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STOP LAPD SPYING COALITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITY OF LOS ANGELES, a municipal corporation;

Plaintiff,

vs.

BEN CAMACHO, STOP LAPD SPYING COALITION and DOES 1-50 inclusive,

Defendants.

Case No. 23STCP01060

Hon. Mitchell L. Beckloff, Dept. 86

DEFENDANT STOP LAPD SPYING COALITION'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR STATUTORY WRIT OF POSSESSION

[Filed concurrently with Stop LAPD Spying Coalition's Request for Judicial Notice; Declaration of Hamid Khan; Declaration of Emma Best; Declaration of Matthew Strugar.]

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Introduction

The City of Los Angeles is seeking "a writ of possession . . . authorizing the County Sheriff to seize" the publications of a local journalist and activist group. (Compl., at Prayer, ¶ 2.) The City is explicit that its goal is to censor the Stop LAPD Spying Coalition's Watch the Watchers website, asking this Court to order the "destruction of all pictures on the Watch the Watchers website." (*Id.*, ¶ 4.) The binding authorities rejecting this kind of censorship includes cases in which the censorship would have protected fundamental constitutional rights or where the publication of stolen military records would cause grave and immediate danger to the nation's security. Unlike those cases, here the City is asking this Court to make it illegal for the public to possess and publish information that threatens no one's constitutional rights and was not stolen or otherwise illegally leaked; they are official City records that the City placed in the public domain itself, deliberately handing them to a journalist eight months ago to settle a California Public Records Act lawsuit.

Any restraint on the Stop LAPD Spying Coalition publishing this information would be unconstitutional because it would require the Coalition to censor its political expression. The City's only attempt to distinguish the long line of cases prohibiting prior restraints is to assert that it seeks to censor the Coalition's past speech, not its future speech. But the constitutional prohibition on this kind of censorship is just as insurmountable. And even if it were not, any distinction between past and future censorship is meaningless here since the Coalition could comply with a solely backwards-looking censorship order and then instantly re-publish this same information from the myriad sources where it currently exists in the public domain. Whatever way the City frames the order it seeks, the relief would be unconstitutional.

Facts

This dispute started with a routine public records request. Journalist Ben Camacho made a request to the Los Angeles Police Department for a roster of current officers along with their official headshot photographs. (Compl., ¶ 8.) After he sued to force compliance, the City of Los Angeles contracted with Camacho to settle the case. (*Id.*, ¶ 11.) The City's consideration for that contract was to provide photographs of sworn LAPD personnel, except for "officers working in an undercover capacity as of the time the pictures were downloaded." (*Ibid.*) The City handed Camacho those records eight months ago, on

September 16, 2022. Camacho then shared those records with the Stop LAPD Spying Coalition, a non-profit community group. (Khan Decl., ¶ 7.) The Coalition used these and other public records to build Watch the Watchers (watchthewatchers.net), a searchable index of various LAPD public records. (*Ibid.*) The website launched on March 17, 2023, and explains that the Coalition created it for the purpose of community education, government transparency, and political participation. (*Id.*, ¶¶ 3, 4.)

Many other members of the public have distributed these same records throughout the public domain. Just as one example, the nonprofit association Distributed Denial of Secrets, a successor of sorts to Wikileaks, published the same information over a month ago, on March 30, 2023. (Best Decl. ¶ 4.) The information has also been published as torrents, which means the files are on a reciprocal network where hundreds or thousands of people can autonomously and anonymously distribute them without a central host. (*Id.*, ¶¶ 4, 6.) Each time the files are downloaded through a torrent "increas[es] the overall download speed and resistance to censorship." (*Id.*, ¶ 4.)

