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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 RYAN MCMAHON, an individual,  
12 Plaintiffs,  
13 v.  
14 JOHN WHITNEY, CITY OF VALLEJO; and  
DOES 1 through 10, inclusive,  
15 Defendants.  
16  
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Case No. 23-cv-01972-KJM-JDP

**APPLICATION OF AMICUS CURIAE  
VALLEJO SUN LLC FOR LEAVE TO  
FILE AMICUS BRIEF IN OPPOSITION  
TO PLAINTIFF'S EX PARTE  
APPLICATION**

Date: January 26, 2024  
Time: 11:00 am.  
Crtrm.: Crtrm. 3 – 15th Flr  
Judge: Hon. Kimberly J. Mueller

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1 **I. INTRODUCTION**

2 Pursuant to Local Rule 230 and the Court’s inherent authority, Vallejo Sun LLC, publisher  
3 of the Vallejo Sun (collectively “Vallejo Sun”) seeks leave to file the attached amicus brief in  
4 opposition to Plaintiff’s so-called “Ex Parte Application,” ECF No. 39, which seeks an  
5 unconstitutional prior restraint on publishing a story of strong public concern.

6 The Vallejo Sun is an independent news publication illuminating Solano County,  
7 California that was founded in 2021 by journalists who saw a need for in-depth reporting about  
8 local government, policing, and extremist movements in the region. *About, Vallejo Sun*,  
9 <https://www.vallejosun.com/about/> (last visited Jan. 25, 2024). Plaintiff improperly seeks an order  
10 preventing the Vallejo Sun, a nonparty to this action, from publishing information of public  
11 concern that was and remains posted on this Court’s public docket. As the docket does not show  
12 that the Vallejo Sun has been served with process or waived service of process, the Vallejo Sun is  
13 not subject to the Court’s jurisdiction and is not obligated to appear as a party. However, due to  
14 the unusual procedural posture and urgency with which Plaintiff is pursuing this matter, the  
15 Vallejo Sun seeks leave to submit the attached amicus brief to explain why the Court lacks  
16 personal jurisdiction to enter any order against the Vallejo Sun and why the requested order would  
17 violate the First Amendment as an unconstitutional prior restraint on speech of public concern.  
18 The Vallejo Sun submits this application and attached brief without appearing as a party in this  
19 action or waiving any and all rights it has or may have, including but not limited to the right to  
20 contest the Court’s personal jurisdiction over it.

21 **II. THE COURT HAS DISCRETION TO PERMIT THE FILING OF THE AMICUS**  
22 **BRIEF AND RELATED DOCUMENTS, AND SHOULD DO SO IN THIS CASE.**

23 “The district court has broad discretion to appoint amici curiae. We may reverse an order  
24 appointing amici only if the district judge has abused his discretion.” *Hoptowit v. Ray*, 682 F.2d  
25 1237, 1260 (9th Cir. 1982), *overruled on other grounds, Sandin v. Conner*, 515 U.S. 472 (1995);  
26 *Earth Island Inst. v. Nash*, No. 1:19-cv-01420-DAD-SAB, 2019 U.S. Dist. LEXIS 214578, at \*3  
27 (E.D. Cal. 2019). “There are no strict prerequisites that must be established prior to qualifying for  
28 amicus status; an individual seeking to appear as amicus must merely make a showing that his



