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MEMBER: MARYLAND, NEW YORK,
AND MASSACHUSETTS BARS

March 7, 2024

Tampa Bay Times
490 1st Ave South
St. Petersburg, Florida 33711

TO:

Mark Katches - MKatches@tampabay.com
Mike VanSickler - MVanSickler@Tampabay.com

Re: Journalist Timothy Burke

Mssrs. Katches and VanSicker:

I'm writing to you regarding one aspect of the coverage of the Tampa Bay Times which relates to my client Timothy Burke. In your reporting, you consistently refer to Mr Burke as the owner of a media consulting company, and not as an online digital journalist.

This omission repeats the narrative that the government has attempted to propagate that Mr Burke is not a journalist, and therefore is not entitled to the protections the law provides to persons who collect information for dissemination to the public. This impression, created by the United States Attorney's Office and perpetuated by you, is wholly incorrect.

Mr Burke is, in fact, a journalist, was engaged in journalism, and most significantly was indicted by the grand jury for journalism. He is also famous for being a journalist, and was invited to present to the Tampa Bay Times as a journalist and about his techniques for finding digital information online as a journalist. As to the argument that Mr. Burke might have been a journalist but was not a journalist at the time of the actions which led to the Indictment, I would point out that Mr. Burke was indicted for the crime of journalism -- finding information that was newsworthy and publishing that information to the public. The Indictment itself acknowledges that Mr. Burke used credentials that were published by the owner of the credentials and found online (on the Wayback machine), and that the "live streams" allegedly "hacked" were actually configured to be publicly accessible without any credentials required. Thus, the Indictment itself alleges that Mr. Burke found public information from a public source and published it. The bulk of the charges in the most recent indictment relate to allegations that Mr Burke found information online that was embarrassing to Fox News (although they are given a pseudonym in the indictment), and that he published, or caused to be published this information through Vice News and Media Matters. A journalist, as you know,

is no less a journalist when they work as a stringer for other publications, or when they publish through other publications. In short, Mr Burke has been indicted for committing the crime of journalism.

Moreover, the government asserted that Mr Burke was not a journalist in their opposition to our respective motions made both by the Tampa Bay Times as a corporate entity and by Mr Burke to the magistrate judge for access to the affidavit in support of the warrant. That allegation was rejected by the magistrate judge who, in a lengthy and detailed ruling, clearly made findings that Mr Burke was, in fact, a journalist, and was working as a journalist in connection with the allegations that are now contained in the indictment. That finding was approved by the district judge as well.

In addition, most of the large organizations supporting journalists, including the Reporters Committee for Freedom of the Press, and the Florida and National Societies for Professional Journalists have also agreed not only that Mr Burke is a journalist, but that this indictment and entire investigation raises significant First Amendment concerns, particularly for digital journalists like Mr Burke.

Mr Burke's status as a journalist is significant for various reasons. Counts thirteen and fourteen of the Indictment charge Mr. Burke with unlawful publication of information -- the publishing of truthful information to the public or, in other words, journalism -- not hacking. The government has, in the past, attempted unsuccessfully to prosecute reporters for disseminating information they alleged to have been obtained unlawfully, and the Supreme Court has rejected such efforts as an unlawful interference with the reporter's First Amendment rights. Bartnicki v. Vopper, 532 U.S. 514 (2001).

By accepting the government's proposition that Mr Burke is not a journalist, you further the prosecution and tacitly accept the idea that the government was not required to comply with its News Media Policy ("Policy") revised and released last month.

<https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.400>

This policy relates to any person or entity who is a member of the news media. In determining under this Policy whether a person or entity is a member of the news media for purposes of this Policy and therefore qualifies for the Policy's protections, the Department broadly evaluates the totality of the circumstances, including, among other things, the frequency of the person's or entity's reporting and whether the person or entity brings information to the attention of the public, engages in newsgathering, has independent sources, holds press credentials, is employed by a member of the news media, and/or is widely identified as a journalist or reporter.

Mr. Burke clearly reports and disseminates information to the public constantly, he engages in newsgathering (in fact, he was indicted for newsgathering), he has independent sources (the indictment mentions at least one), and is widely identified as a journalist in every other media reporting on his case that we have seen. Moreover, under the Privacy Protection Act (PPA) 42 U.S.C. § 2000aa) Mr. Burke's activities -- including the documents and videos seized, constitute

“work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce” and the fact that he is a digital rather than print journalist does not impact this analysis. Steve Jackson Games, Inc. v. United States Secret Service, 816 F. Supp. 432 (W.D. Tex. 1993).

By diminishing his role as a journalist, you invite the government to continue to ignore the provisions of the law designed to protect ALL newsgatherers -- including those at the Tampa Bay Times. As the DOJ News Policy itself notes:

A free and independent press is vital to the functioning of our democracy. Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department’s policy is intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering.

Mr Burke is a journalist, a well-known and respected journalist at that, one whose professional activities in journalism have been profiled by numerous media outlets including, but not limited to The New York Times. Indeed, he’s a journalist who was invited in the past by the Tampa Bay Times to address your own reporters about his digital journalism techniques. That he also runs a media consulting company, provides content to other media outlets, and performs other professional functions does not diminish his role as a journalist, particularly in the context of this indictment where he is indicted specifically for his investigative journalistic work. Whatever happens to him could just as easily happen to any reporter for the Tampa Bay Times, the Marion Kansas Record, or any other media outlet in America. We hope you take this into account and correct your coverage to highlight this fact.

Yours truly,

A handwritten signature in black ink, appearing to read 'M. D. Rasch', written in a cursive style.

Mark D. Rasch, Esq.