V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY SCHOOL BOARD, Plaintiff, v. DEBRA TISLER and CALLIE OETTINGER, Defendants.	Case No. 2021-13491

FAIRFAX COUNTY SCHOOL BOARD'S REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Defendants' Opposition muddies the waters of what is a very straightforward issue. Plaintiff Fairfax County School Board (the "School Board") is merely seeking the return of attorney invoices that were not properly redacted and, thus, contain confidential student and staff information protected under various federal and state laws, the attorney-client privilege, and work product doctrine. Defendants already possess properly redacted versions of the same invoices (which include the amount of legal fees incurred, which Defendants are apparently eager to expose). To be clear, the School Board does *not* seek to prevent Defendants from possessing—or even publishing—the properly redacted invoices. The School Board merely seeks to prevent the public disclosure of confidential, privileged, and work product protected information. Courts regularly prevent the disclosure of such protected information and, in these circumstances, this Court should join them.

I. ARGUMENT

A. Defendants fail to rebut the School Board's argument that it is likely to succeed on the merits of its claims.

To obtain a preliminary injunction, the School Board must show that it is likely to succeed on the merits of the underlying claim(s). *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). In its opening brief, the School Board set forth the elements required to establish detinue and the

equitable claim of imposition of a constructive trust, and applied those requirements to the present facts. Defendants, on the other hand, fail to address any of the elements required to establish either of these claims. Rather than address the underlying elements, Defendants present a hodgepodge of arguments, addressed below, that distract from the very simple issue before the court—whether the School Board is likely to prevail on its pleaded claims.

First, Defendants claim that because the property at issue consists of electronic files "it is not possible for anything to be 'returned' . . . ." Opp'n at 11. This argument is perplexing because electronic files, like hardcopy files, can easily be returned by moving them from Defendants' computers to a USB drive or other device.[1]

Second, Defendants claim that it is appropriate only for a constructive trust to be imposed when the holder is "profiting from it." *Id.* Defendants cite no case for this proposition and, thus, the Court can reject it. *See Bartley v. Commonwealth*, 67 Va. App. 740, 744 (2017) (holding courts are "entitled to have the issues clearly defined and to be cited pertinent authority. . . . [and] is not a depository in which [a party] may dump the burden of argument and research" (citations omitted)). No such "profit" requirement is referenced in any of the cases cited by the School Board.

Third, Defendants contend that it is "inapposite for the board to characterize the information as 'property.'" Opp'n at 11–12. Defendants cite a single criminal case that is not on point, does not involve detinue or constructive trust claims, and, in no way, supports the proposition that detinue cannot be applied to electronic information. Defendants make no attempt to rebut the School Board's citation to Va. Code § 18.2-152.8, a criminal statute recognizing that "personal property" includes "computer data" regardless of whether it is "[t]angible or intangible …."

[1] The files were distributed by a link in which the files needed to be actually downloaded to a computer or storage device. Thus, the files actually exist on Defendants' computers.

Fourth, Defendants claim that the School Board is attempting to impose a "claw-back" provision under VFOIA where no such provision exists. Opp'n at 12. The School Board has not filed any claims under VFOIA, nor is it asking that the Court interpret VFOIA. The two pled claims provide independent avenues for return of the unredacted records.

Fifth, Defendants claim (without proper evidentiary support) that the motion should be denied because the information has already been shared and archived. *Id.* at 12–13. Defendants' sharing of the unredacted information is irrelevant in determining whether the School Board has established detinue or a constructive trust. Both claims require only that Defendants be in possession of the property, which is undisputed. There is no requirement that this possession be exclusive. Put simply, Defendants are in possession of the at-issue information and the School Board is seeking the return of it from Defendants, as they are the original recipients and disseminators of the information.[2] If anything, Defendants' sharing of this information further demonstrates the need for an immediate injunction to prevent additional dissemination.

In sum, the School Board has established a likelihood of success on the merits, and Defendants provide no arguments or evidence to the contrary.

[2] Many courts have ordered individuals to return or destroy documents inadvertently produced under FOIA. *See*, *e.g.*, *Hersh & Hersh v. U.S. Dep't of Health & Human Servs.*, No. C 06-4234 PJH, 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008) ("In light of defendants' consistent efforts at securing return of the documents, the fact that plaintiff was long ago placed on notice of this inadvertent production, and defendants' [A]ugust 2007 production replacing all earlier productions, the court therefore orders plaintiff to return all previously produced documents to defendants."); *Am. Civil Liberties Union v. Dep't of Def.*, No. 09 Civ. 8071 (BSJ)(FM), 2012 WL 13075284, at *5 (S.D.N.Y. Mar. 20, 2012) (rejecting First Amendment argument and ordering the return of an inadvertent production; that "Plaintiffs acquired the Document innocently does not change the fact that the Document is classified and Plaintiffs are not authorized to possess it"); *Kielty v. FEMA*, No. 14-CV-3269 (PGS), 2015 U.S. Dist. LEXIS 199256 (D.N.J. Aug. 18, 2015) (affirming magistrate judge's order clawing back documents inadvertently disclosed by FEMA containing SSNs for individual FEMA employees and enjoining recipient from using or disclosing that information).

