No. 23-13649-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Timothy Burke v. United States of America

Appeal from the United States District Court
For the Middle District of Florida

BRIEF OF APPELLANT TIMOTHY BURKE

Mark D. Rasch
Law Office of Mark Rasch
Member, MD, MA, NY Bar
Phone: (301) 547-6925
MDRasch@gmail.com
To be Admitted Pro Hac Vice

Michael P. Maddux, Esquire
Florida Bar # 964212
Michael P. Maddux, P.A.
2102 West Cleveland Street
Tampa, Florida 32606
Phone: (813) 253-3363
mmaddux@madduxattorneys.com

Ryan Kirkpatrick
Susman Godfrey LLP
1301 6th Ave, 32nd Flr
New York, NY 10019
Phone: (212) 729-2017
rkirkpatrick@susmangodfrey.com
To be Admitted Pro Hac Vice

COUNSEL FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, Mr. Burke provides the following certificate of interested persons:

Judicial Officers

1. The Honorable Sean Flynn, United States Magistrate Judge

2. The Honorable William F. Jung, United States District Judge

Plaintiff/Appellant

3. Timothy Burke

Other Interested Parties

4. Lynn Hurtak, Member, Tampa City Council

Corporate Interested Parties

5. Burke Communications, Inc.

6. Poynter Institute for Media Studies, owner, Times Publishing Company.

Counsel for Mr. Burke/Appellant

7. Ryan Kirkpatrick

8. Michael Maddux

9. Mark D. Rasch

10. Susman Godfrey, LLP

Counsel for the Government/Appellee

11. Holly Gershow, Deputy Chief, Appellate Division, United States Attorney's Office, Middle District of Florida.
12. Roger B. Handberg, United States Attorney, Middle District of Florida
13. David Rhodes, Chief, Appellate Division, United States Attorney's Office, Middle District of Florida.
14. Jay G. Trezevant, Assistant United States Attorney, Middle District of Florida

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request an opportunity to present oral argument on the issues in this appeal. This case involves significant Constitutional issues related to prior restraints on speech and the remedies available to journalists in criminal cases when their journalistic materials are seized by the Government pursuant to a warrant, but no criminal charges are pending. This Court's ruling will have broad ramifications for journalists who collect and disseminate information that they find online.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is an appeal from a District Court's denial of an unindicted journalist's petition for emergency injunctive relief, pursuant to F.R. Crim. P. Rule 41(g) for the return of the contents of his digital newsroom, including materials which are protected under the First Amendment and covered by the Florida journalist shield law, and materials Mr. Burke had intended to publish. The government's seizure and ongoing retention of these journalistic materials constitutes an unconstitutional prior restraint on publication in violation of the First Amendment. Where, as here a Rule 41(g) motion "is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant," the denial of the motion is appealable under 28 U.S.C. §§ 1291 & 1292(a)(1). *DiBella v. United States*, 369 U.S. 121, 132 (1962); *United States v. Korf (In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means)*, 11 F.4th 1235, 1245 (11th Cir. 2021).

The denial of the motion was affirmed by the United States District Court for the Middle District of Florida on October 23, 2023, *Times Publishing Company v. United States of America*, (Doc. 41) No. 8:23-mc-00014-WFJ-SPF (Judge William F. Jung) in an endorsed order. The Notice of Appeal was timely filed on November 1, 2023. (Doc. 43)

STATEMENT OF THE ISSUES

I. Did the District Court err in sealing from both the press and the person from whom items were seized the entirety of the affidavit in support of the warrant to seize a journalist's work product without requiring any particularized showing of harm by the government, and despite a pending Rule 41(g) motion for return of property that alleged the Government's "callous disregard" of movant's constitutional rights?

II. When the government seizes the contents of a newsroom in a manner that acts as a prior restraint on publication, is the journalist entitled to an evidentiary hearing on his motion for return of property under Rule 41(g)?

STATEMENT OF THE CASE

This is an appeal from a District Court's denial of an unindicted journalist's petition for emergency injunctive relief, pursuant to F.R. Crim. P. Rule 41(g), for the return of the contents of his digital newsroom and allowing him to continue publishing newsworthy content which was seized after the journalist published information with Vice News and Media Matters that he found on public websites without "hacking" into any computers. The Magistrate Juge found that the journalists live video files and all information "comingled" with those files, may be indefinitely retained and publication restrained because the sealed affidavit provided

probable cause to believe that some of the files were "downloaded without authorization" or intercepted unlawfully, despite the fact that they were obtained from sites configured to be readily accessible to the public. The court denied access to any portion of the affidavit and took no evidence on any contested matters, but found that the government had not acted with "callous disregard" for the journalists right to publish.

