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IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

JONATHAN D. GRINE,		
PLAINTIFF	:	**CIVIL DIVISION**
v.	:	**No.: 2015-1080**
COUNTY OF CENTRE; **THE MCSHANE FIRM, LLC;** **THEODORE C. TANSKI**	:	
DEFENDANTS	:	

DEFENDANTS THEODORE C. TANSKI AND THE MCSHANE FIRM, LLC'S REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION

Introduction

"The framers of the constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty."

Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting).

Plaintiff's arguments seek to have this Court become a censor of thought and expression. He seeks to silence those who wish to question his authority, his fairness, and his fitness for office, and forever muzzle their freedom of expression under penalty of contempt of court and possible confinement. He seeks the threat of these penalties for engaging in truthful public speech. In other words, he wishes to stop inquiry into his office and his practices. This practice, as Supreme Court of the United States Justice Douglas noted is squarely against the founding principles of this country. But the truth — and liberty of thought and expression— comes from promoting inquiry, not from denying it. The answer is more speech, not less speech. And because the disclosed records involve a matter of public concern, this Court should deny Plaintiff's request for a preliminary injunction, allow the records to be disclosed without restriction, and promote the vigorous public debate about government that is at the core of the First Amendment.

Facts

Theodore Tanski is employed as an attorney by The McShane Firm. Tanski's practice focuses exclusively on appellate and criminal post-conviction litigation. In that role, he investigates post-conviction cases for legal error, ineffective assistance of counsel claims, and/or prosecutorial and judicial misconduct.

The McShane Firm is a law firm located in Dauphin County, which regularly represents citizens in Centre County. Its practice consists primarily of criminal defense litigation. In addition to its law practice, The McShane Firm hosts three different online publication outlets, known as PADUIBLOG.COM, THETRUTHABOUTFORENSICSCIENCE.COM, and PENNLAGO.COM.

On January 29, 2015, Tanski submitted a Right-to-Know request to Centre County, seeking "all to and from cell phone/call records and to and from text messages" between four public employees, one of them being Plaintiff Grine. *Grine Ex. 1*. There were neither requests nor demands for any communications between any private individuals or between public and private individuals. Tanski limited his request to records between September 16, 2014 and November 12, 2014. *Id.* Centre County provided Tanski with the requested information (the "records") on February 13, 2015. The records consist of a pen register, noting the dates and times of incoming and outgoing communications between the implicated public officials. The records have since been properly authenticated, and authenticity is not at issue.

Procedural History

Plaintiff filed suit against Attorney Tanski, The McShane Firm and Centre County on March 16, 2015. Simultaneously, Plaintiff filed a Petition for Emergency Injunction, which a Centre County senior judge granted within two minutes of the filing. The injunction forbids Tanski and The McShane Firm from "disclosing, in any manner, any information related to Judge Grine's telephone communications . . . ." *Order Granting Emergency Injunction*, p. 2, ¶ 7(1). Plaintiff further filed a Petition for Preliminary Injunction requesting the following relief:

> [an Order] prohibiting the Defendants from disclosing any information related to Judge Grine's telephone communications; (b) requiring Defendants to deliver to Judge Grine a copy of all records in their possession that were produced in response to any Right-to-Know request and that contain information about Judge Grine's telephone communications; and, (c) requiring Defendants to destroy all other copies of such records, including any paper or electronic copies that they have in their possession.

Plaintiff's Petition for Preliminary Injunction, pp. 4-5.

Defendants Tanski and The McShane Firm filed an Answer opposing Plaintiff's Petition for Preliminary Injunction, citing protections under the First Amendment of the United States Constitution and Article 1 Section 7 of the Pennsylvania Constitution. This Court held a hearing on Plaintiff's Petition for Preliminary Injunction on April 2, 2015, and this Court directed Plaintiff to submit a brief addressing these issues. Additionally, this Court directed Defendants to submit a reply brief thereafter.

Grine's proposed preliminary injunction places a prior restraint on speech, and as Grine cannot overcome the heavy presumption of constitutional invalidity of prior restraint on speech, the injunction should be denied.

