
NEW BRUNSWICK BOARD OF
EDUCATION,

Plaintiff/Respondent,

v.

NEW BRUNSWICK TODAY,

Defendant/Appellant.

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

: A Civil Action

:
: On Appeal from a Final Order of the
: Superior Court of New Jersey, Middlesex
: County, Chancery Division, Docket No.
: MID-C-85-26

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

DEFENDANT’S APPELLATE BRIEF

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PRELIMINARY STATEMENT

This case presents an extraordinary violation of the First Amendment – a prior restraint specifically prohibited by the United States Supreme Court – that requires immediate adjudication under that same case law.

The New Brunswick Board of Education (BOE) sued an online newspaper—New Brunswick Today (NBT)—for publishing a video that exposed the lies the BOE told to parents about a security issue at New Brunswick High School (NBHS). In short, NBHS told parents that students had a “routine security drill.” But NBT learned through its reporting that there was a lockdown after a student entered NBHS with a gun.

After the BOE continued its misrepresentations, NBT published a video of the incident (obtained lawfully from a source) on its YouTube channel. The BOE sought a preliminary injunction to force removal of the video. Two hours later, the trial court held a hearing. Without conducting any First Amendment analysis, the court imposed sweeping prior restraints on NBT by ordering it to remove the video and prohibiting it from writing any news story about the video.

The trial court committed several reversible errors. First, its initial May 29, 2026 order imposed expansive prior restraints without first conducting any First Amendment review. Case law is clear that prior restraints are presumptively invalid. In all its history, the U.S. Supreme Court has never

permitted a prior restraint on free speech, not even when newspapers published the stolen, highly classified Pentagon Papers that the government claimed threatened national security. Without any analysis, the trial court erred on the side of censorship, not free speech, as the First Amendment requires. Although it later conceded that its initial restraints were too broad, by that time NBT had been unconstitutionally gagged for nearly six weeks.

Second, the court’s July 9, 2026 order still imposes unconstitutional prior restraints. It forbids NBT “and the press” from republishing the video unless they first redact identifying markers of all minors and submit the redacted footage to the BOE “for review and approval”—effectively granting the government veto power over the press. It also forbids NBT “and the press” from identifying the juvenile in any article. These restraints fail at the threshold because the U.S. Supreme Court has already held in Smith v. Daily Mail Publishing Co. that juvenile offender anonymity is not an interest of the highest order that can overcome the heavy presumption against prior restraints.

Third, the trial court mangled the Daily Mail standard by suggesting that NBT’s First Amendment protections were diminished because the video may have come from a “leak.” That reasoning contradicts decades of precedent holding that the press may publish truthful information even if a source obtained it illegally. The court further erred by faulting NBT for not disclosing its sources,

ignoring both that the burden of proof rests on the BOE and that NBT is absolutely privileged under New Jersey's Shield Law not to reveal its sources.

Fourth, the court sua sponte held that the Uniform Public Expression Protection Act (UPEPA) does not apply, invoking an exception the BOE itself never even argued—that its lawsuit was filed “to enforce a law to protect against an imminent threat to public health or safety.” The BOE has no standing to enforce the statutes it cites—the Federal Education Rights and Privacy Act (FERPA) and the criminal provisions of N.J.S.A. 2A:4A-60. Additionally, it has raised privacy concerns, not imminent health or safety threats. The fact that the July 7 order allows the video to be re-published without any redactions to security procedures demonstrates that there is no safety threat.

Finally, the process itself has been constitutionally deficient. Every day a prior restraint remains in effect is a separate irreparable injury under the First Amendment, yet NBT has been subject to these restraints for two months and briefing will not conclude for months more. The pace of these proceedings stands in stark contrast to the immediate review the First Amendment demands.

This Court should immediately reverse the July 9, 2026 order, hold that UPEPA applies and that NBT is entitled to attorney's fees, and provide guidance ensuring that future prior restraint cases receive the expeditious scrutiny the First Amendment requires.

STATEMENT OF FACTS

Defendant NBT is a hyperlocal and community-focused publication covering matters of public concern affecting New Brunswick residents, including the conduct of public institutions and officials such as the New Brunswick BOE and the New Brunswick High School (NBHS). NBT operates several media platforms, including a YouTube channel with over 200,000 followers and a website averaging over 50,000 views per month. (Da82-Da83).¹

On May 8, 2026, NBHS sent an alert to parents stating:

This notification is being sent to inform you that today, May 8, 2026, your child participated in a school security drill at approximately 9:15 am at New Brunswick High School. We routinely have school security drills as a mean[s] to prepare for a variety of emergency situations.

[Da126.]

Through its newsgathering, NBT learned that rather than a routine security drill, the incident was a lockdown implemented after a student brought a weapon into the school. At a BOE meeting on May 19, 2026, NBT editor Charlie Kratovil questioned School Superintendent Aubrey Johnson about the incident and Johnson admitted for the first time that it was not a routine security drill:

Yes, this building was put on a lockdown around 9

¹ Da = Defendant NBT's Appendix

1T = May 29, 2026 Transcript

2T = July 7, 2026 Transcript

o'clock. We had a student who came to school late and . . . while he was entering the building, within searching his bag, he had a toy gun and out of precaution we put the [building] on lockdown. So, there was nothing inside the school. Uh this is while the student was entering the school. Uh he provided a reason why, but that's exactly why it was put on lockdown.

[New Brunswick Board of Education Meeting, New Brunswick Today, May 19, 2026, available at <https://youtu.be/C-YKozRND1w?si=9sZ-lHnqwndAKGss&t=2219>.]

A video that NBT obtained from a confidential source depicted the incident, but it did not match what Johnson had told the public. “The weapon was found on the student, not in a bag. And the gun didn’t appear to be a toy.” Charlie Kratovil, After Lying About Lockdown, School District Sues New Brunswick Today, New Brunswick Today, July 10, 2026, <https://newbrunswicktoday.com/2026/07/after-lying-about-lockdown-school-district-sues-new-brunswick-today>. To expose the BOE’s misrepresentations and show the public what occurred, NBT published the video on its YouTube channel on May 27, 2026.²

² The soundless video depicts the school’s uniformed security guard apparently asking the student to hold his arms up after passing through a metal detector, while the guard frisks his waist. The guard, after apparently finding a weapon, pushes the student against the wall. Two other staff members join in the restraint. They take off the student’s shoes, turn the student around and continue to search him, without handcuffing him (contrary to counsel’s assertions at oral argument). (1T5:21-22; 1T6:4-5). A second guard then joins in and the search continues. Something else is

On May 28, 2026, the BOE's attorney, George F. Hendricks, sent a letter demanding that NBT remove the "highly confidential security video," claiming that "[t]his posting not only violates the law, but violates the presumption of privacy afforded to all students." The letter also demanded that NBT disclose its source, "as this illegal access and use of school security video has placed the safety and welfare of the [d]istrict's students and staff in jeopardy." (Da73).

