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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

BRIEF IN SUPPORT OF STOP LAPD SPYING COALITION'S SPECIAL MOTION TO STRIKE UNDER THE ANTI-SLAPP STATUTE

[Filed concurrently with Stop LAPD Spying Coalition's Notice of Special Motion to Strike Under the Anti-SLAPP Statute and Special Motion to Strike Under the Anti-SLAPP Statute; Request for Judicial Notice; Declaration of Hamid Khan; Declaration of Emma Best.]

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Dept.	86
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Trial Date:	None Set

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Introduction

The City of Los Angeles filed this lawsuit to censor a journalist and activist group. It has no purpose besides punishing political expression on a matter of significant public interest. The case has zero legal merit. All of the "claims" the City pleads are barred by the First Amendment's prohibition on prior restraints. All of the "harms" the City alleges are speculative as well as self-inflicted. And all of the "relief" the City seeks is impossible, given that the information the City wants this Court to remove from the internet cannot be removed from the internet. This is precisely the kind of abusive, speech-chilling litigation that California's anti-SLAPP statute, Code Civ. Proc. § 425.16, was enacted to cut off. The claims should be promptly struck.

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.*) Camacho shared those records with the Stop LAPD Spying Coalition, a nonprofit community association. (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 went live 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.)

Watch the Watchers parallels other data portals publishing similar records and information, though its expressive framing, political purpose, and ease of navigability are unique. (Khan. Decl. ¶ 8.) For years the City's public records web portal has published searchable rosters of all LAPD sworn personnel listing information such as officers' full names, serial numbers, rank, division, exact date of hire, ethnicity, gender, wages, and full names of supervisor, along with rosters listing similar information for all LAPD civilian personnel. (*Id.*, ¶ 9.) Although the City appears to have removed some of these public records from its web portal upon filing this action, the information has been in public circulation for years and will remain so. (*Id.*, ¶ 10; see also Jany, *Since photos' release, LAPD has been quietly scrubbing police rosters*

from portal, L.A. Times (Apr. 22, 2023), https://www.latimes.com/california/story/2023-04-22/la-me-lapd-scrubbing-information.)

Many other members of the public have distributed these same public records. Just as one example, a website run by the nonprofit association Distributed Denial of Secrets, a successor of sorts to Wikileaks, published the same information a month ago on March 30, 2023. (Best Decl. ¶ 4; see also, e.g., Distributed Denial of Secrets, *Release: LAPD Headshots (269 MB)*, (Apr. 6, 2023) https://ddosecrets.substack.com/p/release-lapd-headshots-269-mb.) The information has also been published as torrents, meaning the files are on a reciprocal network where hundreds or thousands of people can autonomously and anonymously distribute them without a centralized host. (*Id.*, ¶¶ 4, 6.) Each time the files are downloaded "increas[es] the overall download speed and resistance to censorship." (*Id.*, ¶ 4.) Many of these individuals are likely outside the jurisdiction of this county and even this country.

Within days of the Watch the Watchers website launching, LAPD's officer union, the Los Angeles Police Protective League, launched a media campaign denouncing the scope of the City's settlement with Camacho. In the union's view, the term "undercover" encompasses just about every LAPD officer. Union leadership even suggested that any current patrol officers who wish to be promoted to detective positions and take undercover assignments decades in the future should count as undercover.[1] (See, e.g., Jany and Winton, *A big question remains amid LAPD photo scandal: Just who is an undercover officer?*, L.A. Times (Apr. 12, 2023), https://www.latimes.com/california/story/2023-04-12/what-is-an-undercover-police-officer.) The union filed a petition for a writ of mandate to force the City to take legal action against anyone publishing information about those identities. (RJN Ex. A.) When the Coalition sought to

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[1] The union's Director Jamie McBride stated in a television interview on March 29, 2023:

> What people don't think about too is not only is this affecting officers working in undercover capacities and sensitive investigations but also when you go through a 20 or 30 year career you go through undercover capacity depending on your assignment. So this can affect future officers who are currently in the department maybe working patrol but when they make detective or work under investigations they go in an undercover capacity. So this is a lot bigger than the active officers that we have right now that are working undercover.

(*L.A. detective: 'They don't care about the safety of officers'*, NewsNation (March 29, 2023, 6:41 AM), https://www.newsnationnow.com/video/l-a-detective-they-dont-care-about-the-safety-of-our-officers-morning-in-america/8513204/.)

intervene, the union opposed, based largely on its exposure to the Coalition's attorneys' fees. (RJN Ex. B.) Once the City brought this lawsuit, the union dismissed theirs as moot. (RJN Ex. C.)