The First Amendment guarantees of freedom of speech and freedom of the press are of "primary value" in our society. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). The value of First Amendment protections extends to the population as a whole, rather than those exercising such protections. *Id.* at 389. More specifically, preserving the protections of the First Amendment through broadly defined freedoms "assures the maintenance of our political system and an open society." *Id.* Furthermore, "speech concerning public affairs is more than self-expression; it is the *essence of self-government*." *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964) (emphasis added). Accordingly, the First Amendment has fostered a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [which] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964).

In defining the term prior restraint, the United States Supreme Court has expressly noted that prior restraints on speech specifically include "judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)). Further, prior restraints specifically include "court orders that actually forbid speech

activities." *Id.* at 550. The Supreme Court of the United States has deemed court orders forbidding speech activities a "classic example" of prior restraints. *Id.*

It is well settled that any prior restraint on expression bears "a 'heavy presumption' against its constitutional validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). The Supreme Court of the United States has further deemed prior restraints on speech "the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. It is also "clear that the barriers to prior restraint remain high unless we are to abandon what this Court has said for nearly a quarter of our national existence and implied throughout all of it." *Id.* at 561. Describing the severe impact of a prior restraint, the Court has reasoned that a prior restraint "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." *Id.* at 559.

Matters of public concern are very broad in scope and are not limited to uncontroverted evidence of illegality or wrongdoing.

Speech pertains to a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (internal citations omitted).

More specifically, matters of public concern include "anything which might touch on an official's fitness for office." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)). In *Gertz*, the Court also distinguished public officials and public figures from private individuals. See *Id.* at 345. Public officials and public figures have voluntarily accepted a public position or "assumed an 'influential role in ordering society'" *Id.* at 345 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result)).

The partial telephone numbers are a component of the records, which are a matter of public concern, and should not be viewed in isolation.

Plaintiff asserts that a portion of the records —partial telephone numbers— should be viewed independently from the records as a whole. As such, he claims that the public significance of the partial telephone numbers themselves should be evaluated in isolation.

Supreme Court authority provides guidance to the contrary. In *Florida Star v. B.J.F.*, a newspaper published the name of a rape victim, violating a state statute. 491 U.S. 524, 536-37 (1989). Ultimately, the Court held that the publication was protected under the First Amendment and could not be punished. In its reasoning, the Court reviewed the information in a broad sense, reviewing the article as a whole. Notably, the Court found that the article as a whole addressed a matter of public concern even though the victim's name in and of itself was not necessarily a matter of public concern. *Id.*

In the present context, the partial telephone numbers are but a narrow component of the entire records. Accordingly, the evaluation regarding public concern should not be

limited to the partial telephone numbers in and of themselves. Providing an added element of authenticating the communications and identifying the communicant, the numbers serve a purpose as a component of these records. Because the partial telephone numbers serve a purpose within the records, and the records deal with a matter of public concern, this Court should not be confined to evaluating the public interest in the partial telephone numbers in and of themselves.

Furthermore, the listing of *partial* telephone numbers has a minimal impact on privacy, if any. Because the records only list the first seven digits of Plaintiff's telephone number, this leaves 10,000 possible combinations remaining, only one of which was ever Plaintiff's telephone number. It is uncertain whether that number is even Plaintiff's number as of today. It would take the most determined individual over eighty-three hours to dial 10,000 combinations if each attempt took only thirty seconds and the caller took no breaks. Furthermore, to provide context, if one's telephone number is analogous to their home address, the first seven digits of a telephone number is analogous to one's city of residence. Disclosure of the first seven digits of a telephone number is no different than disclosing that an individual lives in a city consisting of 10,000 households.[1]

[1] The city of Bellefonte, for example, had a population of only 6,187 as of 2010. See http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

In this case, the records are of political and social concern to the community and are a matter of public concern.

Plaintiff additionally contends that the records, as a whole, do not constitute a matter of public concern. Because the public has already demonstrated its concern with the records, this contention must fail. In addition, the framework provided by the United States Supreme Court, and the rules governing judges' conduct and communications further compels the conclusion that the records are a matter of public concern.

