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FILED

DEC 28 2021

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: S. Cornell, Deputy

6 Attorneys for Proposed *Amici Curiae* FIRST
7 AMENDMENT COALITION and NORTHERN
8 CALIFORNIA CHAPTER OF THE SOCIETY
9 OF PROFESSIONAL JOURNALISTS

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF MARIN

13 IN RE: SEARCH OF THE CANON
14 CAMERA, 2 SANDISK MEMORY
15 CARDS, AND IPHONE XS, WARRANT
16 NO. SW002503

Case No. SC218320a
Warrant No. SW002503

**NOTICE OF MOTION AND MOTION OF
FIRST AMENDMENT COALITION AND
NORTHERN CALIFORNIA CHAPTER
OF THE SOCIETY OF PROFESSIONAL
JOURNALISTS FOR LEAVE TO FILE
AMICI CURIAE LETTER IN SUPPORT
OF MOTION TO QUASH WARRANT
PURSUANT TO PENAL CODE SECTION
1524(G) AND TRAVERSE SEARCH
WARRANT**

Date: December 29, 2021
Time: 9:00 a.m.
Dept.: D

23 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:
24
25 *Amici Curiae* First Amendment Coalition ("FAC") and Northern California Chapter of the
26 Society of Professional Journalists ("SPJ NorCal"), collectively "Proposed *Amici*," respectfully
27 file this application for leave to file the attached *Amici Curiae* Letter in support of the Motion to
28 Quash Warrant Pursuant to Penal Code Section 1524 and Traverse Search Warrant, which is set to

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26 Society of Professional Journalists (“SPJ NorCal”), collectively “Proposed *Amici*,” respectfully
27 file this application for leave to file the attached *Amici Curiae* Letter in support of the Motion to
28 Quash Warrant Pursuant to Penal Code Section 1524 and Traverse Search Warrant, which is set to

1 be heard on December 29, 2021 at 9:00 a.m., in Department D of the above-entitled Court, located
2 at 3501 Civic Center Drive, San Rafael, CA 94903.

3 On November 30, 2021, the Sausalito Police Department (“SPD”) arrested independent
4 photojournalist Jeremy Portje and seized his camera, cell phone and other equipment while he
5 filmed at a homeless encampment in Marinship Park, which is located on public property. On
6 December 9, 2021 SPD obtained a search warrant for Mr. Portje’s video camera, cell phone and
7 two digital storage devices. The Northern California Computer Crimes Task Force has since
8 extracted and downloaded the data from Mr. Portje’s cell phone. The seized equipment and a
9 USB drive with a copy of the cell phone data are apparently still in the possession of either the
10 Northern California Computer Crimes Task Force and/or SPD.

11 This search warrant was issued contrary to California state law, which expressly and
12 absolutely bars the use of search warrants to obtain a journalist’s unpublished materials. (See Pen.
13 Code § 1524, subd. (g), citing Evid. Code § 1070.) Proposed *Amici* are deeply concerned by
14 SPD’s apparent disregard for the federal and state constitutional and statutory protections that
15 strictly limit when law enforcement may search for, or seek to compel a journalist to produce,
16 confidential work product or documentary materials, or to force a reporter to identify a
17 confidential source. For the reasons set forth in the proposed *Amici Curiae* Letter attached hereto
18 as **Exhibit A**, Proposed *Amici* urges the Court to order the immediate return of Mr. Portje’s work
19 product, documentary materials, and newsgathering equipment seized by SPD on November 30.
20 We urge the Court to order the Northern California Computer Crimes Task Force, the Sausalito
21 Police Department, and any other agency which may have possession of Mr. Portje’s materials or
22 any copies thereof, to return any of Mr. Portje’s materials in their possession, and to destroy any
23 copies of such materials. The Court should furthermore order SPD and any other relevant agency
24 that they may not under any circumstances review any information contained on any of the seized
25 devices, and that they must halt any other search warrant applications for Mr. Portje’s materials
26 that may be in progress.

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1 academics, freelance journalists, bloggers, community activists, and ordinary citizens. FAC also
2 works to defend the First Amendment and newsgathering rights of journalists. (See Brian
3 Carmody Search Warrant, [https://firstamendmentcoalition.org/the-bryan-carmody-story-in-
4 depth/.](https://firstamendmentcoalition.org/the-bryan-carmody-story-in-depth/))

5 The Northern California Chapter of the Society of Professional Journalists (“SPJ NorCal”) is dedicated to improving and protecting journalism. It is a Chapter of the national Society of
6 Professional Journalists, the nation’s most broad-based journalism organization. Founded in 1909
7 as Sigma Delta Chi, the Society of Professional Journalists promotes the free flow of information
8 vital to a well-informed citizenry, works to inspire and educate the next generation of journalists,
9 and protects the First Amendment guarantees of freedom of speech and press. SPJ

11 NorCal has a Freedom of Information Committee of journalists and First Amendment
12 lawyers, which assists in its free speech and government transparency advocacy. Also, in
13 collaboration with its Freedom of Information Committee, it hosts the annual James Madison
14 Freedom of Information Awards and offers training to journalists on free press and access issues.

