediate and irreparable public injury. (*See Arcara*, 68 NY2d at 558.) Instead, it held that a prior restraint is justified here because "[i]t is clear that the memoranda themselves are not a matter of public concern." (Decision & Order at 24.) In so holding, the court apparently concluded that the strong constitutional presumption against prior restraints applies only if the restraint is addressed to speech on a matter of public concern. This groundless attempt to graft

a threshold public concern test onto the prior restraint analysis violates the principle of editorial autonomy, which forbids the government from imposing its own views about the public's legitimate news interests on the press.

As the Court of Appeals recognized in *Gaeta v New York News, Inc.* (62 NY2d 340 [1984]), "[d]etermining what editorial content is of legitimate public interest and concern is a function for editors." (*Id.* at 349.) "The press, acting responsibly, *and not the courts* must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable." (*Id.* (emphasis added); *see also Miami Herald*, 418 US at 258 ("The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").) Here, the lower court did not just second-guess the Times' judgment about what constitutes a matter of public concern; it usurped the Times' authority to make that determination in the first instance.

The lower court's infringement of the Times' editorial autonomy ultimately injures the public. The freedom of speech and of the press protects the right of the public "to receive information and ideas, regardless of their social worth." (*Stanley v Georgia*, 394 US 557, 564 [1969] (citing *Winters v New York*, 333 US 507, 510

[1948]).) By interposing its subjective judgment between the right of a free press to publish and the right of the public receive information, the lower court's prior restraint obstructs activity that is "fundamental to our free society." (*Id.*) It impermissibly interferes in the marketplace of ideas by denying members of the public their "well[-]settled . . . right to receive information and ideas," (*Figari v N.Y. Tel. Co.*, 32 AD2d 434, 441 [2d Dep't 1969]) and form their own opinions.

The lower court's imposition of a threshold public concern test was also doctrinally baseless. Speech "lack[ing] 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value) . . . is still sheltered from government regulation" in most contexts. (*United States v Stevens*, 559 US 460, 479 [2010]; *see also Cohen v California*, 403 US 15, 25 [1971] ("[W]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." (omissions in original) (quoting *Winters*, 333 US at 528 [Frankfurter, J., dissenting])).) "Under our Constitution," judgments about the value of the speech are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." (*Brown v Ent. Merchs. Ass'n*, 564 US 786, 790 [2011] (quoting *United States v Playboy Ent. Grp., Inc.*, 529 US 803, 818 [2000]).) The courts have no more authority to restrict the public's right to make those judgments than legislatures do.

Accordingly, the strong presumption against prior restraints is not limited to restraints on speech about matters of public concern. In *Organization for a Better Austin*, which concerned a prior restraint against the distribution of leaflets criticizing a real estate broker's allegedly discriminatory practices, the Supreme Court held that "[a]ny prior restraint on expression" is presumptively unconstitutional. (402 US at 419.) Although the state appellate court had concluded that the restraint was justified because the defendants' true "purpose in distributing their literature was not to inform the public, but to 'force' [the broker] to sign a no-solicitation agreement," the Supreme Court held that this distinction could not justify a prior restraint. (*Id*.) It also rejected the broker's argument that an alleged "invasion of privacy" is "sufficient to support an injunction against peaceful distribution of informational literature" to the public. (*Id.* at 419–20.) The Court's analysis did not turn on any judicial appraisal of the public's interest in the defendants' speech.

The Supreme Court has applied the public concern test in only two lines of First Amendment caselaw, neither of which governs here. First, the Court has held in a number of cases that the First Amendment provides special protection against liability, under a facially valid law, for speech on matters of public concern. (*See Snyder v Phelps*, 562 US 443, 451–52 [2011]; *Bartnicki*, 532 US at 533; *Dun & Bradstreet v Greenmoss Builders*, 472 US 749, 756–761 [1985].) Second, the Court has held that the First Amendment provides some protection for government

employees to speak about matters of public concern. (*See Lane v Franks*, 573 US 228, 237 [2014] (citing *Garcetti v Ceballos*, 547 US 410, 418 [2006]); *Connick v Myers*, 461 US 138, 143–49 [1983].) The Court has never held that First Amendment presumptions against the validity of certain speech restrictions—such as content-based statutes and prior restraints on persons who are not government employees—apply only to restrictions on speech about matters of public concern. (*See Stevens*, 559 US at 479–80.)

The judiciary's experience with the public concern test warns against its use as a yardstick for determining whether to impose prior restraints on the press. As the Supreme Court itself has acknowledged, "the boundaries of the public concern test are not well defined." (*Snyder*, 562 US at 452 (quoting *San Diego v Roe*, 543 US 77, 83 [2004 per curiam]).) Indeed, "courts have been anything but consistent in their determination of what speech" qualifies as speech on a matter of public concern. (Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind LJ 43, 75 [1988]; *see id.* at 50–74 (collecting cases); *accord* Eugene Volokh, *Free Speech & Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan L Rev 1049, 1097–98 [2000].)

"Although broad categories can be identified, there exist contradictions within every category." (Allred, 64 Ind LJ at 75.) This doctrinal confusion is a result of the

"almost unbridled discretion" courts enjoy "in determining what speech is on a matter of public concern." (*Id.* (citing Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S Cal L Rev 1, 25 [1987]). *See also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo Wash L Rev 1, 44–46 [1990]; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation &* Hustler Magazine v. Falwell, 103 Harv L Rev 601, 670–79 [1990].)

This poorly defined, erratically applied test is particularly ill-suited to prior restraints on the press, which (by definition) vest trial courts with the grave power to suppress information before "all avenues of appellate review have been exhausted." (*Neb. Press Ass'n II*, 427 US at 559.) An appellate decision overturning a prior restraint cannot fully cure the damage to First Amendment interests inflicted during the pendency of the appeal. "Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." (*Neb. Press Ass'n v Stuart*, 423 US 1327, 1329 [1975 Blackmun, J., in chambers] [*Neb. Press Ass'n I*].)

This case demonstrates the danger of incorporating the public concern test into the prior restraint analysis. The lower court has already suppressed the Times' reporting for more than seven weeks on the basis of its conclusion that Project Veritas' legal memoranda are not matters of public concern. If the court erred, its error irreparably interfered with the public's right to receive information and to engage in debate. And, given the murkiness of public concern caselaw, there are likely to be many such errors any time courts are asked to evaluate what constitutes a matter of public concern.

B. The Lower Court Misapplied the Public Concern Test.

The lower court's application of the public concern test was also fundamentally flawed. The court did not dispute that "aspects of Project Veritas and/or its journalistic methods" are subjects of "public interest," but it concluded that "[a] client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public," and that "[i]t is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel." (Decision & Order at 24.)

To be sure, attorney–client communications are highly sensitive. Out of respect for that sensitivity, attorneys are ethically obligated to keep such communications confidential, and the communications themselves are privileged

against disclosure in the legal system.[1] However, neither an attorney's duty of confidentiality nor the attorney–client privilege obligates third parties, such as newspapers, to maintain the confidentiality of attorney–client communications that they have lawfully acquired outside of the discovery process. (*Cf. Seattle Times Co. v Rhinehart*, 467 US 20, 34 [1984] ("[A] protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the 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.").)

Even if the Times' source for the memoranda breached a legal duty in conveying the documents, that fact would not impose on the Times a duty to keep the memoranda confidential. In *Bartnicki*, the Supreme Court held that a radio talk show host could not be held liable for the "intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue," where the defendant "did not participate in the interception," even if he "did know—or at least had reason to know—that the interception was unlawful." (532 US at 517–18.) In

[1] Even in those contexts, respect for the confidentiality of attorney–client communications sometimes bows to other considerations. (*See Mohawk Indus., Inc. v Carpenter*, 558 US 100 [2009] (holding that orders requiring the disclosure of attorney–client information are not immediately appealable under the collateral order doctrine).)

holding "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" (*id.* at 535), the Court implicitly rejected the notion that a source's unlawful conduct affects the public concern analysis. Here, too, any breach of confidentiality occasioned by the disclosure of Project Veritas' memoranda to the Times would not affect the public interest in the information contained in those documents.

At bottom, the lower court's public concern analysis is founded on the sensitivity of the documents at issue. This is not a sound basis for a prior restraint. Information can be both highly sensitive and a matter of public interest, and "privacy concerns give way when balanced against the interest in publishing matters of public importance," such as legal advice given to a prominent nonprofit organization regarding its journalistic practices. (*Id.* at 534 (holding that public interest in the negotiations over teachers' compensation at Wyoming West Valley High School outweighed plaintiffs' privacy interest under the federal Wiretap Act); *see also, e.g.*, *Fla. Star v B.J.F.*, 491 US 524 [1989] (holding that a newspaper could not be held liable for identifying a rape victim, after the victim's name was erroneously disclosed by a police department in violation of state law); *Smith v Daily Mail Publ'g Co.*, 443 US 97 [1979] (holding that newspapers could not be indicted for publishing the name of a minor charged as a juvenile offender without the permission of the juvenile court); *Okla. Publ'g Co. v Okla. Cty. Dist. Ct.*, 430 US 308 [1977]

(reversing a pretrial order enjoining the media from publishing the identify of a minor involved in a juvenile hearing at which reporters were present); *Cox Broad. Corp. v Cohn*, 420 US 469 [1975] (holding that a television station could not held liable for identifying a rape-murder victim after obtaining the victim's name from official court documents).)

Many news stories of indisputable public interest are based on highly sensitive information, including attorney–client communications. The publication of the Panama Papers by a global consortium of news organization is a case in point. "The papers—millions of leaked confidential documents from the Mossack Fonseca law firm in Panama—identify international politicians, business leaders and celebrities involved in webs of suspicious financial transactions," the disclosure of which "raised questions about secrecy and corruption in the global financial system." (*What Are the Panama Papers?*, N.Y. Times (Apr. 16, 2016), https://nyti.ms/3znkIQG.) The reporting on the leaked documents caused numerous public scandals. (*See, e.g.*, Steven Erlanger, Stephen Castle & Rick Gladsone, *Iceland's Prime Minister Steps Down Amid Panama Papers Scandal*, N.Y. Times, Apr. 6, 2016, at A1, *available at* https://nyti.ms/3mWLr1k; Rebecca R. Ruiz, *After Panama Papers, A Raid at UEFA and New Questions for FIFA*, N.Y. Times, Apr. 7, 2016, at B1, *available at* https://nyti.ms/34cG33K; Neil MacFarquhar & Stephen Castle, *Panama Papers*

Continue to Shake Leaders, Including Cameron and Putin, N.Y. Times, Apr. 8, 2016, at A7, *available at* https://nyti.ms/3mWKqXi.)

The value to the public in receiving the private, privileged information contained in the Panama Papers has been incalculable, fostering "the premises of democratic government and . . . the orderly manner in which economic, social, [and] political change" occurs in many countries around the globe. (*Immuno AG.*, 77 NY2d at 255.) Under the lower court's reasoning, however, the public officials and public figures whose attorney–client information was disseminated in the leak would have had grounds to enjoin any reporting derived from those documents. Nor is it difficult to find other examples of important stories that may have been suppressed if reporting on attorney–client documents could have been enjoined. (*See, e.g.*, Philip J. Hilts, *Tobacco Company Was Silent on Hazards*, N.Y. Times, May 7, 1994, at A1, *available at* https://nyti.ms/3F3amqt (describing leaked Brown & Williamson Tobacco Corporation documents, including attorney–client communications, showing that the company refused to disclose the health risks associated with cigarettes).)

