THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 TERM

JUNE SESSION

The Mortgage Specialists, Inc.

v.

Implode-Explode Heavy Industries, Inc.

No. 2009-0262

APPEAL FROM FINAL ORDER OF ROCKINGHAM COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

BRIEF OF CITIZEN MEDIA LAW PROJECT AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE*

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N.H. RSA § 383:10-b

All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be subserved by the publication thereof. The commissioner may furnish to the federal supervisory authorities and to independent insuring funds which he deems qualified such information and reports relating to the institutions under his supervision as he deems best. On motion for discovery filed in any court of competent jurisdiction, in aid of any pending action, the court, after hearing the parties, may order the production of such records, investigations and reports for use in such action whenever it is found that justice so requires, subject to such reasonable safeguards imposed by the court as may be necessary to prevent use by unauthorized persons or publicity of irrelevant portions thereof.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Citizen Media Law Project and The Reporters Committee for Freedom of the Press (collectively, "*Amici*") are media research and advocacy organizations located in Massachusetts and Virginia, respectively. Representing both the online and offline worlds of journalism, *Amici* seek to protect the vital role that all journalists play in discussing matters of public concern, uninhibited by regulations and requirements that violate state and federal constitutional principles.

Amici share the concern that, if this Court does not apply the heightened standards required by the Supreme Court of the United States regarding prior restraints on the press and the New Hampshire qualified reporter's privilege, the public's access to valuable news and information will be irreparably harmed. As described more fully in the accompanying Motion for Leave to file this brief, *Amici* offer a unique and valuable perspective on the issues before the Court.

STATEMENT OF THE CASE AND FACTS

Amici provide the following brief summary of facts relevant to the arguments set forth herein.[1]

In connection with its reporting about financial issues, appellant Implode-Explode Heavy Industries, Inc. ("ML-Implode") – a major online news source for the mortgage

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[1] *Amici* rely primarily upon the statement of the case and facts set forth in Respondent's Objection to Preliminary and Permanent Injunctive Relief dated Feb. 25, 2009. Relevant documents from the proceedings below referenced herein include the Verified Petition for Relief dated Nov. 12, 2008 (the "V. Pet. for Relief"), the Rockingham Superior Court's procedural order dated Feb. 6, 2009 (the "Procedural Order II"), the Petitioner's Reply to the Respondent's Objection to Preliminary and Permanent Injunctive Relief dated March 4, 2009 ("Pet'r's Reply to Resp't's Objection"), and the Rockingham Superior Court's final order dated March 11, 2009 (the "Final Order").

industry –published a loan summary chart (the "Loan Chart") pertaining to appellee The Mortgage Specialists, Inc. ("MSI"). The Loan Chart contains detailed information about the lending activity of MSI and was submitted by MSI as part of an investigation by the New Hampshire and Massachusetts banking departments. (V. Pet. for Relief ¶¶ 8-9.) In response, MSI commenced this action, and without conducting an evidentiary hearing or making any findings of fact the Rockingham Superior Court enjoined further publication of the Loan Chart. (Final Order at 5.) Accompanying this restriction, the lower court ruled that ML-Implode must disclose to MSI the identity of the source that provided the Loan Chart to ML-Implode and thus assisted with ML-Implode's coverage of the ongoing national mortgage crisis. (Final Order at 6.) ML-Implode has appealed from the Final Order.

SUMMARY OF THE ARGUMENT

The Superior Court's Final Order failed to take into account the important First Amendment issues at stake before ordering ML-Implode to remove the Loan Chart from its website, http://www.ml-implode.com (the "Site") and to reveal the identity of its confidential source. ML-Implode provides vital information to the public about matters of utmost public concern. Like any traditional media outlet, its newsgathering activities and publication of articles are protected under the First Amendment. The injunction prohibiting ML-Implode from republishing the Loan Chart is an unconstitutional prior restraint on speech and the order compelling ML-Implode to reveal the identity of its confidential source violates both the First Amendment and Article 22 of the New Hampshire Constitution. Despite the importance of the speech involved, the Superior Court failed to even consider the serious First Amendment implications of its decision.

The Superior Court's Final Order goes against New Hampshire law and is inconsistent with important First Amendment principles that have been upheld by this Court. For the reasons set forth herein, *Amici* respectfully ask this Court to apply the relevant legal standards, vacate the Final Order, and hold: (a) that the publication of the Loan Chart cannot be restrained; and (b) that ML-Implode cannot be required to disclose the identity of the Loan Chart's source.

ARGUMENT

I. ENJOINING PUBLICATION OF THE LOAN CHART VIOLATES THE FIRST AMENDMENT AND THREATENS TO CHILL REPORTING ON MATTERS OF IMPORTANT PUBLIC CONCERN.

Under a long line of United States Supreme Court and other cases defining the contours of impermissible limitations on speakers' First Amendment rights, the Final Order's injunction preventing ML-Implode from publishing the Loan Chart constitutes a classic example of a prior restraint on free speech. Like all prior restraints, the Final Order is unconstitutional absent an overwhelming state interest in favor of its issuance. By issuing the Final Order without an evidentiary hearing, the lower court wholly failed to identify such an overwhelming state interest. Even if the lower court had conducted such a hearing, however, it would have found no such state interest in this case. For the reasons set forth herein, the injunction against ML-Implode's publication of the Loan Chart cannot stand.

