PAUL G. BRENNAN, ESTHER KOAI, JAKOB WEINGROFF, JESSICA WEINGROFF, RONALD PUORRO, KATHRYN PUORRO, Plaintiffs-Movants, v. BAY HEAD PLANNING BOARD and KAITLYN TOOKER BURKE and DONALD F. BURKE JR., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: M- On Motion for Leave to Appeal an Interlocutory Order of the Superior Court of New Jersey Law Division: Ocean County Docket No. Below: OCN-L-340-21 Sat Below: Hon. Marlene Lynch Ford, A.J.S.C.

BRIEF IN SUPPORT OF LEAVE TO APPEAL AND PUBLIC APPENDIX

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PRELIMINARY STATEMENT

Plaintiffs Paul Brennan, Ronald Puorro, Kathryn Puorro and Esther Koai, as well as their attorney, Michele Donato, seek leave to appeal from a series of orders that violate the First Amendment.

The Law Division has issued what the judge termed a "gag order," forbidding the plaintiffs in this case, and their attorney, from disseminating information contained in minutes of the Borough Council of Bay Head sitting in executive (non-public) session, that the Borough willingly, albeit mistakenly, provided to Brennan under the Open Public Records Act (OPRA). Moreover, the trial judge has sealed in their entirety the Brennan certifications that explain how the disclosures came about and that lay out in detail the public sources for the information claimed to be confidential; one of the briefs has also been sealed. The certifications thus laid the basis for the plaintiffs' argument made below that a ban on disclosure of "the confidential information" effectively prohibits them from disclosing information that they obtained independently of the OPRA disclosure.

The sealing orders, issued with no explanation and not limited to the small part of the certifications that defendants claimed was confidential, violate longstanding precedent from the New Jersey Supreme Court and this Court recognizing the common law and First Amendment right of access to judicial

records. The gag order barring disclosure of allegedly confidential information that plaintiff Brennan lawfully obtained from the Borough of Bay Head under OPRA violates the First Amendment as construed by a well-settled series of decisions of the U.S. Supreme Court.

Interlocutory review of these orders is necessary because the free speech rights of these individuals, as well as the rights of the public to access court records, is irreparably harmed by the orders below. Accordingly, this Court should grant leave to appeal and order merits briefing.

FACTUAL BACKGROUND

The appeal arises from a land-use controversy in the Borough of Bay Head. Donald F. Burke, Jr., seeking to build a home for his own family on a large parcel in the wetlands section of Bay Head, known as "Lot 13," sought variances from the Bay Head Planning Board. He sued the Planning Board in June 2020, arguing that its delay in addressing his application during the pandemic amounted to approval under New Jersey law, and seeking a declaration from the Law Division that the application be deemed approved. *Burke v. Bay Head Planning Board*, OCN-L-1402-20. [1]

[1] Movants provide these background facts to assist the court in understanding the procedural posture of the case, but do not attach the complaints and other documents to spare the Court excess paperwork because those documents are not necessary for adjudication of this motion.

Paul Brennan and other Bay Head neighbors, concerned about the environmental impact of the proposed Lot 13 construction project, filed their own suit in February 2021 against the Planning Board and the Burkes. *Brennan v. Bay Head Planning Board*, OCN-L-340-21. Their complaint alleged in part that Burke, in a cynical effort to exploit the sensitivities of Bay Head officials to the Borough's insufficiencies in the area of affordable housing, was apparently threatening to build affordable housing units on the wetlands if the variances he sought for a family home were denied or subject to conditions. (PCa2). Both cases were assigned to the Hon. Marlene Lynch Ford, A.J.S.C., who denied a motion to consolidate the two lawsuits.

Unbeknownst to the *Brennan* plaintiffs, during the spring of 2021, the parties to the *Burke* lawsuit—all of whom are defendants in the *Brennan* lawsuit—approached Judge Ford to get approval of an effort to maintain the confidentiality of settlement discussions that they desired to conduct. They presented Judge Ford with a consent order, which she signed April 28, 2021, providing that "the parties' communications regarding settlement are confidential and not subject to disclosure to third parties including but not limited to requests under [OPRA] . . . ." (Pa11).[2] Even though the parties to the *Burke* litigation were all defendants in the *Brennan*

[2] Pa = Plaintiff's Appendix (public)
PCa = Plaintiff's Confidential Appendix
1T = Transcript of Nov. 8, 2021 OTSC Hearing

litigation, they did not disclose this request to the Brennan plaintiffs.