Although the prior restraint in this case is based on CPLR 3101 (c), it is easy to imagine applications for prior restraint based on other statutes or on common-law privacy claims. If the strong presumption against prior restraints hinges on the public concern test, and if attorney–client communications are categorically defined as

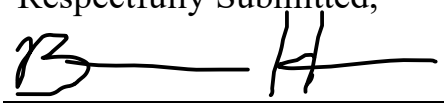
matters of private concern, then anyone who might be embarrassed by reporting on these communications would be able to obtain an injunction against the press. Such a rule would not only nullify the presumption against prior restraints, it would deprive the American people of a great deal of vitally important information.

CONCLUSION

For the reasons discussed above, this Court should vacate the lower court's Decision & Order imposing a prior restraint on the Times.

Dated: January 10, 2022
New York, NY

Respectfully Submitted,



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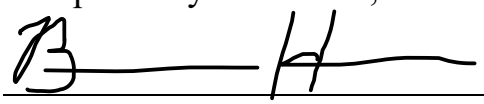
PRINTING SPECIFICATIONS STATEMENT

I certify in compliance with Rule 1250.8(j) of the Practice Rules of the Appellate Division that this brief was prepared on a computer using Microsoft Word, the typeface is Times New Roman, the font size is 14-point type, and the text is double-spaced. The brief contains 4,637 words, excluding the sections listed in Rule 1250.8(f)(2).

Dated: January 10, 2022
New York, NY

Respectfully Submitted,



Brian Hauss

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS,

Plaintiff,

- against -

THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5,

Defendants.

Index No. 63921/2020

Hon. Charles D. Wood

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant The New York Times Company hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the annexed Decision and Order of the Supreme Court of the State of New York, Westchester County in the above captioned action, dated December 24, 2021 and corrected December 27, 2021, which granted in part Plaintiff's Motion for an Order to Show Cause (Mot. Seq. No. 008).

Dated: New York, New York
December 27, 2021

Respectfully submitted,

By: /s/ Joel Kurtzberg

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EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS, Plaintiff, *- against -* THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5, Defendants.	Index No. 63921/2020 (Wood, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order of the Supreme Court of the State of New York, County of Westchester (Wood, J.), in the above captioned action, originally received December 24, 2021, corrected December 27, 2021, and duly entered and filed on December 27, 2021.

DATED: New York, New York
December 27, 2021

CAHILL GORDON & REINDEL LLP

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Attorneys for Defendants The New York Times Company, Maggie Astor, Tiffany Hsu, and John Does 1-5

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS,

Plaintiff,

-against-

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

Defendants.

DECISION & ORDER
Index No. 63921/2020

Seq. Nos. 8&9

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") document numbers 170-195 were read in connection with the instant motion brought by order to show cause by Project Veritas (Seq. No. 8) pursuant to CPLR 3103, against the defendants, seeking an order directing the defendant The New York Times Company ("the Times"): (1) to remove all references to or descriptions of Project Veritas' attorney-client privileged information published on the Times' website on November 11, 2021; (2) to return or immediately destroy all copies of Project Veritas' attorney-client privileged materials in the Times' possession; (3) to refrain from further publishing Veritas' attorney-client privileged materials; (4) to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials; and (5) for an interim order directing the Times to sequester and refrain from further publishing any of Project Veritas' attorney-client privileged materials.

As an initial matter, the court grants the separate motion brought by Reporters Committee

for Freedom of the Press (Seq. No. 9) seeking leave to file an amici curiae brief in support of the Times, and in response to the Court's Order to Show Cause.

NOW, based upon the foregoing, the motions are decided as follows:

The background of this case is set forth more fully in this court's decision and order entered on March 18, 2021. The Times filed a Notice of Appeal of that decision on April 8, 2021. The appeal is pending.

This court (Lefkowitz, J.) also denied the Times' application to stay discovery until a disposition of the pending appeal. The Times then sought a stay of discovery from the Appellate Division, Second Department, which was granted on October 27, 2021.

Project Veritas brought an order to show cause for the instant motion on November 18, 2021, which this court signed and entered, granting a temporary restraining order that directed the Times and its counsel to: (i) immediately refrain from further disseminating or publishing any of Project Veritas' privileged materials in the possession of the Times; (ii) cease further efforts to solicit or acquire Project Veritas' attorney-client privileged materials; and (iii) schedule argument on an expedited basis for November 23, 2021. On November 19, 2021, the Second Department denied a motion by the Times pursuant to CPLR 5704 that sought to vacate the Temporary Restraining Order issued by this court.

On November 23, 2021, after argument by all counsel on the relief requested by Project Veritas, this court set a briefing schedule, with Project Veritas to submit reply papers by December 1, 2021, and the Times a sur-reply by December 3, 2021. The court continued the limited injunction and protective order to permit the parties the opportunity to be heard and fully submit their papers.

On December 14, 2021, at the written request of counsel to the Times, the court amended the order to show cause to clarify that the order does not prohibit the Times from various activities related to newsgathering and reporting of Project Veritas' attorney-client privileged documents.

This latest chapter between these parties began on November 11, 2021, at 1:07 P.M. when the Times emailed Project Veritas founder James O'Keefe and Project Veritas' outside counsel Benjamin Barr, stating, "We are planning to publish a story based on legal memos that Mr. Barr provided to Project Veritas. The memos provide legal advice about how different PV operations could violate various laws, including the Espionage Act and Section 1001. The memos give guidance about how PV can remain in Mr. Barr's view, on the right side of these laws"[1]. The email asked for comment on the forthcoming story by 5:00 P.M. Without waiting until that stated time, at or before 3:02 P.M EST, the Times published on its website full copies of the privileged legal memoranda prepared by Mr. Barr for Project Veritas.[2] Then, at 5:54 P.M[3], the Times published the story entitled *Project Veritas and the Line Between Journalism and Political Spying*[4] which explored Project Veritas' controversial reporting tactics, describing and quoting from Project Veritas' attorney-client documents. The story details how Project Veritas sought advice of counsel regarding the legality of potential news gathering tactics. The story quotes from three legal memoranda prepared by attorney Barr, providing legal advice to Project Veritas. In addition,

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[1] Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166).
[2] These times were alleged set forth in Ms. Locke's letter to Joel Kurtzberg and David McCraw, the Times' counsels, dated November 12, 2021, and have not been disputed (NYSCEF Doc. No. 167).
[3] Project Veritas claims that the time of the email is Central Standard Time, which would be 2:07 Eastern Standard Time (see Affirmation of Elizabeth M. Locke, NYSCEF Doc. No. 165).
[4] Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

the Times shared copies of the memoranda with a Columbia Journalism School professor and sought comment. The Times' publication of the memoranda led Project Veritas to seek an injunction against it.

CPLR 3103

Project Veritas seeks relief pursuant to CPLR 3103(c). CPLR 3103(c) provides, in relevant part "[i]f any disclosure under this article has been *improperly or irregularly obtained* so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed" (CPLR 3103) (emphasis added). The Second Department has held that:

> Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (*Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]).

Project Veritas accuses the Times of improperly obtaining its privileged materials without authorization. In addition, Project Veritas contends that the Times engaged in efforts to obtain Project Veritas' privileged materials outside of approved discovery channels, from an unnamed and unknown individual that the Times allegedly knew was not authorized to disclose such materials. Project Veritas claims that these improper and irregular actions by the Times have substantially prejudiced its rights, and thus the court should issue a protective order mandating that the Times cease such conduct and immediately destroy or return to Project Veritas all ill-gotten,

privileged materials in the Times' possession (CPLR 3103[c]).

In support of its motion, Project Veritas claims that the primary nexus between the memoranda and this underlying defamation case is that they were authored by its counsel of record, Benjamin Barr. Barr's legal advice regarding several related topics goes to the heart of Veritas' video reporting on illegal ballot harvesting by members of Rep. Ilhan Omar's staff. In addition, according to Project Veritas, the content of the attorney-client memoranda relates directly to the Times' defenses in the defamation litigation, including on truth, fault, and damages.

Project Veritas claims that the Times' intrusion upon its protected attorney-client relationship is an affront to the sanctity of the attorney-client privilege and the integrity of the judicial process that demands this court's intervention. According to Project Veritas, it seeks only a narrow protective order to limit the Times from "improperly or irregularly obtaining" and disseminating the privileged communications of its litigation adversary. Project Veritas argues that "a decision denying this protective order—particularly in today's internet and social media age—will permit any would-be citizen journalist, blogger, or Instagram influencer to claim the right to publish their litigation adversary's attorney-client privileged communication with impunity. That is not, and cannot, be the law."[5]

Project Veritas concludes that if this court were to accept the Times' arguments that CPLR 3103(c) permits protective orders "only in situations involving information gathering through formal discovery methods and, in cases where a media entity is a party, only in situations where the information was acquired wrongfully or illegally, would result in a complete re-write of the

[5] Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

text of the statute". [6]

In opposition, the Times argues that the Court should not issue a protective order pursuant to CPLR 3103 because Project Veritas' memoranda have nothing to do with the subject matter in the underlying defamation action, since they predate the Project Veritas video and this defamation action. The Times argues that CPLR 3103(c) does not empower courts to suppress any information that a party may obtain improperly or irregularly. The Times argues that the memoranda must be relevant to the claims or defenses in this defamation action and that the November 11, 2021 article and memoranda have nothing to do with Rep. Omar, alleged voter fraud, ballot harvesting, defamation law, or the Project Veritas video. The Times says it received the memoranda through "newsgathering efforts" that were obviously outside of the litigation process because it obtained a stay of discovery and no discovery has actually taken place in this action. Further, a news organization is not prevented from reporting on newsworthy information--even attorney-client privileged information--that is independently obtained outside of the discovery process. Relying on *Seattle Times Co. v Rhinehart* (467 US 20, 34 [1984]), the Times argues that CPLR 3103(c) empowers the court to control only the distribution and publication of information obtained as part of an action's discovery process.

Taking these legal principles in mind, Project Veritas, as the party seeking relief under CPLR 3103(c), must first demonstrate that the subject memoranda were obtained "improperly or irregularly." If it does so, the court's analysis under CPLR 3103(c) continues requiring a determination as to whether a substantial right of a party has been prejudiced.

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[6] Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

Here, Project Veritas has established that it is the owner of the memoranda and the privilege, and it is not disputed that it did not waive its privilege. Since no discovery was exchanged, this is not a case where the documents were inadvertently turned over during discovery. Project Veritas has alleged that the Times knew that the individual that provided the memoranda was not authorized to disclose them. There is nothing in the record to show how the Times obtained the privileged memoranda that belong to Project Veritas. That information is solely within the Times' knowledge and possession, and it has not offered any explanation beyond vaguely stating that the memoranda were obtained through its "newsgathering efforts."[7] However, in its Memorandum in Opposition, while attempting to distinguish the facts of the case of *Rose v Levine* from this case, the Times incredibly admitted that here "no ***apparent*** bribery…was used to obtain the memoranda."[8] The court finds that Project Veritas has met its burden of showing that the subject memoranda were obtained by irregular means, if not both irregular and improper means.

Turning to the second prong of the CPLR 3103 analysis, Project Veritas must also show that it has been prejudiced as a result. The court finds that the attorney-client relationship between Benjamin Barr and Project Veritas has been undermined by counsel's confidential legal advice and thought processes being in the hands of a litigation adversary, and the subject of a request for public comment. This was compounded by the Times promptly publishing the memoranda to the rest of the world and thereafter within several hours publishing a second story, describing the contents of the memoranda. More specifically, here, at 2:07 P.M., the Times' reporters emailed

[7] NYT Memorandum in Opposition, at 5 (NYSCEF Doc. No. 185).
[8] See Defendant's Memorandum in Opposition, at FN 9 (NYSCEF Doc. No. 185).