The City Attorney sent the Coalition a letter dated April 3, 2023, demanding the Coalition destroy *all* of the photographs that the City gave Camacho. (Khan Decl. Ex. A.) The letter specifically demanded that the Coalition destroy "all images on your public platforms, including watchthewatchers.net." (*Id.*) The Coalition received the letter on April 11, 2023, six days *after* the City filed this lawsuit. (*Id.* ¶ 3.) On April 24, three weeks after demanding that the Coalition destroy all images from its website, the City Attorney filed an *ex parte* application for a temporary restraining order enjoining the Coalition from "transferring, concealing, removing, or otherwise disposing of" those same images on its website. The Court denied that application the next day.

Argument

"A SLAPP suit is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) The purpose of the anti-SLAPP statute is to prevent and deter SLAPPs brought largely to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311–312.) To protect against these abuses, the Legislature required that the anti-SLAPP statute "shall be construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) The statute permits a defendant to strike "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (*Id.*, subd (b)(1).)

In ruling on an anti-SLAPP motion, the Court "engages in a familiar two-step process." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 95.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) A defendant meets this burden simply "by demonstrating that the act underlying the plaintiffs' cause of action fits one of the categories spelled out in section 425.16, subdivision (e)." (*Ibid.*) Second, if the defendant makes that showing, the burden shifts to the plaintiff to establish a probability of prevailing on its claim based on admissible evidence. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) To do so, the plaintiff

must show "that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor." (*Digerati Holdings, LLC v. Young Money Entm't, LLC* (2011) 194 Cal.App.4th 873, 884.) The motion must be granted if the "plaintiff fails to produce evidence to substantiate his claim or if the defendant has shown that the plaintiff cannot prevail as a matter of law." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.)

This case is a classic SLAPP. The City is suing an activist group to censor the group's website and prevent their political speech. The lawsuit has no chance of success. Its claims are barred by the First Amendment. The City fails to meet basic statutory pre-requisites to suit. And the City will be unable to show that the disclosure of *all* 9,311 photographs was "inadvertent." This is a case of a politically influential union ginning up outrage, demanding the City file a frivolous lawsuit, and city officials caving to that pressure for political benefit.

I. The Anti-SLAPP Statute Applies to the City's Lawsuit

"A cause of action is subject to a motion to strike under the anti-SLAPP statute even if it is based only in part on allegations regarding protected activity." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 653 (*Thomas*).) *Thomas* held that the anti-SLAPP statute's reference to "cause of action" encompasses petitions to enjoin civil harassment because the statute used the phrase "cause of action" "interchangeably with the nouns 'claim' (§ 425.16, subd. (b)(3)), 'complaint' (§ 425.16, subd. (f)), [and] 'action' (§ 425.16, subd. (c))," as well as, "importantly here, petition (§ 425.16(h).)." (*Id.* at p. 646.) Not only does the City's Complaint describe three "Cause[s] of Action," every single page describes the filing as both a "Complaint" and "Petition." (Compl. at Caption, Footers, pp. 6–8.) Based on the plain text of section 425.16, the City's lawsuit is subject to the anti-SLAPP statute.

II. The Anti-SLAPP Statute Applies to the City's Claims Against the Coalition.

The anti-SLAPP statute applies to the City's claims against the Coalition because the City's claims arise from the Coalition's speech on a matter of public interest in a public forum: the Coalition's Watch the Watchers website. (Compl. ¶¶ 3, 16.)

A. The City's Claims Arise from the Coalition's Speech.

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park v. Bd. of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1062 (*Park*).) Here, the

Coalition published information from public records on a website it built to advance its mission of increasing police accountability. This is core political speech. The City's only claim that the Coalition possesses these records arises from the Coalition's website. (Compl. at ¶¶ 3, 16.) The Coalition's political speech is at the core of the City's claims against the Coalition and the claims arise only from the Coalition's political speech. This is the Coalition's entire connection to the case.

Because the Coalition's political speech – in particular the Coalition's publication of information on its website – is the basis of the City's claims, this speech "is the wrong complained of" and the "claims arise from protected activity." (*Park, supra,* 2 Cal.5th at pp. 1060, 1067.)