Meanwhile, plaintiff Brennan, doing his best to keep track of the Burke wetlands construction project, made a series of OPRA requests for the Borough Council's meeting minutes. On September 23, 2021, the Borough produced minutes of seven executive sessions held in December 2020 and February to June 2021. (PCa6). The executive session minutes contained extensive redactions, which had apparently been made using a tool available in Microsoft Word. (Pa25-40).

Brennan opened these documents on his iPhone so that he could read them easily and share excerpts with his attorney in the *Brennan* litigation, Donato. (PCa6-7). Brennan undertook these actions without any intention of getting under the redactions; but when he opened the documents in this manner, the redactions disappeared and he was able to read the entire documents. (PCa7-9). He discovered what he considered to be improper conduct by public officials and he shared the documents with his counsel and other potentially interested citizens. (PCa11; 1T5-6.)

Brennan believed that many of the redactions were inappropriate, and he asked the Borough staff member who had sent him the minutes what the basis was for each of the redactions. (Pa17. The response from the Borough's attorney did not assuage Brennan's concerns, and he continued to furnish

the unredacted minutes to other members of the community. (PCa7).

Meanwhile, Donato, as counsel for plaintiffs, promptly contacted Jean Cipriani, the attorney for the Borough of Bay Head, to let her know that the minutes had not been adequately redacted. (Pa17). Cipriani, in turn, contacted the attorney for defendant Bay Head Planning Board, Stephen Zabarsky, to let him know that Brennan had the unredacted minutes. Zabarsky sent Cipriani the ex parte confidentiality order that had been issued in the *Burke* litigation; Cipriani sent it on to Donato. Cipriani told Donato that, in her opinion, anything that Brennan had done to remove the redactions in the minutes must have been improper, and she asked that no further use be made of the unredacted minutes. (Pa17).

On September 28, 2021, Cipriani met with Brennan and Donato. During that meeting, Brennan demonstrated how the redactions in the minutes had disappeared when he opened the documents on his mobile phone. (PCa14). Cipriani told Donald Burke, Sr., the attorney for the Burkes, that Brennan had the unredacted minutes. On September 30, 2021, Brennan wrote to the Mayor and Council of Bay Head suggesting that they take action to purchase the property, thus mooting the issues in both the *Burke* and the *Brennan* lawsuits, and asking that the subject be discussed at the next Council meeting, scheduled for October 4, 2021. His letter mentioned issues that were revealed by the

unredacted minutes, albeit without specific mention of the minutes themselves. Following this letter, both the Mayor and Council received many communications from members of the public discussing the contents of the unredacted minutes. (Pa17-19).

On October 4, 2021, Cipriani wrote to counsel in the *Brennan* litigation to memorialize her discussions with Brennan and with each of those attorneys. She said that, although the Borough was not a party to either the *Brennan* or *Burke* cases, she would raise in the executive session of that evening's Council meeting whether the Borough should take further action regarding the confidentiality of its discussions. She further indicated that the Brennan proposal would be discussed only in executive session because it involved "pending and anticipated litigation." (Pa18). Nevertheless, there was extensive discussion of the issue at the public portion of the October 4, 2021 meeting, including references to the contents of the redacted minutes which were, plainly, in broad public circulation by that time.

PROCEEDINGS BELOW

On October 12, 2021, the Burke defendants filed an order to show cause (OTSC) why the plaintiffs should not be restrained from "disseminating confidential information contained" in the inadequately redacted executive session minutes, as well as requiring plaintiffs to identify everybody to whom that allegedly confidential information had been communicated; to

take steps to "effectuate the return of the confidential information;" and imposing sanctions "appropriate to deter such conduct going forward." (Pa19-21). The Burkes attached Cipriani's letter as evidence of what had occurred, attested by Cipriani only "to the best of my knowledge," along with a copy of the ex parte confidentiality order in the *Burke* lawsuit. (Pa10-18). Notably, however, the Borough neither filed its own request for an injunction against dissemination of its insufficiently redacted minutes, nor joined in the motion filed by the Burke defendants.