James O'Keefe and Benjamin Barr that they had obtained the privileged memoranda where Barr as counsel gave advice to Project Veritas. Even though the email gave O'Keefe and Barr a deadline for comment, 5:00 P.M., at 3:02 P.M. the Times went ahead and published the entirety of the memoranda on its website ahead of the deadline it had set. At some point for reasons unknown, the Times voluntarily removed the link to the memoranda, but published an article quoting heavily from the privileged memoranda. This act by the Times to obtain and publish the confidential privileged memoranda can only be deemed to have prejudiced the rights of the plaintiff by directly compromising the confidential legal advice rendered by counsel.

Further, as Project Veritas correctly points out in its reply brief, there are a whole host of ways that the Times has gained strategic advantage in the litigation with the knowledge it gained from the memoranda, even without being able to admit them into evidence in this case. The Times' witnesses can now craft their responses to questions at a deposition using what they have learned. The Times' attorneys now have insight to formulate deposition topics and strategy based on the content of the memoranda. Indeed, in the November 11, 2021 article published at 5:54 P.M., the Times itself noted that the memoranda "give new insight into the workings of the group at a time when it faces potential legal peril in the diary investigation - and has signaled that its defense will rely in part on casting itself as a journalistic organization protected by the First Amendment."[9] That "insight" for the Times is unquestionably concomitant prejudice to the plaintiff.

[9] Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The court has also considered the Times' contention that this court has no power to address the Times' publication of these memoranda, since they were obtained outside the discovery process. There is no dispute by Project Veritas that the memoranda were obtained by the Times outside of any discovery related to this action. Although the memoranda were written almost four years before the Times published them on November 11, 2021, similar themes and allegations by the Times against Project Veritas permeate the memoranda and the pleadings in this case.[10] The Times' own reporting in the subject article confirms this: "Project Veritas is suing The New York Times over a 2020 story about a video the group made alleging voter fraud in Minnesota. Most news organizations consult regularly with lawyers, but some of Project Veritas's questions for its legal team demonstrate an interest in using tactics that test the boundaries of legality and are outside of mainstream reporting techniques."[11]

Further, the Times' reliance on *Seattle Times Co. v Rinehart* is misplaced here. In *Seattle Times Co.*, the issue was not the violation of the attorney-client privilege, but rather the use and publication of financial records obtained during disclosure of the Aquarian Foundation and its "spiritual leader," Rhinehart. Initially, the trial court denied any protective order, but after harassment and reprisal concerns were raised through affidavits of Aquarian donors and clients, the court ultimately granted an order prohibiting the publication of the donor and client names,

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[10] See Summons and Complaint, NYSCEF Doc. No. 1, ¶¶ 11-21; Memorandum of Law in Support of Motion to Dismiss, (NYSCEF Doc. No. 14 point IV); Affirmation in Support of Motion to Dismiss (NYSCEF Doc. No. 15, para 19-71).

[11] The sentences follow each other, with a solicitation ad by The Times inserted between them. The story consists of 58 sentences separated into 41 paragraphs, eschewing traditional paragraph structure. Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

addresses, and the amounts they contributed. In reviewing the trial court's order, the Supreme Court noted, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information" (467 U.S. 20, 33 [1984]). Thus, the Supreme Court made clear that the Seattle Times was not restricted from gathering information available through "traditional public source(s)" such as, interviewing Aquarian members or examining public records. This is consistent with other cases where the Supreme Court refused to block publication of private—but not privileged—information gathered outside discovery through "routine newspaper reporting techniques,"[12] and where the "Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection."[13] Likewise, here the Times is in no way restricted from gathering and publishing information available through traditional public sources. However, attorney-client privileged documents, by definition, are not available through a traditionally public source of information.

Attorney-Client Privilege

The attorney-client privilege is "the oldest of privileges for confidential communications" tracing its origins back nearly 450 years to 1577 England (see *Upjohn Co. v United States*, 449 U.S. 383, 389 [1981]; Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide For American Attorneys*, 4 Loy. U. Chi. Int'l L. Rev. 51). The intent of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v*

[12] See *Smith v Daily Mail Pub. Co.*, 443 US 97, 103 (1979)
[13] See *Cox Broadcasting v Cohn*, 420 US 469, 496 (1975)

United States, 449 U.S. at 389). Open dialogue between attorney and client is "deemed essential to effective representation" (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). The attorney-client privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment" (*Siegel v Snyder*, 2021 WL 6057821 [2d Dept, December 22, 2021], citing *Matter of Priest v Hennessy,* 51 NY2d 62, 67–68 [1980]; *see Ambac Assur. Corp. v Countrywide Home Loans, Inc.,* 27 NY3d 616, 623 [2016]). Thus, the attorney-client privilege is not solely tied to the contemplation of litigation (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d at 380, citing *Root v Wright,* 84 NY 72, 76 [1881]; *Bacon v Frisbie,* 80 NY 394, 400 [1880]).

The protections afforded by the attorney-client privilege have not only developed through over four centuries of common law, but are found in statute (CPLR 4503), the Code of Professional Responsibility (EC 4–1) and are strongly rooted in the constitutional right to counsel (U.S. Const. 6th Amend.; N.Y. Const., art. I, §6). The attorney-client privilege applies to confidential communications between clients and their attorneys made "in the course of professional employment" (CPLR 4503[a][1]). The communication itself must be "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d at 379, citing *Rossi v Blue Cross & Blue Shield,* 73 NY2d 588, 593 [1989]). The CPLR establishes "categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c])"

(*Spectrum Sys. Intl. Corp. v Chemical Bank,* 78 NY2d at 376–377).

Despite stating that this privilege is "absolute", the Court of Appeals has recognized that the privilege may give way to strong public policy considerations. For example, "[t]he attorney-client privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose" (*see Matter of Priest v Hennessy*, 51 NY2d at 68; *Matter of Jacqueline, F.,* 47 NY2d 215, 219 [1979]). Even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure (*see Matter of Priest v Hennessy*, 51 NY2d at 69; *Matter of Jacqueline, F.,* 47 NY2d 215).

The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity (*Matter of Priest v Hennessy,* 51 NY2d at 69). Since Project Veritas seeks the protection of the attorney-client privilege, it has the burden of proving the existence of the privilege. Here, as demonstrated in its reporters' email and in its November 11, 2021 article, the Times has told both Project Veritas and the world that the documents were attorney-client communication.[14] Further, the Times has not claimed otherwise either before this court during oral argument, or in its opposition or in its sur reply. There is no dispute that Project Veritas is the holder of the privilege, and the Times has not claimed that it was waived by Project Veritas.

[14] See Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166) and Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The Constitution

Project Veritas also seeks remedies that go beyond the typical discovery process--to remove all references to descriptions of Project Veritas' privileged attorney-client information published on the Times' website on November 11, 2021; to return and/or immediately delete all copies of Project Veritas' said attorney-client privileged materials; to refrain from further publishing Veritas' attorney-client privileged materials; and to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials.

In opposition, the Times argues that it has a constitutional right to publish the memoranda, even if they are privileged, because Project Veritas' request to prohibit the Times from publishing newsworthy information is a classic prior restraint under the First Amendment.[15] The Times claims that Project Veritas seeks to enjoin news reporting by journalists that is independent of and unrelated to this litigation and therefore not subject to the ordinary powers of the Court to regulate discovery. For the reasons set forth below, this Court does not agree.

The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment was ratified within the Bill of Rights in 1791 (Michael Diederich, Jr., *The President, the States and Policing American Cities*, N.Y. St. B.J., September/October 2020, at 26, 27). This prohibition against abridging freedom of the press similarly applies to the

[15]The brief of amici curiae argues similar points on this issue.

States by virtue of the due process clause of the Fourteenth Amendment (*see* N.Y.Const., art. I, s 8; *Lewis v Am. Fed'n of Television & Radio Artists*, 34 NY2d 265, 272 [1974]).

At the philosophical conception of this nation, "the 1776 Virginia Declaration of Rights, drafted by George Mason with contributions from James Madison and Patrick Henry, recognized that the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments" (Michael Miller, *Enemy of the People?,* N.Y. St. B.J., September 2018, at 5, 6; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 [1983]). Given their experience with King George III and a British Parliament that showed little regard for freedom of speech and of the press (and even less so in the American Colonies), the Framers of the Bill of Rights identified freedom of worship, speech, and press as important rights to spell out in the First Amendment.

Viewed as a whole, the Bill of Rights (Amendments 1-10) seeks to guarantee the rights of the governed individual. While the First Amendment clearly states that Congress shall make no law… abridging freedom of speech, or of the press," the Ninth Amendment broadly, yet succinctly states, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Like the attorney-client privilege, the First Amendment is vital to our republic, but also has limits. "For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that 'freedom of speech does not comprehend the right to speak on any subject at any time'" (*Seattle Times Co. v Rhinehart,* 467 U.S. at 31, citing *American Communications Assn. v Douds*, 339 U.S. 382, 394–395 [1950]). Also, "[t]he right to speak and publish does not carry with it the right to gather information" (*Zemel v Rusk,* 381 U.S.

1, 17 [1965]). In this collision between attorney-client privilege and the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society (*Cox Broad. Corp. v Cohn*, 420 U.S. 469, 491 [1975]).

"Prior restraint" on speech has been defined as when a law, regulation or judicial order suppresses speech on the basis of the speech's content[16] and in advance of its actual expression[17] (*United States v Quattrone*, 402 F.3d 304, 309 [2d Cir. 2005]). Prior restraints constitute "the most serious and the least tolerable infringement" on our freedoms of speech and press (*United States v Quattrone*, 402 F.3d at 309). "Prior restraints whatever the form, upon the rights of free speech and publication by the media bear a heavy presumption of constitutional invalidity" (*Matter of Natl. Broadcasting Co. v Cooperman,* 116 AD2d 287, 289–290 [2d Dept 1986]).

The Times urges that prior restraints "may be imposed only in the most exceptional cases," and can only be issued "upon a showing on the record that such expression will immediately and irreparably create public injury" (*Porco v Lifetime Entertainment Services, LLC,* 116 AD3d 1264, 1266 [3d Dept 2014] (internal citations and quotation marks omitted) (an order enjoining the broadcast of a movie about a convicted murderer of his parents to be an unconstitutional prior restraint). A plaintiff seeking a prior restraint of expression of views must show that the public at large will be immediately and irreparably harmed (*see East Meadow Association v Board of Education of Union Free School District No. 3, County of Nassau,* 18 NY2d 129, 134 (1966) (prior

[16] The vast majority of cases cited by the Times deal with restrictions based on content. The court has viewed the memoranda for the purposes of establishing whether they were attorney-client communications, and to determine whether they bear any nexus to this cause of action. Otherwise, their content is irrelevant to the holdings herein.
[17] In this case, the Times published the memoranda on its web site, then voluntarily took them down prior to the instant motions being filed.

restraint of a Vietnam War critic/folk singer's concert requires "danger of immediate and irreparable injury to the public weal"). Prior restraints upon the rights of free speech and publication "may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice" (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [1st Dept 2007]). The government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury (*see People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 (1986).[18]

The list of exceptions to prior restraints is short. The Supreme Court has held that only in exceptional cases, a prior restraint may survive constitutional scrutiny. Project Veritas has a heavy burden to show justification for the imposition of such a restraint (*see Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 558 [1976]). One exception might arise where the speech at issue falls into a category of expression that lies outside of the First Amendment's broad protections (*see Nebraska Press Ass'n v Stuart*, 427 U.S. at 590 [Brennan, J., concurring]). Thus, a prior restraint on the dissemination of child pornography is likely to survive First Amendment scrutiny (*see United States v Quattrone,* 402 F3d at 310). Among other matters not afforded First Amendment free speech and free press protection are: obscene speech and "fighting words" *(Roth v United States,* 354 U.S. 476 [1957] cf. *Harisiades v Shaughnessy,* 342 U.S. 580, 591–592 [1952]) and advocating the violent overthrow of the government (*Doe v Daily News, L.P.,* 173 Misc2d 321, 322–23 [Sup. Ct. NY Cty 1997]).