The City sent the Coalition a letter on April 3, 2023 demanding the Coalition censor its website. (Khan Decl., Ex. B.) It filed suit two days later. Both respondents have anti-SLAPP motions pending.[1]

Argument

This Court should deny the writ. For starters, the City failed to even satisfy the minimal preconditions to suit. Even if it had, the First Amendment is an insurmountable burden because the City's interests are trivial in comparison to other cases in which courts have denied similar attempts at government censorship. Whether the government seeks to punish speech pre- or post-publication, it must meet the stringent requirements of a prior restraint. The City fails every prong of that test. But even if it could get a prior restraint against someone who broke the law to obtain the records, it still couldn't get one against the Coalition because the First Amendment protects third-party publishers who had no role in the

[1] This Court should rule on the Respondents' anti-SLAPP motions before resolving the ultimate merits of the City's lawsuit. The Legislature enacted the anti-SLAPP statute to "end SLAPP suits at an early stage." (*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 380.) This statutory purpose is subverted if the Court frontloads the ultimate merits of case before hearing timely anti-SLAPP motions. Prioritizing the ultimate merits will only create more work for the Court and the parties, too, because resolving the merits will not moot the anti-SLAPP motions, since the Court will still have to rule on them to determine fee eligibility. (*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1456–1457.)

allegedly wrongful procurement of the information. And even if the First Amendment never existed, the City still hasn't met its burden on a writ of possession because it hasn't shown that it "inadvertently" released the records or what it means when it claims that the photographs depict "undercover" officers. Each of these is an independent basis to deny the writ.

I. The City Failed to Meet Its Precondition to Suit.

The City failed to meet the preconditions to suit under the statute it proceeds under. The law requires the agency issue a written notice demanding return of the records and file suit no earlier than 20 days after the recipient receives that notice. (Gov't Code §§ 6204, subd (b); 6204.2, subd (b).) The City flouted that requirement. The City *sent* notice to the Coalition on April 3, 2023 and filed suit only two days later. (Compl., ¶ 20.) The Coalition did not *receive* the letter until another six days after the City sued. (Khan Decl., ¶ 11.) Because the City did not follow Government Code section 6204.2's procedural requirements, its application fails on that basis alone.

II. Whether Targeting Current Expression or Future Expression, Censorship Orders Are Presumptively Unconstitutional.

To survive constitutional review, a prior restraint must be necessary to further a government interest of the highest magnitude. (See *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 562.) A prior restraint will be deemed necessary only if: (1) the harm to the government interest is certain to occur; (2) the harm will be irreparable; (3) no alternative exists for preventing the harm; and (4) the prior restraint will actually prevent the harm. (See *id.* at p. 562; *id.* at p. 571 (conc. opn. of Powell, J.); see also *New York Times Co. v. United States* (1971) 403 U.S. 713, 730 (conc. opn. of Stewart, J.) (*New York Times*) [explaining that an order barring publication of the Pentagon Papers was unconstitutional because the government failed to show that publication would "surely result in direct, immediate, and irreparable harm to our Nation"].)

Few if any legal principles are as well-established as the constitutional barrier against such censorship. Prior restraints on publication of truthful information are so forbidden that they are "presumptively unconstitutional" (*Alexander v. United States* (1993) 509 U.S. 544, 550), and "may be considered only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." (*CBS, Inc. v. Davis* (1994) 510 U.S. 1315, 1317 (chambers opn. of

Blackmun, J.) (*CBS*).) Given the Supreme Court's antipathy toward prior restraints, it is no surprise that the Court "has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." (*Procter & Gamble Co. v. Bankers Trust Co.* (6th Cir. 1996) 78 F.3d 219, 227.) Such censorship can be justified only in the most exceptional circumstances, such as to prevent the dissemination of information about troop movements during wartime (*Near v. Minnesota* (1931) 283 U.S. 697, 716), or to "suppress[] information that would set in motion a nuclear holocaust." (*New York Times, supra*, 403 U.S. at p. 726 (conc. opn. of Brennan, J.).)

Because no case has yet to surely threaten nuclear holocaust, courts have universally rejected prior restraints, even where the government interest at stake was far higher than anything the City offers here. (See *New York Times, supra,* 403 U.S. at p. 714 [publication of Pentagon Papers, despite claim that disclosure posed "grave and immediate danger" to national security]; *Nebraska Press, supra,* 427 U.S. at pp. 556–561 [publication of defendant's confession in small-town murder case that allegedly would have jeopardized his Sixth Amendment right to a fair trial]; *Near, supra,* 283 U.S. at pp. 716–718 [defamatory and racist statements that allegedly disturbed the "public peace"]; *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 (*Cox Broadcasting*) [publication of rape victim's name]; *Florida Star v. B.J.F.* (1989) 491 U.S. 524, 532–533, 547 (*Florida Star*) [publication of rape victim's name in violation of statutory protection]; *Oklahoma Publishing Co. v. District Court* (1977) 430 U.S. 308, 310–312 (per curiam) (*Oklahoma Publishing*) [publication of name and likeness of 11-year-old criminal defendant]; *Landmark Communications, Inc. v. Virginia* (1978) 435 U.S. 829, 831–832 [publication of information from confidential judicial disciplinary proceedings in violation of criminal statute].) As one California appellate court has noted, there appears to be no case, "in either federal or state court, that has upheld a prior restraint under the *Nebraska Press* criteria." (*South Coast Newspapers, Inc. v. Superior Court* (2000) 85 Cal.App.4th 866, 870.)