The proposed OTSC provided that plaintiffs be "temporarily restrained from dissemination of the confidential Borough of Bay Head Executive Session Meeting Minutes pending further Order of this Court." (Pa20). The brief submitted in support of this proposed order relied largely on inapposite authority addressing the trade secrets of private businesses, but omitted controlling First Amendment authority from the U.S. Supreme Court. Even though defendants were seeking a judicial remedy restraining the freedom of citizens to criticize their own government, the brief in support of the OTSC made no mention of the First Amendment or of the rule against prior restraints. Moreover, the brief did not explain why the Burkes had standing to complain about the dissemination of the minutes of the Borough, which is not even a party to the Brennan litigation, or about a violation of the attorney-client privilege belonging to the Borough.

Judge Ford signed the OTSC as presented to her without waiting to give the plaintiffs a chance to respond to the proposed gag order.

On October 25, plaintiffs filed their response to the OTSC, along with a motion to dissolve the temporary restraints. (Pa51). The motion was supported by a detailed certification from Brennan, explaining in detail how he viewed the unredacted text without intention of removing the redactions. (PCa1-21). He also explained that he had already given out the minutes to many other residents, and showed that, in a variety of ways, he possessed from other public sources much of the supposedly confidential information the unsuccessfully redacted parts of the minutes contained. As a result, a prohibition on disseminating information contained in the minutes was, in effect, an order forbidding him from talking to others in the community about information that he had obtained entirely independent of the minutes themselves. Brennan attached to his certification more than a dozen documents, already available to him and many of them in the public record, that showed information that was also in the minutes.

In a brief supporting lifting of the restraints, plaintiffs pointed out that it was carelessness on the part of the Borough that led to the provision of documents that Brennan had accidentally unredacted, pointing to many explanations that legal commentators and, indeed, the Government Records Council

(GRC) have given over the past fifteen years about the need for government records officials to perform their redactions by hand instead of by software to avoid releasing information that they wanted to keep confidential.[3] The brief also argued that the injunction was an impermissible prior restraint in violation of the First Amendment. Plaintiffs cited several decisions of the U.S. Supreme Court holding that state laws that purported to forbid member of the public to disclose otherwise private and secret information that they had obtained from government proceedings violate the First Amendment; such decisions had also held that state court injunctions enforcing such provisions similarly violate the First Amendment. Similarly, the Supreme Court has held that when a private citizen lawfully obtains information otherwise protected by state privacy law, it violates the First Amendment to forbid the citizen from communicating that information to the general public. Thus, the brief explained, the proposed injunction forbidding plaintiffs from communicating information that the Borough had intended to

[3] *See* Judge Herbert Dixon, *Embarrassing Redaction Failures*, American Bar Association's Judge's Journal, https://www. americanbar.org/groups/judicial/publications/judges_journal/2019 /spring/ embarrassing -redaction-failures/; Adobe, *Redaction of Confidential Information in Electronic Documents* https://www.wired.com/images_blogs/threatlevel/ 2009/ 12 /redaction. pdf (2006). The GRC has taken note of this issue in a page that has been on its web site since 2009. *Redacting Government Records*, https://www.nj.gov/grc/ custodians/redacting/.

redact from the executive session minutes violated the rule against prior restraints and hence was forbidden by the First Amendment.

In a reply brief filed in support of its proposed order, the Burkes submitted a series of emails from Cipriani in which she laid out some local laws that she thought barred disclosure of the minutes, and attached copies of the redacted minutes as they had been supplied to Brennan. (Pa22-48). However, the Burkes did not file the unredacted minutes, even under seal, so that the trial judge could conduct an independent review to assess the need for confidentiality.

On October 27, 2021, the Burke defendants filed a new motion, asking Judge Ford to delete Brennan's entire certification from the record on the ground that paragraph 24 of the certification mentioned one of the redacted subjects in the minutes of the June 2021 executive session. (Pa49). In response, Brennan explained why he did not believe that his initial certification had violated any confidentiality requirements (PCa53-54), but said that he would submit an amended certification from which the details in paragraph 24 had been deleted. (Pa57). He filed the "Supplemental Certification" on November 1, 2021. (PCa22-46).