[18] Memorandum of Law in Opposition, (NYSCEF Doc. No. 185 at 1, 7)

As the Supreme Court has held, "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 a need of the highest order" (*Smith v Daily Mail Publishing Co.*, 443 U.S. 97, 103 [1979]). The freedom to publish regarding **matters of public concern** is a bedrock principle of the First Amendment, and "state action to punish the publication of truthful information seldom can satisfy constitutional standards" (*Smith v Daily Mail Publishing Co.*, 443 U.S. at 102). In *Bartnicki v Vopper*, the Court held that the First Amendment outweighed any privacy interests at issue and the broadcast at issue was fully protected by the First Amendment (*Bartnicki v Vopper*, 532 U.S. 514 [2001]). The recordings were provided to the broadcasters by individuals who obtained them illegally, but the court held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of **public concern**" (*Bartnicki v Vopper*, 532 U.S. at 535).

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236(A) [Sup. Ct, Suffolk, Cty 2007]). "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need of the highest order" such as to "suppres[s] . . . information that would set in motion a nuclear holocaust" (*New York Times Co. v. United States*, 403 U.S. 713, 726 [1971] [Brennan, J., concurring]).

As the party seeking to impose a prior restraint (to suppress the memoranda from publication and dissemination), Project Veritas bears a heavy burden of proof demonstrating justification for its imposition (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [2007]).

The Times believes that this court has already burdened it with unconstitutional restriction, and that the First Amendment guarantees its ability to publish the memoranda. The Times relies upon the case of *Nicholson v Keyspan Corp* (14 Misc3d 1236[A] [Sup Ct, Suffolk County, 2007]). Acknowledging the importance of attorney-client privilege to our legal system, the court in *Nicholson* still refused to enjoin the news organizations from publishing privileged information. In *Nicholson*, the court held: "This broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege" (14 Misc3d 1236(A) at 7-8). The court also noted, "even this privilege, important as it is, cannot be used to restrict the properly exercised, constitutionally protected freedom of the press to publish" (14 Misc3d 1236[A] at 9).

However, Nicholson is readily distinguishable from the case at bar. First, Justice Sgroi made a factual finding that the two media intervenors did not obtain the document at issue illegally or by improper means. In fact, in *Nicholson*, a party had actually leaked the document. Therefore, the court declined to issue an injunction against the two media outlets, but did issue one against the party (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 1-3). Finally, the documents were of public concern, as they related to significant environmental contamination. The court prefaced its decision by stating, "This case raises issues of public concern not only because of the effect of the plume on the health, safety and welfare of the persons directly in the path of the plume, but because the financial costs involved in remediating the plume of contaminants may be borne by the ratepayers of KeySpan if KeySpan passes those expenses through to the utility's customers and the

plume itself allegedly is or soon may be polluting the Great South Bay" (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 3). Further, notably, the defendant in Nicholson, Keyspan Corp. is a quasi-governmental entity, a utility company, whose actions impact the public at large, which was in the forefront of the court's mind: "The subject matter of this litigation is of great public concern and the attorney client privilege exercised by the Defendants will be restrictively applied to encourage full and fair disclosure of information because this case will affect the health, safety and welfare of the public" (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 9).

In its sur reply, the Times also cites *Rodgers v U.S. Steel Corp*, for the principle that "an order enjoining plaintiff's counsel from sharing allegedly privileged materials 'obtained otherwise than through the court's processes' was unconstitutional prior restraint" (*see Rodgers v U.S. Steel Corp*, F2d 1001, 1004-1009 [3rd Cir 1976]). However, contrary to the Times' contentions, the holding in *Rodgers* is inapposite, because the facts bear little resemblance to the facts here. The subject document in *Rodgers* was a government document, which outlined the methodology that the Department of Justice used to calculate workers' back pay (not a private party's attorney-client privileged memoranda). The District Court specifically stated, "This is not a lawyer's work product" (here it is), and the Third Circuit determined that absent dissemination of the document, time constraints governing the solicitation and tender could prejudice 600 employees from being able to make an informed decision about whether or not to accept the settlement offer (*Rodgers v U.S. Steel Corp*, F2d at 1004-1009).

The Eleventh Circuit grappled with balancing the First Amendment with the Sixth Amendment's right to counsel when CNN obtained audio recordings of former Panamanian

President General Manuel Noriega and his criminal defense attorney. It noted that the Supreme Court has held, "[t]the First Amendment generally grants the press no right to information about a trial superior to that of the general public" (*U.S. v Noriega*, 917 F2d 1543, 1548 [11th Cir 1990], citing *Nixon v Warner Communications*, 435 US 589, 609 [1978]). The Eleventh Circuit went on to unequivocally hold "the general public has no right of access to private communications between a defendant and his counsel" (*U.S. v Noriega*, 917 F2d at 1548). There, CNN also held information that only it possessed (the tapes), and refused to turn them over. Similarly, here only the Times knows how it obtained Project Veritas' attorney-client communications.

Other news organizations have voiced their support for the right to publish the attorney-client privileged memoranda, through the submission of the amici curiae brief by the Reporters Committee for Freedom of the Press, which includes The Associated Press, Daily News, Gannett, Reuters, Forbes, and the Washington Post, among others.[19] These organizations fear that permitting litigants to obtain orders restraining the speech of news organizations in the manner contemplated by the Order to Show Cause would harm news organizations' ability to publish journalism of public concern.

The first issue that the court first must decide is whether the speech at issue addresses a matter of public concern (*see Lewis v Cowen*, 165 F3d 154, 161 [2d Cir. 1999]). The parameters of the public concern test are poorly defined, but there is some guidance in the Supreme Court decision in *Connick v Myers* (461 U.S. 138, 146 [1983]), where the Supreme Court defined a matter of public concern as one that "relat[es] to any matter of political, social, or other concern to

[19] Affirmation of Katie Townsend (NYSCEF Doc No. 187) and Amici Brief of Reporters Committee for Freedom of the Press (NYSCEF Doc. No. 188).

the community", but cautioned that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case" (*Connick,* 461 U.S. at 149). Instructive to this court's analysis of what exactly constitutes a matter of public concern is the Court of Appeals decision in *Santer v. Board of Educ. of East Meadow Union Free School Dist.* 23 NY3d 251 (2014). Like the *Pickering* case it cited, *Santer* involved a case where a public school board disciplined a teacher for voicing opinions about the schools. Santer applied the "*Pickering Test.*" The first prong of the analysis is "whether the speech which led to an employee's discipline relates to a matter of public concern" (23 NY3d at 263-264). The second prong is a balance between the individual's interest in speaking and the government interest in effective operations (23 NY3d at 264). Connick, Pickering, and their progeny instruct that "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community'…or when it 'is the subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (*Snyder v Phelps*, 562 U.S. 443, 453 [2011] quoting *San Diego v. Roe,* 543 U.S. 77, 83–84 [2004], and *Connick,* 461 U.S. at 146). Whether a public employee's speech addresses a matter of public concern is a question of law to be determined in light of "the content, form, and context of a given statement, as revealed by the whole record" (*Santer v Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 263–64 (2014) (internal citations omitted); (*City of San Diego v Roe,* 543 U.S. 77, 83–84 [2004]).

The Court of Appeals held that an article about the arrest of a public school teacher for felony possession of heroin and unlawful possession of a hypodermic needle fell "within the sphere

of public concern", due to the teacher's occupation of instructing youth, and the issue of heroin addiction (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975]). Consistent with that, when a trial court enjoined a plaintiff from publishing defamatory statements and a confidential psychological evaluation of the defendant and directed the plaintiff to remove a website featuring negative comments and statements about the defendant as well as depictions of vermin, the devil, and skulls and crossbones, the Second Department has held that the injunction "constituted an impermissible prior restraint on free speech", except as to the prohibition regarding the psychological profile, which was not a matter of public concern (*Rose v Levine*, 37 AD3d 691, 692-693 [2d Dept 2007]).

Another example of content, form, and speech found not to implicate public concerns, was a plaintiff's speech involving her private employment situation regarding allegations of abuse of overtime and workplace bullying (*see Lewis v Cowen*, 165 F.3d 154, 164 [2d Cir. 1999]). "In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose" (*Lewis v Cowen,* 165 F.3d at 163–64). Likewise, a plaintiff who sought to confer with her union representative about defendants' alleged efforts to impugn her reputation as a teacher implicated plaintiff's own self-interest, not a matter of public concern—she was "not speaking out on matters of public concern but complaining about individual instances that affected her personally" (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 247 [S.D.N.Y. 2009]).

"Public concern" is also considered by the Civil Rights Law §79-h, which offers certain protections invoking actual and qualified privilege for professional journalists and newscasters from contempt.

> 8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or **other matters of public concern** or public interest or affecting the public welfare (Civil Rights Law §79-h).

Ironically, while all parties concede that there is no relevant caselaw that is "on all fours" with the facts herein, it is noteworthy that one U.S. District Court mused the following: "[W]hat if a confidential memorandum is stolen from an attorney's office and subsequently published in newspapers across the country? Clearly, the client should not be held to have waived the attorney-client privilege. The fact that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document. Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege. To hold that public circulation eliminates the privilege would, in effect, give *any* individual who secured a privileged document the power to waive the attorney-client privilege by simply having the contents widely recounted in newspaper reports (see *Smith v Armour Pharm. Co.,* 838 F. Supp. 1573, 1577 [S.D. Fla. 1993]). As was the case when that court struggled with these issues, the law is still unsettled regarding the court's power to limit the use of documents obtained by means other than that court's discovery process (*see Smith v Armour Pharm. Co.,* 838 F Supp at 1578).

In light of these principles of law, the court rejects the Times' position that Project Veritas' attorney-client communications are a matter of public concern. Undoubtedly, every media outlet

believes that anything that it publishes is a matter of public concern. The state of our nation is that roughly half the nation prioritizes interests that are vastly different than the other half. Our smart phones beep and buzz all day long with news flashes that supposedly reflect our browsing and clicking interests, and we can tune in or read the news outlet that gives us the stories and topics that we want to see. But some things are not fodder for public consideration and consumption. These memoranda, and hundreds of thousands of similar attorney-client privileged documents that are in homes, offices, and businesses in every village, town, and city in this nation are only between an attorney and a client, and it does not matter one bit who the attorney and client are. While the content of the advice is irrelevant to this court's analysis, in this case, the subject memoranda here contain typical, garden variety, basic attorney-client advice that undoubtedly is given at nearly every major media outlet in America, including between the Times and its own counsel.

A client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public. It is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel. Like a public employee who brings a First Amendment claim alleging a prior restraint on her freedom of speech must show that the speech touches on a matter of public concern (*United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465–66 [1995]), it is quintessentially personal, not public, in nature (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp.2d 230, 248 [S.D.N.Y. 2009]).

It is clear that the memoranda themselves are not a matter of public concern, and therefore, the balance tips in favor of the attorney-client privilege. That is not to say that aspects of Project Veritas and/or its journalistic methods are not of public interest. The Times is perfectly free to investigate, uncover, research, interview, photograph, record, report, publish, opine, expose or

ignore whatever aspects of Project Veritas its editors in their sole discretion deem newsworthy, without utilizing Project Veritas' attorney-client privileged memoranda.