The City's only effort to distinguish all this precedent prohibiting prior restraints is to argue that the relief it seeks – the "destruction of all electronic and physical copies of photographs" – "would not constitute a prior restraint as the photographs at issue have already been published." (Memo at pp. 5, 12.) This distinction between present and future censorship is how the City tries to distinguish the nearly identical precedent *Association of L.A. Deputy Sheriffs v. L.A. Times Commission's LLC* (2015) 239

Cal.App.4th 808 (*ALADS*). That case rejected an effort by sheriff deputies to bar the Los Angeles Times from publishing deputy "photographs" and other information from confidential personnel files as well as to secure an order directing the Times "'to immediately return'" those files to the Sheriff's Department. (*Id.* at p. 813.) The union claims that a Times reporter either "stole, received from someone else who stole, or otherwise unlawfully came into physical possession of" these records. (*Ibid.*) The City says this case is not like *ALADS* because it is seeking an order authorizing sheriffs to confiscate current publications, not prohibit future publication. (Memo at p. 5.)

The City's position is shocking. According to the City, there is no First Amendment impediment to government censorship so long as the speaker has spoken at least once. If that were the law, the City could ban a book so long as one copy had been sent out to a reviewer or enjoin a leafletter once she distributed a single leaflet. That is not a vision of a free society., and It is also not how courts treat First Amendment protections against government censorship. When a trial court ordered an "attorney to remove for the duration of trial two pages from her Web site," the Court of Appeal held "this was an unlawful prior restraint on the attorney's free speech rights under the First Amendment." (*Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1482.) When a trial court enjoined members of an advocacy organization from continuing to "pass[] out pamphlets, leaflets or literature," the Supreme Court held that this injunction was "prior restraint on speech and publication." (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 417–418.) When a commission gave notice that "certain designated books or magazines distributed" in Rhode Island were deemed "objectionable for sale, distribution or display to youths" and such notice caused distributor "to take steps to stop further circulation of copies of the listed publications," the Supreme Court held that "[w]hat Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints." (*Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 63, 70.) And when a plaintiff claimed she was duped into appearing in a controversial movie and "sought a preliminary injunction requiring Google to remove the film from all of its platforms" months after it was uploaded, the Ninth Circuit held such a "takedown order of a film . . . is a classic prior restraint of speech." (*Garcia v. Google, Inc.* (9th Cir. 2015) 786 F.3d 733, 737, 747 (en banc).) In each of these cases, the speaker had already spoken but the attempt at censorship still sought a prior restraint.

So whether the government seeks to muzzle current speech or prevent future speech, either "action requires the highest form of state interest to sustain its validity." (*Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 102 (*Daily Mail*).) *Daily Mail* invalidated after-publication penalties on a newspaper that had printed the name of a juvenile defendant in violation of a state law. The Court ruled that it "need not decide whether [this law] operated as a prior restraint," because the state "must nonetheless demonstrate that its punitive action was necessary to further the state interests asserted" and "state action to punish the publication of truthful information seldom can satisfy constitutional standards." (*Ibid.*) This rule applies in all other contexts, including civil penalties (see *Bartnicki v. Vopper* (2001) 532 U.S. 514, 521 & n.3 (*Bartnicki*); *Florida Star, supra*, 491 U.S. at 526; *Cox Broadcasting, supra*, 420 U.S. at 471) and, like the order the City seeks here, orders to seize property. (*Fort Wayne Books, Inc. v. Indiana* (1989) 489 U.S. 46, 63 (*Fort Wayne Books*) [order to seize property is functionally a prior restraint "when materials presumptively protected by the First Amendment are involved"].) Even if the materials are already published, "It is [t]he risk of prior restraint . . . that motivates this rule." (*Id.* at pp. 63–64 [quoting *Maryland v. Macon* (1985) 472 U.S. 463, 470, quotation marks omitted].) After all,"[s]eizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore." (*Roaden v. Kentucky* (1973) 413 U.S. 496, 504.) This means any such seizure "is plainly a form of prior restraint" (*ibid.*), and whether state law characterizes the speech censorship as property seizure is immaterial: "As far back as the decision in *Near v. Minnesota*, this Court has recognized that the way in which a restraint on speech is 'characterized' under state law is of little consequence." (*Fort Wayne Books, supra*, 489 U.S. at p. 66 [citation omitted].)