On November 8, 2021, Judge Ford held an OTSC hearing at which plaintiffs, the Burke defendants, and counsel for the Bay Head Planning Board appeared; nobody appeared for the Borough,

whose minutes and supposed confidentiality rights were at issue. During the hearing, both Judge Ford and counsel for the Burkes acknowledged that Brennan had already widely disseminated the minutes and information contained in those minutes, 1T5-7, 1T13, but the Burkes argued, and the judge agreed, that it was important to forbid Brennan from disseminating the information further. (1T6, 26). The judge acknowledged that Brennan had not intentionally removed the redactions, 1T6, 1T26, but she opined that once he understood that Bay Head had intended to keep the information confidential, it was wrong of him to keep giving the information out instead of filing a lawsuit under OPRA and litigating over the redactions that he deemed improper. (1T11-13). The judge acknowledged that plaintiffs' counsel had raised First Amendment arguments, but said that because plaintiffs and their counsel had submitted to the jurisdiction of the court by bringing this litigation, she had the power to issue a gag order prohibiting them from disseminating information even though plaintiff Brennan had obtained the same information from other sources and even though it pertained to discussions about settlement of different litigation than the suit in which the gag order was being imposed. (1T19). The judge declared that she was going to enjoin the further dissemination of "confidential information" contained in the minutes in order to protect "the rights of both the Town and the Planning Board as well as . . . the Burkes as to their

confidential communications." (1T26).

Accordingly, on November 19, 2021, Judge Ford enjoined "further dissemination and use in this litigation of confidential information redacted by the Borough of Bay Head in the Executive Session Meeting Minutes provided to Paul Brennan through [OPRA]." (Pa1). The order further directed that Brennan's October 25 certification be deleted from the eCourts docket, but be retained by the court under seal. (Pa2). The court issued a separate order on November 19, 2021, directing that both the original Brennan Certification and the Supplemental Certification be deleted from the electronic docket but retained in the court's paper files, marked "Confidential."[4] (Pa3).

LEGAL ARGUMENT

I. To Protect First Amendment Rights, the Court Should Grant Leave to Appeal from the Trial Court's Orders Forbidding Disclosure of Information. (Pa1-Pa2)

The controversy about how Lot 13 should or should not be developed has been a subject of intense local controversy, and the minutes revealed important aspects of how the Bay Head Council was dealing with that controversy.[5] By deciding that one

[4] The electronic docket, and notices to delete that were sent to Donato, indicate that "briefs" filed by Donato were ordered to be deleted from eCourts. There appears to be no written order sealing or deleting any briefs, despite such requests being made. *See* Certification of Paul Alan Levy. One of the briefs has been deleted from eCourts; the other remains.

[5] Movants do not delve into the details of the unredacted

side in the debate is unable to make any reference to information about that subject, simply because it was discussed in an executive session that the Borough mistakenly supplied with incompetent redactions, and even though, as the Brennan Certifications show, Brennan and his fellow plaintiffs already had independent access to much of the same information, the court below has improperly disabled one side in an important public discussion, in violation of the First Amendment.

The Court should grant leave to appeal the trial court's orders forbidding Brennan, the other plaintiffs and their attorney, Donato, from disseminating confidential information contained in the insufficiently redacted Bay Head Council minutes because that order is flatly forbidden by longstanding U.S. Supreme Court precedent under the First Amendment. The Supreme Court has repeatedly ruled that when otherwise private information has been lawfully obtained, whether from the government or from private parties, members of the public cannot be forbidden from disseminating that information.

Several cases address the issue mistakenly release by government bodies of information protected from public disclosure by state statutes intended to protect the personal privacy of juveniles or sexual assault victims; each holds that the First Amendment trumps the claimed privacy right. *Florida*

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minutes or the Certifications to avoid any need to file a redacted version of this motion. Should leave to appeal be granted, it may be necessary to file partially redacted briefs.