15 For all of the reasons set forth above, Proposed *Amici* respectfully request that the Court
16 grant leave to file the proposed *Amici Curiae* Letter attached hereto as **Exhibit A** in the above-
17 captioned matter.

18 Dated: December 28, 2021

19 FIRST AMENDMENT COALITION

20
21 By



22 DAVID E. SNYDER
23 MONICA N. PRICE
24 Attorneys for Proposed *Amici Curiae*
25 FIRST AMENDMENT COALITION
534 Fourth Street, Suite B
San Rafael, CA 94901

26 *Counsel for Proposed Amici First*
27 *Amendment Coalition and Northern*
28 *California Chapter of the Society of*
Professional Journalists

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF MARIN

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of MARIN, State of California. My business address is 534 4th Street,
Suite B, San Rafael, CA 94901-3334.

5 On December 28, 2021, I served true copies of the following document(s) described as
6 **NOTICE OF MOTION AND MOTION OF FIRST AMENDMENT COALITION AND**
7 **NORTHERN CALIFORNIA CHAPTER OF THE SOCIETY OF PROFESSIONAL**
8 **JOURNALISTS FOR LEAVE TO FILE AMICI CURIAE LETTER IN SUPPORT OF**
9 **MOTION TO QUASH WARRANT PURSUANT TO PENAL CODE SECTION 1524(G)**
10 **AND TRAVERSE SEARCH WARRANT** on the interested parties in this action as follows:

9 Lori Frugoli Via Messenger
10 Marin County District Attorney
11 3501 Civic Center Drive, Suite 130
12 San Rafael, CA 94903

11 Sausalito Police Via Messenger
12 29 Caledonia Street
13 Sausalito, CA 94965

14 Charles D. Dresow Via Email
15 Ragghianti Freitas LLP
16 1001 Fifth Avenue, Suite 100
San Rafael, CA 94901
Email: cdresow@rflawllp.com

17 **BY MESSENGER SERVICE:** I served the documents by placing them in an envelope or
18 package addressed to the persons at the addresses listed on the Service List and providing
them to a professional messenger service for service.

19 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
20 document(s) to be sent from e-mail address rregnier@sheppardmullin.com to the persons
21 at the e-mail addresses listed in the Service List. I did not receive, within a reasonable
time after the transmission, any electronic message or other indication that the transmission
was unsuccessful.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct.

24 Executed on December 28, 2021, at East Palo Alto, California.

25 
26 _____
Robin P. Regnier

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STATE OF CALIFORNIA, COUNTY OF MARIN

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Lori Frugoli
Marin County District Attorney
3501 Civic Center Drive, Suite 130
San Rafael, CA 94903

Sausalito Police
29 Caledonia Street
Sausalito, CA 94965

BY MESSENGER SERVICE: I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed on the Service List and providing them to a professional messenger service for service.

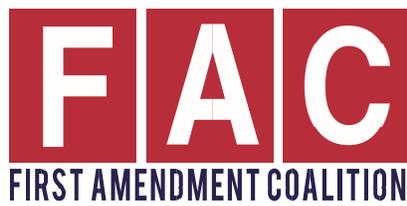
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 28, 2021, at East Palo Alto, California.



Robin P. Regnier

EXHIBIT A



December 28, 2021

VIA HAND DELIVERY

The Honorable Geoffrey M. Howard
Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

RE: Motion to Quash Warrant Pursuant to Penal Code Section 1524(g) and Traverse Search Warrant, Search Warrant Number 002503

Dear Judge Howard:

The First Amendment Coalition and the Northern California Chapter of the Society for Professional Journalists (“*Amici*”), write in support of the application of independent photojournalist Jeremy Portje to quash Search Warrant 002503 and to compel the return of protected work product, documentary materials, and newsgathering equipment seized by the Sausalito Police Department (“SPD”) on November 30, 2021. The issuance of the search warrant for journalist Jeremy Portje’s newsgathering materials violated not just California law and the California Constitution, but the First Amendment to the United States Constitution and the federal Privacy Protection Act, as detailed below. As organizations that work to defend the First Amendment rights of free speech, a free press and the public’s right to know, *Amici* are deeply concerned by SPD’s disregard for the federal and state constitutional and statutory protections, which strictly limit the use of even **subpoenas** to obtain confidential work product or documentary materials—much less **search warrants**, which are absolutely barred under California law (California Penal Code, section 1524(g)) and, with some exceptions not applicable here, under federal law as well (*see* 42 U.S.C. §§ 2000aa et seq.).