The distinction between current versus future censorship is especially meaningless here since all the information that the City wants returned or destroyed is reproducible from the public domain. It is not at all clear how a solely backwards-looking censorship order would function for information like this. Even if the Coalition files a return on a writ attesting it "returned" or "destroyed" the photographs from its website, the Coalition could turn around and instantly re-obtain and re-publish all of this information from the many sources in the public domain where the information has been circulating for months. (See, e.g., Best Decl. ¶¶ 4, 6–7; Camacho Decl. ¶ 17.) The Coalition could even replace its current website

with a link to other people's public copies of the photographs, ensuring that visitors remain able to access and re-publish them.

If the City is seeking for the Coalition to "destroy" all photographs from its website while remaining free to instantly re-generate the website using other publicly available copies, then this ritual would never mitigate any alleged harms. The Coalition's website would be unchanged. Probably for that reason, the City is explicit that its purpose is not simply to require a new source for the photographs but also to ban the Coalition from ever re-publishing or linking to them again. The City's Complaint specifically seeks to require "destruction of all pictures on the Watch the Watchers website" and to "enjoin[] Defendants from possessing, using, posting, or further distributing" those photographs. (See Compl., at Prayer, ¶ 4.) If this means only the Coalition's current copies, then it's pointless. If it includes copies available throughout the public domain, then it's a prior restraint.

III. The Censorship Order the City Seeks Is Unconstitutional.

The First Amendment prohibits the relief the City seeks for three reasons. First, it fails every prong of the *Nebraska Press* test for prior restraints. Second, the City cannot enjoin the expression of a third party that is re-publishing truthful information available in the public domain. And the First Amendment protects the Coalition's right to express itself on issues of public significance.

A. The City Cannot Overcome the Presumption of Unconstitutionality for Censorship Orders.

To show that a censorship order is constitutional here, the City must clear a standard even stricter than the "fatal in fact" test for strict scrutiny. (See *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30–31.) This requires the City show that (1) the harm to a government interest of the highest magnitude will "definitely occur"; (2) the harm will be irreparable; (3) censorship is the only option to prevent the harm; and (4) the censorship will work. (*Nebraska Press, supra,* 427 U.S. at p. 562.) The City fails to make even one of these showings.

1. The City's interest is not of the highest magnitude.

The City has not shown that their request for a censorship order addresses a government interest of the highest magnitude. A website with photographs of public servants whose identities were already made public by the City does not rise to the level of "set[ting] in motion a nuclear holocaust." (*New York*

Times, supra, 403 U.S. at p. 726 (conc. opn. of Brennan, J.).) The City comes nowhere near showing that publication of this information is higher than the interests courts have found insufficient to warrant a prior restraint, including national defense secrets that threatened grave and immediate danger, confidential judicial disciplinary records, and publications that threaten protected constitutional and statutory interests. (See *infra*, section II.)

The City's sole evidence of harm from the Coalition's website lies in two declarations, one of them anonymous. Despite the City waiting a month and half after the Coalition launched its website to request a writ of possession, this evidence references almost no harm from the website during that time. One of the declarations, signed more than a month after the Coalition launched its website, references exactly a single past occurrence: an "undercover officer who chose to retire." (Tippett Decl. ¶ 22.) Besides that single retirement, the retiring officer's actual reasons for which are hearsay, all that the declaration offers is speculation about what current LAPD personnel or future LAPD recruits might choose to do. As for the City's argument that officers' "fear is not theoretical; these officers are dealing with it right now" (Memo at p. 8 [citing Tippett Decl., ¶ 14]), its only evidence is hearsay too: "I have spoken to undercover officers who, believe, as I do, that these kinds of investigations, and many others, are now at risk if the photos remain exposed to the public." (Tippett Decl., ¶ 14.) Of course, these photographs will "remain exposed to the public" no matter what the Coalition does with them.