Star v. BJF, 491 U.S. 524, 541 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, (1975). For example, in *Florida Star*, the Duval County Sheriff's Department prepared a report of a victim's claim of sexual assault, including the victim's full name, and placed that report in its pressroom. A newspaper intern found the report and copied it verbatim; the newspaper then published an account of the alleged assault, including the victim's full name. The victim sued the newspaper for damages and recovered a verdict, but the Supreme Court reversed, holding that the right to publish truthful information obtained from the government, even though the government should have kept the information secret, was protected by the First Amendment.

Similarly, in *Smith* and *Oklahoma Publishing*, newspapers published the names of juveniles who had been charged in juvenile proceedings, in violation of state statutes, after one of the media companies got the names by being in an open courtroom from which the court had failed to exclude reporters; the other company got the names by monitoring the police band. The Supreme Court held that judicial gag orders forbidding the media from repeating the names (*Oklahoma Publishing)* and indictments of two newspapers for having published the names (*Daily Mail*) were unconstitutional.

The Supreme Court returned to the issue of the publication of private information in violation of privacy laws in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where a radio commentator played a surreptitiously recorded conversation between two union leaders, held by cellphone, about their union's contentious contract negotiations. Although the interception and recording of the call were themselves illegal, the radio commentator was not the person who made the recording; he only received it and played it. Both federal and state laws made interception and recording of phone conversations illegal, and they provided causes of action against anybody who discloses an illegally recorded communication with knowledge of the illegality. But the Supreme Court held that because the radio commentator was neither involved in the illegal recording, nor complicit in the illegal interception, he could not be sued for truthfully reporting its contents or, indeed, for playing the recording. *Id.* at 519, 535.

Similarly, in this case, Brennan received public documents which, due to the carelessness of the public employee who sent it to him, disclosed information claimed to be exempt from disclosure. Even if the Borough employee acted improperly in releasing the document without effective redaction (and appellants do not agree that the redactions are appropriate), Brennan had no involvement in that employee's error of judgment, and indeed Brennan did not act deliberately to unredact the

document. The very act of opening the document stripped away the redactions, which occurred solely because of the Borough's mistake. Consequently, under *Bartnicki*, no claim lies against Brennan for redistributing the document that he obtained in an entirely lawful manner.

Especially problematic is the aspect of the Court's order that enjoins Brennan, the other plaintiffs, as well as their attorney, from further dissemination of the document: that order is an impermissible prior restraint. Injunctions against the future exercise of First Amendment rights are almost always impermissible — it requires a countervailing interest on the order of a severe threat to life and limb, such as the disclosure of troop movements, to warrant the issuance of a prior restraint. *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697, 706 (1931).

Thus, for example, when court officials carelessly allowed reporters to be present in court during a juvenile proceeding, the Supreme Court held in *Oklahoma Publishing* that it was an impermissible prior restraint to enjoin the press from publishing the name and photographs of the eleven-year-old boy who was subject to the proceeding, even though a state statute prohibited publication. 430 U.S. at 311-12. Similarly, after a government employee copied classified documents, in violation of his oath of secrecy and of various criminal statutes, and the

New York Times began to publish them despite warnings from the government that disclosure would cause grave and irreparable damage to the national security, the Supreme Court found an impermissible prior restraint. *New York Times*, 403 U.S. at 714. In the words of Justice Black, "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *Id.* at 715. And when a realtor complained that a community group's distribution of leaflets accusing him of "blockbusting" was damaging his business and reputation, as well as invading his privacy, the Supreme Court again found an impermissible prior restraint. *Organization for a Better Austin*, 402 U.S. at 419-420.

The Burkes' interest in concealing private discussions that they had with some city leaders does not even rise to the level of privacy that were asserted by the child in *Oklahoma Publishing*, the sensitive military secrets in *New York Times*, or the reputation of the realtor in *Organization for a Better Austin,* and which even so were not sufficient to justify a prior restraint. Consequently, the trial court's prohibition against publication of the unredacted documents should be vacated as an impermissible prior restraint. *See also Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 226 (6th Cir. 1996) (holding impermissible that a prior restraint against publication of a trade secret, and citing *In the Matter of Providence Journal*

Co., 820 F.2d 1342, *modified on reh'g* 820 F.2d 1354 (1st Cir.1986)).