B. The Coalition's Speech Is in Connection with an Issue of Public Interest in a Public Forum.

Subsections (e)(3) and (e)(4) of the anti-SLAPP statute apply because the Coalition's speech was made in connection with an issue of public interest in a public forum. (Code Civ. Proc., § 425.16, subds. (e)(3), (e)(4).)

Courts use "a two-part analysis rooted in the statute's purpose and internal logic" to determine whether a statement is made in connection with an issue of public interest. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 148 (*FilmOn*).) "First, [a court should] ask what 'public issue or . . . issue of public interest' the speech in question implicates — a question [courts can] answer by looking to the content of the speech." (*Ibid.,* quoting Code Civ. Proc., § 425.16, subd. (e)(4) (ellipsis in original).) "Second, [a court should] ask what functional relationship exists between the speech and the public conversation about some matter of public interest." (*Id.* at pp. 149–150.)

1. The Coalition's Speech Implicates the Public Issue of Police Accountability.

In identifying the public issue, "*FilmOn*'s first step is satisfied so long as the challenged speech or conduct, considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute." (*Geiser v. Kuhns* (2022) 13 Cal.5th 1238, 1253 (*Geiser*).) Defendants will "virtually always" be able to make this showing. (*Id.* at p. 1250.)

The issue here is clear: the website seeks police accountability and transparency. It prominently states that the "website is intended as a tool to empower community members engaged in copwatch and other countersurveillance practices. . . . The website's ease of use also makes it a political statement,

flipping the direction of surveillance against the state's agents. Police have vast information about all of us at their fingertips, yet they move in secrecy." (Khan Decl., ¶ 4.)

A website posting "truthful lawfully-obtained, publicly-available personal identifying information" about police officers—even including residential addresses—"is generally directed to the issue of police accountability," which is "a matter of public significance." (*Sheehan v. Gregoire* (W.D. Wash. 2003) 272 F.Supp.2d 1135, 1139 n.2, 1145].) And under anti-SLAPP precedent, "Police misconduct is *always* a matter of public interest." (*Rall v. Tribune 365, LLC* (2019) 43 Cal.App.5th 638, 653 [parentheses omitted, emphasis added]; see also *Assn. for L.A. Deputy Sheriffs v. L.A. Times Communications LLC* (2015) 239 Cal.App.4th 808, 826 (*ALADS*) ["The public has a strong interest in the qualifications and conduct of law enforcement officers."].) The issue is public.

2. The Coalition's Speech Connects to a Public Issue.

FilmOn's second step looks to the context of the speech to determine "what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn, supra*, 7 Cal.5th at pp. 149–150.) These contextual factors include the identity of the speaker, its audience, and its purpose. (*Id.* at p. 145.) All these factors show that the Coalition's speech connects to the public issue of police accountability.

The Coalition's identity shows its speech furthered the conversation on the public issue. Unlike the private, for-profit enterprise selling its commercial products in *FilmOn*, the Coalition is a community advocacy organization publishing public records in a public forum. (See *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576 [publicly accessible "Web sites . . . meet the definition of a public forum"].)

The Coalition's audience also shows its speech furthered the conversation on a public issue. A private audience "makes heavier [the speaker's] burden of showing that . . . the alleged statements nevertheless contributed to discussion or resolution of a public issue." (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 903.) The Coalition sought the largest audience it could reach. It published a website, held a press conference to announce the website's launch, and heavily promoted the website on social media, at political demonstrations, in open community meetings, and in media interviews. (Khan Decl., ¶ 6.) The Coalition's audience is literally anyone it could get to listen. Its audience was the public.

Finally, the purpose of the Coalition's speech also shows an intent to further the public conversation on police accountability, transparency, and surveillance. The website states: "This website is intended as a tool to empower community members engaged in copwatch and other countersurveillance practices. You can use it to identify officers who are causing harm in your community. The website's ease of use also makes it a political statement, flipping the direction of surveillance against the state's agents. Police have vast information about all of us at their fingertips, yet they move in secrecy." (Khan Decl., Ex. A.)

III. The City Will Be Unable to Show a Probability of Success on the Merits of the Claims.

Because the anti-SLAPP statute applies to the City's claims, the burden shifts to the City to prove that the claims are legally sufficient and supported by a prima facie evidentiary showing of success.