The City's declarations also illustrate the exaggeration surrounding the term "undercover." Although the City offers an anonymous declaration from a so-called "undercover" officer, the only harm he reports is that "[a]n individual who is often observed filming" police officers "near the police station I work out of" filmed him outside that station. (Doe Decl., ¶ 4–5.) In other words, he was identified because he was filmed outside his LAPD station, not because of any photographs. The City's other declarant states that he "currently supervise[s] the Special Investigation Section (SIS)," that "only a small number of detectives have been assigned to SIS," and that "all sworn personnel in SIS have worked or currently work in an undercover capacity." (Tippett Decl., ¶¶ 9–10.) The same declarant even claims that "SIS Detectives live an intentionally private life and try to keep their employer and/or identities confidential" and that "these officers will purposefully avoid getting photographed at public (or even private) events and typically steer clear of social media." (*Id.* ¶ 17.) Very little of that appears to be true. Many SIS

detectives publicly self-identify their role, and their photographs are easy to find. (Strugar Decl., ¶¶ 4–29.) For example, an officer who identifies himself as an SIS detective on his LinkedIn social media profile has had his photograph on LAPD's official website for 20 years, two thirds of his career. (*Id.*, ¶¶ 5–6.) This officer also uses his photographs to promote his side business selling earplugs, and his public Facebook profile shows photographs of him with his young children. (*Id.*, ¶¶ 7–8.) Another officer whose LinkedIn profile boasts he is an SIS detective is depicted in over a dozen news articles about his "undercover" purchases of bootleg DVDs and handbags, and footage of his appearance on 60 Minutes has been online since 2009. (*Id.*, ¶¶ 9–14.) And a third officer who also outs himself as SIS on his LinkedIn profile has had his name and photograph showcased on the website of an association of robbery investigators that he chairs. (*Id.*, ¶¶ 15–17.) These are just a few examples among many. (See *id.*, ¶¶ 5–29.) The City has not proven that secrecy for these officers is an interest of the highest magnitude.

As for the City's argument that censoring the photographs is necessary for "maintaining its officer staffing levels," the City presents *no* evidence on this, instead citing news articles that never mention officer photographs. (Memo at pp. 9–10.) The City even admits that this issue is years old: "the police department's staffing . . . has fallen by approximately 1,000 officers over just the last four years." (*Ibid.*) Even if the City could prove that this shortage is caused by the Coalition's website rather than the other factors listed in the articles the City cites, this is worlds apart from the magnitude of concerns that courts have found insufficient for a prior restraint.

2. Any alleged harm is speculative.

The City has not shown that any alleged harm from the Coalition posting on its website information the City itself made public "is both great and certain." (*CBS, supra,* 510 U.S. at p. 1317 (chambers opn. of Blackmun, J.).) Again, the City's only evidence of harm is speculation about matters unrelated to the Coalition's website. Even this speculation has been contradicted by LAPD leadership. A month after the Coalition's website launched, LAPD Chief Michel Moore informed the Los Angeles Board of Police Commissioners (the body that oversees LAPD) that "[t]he vast majority of our investigations have been unimpacted" because "most of LAPD's 'undercover operators are comfortable with their role.'" (Cain, *LAPD chief says most undercover investigations 'unimpacted' following photo release*, L.A. Daily News

(Apr. 11, 2023), https://www.dailynews.com/2023/04/11/lapd-chief-says-most-undercover-investigations-unimpacted-following-photo-release/.)