A. The Final Order's Injunction Preventing Publication of the Loan Chart Constitutes an Unconstitutional Prior Restraint on Speech.

1. The Final Order's Injunction Preventing Publication of the Loan Chart Constitutes a Prior Restraint on Speech.

Any injunction, "so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights," absent an overwhelming countervailing interest. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). "Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Prior restraints represent "the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and constitute "one of the most extraordinary remedies known to our jurisprudence," *id.* at 562. The First Amendment forbids prior restraint of speech even more than it forbids criminal punishment or money damages imposed after publication, because "[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. The Superior Court's Final Order is a prior restraint on speech to the extent it forbids the continued publication of the Loan Chart and associated reporting. The fact that this information had previously been made available by ML-Implode is of no consequence, because the injunction prevents all readers from viewing the Loan Chart, including those who viewed it prior to the injunction. *See Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (noting that an injunction against online publication pending resolution of other issues was impermissible).

Although the prohibition against prior restraints is not absolute, "the gagging of publication has been considered acceptable only in exceptional cases . . . where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., Circuit Justice) (internal quotation omitted). The Supreme Court has noted: "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin*, 402 U.S. at 419. In cases such as this one, where "the prior restraint impinges on the right of the press to communicate news and involves expression in the form of pure speech — speech not connected with any conduct — the presumption of unconstitutionality is virtually insurmountable." *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986) (citing *Neb. Press Ass'n*, 427 U.S. at 558, 570 (White, J., concurring)). Reflecting this disfavored status, the Supreme Court has found prior restraints constitutionally impermissible even when publication has threatened urgent national security interests, *New York Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 714 (1971) (per curiam), and when it has threatened to adversely impact a criminal defendant's right to a fair trial, *Neb. Press Ass'n*, 427 U.S. at 568-70.

Court orders that forbid the publication of confidential documents and information, such as the Final Order and its injunction against ML-Implode, constitute unlawful prior restraints, regardless of how the documents were obtained. *See Pentagon Papers*, 403 U.S. at 714 (injunction against publication of classified documents stolen from Justice Department was invalid prior restraint); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (temporary restraining order enjoining

publication of leaked trial documents under seal was invalid prior restraint); *In re Providence Journal Co.*, 820 F.2d at 1351-53 (temporary restraining order prohibiting publication of FBI logs and memoranda was invalid prior restraint); *cf. Wikileaks*, 535 F. Supp. 2d at 985 (dissolving injunction against website hosting leaked confidential bank documents on other grounds, but noting substantial prior restraint issue).

The *Pentagon Papers* case demonstrates just how dramatic the prohibition on prior restraints is. 403 U.S. 713. There, *The New York Times* obtained stolen, top-secret Defense Department documents detailing a history of United States political and military involvement in Vietnam. *See Pentagon Papers*, 403 U.S. at 714. Although these documents contained highly classified and damaging information and were to be released in the middle of the Vietnam War, the Supreme Court held that even such strong government interests could not overcome the established presumption against constitutional validity. *Id.*

A Federal District Court applied the standard articulated in *Pentagon Papers* to publication on the Internet in *Ford Motor Co. v. Lane.* 67 F. Supp. 2d 745 (E.D. Mich. 1999). There, Ford Motor Co. sued a website that obtained and published internal Ford Motor Co. documents, including blueprints, fuel efficiency reports, and photographs of a new Ford car model. *Id.* at 747. Although the disclosure may have violated state trade secrets statutes, the District Court refused to grant a preliminary injunction forbidding disclosure, citing the prohibition against prior restraints. *Id.* at 754. The court noted that while online speech may lack some of the editorial control of the established press, the First Amendment does not permit an injunction of this nature, "[n]otwithstanding such technological changes." *Id.* at 753-54.

The *Ford Motor Co.* court's rationale is consistent with technological reality and basic common sense. Content posted online – such as that published by ML-Implode as part of its public reporting on the Site – is, in effect, continually published and ephemeral. When a court orders that such content be removed from the Internet, that order has prospective effect because it also directly restricts what the website can publish in the future. Similarly, due to online content's ephemeral quality, such an injunction ordering the removal of online reporting or other content prevents *all* readers from viewing that content going forward, including those who previously viewed it prior to the injunction. The resulting constraints on what a website can publish going forward and what readers can access and read fundamentally impinge on one of the "significant societal interests" served by the First Amendment, namely to protect "the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality); *cf. Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) ("the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom").

If *The New York Times* published the *Pentagon Papers* today, it would surely do so on its website in addition to its print edition. A court order requiring the *Times* to take down the online story shortly after publication and to refrain from reposting it would be as much a prior restraint, and equally repugnant to the First Amendment, as the unconstitutional order enjoining initial publication in print that was disallowed by the Supreme Court in 1971.

2. *MSI Did Not Make the Requisite Exceptional Showing Sufficient to Support a Prior Restraint on Speech.*

"[A] party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available." *In re Providence Journal Co.*, 820 F.2d at 1351 (citing *Neb. Press Ass'n*, 427 U.S. at 562-68). No such showing was made; indeed, no such exceptional showing can be made in this case.