In order to preserve the “unique role” and independence of the press, both state and federal law require subpoenas, not search warrants for journalistic materials. (See *Miller v. Superior Court* (1999) 21 Cal. 4th 883, 898; Pen. Code, § 1524, subd. (g); 42 U.S.C. §§ 2000aa et seq.) The requirement under California law that authorities use subpoenas instead of search warrants is fundamental and well-defined. (Pen Code, § 1524, subd. (g); Evid Code. § 1070; Cal. Const. art I, § 2, subd. (b).) Subpoenas ensure that journalists can contest the seizure of their materials in court *before* the search takes place, thus providing an essential opportunity to protect the fundamental and constitutionally protected rights afforded by the Shield Law—rights that implicate broader democratic principles and liberties. (See *In re Willon* (1996) 47 Cal.App.4th 1080, 1091[Shield Law’s purpose is to “safeguard the free flow of information from the news media to the public, one of the most fundamental cornerstones assuring freedom in America”]. This process is essential to a free press and provides important protections for confidential

sources. (See *Miller v. Superior Court* (1999) 21 Cal.4th 883, 898 [“(U)sing the power of the state to compel journalists to become investigative arms of one side of a legal dispute undermines their editorial independent and erodes the trust of their sources”].)

Both California and federal courts, as well as Congress, have repeatedly recognized the profound threat to newsgathering posed by unlawful searches directed at members of the news media. (See, e.g., *Citicasters v. McCaskill* (8th Cir. 1996) 89 F.3d 1350, 1355 [local prosecutor could be held liable under federal Privacy Protection Act (“PPA”) based on seizure of videotape from television station]; *Morse v. Regents of the Univ. of Cal.* (N.D. Cal. 2011) 82 F. Supp.2d 1112, 1121 [journalist whose camera was seized could bring PPA claim against chief of UC Berkeley police department]; *Miller v. Superior Court* (1999) 21 Cal.4th 883, 893-94 [Shield Law protections absolute for non-party reporter subpoenaed by the prosecution in a criminal case]; *People v. Vasco* (2005) 131 Cal. App. 4th 137 158 (2005) (“[t]he prosecution has no due process right to overcome a newsperson's shield law immunity and force disclosure of unpublished information, even if the undisclosed information is crucial to the prosecution's case”).

Journalists rely on assurances of confidentiality in the pursuit of newsworthy information. Confidentiality of sources is even more important when newsgathering may reveal government misconduct or might be perceived as embarrassing the government. Law enforcement use of tools such as search warrants to chill the disclosure of newsworthy information demands that courts rigorously enforce existing legal protections for journalists’ work product and documentary materials

As Senator Edward Kennedy (D-MA) explained shortly before Congress passed the PPA: “By exposing the work product of reporters to the roving eye of any policeman who has obtained a search warrant to examine newsroom documents, [the execution of a warrant] threatens to dry up the confidential sources of information which form the backbone of investigative journalism.” (Privacy Protection Act, Hearing Before the S. Judiciary Comm. on S. 115, S. 1790, and S. 1816, 96th Cong. 2 (1980) (opening statement of Sen. Edward M. Kennedy, chairman).)

Both SPD and the Marin County District Attorney (“DA”) were on notice of Mr. Portje’s status as a journalist and the protections that status confers. On December 7, 2021, *Amici* sent an urgent letter to SPD Chief John Rohrabacher, District Attorney Lori Frugoli, and Mayor Jill Hoffman, outlining the clear California state law which absolutely and unequivocally bars the use of search warrants to obtain unpublished newsgathering materials. Despite this clear notice, two days later SPD sought and obtained a search warrant from the Court for Mr. Portje’s video camera, cell phone and two digital storage devices. The “Contemporaneous Notification” of his device search was sent on December 13, 2021. The seized equipment and a USB drive with a copy of the cell phone data are apparently still in the possession of either the Northern California Computer Crimes Task Force and/or SPD.