STATEMENT OF THE FACTS

A. Burke's Journalism and Storage of Live Streams on His Computers

While Mr. Burke cannot know for certain, because virtually everything about this case has been sealed by order of the Magistrate Judge until at least May 4, 2024 (Doc. 18), this case apparently originated with a complaint by Fox News about Media Matters broadcast of an interview between Fox' then-premier commentator Tucker Carlson and media personality Kanye West (known as "Ye"). After Fox itself broadcast a highly edited version of the interview, Media Matters then broadcast the rest of the interview in which Ye goes on what can be described as an antisemitic and bizarre rant about a range of issues, demonstrating not only Ye's anti-semetism, but Fox's attempted cover up and minimization (and possible tolerance for) these views. (Doc. 25 p. 2-3) Similarly, Vice News published other outtakes of Tucker

Carlson in a segment called "Fox News Leaks" where Carlson makes a series of sexist and misogynistic remarks to members of his staff. (Id.) On May 5, 2023, Fox News lawyers sent cease and desist letters to both Media Matters and Vice News, asserting that "the unaired footage is FOX's confidential intellectual property; FOX did not consent to its distribution or publication…." and that the interview was "unlawfully obtained." (Doc. 25 p. 2-3) [1] The Department of Justice followed up on May 25, 2023, with document preservation requests to both Media Matters and Fox News, informing each that the government had opened a criminal investigation into their news broadcasts, but that they were not "targets" of the investigation. [2] The investigation quickly focused on Timothy Burke, an award-winning journalist whose specialty is finding and disseminating newsworthy content gleaned from live video feeds broadcast and accessible over the Internet. The government concluded that Burke had found and downloaded the raw, unedited Fox News interview as it occurred (a live feed) from publicly accessible, Internet addressable website using a userid and password posted publicly online by the owner of the credential and *not*

[1] May 5, 2023, letter from Christopher Chiou, Wilson Sonsini to Angelo Carusone, Media Matters, available at https://twitter.com/maxwelltani/status/1654490911445864449 (last visited, December 13, 2023)

[2] Daily Mail, May 26, 2023, available at https://www.dailymail.co.uk/news/article-12129235/FBI-probes-hack-Fox-News-computers-theft-unaired-footage.html (last visited, December 13, 2023)

by any unauthorized person. . (Doc. 25 p. 3)[3] Burke had accessed the hosting website because a confidential source informed him that the owner of credentials to that website had posted their credentials to the public, inviting others to log into its own live streams and listen to its broadcasts. When Burke logged into the hosting platform using the published credentials the website, automatically downloaded to Burke's computer a list of the URL's of other active live streams on the site. (Doc. 25 p. 3). By entering these URLs into a browser (whether logged into the hosting platform website or not), Burke could see and download the unencrypted, broadcast, publicly accessible, Internet addressable live feeds - including those of Fox News. Importantly, Burke "hacked" no website, "stole" no credentials, and violated no terms of service. (Doc. 25 p 3) He merely found something newsworthy on a publicly accessible site.

On May 8, 2023, federal agents executed a search warrant signed days earlier by Magistrate Judge Flynn which called for the seizure of evidence, fruits and instrumentalities of, inter alia "downloading confidential information without authorization in violation of 18 U.S.C. 1030(a)(2)" and evidence of "interception" of communications without authorization in violation of 18 U.S.C. 2511. (Doc. 25 p 4 and 18-1, Attachment B, par. 4). Agents seized more than 100 terabytes of data

[3] See, https://web.archive.org/web/20220116173451/https://www.wgnsradio.com/article/54354/links (last visited, December 22, 2023).

(the equivalent of 11 billion pages of documents) [4] across "approximately two dozen electronic devices" from Burke's digital newsroom and also seized the devices of his wife, Tampa City Councilwoman Lynn Hurtak. (Doc. 35, p. 2, Doc. 33 p. 4).[5]

The warrant itself made no mention of any filter protocols, search protocols or minimization procedures, nor did it note the appointment of "filter team," or reference the protections of the Privacy Protection Act (42 USC 2000aa)(PPA), or DOJ regulations (28 CFR 50.10(e)(2)) and 28 C.F.R. 50.10(d)(2)(ii)) designed to protect journalists from being subjected to search warrants. The warrant similarly did not describe how searching agents were to determine which files seized contained "evidence of downloading without authorization." (the search protocol).

As a result of the wholesale seizure of his newsroom, Burke cannot publish his materials himself or provide them to news outlets for publication. (Doc. 25 p. 8). The seizure of his hardware and software also meant that Burke could not access any other information, and much of what has been returned is effectively unusable (Doc. 50 p. 9-13). Burke has not been provided an inventory of the electronic files the

4 See, e.g., Quora.com inquiry "how many pages of text is 100Tb of data?) https://www.quora.com/How-many-standard-8-5x11-pages-would-it-take-to-store-100TB-of-plain-text-data#:~:text=1TB%20is%20equal%20to%201%2C099%2C511%2C627%2C776,1TB%20contains%20approximately%201%2C099%2C511%2C627%2C776% 0characters.&text=Therefore%2C%20it%20would%20take%20approximately,standard%208.5%22x11%22%20pages.

5 The original, May 4, 2023, warrant called for the seizure of items related to alleged violations "occurring after August 1, 2022…" (Doc. 18-1, Attachment B).

government has retained. (Doc. 50 p. 3) or a report from the government's "Filter Team" (Id. at 4-6).

PROCEDURAL HISTORY

Shortly following the search and seizure, the *Tampa Bay Times* sought access to the affidavit in support of the warrant under its First Amendment right of access to public records, (Doc. 1). Burke joined the Motion to Unseal based on his status as the subject from whom the materials were seized, (Doc. 24), separately moved for return of his property under F.R. Crim. P. 41(g), (Doc. 25) and requested an evidentiary hearing on these motions (Doc. 26). There was no evidentiary hearing, and no taking of testimony.