While dressed up in a request for a "writ of possession" and an injunction against "using, posting, or further distributing" records that the City itself made public, the City is seeking an order censoring the Coalition's Watch the Watchers website. (Compl. at Prayer.) The City is very candid about this purpose, asking this Court to order the "destruction of all pictures on the Watch the Watchers website." (*Ibid.*)

The City's lawsuit seeks to have this Court issue an order censoring the Coalition from continuing to engage in its political speech and from engaging in such speech in the future. Censorship orders virtually always violate the First Amendment. Because of this insurmountable barrier, the City cannot meet its second step burden of showing that the Complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in its favor.

A. The City Cannot Prevail on its Claims Because the Prior Restraint it Seeks Is Presumptively Unconstitutional.

To pass constitutional muster, a prior restraint must be necessary to further a governmental 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 governmental 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 the order barring temporarily publication of the Pentagon Papers was an unconstitutional

prior restraint because 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. Because prior restraints are so antithetical to the First Amendment, 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 any the City might dream up 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 obtained from judicial records open to public inspection]; *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 after government officials "inadvertently" disclosed it]; *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.) And unlike here, many of the cases rejecting prior restraints on publication of government records involved confidential information that was stolen or otherwise unlawfully obtained.

The Court of Appeal has even upheld the grant of an anti-SLAPP motion rejecting a prior restraint in circumstances remarkably similar this one. (See *ALADS, supra,* 239 Cal.App.4th at p. 824).) There a police union went to court to prevent publication of information from sheriff's deputies' confidential background investigation files and secure an order directing the Los Angeles Times "'to immediately return'" the records to the Sheriff's Department. (*Id.* at p. 813.) The police union alleged that a Times reporter either "stole, received from someone else who stole, or otherwise unlawfully came into physical possession of the confidential background investigation files." (*Ibid.*) The Court of Appeal affirmed the trial court's order striking the entire lawsuit under the anti-SLAPP statute. (See *id.* at pp. 820–824.) The Court held that it did not even need to "determine whether the complaint as pleaded adequately alleges a cause of action . . . because the injunction the plaintiffs [sought] would be an unconstitutional prior restraint." (*Id.* at p. 821.) And unlike in that case, the City is seeking not only a prior restraint on future expression but also a censorship order "authorizing the County Sheriff to seize" information from the Coalition's website. (Compl. at Prayer.) In other words, this isn't just prohibiting the publication of a newspaper article: it's like government agents confiscating the L.A. Times from newsstands and libraries.

Because the City's attempt to weaponize Civil Code section 3379 and Government Code section 6204.2 would require a prior restraint, the City must overcome the presumption of unconstitutionality to show that those statutes are constitutional as applied to the Coalition's publication of its website.

B. The City Cannot Overcome the Presumption of Unconstitutionality.

To show that a prior restraint would be constitutional here, the City has the burden of showing (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.) This test is even stricter than the "fatal in fact" strict scrutiny test. (See *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30–31.)

The City must show a probability of prevailing on each one of these prongs. It can't come close to meeting any of them:

1. The City's Interest Is Not of the Highest Magnitude.

The City will be unable to show their request for a prior restraining order addresses a government interest of the highest magnitude. Even if the overheated rhetoric on this issue might suggest otherwise, the existence of the name and pictures of public servants on a website 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 will be unable to show that the publication of information its attorneys provided in response to a Public Record Act request is somehow 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.A.)

2. Any Alleged Harm is Speculative.

The City will be unable to show 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.).) The alleged harm here is neither great nor certain. While the City claims that publication of officers' photos "compromises current and future criminal investigations and exposes those officers to real and present danger of harm by the criminals with whom they engage" (Compl. at Introduction), the City's Chief of Police informed the Board of Police Commissioners on April 11, 2023, almost a month after Watch the Watchers launched, that "[t]he vast majority of our investigations have been unimpacted" and most undercover operators remain "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/.) The City will not be able to show otherwise.

3. Any Alleged Harm Is Reparable.

Not only is any harm from the Coalition posting records the City itself disclosed speculative, but if it exists, it is reparable. The City or the individual officers can seek money damages for any of its imagined harms.

The Court of Appeal rejected a police union's request for a prior restraint against the L.A. Times publishing information gleaned from officer's confidential personnel files in part because any alleged harm could be remedied by money damages. (*ALADS, supra*, 239 Cal.App.4th at 842 ["If and when the Times publishes any article that constitutes actionable libel or invasion of privacy about any individual deputy, that deputy remains free to file any lawsuit he or she can plead and prove in good faith."].) And in fact, officers have begun the process of filing such a suit against the City for disclosing these records, emphasizing that any alleged harm here can be cured with a legal remedy. (RJN Ex. D.)