The court below issued the Final Order without making findings of fact or law as to any of the issues relevant to a prior restraint analysis. The lower court held no evidentiary hearing, it made no particularized findings of fact or conclusions of law, and it engaged in no heightened First Amendment scrutiny before it imposed this "most serious and . . . least tolerable infringement on First Amendment rights." *See Neb. Press Ass'n,* 427 U.S. at 559. Because of the lower court's approach, the Final Order provides no coherent basis on which one might conclude that publishing the Loan Chart was unprotected speech, offers no grounds for concluding that an injunction furthered any legitimate government interest. *Cf. Miller Newspapers, Inc. v. City of Keene*, 546 F. Supp. 831, 836 (D.N.H. 1982) (When First Amendment interests are at stake, "rigorous adherence to adequate procedural safeguards is also required to protect . . . activity from unwarranted governmental intrusion.").

In seeking this prior restraint, MSI invoked various privacy and other business interests, including loss of business as a result of ML-Implode posting the Loan Chart (V. Pet. for Relief ¶ 26), general harm to reputation (Pet'r's Reply to Resp't's Objection ¶ 16), breach of privacy (*id.* at ¶ 21), and harm to the integrity of the New Hampshire Banking Department ("NHBD") regulatory system (*id.* at ¶ 44). None of these alleged

interests, even if substantiated, are or could be compelling enough to justify the most extraordinary remedy of a prior restraint and overcome the "virtually insurmountable" presumption of unconstitutionality that such restraints raise. *See In re Providence Journal Co.*, 820 F.2d at 1348.

"Designating the conduct as an invasion of privacy" does not justify a prior restraint. *Org. for a Better Austin*, 402 U.S. 415, 419-20 (1971); *see also Procter & Gamble Co.*, 78 F.3d at 225 (prohibiting restraint on the justification of protecting "vanity . . . or commercial self-interest."); *In re Providence Journal*, 820 F.2d at 1350 ("An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude [as interests that could justify a prior restraint]."); *cf. Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978) (injury to reputation alone insufficient to impose subsequent punishment for publishing truthful information on matters of public concern). For example, this Court held in *In re Brooks*, 140 N.H. 813 (1996), that a Supreme Court Rule prohibiting discussion of attorney discipline procedures failed First Amendment scrutiny, despite state interests in protecting the reputations of attorneys, maintaining the integrity of investigations, and shielding witness and client confidences. *Id.* at 820.

In any event, even if MSI's privacy and reputational interests were "most extraordinary" and could be sufficient to somehow outweigh the First Amendment interests at stake, the Final Order does not meet the heightened requirements for a prior restraint on speech. As noted, a prior restraint must be narrowly tailored to achieving the government's compelling interest, *cf. In re Brooks*, 140 N.H. at 819-20, and "no less extreme measures [must be] available," *In re Providence Journal*, 820 F.2d at 1351. *See*

United States v. Noriega, 917 F.2d 1543, 1552 (11th Cir. 1990) (allowing only portions of witness tapes to be restricted from publication due to Sixth Amendment concerns). As described above, the Superior Court made no effort to engage in heightened First Amendment scrutiny in this case and did not limit the scope of the injunction in any manner. (Final Order at 5-6.) The Final Order was not narrowly tailored – indeed, it was not tailored at all – and the lower court made no effort to consider less extreme measures that may achieve the same results. Neither by substance nor by process did the Superior Court meet the stringent standards required in imposing prior restraints.

B. ML-Implode's Publication of the Loan Chart on the Site Constitutes Constitutionally Protected Speech, Which May Not Be Punished Even After Publication.

The restraint against publication imposed here is especially inappropriate, as ML-Implode's posting of the Loan Chart on the Site is constitutionally protected speech, which may not be punished *even after* publication, let alone restrained prior to it.[2] The Supreme Court has recognized repeatedly that the First Amendment protects truthful speech on matters of public concern. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 527-28, 533-35 (2001) (First Amendment barred imposition of civil damages under wiretapping law for publishing contents of conversation relevant to matter of public concern); *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (First Amendment barred imposition of civil damages on newspaper for publishing rape victim's name); *Smith v.*

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[2] As noted earlier, the First Amendment prohibits prior restraint of speech even more strictly than post-publication punishment for it because of the "immediate and irreversible sanction" imposed by a prior restraint and that restraint's "freezing" effect on speech. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Although this injunction did not meet the criteria for prior restraints and should be vacated on that basis alone, *Amici* choose to address the constitutional prohibitions on post-publication punishment as well for the sake of completeness.

Daily Mail Publ'g Co., 443 U.S. 97, 103-06 (1979) (First Amendment barred prosecution under state statute for publishing names of juvenile offenders without permission of court); *Landmark Commc'ns*, 435 U.S. at 841-42 (First Amendment barred criminal prosecution for disclosing information from a confidential judicial discipline proceeding); *Pentagon Papers*, 403 U.S. at 714 (1971) (per curiam) (First Amendment barred injunction against publication of classified documents leaked from Defense Department). Therefore, "if a newspaper obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith*, 443 U.S. at 103; *accord Bartnicki*, 532 U.S. at 527-28; *Florida Star*, 491 U.S. at 533[3].