The Magistrate Judge denied all of these motions, holding, *inter alia*, that (i) no evidentiary hearing was necessary, (ii) Burke was not entitled to see any portion of the probable cause affidavit because "each section of the affidavit builds on the one before it, and the sum of these parts equals the Government's probable cause," (Doc. 35 at 3 (quoting Doc. 23)), (iii) Court's prior *ex parte* and sealed finding of probable cause rendered all of the materials seized to be presumptive "contraband" which need not be returned (Doc. 35 at 13) and also meant that Burke could not show "callous disregard" for his rights under the standard set forth in *Richey v. Smith*, 515 F.2d 1239, 1243-33 (5th Cir. 1975) for the return of property; and, (iv) that Burke is not without legal remedies because he can move to suppress if he is indicted (Doc

35, p. 6, n.1). The District Court (Hon. William Jung) affirmed the Report and Recommendation of the Magistrate Judge (Doc. 41). As of the date of this brief, Burke has still not been charged with any crime, and the government retains all his original recorded live video streams which, because they were recorded live, are the only copies in existence.

STANDARD OF REVIEW

This Court reviews questions of law surrounding the District Court's denial of a motion for return of seized property, *de novo*, and factual findings for clear of error. *United States v. Howell*, 425 F. 3d 971, 973-74 (11th Cir. 2005) (citing *United States v. Castro*, 883 F.2d 1018, 1019 (11th Cir.1989) and *Parker v. Head*, 244 F.3d 831, 836 (11th Cir.2001). *United States v. Machado*, 465 F. 3d 1301, 1307 (11th Cir., 2006)); *see United States v. Sivanadiyah*, Dkt. No. 19-13726 (11th Cir., 2021). [6]

Where the actions of the government act as a prior restraint on "the tenets of free expression underlying a free society," the actions are subject to strict scrutiny. *See Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004); *Cooper v. Dillon*, 403 F.3d 1208, 1214-18 (11th Cir. 2005). Where a search warrant calls for the seizure of expressive materials gathered for dissemination to the public,

6 After *Richey*, the Fifth Circuit, in vacating the denial of a Rule 41(g) Motion noted "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Harbor Healthcare System, L.P. v. United States*, 5 F.4th 593, 598 (5th Cir. 2021)

the warrant is subject to examination with "scrupulous exactitute." *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

SUMMARY OF THE ARGUMENT

"To avoid unnecessary interference with the executive branch's criminal enforcement authority—while also offering relief in rare instances where a gross constitutional violation would otherwise leave the subject of a search without recourse," a party aggrieved by an illegal seizure or retention of their property may seek return of that property when they can show that the government acted in "callous disregard" for their Constitutional rights." *Trump v. United States*, 54 F. 4th 689, 697 (11th Cir., 2022). By all measures, this is one of those "rare instances."

Mr. Burke, an award-winning journalist, is under investigation for publishing materials he found on the open Internet that embarrassed people in political power, who claimed that he downloaded this information "without authorization." Based on this assertion, the government has seized, and for the most part refuses to return, the entire contents of his newsroom. The seizure took not only Burke's privileged communications with sources, his research, notes, contacts, and information about his editorial processes all protected from exposure to the Government under the First Amendment but also terabytes of video files he collected, stored, indexed, and developed search protocols for, with the intent to publish.

Burke published information that was streaming unencrypted on public websites. The Magistrate Judge found probable cause to believe that the information from these public websites was "downloaded without authorization in violation of 18 USC 1030(a)(2)" and that the live streams, , obtained from public websites, were somehow "unlawfully intercepted" in violation of 18 USC 2511 Nevertheless, based on these findings, the government seized, and continues to hold the bulk of Burke's newsroom. Not only is he now restricted from publishing in a manner that is a prior restraint on his speech, the government's seizure of files downloaded from public sources creates an immediate chilling effect on Burke's and other journalists' ability to do what they do - collect and report on information. The Magistrate Judge improperly embargoed the entire contents of the affidavit in support of the warrant - including those portions which would have demonstrated the government's minimization and remediation efforts, the required DOJ approvals for searches of journalists, and the protocols mandated to the "filter team" to protect against exposure to both privileged and First Amendment protected materials The Magistrate Judge did so based on completely boilerplate justifications that could be invoked in any criminal case; it made no findings that unsealing might lead to the destruction of evidence, flight, or the intimidation of witnesses. The Magistrate Judge further denied Burke's request for an evidentiary hearing and took no evidence on critical issues necessary to balance the immediate harm resulting from the prior

restraint on publication against the government's need to investigate supposed crimes, instead accepting the government's assertions that it had acted reasonably.

Burke has been placed in a legal Catch-22; he must demonstrate that the seizure of his newsroom was done with "callous disregard" for his rights as a journalist, but he has been denied both information and a hearing necessary to do so. And the Magistrate Judge's reasoning that Burke is "not without recourse" because he can see the affidavit and challenge the search if and when he is indicted, *see* Order at 6, n.1, is illogical and has been explicitly rejected by this Court: "Contrary to the government's suggestion, suppression is not an adequate remedy for any violations. … suppression does not redress the government's intrusion into the Intervenors' personal and privileged affairs. In contrast, Rule 41(g) can." *See United States v. Korf (In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means)*, 11 F.4th 1235, 1247 (11th Cir. 2021).