4. The City Cannot Show Its Prior Restraint Would Prevent the Supposed Harm.

The City will be unable to show that the prior restraint will manage to prevent any alleged harm caused by making these public records available to the public because the records are already widely disseminated. The sole harm the City alleges is supposed risk to "officers currently serving in sensitive assignments whose identities were compromised." (Compl. at Introduction.) Even if the City could prove that this allegation amounts to a direct and certain harm, an order requiring the Coalition to destroy information from its website cannot un-compromise those identities.

Thousands of people have already visited the Coalition's website during the now nearly six weeks that have elapsed since the website's launch, and anyone who has likely has "possession" of this information in their web browser's cache. Tens of thousands of people have also viewed a separate download link published by Camacho. (Declaration of Benjamin Camacho filed with his anti-SLAPP motion, ¶ 17.) The information has also been re-published and hosted across a range of other online media. (Best Decl., ¶¶ 4, 7.) The information has even been published through torrents, meaning the files are on a reciprocal, decentralized network where hundreds or thousands of can distribute it. (*Id.*, ¶¶ 4, 6; 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 individuals are likely outside the jurisdiction of this county and even this country. In fact, an attorney representing hundreds of purportedly "undercover" officers in tort claims against the City has 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, The Epoch Times (Apr. 7, 2023), https://www.theepochtimes.com/undercover-officers-data-leak-sparks-legal-battle-in-los-angeles_5180395.html.)

While courts use different metaphors, they all 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 the 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 [request for injunction "no longer available because the [records] are now available to the public"].)

Because effective relief would require an injunction against much of the world, the City will be unable to show that its prior restraint against the Coalition will prevent any of the alleged harm.

C. The City Cannot Prevail on Its Claims Against the Coalition Because the First Amendment Protects the Publication of Newsworthy Information by Innocent Recipients.

Even if the City were correct that all the records it disclosed were "inadvertent" and it could obtain a prior restraint against the requester of the records, the City still could not show a probability of prevailing against the Coalition because the First Amendment provides a near absolute right to publish truthful information about matters of public interest that the speaker lawfully acquired. (See *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 103 (*Daily Mail*).) This rule prevents the City from getting *any* relief—be it a writ of possession, an injunction, or declaratory relief—against the Coalition's publication of the records.

In *Bartnicki v. Vopper* (2001) 532 U.S. 514, 535 (*Bartnicki*), the Supreme Court affirmed that this rule applies even if a re-publisher of information knew that its source had obtained the information illegally. In *Bartnicki*, two people whose phone call was illegally recorded sued Vopper, a radio commentator, under state and federal wiretapping laws after he repeatedly aired excerpts of the conversation on his radio show. (*Id.* at pp. 519–520.) The 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 found 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 rule has also been applied to judicial orders enjoining publication. (*Oklahoma Publishing*, *supra*, 430 U.S. at p. 308.) In fact, this was the rule the Supreme Court applied in the Pentagon Papers case when it invalidated injunctions against the publication of a classified Defense Department report that had purportedly been stolen by the newspapers' source, even though the government claimed the publication of the report would damage national security. (*New York Times*, *supra*, 403 U.S. at pp. 723–724.) As Justice Brennan explained, "Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue." (*Id.* at p. 727 (conc. opn. of Brennan, J.).)

This rule applies even in the face of legitimate and significant governmental interests in keeping the information confidential. In the Pentagon Papers case, the government claimed the disclosure of information purloined from the Defense Department threatened a "'grave and immediate danger to the security of the United States.'" (*New York Times*, *supra*, 403 U.S. at p. 741 (conc. opn. of Marshall J., quoting brief of United States).) In *Daily Mail*, the Court protected the publication of the name of a juvenile defendant even though state law declared such information confidential. (*Daily Mail*, *supra*, 443 U.S. at p. 104; see also *Oklahoma Publishing*, *supra*, 430 U.S. at pp. 311–312 [same]. The rule applies to publication of other information considered confidential by law, including information on judicial disciplinary proceedings (see *Landmark Communications, Inc. v. Virginia* (1978) 435 U.S. 829, 839 (*Landmark Communications*)), and the name of a sexual assault victim. (*Florida Star*, *supra*, 491 U.S. at pp. 537–538; *Cox Broadcasting*, *supra*, 420 U.S. at p. 495.)