Speech is a matter of concern when it can "be fairly considered as relating to *any* matter of political, social, or other concern to the community." *Snyder*, 562 U.S. at 445 (emphasis added). The use of the words "fairly considered as relating to" confirms the notion that matters of public concern are not limited to irrefutable, uncontroverted evidence of wrongdoing. Rather, matters of public concern include "*anything* which *might* touch on an official's fitness for office." *Gertz*, 418 U.S. at 344-45 (emphasis added).

To demonstrate how these records may touch upon Grine's fitness for office we only need to look briefly at the Pennsylvania Code of Judicial Conduct. The Pennsylvania Code of Judicial Conduct demands "public confidence in the independence, integrity, and impartiality of the judiciary." PA ST CJC Rule 1.2. Accordingly, judges are bound to avoid even "the *appearance* of impropriety," not just actual impropriety. *Id.* (emphasis added). These demands exist specifically because "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the *appearance* of impropriety." PA ST CJC Rule 1.2, cmt. 1 (emphasis added). Because this principle is vital to the judicial

system, it extends beyond the bench itself, and "applies to both the professional and personal conduct of a judge." PA ST CJC Rule 1.2, cmt. 1. Similarly, Comment 2 to Rule 1.2 places judicial officers on notice: "[J]udges should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code." PA ST CJC Rule 1.2, cmt. 2. Moreover, it is settled that both the Pennsylvania Rules of Professional Conduct and the Pennsylvania Judicial Code of Conduct have rules governing *ex parte* communications.

Here the speech is the dissemination of the records showing the frequency and timing of telephone communications between a sitting judge and active prosecutors. Propriety of judicial conduct and communications are of utmost importance to the public, as evidenced by the rules imposed by the Pennsylvania Code of Judicial Conduct. As so much as the *appearance* of impropriety is forbidden, the timing and frequency of communications between a sitting judge and prosecutors is necessarily of interest to the community at large. Further, to argue that communications between members of the Centre County District Attorney and members of the judiciary of Centre County is not a matter of public concern contravenes the direct testimony of Grine, Gillette-Walker and Stacy Parks Miller. At the Preliminary Injunction Hearing, each acknowledged that the topic of potentially improper communications between sitting judges and prosecutors is a proper matter of public discourse.

Although Plaintiff argues that his role as a public official has no impact on whether the records are a matter of public concern, the contention is misguided. As the Superior Court stated, "[b]ecause speech about a public official is, by definition, of public

concern, there is no need to discuss the characterization of the nature of the speech here." *DiSalle v. P.G. Pub. Co.*, 544 A.2d 1345, 1365 (1988) (discussing the nature of speech to determine the appropriate scrutiny level to be applied when assessing damages in a defamation case). Furthermore, matters of public concern encompass "anything which might touch on an official's fitness for office." *Gertz*, 418 U.S. at 344-345. Because the rules specifically govern a judge's communications with prosecutors, the frequency and timing of telephone communications would necessarily touch on a judge's fitness for office.

The records are also of legitimate news interest, and are therefore a matter of public concern.

Subjects of "legitimate news interest . . . of general interest and of value and concern to the public" are additionally matters of public concern. In this case, the records have proven to be a subject of legitimate news interest. To assert otherwise is a distortion of reality. In Centre County, the public has been extremely vocal regarding communications between its public officials. Members of the public have organized public protests demanding transparency and accountability. Members of the public filled the courtroom to listen to testimony on the day of the Preliminary Injunction Hearing. Additionally, the extensive media coverage is undeniable. Various media outlets have published numerous stories focusing on communications between Centre County's public

officials, and the very records in question.[2] The coverage includes not only local newspapers, but news outlets as far away as Pittsburgh and Philadelphia, and at least one national news organization: *The Legal Intelligencer*. See Footnote 2.