As of the date of this brief, it has now been almost 8 months since the Government seized the entirely of Burke's digital newsroom. Despite that there is no factual dispute as to what Burke did to obtain the materials in question, Burke has not been charged with a crime and the Government has not indicated if and when he ever will be.[7] Yet it continues to withhold the seized journalistic materials and thereby prevent further publication--without ever having the legal basis for the

[7] There is a five-year Statute of Limitations.18 U.S.C. 3282.

seizure tested in an adversarial proceeding, let alone subjected to the type of scrutiny that the Supreme Court has mandated for First Amendment prior restraints on publication. This Court should reverse and remand for such a hearing.

ARGUMENT

A. Burke Was Entitled to Unseal the Affidavit in Support of the Warrant and to an Evidentiary Hearing on His Challenge to the Ongoing Seizure and Withholding of his Journalistic Materials.

a. Where a seizure of journalist's materials acts as a prior restraint on publication, the seizure is subject to strict scrutiny; Burke's challenge to the seizure received no scrutiny at all.

When a motion for return of seized property under F.R.Cr.P. Rule 41(g) is filed on a pre-indictment basis, it is treated as an action in equity and evaluated under the four factors articulated in *Richey v. Smith*, 515 F.2d 1239, 1243-33 (5th Cir. 1975) (the "*Richey* Factors"). [8]In *Trump v. United States*, 54 F.4th 689, 698 (11th Cir. 2022), this Court reaffirmed that the first *Richey* factor— "callous disregard" for the property holder's Constitutional rights —is not only the "foremost consideration," but an "indispensab[le]" requirement for relief.

Searches like the one at bar, which involve the seizure of expressive materials, and which operate as a prior restraint on First Amendment protected speech, are held

[8] Because the Fifth Circuit issued this decision before the close of business on September 30, 1981, it is binding precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

to a higher standard than ordinary seizures. Because the seizure (and failure to return) also "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition [of First Amendment protected materials]" *Roaden v. Kentucky*, 413 U.S. 496, 504–05 (1973), in a way that is wholly inconsistent with the First Amendment's "guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931), the actions of the Government are subject to strict scrutiny. Similarly, a warrant authorizing a search for expressive material must be read with "scrupulous exactititude" to avoid the seizure (and failure to return) materials that the subject has a constitutional right to publish. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). This is all the more problematic here where the objective of the government's actions in both seizing and refusing to return the materials is *precisely to prevent Burke from publishing the seized materials*.

In the case of Mr. Burke's challenge to the seizure, there has not been "strict scrutiny." There has been no scrutiny. There has been no witness testimony, no adversarial evidentiary hearing, and the justifications for shutting down Mr. Burke's reporting and his newsroom remain opaque. The Magistrate Judge released no portion of the affidavit in support of the warrant, not even those portions that would reveal the standards and protocols under which the Government was required to review the material seized to protect Burke's journalistic material. The warrant did not call for seizure of files taken without authorization from any defined person,

persons, or websites – it effectively resulted in the seizure of all files within a span of years that contain "information," so the government could later investigate whether any of them were held "without authorization," and provided no guidance on how that determination was to be made, making the warrant a "general warrant." *Coolidge v. New Hampshire*, 403 US 443, 467 (1971) ("the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings"); United *States v. McCall*, 84 F.4th 1317 (11th Cir. 2023). Here, the government has seized all of the journalists' files (and all files commingled with them) and not simply those files for which there was any probable cause to believe that the information in these files were "downloaded without authorization" – which itself is not a criminal offense. The government simply seized *all files*, and then sought to determine if any of the seized files were downloaded "without authorization. "..

The seizure and failure to return to the journalist the materials he intended to publish constitutes "an immediate and irreversible sanction" that not only "chills" speech but also "freezes" it. *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). Under circumstances where "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971), *cited in Cheffer v. McGregor*, 6 F. 3d 705, 711 (11th Cir., 1993). As noted infra, there has neither been "strict scrutiny" of the prior restraint order, nor

"scrupulous exactitute" in the seizure and refusal to return reporting materials. Moreover, in the *New York Times* case -- the Pentagon Papers case -- the Supreme Court declined the Government's entreaties to prohibit the publication of what it alleged were stolen classified documents, because an order preventing such publication was inconsistent with the First Amendment. Here, the Government claims the very same thing, and the District Court acquiesces by preventing publication, not by injunction, but through an *ex parte*, and, according to the Court below, unreviewable warrant - which itself describes conduct that is not criminal.

The Government has seized as "contraband" Burke's entire collection of video "live feeds" and all of Burke's journalistic materials, and it refuses to return them. The Magistrate Judge's analysis endorsed this "contraband" analogy, treating journalistic materials no differently than drugs, illicit weapons, or stolen money. (Doc. 35, p. 13). But the Supreme Court has repeatedly rejected the "contraband" theory to prevent dissemination of expressive materials. *See A Quantity of Books v. Kansas*, 378 U. S. 205, 211-212 (1964) ("It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia other contraband. We rejected that proposition in *Marcus v. Search Warrant*, 367 U. S. 717 (1961).")