Here, the court's protective order does not act as an impermissible prior restraint on the Times. As important as the First Amendment's protection against prior restraints is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern. "What is also at stake in the dissemination of privileged information into the public domain is the privacy of the individuals mentioned or discussed therein and the importance of full and free communication between attorney and client. 'Hit and run' journalism is no more protected under the First Amendment, than speeding on a crowded sidewalk is permitted under a valid driver's license" (*Greenberg v CBS Inc.,* 69 AD2d 693, 700 [2d Dept 1979]). Steadfast fidelity to, and vigilance in protecting First Amendment freedoms cannot be permitted to abrogate the fundamental protections of attorney client privilege or the basic right of privacy.

Project Veritas' final contention is that the Times' attorneys violated the New York Rules of Professional Conduct ("NYRPC"). The court finds that there is no basis for this in the record. The court agrees with the Times' assertion made during oral argument, that an attorney is entitled and obligated to convey frank and open legal advice to his or her media client regarding issues such as these.[20] The court notes that if the Time' counsel's attorney-client advice were stolen or otherwise irregularly ended up in the hands of Project Veritas or any other media outlet, without the Times having waived its privilege, the communication would likewise not be a matter of public

[20] November 23, 2021 oral argument Tr., at p. 45

concern.[21] From this record, nothing indicates that counsel for the Times strayed from ethical obligations.

Finally, with acknowledgement to Justice White, the holding today is grounded in the recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of justice and the attorney-client privilege. Although based upon the facts of the case here, the balance is struck for the latter, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of the media's nearly unfettered right to broadcast issues concerning public affairs were confused with the attempt to constitutionalize the publication of the private, privileged communication that is presented here (*Connick v Myers,* 461 U.S. at 154).

The Times' "shot across the bow"[22] of their litigation adversary cries out for court intervention, to protect the integrity of the judicial process, and to remedy the "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" that the Times created on November 11, 2021 (CPLR 3103(a); *Ligoure v City of New York*, 128 AD3d at 1028). Having met the requirements of CPLR 3103(c), the court in its discretion must fashion an appropriate sanction that will adequately redress the violation (*Lipin v Bender,* 84 NY2d 562 [1994]). The Court of Appeals noted that CPLR 3103 bestows wide discretion to the court to enter *any* order, including an order of dismissal, or realistic remedies that is appropriate under the circumstances. "As the

[21] Based on the scenario of non-governmental entities. Certainly, actions of public entities are more likely to be of public concern.
[22] *see* Letter from Plaintiff's counsel to Defendant's counsel (NYSCEF Doc. No. 167).

drafters [of CPLR 3103] made clear, '[t]here is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery'" (*Lipin v Bender,* 84 NY2d at 572–73, citing First Preliminary Report of Advisory Comm on Practice and Procedure, 1957 NY Legis Doc No. 6 [b], at 124).

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that the plaintiff Project Veritas' motion (Seq. No. 8) is **granted** in part to the extent set forth below; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel or other persons under its control are directed to immediately turn over to the plaintiff Project Veritas' counsel all physical copies of the subject legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, that are in its control or possession; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel, or other persons under its control are directed to immediately delete/destroy copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, from any computer, cloud server or other data collecting or disseminating sources, including but not limited to, all attachments to emails and cloud server devices, and to remove such documents from the internet and any web sites or servers over which they have control; and it is further

ORDERED, that the defendant New York Times' counsel and the defendants herein are directed to use best efforts to retrieve copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, provided to third parties, including but not limited to, Bill Grueskin; and it is further

ORDERED, that the defendant New York Times' counsel and the defendants herein are directed not to use the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, or information obtained from those documents in this action for any purposes whatsoever; and it is further

ORDERED, that the defendant New York Times is directed to file with the court within ten (10) days of service with notice of entry of this order an affidavit/affirmation confirming its compliance hereto, setting forth in detail all documents that have been destroyed or removed from data collecting or disseminating sources, including emails and attachments thereto, the date that the documents and copies of documents were destroyed, and the method used to destroy the documents and copies of documents; and it is further

ORDERED, that, if applicable, all counsel are directed to file with the court, an affirmation setting forth any documents filed on NYSCEF containing excerpts of the subject attorney-client memoranda, and submit copies of the documents with proposed redactions, for consideration by the court for entry of an appropriate sealing order; and it is further

ORDERED, that the attorney-client memoranda that are the subject of this order shall not be shown, transmitted, or disseminated in any manner to any persons absent written order of this Court; and it is further

ORDERED, that the motion for leave to file brief of Amici Curiae in support of the New York Times (Motion Seq. No. 9) is granted; and it is further

ORDERED, that in the event the defendant New York Times fails to comply as directed herein, plaintiff Project Veritas shall upload to the NYSCEF file, no later than January 28, 2022, upon notice to defendants, an affidavit/affirmation of noncompliance and plaintiff is granted leave to seek any relief related thereto, including preclusion, striking of pleadings, and costs and/or sanctions; and it is further

ORDERED, that all other relief requested by any person or party not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 23, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

PROJECT VERITAS

- against -

THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ Action Commenced under CPLR 214-g
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	☐ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
■ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Westchester
Dated: 12/27/2021	Entered: 12/27/2021
Judge (name in full): Hon. Charles D. Wood	Index No.: 63921/2020
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ■ Yes ☐ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

2021-02719

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Appeal 2021-02719 is fully briefed but has not been calendared for argument.

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Defendant The New York Times Company hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the Decision and Order of the Supreme Court, dated December 24, 2021, which granted in part Plaintiff's Motion for an Order to Show Cause and ordered The New York Times Company and persons associated with it to (1) not disseminate or transmit certain legal memoranda obtained by The New York Times through the newsgathering efforts of its reporters; and (2) turn over to Plaintiff, delete/ destroy, and/ or seek to retrieve from others copies of the legal memoranda.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Defendant The New York Times Company respectfully submits that the Decision and Order, which prohibits The New York Times Company from disseminating or publishing certain newsworthy information and forces The New York Times Company "immediately" to destroy and/or produce to Project Veritas all copies of certain materials obtained as part of The Times's newsgathering activities, is a paradigmatic example of an unconstitutional prior restraint. See, e.g., Alexander v. United States, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."). This extraordinary remedy, "the most serious and the least tolerable infringement on First Amendment rights," Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976), was issued without any evidence of "immediate and irreparable injury" to the public. East Meadow Association v. Board of Education of Union Free School District No. 3, County of Nassau, 18 N.Y.2d 129, 134 (1966). The Order unconstitutionally infringes upon The New York Times Company's rights under both the First Amendment, which exist "to prevent previous restraints upon publication," Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931), and contravenes well-settled United States Supreme Court authority prohibiting such orders, see, e.g. Seattle Times Co. v. Rhinehard, 467 U.S. 20, 34 (1984); Bartnicki v. Vopper, 532 U.S. 514 (2001), and also under the even more speech-protective New York Constitution. Furthermore, in granting the Order, the lower court exceeded its authority under CPLR § 3103 and granted relief that is entirely unrelated to disclosure specifically, or even to the underlying defamation action more generally. Therefore, The New York Times Company respectfully requests that the Appellate Division stay the portions of the order purporting to require "immediate" actions by The New York Times Company—actions causing injury that could not be undone even if the Court later grants this appeal in full—and that it vacate the entire order.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	The New York Times Company	Defendant	Appellant
2	Maggie Astor	Defendant	None
3	Tiffany Hsu	Defendant	None
4	Project Veritas	Plaintiff	Respondent
5			
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

AFFIRMATION OF SERVICE

Joel Kurtzberg, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

I am over eighteen years of age, am not a party to this action, and reside in the County of New York, State of New York. On the 27th day of December 2021, I served the foregoing **NOTICE OF APPEAL** and **INFORMATIONAL STATEMENT** via the Court's electronic filing system and electronic mail upon the following counsel of record:

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Counsel for Plaintiff Project Veritas

Dated: December 27, 2021

/s/ Joel Kurtzberg

EXHIBIT C

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PROJECT VERITAS,

Plaintiff,

-against-

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

Defendants.

DECISION & ORDER
Index No. 63921/2020

Seq. Nos. 8&9

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") document numbers 170-195 were read in connection with the instant motion brought by order to show cause by Project Veritas (Seq. No. 8) pursuant to CPLR 3103, against the defendants, seeking an order directing the defendant The New York Times Company ("the Times"): (1) to remove all references to or descriptions of Project Veritas' attorney-client privileged information published on the Times' website on November 11, 2021; (2) to return or immediately destroy all copies of Project Veritas' attorney-client privileged materials in the Times' possession; (3) to refrain from further publishing Veritas' attorney-client privileged materials; (4) to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials; and (5) for an interim order directing the Times to sequester and refrain from further publishing any of Project Veritas' attorney-client privileged materials.

As an initial matter, the court grants the separate motion brought by Reporters Committee

for Freedom of the Press (Seq. No. 9) seeking leave to file an amici curiae brief in support of the Times, and in response to the Court's Order to Show Cause.

NOW, based upon the foregoing, the motions are decided as follows:

The background of this case is set forth more fully in this court's decision and order entered on March 18, 2021. The Times filed a Notice of Appeal of that decision on April 8, 2021. The appeal is pending.

This court (Lefkowitz, J.) also denied the Times' application to stay discovery until a disposition of the pending appeal. The Times then sought a stay of discovery from the Appellate Division, Second Department, which was granted on October 27, 2021.

Project Veritas brought an order to show cause for the instant motion on November 18, 2021, which this court signed and entered, granting a temporary restraining order that directed the Times and its counsel to: (i) immediately refrain from further disseminating or publishing any of Project Veritas' privileged materials in the possession of the Times; (ii) cease further efforts to solicit or acquire Project Veritas' attorney-client privileged materials; and (iii) schedule argument on an expedited basis for November 23, 2021. On November 19, 2021, the Second Department denied a motion by the Times pursuant to CPLR 5704 that sought to vacate the Temporary Restraining Order issued by this court.

On November 23, 2021, after argument by all counsel on the relief requested by Project Veritas, this court set a briefing schedule, with Project Veritas to submit reply papers by December 1, 2021, and the Times a sur-reply by December 3, 2021. The court continued the limited injunction and protective order to permit the parties the opportunity to be heard and fully submit their papers.

On December 14, 2021, at the written request of counsel to the Times, the court amended the order to show cause to clarify that the order does not prohibit the Times from various activities related to newsgathering and reporting of Project Veritas' attorney-client privileged documents.

This latest chapter between these parties began on November 11, 2021, at 1:07 P.M. when the Times emailed Project Veritas founder James O'Keefe and Project Veritas' outside counsel Benjamin Barr, stating, "We are planning to publish a story based on legal memos that Mr. Barr provided to Project Veritas. The memos provide legal advice about how different PV operations could violate various laws, including the Espionage Act and Section 1001. The memos give guidance about how PV can remain in Mr. Barr's view, on the right side of these laws"[1]. The email asked for comment on the forthcoming story by 5:00 P.M. Without waiting until that stated time, at or before 3:02 P.M EST, the Times published on its website full copies of the privileged legal memoranda prepared by Mr. Barr for Project Veritas.[2] Then, at 5:54 P.M[3], the Times published the story entitled *Project Veritas and the Line Between Journalism and Political Spying*[4] which explored Project Veritas' controversial reporting tactics, describing and quoting from Project Veritas' attorney-client documents. The story details how Project Veritas sought advice of counsel regarding the legality of potential news gathering tactics. The story quotes from three legal memoranda prepared by attorney Barr, providing legal advice to Project Veritas. In addition,

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[1] Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166).
[2] These times were alleged set forth in Ms. Locke's letter to Joel Kurtzberg and David McCraw, the Times' counsels, dated November 12, 2021, and have not been disputed (NYSCEF Doc. No. 167).
[3] Project Veritas claims that the time of the email is Central Standard Time, which would be 2:07 Eastern Standard Time (see Affirmation of Elizabeth M. Locke, NYSCEF Doc. No. 165).
[4] Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

the Times shared copies of the memoranda with a Columbia Journalism School professor and sought comment. The Times' publication of the memoranda led Project Veritas to seek an injunction against it.