Bartnicki makes this principle abundantly clear. There, the Supreme Court addressed whether illegal conduct on the part of a source strips an ensuing publication of constitutional protection. *Bartnicki*, 532 U.S. 514. Members of a teachers union sued a radio personality under state and federal wiretapping laws after he played an unlawfully recorded telephone conversation between the plaintiffs on the air. *Id.* at 518-19. The District Court, finding no constitutional issue, denied the broadcaster's motion for summary judgment on First Amendment grounds. *Id.* at 521. The Third Circuit disagreed, holding that state and federal wiretapping laws restricted more speech than was necessary to protect the privacy interests at stake. *Id.* at 521-22. In affirming, the

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[3] The State of New Hampshire expresses the interest of a free press in stronger terms than the Constitution of the United States. *See* N.H. Const. Pt. 1 Art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state. . ."); *Associated Press v. State*, 153 N.H. 120, 128 (2005) ("The explicit incorporation of the right of access to governmental documents into the State Constitution provides greater textual support . . . than does the First Amendment."); *Opinion of the Justices*, 117 N.H. 386, 389 (1977) ("Our constitution quite consciously ties a free press to a free state . . .").

Supreme Court held that the First Amendment prohibited the recovery of damages against the broadcaster, explaining "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535. The court noted that, though the wiretapping statutes protected valid privacy interests, "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

The United States Court of Appeals for the First Circuit recently applied *Bartnicki* to an Internet publication in *Jean v. Mass. State Police*, 492 F.3d 24, 31 (1st Cir. 2007). In *Jean*, a man arrested under a misdemeanor charge captured video of Massachusetts State Police conducting a warrantless search of his house and provided that video to Jean, a political activist. *Id.* at 25. After Jean posted that video on her website, the State Police sent her a letter demanding that she remove the video or face potential wiretapping prosecution. *Id.* at 25-26. In response, Jean filed for a declaratory judgment and injunction, on First Amendment grounds, against prosecution for violating Massachusetts wiretapping laws. *Id.* at 26.

The First Circuit held that Jean could not be criminally punished for posting the video online, even though her source violated state wiretapping laws in making the video and Jean had reason to know of the violation. The court rejected the argument that *Bartnicki* does not apply to the knowing receipt of unlawfully obtained recordings, and held that, even though Jean herself may have committed an unlawful act under state wiretapping law, the First Amendment as interpreted in *Bartnicki* does not permit Massachusetts to criminalize Jean's conduct. *Jean*, 492 F.3d at 31.

In the present case, ML-Implode's published speech is plainly within the protections described by *Bartnicki* and *Jean*. First, the speech was truthful. MSI does not contend, nor did the lower court find, that the Loan Chart or any information contained in it is false or defamatory.[4] Second, the Loan Chart and data contained in it are matters of legitimate public concern. ML-Implode posted the Loan Chart in August 2008 as part of a larger report on the New Hampshire and Massachusetts Banking Departments' issuance of cease-and-desist orders against MSI. *See The Mortgage Specialists – Retail*, The Mortgage Lender Implode-O-Meter, Aug. 19, 2008, http://ml-implode.com/ailing/ lender_TheMortgageSpecialists_2008-08-19.html (last visited June 12, 2009). At the time, the mortgage industry and its practices were the subject of vigorous national debate, with coverage in every major New Hampshire newspaper[5] and numerous national publications. ML-Implode's online reporting was a major part of this national dialogue, with the Site reaching over 100,000 frequent visitors and offering up-to-the-minute updates on the practices of the mortgage lending industry. Louise Story, *Loan Pains Turned Site Into a Hit*, New York Times, July 8, 2008, http://www.nytimes.com/2008/07/ 08/business/08implode.html (last visited June 5,

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[4] Nor does the Loan Chart fall into other categories of unprotected speech recognized by the Supreme Court, including obscenity, speech that incites violence, and speech that presents grave and imminent danger. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

[5] *See generally* Shawne Wickham, *NH Task Force Targets Those Behind Mortgage Meltdown*, New Hampshire Union-Leader, Oct. 25, 2008, http://www.unionleader.com/article.aspx?articleId=c3b25d0a-f341-451a-81d4-001665a7524f2; Clare Trapasso, *N.H. Residents Worried after Wall St. Meltdown*, Seacoast Online, Sept. 16, 2008, http://www.seacoastonline.com/articles/ 20080916-BIZ-809160362; *President of Mortgage Companies Denies Fraud*, Foster's Daily Democrat, Aug. 1, 2008, http://www.fosters.com/apps/pbcs.dll/article?AID=/20080801/ NEWS10/716946187.

2009). The Loan Chart served an important role as direct evidence supporting and documenting claims made by ML-Implode in its reporting. Consequently, ML-Implode's publication of this newsworthy document is entitled to the full benefit of First Amendment protection.