At this juncture, we do not even know if the Magistrate Judge was told that that the search was for the office of a journalist, and/or that the seizure was for First Amendment protected materials, but clearly the absence of such representations would fall within the category of "callous disregard." Moreover, the affidavit and warrant authorizing the seizure of journalistic or expressive materials must be drafted and the warrant executed with "scrupulous exactitude" to avoid precisely what has happened here - the wholesale seizure of First Amendment protected materials that the subject has the right to publish. *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (higher standard for seizing obscene materials), but see *New York v. P.J. Video, Inc.*, 475 US 868, 876 (1986)(government may seize obscene materials on showing of probable cause.).

The Magistrate Judge, relying on *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) correctly observed that "[p]roperly administered, the preconditions for a warrant - probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness -- should afford sufficient protection against the harms that are assuredly threatened by warrants for searching newspaper offices." [9] But this is only the beginning of the process. Once the search is executed,

9 It should be noted that the officers executing the warrant in *Zurcher* took about 15 minutes to execute the warrant, did not "read or scan" any materials other than photographs, and seized no materials at all. *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (ND Cal. 1972). The seizure here is more than an "incidental burdening of the press." (Doc. 33 at 16, citing *Branzburg v. Hayes*, 408 U.S. 665, 682-83,(1972)). It

and the items seized, Rule 41(g) by its terms provides an opportunity -- consistent with the Government's need to continue its investigation -- for the aggrieved party to challenge whether the search is, in fact, lawful -- and even if it is, whether on balance, the harm resulting from the government's continued retention of the records outweighs the Government's need to keep the records from the movant and, in this case, from the public. That did not happen here. The Magistrate Judge simply reaffirmed his own initial *ex parte* finding of probable cause based on a sealed affidavit, determined that all seized materials were thus presumptive contraband, and denied Burke any opportunity for presenting evidence or any meaningful review.

This does not, of course, mean that a journalist is immune from investigation, search or seizure, or that a journalist is free to collect information unlawfully. Indeed, Rule 41(g) provides for exactly this possibility - permitting return of materials subject to conditions that will permit the investigation to continue. That is not what the Government here seeks. It seeks to retain and prevent publication of the video live stream materials indefinitely, and the Magistrate Judge permitted this without any meaningful review. This is a violation of Burke's and the public's First Amendment right and Burke's fundamental rights to due process, and his rights under Rule 41(g).

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is a wholesale seizure of a newsroom and indefinite retention of protected materials to prevent them from being published.

b. The Probable Cause Finding Justifying the Seizure of the Newsroom Rests on a Theory of Criminality Rejected by the US Supreme Court

The Magistrate Judge found that "the items the Government is authorized to seize under the warrant do not qualify as protected work product or documentary materials … because they are contraband or fruits of the crime under investigation," and further, that the seizure of protected journalistic materials was authorized because such materials were "commingled with criminal evidence" on Burke's computers, while Burke was "the subject of a criminal investigation." (Doc. 25 p 13).

The only specific reference to the "crime under investigation" in the warrant itself is "downloading confidential information without authorization…" (Doc. 18-1, Warrant, Exhibit B, Par. 4), a nonexistent crime with a long history in this Circuit.[10] The Supreme Court reversed this precedent and made it clear that "downloading information without authorization" is not a violation of 18 U.S.C.

[10] *United States v. Rodriguez*, 628 F. 3d 1258 (11th Cir., 2010)(SSA employee downloads information without proper authorization); *United States v. Van Buren*, 940 F. 3d 1192 (11th Cir., 2019)(Georgia police officer downloads law enforcement data for personal reasons); *Maye v. United States*, (11th Cir., 2019)(unpublished)(downloading data from NCIC computers without authorization); *United States v. Patel*, No. 09-14985. (11th Circuit 2010) (CIS adjudications officer downloads information about his own status without authority); *United States v. Jordan*, No. 06-12583 (11th Cir. 2009)(Incumbent Sheriff charged but acquitted of accessing law enforcement database to get information on voters without authorization).

2511 (a)(2). *Van Buren v. United States*, 593 U.S. ___, 141 S. Ct. 1648 (2021), *on remand*, 5 F. 4th 1327 (11th Cir., 2021). *Van Buren* expressly found that the statute's "exceeding authorization to access" a computer provision under 18 USC 1030(a)(2) did not apply to someone whose access to a computer is not "unauthorized," even if their downloading of information is "without authorization" and noted the contrary interpretation would "attach criminal penalties to a breathtaking amount of commonplace computer activity." 141 S. Ct. at 1661. The CFAA is a "hacking" statute, not an information "misappropriation" statute. [11] Similarly, in *Bartniki v. Voepper*, 532 U.S. 514 (2001) the Supreme Court emphasized that the wiretap statute did not prohibit a journalist from distributing communications that were made under circumstances where the participants had no reasonable expectations of privacy, 532 U.S. at 524, and in *Snow v. DirecTV, Inc.*, 450 F. 3d 1314, 1320-21 (11th Cir. 2006) this Court made it clear that downloading information that is readily accessible to the public does not violate 18 USC 2511 noting that, "[i]f by simply clicking a hypertext link, after ignoring an express warning, on an otherwise publicly accessible webpage, one is liable under [18 USC 2511]], then the floodgates of