Kratovil immediately asked Hendricks what laws were violated by posting the video. (Da77). The next morning, on May 29, 2026, Hendricks threatened criminal and civil penalties³ unless NBT removed the video:

Pursuant to your inquiry, I direct your attention to [N.J.S.A.] 2A:4A-60, in general but in particular subsection h dealing with disclosure of that information being a disorderly persons (criminal) offense.

The Federal Statute, Family Education Privacy Act, FIRPA [sic], US Code 20USC-12326 [sic] prohibits disclosing public information about students. That is in general with penalties. It is the position of the Board that you remove your post/video of this juvenile student, that would be the end of it.

removed from the student's person and the video ends with his hands free in the air.

³ R.P.C. 3.4(g) is clear that a lawyer shall not "present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter." See also Berge v. Sch. Comm. of Gloucester, 107 F.4th 33, 43 (1st Cir. 2024) ("If the First Amendment means anything in a situation like this [where a school demanded a reporter remove a video of public officials], it is that public officials cannot — as they did here — threaten a person with legal action under an obviously inapt statute simply because he published speech they did not like.").

I need to know by 10:00 a.m. this morning, otherwise I will file papers with Judge Michael Toto and appear before him at 1:30 p.m. You will be served with the papers and appear if you wish to oppose my application for the Court to order you to delete/remove your post.

[Da76.]

NBT did not respond to the BOE's threat or remove the video.

PROCEDURAL HISTORY

A. The BOE Sues NBT

On May 29, 2026, just hours after Hendricks emailed Kratovil, the BOE filed an order to show cause (OTSC). (Da66-Da77). The verified complaint generally referenced N.J.S.A. 2A:4A-60, FERPA, and the BOE's "statutory duty to protect the privacy of all students." It sought an order:

- A. Mandating [NBT]'s immediate removal of the confidential school security/surveillance video taken at Plaintiff's New Brunswick High School, as posted on the [YouTube] website of New Brunswick Today; [and]
- B. Enjoining and restraining . . . [NBT], from any and all future postings of confidential school security/surveillance video taken at any of the schools in Plaintiff's District[.]

[Da7.]

In an accompanying certification, Johnson stated for the first time that the weapon found on the student was not a "toy gun," but rather was an "airsoft

(BB) gun.” (Da70).⁴ He also conceded that the weapon was found in the “student’s waistband,” not in his bag as previously stated. Ibid.

Johnson also alleged the video NBT posted “is the exact surveillance footage maintained within the district’s internal security surveillance system” and “[t]he district has reason to believe that the footage was recorded from a computer by an individual with access to the district’s surveillance system and disseminated without authorization.” Ibid. He said he was investigating the leak.

B. The Trial Court Issues Temporary Restraints Requiring NBT to Remove the Video and Enjoining It from Publishing Articles Describing the Video’s Content

Without providing NBT an opportunity to file a brief, the trial court quickly heard virtual argument (1T) and imposed temporary restraints without conducting any First Amendment analysis, although NBT vigorously put forward a First Amendment defense. (Da60; 1T21-1T42). Despite recognizing that the BOE’s asserted claims were “doubtful,” it decided to “suspend the harm” to the juvenile to “maintain the status quo that existed prior to [the video’s] dissemination.” (1T35-1T36). It did not consider NBT’s First Amendment right to publish the video, nor whether its expansive restraints were the least restrictive means of protecting the juvenile’s interests.

⁴ The New Brunswick Police Department’s report states that the juvenile was charged with “false public alarm, “possession of an imitation firearm,” and “possession of a weapon in a school.” (Da85).

The court set a return date for permanent restraints on July 7, 2026. In the interim, NBT was “immediately compelled to remove” the video from its YouTube page and was “restrained and enjoined from (i) writing or posting about the content” of the video and “(ii) making any further postings of confidential school security/surveillance video as taken at any of the schools in the [BOE]’s District.” (Da62).

NBT immediately took down the video, which had already been viewed more than 5,500 times before its removal. (Da124). Per the order, it could not publish any news story about the video, depriving the public of learning how the video exposed that the BOE had not been truthful to the public.

C. NBT Seeks Interlocutory Review of the Temporary Restraints

On June 1, 2026, the trial court entered an order denying a stay. (Da18). NBT filed an emergent application with the Appellate Division. The request to stay the temporary restraints was denied, but permission to file an emergent motion for leave to appeal was granted. (Da79). The Supreme Court denied an emergent request to stay based on the Appellate Division’s agreement to hear an emergent appeal. (Da81).

After briefing, the Appellate Division denied the motion for leave to appeal without prejudice, even though it recognized no First Amendment analysis had occurred. The June 9, 2026 order stated:

The order permits defendant to move to dissolve or modify the temporary restraints on three business days' notice to plaintiff, which would provide the trial court the benefit of the parties' briefing of the constitutional issues raised in this matter, which it did not have when it entered the May 29 order to show cause. This would also allow the trial court to address these issues in the first instance. Should defendant move to dissolve or modify the restraints, the trial court shall expeditiously hear the motion.

[Da90-Da91 (emphasis added).]

NBT moved to lift the restraints the next day. The trial court refused to schedule the motion until July 7, due to a vacation and its other scheduled matters. (Da18).

NBT then filed an emergent application, asking the Appellate Division to order the trial court to hear the motion "expeditiously" as it had ordered on June 9 or to assign a different judge. The Appellate Division denied the motion because "a trial court exercises broad discretion in controlling its calendar, and any challenge to that authority 'must be reviewed under a deferential standard.'" (Da93). It refused to stay the restraints in the interim.

NBT went to the Supreme Court, but it, too, denied such relief. (Da94). Thus, NBT was subject to prior restraints expansive prior restraints for weeks, without any First Amendment review having ever been conducted by any court.

D. NBT Files a UPEPA OTSC

In the interim, NBT moved for dismissal under UPEPA on June 5, 2026.

A return date was set for July 7, 2026. (Da87).