CPLR 3103

Project Veritas seeks relief pursuant to CPLR 3103(c). CPLR 3103(c) provides, in relevant part "[i]f any disclosure under this article has been *improperly or irregularly obtained* so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed" (CPLR 3103) (emphasis added). The Second Department has held that:

> Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (*Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]).

Project Veritas accuses the Times of improperly obtaining its privileged materials without authorization. In addition, Project Veritas contends that the Times engaged in efforts to obtain Project Veritas' privileged materials outside of approved discovery channels, from an unnamed and unknown individual that the Times allegedly knew was not authorized to disclose such materials. Project Veritas claims that these improper and irregular actions by the Times have substantially prejudiced its rights, and thus the court should issue a protective order mandating that the Times cease such conduct and immediately destroy or return to Project Veritas all ill-gotten,

privileged materials in the Times' possession (CPLR 3103[c]).

In support of its motion, Project Veritas claims that the primary nexus between the memoranda and this underlying defamation case is that they were authored by its counsel of record, Benjamin Barr. Barr's legal advice regarding several related topics goes to the heart of Veritas' video reporting on illegal ballot harvesting by members of Rep. Ilhan Omar's staff. In addition, according to Project Veritas, the content of the attorney-client memoranda relates directly to the Times' defenses in the defamation litigation, including on truth, fault, and damages.

Project Veritas claims that the Times' intrusion upon its protected attorney-client relationship is an affront to the sanctity of the attorney-client privilege and the integrity of the judicial process that demands this court's intervention. According to Project Veritas, it seeks only a narrow protective order to limit the Times from "improperly or irregularly obtaining" and disseminating the privileged communications of its litigation adversary. Project Veritas argues that "a decision denying this protective order—particularly in today's internet and social media age—will permit any would-be citizen journalist, blogger, or Instagram influencer to claim the right to publish their litigation adversary's attorney-client privileged communication with impunity. That is not, and cannot, be the law."[5]

Project Veritas concludes that if this court were to accept the Times' arguments that CPLR 3103(c) permits protective orders "only in situations involving information gathering through formal discovery methods and, in cases where a media entity is a party, only in situations where the information was acquired wrongfully or illegally, would result in a complete re-write of the

[5] Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

text of the statute". [6]

In opposition, the Times argues that the Court should not issue a protective order pursuant to CPLR 3103 because Project Veritas' memoranda have nothing to do with the subject matter in the underlying defamation action, since they predate the Project Veritas video and this defamation action. The Times argues that CPLR 3103(c) does not empower courts to suppress any information that a party may obtain improperly or irregularly. The Times argues that the memoranda must be relevant to the claims or defenses in this defamation action and that the November 11, 2021 article and memoranda have nothing to do with Rep. Omar, alleged voter fraud, ballot harvesting, defamation law, or the Project Veritas video. The Times says it received the memoranda through "newsgathering efforts" that were obviously outside of the litigation process because it obtained a stay of discovery and no discovery has actually taken place in this action. Further, a news organization is not prevented from reporting on newsworthy information--even attorney-client privileged information--that is independently obtained outside of the discovery process. Relying on *Seattle Times Co. v Rhinehart* (467 US 20, 34 [1984]), the Times argues that CPLR 3103(c) empowers the court to control only the distribution and publication of information obtained as part of an action's discovery process.

Taking these legal principles in mind, Project Veritas, as the party seeking relief under CPLR 3103(c), must first demonstrate that the subject memoranda were obtained "improperly or irregularly." If it does so, the court's analysis under CPLR 3103(c) continues requiring a determination as to whether a substantial right of a party has been prejudiced.

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[6] Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

Here, Project Veritas has established that it is the owner of the memoranda and the privilege, and it is not disputed that it did not waive its privilege. Since no discovery was exchanged, this is not a case where the documents were inadvertently turned over during discovery. Project Veritas has alleged that the Times knew that the individual that provided the memoranda was not authorized to disclose them. There is nothing in the record to show how the Times obtained the privileged memoranda that belong to Project Veritas. That information is solely within the Times' knowledge and possession, and it has not offered any explanation beyond vaguely stating that the memoranda were obtained through its "newsgathering efforts."[7] However, in its Memorandum in Opposition, while attempting to distinguish the facts of the case of *Rose v Levine* from this case, the Times incredibly admitted that here "no ***apparent*** bribery…was used to obtain the memoranda."[8] The court finds that Project Veritas has met its burden of showing that the subject memoranda were obtained by irregular means, if not both irregular and improper means.

Turning to the second prong of the CPLR 3103 analysis, Project Veritas must also show that it has been prejudiced as a result. The court finds that the attorney-client relationship between Benjamin Barr and Project Veritas has been undermined by counsel's confidential legal advice and thought processes being in the hands of a litigation adversary, and the subject of a request for public comment. This was compounded by the Times promptly publishing the memoranda to the rest of the world and thereafter within several hours publishing a second story, describing the contents of the memoranda. More specifically, here, at 2:07 P.M., the Times' reporters emailed

[7] NYT Memorandum in Opposition, at 5 (NYSCEF Doc. No. 185).
[8] See Defendant's Memorandum in Opposition, at FN 9 (NYSCEF Doc. No. 185).

James O'Keefe and Benjamin Barr that they had obtained the privileged memoranda where Barr as counsel gave advice to Project Veritas. Even though the email gave O'Keefe and Barr a deadline for comment, 5:00 P.M., at 3:02 P.M. the Times went ahead and published the entirety of the memoranda on its website ahead of the deadline it had set. At some point for reasons unknown, the Times voluntarily removed the link to the memoranda, but published an article quoting heavily from the privileged memoranda. This act by the Times to obtain and publish the confidential privileged memoranda can only be deemed to have prejudiced the rights of the plaintiff by directly compromising the confidential legal advice rendered by counsel.

Further, as Project Veritas correctly points out in its reply brief, there are a whole host of ways that the Times has gained strategic advantage in the litigation with the knowledge it gained from the memoranda, even without being able to admit them into evidence in this case. The Times' witnesses can now craft their responses to questions at a deposition using what they have learned. The Times' attorneys now have insight to formulate deposition topics and strategy based on the content of the memoranda. Indeed, in the November 11, 2021 article published at 5:54 P.M., the Times itself noted that the memoranda "give new insight into the workings of the group at a time when it faces potential legal peril in the diary investigation - and has signaled that its defense will rely in part on casting itself as a journalistic organization protected by the First Amendment."[9] That "insight" for the Times is unquestionably concomitant prejudice to the plaintiff.

[9] Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The court has also considered the Times' contention that this court has no power to address the Times' publication of these memoranda, since they were obtained outside the discovery process. There is no dispute by Project Veritas that the memoranda were obtained by the Times outside of any discovery related to this action. Although the memoranda were written almost four years before the Times published them on November 11, 2021, similar themes and allegations by the Times against Project Veritas permeate the memoranda and the pleadings in this case.[10] The Times' own reporting in the subject article confirms this: "Project Veritas is suing The New York Times over a 2020 story about a video the group made alleging voter fraud in Minnesota. Most news organizations consult regularly with lawyers, but some of Project Veritas's questions for its legal team demonstrate an interest in using tactics that test the boundaries of legality and are outside of mainstream reporting techniques."[11]

Further, the Times' reliance on *Seattle Times Co. v Rinehart* is misplaced here. In *Seattle Times Co.*, the issue was not the violation of the attorney-client privilege, but rather the use and publication of financial records obtained during disclosure of the Aquarian Foundation and its "spiritual leader," Rhinehart. Initially, the trial court denied any protective order, but after harassment and reprisal concerns were raised through affidavits of Aquarian donors and clients, the court ultimately granted an order prohibiting the publication of the donor and client names,

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[10] See Summons and Complaint, NYSCEF Doc. No. 1, ¶¶ 11-21; Memorandum of Law in Support of Motion to Dismiss, (NYSCEF Doc. No. 14 point IV); Affirmation in Support of Motion to Dismiss (NYSCEF Doc. No. 15, para 19-71).

[11] The sentences follow each other, with a solicitation ad by The Times inserted between them. The story consists of 58 sentences separated into 41 paragraphs, eschewing traditional paragraph structure. Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

addresses, and the amounts they contributed. In reviewing the trial court's order, the Supreme Court noted, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information" (467 U.S. 20, 33 [1984]). Thus, the Supreme Court made clear that the Seattle Times was not restricted from gathering information available through "traditional public source(s)" such as, interviewing Aquarian members or examining public records. This is consistent with other cases where the Supreme Court refused to block publication of private—but not privileged—information gathered outside discovery through "routine newspaper reporting techniques,"[12] and where the "Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection."[13] Likewise, here the Times is in no way restricted from gathering and publishing information available through traditional public sources. However, attorney-client privileged documents, by definition, are not available through a traditionally public source of information.

Attorney-Client Privilege

The attorney-client privilege is "the oldest of privileges for confidential communications" tracing its origins back nearly 450 years to 1577 England (see *Upjohn Co. v United States*, 449 U.S. 383, 389 [1981]; Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide For American Attorneys*, 4 Loy. U. Chi. Int'l L. Rev. 51). The intent of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v*

[12] See *Smith v Daily Mail Pub. Co.*, 443 US 97, 103 (1979)
[13] See *Cox Broadcasting v Cohn*, 420 US 469, 496 (1975)

United States, 449 U.S. at 389). Open dialogue between attorney and client is "deemed essential to effective representation" (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). The attorney-client privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment" (*Siegel v Snyder*, 2021 WL 6057821 [2d Dept, December 22, 2021], citing *Matter of Priest v Hennessy,* 51 NY2d 62, 67–68 [1980]; *see Ambac Assur. Corp. v Countrywide Home Loans, Inc.,* 27 NY3d 616, 623 [2016]). Thus, the attorney-client privilege is not solely tied to the contemplation of litigation (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d at 380, citing *Root v Wright,* 84 NY 72, 76 [1881]; *Bacon v Frisbie,* 80 NY 394, 400 [1880]).

The protections afforded by the attorney-client privilege have not only developed through over four centuries of common law, but are found in statute (CPLR 4503), the Code of Professional Responsibility (EC 4–1) and are strongly rooted in the constitutional right to counsel (U.S. Const. 6th Amend.; N.Y. Const., art. I, §6). The attorney-client privilege applies to confidential communications between clients and their attorneys made "in the course of professional employment" (CPLR 4503[a][1]). The communication itself must be "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d at 379, citing *Rossi v Blue Cross & Blue Shield,* 73 NY2d 588, 593 [1989]). The CPLR establishes "categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c])"

(*Spectrum Sys. Intl. Corp. v Chemical Bank,* 78 NY2d at 376–377).

Despite stating that this privilege is "absolute", the Court of Appeals has recognized that the privilege may give way to strong public policy considerations. For example, "[t]he attorney-client privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose" (*see Matter of Priest v Hennessy*, 51 NY2d at 68; *Matter of Jacqueline, F.,* 47 NY2d 215, 219 [1979]). Even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure (*see Matter of Priest v Hennessy*, 51 NY2d at 69; *Matter of Jacqueline, F.,* 47 NY2d 215).

The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity (*Matter of Priest v Hennessy,* 51 NY2d at 69). Since Project Veritas seeks the protection of the attorney-client privilege, it has the burden of proving the existence of the privilege. Here, as demonstrated in its reporters' email and in its November 11, 2021 article, the Times has told both Project Veritas and the world that the documents were attorney-client communication.[14] Further, the Times has not claimed otherwise either before this court during oral argument, or in its opposition or in its sur reply. There is no dispute that Project Veritas is the holder of the privilege, and the Times has not claimed that it was waived by Project Veritas.