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1 **I. INTRODUCTION**

2 The Vallejo Sun is an independent news publication about Solano County. *About*, Vallejo  
3 Sun, <https://www.vallejosun.com/about/> (last visited Jan. 25, 2024). It was founded by journalists  
4 in 2021 to publish in-depth reporting about local government, policing, and extremist movements.  
5 *Id.* It publishes news of public concern squarely protected by the First Amendment. Plaintiff filed  
6 a so-called “ex parte application” that improperly seeks to prevent the Vallejo Sun from publishing  
7 information of public concern that was and remains posted on this Court’s public docket. ECF No.  
8 39. Plaintiff’s counsel apparently learned of the Vallejo Sun’s intent to publish when it asked for  
9 comment. Decl. of Lenore Albert, Esq. Ex. 2, ECF No. 39-1. The Vallejo Sun has published the  
10 article. Scott Morris, *Vallejo officer fired for Willie McCoy shooting had history of complaints*  
11 *before joining Vallejo police*, Vallejo Sun (Jan. 25, 2024), [https://www.vallejosun.com/vallejo-](https://www.vallejosun.com/vallejo-officer-fired-for-willie-mccoy-shooting-had-history-of-complaints-before-joining-vallejo-police/)  
12 [officer-fired-for-willie-mccoy-shooting-had-history-of-complaints-before-joining-vallejo-police/](https://www.vallejosun.com/vallejo-officer-fired-for-willie-mccoy-shooting-had-history-of-complaints-before-joining-vallejo-police/).  
13 When counsel declined to comment, the Vallejo Sun properly exercised its editorial discretion to  
14 publish a newsworthy story about the conduct and qualifications of a police officer. The Vallejo  
15 Sun was under no obligation to refrain from publishing merely because Plaintiff improperly  
16 threatened to seek an unconstitutional prior restraint on speech. The “status quo” of newspapers  
17 “is to publish news promptly that editors decide to publish,” and Plaintiff’s threat improperly  
18 attempted to “impinge[] on the exercise of editorial discretion” protected by the First Amendment.  
19 *In re Providence J. Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986).

20 Setting aside whether Plaintiff’s application complies with applicable federal or local rules,  
21 which is not conceded, it cannot remotely justify seeking a court order for censorship of a  
22 newspaper’s speech on matters of public concern. Procedurally, the Vallejo Sun is not a party to  
23 this case and has not been served with sufficient process to subject it to the Court’s personal  
24 jurisdiction. Therefore, the Court has no authority to issue an injunction against it. Substantively,  
25 even assuming otherwise, the First Amendment squarely prohibits the prior restraint on speech  
26 sought by Plaintiff. The Court should therefore reject Plaintiff’s improper attempt to censor a  
27 newspaper’s protected speech.

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1 **II. THE COURT LACKS PERSONAL JURISDICTION OVER THE VALLEJO SUN**  
2 **OR AUTHORITY TO ISSUE AN ORDER AGAINST IT.**

3 The Court lacks personal jurisdiction over the Vallejo Sun and has no authority to issue an  
4 order against it. Plaintiff sued the City of Vallejo, John Whitney, and Shane Bower, who has since  
5 been dismissed from the case. ECF No. 19. Plaintiff did not sue the Vallejo Sun, nor does the  
6 docket show that the Vallejo Sun has been served with a summons or otherwise subjected to this  
7 Court’s jurisdiction. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350  
8 (1999) (“Service of process, under longstanding tradition in our system of justice, is fundamental  
9 to any procedural imposition on a named defendant.”). That failure is fatal to Plaintiff’s misguided  
10 attempt to seek an injunction censoring the speech of the Vallejo Sun.

11 A federal court may issue an injunction only “if it has personal jurisdiction over the parties  
12 and subject matter jurisdiction over the claim; it may not attempt to determine the rights of  
13 persons not before the court.” *Zepeda v. U.S. Immigr. & Naturalization Serv.*, 753 F.2d 719, 727  
14 (9th Cir. 1983). Without service of process, the Vallejo Sun is not subject to this Court’s  
15 jurisdiction or bound by its orders. “It is elementary that one is not bound by a judgment *in*  
16 *personam* resulting from litigation in which he is not designated as a party or to which he has not  
17 been made a party by service of process. The consistent constitutional rule has been that a court  
18 has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person  
19 of the defendant.” *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 110 (1969) (citations  
20 omitted); *see also, e.g., R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999)  
21 (“Injunctive relief, by its very nature, can only be granted in an *in personam* action commenced by  
22 one party against another in accordance with established process. Consequently, a party cannot  
23 obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that  
24 person or someone in legal privity with that person.”) (citing Fed. R. Civ. P. 65(d)).