E. The Trial Court Denies the UPEPA OTSC and Imposes Permanent Restraints Upon NBT and the Press

After hearing oral argument on July 7, 2026 (2T), the trial court entered a final order and opinion on July 9, 2026. (Da1). That opinion also fails to conduct a proper First Amendment analysis or adhere to the presumption against prior restraints. In various places the decision contradicts itself. Compare, e.g., Da46 (properly stating that the First Amendment protects a reporter who published material even if an anonymous person illegally leaked it to them) to Da37 (stating that if the document comes from a leak or source who illegally obtained it, the court must engage in balancing to decide if the First Amendment applies).

The court did admit that “now that time has permitted a constitutional analysis of the issues,” its hastily entered order six weeks earlier should not have prohibited NBT from publishing articles about the video or required it to remove the entire video from the internet. (Da48). It denied the BOE’s request for a permanent injunction, subject to the “temporary restraints”⁵ being “modified.” (Da4). Those modified restraints are: (1) “[NBT] and the press” may now write about the content of the video “so long as the name(s) and identity(ies) of the

⁵ The court couches its decision as a denial of the permanent injunction, subject to the “modified” temporary restraints, rather than as granting the injunction in part. It is clear the July 9, 2026 order is an appealable final order. Nonetheless, NBT also has an appeal of right pursuant to N.J.S.A. 2A:53A-57 of UPEPA.

16-year old juvenile/student, and of any and all other juvenile/students depicted in the video footage, is/are not revealed or identified in any way or manner whatsoever;” and (2) “[NBT] and the press shall be permitted to post the subject video footage but only on the express condition that [NBT] and the press redact, blur, or otherwise obscure the face and identifying markers of the minors in the video footage.” (Da4-Da5). Thus, the court expanded the restraints to all media, including non-parties. It further ordered that if NBT wants to re-publish the video, it must redact it and “present the modified footage to Plaintiff and its counsel for review and approval, with copy to the Court.” (Da5).

With little analysis, the court also sua sponte held that UPEPA does not apply because the BOE’s cause of action was asserted “by a governmental unit or an employee or agent of a governmental unit in an official capacity to enforce a law to protect against an imminent threat to public health or safety.” (Da7; Da43) (citing N.J.S.A. 2A:53A-50(c)(2)). Thus, NBT could not recover attorney’s fees for partially prevailing in its motion to lift the restraints.

F. NBT Again Seeks Emergent Relief

Because the modified restraints remain unconstitutional and continue to result in daily irreparable harm, NBT filed another emergent application seeking a stay/reversal of the restraints or at least an expedited appeal. The Appellate

Division denied the request by stating that NBT “has not made a showing warranting emergent relief.” (Da129).

NBT sought the same relief from the Supreme Court. On July 14, 2026, the Clerk entered an order stating: “Acting as a single Justice, the application for emergent relief is denied for the reasons stated in the Appellate Division’s disposition dated July 10, 2026. Acting on behalf of the Court, we ask the Appellate Division to schedule the appeal on the merits in this matter on an expedited basis.” (Da130).

NBT immediately filed a Notice of Appeal on July 14, 2026. (Da132). Although the scheduling order is labeled accelerated and preemptory, the case will not be fully briefed until October 14, 2026—more than three months after the modified restraints were imposed. (Da144).

LEGAL ARGUMENT

I. THE JULY 9, 2026 ORDER IMPOSES UNCONSTITUTIONAL PRIOR RESTRAINTS AND MUST BE REVERSED (Da1-Da5)

Prior restraints are “the most serious and least tolerable infringement on First Amendment rights” and “one of the most extraordinary remedies known to our jurisprudence.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559, 562 (1976). The damage a prior restraint causes “can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.” Ibid. Unlike laws that punish speech after it occurs, prior restraints are the “essence of censorship,” and a “chief purpose” of the First Amendment is to prohibit them. Near v. Minnesota, 283 U.S. 697, 713 (1931). As the U.S. Supreme Court has explained:

The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

[Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975).]

The Court later elaborated on this distinction:

A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only

after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. 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.

[Nebraska Press, 427 U.S. at 559.]

Accordingly, the First Amendment provides special protection against prior restraints. The Court has repeatedly explained that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The "heavy burden" for justifying a prior restraint is placed on the government. Ibid. Prior restraints, or the "gagging of publication," are allowed only in "exceptional cases." CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994).

The government's burden in a prior restraint case is so difficult to meet that "the Supreme Court has never upheld a prior restraint on pure speech." Matter of Providence J. Co., 820 F.2d 1342, 1348 (1st Cir. 1986). Indeed, the Court has found prior restraints unconstitutional even when newspapers sought to publish the highly classified Pentagon Papers that had been illegally leaked to them, New York Times Co., 403 U.S. at 714, when pre-trial publicity threatened to adversely impact a criminal defendant's constitutional right to a

fair trial, Nebraska Press, 427 U.S. at 568-70, and where a TV network engaged in “calculated misdeeds” to obtain video footage that could “result in significant economic harm” to a company. CBS, Inc., 510 U.S. at 1318.

Though it has never permitted a prior restraint on pure speech, the Court has speculated what type of “exceptional” interest might overcome the presumption of invalidity and constitute an exception to the near absolute ban on prior restraints. For example, in Near, the Court hypothesized that a prior restraint might be allowed to stop “[t]he publication of the sailing dates of transports or the number and location of troops.” 283 U.S. at 716. Similarly, in the Pentagon Papers case, Justice Brennan suggested a prior restraint might be allowed to “suppress[] information that would set in motion a nuclear holocaust” or where publication would “inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of transport already at sea.” New York Times Co., 403 U.S. at 726 (Brennan, J., concurring).

The Near Court also speculated that a prior restraint might be permitted to block speech that is not protected by the First Amendment, such as obscene publications or “incitements to acts of violence and the overthrow by force of orderly government.” 283 U.S. at 716. But, as Justice Brennan later noted, even then, there must be “adequate and timely procedures . . . to protect against any restraint of speech that does come within the ambit of the First Amendment.”

Nebraska Press, 427 U.S. at 591 (Brennan, J., concurring).

In short, although prior restraints are not categorically prohibited under the constitution in all instances, they are presumptively invalid and that presumption can be overcome only in truly exceptional cases.

A. The Trial Court’s Orders Imposed Prior Restraints

A prior restraint is an “administrative [or] judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur.” Alexander v. U.S., 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)). “Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints.” Ibid. In the digital era, courts also treat “takedown orders” as prior restraints because they effectively prohibit re-publication. See, e.g., Garcia v. Google, Inc., 786 F.3d 733, 747 (9th Cir. 2015) (en banc) (“The panel’s takedown order of a film of substantial interest to the public is a classic prior restraint of speech.”); Marceaux v. Lafayette City-Par. Consol. Gov’t, 731 F.3d 488, 493 (5th Cir. 2013) (order requiring removal of website during trial must be analyzed under prior restraint doctrine); U.S. v. Bell, 414 F.3d 474, 478 (3d Cir. 2005) (order requiring website to remove content was a “classic example” of a prior restraint, but was permissible because fraudulent commercial speech is unprotected).