The court below indicated during the OTSC hearing that it was invoking the power to issue "gag orders" limiting the ability of parties and their attorneys to speak publicly during litigation. (1T19). However, a trial judge may issue a gag order only when supported by "specific findings that there is a reasonable likelihood of prejudicial pretrial publicity which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." *State v. Carter*, 143 N.J. Super. 405, 409 (App. Div. 1976). The lawsuit seeks injunctive relief and will be tried by the bench, where there is no similar danger of prejudicing the finder of fact. The power to limit extra-judicial comments does not give trial judges a roving commission to prohibit speech unrelated to that goal.[6]

[6] The Burkes' OTSC relied heavily on the consent order in their suit against Bay Head Planning Board, allowing that body to treat its own documents as confidential, but the trial court did not cite that order in granting the prior restraint, and that order does not provide an alternate ground supporting the gag order. The order on its face does not purport to direct third parties; it does not even direct the Bay Head Planning Board to keep anything confidential, but only allows it to do so. Moreover, the order pertains only to discussions between Burke and the Planning Board, the "parties"; but what Brennan received was minutes of the Bay Head Borough Council, which are outside the express terms of the order. And, even if the order were read more broadly to cover minutes of the Council, the order was obtained ex parte, in a proceeding from which Brennan was deliberately excluded and hence not given any opportunity to argue against entry of the order. It would violate constitutional due process to hold that he is bound by that

The order also violates the First Amendment insofar as it extends the prior restraint to the other plaintiffs in this case, as well as to their counsel, Donato. Even if the court below were correct in concluding that Brennan's having gained access to the content behind the redactions was wrongful, neither the other plaintiffs nor Donato were involved in that gaining of access, hence under *Bartnicki v. Vopper*, the First Amendment forbade the court from restraining the use of the minutes by these additional individuals.

Where constitutional rights are violated, that violation in and of itself is irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality decision). *See also The Bronx Household of Faith v. Bd of Edu. of City of New York*, 331 F.3d 342, 349-350 (2nd Cir. 2003) (irreparable harm established where plaintiff articulates a "specific present objective harm or a threat if specific future harm" that chills First Amendment rights); *Davis v. New Jersey Dept. of Law and Public Safety*, 327 N.J. Super. 59, 68-69 (Law Div. 1999)(loss of First Amendment rights, "for even minimal periods of time, unquestionably

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order, which "runs up against the deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)) (internal quotation marks omitted).

constitutes irreparable harm")(quoting *Elrod*, 427 U.S. at 373)). "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of *12 irreparable harm is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984).

Accordingly, the interests of justice warrant this Court's grant of leave to appeal.

II. The Court Should Grant Leave to Appeal the Order Sealing the Entire Certifications Filed Below, As Well as the Deleting of Briefs from eCourts (Pa3-Pa7)

The Court should also grant leave to appeal the orders[7] taking the Brennan certifications out of the public record, in violation of both the First Amendment and the common law right of access to judicial records. Following the decision of the New Jersey Supreme Court in *Hammock by Hammock v. Hoffmann-LaRoche*, Inc., 142 N.J. 356 (1995), this Court has held that both the First Amendment and the common law guarantee the public's right of access to judicial records, imposing serious limits on the ability to keep secret even private matters unrelated to the functioning of government. *Verni ex rel. Burstein v. Lanzaro*, 404 N.J. Super. 16 (App. Div. 2008), and

[7] As stated above in footnote 4, and the Certification of Paul Alan Levy, the Clerk's Office made notations in eCourts that Plaintiffs' briefs were being deleted pursuant to an Order. Plaintiffs have been unable to obtain the actual Order, but seek reinstatement of those briefs into eCourts.

Lederman v. Prudential Life Insurance Co., 385 N.J. Super. 307 (App. Div. 2006). The blanket sealing of Brennan's two certifications, as well as of the briefs opposing the Burkes' motion seeking to limit plaintiffs' speech, violated both the First Amendment and the common law, for several reasons.

First, unlike materials whose secrecy had justified sealing orders in cases such as *Hammock*, *Verni*, and *Lederman*, the secrecy sought here consists entirely of discussions among elected officials about a matter of intense public debate among the citizens of Bay Head, who not only want to have that information in order to hold their elected official accountable for their decisions, but have, indeed, discussed those very materials in public sessions of the Bay Head Borough Council. No previous decision has held that such **governmental** materials can properly sealed when the parties need to discuss those materials with the Court as part of their litigation.