[11] See, e.g., *United States v. Nosal*, 676 F. 3d 854, 857 (9th Cir., 2012)(Nosal II)("The government's interpretation would transform the CFAA from an anti-hacking statute into an expansive misappropriation statute"); *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F. 4th 1180, 1196 (9th Cir., 2022) ("The CFAA was enacted to prevent intentional intrusion onto someone else's computer—specifically, computer hacking.").

litigation would open and the merely curious would be prosecuted. We find no intent by Congress to so permit." See 18 USC 2511(2)(g)(i).[12]

c. Information "Downloaded Without Authorization" By A Journalist Is Not "Contraband"

Put plainly, the government refuses to return Burke's files because they believe the reporting information was obtained without permission, is contraband, and if returned to Burke, he is likely to use it for his reporting. Even if the government's assertion that the document owners did not intend Burke to have this information proves accurate, reporting on such information is not unlawful. See, *Florida Star v. BJF*, 491 U.S. 524 (1989) (newspaper permitted to publish name of rape victim which police "erroneously had included in material released to the press" *The Florida Star v. BJF*, 530 So. 2d 286, 287 (Fla. Sup. Ct., 1988, even though disclosure violated Florida law and reporter found information that would not have been "known, or accessible, to others." 491 U.S. at 535. Nevertheless, the reportage

[12] The government seized everything with the hope of determining post seizure if any of the information seized was "downloaded without authorization.". *United States v. Blum*, 753 F. 2d 999 (11th Cir., 1985)(affidavit necessary to provide searching agent with guidance); *United States v. Martin*, 297 F. 3d 1308, 1313 (11th Cir., 2002) (affidavit provides detail to prevent prohibited "general warrant;" *United States v. Lebron*, 729 F. 2d 533, 539 (8th Cir., 1984) (warrant for "stolen property" provides no guidance to searching agents and is general warrant.")

was not "contraband" and the dissemination of that information could not be punished - much less prevented in advance.

The Supreme Court has rejected the notion that the government may seize expressive materials, label them contraband, and use that label to prevent the materials from being disseminated. This is because, the "Bill of Rights," the Court noted in *Marcus v. Search Warrants of Prop*., 367 U.S. 717, 731–32 (1961) "was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression "and "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new." *Id,* 367 U. S. at 724, citing *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765). The Court has resoundingly rejected the "contraband" theory to prevent dissemination of expressive materials. "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia other contraband. We rejected that proposition in *Marcus v. Search Warrant*, 367 U. S. 717 (1961)." *A Quantity of Books v. Kansas*, 378 U. S. 205, 211-212 (1964).

d. The Government's boilerplate claims, never tested at any hearing, were not sufficient to meet its burden to show a compelling

Governmental interest that overrides Burke's right of access and his right to return of his property under Rule 41(g)

Because whether the government exhibited "callous disregard" under *Richey* will almost always come down to whether there was probable cause for the search and seizure, the wholesale embargoing of the probable cause basis for a search and seizure renders Rule 41(g) "meaningless." *See In re Search of Up North Plastics, Inc.*, 940 F. Supp. at 232-33 (holding that both the "Fourth Amendment right of probable cause" and Rule 41(g) are "meaningless if an aggrieved party is not allowed to review the affidavit supporting the search" because "the court's decision [on a motion for return of property] will almost always depend on whether the affidavit submitted in support of the warrant application established probable cause").

"The Fourth Amendment right to be free of unreasonable searches and seizures includes the right to examine the affidavit that supports a warrant after the search has been conducted and a return has been filed with the Clerk of Court pursuant to Fed.R.Crim.P. 41." *In re Search Warrants Issued*, 889 F. Supp. 296, 299 (S.D. Ohio 1995) The Magistrate Judge correctly found that there was a general right of access to search warrants as public records, and that that right of access could be abrogated only in the case where the Government clearly demonstrated a "compelling government interest" in embargoing this information, and that the embargo was the "narrowly tailored" to protect that interest. (Doc 35 at 5). *See*

Brown v. Advantage Eng., 960 F.2d 1013, 1015-16 (11th Cir. 1992). Questions of sealing and public access require a balancing of interests. *Globe Newspaper Co. v. Superior Court, County of Norfolk*, 457 US 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 581, n. 18 (1980), and a Court is directed to balance the need for disclosure against the government's demonstration of a "compelling need" for secrecy. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 US 1, 15 (1986). On one side of this balance is the fact that the "Fourth Amendment right of probable cause" and Rule 41(g) are "meaningless if an aggrieved party is not allowed to review the affidavit supporting the search" because "the court's decision [on a motion for return of property] will almost always depend on whether the affidavit submitted in support of the warrant application established probable cause" *Matter of Up North Plastics, Inc.*, 940 F. Supp. 229, 232 (D. Minn. 1996). The Court there noted correctly that:

> The affidavit must be seen to be effectively challenged. A person whose property is seized pursuant to a search warrant, cannot decide whether he/she should make a motion under Rule 41 unless they know the basis upon which the search warrant was issued. To permit an affidavit or any documents in support of a search warrant to remain sealed against examination by the person whose property was searched deprives him of the right secured by Rule 41 to challenge that search. There is nothing in Rule 41 to suggest that such evidence is intended to be taken in secret or without a full opportunity for the aggrieved person to argue that probable cause was lacking.