Plaintiff argues that since Tanski and The McShane Firm do not yet have access to the contents of the communications, the records cannot be newsworthy. This argument is contrary to the reasoning provided by the Supreme Court of the United State in *Bartnicki*. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In that case, the Court held that the dissemination of tapes, which were lawfully obtained, regarding labor negotiations was

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[2] The following is just a simple canvas as to the number of articles on this type of communication and related matters:
Clayton Over, *Centre County Courthouse Picketers Protest Corruption*, Centre Daily Times (January 14, 2015), http://www.centredaily.com/2015/01/14/4554233/centre-county-courthouse-picketers.html;
Michael Martin Garrett, *Concerns Raised Over Reports of Centre County Judge Removing Documents From Public Files*, StateCollege.com (January 21, 2015), http://www.statecollege.com/news/local-news/concerns-raised-over-reports-of-centre-county-judge-removing-documents-from-public-files,1462492/;
Clayton Over, *Motion in Rape Case Alleges Improper Communications Between Parks Miller, Prosecutors, Judges*, Centre Daily Times (March 6, 2015), http://www.centredaily.com/2015/03/06/4637296_motion-in-rape-case-alleges-improper.html?rh=1;
Michael Martin Garrett, *Centre County Judge, District Attorney Accused of Bias, DA Says Claim is 'Without Merit'*, StateCollege.com (March 6, 2015), http://www.statecollege.com/news/local-news/centre-county-judge-district-attorney-accused-of-bias-da-says-claim-is-without-merit,1463092/;
Clayton Over, *Attorney Philip Masorti Seeks To Disqualify Parks Miller, DA's Office From All Of His Cases*, Centre Daily Times (March 11, 2015), http://www.centredaily.com/2015/03/11/4645644/attorney-philip-masorti-seeks.html#storylink=cpy;
Jeremy Hartley, *Two Judges File Suit Against Centre County*, Centre Daily Times (March 17, 2015), http://www.centredaily.com/2015/03/17/4655954/two-judges-file-suit-against-centre.html;
Alex Freeman, *Pennsylvania District Attorney Abusing Office Amid Rampant Court Corruption*, The Fifth Column (March 17, 2015), http://thefifthcolumnnews.com/2015/03/pennsylvania-district-attorney-abusing-office-amid-rampant-court-corruption/;
Clayton Over, *Records from Right-to-Know Requests are at Issue in Centre County Judicial Lawsuits*, Centre Daily Times (April 2, 2015), http://www.centredaily.com/2015/04/02/4683836_records-from-right-to-know-requests.html?rh=1#storylink=cpy;
Michael Martin Garrett, *Attorney Asks to Be Removed from Judge's Lawsuit Against Centre County*, StateCollege.com (April 7, 2015), http://www.statecollege.com/news/local-news/attorney-asks-to-be-removed-from-judges-lawsuit-against-centre-county,1463507/;
Adam Brandolph, *Pair of Centre County Judges Seeks to Destroy Cellphone Evidence*, TribLIVE (April 13, 2015), http://triblive.com/state/pennsylvania/8161261-74/county-judges-records#ixzz3XoKVx4Nx;
Max Mitchell and Lizzy McLellan, *Centre County Courts 'in Turmoil'*, The Legal Intelligencer (April 14, 2015), http://www.thelegalintelligencer.com/id=1202723186530/Centre-County-Courts-in-Turmoil#ixzz3XoMny7jh.

protected under the First Amendment. The Court reasoned that if the statements had been made in a public arena, or if a third party had inadvertently heard the statements, they would be newsworthy. *Id.* at 525.

Unlike *Bartnicki*, the public officials in this case are bound to rules governing the extent of their communications. These rules demand that they avoid even the appearance of impropriety, which may be evidenced by the timing and frequency of communications between judges and district attorneys. If records reflecting the timing and frequency of communications between sitting judges and district attorneys were released in public, the records would be newsworthy, as evidenced by the media coverage in this case and various other Centre County cases. Because the records were lawfully obtained and the records themselves reflect a subject which is newsworthy, this case is analogous to *Bartnicki.*

Plaintiff further cites *Dunn & Bradstreet* as an illustration of matters of purely private concern. 472 U.S. 749 (1985). That case, however, dealt with the dissemination of an inaccurate version of a *private individual's* credit report. In its reasoning, the Court considered that the report was "wholly false" and that it was "solely in the individual interest of the speaker and its specific business audience." *Id.* at 762.