Finally, even if ML-Implode's source leaked the Loan Chart without authorization or in violation of the law, that fact does not make ML-Implode's speech any less protected; as the Supreme Court has plainly held, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki*, 532 U.S. at 535. Nor did ML-Implode's own conduct strip it of constitutional protection. Even if ML-Implode's conduct were unlawful under New Hampshire law, which it is not, the First Amendment would not permit New Hampshire to punish or restrain ML-Implode's conduct. *See Jean*, 492 F.3d at 31 ("[W]hether Jean's conduct fell within the statute is not determinative . . . . Rather, the determinative question is whether the First Amendment, as applied by the Supreme Court in *Bartnicki*, permits Massachusetts to criminalize Jean's conduct."). Because publication of the Loan Chart is truthful speech on a matter of public concern fully protected by the First Amendment, imposing damages or other subsequent punishment on ML-Implode would undoubtedly be unconstitutional under *Bartnicki* and its progeny.

In any event, publishing truthful, non-classified information of public importance, voluntarily provided by a third-party, violates no New Hampshire law that *Amici* can identify. MSI claimed, and the lower court presumably agreed, that N.H. RSA 383:10-b, "Bank Commissioner: Confidential Information," created a private cause of action in MSI against ML-Implode for publishing the Loan Chart. Section 383:10-b provides:

> All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be subserved by the publication thereof. The commissioner may furnish to the federal supervisory authorities and to independent insuring funds which he deems qualified such information and reports relating to the institutions under his supervision as he deems best. On motion for discovery filed in any court of competent jurisdiction, in aid of any pending action, the court, after hearing the parties, may order the production of such records, investigations and reports for use in such action whenever it is found that justice so requires, subject to such reasonable safeguards imposed by the court as may be necessary to prevent use by unauthorized persons or publicity of irrelevant portions thereof.

N.H. RSA 383:10-b.

Nothing in the plain language of the statute reveals a legislative intent to create a private cause of action against third-party publishers of documents supplied in confidence to the NHBD. Rather, the statute gives the commissioner power to make records of investigations by the NHBD confidential and describes the permissible grounds for lifting that confidentiality. *See In re Portsmouth Trust Co.*, 120 N.H. 753, 756 (1980) ("RSA 383:10-b empowers the commissioner to make reports of the bank examiner confidential."). The statute does not purport to vest privacy rights in the subjects of investigations and says nothing about third-party publication.

Similarly, publication of the Loan Chart exposed ML-Implode to no civil tort liability for invasion of privacy through the publication of private facts. This court has adopted the elements of the private facts tort found in the Restatement (Second) of Torts, § 652D (1966). *See Karch v. BayBank FSB*, 147 N.H. 525, 535 (2002). Section 652D

excludes from liability publication of information "of legitimate concern to the public." *See* Restatement (Second) of Torts, § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that . . . is not of legitimate concern to the public."); *see also Riley v. Harr,* 292 F.3d 282, 298-99 (1st Cir. 2002) (construing New Hampshire law) (holding that private facts cause of action contemplates an exception for "statements that are substantially relevant to a matter of legitimate public concern"). For the reasons discussed above, no private facts claim against ML-Implode for publishing the Loan Chart is tenable.[6]

Thus, ML-Implode's publication of truthful information on a matter of public concern is not unlawful in New Hampshire and, even if it were, would nevertheless be fully protected speech under the First Amendment and the clear principles of *Bartnicki* and *Jean.* As there is no basis for punishing this valuable speech after the fact, and because the First Amendment would bar such punishment, the Final Order's imposition of a prior restraint is even more improper and unconstitutional.

C. Sustaining the Lower Court's Ruling Would Chill Reporting on Matters of Significant Public Concern.

Upholding the lower court's ruling would not only violate ML-Implode's constitutional right to publish truthful information on a matter of public concern, and the

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[6] Even more fundamentally, as a corporation, MSI may not sue for violation of the common law right to privacy. *See* Restatement (Second) of Torts § 652I cmt. c ("A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by §§ 652B to 652E."); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

public's right to receive such information, but also would discourage other online news ventures from pursuing aggressive investigative reporting and publishing of primary documents on the Internet, to the further detriment of the public. As organizations devoted to the free flow of information and development of a vibrant news environment, online and offline, *Amici* have an especially acute interest in avoiding this wider chilling effect on speech.

The practice of journalism is currently undergoing a major transformation. The technology that journalists use to disseminate their content is rapidly changing, and there has been an accompanying resurgence in independent content – blogs, documentaries, non-profit journalism, and niche publications like ML-Implode. Growing in tandem is the regular practice of online sources linking to or posting primary source documents, empowering readers to view and study critical news material directly. An ordinary website's capacity to host and display copies of important documents enables journalists of any stripe to support the assertions made in their stories with documentary proof and to give their readers a deeper and more direct comprehension of the subject matter. Readers are being empowered to scrutinize source documents for themselves, allowing them to compare their impressions with others reporting on these matters.