940 F. Supp. at 232; *see also In re Extradition of Manrique*, Case No. 19-mj-71055-MAG-l (TSH), 12-13 (N.D. Cal. Feb. 6, 2020); *Lindell v. United States*, File No. 22-cv-2290 (ECT/ECW). Dist. Court, Minnesota 2022 (Nov. 3, 2022).

On the other side of the equation is the government's unattested boilerplate claims of unspecified harm resulting from disclosure - the kind of claims which can be, and often are asserted in every criminal investigation. In its motion to seal the affidavit, (Doc. 18-1, Record #3) the government noted that.:

> Disclosure of the contents of the affidavit may cause the subjects to flee, destroy evidence, disclose facts that could jeopardize an ongoing criminal investigation, and cause witnesses named in the affidavit to be subject to possible harassment or retaliation from individuals who are the subjects of the investigation or who have an interest therein.

The government offered no evidence to support these contentions, and the nature and scope of the investigation - as well as the identity of the "subject" has been disclosed by the Magistrate Judge himself. (Doc. 35 p. 13). There is no genuine threat of fleeing witnesses, intimidation, harassment, retaliation, obstruction, or destruction of evidence. [13] Mr. Burke, the "subject" of the investigation, has no

[13] In *Trump*, the Magistrate Judge had rejected, pre-indictment, the "Government's argument that the present record justifies keeping the entire Affidavit under seal," *In re Sealed Search Warrant*, 622 F. Supp. 3d 1257, 1265 (S.D. Fla. 2022), despite the fact that the court had already found probable cause for obstruction of the investigation by the subject, the FBI had already been inundated with threats, and there was a serious risk of witness harassment and intimidation, id. at 1263.

intention to flee, and the Court has the full power to prevent the destruction of evidence.

e. Even if the Government had met its burden to show a compelling interest that overrides the strong public and private interests in favor of unsealing, wholesale sealing of the search affidavit in its entirety is not the least restrictive means available.

Even if the government had offered anything other than boilerplate justifications, and even if they were sufficient to overcome the strong countervailing interests in favor of disclosure, the wholesale sealing of the affidavit could not possibly be the least restrictive means possible to protect the governmental interests.[14] *See Brown v. Advantage Eng.*, 960 F.2d at 1015-16. Yet, in the Order on Burke's Motion to Unseal, the Court summarily held that "line-by-line redaction is not practical." Doc 35 at 6.

It is not clear what the District Court means by "not practical." It is clear, however, that the Magistrate Judge could have, without compromising any legitimate governmental interests, at a minimum, released those portions of the affidavit relevant to the issue of "callous disregard," including whether the affiant told the Magistrate Judge: (i) that they sought an order seizing and preventing

[14] Burke further notes that he expressly offered to inspect the affidavit under a protective order and file any future references to it under seal. (Dkt. 25 p 15 n. 30) So, the government needed to show not only that public disclosure might create some risk of harm (which it does not), but also that even disclosure only to Burke and his attorneys, pursuant to a protective order, would cause harm..

publication of documentary materials collected for dissemination to the public under the Privacy Protection Act (PPA), *42* U.S.C. § 2000aa;[15]. (ii) that the "live feeds" alleged to be downloaded without authorization were on websites that were unencrypted and readily accessible to anyone with the appropriate URL; (iii) that the video feeds came from sites that were "readily accessible to the public" under 18 U.S.C. § 2511(2)(g)(1); (iv) that the government had obtained approval from the relevant DOJ components to seize the contents of a newsroom; (v) the nature and extent of "filter protocols" to prevent the investigative team from seeing both privileged and First Amendment protected materials; (vi) that the search protocols included safeguards to ensure that only materials which were evidence of unauthorized access to computers or wiretapping were seized, retained or viewed.

Where, as here, the government's seizure and retention prevents the publication of materials, suppression of this evidence in the event of an indictment and trial, or return of the materials after the termination of the case or the expiration of the Statute of Limitations is not a remedy at all. *Korf* supra, 11 F.4th at 1247 (11th Cir. 2021) ("Contrary to the government's suggestion, suppression is not an adequate remedy for any violations. … suppression does not redress the government's

[15] In the proceedings below, the government took the position that Burke was not a journalist" (Dkt. 33 p. 12). While the Magistrate Judge found him to be a "member of the media," access to the affidavit is necessary to determine the government's representations at the time of application.

intrusion into the Intervenors' personal and privileged affairs. In contrast, Rule 41(g) can.") [16]

f. The District Court Erred in Failing to Hold an Evidentiary Hearing as Required by Rule 41(g)

Rule 41(g) itself provides that the District Court "must" receive evidence on factual issues. The Magistrate Judge declined to permit any hearing or taking of facts, accepting as conclusive that proper mitigation procedures were in place and were followed by the government to protect Burke's privileged documents and material, his work product and his First Amendment protected activities, and therefore, there was no "callous disregard" for Burke's right to publish, to be free from prior restraint, and to protect his journalistic privileges.

The assertions of the government in a Rule 41(g) motion are not evidence. *United States v. Potes Ramirez*, 260 F. 3d 1310, 1314 (11th Cir., 2001), and "Rule 41(e) [now (g)] compels a District Court to afford such persons an opportunity to submit evidence in order to demonstrate that they are lawfully entitled to the challenged property… " *United States v. Howell*, 425 F.3d 971, 976 (11th Cir. 2005). Indeed, the terms of Rule 41(g) itself provide that the District Court "must" receive evidence on factual issues. *United States v. Melquiades*, Dkt. No. 10-10380 (11th

[16] Suppression is also antithetical to Burke's interests as a journalist. He wants access to his video live feeds to publish them, not to withhold them from the Court or the public.