Here, the initial May 29, 2026 temporary restraints were imposed during a remote hearing with little more than two hours' notice and without any First Amendment review whatsoever. The result was three prior restraints that (1) compelled NBT to immediately remove the entire video from its YouTube channel, (2) prohibited NBT from even writing an article about the video's contents, and (3) prohibited NBT from publishing any videos that might come into its possession in the future. (Da61-Da62). Even the trial court later admitted that those prior restraints were far too broad, but not until after NBT was unconstitutionally gagged by them for nearly six full weeks.⁶

After a second hearing on July 7, 2026, the trial court modified the restraints, but the July 9 order still imposed two prior restraints: (1) it forbids NBT “and the press” from re-publishing the video without first blurring/redacting “the face and identifying markers” of all minors on the video and submitting the redacted/blurred video to the BOE for its “review and approval,” and (2) it forbids NBT “and the press” from publishing the names/identities of the juvenile and “any and all other juvenile/students depicted in the video footage” in any news article. (Da4-Da5).

⁶ NBT discusses the unconstitutionality of May 29, 2026 order and the judicial process in this case in Point IV below.

B. No Exceptional Interest Overcomes the Presumptive Invalidity of the Prior Restraints

The trial court acknowledged that “the point is well-taken that prior restraints are presumptively unconstitutional and must be narrowly tailored,” but then disregarded that well-settled law. The court called this a “tough call” (Da58), but the law is clear that a juvenile offender’s privacy interest is not an exceptional interest that can justify a prior restraint.

In Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), reporters learned the name of a juvenile arrested for allegedly killing another youth and published it. The reporters and newspapers were then indicted under a statute making it a crime for a newspaper to publish, without the court’s written approval, the name of any youth charged as a juvenile offender. Id. at 97. The parties disagreed whether the statute should be subject to the rigid standards for prior restraints, or whether it should be treated as “a penal sanction for publishing lawfully obtained, truthful information.” Id. at 101. The Court ultimately said that distinction did not matter because even a statute that imposes a criminal sanction still “requires the highest form of state interest to sustain its validity.” Id. at 102.

The Court then considered the governmental interest at stake, which is the

same here:⁷ to “protect the anonymity of the juvenile offender,” which will “further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.” Id. at 104. Despite recognizing that interest was important, the Court held that “[t]he magnitude of the State’s interest in this statute is not sufficient to justify application of a criminal penalty to respondents.” Ibid. Accord Oklahoma Pub. Co. v. District Ct., 430 U.S. 308 (1977) (striking down prior restraint that prohibited press from publishing name and picture of juvenile defendant); Minneapolis Star & Tribune Co. v. Schmidt, 360 N.W.2d 433 (Minn. Ct. App. 1985) (order prohibiting publication of juvenile offender’s name was unconstitutional because trauma from publicity did not overcome heavy presumption against prior restraints); State, ex rel., The Times & Democrat, 274 S.E.2d 910, 911 (S.C. 1981) (“[W]e are aware of no interest of the State or the juvenile which is sufficient to withstand the mandate of the First Amendment when there is an attempt to prevent, because of the youthfulness of the alleged offender, the truthful publication of lawfully obtained information about a

⁷ The trial court described the interest here as: “The public dissemination of the video footage depicting a minor in a disciplinary or potentially criminal context can have lasting reputational, psychological, and safety consequences for the student(s) and his/their family(ies).” (Da49-Da50).

juvenile charged with a crime.”). See also Davis v. Alaska, 415 U.S. 308 (1974) (finding state’s interest in preserving juvenile offender anonymity was not significant enough to overcome another constitutional interest—a defendant’s constitutional right to cross-examine witnesses).

If a juvenile offender’s interest in anonymity does not constitute an interest “of the highest order” necessary to justify a criminal punishment for publishing the juvenile’s name, then it cannot meet the more rigorous standard applied in prior restraint cases. See Southeast Promotions, 420 U.S. at 558 (“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.”). Thus, the interest in juvenile offender anonymity does not present an exceptional interest that overcomes the heavy presumption against constitutional validity.

Despite this binding case law, the trial court said that even if the privacy interests of minors⁸ are not interests of the highest order, it was nonetheless going to “balance the First Amendment rights of the press with the statutory and ethical obligations of the school district to protect its students.” (Da49). The court concluded that the “unique statutory mandates of FERPA, N.J.S.A. 2A:4A-

⁸ The trial court’s prior restraints apply not just to the student who was allegedly caught with a weapon and charged, but every student on the video.

60, and other above cited law, combined with the government’s affirmative duty to protect minors, provide a basis for the [c]ourt to consider a narrowly tailored, temporary restraint” that would “respect both the privacy rights of the student and the press’s right to report on matters of public concern, provided it is limited in scope, duration, and subject matter.” (Da50). That conclusion is unconstitutional and must be reversed.

The threshold question in a prior restraint case is not a balancing of privacy versus First Amendment rights as the trial court characterized it, but whether there is an exceptional interest that overcomes the heavy presumption that prior restraints are unconstitutional. If there is no such exceptional interest—as is the case here—then that is the end of the inquiry and no balancing occurs. As Justice Brennan explained in Nebraska Press:

To be sure, our brief per curiam declared that ““(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,” . . . and that the “Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’” . . . This does not mean, as the [court below] assumed, that prior restraints can be justified on an Ad hoc balancing approach that concludes that the “presumption” must be overcome in light of some perceived “justification.” Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed “must fit within

one of the narrowly defined exceptions to the prohibition against prior restraints.”

[427 U.S. at 592 (Brennan, J., concurring) (emphasis added).]

The fact that the BOE is bound by confidentiality laws like FERPA, that N.J.S.A. 2A:4A-60 prohibits certain public officials from disclosing certain information about juvenile proceedings, and that the video might be exempt under the Open Public Records Act (OPRA) has no bearing on whether the First Amendment allows a court to restrain the media from publishing it.⁹ The interest asserted is not of the highest order and does not fall within the exceptions to prohibition against prior restraints. That should have been the end of the inquiry.