3. Any alleged harm is reparable.

Not only is any harm from the Coalition re-posting records that the City itself disclosed speculative, if it exists then it is reparable. The Court of Appeal rejected the police union's request for an order requiring the L.A. Times to return photographs and other police personnel records in part because any harm could be remedied by money damages. (*ALADS*, *supra*, 239 Cal.App.4th at p. 842.) And in fact, hundreds of officers have already filed such a damages claim against the City. (Request for Judicial Notice (RJN), Ex. B.) Their counsel has even admitted: "The real threat here is not Watch the Watchers, the real threat is somebody that is computer savvy that's already pulled off all that information. . . . It's already been downloaded tens of thousands of times." (Joseph, *Undercover Officers' Data Leak Sparks Legal Battle in Los Angeles*, Epoch Times (Apr. 7, 2023), https://www.theepochtimes.com/undercover-officers-data-leak-sparks-legal-battle-in-los-angeles_5180395.html.)

Unlike damages remedies that require no censorship, the City is seeking deliberately overbroad censorship. Although the City says that its proposed order is "narrowly tailored" (a lower standard than what is required for a censorship order) "because it seeks return of the production of the inadvertently produced images of undercover officers exempt under the CPRA," everywhere else in their application they demand the return and destruction of all photographs or "[i]n the alternative photos of all officers below command staff (i.e. captain) level." (Memo at p. 8.) The City knows that this includes photographs of several thousand officers – the vast majority – whose work will never require secrecy. The City wants a fully secret police force. Nothing about this request is narrowly tailored.

4. The City cannot show that censorship will prevent the supposed harm.

The City will be unable to show that censorship will prevent any of the alleged harm because the records are widely disseminated. Several tens of thousands of people have visited the Coalition's website during the now nearly two months since the website's launch. Those visitors likely have "possession" of this information in their web browser's cache. Tens of thousands of people have also viewed a separate download link publicized by Camacho. (Camacho Decl., ¶ 17.) The information has also been re-published and hosted across a range of other online media, including through torrents, which means the files

are on reciprocal, decentralized networks where hundreds or thousands of people can distribute them. (Best Decl., ¶¶ 4, 6–7; see also, e.g., *Pacific. Century Internat., Ltd. v. Does 1-48* (N.D. Cal. Oct. 7, 2011) 11-cv-3823 MEJ, 2011 WL 4725243, at *3 n.1 [describing how torrents work].) Many of these people are likely outside the jurisdiction of this county and even this country.

While courts use different metaphors, they agree that once information is circulating publicly, any restraint on that information cannot issue because it would be ineffective. (See, e.g., *Bank Julius Baer & Co. Ltd. v. WikiLeaks* (N.D. Cal. 2008) 535 F.Supp.2d 980, 985 [cat out of the bag]; *In re Charlotte Observer* (4th Cir. 1989) 882 F.2d 850, 854–855 (4th Cir. 1989) [genie out of bottle]; *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1245 ["because the information is already public, the harm . . . has already occurred and cannot be prevented by the order"]; *Doe v. Reed* (9th Cir. 2012) 697 F.3d 1235, 1238 [injunction "no longer available because the [records] are now available to the public"].) While the City cites two cases in which requesters of public records were asked to return inadvertently included pages (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176; *Rocky Mountain Wild Inc. v. United States Forest Serv.* (10th Cir. 2022) 56 F.4th 913, 930–931), and a third deciding whether federal employees could litigate a Fair Labor Standards Act case anonymously (*Doe No 1 v. United States* (Ct. Fed. Cl. 2019) 143 Fed.Cl. 238, 241), none of those cases addressed the First Amendment implications of either overbroadly censoring public records or restricting a third party's re-publication of information circulating in the public domain. The cases never even *mention* the First Amendment.

B. The First Amendment Protects the Publication of Newsworthy Information by Innocent Recipients.

Even if the City had shown that all of the photographs it disclosed were "inadvertent" and that it can obtain a censorship order to claw those photographs back from the requester of the records – which it cannot – the City still could not restrain the Coalition in the same way because the First Amendment provides a near absolute right to publish truthful information about matters of public concern that was "'publicly revealed' or 'in the public domain.'" (*Daily Mail, supra*, 443 U.S. at p. 102 [quoting *Oklahoma Publishing, supra*, 430 U.S. at p. 308.) This rule cleanly bars any kind of order restricting the Coalition's publication of this information.