Technological advances and troubled economic times have forced a number of newspapers, such as the *Christian Science Monitor* and the *Seattle Post-Intelligencer*, to begin to publish exclusively online. *See* Dan Richman & Andrea James, *Seattle P-I to Publish Last Edition Tuesday*, Seattle Post-Intelligencer, Mar. 17, 2009; David T. Cook, *Our First Century*, Christian Sci. Monitor, Nov. 25, 2008, http://www.csmonitor.com/2008/1125/p25s08-usgn.html. At the same time, online news sources like *The Huffington*

Post, Slate, Salon, Talking Points Memo and many, many others have garnered respectability and substantial reader interest as valuable, credible and innovative outlets for news reporting and analysis. In the past decade, many significant and engaging news stories, including elements of the Monica Lewinsky scandal, the events leading to the resignation of Senator Trent Lott, the scrutiny of Dan Rather's coverage of President George W. Bush's National Guard service, and the uncovering of falsehoods in memoir author James Frey's *A Million Little Pieces* began with online news sources. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 524-25 (2007).

Both online and off, good journalism requires investment of time and resources. If online news reporters and publishers are given reason to fear that courts will order the removal of news material, supporting documents and other protected speech based simply on a misunderstanding of or hostility to publication on the Internet, then these organizations will be deterred from investing the required time and resources to engage in aggressive reporting in the future. For years, the traditional, offline press has enjoyed and relied on the robust protection against prior restraints on "the communication of news and commentary on current events." *Neb. Press Ass'n*, 427 U.S. at 559. Journalistic functions carried out online, whether by professional news organizations or by independent "citizen reporters," are important to robust and vigorous reporting and to ensuring an informed public, and should enjoy the same protection. Denying online speakers and journalists these full protections of the First Amendment is not only flatly at odds with the Constitution and numerous decisions of the Supreme Court but would also send a chilling message to others who would endeavor to report on corporate misconduct

and other matters of public interest in New Hampshire and elsewhere. This is particularly true where, as in this case, there were no findings of fact, no conclusions of law, and no serious discussion of how the "virtually insurmountable" presumption of a prior restraint's unconstitutionality could be overcome.

Accordingly, *Amici* respectfully ask this Court to vacate the Final Order enjoining ML-Implode's publication of the Loan Chart.

II. THE SUPERIOR COURT VIOLATED NEW HAMPSHIRE LAW BY FAILING TO APPLY A QUALIFIED REPORTER'S PRIVILEGE BEFORE ORDERING THE DISCLOSURE OF THE SOURCE OF THE LOAN CHART.

Freedom of the press is guaranteed under both the First Amendment of the U.S. Constitution and Article 22 of the New Hampshire Constitution. As part of ensuring a free press that is able to provide important information to the public, courts in New Hampshire and across the nation have recognized a reporter's privilege stemming from both federal and state laws that allow journalists to protect confidential sources. Additionally, that reporter's privilege has been held to apply to non-traditional newsgatherers such as book authors and Internet journalists when they are acting with the intent to disseminate investigative news to the public. *Von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). ML-Implode offers an independent news web site that provides important coverage of the mortgage industry. Thus, the identity of the source disclosing the Loan Chart to the editors of ML-Implode is protected under both the First Amendment and New Hampshire law.

A. The Use of Confidential Sources is Protected under both New Hampshire Law and the First Amendment.

New Hampshire courts recognize a qualified reporter's privilege rooted in the New Hampshire Constitution. *See* N.H. Const. Pt. 1 Art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."). In *Opinion of the Justices* this Court was asked to determine if a qualified reporter's privilege protected a reporter from disclosing sources used to report on the removal of a government official. 117 N.H. 386 (1977). In granting protection to the reporter from having to testify, this Court noted, "[o]ur constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process." *Id.* at 389. Though the Justices did not address the scope of the privilege, or the issue of who qualifies as a reporter, the case made it clear that there is a qualified reporter's privilege in civil cases in New Hampshire.

This Court further applied the qualified reporter's privilege to a criminal case in *State v. Siel*, holding that a reporter's interest in protecting a source outweighed a criminal defendant's interest in obtaining the source's identity. 122 N.H. 254, 259-61 (1982). In doing so, the Court further acknowledged a privilege derived from the First Amendment, protecting journalists from being compelled to reveal confidential sources and information. *See id.* at 259 ("Our review of *Branzburg v. Hayes*, 408 U.S. 665 (1972) . . . , convinces us that a majority of the justices on the United States Supreme

Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources.").[7]

The First Circuit has also found this First Amendment-based reporter's privilege. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (holding that a qualified reporter's privilege protected confidential sources used by academic researchers); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (remanding a decision of the New Hampshire District Court that held a reporter in contempt and ordering the District Court to apply a qualified reporter's privilege). In *Cusumano*, the First Circuit recognized a balancing test under which courts must endeavor before ordering disclosure of confidential sources, rooted in the protections offered by the First Amendment. 162 F.3d at 716. There, Microsoft Corp. sought research materials produced by two book authors in order to advance its defenses in an ongoing antitrust lawsuit regarding Microsoft's web browser. *Id.* at 711. The authors compiled the research materials while drafting a book about Microsoft and Internet browser competitor Netscape. *Id.* The First Circuit found no error in the lower court's application of the qualified journalistic privilege, and affirmed an order protecting the author's work product from disclosure under this privilege. *Id.* at 717.