B. Defendants fail to provide any evidence or argument with regard to the remaining requirements for a preliminary injunction.

To prevail on its request for injunctive relief, the School Board must establish the remaining elements—*i.e.*, a risk of irreparable harm in the absence of an injunction, that the balance of the hardship favors the School Board, and that public interest favors entry of an injunction. *See Winter*, 555 U.S. at 20.

In its opening brief, the School Board addressed each of these three elements. Defendants failed to address any of them. Thus, they are conceded. *See Simpkins v. Am. Modern Home Ins. Co.*, No. 1:17-cv-0144, 2018 WL 1383843, at *4 n.7 (E.D. Va. Mar. 16, 2018) (plaintiffs conceded argument by failing to address it in their response); *Chadwell v. Brewer*, 59 F. Supp. 3d 756, 765 n.6 (W.D. Va. 2014) (plaintiff abandoned a claim by failing to respond to defendant's arguments).

C. Defendants' constitutional arguments are misplaced.

Rather than explaining how they are entitled even to *retain* the privileged, work product protected, and confidential information about students and staff, Defendants instead seek refuge in the First Amendment, asserting that "they have the constitutional right to *publish* and *disseminate*" it, Opp'n at 3 n.2 (emphases added), and condemning any attempt to stop them as an unlawful "prior restraint," *see id.* at 3–8. They cite no cases, however, that support such an extreme position. If the Court reaches Defendants' constitutional arguments, it should reject them.[3]

1. The Court need not reach Defendants' constitutional arguments.

As an initial matter, the School Board notes that the Court does not need to address Defendants' argument that an injunction against publishing the protected information would violate the U.S. Constitution. If the Court were to order Defendants to return or destroy the inadvertently produced records (and any copies that come into their possession), then the

[3] Defendants' suggestion that Article I, § 12 of the Constitution of Virginia provides even greater protection than the First Amendment, based on the different language used there, was specifically rejected in *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004).

publication issue would be moot because Defendants would have no protected information to publish (but would be free to publish the corrected records). A holding that Defendants are not authorized to possess the protected information should obviate the need to address an unnecessary constitutional issue. Indeed, courts regularly invoke the canon of constitutional avoidance precisely because it "allows courts to *avoid* the decision of constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original).

2. Defendants have no First Amendment right to publicly disclose the protected information.

If the Court does reach Defendants' constitutional arguments, it should reject them. As a general matter, Defendants are wrong to suggest that a court can only prevent the disclosure of information in the most extreme circumstances, "such as the publication of troop movements during wartime . . . ." Opp'n at 4. In fact, courts regularly protect information from disclosure, in a variety of settings and for a variety of purposes.[4] The Court should reject Defendants' absolutist theory, under which whole categories of court orders would be unconstitutional, and instead follow the U.S. Supreme Court's guidance to make case-by-case examinations: "[T]he sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989).

Accordingly, it is not enough for Defendants simply to label the proposed injunction a "prior restraint." Rather, the underlying question that must be answered is whether, under these

[4] *See, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (protective order prohibiting newspaper from publishing discovery material did not violate the First Amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 571 n.13 (1980) ("[C]ommercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."); *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004) (noting "well-settled law that the prior restraint doctrine is inapplicable in cases where one's proprietary interests are at stake"); 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 15:58 (2021) ("The strict rule against prior restraints in defamation cases is enforced with less stringency when privacy interests are involved.").

circumstances, Defendants have a First Amendment interest in exposing to the world sensitive information about students, confidential information about employees, and matters subject to the attorney-client privilege and work product doctrine. They do not.

To begin with, Defendants' justification cannot be that the students, staff, or attorneys are public figures entitled to less privacy, as Defendants appear to suggest. *See* Opp'n at 7 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), and arguing that "even *untrue* statements about public officials are constitutionally protected"). Far from it. The law actually confers additional protections on these groups, safeguarding the privacy of children, through statutes like Family Educational Rights and Privacy Act ("FERPA") and recognizing the "compelling interest in protecting the physical and psychological well-being of minors," *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); of employees, through state and federal privacy laws; and of attorney-client confidences, through a privilege recognized at common law and by statute, *see* Va. Sup. Ct. R. 2:502, Va. Code Ann. § 8.01-420.7.

Nor can Defendants' excuse be merely that there is a public interest in the amount of money the School Board spends on legal fees (which the properly redacted records still disclose). Opp'n at 7. *That* is an entirely different proposition than that "the public has a legitimate interest in seeing" sensitive student and confidential staff information. *Id.* Indeed, courts often distinguish between the public's interest in newsworthy events and the names of individuals incidentally caught up in those events. *See, e.g.*, *Doe v. Mills*, 536 N.W.2d 824, 830 (Mich. Ct. App. 1995) ("[E]ven though the abortion issue may be regarded as a matter of public interest, the plaintiffs' identities in this case were not matters of legitimate public concern, nor a matter of public record, but, instead, were purely private matters."). The circumstances here are markedly different from those in the *Smith* case cited by Defendants, Opp'n at 5, which involved the identity of a criminal defendant and therefore raised "no issue . . . of privacy . . . ." *See Smith v. Daily Mail Publ'g Co.*,

443 U.S. 97, 105 (1979). Obviously, the students and employees whose names happen to appear in the billing records are quite differently situated from a criminal defendant, whose own actions put him at the center of the newsworthy event. Defendants also cannot draw analogous support from *Bartnicki v. Vopper*, 532 U.S. 514 (2001), Opp'n at 5, where the "legitimate privacy expectations [were] unusually low, and the public interest in defeating those expectations [was] unusually high." *Id.* at 540. Not so here.