Second, as explained in Point I above, the trial court erred by issuing a prior restraint barring plaintiffs and their attorney from discussing publicly what they learned when the Borough of Bay Head inadvertently revealed the details of Council discussions that the Borough intended to keep confidential. Because the prior restraint itself should be vacated under the First Amendment, the sealing order itself

necessarily fails because its only purpose is to preserve the effectiveness of the prior restraint.

Third, even if sealing some short passages in the initial Brennan Certification was justified, the entire certification along with all its exhibits would not be. As the Supreme Court said in *Hammock by Hammock*, "The need for secrecy should extend no further than necessary to protect the confidentiality. Documents should be redacted when possible, editing out any privileged or confidential subject matter, [citation omitted], so that the protective order will have the least intrusive effect on the public's right-of-access." 142 N.J. at 382. The Burkes' motion identified one paragraph out of the fifty-five paragraph declaration that allegedly breached their alleged confidentiality entitlement; that is not a proper basis for sealing the *entire* certification and its thirteen exhibits. The motion to delete did not identify a single exhibit that contained allegedly confidential information. The Burkes never moved to delete the supplemental certification, and at no point during the hearing on the OTSC did Judge Ford specify parts of the certifications that warranted secrecy. The sealing orders should be vacated for failure to meet the requirement of using redaction to minimize the extent of court secrecy.

Fourth, the Burkes' showing in support of sealing was

facially inconsistent with the requirements set forth by governing precedent. According to *Hammock v. Hammock*, "the person who seeks to overcome the strong presumption of access must establish by a preponderance of the evidence that the interest in secrecy outweighs the presumption, [including] evidence to show why public access to the documents should be denied currently." 142 N.J. at 381-382. The Burkes relied entirely on an unsworn piece of correspondence from attorney Cipriani, Pa16-18, which was attested by an affidavit sworn "to the best of my knowledge." (Pa14). Nor did the Burkes supply the court with the unredacted executive session minutes in question from which, reviewed under seal, the trial court could have made an independent judgment about the need for confidentiality. Moreover, considering that the minutes had been widely disseminated within the community and had been discussed during the public session of the October 4 council meeting, it was incumbent on the Burkes, as the proponents of secrecy, "to show why public access to the [Certification] should be denied currently." *Id.* at 382.

Fifth, the sealing orders also violate the First Amendment and the common law right of access to court records because they lack specific findings about the need for confidentiality of each document to be sealed, and about the insufficiency of

redaction to protect confidentiality. As the Supreme Court said in *Hammock v. Hammock*,

> the trial court . . . must examine each document individually and make factual findings with regard to why the presumption of public access has been overcome. . . . [T]he trial court must . . . state with particularity the facts, without disclosing the secrets sought to be protected, that currently persuade the court to seal the document or continue it under seal.
>
> *Id.* at 382.

There are no findings in the sealing orders, either about the need for confidentiality, the reasons why the presumption of public access has been overcome, or the inadequacy of redaction to protect any legitimate confidentiality interests.

For all of these reasons, the Court should grant leave to appeal from the sealing order.

CONCLUSION

To protect the public interest and the First Amendment, the Court should grant leave to appeal, permit merits briefing, and allow oral argument. Alternatively, the Court should grant movants relief now[8] and reverse the Law Division's November 19,

[8] The trial court's conclusions of law are subject to de novo review. *Scheeler v. Office of the Gov.*, 448 N.J. Super. 333, 342 (App. Div. 2017). Even with respect to factual issues, the First Amendment requires appellate courts to conduct an independent examination of the record to ensure that First Amendment rights have been adequately protected. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny*

2019 Order restraining movants (Pa1); November 19, 2019 Order deleting Brennan's certifications (Pa3); and apparent November 19, 2019 Orders (or the Clerk's decisions) to delete Plaintiffs' briefs from eCourts.

Respectfully submitted,

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/s/ CJ Griffin

PUBLIC CITIZEN LITIGATION GROUP

/s/ Paul Alan Levy

December 9, 2021

County, 653 F.3d 290, 295 (3d Cir. 2011) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-503 (1984)).