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[7] In *Branzburg*, though the majority found that a privilege did not protect reporters who were subpoenaed to testify before grand juries, it did acknowledge that "without some protection for seeking out the news, freedom of the press would be eviscerated." *Branzburg*, 408 U.S. at 681. Nevertheless, five justices – four dissenters and one in concurrence – recognized that reporters do enjoy a First Amendment-based qualified reporter's privilege to resist compelled disclosure of sources and information. *See Id.* at 709 (Powell, J., concurring); *id.* at 711-25 (Douglas, J., dissenting); *id.* at 725-52 (Stewart, J., dissenting). Justice Powell, in concurring, advocated that a case-by-case balancing test is necessary to determine if a journalist has privilege. *Id.* at 710 (Powell, J., concurring).

B. The Reporting Done by ML-Implode Should Be Protected Under a Qualified Reporter's Privilege.

The qualified reporter's privilege applies to all parties engaged in the practice of gathering information for public dissemination, including non-traditional newsgatherers like ML-Implode. In *von Bulow*, the Second Circuit established that a non-traditional journalist can invoke a reporter's privilege when, at the time of the newsgathering, the journalist has the intent to investigate and disseminate news to the public. *Von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987). The *von Bulow* case involved a civil lawsuit brought by a deceased woman's children against the woman's husband, Claus von Bulow, who allegedly murdered her. *Id.* at 138-40. The plaintiffs sought information from the author of a book about the Claus von Bulow murder investigation. *Id.* In determining whether a reporter's privilege applied to the book author, the court stated that: "[T]he individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process. . . . Further, the protection from disclosure may be sought by one not traditionally associated with the institutionalized press." *Id.* at 144-45. In that case, the court found that the author did not have the benefit of the reporter's privilege because she was not independent of the von Bulows and did not have the intent to disseminate news. Indeed, the author had a close relationship with Claus von Bulow and admitted during oral argument that her intent of writing a book was to vindicate him, not to publish an unbiased and factual account of the situation. *Id.* at 145.

In *In re Madden,* 151 F.3d 125 (3d Cir. 1998), the Third Circuit held that an employee of World Championship Wrestling recording reports about professional

wrestlers for a paid telephone hotline could not benefit from the reporter's privilege. *Id.* at 131. The court held that the person was not a journalist because he was not independent of World Championship Wrestling and did not have the requisite "intent at the inception of the newsgathering process to disseminate investigative news to the public." *Id.* at 129-30.

Following *von Bulow*, the First Circuit held that two book authors could avail themselves of the qualified reporter's privilege found in the First Amendment. *Cusumano*, 162 F.3d at 714. In so holding, the court noted:

> [T]he medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. . . . Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public."

Id. at 714 (citing *von Bulow*, 811 F.2d at 144). The court went on to say that the authors were privileged because their intent had been to "compile, analyze, and report their findings." *Id.* at 715. *See also Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) (holding that a reporter's privilege applied to an investigative book author).

ML-Implode is an independent organization that provides extensive coverage of the housing finance sector, by documenting the collapse of the mortgage industry and seeking ways to heal "the housing sector, the economy and the country." *See About The Mortgage Lender Implode-O-Meter*, The Mortgage Lender Implode-O-Meter, http://ml-implode.com/about.html (last visited June 12, 2009). Unlike the authors in *von Bulow* and *In re Madden*, ML-Implode had every intention at the inception of the newsgathering

process to disseminate investigate news to the public. ML-Implode is not employed by or affiliated with the subjections of its news coverage, like the authors were in *von Bulow* and *In re Madden*. The *von Bulow* and *In re Madden* test is a workable standard that makes an important distinction before applying a privilege: only those journalists who are independent news gatherers can avail themselves of the privilege. ML-Implode is precisely the type of journalist that is meant to receive the benefits of a reporter's privilege. When ML-Implode received a copy of the Loan Chart from a confidential source, they acted as any reporter would: they published a story detailing the facts contained in the Loan Chart that suggested that MSI were in trouble with the NHBD because of improper mortgage activities. (*See* Final Order.) Like the authors in *Cusumano*, whose book provided an independent look at Microsoft, ML-Implode has a First Amendment right to protect the identity of any confidential sources it used in the newsgathering process.

The medium in which ML-Implode offers its news to the public is irrelevant, as the above cases show. It is the function of an organization, not the medium of publication, which defines it as worthy of a journalist's privilege. Long before the advent of the Internet, the U.S. Supreme Court recognized that the definition of "press" did not depend upon the chosen medium used to distribute the work. "The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). As the news media continue to change and more and more newspapers publication occurs online, courts are recognizing that news web sites have the same First Amendment privileges as traditional

media. *See O'Grady v. Super. Ct.*, 139 Cal.App.4th 1423, 1464 (Cal. Ct. App. 2006) (Defining a website as a periodical for the purposes of a California journalist shield law, prohibiting disclosure of the source of a trade secret); *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999) (Internet journalist Matt Drudge was protected from having to reveal his notes by a qualified reporter's privilege).

Given the high public value of ML-Implode's reporting, this case presents an opportunity for the New Hampshire Supreme Court to further define the scope of the reporter's privilege in New Hampshire as it applies to Internet journalists. The qualified reporter's privilege, which has been used to protect confidential sources used by traditional journalists, must be applied to the Site in order to further the rights of a free press that both the federal and New Hampshire constitutions protect.

C. The Superior Court Erred by Failing to Consider a Qualified Reporter's Privilege Before Ordering Release of the Source of the Loan Chart.