Finally, Defendants fail to explain how an order enjoining disclosure of the protected information would prevent them (or other members of the public) from expressing their opinion that the School Board "spends too much money on lawyers . . . ." Opp'n at 7. Unlike in *Burfoot v. May4thCounts.com*, 80 Va. Cir. 306 (2010), Opp'n at 4, in which a court ordered the removal of defendants' entire website, Defendants are unaffected in communicating their intended message. If they believe "the bills and invoices from the board's attorneys" can "substantiate [their] contentions" on that topic, the School Board has provided them a version that they can "show[] the public"—thereby allowing for "'uninhibited, robust and wide-open'" public debate without compromising the privacy rights of others. Opp'n at 7 (quoting *Sullivan*, 376 U.S. at 270).

D. Defendants' privilege waiver arguments are inapposite.

Defendants argue that the School Board has waived the attorney-client privilege because there was an inadvertent disclosure of privileged information. *Id.* at 8–10. Defendants' waiver argument is a red herring. The issue of waiver is wholly irrelevant to the question at issue here—whether the School Board has established the requirements for a preliminary injunction.

Yet, even were the Court to address this argument, there has been no waiver. As a general rule, confidential communications between an attorney and a client made in the course of and concerning the subject matter of the attorney's representation are privileged. *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 453 (2007). Information contained in attorney billing records

may be privileged and/or work-product protected if the material reveals "confidential information, including the motive of the client in seeking representation," "litigation strategy," "the specific nature of the services provided," or "analytical work product or legal advice . . . ." *Bergano v. City of Va. Beach*, 296 Va. 403, 410 (2018) (analyzing privilege exemptions under VFOIA).

Waiver of the attorney-client privilege "is not lightly presumed . . . ." *United States v. Kendrick*, 331 F.2d 110, 116 (4th Cir. 1964). "[P]rotection of the privilege [has been] long recognized in Virginia law . . . ." *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 127 (2010). The privilege is so sacrosanct that the Rules of Professional Conduct make it unethical for lawyers to gain an advantage in litigation by capitalizing on inadvertent disclosures. *See* Va. R. Prof. Conduct 3.4; LEO 1871; LEO 1702.

The Supreme Court of Virginia has held that "waiver may occur if the disclosing party failed to take reasonable measures to ensure and maintain the document's confidentiality, or to take prompt and reasonable steps to rectify the error." *Walton*, 280 Va. at 126–27. In conducting this analysis, courts must consider the following factors:

> (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

Id. at 127.

Even if the Court entertained this irrelevant topic, there has been no waiver for at least two reasons.[5] First, the attorney-client privilege can be waived only by the client, "the holder of the privilege." *Id.* at 131; *Commonwealth v. Edwards*, 235 Va. 499, 509 (1988) ("The waiver, like the

[5] The School Board does not believe that the waiver issue is properly before the Court. If the Court entertains this issue, the School Board requests the opportunity for additional briefing.

privilege, belongs to the client and not to the attorney."). Here, the privilege is held exclusively by the School Board. The inadvertent disclosure was made by a Fairfax County Public School employee who is *not* a member of the School Board and not the "holder of the privilege." Thus, the privilege holder—the School Board—never waived the privilege.

Second, applying the *Walton* factors to the evidence currently before the Court establishes that such disclosures did not operate as a waiver. Here, the undisputed facts show that the School Board took "reasonable measures to ensure and maintain the document's confidentiality" and "prompt and reasonable steps to rectify the error." 280 Va. at 126–27. Within a day of discovering the disclosures within a 1,300-page production, School Board personnel began remediation efforts, which included at least twelve (12) separate attempts to secure return of the information. Kennedy Decl. to Pl.'s Prelim. Inj. Br. ¶¶ 6–8, 10, 12. And when Defendants rebuffed those attempts, the School Board filed this equity-only action in a further attempt to protect the information. The School Board's efforts to rectify the error were beyond "prompt and reasonable." *Walton*, 280 Va. at 126–27; *see also Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 4368617, at *8 (W.D. Va. Oct. 2, 2017) (applying *Walton* and finding no waiver where the party "attempted to rectify the error within four days of discovering it").[6]

II. CONCLUSION

Accordingly, the School Board respectfully requests that the Court issue a preliminary injunction on the terms set forth in the Motion.

[6] Defendants do not claim waiver of the work product doctrine. Had they done so, that argument would similarly fail.

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Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

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CERTIFICATE OF SERVICE

I certify that on October 15, 2021, a true and accurate copy of this document was sent by email and first-class mail to:

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