C. The Trial Court’s Restraints Are Underinclusive and Do Not Accomplish the Stated Purpose

⁹ The trial court suggests these laws make this case unique or create an interest of the highest order (Da36-Da39) but almost every U.S. Supreme Court case on prior restraints or subsequent punishment on speech involved strong confidentiality laws. See New York Times Co., 403 U.S. 713 (espionage act); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (statute criminalizing publishing name of rape victim); Oklahoma Pub. Co. v. District Ct., 430 U.S. 308 (1977) (statute criminalizing publishing the name of juvenile offender); Landmark Comms. v. Virginia, 435 U.S. 829 (1978) (statute making it a crime to publish information regarding confidential judicial misconduct proceedings); Daily Mail, 443 U.S. at 102 (statute criminalizing publishing the name of juvenile offender); Florida Star, 491 U.S. 524 (statute criminalizing publishing name of rape victim); Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) (wiretap act). Those confidentiality laws, while serving important state interests, cannot overcome the heavy presumption against prior restraints or even permit a criminal punishment. This case is not unique, nor do the confidentiality statutes authorize the BOE or the court to impose restraints upon NBT.

The U.S. Supreme Court has already held that the state's interest in juvenile anonymity is not an interest of the highest order that could justify a prior restraint or a criminal punishment. Daily Mail, 443 U.S. at 104. But even setting that aside, the trial court's July 9, 2026 restraints fail on an independent ground: they are not tailored to accomplish their stated purpose.

In The Florida Star v. B.J.F., 491 U.S. 524 (1989), the Court held that although protecting rape victims' identities involves "highly significant interests," those interests could not justify criminally punishing a reporter who published a victim's name. Id. at 537-38. The Court also identified an independent defect: the statute's "facial underinclusiveness" raised "serious doubts about whether Florida is, in fact, serving . . . the significant interests which [the government] invokes." Id. at 540. The statute prohibited publication only in an "instrument of mass communication" but "d[id] not prohibit the spread by other means." Ibid. For example, an "individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers." Ibid. The Court emphasized: "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by

applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.” Ibid. As Justice Scalia elaborated:

[A] law cannot be regarded as protecting an interest ‘of the highest order’ . . . and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. In the present case, I would anticipate that the rape victim’s discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name. Yet the law in question does not prohibit the former in either oral or written form. Nor is it at all clear, as I think it must be to validate this statute, that Florida’s general privacy law would prohibit such gossip.

[Id. at 541-42 (Scalia, J., concurring).]

Here, the prior restraints must be reversed because there is no exceptional interest at stake that overcomes the presumption against constitutional invalidity. But like in Florida Star, there is also an independent reason—the prior restraints are underinclusive because they apply only to the press. The trial court perhaps realized there was an underinclusivity problem with its initial order, which imposed prior restraints only on NBT and not any other media.¹⁰ But the modified order remains underinclusive to serve the stated interest because it does not prohibit other students, community members, or any of the more than

¹⁰ This nationwide gag order creates serious due process concerns because “the press” had no notice or opportunity to be heard.

5,500 people who watched the video (or even downloaded it) from widely sharing the names of the juvenile or the other students via social media posts or community gossip. That is exactly the “independent ground” the Court cited in Florida Star when finding that the newspaper could not be punished for publishing the juvenile’s name.¹¹

Because this case does not present an “exceptional” interest that permits a prior restraint on speech, the July 9, 2026 order must be reversed.

II. THE ORDER IS ALSO UNCONSTITUTIONAL UNDER THE DAILY MAIL STANDARD (Da37)

In Daily Mail, the Supreme Court held that “[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 to further a state interest of the highest order.” 443 U.S. at 103. Because prior restraints are the “least tolerable infringement on First Amendment rights,” Nebraska Press, 427 U.S. at 559, they demand an even more exacting standard: they are presumptively invalid and permissible only in exceptional cases. CBS,

¹¹ Of course, any order prohibiting the entire public from speaking the juvenile’s name would be blatantly unconstitutional because the First Amendment protects truthful speech. See G.D. v. Kenny, 205 N.J. 275 (2011) (statute that makes it a petty disorderly persons offense to disclose an expunged arrest could not be constitutionally applied to a member of the public). This only proves there is no constitutionally permissible way to stop the media or the public from writing or speaking about the juvenile’s identity.

Inc., 510 U.S. at 1317. Thus, although Daily Mail confirms that juvenile offender anonymity is not an interest of the highest order, the more fundamental bar on prior restraints controls and it has not been satisfied here.

But even under the less demanding Daily Mail test, the trial court erred. NBT satisfies every requirement of the Daily Mail standard.

A. The Trial Court Erred In Concluding that NBT Did Not Satisfy Daily Mail’s “Lawfully Obtained” Prong

1. Even if Source Unlawfully Obtains Material, Daily Mail Permits a Reporter to Publish It

The trial court at first correctly explained:

The Court would agree with the Defendant, to a certain extent, that even if the video was unlawfully obtained, the claimed First Amendment protection for publication would generally remain intact. It is acknowledged that the Supreme Court and other courts have consistently held that the press may publish truthful information of public concern, even if the source obtained it illegally, so long as the press did not participate in the unlawful acquisition. The remedy for any alleged illegality in obtaining the material is not a prior restraint or censorship, but rather civil or criminal action against the wrongdoer.

[Da37 (emphasis removed).]

But then the trial court contradicted itself and added:

However, if the press obtained the surveillance footage through a leak or an independent source – or if illegally obtained by others without its participation or direction - rather than an Open Public Records Act (OPRA) request, the court still must balance the juvenile’s

statutory right to confidentiality (N.J.S.A. 2A:4A-60) against the severe constitutional presumption against censorship.

[Da37.]

Respectfully, this line of reasoning is both factually and legally incorrect.

Neither the Daily Mail line of cases nor the prior restraint doctrine stands for the proposition that First Amendment protection is limited to truthful reporting of information received directly from the government,¹² or that the government may restrain or punish the publication of truthful information simply because it was obtained from a source who violated the law or from an unauthorized leak. To the contrary, case after case holds precisely the opposite.

For example, in the Pentagon Papers case, it did not matter to the U.S. Supreme Court that a third party had stolen the highly classified documents and unlawfully leaked them to the *Washington Post* and *New York Times*. The government still could not enjoin the newspapers from publishing them because the governmental interest in protecting classified material about past military operations was not the type of exceptional interest that overcomes the presumption against prior restraints. New York Times Co., 403 U.S. at 714. See Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) (discussing the Pentagon Papers

¹² In Daily Mail, the juvenile's name was obtained from various newsgathering sources, not through public records or court proceedings.

case and noting “the attention of every Member of this Court was focused on the character of the stolen documents’ contents and the consequences of public disclosure” and “neither the majority nor the dissenters placed any weight on [the] fact” that the documents were stolen).

In Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), the Court confronted a statute that made divulging or publishing confidential information from the judicial disciplinary commission a criminal violation. Id. at 836. A newspaper nonetheless published a truthful article about pending confidential charges made against a judge, which included the judge’s name and photograph. Id. at 832. The newspaper’s source was unidentified individuals who violated the law by divulging the information to the newspaper. After the newspaper was found guilty of violating the law, the Court struck down the statute and found that the First Amendment protected the newspaper’s right to publish the truthful information that had been leaked to them. Id. at 838.

In Bartnicki, 532 U.S. 514, the Court squarely addressed whether the government may punish a publisher who obtained information “from a source who has obtained it unlawfully.” Id. at 528. There, a third party illegally intercepted a phone call between union leaders during contentious school district negotiations; one leader threatened to “blow off” the negotiators’ “front porches.” Id. at 518-19. A radio host played the tape on air. Id. at 519. The union

officials then sued, arguing that the “private telephone conversation had been obtained by means of an illegal interception.” Ibid.

Applying the Daily Mail principle, the Supreme Court recognized that “state action to punish the publication of truthful information can seldom satisfy constitutional standards.” Id. at 527. Although it also recognized an important privacy right served by wiretap statutes that forbid surreptitious recording of private phone calls, it held the media could not be punished for publishing the call because “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.

Even in the context of illegal recordings from within a school, courts have upheld the media’s right to publish them. In Yurish v. Sinclair Broadcast Group Inc., 866 S.E.2d 156 (W.Va. 2021), a student’s mother placed a secret recording in the student’s hair so that she could surreptitiously record school staff. The recording was then given to the media, who broadcast the audio and exposed that staff physically and verbally abused students. Id. at 159. Relying upon Bartnicki and Daily Mail, West Virginia’s highest court found that even if the recordings were illegally made in violation of the wiretapping statutes, the media’s publication of the recordings was protected by the First Amendment. Thus, the wiretapping statute, which imposed penalties for such reporting, was unconstitutional under the First Amendment.

Here, the court was wrong to hold the First Amendment does not apply when the media publishes material that a source leaked or illegally obtained.

2. The Shield Law Protects NBT From Disclosing Its Sources

The trial court's decision also suggests that NBT may not be entitled to Daily Mail protection because it did not prove that it lawfully obtained the video. But the burden for overcoming the First Amendment to justify a prior restraint or a punishment on speech rests with the BOE, not NBT. New York Times Co., 403 U.S. at 714; Daily Mail, 443 U.S. at 102.

Although the trial court's decision states that the "BOE alleges that NBT obtained and published confidential surveillance footage from the District's internal system without authorization," (Da34) the BOE made no such allegation. The verified complaint merely asserts that the BOE "came across a YouTube video link posted by the Defendant, New Brunswick Today, of a confidential school security/surveillance video involving a minor child taken at Plaintiff's New Brunswick High School, as posted on the website of New Brunswick Today." (Da66). Superintendent Johnson certified:

8. Upon review, the video posted publicly is the exact surveillance footage maintained within the district's internal security surveillance system.

9. The district has reason to believe that the footage was recorded from a computer by an individual with access to the district's surveillance system and disseminated without authorization (the district is conducting its own

investigation for this purpose).

...

14. The district did not authorize the release or public dissemination of this surveillance footage.

[Da70-Da71.]

And despite the passage of time, Johnson did not include any information in his June 23, 2026 certification about the status of his investigation into the alleged breach. (Da95-Da96). Thus, the BOE did not even allege that NBT unlawfully obtained the video, let alone produce evidence to meet its heavy burden of proof.

NBT explained that the video was lawfully obtained, but the trial court seemed to suggest that NBT must disclose its sources to establish that fact. See Da21 (“The Defendant’s Editor, Charlie Kratovil, certified to the Court that the video was ‘lawfully obtained’ but failed to disclose how or from whom.”). But BOE has the burden of proof and NBT has a privilege under New Jersey’s Shield Law not to disclose the “source . . . or person from or through whom any information” is obtained. N.J.S.A. 2A:84A-21. The privilege is “absolute,” Too Much Media, 206 N.J. 209, 227 (2011), and “affords newsmen a broad privilege against compulsory disclosure of the information they gather and the identities of the sources of that information.” In re Schuman, 222 N.J. Super. 387, 390 (App. Div. 1988), rev’d on other grounds, 114 N.J. 14 (1989).

Our Supreme Court has held that a media defendant does not waive the

privilege through partial disclosure or by invoking a defense, even if invocation of the privilege prohibits a plaintiff from obtaining evidence to meet its burden of proof. See Maressa v. New Jersey Monthly, 89 N.J. 176 (1982);¹³ In re Venezia, 191 N.J. 259, 284 (2007) (reaffirming Maressa and declaring that a reporter “may be questioned only about specific information that he has already disclosed”).

Thus, NBT’s refusal to disclose its sources does not somehow alleviate the BOE of its heavy burden of proof in this case or deprive NBT of Daily Mail protection.¹⁴

¹³ In Maressa, a defamation case, the plaintiff argued that the media defendants waived the privilege due to partial disclosures and invoking affirmative defenses, such as truth and lack of malice. 89 N.J. at 186. The Supreme Court disagreed and held that the defendants had an absolute privilege not to provide discovery or testify, even if that deprived the plaintiff of information necessary to prove important elements of their case, such as actual malice. Id. at 187-88.

¹⁴ Even if NBT had obtained the video unlawfully, the remedy is not a prior restraint. In CBS, Inc., the trial court found that CBS had obtained the video “at the very least, through calculated misdeeds” because it had convinced a federal employee to wear an undercover camera during his shift at a meatpacking plant. 510 U.S. at 1316. The Supreme Court said that did not matter: “Even if criminal activity by the broadcaster could justify an exception to the prior restraint doctrine under some circumstances, the record developed thus far contains no clear evidence of criminal activity on the part of CBS[.]” Id. at 1318. The Court continued that if CBS had in fact violated the law, the plaintiff’s remedy was through civil damages, not a prior restraint. See also Nebraska Press, 427 U.S. at 588, n. 15 (Brennan, J., concurring) (“[E]ven if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.”).