The rule applies to both criminal and civil penalties against publication. (See *Bartnicki*, *supra*, 532 U.S. at p. 521 & n.3 [both]; *Florida Star*, *supra*, 491 U.S. at 526 [civil]; *Landmark Communications*, *supra*, 435 U.S. at 830 [criminal]; *Daily Mail*, *supra*, 443 U.S. at 99 [criminal]; *Cox Broadcasting*, *supra*, 420 U.S. at 471 [civil].) Even where California's statute authorizing specific recovery of illegally possessed documents is otherwise applicable, the First Amendment establishes "a public policy exception to the general rules protecting property interests." (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1286.) That First Amendment exception preserves a third party's freedom both to retain copies of the same documents "and to disseminate any information contained in them." (*Ibid.*)

In short, the First Amendment prevents the City from prevailing on any claim to censor 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.

D. The City Cannot Prevail Because It Did Not Satisfy Preconditions to Suit.

The City bases its claims—and proceeds under—Government Code section 6204 *et seq*. (Compl. ¶¶ 19, 20, 37.) But that law creates a prerequisite to suit: it requires the agency issue a written notice demanding return of the records. (Gov't Code §§ 6204, subd (b); 6204.2, subd (b).) The agency can file suit no earlier than 20 days after the recipient receives that notice. (Gov't Code §§ 6204.2, subd (b); 6204, subd (b).)

The City's own Complaint shows it flouted that requirement. The City claims it *sent* notice to the Coalition on April 3, 2023. The City filed suit only two days later. And 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 Complaint is legally insufficient and it cannot prevail on its claims.

E. The City Cannot Prevail on Its Claims because the Disclosure Was Not "Inadvertent."

Even if the First Amendment never existed and the City met all statutory preconditions to suit, it would still be unable to prevail on its claims because the City's central contention—that it provided photographs in a flash drive to Camacho inadvertently (Compl. at Introduction, ¶¶ 12, 14, 16, 22, 24, 26, 27, 30, 31, 36 & Prayer)—is contrived. The City will be unable to establish that it genuinely produced photographs inadvertently.

This is a case of buyer's remorse, not mistake. The City contracted with Camacho to settle a lawsuit. The flash drive was the City's consideration. The City even specified that the only photographs counsel for both parties had agreed to exempt were those of "officers working in an undercover capacity as of the time the pictures were downloaded (end of July 2022)." (Compl. at ¶ 12.) But when the Coalition's publication of these records drew attention to the contract the City had entered, the police union threw a tantrum. City politicians largely fell in line. The police union even sued the City demanding that the City take legal action against Camacho and the Coalition. (RJN Ex A.) The union knew any such lawsuit was

dead on arrival. In fact, when the Coalition moved to intervene in that lawsuit, the union's opposition was mainly based on the prospect of paying attorneys' fees to the Coalition. (RJN Ex. B.) But the City nonetheless decided to carry water for the union, filing this frivolous lawsuit as a political stunt.

Any assertion that this case is about inadvertent identification of so-called "undercover" officers is a ruse. In a break from past policy, LAPD this month announced a wide-ranging "list of units and divisions whose officers' photos would automatically be excluded from future public disclosures." (Jany and Winton, *supra*.) Meanwhile the police union is asserting that virtually every LAPD officer qualifies as "undercover." That limitless definition now appears to be a policy objective of the new City Attorney who took office after her predecessor's settlement with Camacho: when demanding the records back, her office stated that the only photos that can be published going forward are ones of officers "whose photos are displayed on the official LAPD website based upon their seniority and or rank." (Declaration of Benjamin Camacho filed in connection with his anti-SLAPP motion, Ex. C.) In other words, everyone but the highest brass featured on LAPD's own website is suddenly "undercover." That is nonsense.

The whole action is a performance designed to appease the union and threaten the Coalition's (and Camacho's) rights. The City will be unable to show that their disclosure of the information they seek to take possession of was "inadvertent."

Conclusion

Many cases seeking to curtail public participation through costly litigation "come before the Court[s] clad, so to speak, in sheep's clothing," (*Morrison v. Olsen* (1988) 487 U.S. 654, 699 (dis. opn. of Scalia, J.)), with true purposes dressed in seemingly legitimate causes of action. "But this wolf comes as a wolf." (*Ibid*.) Rare is the case that is so clearly aimed at punishing public participation. The Court should grant this motion.

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