Cir., August 24, 2010) (unpublished) ("once a Rule 41(g) movant alleges facts sufficient to sustain his claims—claims that are neither barred by law nor frivolous—the district court must collect some evidence to resolve the material factual issues disputed by the parties."); *United States v. Davis*, Dkt. No. No. 18-12165 (11th Cir., September 18, 2019) (unpublished) (government must provide "some evidentiary support" for its claims in Rule 41(g) motion.)

Mr. Burke was afforded no such opportunity. Burke was unable to challenge the probable cause basis for the search because the Magistrate Judge refused to let him see a single word in the search warrant affidavit. Burke was also unable to present testimony about the nature of the materials seized, his reliance on those materials and his need for access to them, the (in)adequacy of the limited return of documents outside the scope of the warrant, and most significantly, the degree of harm to himself, his business, and his journalism resulting not only from the seizure, but from his inability to obtain return of the confidential files. The Magistrate Judge found that Burke had not specifically pointed to individual materials he intended to publish, (Doc 35 at 14), but this ignores the type of journalism that Burke does (locating relevant videos in his archive *in response* to breaking news), and also ignores that the Government has failed to provide detailed inventory of the content of his seized video materials. At a hearing, Burke could have presented evidence on these issues.

The Magistrate Judge also accepted without taking evidence, the Government's representation of the existence of a "filter team" and the reasonableness of the protocols designed to prevent the investigative team from having access to both privileged and protected journalist records, despite the fact that there is no mention of a filter team or filter protocols in the warrant itself. Illustrative is *In re Sealed Search Warrant & Application (Korf)*, 11 F. 4th 1235, 1246-1247 (11th Cir., 2021) holding that inadequacies in the filter protocols designed to protect privileged information could demonstrate "callous disregard" for the rights of the privilege holder. Here, the Magistrate Judge has sealed the filter protocols, or indeed, whether such protocols even exist. Burke was further entitled to present evidence at an adversarial hearing that Fox News did not have any reasonable expectation of privacy over live feeds streaming on public websites and that neither of the statutes cited in the warrant proscribe what is alleged. Lastly, Burke was entitled to present evidence at a hearing that any legitimate Government interests could be served by simply making forensic copies of the materials and returning the originals to Burke so he could publish them. The materials seized should be returned. None of the seized materials are unlawful for a journalist to possess, these are live feeds that were being broadcast unencrypted on publicly accessible websites. Even assuming arguendo that they, like the Pentagon Papers,

were obtained illegally (which they were not), the Government does not have a valid interest in enjoining their publication.

RELIEF SOUGHT

This Court should remand the case to the District Court with directions to (a) unseal the affidavit and (b) hold an evidentiary hearing pursuant to Rule 41(g).

In the event that this Court does not order the District Court to return the contents of the seized materials, or forensic copies thereof, this Court should remand the case to the District Court with directions to conduct an evidentiary hearing and release the portions of the affidavit which relate to the following issues: (i) was the Magistrate Judge informed that he was being asked to seize a newsroom? (ii) did the Magistrate Judge approve the filter team protocols, what were these protocols, and how have they been followed; (iii) what instructions (search terms or other parameters) did the government use to determine which files were "evidence of downloading without authorization" or "unauthorized interception?;" (iv) evidence in the affidavit in support of probable cause indicating whether the access to video feeds or other information proposed to be seized under the warrant was made via publicly accessible, Internet addressable websites?; (v) evidence in the affidavit in support of probable cause indicating whether the "communications" allegedly "intercepted" were on websites that were configured to be "readily accessible to the

public?;" (vi) evidence presented to the Magistrate in support of the warrant indicating that the government had "complied with" the provisions of the Privacy Protection Act, (PPA), 42 U.S.C. 2000aa, et. seq., and DOJ Media Policies, 28 CFR 50.10 *et. seq*.

CERTIFICATE OF COMPLIANCE WITH Rule 32(g)(1), FRAP

The undersigned certifies that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: December 26, 2023

Respectfully Submitted,

s/Michael P. Maddux

Michael P. Maddux, Esquire
Florida Bar Number: 0964212
Attorney for Appellee
Michael P. Maddux, P.A.
2102 West Cleveland Street
Tampa, Florida 33606
Phone: (813) 253 - 3363
Facsimile: (813) 253 - 2553
E-Mail: mmaddux@madduxattorneys.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 26th day of December 2023, I caused this Opening Brief of Appellant, Timothy Burke to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Jay G. Trezevant,
Assistant United States Attorney,
Middle District of Florida
Suite 3200
400 N Tampa St
Tampa, FL 33602-4798
813/274-6312
Fax: 813/274-6103
Email: jay.trezevant@usdoj.gov

Counsel for the United States of America

Carol J. Locicero
Thomas & LoCicero, PL
601 South Blvd
Tampa, FL 33606-2629
813/984-3060
Fax: 813/984-3070
Email: clocicero@tlolawfirm.com

Counsel for Times Publishing Company

s/Michael P. Maddux
Michael P. Maddux, Esquire