In conclusion, the July 9, 2026 order is invalid under either the prior restraint doctrine or the Daily Mail test because there is no interest of the highest order in this case, among other reasons. This Court should immediately reverse.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT UPEPA DOES NOT APPLY TO THIS CASE (Da6; Da41)

UPEPA allows a party to seek dismissal, or partial dismissal, of any:

cause of action asserted in a civil action against a person based on the person's:

- (1) communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
- (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
- (3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.

[N.J.S.A. 2A:53A-50(b).]

If a communication qualifies for protection under UPEPA, it may nonetheless be excluded from that protection if one of UPEPA's three exceptions apply. To claim an exception, the respondent to the UPEPA motion (here, the BOE) has the burden of proving that the cause of action is either:

- (1) against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;

- (2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety; or
- (3) against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services.

[N.J.S.A. 2A:53A-50(c).]

UPEPA must be construed “broadly . . . to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United States Constitution or the New Jersey Constitution.” N.J.S.A. 2A:53A-59.

Under UPEPA, a court “shall dismiss with prejudice a cause of action, or part of a cause of action” if two steps are satisfied. N.J.S.A. 2A:53A-55(a). First, the court determines that UPEPA applies to the speech at issue and that the responding party failed to establish that any of UPEPA's exceptions apply. N.J.S.A. 2A:53A-55(a)(1)-(2). If step one is satisfied, the court examines the adequacy of the complaint in step two. N.J.S.A. 2A:53A-55(a)(3).

UPEPA provides an appeal as of right from an order denying an OTSC filed under UPEPA. N.J.S.A. 2A:53A-57. This appeal involves UPEPA's first step and the court's sua sponte determination that an exception applies. The BOE did not

argue that any exception applies but instead argued that UPEPA did not apply because the video, or the juvenile's identity within it, did not relate to a matter of public concern. (Da29). The trial court correctly held that the video's "subject matter is indeed of public interest and concern." (Da47).

Nonetheless, although the BOE did not argue that any of UPEPA's exceptions apply, the trial court held that although the action was a matter of public interest, UPEPA did not apply because the cause of action in this case was asserted "by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to health or safety." N.J.S.A. 2A:53A-50(c)(2). The court provided scant analysis to support its holding (indeed there are no cases applying the exception), merely stating that the exception applies because the BOE sought to protect "the minor students depicted in the video and in safeguarding disclosure of security measures in place and taken to protect them." (Da42).

To prove the exception applies, the BOE had the burden of proving three elements: (1) that its cause of action was filed by a governmental unit, (2) that its cause of action was "to enforce a law," and (3) that the action was filed "to protect against an imminent threat to health or safety." N.J.S.A. 2A:53A-50(c)(2). It cannot satisfy this test, which is why it could not claim this exemption.

Clearly the cause of action was filed by a governmental unit. Regarding the second element, the BOE's action was not to "enforce a law" because the laws it pleaded in its verified complaint provide it no standing or private enforcement powers to enforce the law. Although FERPA imposes obligations upon schools to safeguard student records, it does not create a private right of action to a student or a BOE to enforce it. See Gonzaga University v. Doe, 536 U.S. 273 (2002) (concluding that FERPA creates no enforceable private right of action). Notably, neither the BOE nor the trial court pointed to a single case in which a school board was able to bring an action under FERPA, as no such cases exist.

The BOE also has no standing to enforce N.J.S.A. 2A:4A-60(h), which provides that:

Whoever, except as provided by law, knowingly discloses, publishes, receives, or makes use of or knowingly permits the unauthorized use of information concerning a particular juvenile derived from records listed in subsection a. or acquired in the course of court proceedings, probation, or police duties, shall, upon conviction thereof, be guilty of a disorderly persons offense.

[N.J.S.A. 2A:4A-60(h) (emphasis added).]

That statute also clearly does not apply. First, N.J.S.A. 2A:4A-60(a) applies only to the "[s]ocial, medical, psychological, legal and other records of the court and probation division, and records of law enforcement agencies."

(emphasis added). The video here is not a record of any of the enumerated entities, nor does it fall within any of those categories of records.¹⁵ Additionally, the video and the information within it was not “acquired in the course of court proceedings, probation, or police duties.” N.J.S.A. 2A:4A-60(h). More importantly, disorderly persons convictions must be prosecuted by a prosecutor in municipal court, not by a BOE in the Chancery Division.

Regarding the third element, the BOE cannot prove that its action was filed “to protect against an imminent threat to health or safety.” N.J.S.A. 2A:53A-50(c)(2). The BOE itself concedes the video presents privacy concerns, not “imminent health and safety” concerns. See Da71 (disclosure “raises significant concerns regarding student privacy rights, potential FERPA-related concerns, and may place students at risk of embarrassment, intimidation, retaliation or other potential harm”).

To the extent the BOE argues the video reveals “components of the district’s internal security operations, including security staffing, responses,

¹⁵ The trial court cited Digital First Media v. Ewing Twp., 462 N.J. Super. 389 (App. Div. 2020), which involved N.J.S.A. 2A:4A-60, for the proposition that “blurring or blocking out a juvenile’s face and identifying details satisfies the minor’s right to privacy while preserving the public’s right to inspect the conduct of public officials and school security.” But the report at issue in that case—a use of force report—was a record held by a law enforcement agency and thus was arguably protected by N.J.S.A. 2A:4A-60, unlike the video at issue here. More importantly, OPRA does not extend to prohibit the media from publishing records it obtains from other sources. The trial court repeatedly confused these concepts.

screening procedures, camera positioning, and building security and safety protocols,” (Da71) such concerns can hardly be considered an “imminent threat to health or safety.” The school’s security system is visible to everyone who walks into the building. Revealing a student passing through a metal detector and being frisked and arrested does not expose highly sensitive information that puts everyone in immediate harm. The trial court clearly agreed because its July 9, 2026 order allows the press to re-publish the video without requiring any redactions to that alleged security information.

The statute directs that UPEPA be “broadly construed to protect the exercise of the right of freedom of speech and of the press.” 2A:53A-59. Further, the statute’s exemptions must be applied narrowly. Holtec Int’l v. Javerbaum Wurgaft Hicks Kahn Wikstom & Sinins, PC., ___ N.J. Super. ___ (App Div. 2026) (citing Wright v. Vogt, 7 N.J. 1, 6 (1951)).

Accordingly, the trial court erred in applying UPEPA’s second exception and, at a minimum, NBT is entitled to attorney’s fees for partially prevailing by forcing the trial court to modify and narrow its prior temporary restraints.