Bartinicki illustrates the rule. There, two people whose phone call was illegally recorded sued Vopper, a radio commentator, under state and federal wiretapping laws after he repeatedly aired excerpts from conversation on his radio show, knowing they were recorded illegally. (532 U.S. at pp. 519–520.) The federal wiretapping law made it both illegal and civilly actionable to "intentionally disclose" illegally recorded conversations. (*Id*. at p. 520 & n.3, citing 18 U.S.C. § 2511, subd. (1)(c).) But the Court ruled that the disclosure prohibitions could not be constitutionally applied against Vopper, explaining that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." (*Id.* at p. 535.)

The First Amendment prevents the City censoring or otherwise prohibit dissemination of information of public concern, particularly when the party to be enjoined did not obtain the information wrongfully. Any liability – or restrictions on publication – can be imposed, if at all, only on those who took part in the supposedly wrongful or unlawful obtaining of the information.

C. The First Amendment Protects Publication of Matters of Public Concern.

Not only is the information the Coalition is publishing truthful, it concerns a matter of public significance. Even when state law makes it illegal to publish the name of a crime victim or defendant, those identities are still "a matter of public significance" under the First Amendment. (*Florida Star*, *supra*, 491 U.S. at p. 553; *Daily News*, *supra*, 443 U.S. at p. 103.) Unlike the state laws in those cases, under California law "a peace officer typically has no substantial interest in maintaining the confidentiality of his or her identity." (*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 704.) So, in *ALADS*, where the records the sheriff deputies sought to seize were alleged to include "approximately 500" of their photographs, the Court of Appeal ruled that this information involved "a matter of public concern." (*ALADS*, *supra*, 239 Cal.App.4th at 813, 824.) Even "truthful lawfully-obtained, publicly-available personal identifying information" about police officers – including their home addresses – has been considered "a matter of public significance" because it "is generally directed to the issue of police accountability." (*Sheehan v. Gregoire* (W.D. Wash. 2003) 272 F.Supp.2d 1135, 1139 n.2, 1145.)

Contrast that to the cases the City relies on. *Balboa Island Village, Inc. v. Lemen* (2007) 40 Cal.4th 1141, held that a woman sued for defaming a bar that neighbored her vacation home could be enjoined from "repeating statements about plaintiff that were determined at trial to be defamatory." (*Id.* at p. 1144.)

Not only did this case concern purely private business interests and an interpersonal dispute rather than any matter of public significance, the function of a defamation trial is to determine that the content of the speech to be enjoined falls outside the First Amendment's protection. (See *id.* at p. 1149.) The City is trying to take a case in which the First Amendment protections were baked into the proceeding and weaponize it to say the First Amendment protections are unnecessary. That's not how it works.[2]

Even the case that the City relies on to argue that "a writ of possession is an appropriate vehicle for seeking return of the City's exempt records" (Memo, p. 13 [citing *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1286 (*Pillsbury*)]) affirms that the First Amendment creates "a public policy exception" securing a third party's freedom "to disseminate any information contained in" otherwise contested property. (*Pillsbury, supra*, 55 Cal.App.4th at p. at 1286.)

The freedom to publish truthful information of public significance regardless of its source is guaranteed even in the face of legitimate and significant need for secrecy. In the Pentagon Papers case, the government claimed that the publication of purportedly stolen Department of Defense records threatened a "'grave and immediate danger to the security of the United States.'" (*New York Times, supra*, 403 U.S. at p. 741 (opn. of Marshall J., quoting brief of United States).) And in *Daily Mail*, the Court protected the publication of the name of a juvenile defendant even though state law made his identity confidential. (*Daily Mail*, *supra*, 443 U.S. at p. 104.) Summarizing a long line of cases on this point, the Court explained that "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." (*Id.* at p. 103 [quoting *Oklahoma Publishing*, *supra*, 430 U.S. at pp. 311–312].) Under this rule, any liability or restrictions on publication can be imposed, if at all, only on those who took part in the supposedly wrongful or unlawful obtaining of the information, not on anyone re-publishing the information from the public domain.

The City says nothing about this precedent protecting the public's right to publish truthful information about matters of public concern. The closest the City comes to addressing this issue is the puzzling claim that the First Amendment did not require the City to make this information public in the first place.

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[2] Likewise, *DVD Copy Control Association v. Brunner* (2003) 31 Cal.4th 864, upheld an injunction restricting disclosure of a company's trade secrets because "the content of the trade secrets neither involves a matter of public concern nor implicates the core purpose of the First Amendment." (*Id.* at p. 883.)