The affidavit of probable cause in support of the December 9 warrant fails to expressly acknowledge Mr. Portje’s status as a journalist except on one occasion, when Officer White opines that Mr. Portje is “not a true objective journalist.” (Affidavit at 18.) It is clear from this statement, as well as the rest of the contents of the warrant affidavit, that police were and are

aware of Mr. Portje’s status as a journalist—but sought to obscure and downplay that fact. The resulting warrant application is therefore substantially misleading, and likely prevented the Court from understanding the core constitutional rights at stake here. In any event, one police officer’s opinion about a journalist’s “true objectivity”—itself a purely subjective assertion—has no relevance; the protections under Penal Code section 1524, subdivision (g), the Privacy Protection Act or the First Amendment apply to all journalists, “objective” or not. (See, e.g., *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1457 [“[W]e can think of no workable test or principle that would distinguish ‘legitimate’ from ‘illegitimate’ news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment;” Shield Law protections apply to all individuals who “gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience”].)

The Court should quash the search warrant for Mr. Portje’s video camera, cell phone and digital storage devices and order the immediate return of the devices and the information stored thereon. We urge the Court to order the Northern California Computer Crimes Task Force, SPD, and any other agency which may have possession of Mr. Portje’s materials or copies thereof, to return any of Mr. Portje’s materials in their possession, and to destroy any copies of such materials. The Court should furthermore order SPD and any other relevant agency not to, under any circumstances, review any information contained on any of the seized devices, and that law enforcement must halt any other search warrant applications for Mr. Portje’s materials that may be in progress.

(1) The Search Warrant Was Issued in Clear Violation of California Statutory and Constitutional Law

The California Constitution and California statutory law clearly forbid the use of a search warrant to seize journalistic work product. California Penal Code section 1524, subdivision (g) plainly states that “[n]o warrant shall issue for any item or items described in Section 1070 of the Evidence Code.” California’s journalist Shield Law, codified in California Evidence Code section 1070 and later enshrined in article I, section 2 of the California Constitution, protects journalists from being held in contempt of court if they refuse to reveal “unpublished information obtained or prepared in gathering, receiving, or processing of information for communication to the public.”

Mr. Portje is a documentary filmmaker and freelance news photographer whose unpublished materials are protected by California Penal Code section 1524 and the California journalist Shield Law. The state’s Shield Law protects a “reporter or other person connected with or employed upon a newspaper, magazine or other periodical publication.” (Evid. Code, § 1070, subd. (a).) Mr. Portje falls within the definition of a journalist because he is a freelance journalist whose credits have appeared in the Marin Independent Journal, the Mercury News, the Associated Press and other outlets. Courts have held that the broad language of Evidence Code section 1070 protects a wide variety of journalists, including freelancers, bloggers, and student journalists. (See, e.g., *People v. Von Villas* (1992) 10 Cal.App.4th 201, 231-232 [holding that freelancers for Hustler Magazine were protected by California’s Shield Law]; *O’Grady*, 139

Cal.App.4th at 1461-1466 [same for website bloggers who wrote exclusively about Apple products].)

The definition of “unpublished information” under the Shield Law is broad and “includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.” (Evid. Code, § 1070, subd. (c).) The video camera, cell phone and digital storage devices searched subject to the Search Warrant include information gathered pursuant to Mr. Portje’s role as a journalist, and any such information contained in any seized equipment is “unpublished information” under the Shield Law. Penal Code section 1524, subdivision (g) prohibits SPD from obtaining a search warrant for the content of Mr. Portje’s devices.

California law also expressly provides that an aggrieved journalist may seek the return of items seized in violation of the law. Penal Code section 1538.5, subdivision (n), invoked by Mr. Portje before this Court, states that, “[n]othing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions.”

The warrant here also violated federal constitutional free speech and due process principles. The First Amendment reporter’s privilege recognizes that compelled production of even non-confidential information “can constitute a significant intrusion into the newsgathering and editorial processes” (*Shoen v. Shoen* (9th Cir. 1993) 5 F.3d 1289,1294) and ensures that “compelled disclosure from a journalist must be a last resort after pursuit of other opportunities have failed.” (*Id.* at 1297-98.)

Where First Amendment protections apply, the requirements of the Fourth Amendment must be applied with “scrupulous exactitude.” (*Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 564.) Such “exactitude” was manifestly lacking here, where police appear to have attempted to obscure even the basic fact of Mr. Portje’s status as a journalist, and the warrant for Mr. Portje’s video camera, cell phone and digital storage devices swept up information that was not even related to the November 30, 2021 incident. Then, the Northern California Computer Crimes Task Force copied the entire contents of Mr. Portje’s cell phone, including all communications and web searches, months or possibly years of data. The cell phone, video camera and digital storage devices are still being held in evidence despite the presence of assuredly protected information such as journalist work product. Mr. Portje’s confidential sources are all in jeopardy, and their identities are now in the hands of the police.