IV. THE PROCESS THAT LED TO THIS APPEAL MUST BE ADDRESSED AND REMEDIED (Da15-Da19)

A prior restraint is “the most serious and least tolerable infringement on First Amendment rights,” Nebraska Press, 427 U.S. at 559, and “[w]here . . . 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.” CBS, Inc., 510 U.S. at 1317 (quoting Nebraska Press Ass’n v. Stuart, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)). See also Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

Accordingly, courts have held a prior restraint may not be imposed without a First Amendment review even if the restraints are temporary so that the court has time to receive and review briefing. For example, in Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), opinion modified on reh’g, 820 F.2d 1354 (1st Cir. 1987), the First Circuit was “sympathetic” to the district court’s “natural instinct . . . to delay the matter temporarily so that a careful, thoughtful answer could be crafted” given the emergent nature of the proceedings and the lack of adequate legal briefing to inform its decision. Id. at 1351. Nonetheless, the court found that “[t]his approach is proper in most instances, and indeed to follow any other course of action would often be irresponsible. But, absent the most compelling circumstances, when that approach results in a prior restraint on pure speech by the press it is not allowed.” Ibid. Accord New York Times Co., 403 U.S. at 727 (Brennan, J., concurring) (“[E]very restraint in this case, whatever its form, has violated the First

Amendment—and not less so because the restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly”); Capital Cities Media, Inc. v. Toole, Jr., 463 U.S. 1303 (1983) (“[W]e have recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints. It is clear that even a short-lived ‘gag’ order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to the First Amendment so long as it remains in effect.”); R. Smolla, 1 Smolla & Nimmer on Freedom of Speech § 11:28 (2026) (“[I]t is a well-settled principle at the intersection of First Amendment law and preliminary injunctive relief practice that the loss of First Amendment freedoms, even for short periods of time, constitutes ‘irreparable injury’ of the sort normally warranting expeditious judicial intervention.”).

Indeed, the U.S. Supreme Court has recognized that the heavy presumption against prior restraints “is not reduced by the temporary nature of [the] restraint.” Nebraska Press, 427 U.S. at 559. The speed at which the U.S. Supreme Court handles prior restraint cases demonstrates the expedience that the First Amendment demands:

In the Pentagon Papers case, only fifteen days elapsed between the government’s motion for a preliminary injunction on June 15, 1971, and the Supreme Court’s reversal on June 30, 1971. New York Times Co., 403 U.S. 713.

The Court granted certiorari the day after receiving the petition, heard oral argument the following day, and issued its opinion four days later. Ibid.¹⁶

In CBS, Inc., 510 U.S. at 1316, the state high court gave the lower court nearly five weeks to address its prior restraints. That was not fast enough. The Supreme Court stayed the injunction just two days after it was imposed, with Justice Blackmun declaring that “indefinite delay of the broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment.” Id. at 1317.

In Nebraska Press, 423 U.S. 1319, the state high court refused to hear a motion to stay prior restraints until its next motion day, which was more than a month away. Justice Blackmun stated that if the court took until December 1, 1975 to act, “the very day-by-day duration of that delay would constitute and aggravate” the deprivation of “profound” constitutional rights and he would “not hesitate to promptly act.” Id. at 1325. However, because the state high court indicated it would hear the motion sooner, Justice Blackmun did not act, but said his inaction was not “without prejudice to the applicants to reapply to me should prompt action not be forthcoming.” Ibid.

¹⁶ The dissents focused on the “feverish” speed of the case. But Justice Black would have immediately vacated the injunction without oral argument because “every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.” New York Times Co., 403 U.S. at 714-15 (Black, J., concurring).

In the Nazi march on Skokie case, the Court intervened after a trial court enjoined Nazis from marching, displaying swastikas, or distributing hate materials, and the state high court denied both a stay and expedited review. National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977). The Court recognized that an appeal in the normal course could take “a year or more to complete” and held that without “strict procedural safeguards . . . including immediate appellate review,” the restraints must be stayed. Id. at 44 (emphasis added).

The process here stands in stark contrast. On May 29, 2026, the trial court heard argument roughly two hours after the BOE filed suit and imposed sweeping prior restraints without conducting any First Amendment analysis. It prohibited NBT from even publishing a news article about the video, relief that the BOE had not even sought. The court later conceded it should not have done so (Da48), but not until NBT had been unconstitutionally gagged for six weeks.

NBT twice sought a reversal or stay from our appellate courts but was told each time there was no irreparable injury because the restraints were only temporary to “allow the trial court to address these issues in the first instance” and could be lifted on three days’ notice. (Da91). Respectfully, the appellate courts missed the point: imposing prior restraints without any First Amendment scrutiny is itself a constitutional violation, which appellate inaction sanctioned.

When the trial court then refused to hear that motion on three days' notice, the unconstitutional errors compounded. NBT again filed emergent applications for a stay, to have the trial court hear the motion sooner, or to have the motion assigned to a different judge. Our appellate courts denied that relief purely due to deference to a trial court's control of its own calendar. (Da93). But neither the federal nor state Constitutions allow prior restraints to be imposed for weeks without any First Amendment review. Southeastern Promotions, 420 U.S. at 562 (finding court procedures inadequate where "effective review on the merits" did not occur for months, leaving the restraint in place). To comply with the First Amendment, the prior restraints should have immediately stayed until a court could perform the correct review.

After the trial court issued its July 9, 2026 order, the appellate courts again denied a stay, erroneously stating there was no "irreparable harm." The Supreme Court ordered this appeal "expedited" (Da130), but that order is illusory, as briefing under the scheduling order does not conclude for nearly three months.¹⁷ (Da144). That falls far short of the immediate, exacting review the First Amendment demands.

¹⁷ NBT filed its notice of appeal only a few hours after the Supreme Court issued its order that this appeal should be expedited. NBT files this brief weeks before the scheduled deadline, in hopes that the scheduling order will be adjusted so that this appeal can be resolved much faster than the current schedule.

Although NBT is confident this Court will reverse, reversal will come far too late. NBT has suffered irreparable harm from prior restraints that have been in place for two months and will remain for months more. The slow pace of these proceedings is itself an independent constitutional defect. This Court should provide guidance to ensure that prior restraint cases receive the immediate, exacting scrutiny that the First Amendment demands.

CONCLUSION

For the foregoing reasons, this Court should: (1) immediately reverse the July 9, 2026 order as an unconstitutional prior restraint; (2) hold that UPEPA applies and that NBT is a prevailing party entitled to attorney's fees; and (3) make clear that prior restraint cases demand expeditious review, or, at a minimum, a stay of the restraint until a First Amendment analysis can take place.

Respectfully Submitted,

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