(See Memo at p. 6.) But the question in a censorship case is not whether the First Amendment furnished a right to obtain the information at issue. When the U.S. Supreme Court ruled that the New York Times could publish the Pentagon Papers, the question was not whether the First Amendment was a basis for the newspaper to petition the Pentagon for those records in the first place. It was whether the government could forbid their publication. Both there and here, the First Amendment's function is to bar the government from restraining publication of truthful information about matters of public concern.

IV. The City Is Not Entitled to a Writ of Possession.

Even if the First Amendment did not exist, no writ of possession should issue because the City's core contention for why these widely circulating photographs are suddenly the City's exclusive property – that it provided them in a flash drive inadvertently – is contrived. A writ of possession requires finding that "the plaintiff has established the probable validity of the plaintiff's claim to possession of the property." (Code Civ. Proc., § 512.060(a).). The City's claim to possession of the property here is based entirely on the assertion that it provided Camacho photographs inadvertently. Although the City repeats this assertion constantly (see Compl., at Introduction, ¶¶ 12, 14, 16, 22, 24, 26, 27, 30, 31, 36, Prayer; Memo at pp. 1, 2, 3, 7, 8, 10, 11, 12, 13, 14, 15), its sole evidence on this point is one line of hearsay in a declaration from its counsel who negotiated the City's production of the photographs: "I have since learned that the flash drive contained images of undercover officers." (Collins Decl., ¶ 7.) Even if this statement about what the attorney "learned" could be taken as true, nowhere does the City either claim or present evidence that its counsel ever defined the scope of "undercover," a term whose meaning has long been ambiguous and contested. (See Jany and Winton, *A big question remains amid LAPD photo scandal: Just who is an undercover officer?*, L.A. Times (Apr. 12, 2023), https://latimes.com/california/story/2023-04-12/what-is-an-undercover-police-officer.) The City fails to establish that it inadvertently produced any of the photographs it seeks to censor, let alone all of them.

This case arose because the Los Angeles Police Protective League did not learn about the City's settlement until seven months after the City entered it. The union immediately launched a media campaign to denounce the settlement, along with a lawsuit demanding that the City must sue anyone in possession of the photographs. (RJN, Ex. A.) LAPPL asserted that the identity of all rank-and-file officers should be secret, since even a patrol officer might someday "make detective" and take undercover

assignments in the future. (See, e.g., *L.A. detective: 'They don't care about the safety of officers'*, NewsNation (March 29, 2023), https://newsnationnow.com/video/l-a-detective-they-dont-care-about-the-safety-of-our-officers-morning-in-america/8513204/.) This limitless definition now appears to be a policy objective of the new City Attorney elected after the settlement with Camacho: the City's arguments in this case have included the assertion that the identities of all "officers *eligible* for undercover assignments as the need for additional officers arises" in the future must be kept secret, even if those officers do not currently work undercover. (TRO App. at p. 4 [emphasis added].) The City expressly took a contrary view in September when settling Camacho's lawsuit, stating that only "officers working in an undercover capacity *as of the time the pictures were downloaded (end of July 2022)* are not included." (Collins Dec., Ex. 2 [emphasis added].) Likewise, the City's present application argues either for the return or destruction of every officer's photograph or "[i]n the alternative, . . . the return and destruction of photos of all officers below command staff (i.e. captain) level." (Memo at p. 8) In other words, "undercover" suddenly means the entirety of LAPPL's bargaining unit. (See LAPPL, *LAPPL Mission Statement*, https://lapd.com/lappl-mission-statement [explaining that LAPPL represents all LAPD officers up to lieutenant]; LAPD, *LAPD Rank Structure*, https://lapdonline.org/training-division/join-the-team/rank-structure/ [explaining that lieutenant is the rank right below captain].)

Not only is that view absurd, it is not what that City Attorney agreed to eight months ago. The City has not established that it produced any photographs inadvertently, let alone all of the 9,311 photographs it now seeks to censor. Countless members of the public have now published these photographs. This information is diffused throughout the public domain. It no longer belongs to the City alone.

Conclusion

The City of Los Angeles is asking this Court to issue a writ of possession to "seize" an activist group's political expression. This is a request for an unconstitutional censorship order. This Court should deny the City's application.

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