[14] See Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166) and Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The Constitution

Project Veritas also seeks remedies that go beyond the typical discovery process--to remove all references to descriptions of Project Veritas' privileged attorney-client information published on the Times' website on November 11, 2021; to return and/or immediately delete all copies of Project Veritas' said attorney-client privileged materials; to refrain from further publishing Veritas' attorney-client privileged materials; and to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials.

In opposition, the Times argues that it has a constitutional right to publish the memoranda, even if they are privileged, because Project Veritas' request to prohibit the Times from publishing newsworthy information is a classic prior restraint under the First Amendment.[15] The Times claims that Project Veritas seeks to enjoin news reporting by journalists that is independent of and unrelated to this litigation and therefore not subject to the ordinary powers of the Court to regulate discovery. For the reasons set forth below, this Court does not agree.

The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment was ratified within the Bill of Rights in 1791 (Michael Diederich, Jr., *The President, the States and Policing American Cities*, N.Y. St. B.J., September/October 2020, at 26, 27). This prohibition against abridging freedom of the press similarly applies to the

[15]The brief of amici curiae argues similar points on this issue.

States by virtue of the due process clause of the Fourteenth Amendment (*see* N.Y.Const., art. I, s 8; *Lewis v Am. Fed'n of Television & Radio Artists*, 34 NY2d 265, 272 [1974]).

At the philosophical conception of this nation, "the 1776 Virginia Declaration of Rights, drafted by George Mason with contributions from James Madison and Patrick Henry, recognized that the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments" (Michael Miller, *Enemy of the People?,* N.Y. St. B.J., September 2018, at 5, 6; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 [1983]). Given their experience with King George III and a British Parliament that showed little regard for freedom of speech and of the press (and even less so in the American Colonies), the Framers of the Bill of Rights identified freedom of worship, speech, and press as important rights to spell out in the First Amendment.

Viewed as a whole, the Bill of Rights (Amendments 1-10) seeks to guarantee the rights of the governed individual. While the First Amendment clearly states that Congress shall make no law… abridging freedom of speech, or of the press," the Ninth Amendment broadly, yet succinctly states, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Like the attorney-client privilege, the First Amendment is vital to our republic, but also has limits. "For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that 'freedom of speech does not comprehend the right to speak on any subject at any time'" (*Seattle Times Co. v Rhinehart,* 467 U.S. at 31, citing *American Communications Assn. v Douds*, 339 U.S. 382, 394–395 [1950]). Also, "[t]he right to speak and publish does not carry with it the right to gather information" (*Zemel v Rusk,* 381 U.S.

1, 17 [1965]). In this collision between attorney-client privilege and the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society (*Cox Broad. Corp. v Cohn*, 420 U.S. 469, 491 [1975]).

"Prior restraint" on speech has been defined as when a law, regulation or judicial order suppresses speech on the basis of the speech's content[16] and in advance of its actual expression[17] (*United States v Quattrone*, 402 F.3d 304, 309 [2d Cir. 2005]). Prior restraints constitute "the most serious and the least tolerable infringement" on our freedoms of speech and press (*United States v Quattrone*, 402 F.3d at 309). "Prior restraints whatever the form, upon the rights of free speech and publication by the media bear a heavy presumption of constitutional invalidity" (*Matter of Natl. Broadcasting Co. v Cooperman,* 116 AD2d 287, 289–290 [2d Dept 1986]).

The Times urges that prior restraints "may be imposed only in the most exceptional cases," and can only be issued "upon a showing on the record that such expression will immediately and irreparably create public injury" (*Porco v Lifetime Entertainment Services, LLC,* 116 AD3d 1264, 1266 [3d Dept 2014] (internal citations and quotation marks omitted) (an order enjoining the broadcast of a movie about a convicted murderer of his parents to be an unconstitutional prior restraint). A plaintiff seeking a prior restraint of expression of views must show that the public at large will be immediately and irreparably harmed (*see East Meadow Association v Board of Education of Union Free School District No. 3, County of Nassau,* 18 NY2d 129, 134 (1966) (prior

[16] The vast majority of cases cited by the Times deal with restrictions based on content. The court has viewed the memoranda for the purposes of establishing whether they were attorney-client communications, and to determine whether they bear any nexus to this cause of action. Otherwise, their content is irrelevant to the holdings herein.
[17] In this case, the Times published the memoranda on its web site, then voluntarily took them down prior to the instant motions being filed.

restraint of a Vietnam War critic/folk singer's concert requires "danger of immediate and irreparable injury to the public weal"). Prior restraints upon the rights of free speech and publication "may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice" (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [1st Dept 2007]). The government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury (*see People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 (1986).[18]

The list of exceptions to prior restraints is short. The Supreme Court has held that only in exceptional cases, a prior restraint may survive constitutional scrutiny. Project Veritas has a heavy burden to show justification for the imposition of such a restraint (*see Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 558 [1976]). One exception might arise where the speech at issue falls into a category of expression that lies outside of the First Amendment's broad protections (*see Nebraska Press Ass'n v Stuart*, 427 U.S. at 590 [Brennan, J., concurring]). Thus, a prior restraint on the dissemination of child pornography is likely to survive First Amendment scrutiny (*see United States v Quattrone,* 402 F3d at 310). Among other matters not afforded First Amendment free speech and free press protection are: obscene speech and "fighting words" *(Roth v United States,* 354 U.S. 476 [1957] cf. *Harisiades v Shaughnessy,* 342 U.S. 580, 591–592 [1952]) and advocating the violent overthrow of the government (*Doe v Daily News, L.P.,* 173 Misc2d 321, 322–23 [Sup. Ct. NY Cty 1997]).

[18] Memorandum of Law in Opposition, (NYSCEF Doc. No. 185 at 1, 7)

As the Supreme Court has held, "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 a need of the highest order" (*Smith v Daily Mail Publishing Co.*, 443 U.S. 97, 103 [1979]). The freedom to publish regarding **matters of public concern** is a bedrock principle of the First Amendment, and "state action to punish the publication of truthful information seldom can satisfy constitutional standards" (*Smith v Daily Mail Publishing Co.*, 443 U.S. at 102). In *Bartnicki v Vopper*, the Court held that the First Amendment outweighed any privacy interests at issue and the broadcast at issue was fully protected by the First Amendment (*Bartnicki v Vopper*, 532 U.S. 514 [2001]). The recordings were provided to the broadcasters by individuals who obtained them illegally, but the court held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of **public concern**" (*Bartnicki v Vopper*, 532 U.S. at 535).

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236(A) [Sup. Ct, Suffolk, Cty 2007]). "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need of the highest order" such as to "suppres[s] . . . information that would set in motion a nuclear holocaust" (*New York Times Co. v. United States*, 403 U.S. 713, 726 [1971] [Brennan, J., concurring]).

As the party seeking to impose a prior restraint (to suppress the memoranda from publication and dissemination), Project Veritas bears a heavy burden of proof demonstrating justification for its imposition (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [2007]).

The Times believes that this court has already burdened it with unconstitutional restriction, and that the First Amendment guarantees its ability to publish the memoranda. The Times relies upon the case of *Nicholson v Keyspan Corp* (14 Misc3d 1236[A] [Sup Ct, Suffolk County, 2007]). Acknowledging the importance of attorney-client privilege to our legal system, the court in *Nicholson* still refused to enjoin the news organizations from publishing privileged information. In *Nicholson*, the court held: "This broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege" (14 Misc3d 1236(A) at 7-8). The court also noted, "even this privilege, important as it is, cannot be used to restrict the properly exercised, constitutionally protected freedom of the press to publish" (14 Misc3d 1236[A] at 9).

However, Nicholson is readily distinguishable from the case at bar. First, Justice Sgroi made a factual finding that the two media intervenors did not obtain the document at issue illegally or by improper means. In fact, in *Nicholson*, a party had actually leaked the document. Therefore, the court declined to issue an injunction against the two media outlets, but did issue one against the party (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 1-3). Finally, the documents were of public concern, as they related to significant environmental contamination. The court prefaced its decision by stating, "This case raises issues of public concern not only because of the effect of the plume on the health, safety and welfare of the persons directly in the path of the plume, but because the financial costs involved in remediating the plume of contaminants may be borne by the ratepayers of KeySpan if KeySpan passes those expenses through to the utility's customers and the

plume itself allegedly is or soon may be polluting the Great South Bay" (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 3). Further, notably, the defendant in Nicholson, Keyspan Corp. is a quasi-governmental entity, a utility company, whose actions impact the public at large, which was in the forefront of the court's mind: "The subject matter of this litigation is of great public concern and the attorney client privilege exercised by the Defendants will be restrictively applied to encourage full and fair disclosure of information because this case will affect the health, safety and welfare of the public" (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 9).

In its sur reply, the Times also cites *Rodgers v U.S. Steel Corp*, for the principle that "an order enjoining plaintiff's counsel from sharing allegedly privileged materials 'obtained otherwise than through the court's processes' was unconstitutional prior restraint" (*see Rodgers v U.S. Steel Corp*, F2d 1001, 1004-1009 [3rd Cir 1976]). However, contrary to the Times' contentions, the holding in *Rodgers* is inapposite, because the facts bear little resemblance to the facts here. The subject document in *Rodgers* was a government document, which outlined the methodology that the Department of Justice used to calculate workers' back pay (not a private party's attorney-client privileged memoranda). The District Court specifically stated, "This is not a lawyer's work product" (here it is), and the Third Circuit determined that absent dissemination of the document, time constraints governing the solicitation and tender could prejudice 600 employees from being able to make an informed decision about whether or not to accept the settlement offer (*Rodgers v U.S. Steel Corp*, F2d at 1004-1009).

The Eleventh Circuit grappled with balancing the First Amendment with the Sixth Amendment's right to counsel when CNN obtained audio recordings of former Panamanian

President General Manuel Noriega and his criminal defense attorney. It noted that the Supreme Court has held, "[t]the First Amendment generally grants the press no right to information about a trial superior to that of the general public" (*U.S. v Noriega*, 917 F2d 1543, 1548 [11th Cir 1990], citing *Nixon v Warner Communications*, 435 US 589, 609 [1978]). The Eleventh Circuit went on to unequivocally hold "the general public has no right of access to private communications between a defendant and his counsel" (*U.S. v Noriega*, 917 F2d at 1548). There, CNN also held information that only it possessed (the tapes), and refused to turn them over. Similarly, here only the Times knows how it obtained Project Veritas' attorney-client communications.

Other news organizations have voiced their support for the right to publish the attorney-client privileged memoranda, through the submission of the amici curiae brief by the Reporters Committee for Freedom of the Press, which includes The Associated Press, Daily News, Gannett, Reuters, Forbes, and the Washington Post, among others.[19] These organizations fear that permitting litigants to obtain orders restraining the speech of news organizations in the manner contemplated by the Order to Show Cause would harm news organizations' ability to publish journalism of public concern.