The Superior Court's granting of the injunction requiring ML-Implode to reveal the identity of its confidential source goes against both New Hampshire law and the First Amendment. The court ordered the identity of the source without even *considering* the qualified reporter's privilege. (*See* Final Order.) Under the First Amendment and New Hampshire law, a court must conduct a balancing test that weighs the First Amendment rights of the news organization against the rights of the litigant seeking the information. As the First Circuit noted:

> Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law. In performing this task, trial judges – despite the heavy burdens most of them carry – are now increasingly recognizing the 'pressing need for judicial supervision.'

Bruno & Stillman, 633 F.2d at 595 n.11 (citing *AFC Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979)).

Far from exercising cautious judicial supervision, the Superior Court failed to even recognize that a balancing of interests must occur. (*See* Final Order.) In fact, the Final Order did not even mention that a reporter's privilege is recognized in New Hampshire before compelling ML-Implode to reveal its confidential source. (*Id.*) It is vital that courts balance the First Amendment rights of news media against the rights of litigants seeking information from reporters to ensure that reporters are not forced to serve as investigate arms of the government and the courts.

Further, in applying the reporter's privilege balancing test, the Superior Court should have found that ML-Implode's need to protect the identity of its confidential source outweighs the plaintiff's request for the information. In *Bruno & Stillman*, the First Circuit assessed a New Hampshire boat company's right to force disclosure of confidential sources used in an article published in *The Boston Globe*, in order to ascertain a party for a defamation claim. 633 F.2d at 584. The court, noting that inquiries into privilege are by nature "fact-sensitive," *id.* at 595, ordered lower courts to "balance the potential harm to the free flow of information that might result against the asserted need for the requested information," *id.* at 596. While this privilege is "one that demands sensitivity, invites flexibility, and defies formula," *id.* at 598, the First Circuit cites several factors as favorable in assessment, including the degree to which the disclosure is used as a "fishing expedition" for claims, the need for confidentiality on the part of the journalist and source, the exhaustion of all other non-confidential sources, and

the "importance to the [journalist's] continued newsgathering effectiveness" to preserve confidentiality, *id.* at 597-98.

After applying the qualified reporter's privilege to this case, this Court should find that ML-Implode's source is protected under the principles derived from *Bruno & Stillman*. As discussed above, RSA 383:10-b should not be read to create a private right of action against third parties disclosing confidential information, or their sources. MSI's reliance on this statute to compel disclosure of a source amounts to less than a "fishing expedition," as even if it were able to ascertain a party, there is no cognizable theory under which it could file suit. Furthermore, there is no evidence that MSI attempted to obtain this information through any other means, such as seeking information from the NHBD as to who had access to the Loan Chart. Finally, ML-Implode used the Loan Chart to inform its readers about problems that MSI was having with the NHBD. This is information that is of extreme interest and importance to the public. ML-Implode is able to provide this type of reporting to the public because it can rely on confidential sources within the housing finance sector. Forcing the disclosure of ML-Implode's confidential sources hinders their ability to effectively disseminate newsworthy information, a factor given high significance in *Bruno & Stillman*. 633 F.2d 597-98.

MSI is not seeking the information in furtherance of its own lawsuit against ML-Implode, or for any other purpose that would outweigh the interest in keeping the identity of ML-Implode's source secret. MSI sought the information only so that it could attempt to bring a case against the source for leaking that information in violation of the New Hampshire banking statute. The importance of preserving ML-Implode's First Amendment right to work with confidential sources so that it may continue to provide the

public with up-to-date, vital information about the housing finance sector outweighs the need to placate MSI by giving it the identity of the source that provided the information. Even should a court find to the contrary, going against the strong values articulated above, the First Amendment requires careful consideration of these conflicting interests. The Rockingham Superior Court simply did not engage in such careful consideration in this case. Accordingly, *Amici* urge the Supreme Court to apply a qualified reporter's privilege to this case, and further find in favor of protecting ML-Implode's source.

CONCLUSION

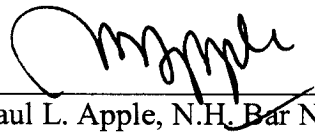
For the foregoing reasons, the Superior Court's Final Order prohibiting the dissemination of the Loan Chart and ordering the disclosure of the source who provided it to ML-Implode violates the constitutional principles set forth by the New Hampshire and federal courts. Because the restriction against publication is an unconstitutional prior restraint on speech, and because the order demanding the disclosure of a confidential news source violates the state's qualified reporter's privilege, *Amici* request that this Court vacate the Final Order.

ORAL ARGUMENT

The *Amici* waive oral argument.

Dated: June 22, 2009

Respectfully submitted,



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[8] *Amici* wish to acknowledge the invaluable assistance of George Washington University Law School student and Cyberlaw Clinic intern Andrew Sellars in the preparation of this brief.

CERTIFICATION

Two (2) copies of the foregoing were served by U.S. Mail, postage prepaid, on the following individuals:

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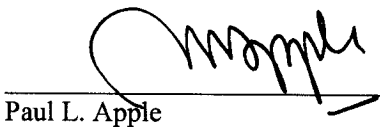

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