Here, Grine is a *public official* and the records pertain to his communications with other *public officials*. There are rules governing the manner in which these public officials may communicate, specifically instituted for the benefit of the public. It is unreasonable to suggest that the records, reflecting communications between public officials are "solely in the individual interest" of Tanski, The McShane Firm and a

specific audience. Equally as important, there is no dispute that the records are entirely accurate.

Plaintiff asserts that Tanski and The McShane firm has offered "no explanation as to why the information has any public significance." *Plaintiff's Supplemental Brief in Support of Plaintiff's Petition for Preliminary Injunction*, p. 11. Tanski and The McShane Firm concede that they have not provided details regarding the frequency of the communications, the timing of the communications, or between whom communication took place. However, Plaintiff fails to recognize that Tanski and The McShane Firm remain subject to his emergency injunction, prohibiting them from "disclosing, *in any manner*, any information related to Judge Grine's telephone communications" (emphasis added). By Plaintiff's own motion, the court filings in this action are no longer sealed. See generally, *Plaintiff's Motion to Unseal.* For Defendants to submit a court filing describing in great detail each and every aspect of the records which may constitute public concern would blatantly violate Plaintiff's purported purpose for the emergency injunction, and subject them to fines and possible imprisonment. It remains inequitable to allow Plaintiff to enjoin Tanski and The McShane Firm from disclosure *in any manner* and proceed to fault Tanski and The McShane Firm for abiding by the order.

***McGogney* has no bearing on this case, as it does not pertain to the First Amendment and is Limited to Right-to-Know Analysis.**

Plaintiff finally argues that the remedy sought is not unprecedented, citing *Board of Supervisors of Milford Twp. v. McGogney*. 13 A.3d 569 (Pa. Cmwlth. 2011). *McGogney*, however, deals solely with the Right-to-Know law, and has nothing to do with the First Amendment. It contains no discussion regarding the First Amendment, no analysis as to whether the documents involved contained a matter of public concern and no analysis using the factors involved in determining whether records should be afforded constitutional protection. As a result, *McGogney* offers no guidance with respect to this case.

Conclusion

If the records are ultimately disclosed, Plaintiff will have both the right and the capability to vocally challenge any misconceptions. In fact, Plaintiff took that precise course of action at the Preliminary Injunction hearing. As counsel for Tanski and The McShane Firm pointed out, the history of this country and the Supreme Court's jurisprudence demonstrate that we answer speech with more speech. We do not restrict speech. Grine, as he has already done and may continue to do, may answer the speech about his fitness for office with more speech. What he cannot do and what the Constitution prevents this Court from doing is suppressing and censoring speech about a matter of public concern which touches Grine's fitness for office.

Stifling speech is not the appropriate remedy for Plaintiff's alleged concerns. Plaintiff's role in the community renders him inextricably bound to the public. In

choosing to run for election, Plaintiff chose to serve the public. He campaigned to the public, asked the public for their support and was ultimately elected by the public. On a regular basis, he makes decisions which impact the public. Therefore, he is accountable to the public.

The public has an interest in Plaintiff abiding by the Code of Judicial Conduct. Communications between judges and prosecutors who try cases before them are governed by the Code of Judicial Conduct. Matters of public concern are not limited to hard evidence of undoubted violations, wrongdoing or illegality. Contrary to what Plaintiff would have this Court believe, First Amendment protections are not limited to "smoking guns." Instead, the very purpose of the First Amendment is to encourage thoughtful discussion about matters which have an impact upon the public. Imposing a prior restraint against Tanski and The McShane Firm would have precisely the opposite effect.

In light of Defendants' protections under the First Amendment, we submit this Court is constrained to deny Plaintiff's request for a prior restraint. As a result, Defendants respectfully request that this Court deny Plaintiff's Motion for Preliminary Injunction and declare that Defendants have the First Amendment Right to disclose the records in their possession free of any restrictions.

In close, we ask this court to consider the wise words of Frederick Douglass who said: "To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker." We ask this Court to avert this double wrong.

Respectfully submitted,

Date: 4/20/2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of APRIL, 2015 a true and correct copy of the above instrument was sent by United States mail, postage prepaid, addressed to all known counsel of record, listed below.

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