(2) The Search Warrant Was Issued in Violation of the Federal Privacy Protection Act

The federal Privacy Protection Act of 1980 (“PPA”) protects the flow of confidential information to journalists by limiting when law enforcement – including state agencies and city departments like SPD – may search for or seize journalistic work product of documentary materials. (See

Pub. L. No. 96-440, 94 Stat. 1879 (1980), codified at 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7.) The PPA requires a subpoena prior to a government search directed at a journalist and “generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public.” (*Morse v. Regents of the Univ. of Cal.* (N.D. Cal. 2011) 821 F. Supp. 2d 1112, 1120-1121.)

For journalists’ work product,¹ authorities may only search for or seize such material if the immediate seizure is necessary to prevent the death of, or serious bodily injury to, a human being, or where there is probable cause to believe that the possessor has committed or is committing certain crimes. The latter carve-out, known as the “suspect exception,” applies only where the offense to which the material relates does not consist of the receipt, possession, communication, or withholding of the material. (42 U.S.C. § 2000aa(a)(1)-(2).)² Such receipt, possession and communication is indeed protected under the First Amendment. (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 519-520 [government may not impose criminal liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques].) In any event, here, the search warrant affidavit repeatedly references the apparent belief of SPD that Mr. Portje was communicating with others to “instigate a conflict with” police – i.e., that the warrant was needed to seize those communications as evidence of an alleged conspiracy to do so. Because the warrant was based in large part on an offense that “consist[s] of. . . the communication. . . of the material” to be seized, it was barred under the Privacy Protection Act.

For all other documentary material,³ the PPA adds two additional exceptions that permit its seizure by law enforcement. These are: when notice pursuant to a subpoena would result in destruction, alteration, or concealment of such materials; or when such materials have not been produced pursuant to a court order directing compliance with a subpoena, all appellate remedies have been exhausted, and there is reason to believe that delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of

¹ Work product encompasses material prepared by the journalist or another in anticipation of reporting to the public. It is defined as material that is prepared, produced, authored, or created by any person in anticipation of that material being communicated to the public; is possessed for the purposes of communicating such materials to the public; and includes the mental impressions, conclusions, opinions, or theories of the person who created the material. (42 U.S.C. § 2000aa-7(b).)

² The “suspect exception” does apply to the receipt, possession, communication, or withholding of material covered by the federal Espionage and Atomic Energy Acts and child exploitation laws. (See 42 U.S.C. § 2000aa(a)(1), (b)(1); 18 U.S.C. §§ 793, 794, 797, 798, 2251, 2251A, 2252, 2252A; 42 U.S.C. §§ 2274, 2275, 2277; 50 U.S.C. § 783.)

³ “Documentary materials” means materials upon which information is recorded. (42 U.S.C. § 2000aa-7(a) (listing examples, such as photographs, video, and audio tapes).) Neither documentary materials nor work product materials include contraband; the fruits of a crime; things otherwise criminally possessed; or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense. (42 U.S.C. § 2000a-7(a) and (b).)

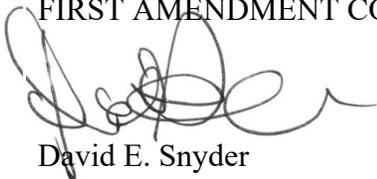
justice. (42 U.S.C. § 2000aa(b)(1)-(4).) With respect to the “interests of justice” exception, the person possessing such materials must be permitted to submit an affidavit explaining why the materials are not subject to seizure. (42 U.S.C. § 2000aa(c).) In this case, there has been no subpoena or allegation that a subpoena would result in the destruction of evidence. These exceptions do not apply.

The affidavit of probable cause submitted by SPD in support of their application for the Portje warrant does not articulate any of the required exceptions to the protections of the PPA and thus the warrant should not have issued and should be quashed.

For all of these reasons, and those set forth in Mr. Portje’s motion, *Amici* urge this Court to quash the search warrant for Mr. Portje’s video camera, cell phone and digital storage devices and order the immediate return of the devices and the information stored thereon. We urge the Court to order the Northern California Computer Crimes Task Force, SPD, and any other agency which may have possession of Mr. Portje’s materials or copies thereof, to return any of Mr. Portje’s materials in their possession, and to destroy any copies of such materials. The Court should furthermore order SPD and any other relevant agency not to, under any circumstances, review any information contained on any of the seized devices, and that they must halt any other search warrant applications for Mr. Portje’s materials that may be in progress.

Sincerely,

FIRST AMENDMENT COALITION



David E. Snyder
Executive Director

On behalf of:

Amici First Amendment Coalition and
The Northern California Chapter of the Society of Professional Journalists