The first issue that the court first must decide is whether the speech at issue addresses a matter of public concern (*see Lewis v Cowen*, 165 F3d 154, 161 [2d Cir. 1999]). The parameters of the public concern test are poorly defined, but there is some guidance in the Supreme Court decision in *Connick v Myers* (461 U.S. 138, 146 [1983]), where the Supreme Court defined a matter of public concern as one that "relat[es] to any matter of political, social, or other concern to

[19] Affirmation of Katie Townsend (NYSCEF Doc No. 187) and Amici Brief of Reporters Committee for Freedom of the Press (NYSCEF Doc. No. 188).

the community", but cautioned that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case" (*Connick,* 461 U.S. at 149). Instructive to this court's analysis of what exactly constitutes a matter of public concern is the Court of Appeals decision in *Santer v. Board of Educ. of East Meadow Union Free School Dist.* 23 NY3d 251 (2014). Like the *Pickering* case it cited, *Santer* involved a case where a public school board disciplined a teacher for voicing opinions about the schools. Santer applied the "*Pickering Test.*" The first prong of the analysis is "whether the speech which led to an employee's discipline relates to a matter of public concern" (23 NY3d at 263-264). The second prong is a balance between the individual's interest in speaking and the government interest in effective operations (23 NY3d at 264). Connick, Pickering, and their progeny instruct that "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community'…or when it 'is the subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (*Snyder v Phelps*, 562 U.S. 443, 453 [2011] quoting *San Diego v. Roe,* 543 U.S. 77, 83–84 [2004], and *Connick,* 461 U.S. at 146). Whether a public employee's speech addresses a matter of public concern is a question of law to be determined in light of "the content, form, and context of a given statement, as revealed by the whole record" (*Santer v Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 263–64 (2014) (internal citations omitted); (*City of San Diego v Roe,* 543 U.S. 77, 83–84 [2004]).

The Court of Appeals held that an article about the arrest of a public school teacher for felony possession of heroin and unlawful possession of a hypodermic needle fell "within the sphere

of public concern", due to the teacher's occupation of instructing youth, and the issue of heroin addiction (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975]). Consistent with that, when a trial court enjoined a plaintiff from publishing defamatory statements and a confidential psychological evaluation of the defendant and directed the plaintiff to remove a website featuring negative comments and statements about the defendant as well as depictions of vermin, the devil, and skulls and crossbones, the Second Department has held that the injunction "constituted an impermissible prior restraint on free speech", except as to the prohibition regarding the psychological profile, which was not a matter of public concern (*Rose v Levine*, 37 AD3d 691, 692-693 [2d Dept 2007]).

Another example of content, form, and speech found not to implicate public concerns, was a plaintiff's speech involving her private employment situation regarding allegations of abuse of overtime and workplace bullying (*see Lewis v Cowen*, 165 F.3d 154, 164 [2d Cir. 1999]). "In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose" (*Lewis v Cowen,* 165 F.3d at 163–64). Likewise, a plaintiff who sought to confer with her union representative about defendants' alleged efforts to impugn her reputation as a teacher implicated plaintiff's own self-interest, not a matter of public concern—she was "not speaking out on matters of public concern but complaining about individual instances that affected her personally" (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 247 [S.D.N.Y. 2009]).

"Public concern" is also considered by the Civil Rights Law §79-h, which offers certain protections invoking actual and qualified privilege for professional journalists and newscasters from contempt.

> 8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or **other matters of public concern** or public interest or affecting the public welfare (Civil Rights Law §79-h).

Ironically, while all parties concede that there is no relevant caselaw that is "on all fours" with the facts herein, it is noteworthy that one U.S. District Court mused the following: "[W]hat if a confidential memorandum is stolen from an attorney's office and subsequently published in newspapers across the country? Clearly, the client should not be held to have waived the attorney-client privilege. The fact that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document. Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege. To hold that public circulation eliminates the privilege would, in effect, give *any* individual who secured a privileged document the power to waive the attorney-client privilege by simply having the contents widely recounted in newspaper reports (see *Smith v Armour Pharm. Co.,* 838 F. Supp. 1573, 1577 [S.D. Fla. 1993]). As was the case when that court struggled with these issues, the law is still unsettled regarding the court's power to limit the use of documents obtained by means other than that court's discovery process (*see Smith v Armour Pharm. Co.,* 838 F Supp at 1578).

In light of these principles of law, the court rejects the Times' position that Project Veritas' attorney-client communications are a matter of public concern. Undoubtedly, every media outlet

believes that anything that it publishes is a matter of public concern. The state of our nation is that roughly half the nation prioritizes interests that are vastly different than the other half. Our smart phones beep and buzz all day long with news flashes that supposedly reflect our browsing and clicking interests, and we can tune in or read the news outlet that gives us the stories and topics that we want to see. But some things are not fodder for public consideration and consumption. These memoranda, and hundreds of thousands of similar attorney-client privileged documents that are in homes, offices, and businesses in every village, town, and city in this nation are only between an attorney and a client, and it does not matter one bit who the attorney and client are. While the content of the advice is irrelevant to this court's analysis, in this case, the subject memoranda here contain typical, garden variety, basic attorney-client advice that undoubtedly is given at nearly every major media outlet in America, including between the Times and its own counsel.

A client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public. It is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel. Like a public employee who brings a First Amendment claim alleging a prior restraint on her freedom of speech must show that the speech touches on a matter of public concern (*United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465–66 [1995]), it is quintessentially personal, not public, in nature (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp.2d 230, 248 [S.D.N.Y. 2009]).

It is clear that the memoranda themselves are not a matter of public concern, and therefore, the balance tips in favor of the attorney-client privilege. That is not to say that aspects of Project Veritas and/or its journalistic methods are not of public interest. The Times is perfectly free to investigate, uncover, research, interview, photograph, record, report, publish, opine, expose or

ignore whatever aspects of Project Veritas its editors in their sole discretion deem newsworthy, without utilizing Project Veritas' attorney-client privileged memoranda.

Here, the court's protective order does not act as an impermissible prior restraint on the Times. As important as the First Amendment's protection against prior restraints is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern. "What is also at stake in the dissemination of privileged information into the public domain is the privacy of the individuals mentioned or discussed therein and the importance of full and free communication between attorney and client. 'Hit and run' journalism is no more protected under the First Amendment, than speeding on a crowded sidewalk is permitted under a valid driver's license" (*Greenberg v CBS Inc.,* 69 AD2d 693, 700 [2d Dept 1979]). Steadfast fidelity to, and vigilance in protecting First Amendment freedoms cannot be permitted to abrogate the fundamental protections of attorney client privilege or the basic right of privacy.

Project Veritas' final contention is that the Times' attorneys violated the New York Rules of Professional Conduct ("NYRPC"). The court finds that there is no basis for this in the record. The court agrees with the Times' assertion made during oral argument, that an attorney is entitled and obligated to convey frank and open legal advice to his or her media client regarding issues such as these.[20] The court notes that if the Time' counsel's attorney-client advice were stolen or otherwise irregularly ended up in the hands of Project Veritas or any other media outlet, without the Times having waived its privilege, the communication would likewise not be a matter of public

[20] November 23, 2021 oral argument Tr., at p. 45

concern.[21] From this record, nothing indicates that counsel for the Times strayed from ethical obligations.

Finally, with acknowledgement to Justice White, the holding today is grounded in the recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of justice and the attorney-client privilege. Although based upon the facts of the case here, the balance is struck for the latter, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of the media's nearly unfettered right to broadcast issues concerning public affairs were confused with the attempt to constitutionalize the publication of the private, privileged communication that is presented here (*Connick v Myers,* 461 U.S. at 154).

The Times' "shot across the bow"[22] of their litigation adversary cries out for court intervention, to protect the integrity of the judicial process, and to remedy the "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" that the Times created on November 11, 2021 (CPLR 3103(a); *Ligoure v City of New York*, 128 AD3d at 1028). Having met the requirements of CPLR 3103(c), the court in its discretion must fashion an appropriate sanction that will adequately redress the violation (*Lipin v Bender,* 84 NY2d 562 [1994]). The Court of Appeals noted that CPLR 3103 bestows wide discretion to the court to enter *any* order, including an order of dismissal, or realistic remedies that is appropriate under the circumstances. "As the

[21] Based on the scenario of non-governmental entities. Certainly, actions of public entities are more likely to be of public concern.
[22] *see* Letter from Plaintiff's counsel to Defendant's counsel (NYSCEF Doc. No. 167).

drafters [of CPLR 3103] made clear, '[t]here is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery'" (*Lipin v Bender,* 84 NY2d at 572–73, citing First Preliminary Report of Advisory Comm on Practice and Procedure, 1957 NY Legis Doc No. 6 [b], at 124).

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that the plaintiff Project Veritas' motion (Seq. No. 8) is **granted** in part to the extent set forth below; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel or other persons under its control are directed to immediately turn over to the plaintiff Project Veritas' counsel all physical copies of the subject legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, that are in its control or possession; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel, or other persons under its control are directed to immediately delete/destroy copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, from any computer, cloud server or other data collecting or disseminating sources, including but not limited to, all attachments to emails and cloud server devices, and to remove such documents from the internet and any web sites or servers over which they have control; and it is further

ORDERED, that the defendant New York Times' counsel and the defendants herein are directed to use best efforts to retrieve copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, provided to third parties, including but not limited to, Bill Grueskin; and it is further

ORDERED, that the defendant New York Times' counsel and the defendants herein are directed not to use the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, or information obtained from those documents in this action for any purposes whatsoever; and it is further

ORDERED, that the defendant New York Times is directed to file with the court within ten (10) days of service with notice of entry of this order an affidavit/affirmation confirming its compliance hereto, setting forth in detail all documents that have been destroyed or removed from data collecting or disseminating sources, including emails and attachments thereto, the date that the documents and copies of documents were destroyed, and the method used to destroy the documents and copies of documents; and it is further

ORDERED, that, if applicable, all counsel are directed to file with the court, an affirmation setting forth any documents filed on NYSCEF containing excerpts of the subject attorney-client memoranda, and submit copies of the documents with proposed redactions, for consideration by the court for entry of an appropriate sealing order; and it is further

ORDERED, that the attorney-client memoranda that are the subject of this order shall not be shown, transmitted, or disseminated in any manner to any persons absent written order of this Court; and it is further

ORDERED, that the motion for leave to file brief of Amici Curiae in support of the New York Times (Motion Seq. No. 9) is granted; and it is further

ORDERED, that in the event the defendant New York Times fails to comply as directed herein, plaintiff Project Veritas shall upload to the NYSCEF file, no later than January 28, 2022, upon notice to defendants, an affidavit/affirmation of noncompliance and plaintiff is granted leave to seek any relief related thereto, including preclusion, striking of pleadings, and costs and/or sanctions; and it is further

ORDERED, that all other relief requested by any person or party not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 23, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

PROJECT VERITAS, *Plaintiff-Respondent*, vs. THE NEW YORK TIMES COMPANY, *Defendant-Appellant*, and MAGGIE ASTOR, TIFFANY HSU, and JOHN DOES 1-5, *Defendants.*	:	**AFFIDAVIT OF SERVICE** Appellate Division Docket No. 2021-09551 Westchester County Index No. 63921/2020

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, LOURDES CHAVEZ, being duly sworn, depose and say that:

1. I am not a party to the above-captioned action, am 18 years of age or older, and am an employee of the New York Civil Liberties Union.

2. On the 10 day of January, 2022, I served one true and correct copy of the Motion for Leave File Proposed Brief of Amici Curiae American Civil Liberties Union, New York Civil Liberties Union, and National Coalition Against Censorship in Support of Defendant-Appellant The New York Times Company, and all supporting papers, on each of the individuals listed below.

3. The method of service was by electronic mail and USPS next-day mail and electronic mail.

4. The names of the individuals served and the addresses at which service was made are as follows:

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Justin T. Kelton
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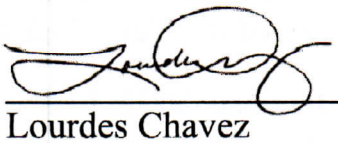
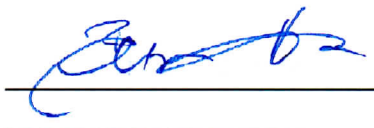
Dated: January 10, 2022
New York, New York



Lourdes Chavez

Sworn to before me this
10 day of January, 2022



NOTARY PUBLIC

BETH HAROULES
Notary Public, State of New York
No. 02HA4890292
Qualified in New York County
Commission Expires March 30, 2023