25 This Court has repeatedly confirmed that it may not issue an injunction against a nonparty  
26 not properly before the Court. *See, e.g., Salcido v. Moon*, No. 23-cv-01606, 2024 U.S. Dist.  
27 LEXIS 620, at \*2–3 (E.D. Cal. Jan. 2, 2024); *Williams v. Beer*, No. 21-cv-00155, 2023 U.S. Dist.  
28 LEXIS 211770, at \*4 (E.D. Cal. Nov. 28, 2023); *Brackett v. Anderson*, No. 21-cv-02282, 2023

1 U.S. Dist. LEXIS 187148, at \*3 (E.D. Cal. Oct. 18, 2023). That principle is sufficient to mandate  
2 rejection of Plaintiff’s improper attempt to censor the speech of the Vallejo Sun.

3 The mere allegation that Plaintiff emailed the ex parte application to the Vallejo Sun, Pl.’s  
4 Ex Parte Appl. Ex. 1, ECF No. 39-1, is insufficient to establish personal jurisdiction to issue an  
5 injunction. *R.M.S. Titanic*, 171 F.3d at 958 (vacating injunction against nonparty for lack of  
6 personal jurisdiction, where nonparty had never been served with process and party seeking  
7 injunction merely gave “informal notice of the motion’s pendency,” because “actual notice of [the]  
8 motion for an injunction ... does not alone meet the formal requirements for obtaining personal  
9 jurisdiction”); *Vasquez v. Bailey*, No. CA 10-214 S, 2011 U.S. Dist. LEXIS 67682, \*9 (D.R.I.  
10 May 13, 2011) (holding that mere notice to nonparties of motion for temporary restraining order  
11 and preliminary injunction “does not alter the fact that the Court still lacks jurisdiction over all of  
12 these individuals” due to lack of service of process “and may not grant either a T.R.O. or a  
13 preliminary injunction against them”)

14 Even if Plaintiff were to contend that the Vallejo Sun were somehow acting in concert with  
15 a named defendant, which it has not done and would be meritless, the Vallejo Sun cannot be  
16 subjected to an injunction on that basis without the Court making that determination in a  
17 proceeding to which the Vallejo Sun has been made a party, which has not occurred. Fed. R. Civ.  
18 P. 65(d)(2); *Zenith Radio Corp.*, 395 U.S. at 112; *United States v. Kirschenbaum*, 156 F.3d 784,  
19 794 (7th Cir. 1998). Accordingly, this Court lacks authority to issue any injunction against the  
20 Vallejo Sun.

21 **III. PLAINTIFF IMPROPERLY SEEKS TO IMPOSE AN UNCONSTITUTIONAL**  
22 **PRIOR RESTRAINT ON PUBLICATION OF A NEWSWORTHY ARTICLE OF**  
23 **PUBLIC CONCERN.**

24 Even if the Court somehow had authority to consider issuing an injunction against the  
25 Vallejo Sun, the injunction sought by Plaintiff would unquestionably violate the First Amendment.  
26 As the Supreme Court has explained, “court orders that actually forbid speech activities” are  
27 “classic examples of prior restraints.” *Alexander v. United States*, 509 U.S. 544, 550 (1993)  
28 (citation omitted). A “prior restraint on publication” is “one of the most extraordinary remedies  
known to our jurisprudence” and “the most serious and the least tolerable infringement on First

1 Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559, 562 (1976). “Of all the  
2 constitutional imperatives protecting a free press under the First Amendment, the most significant  
3 is the restriction against prior restraint upon publication.... Prohibiting the publication of a news  
4 story or an editorial is the essence of censorship.” *Providence J.*, 820 F.2d at 1345. No such  
5 restraint can be remotely justified in this case.

6 Plaintiff seeks to prohibit speech about the conduct and qualifications of a police officer,  
7 which are matters of paramount public concern. *Robinson v. York*, 566 F.3d 817, 822 (9th Cir.  
8 2009) (“As a matter of law, the competency of the police force is surely a matter of great public  
9 concern.”) (citation and quotation marks omitted); *Ass’n for L.A. Deputy Sheriffs v. L.A. Times*  
10 *Commc’ns LLC*, 239 Cal. App. 4th 808, 826 (2015) (“The public has a strong interest in the  
11 qualifications and conduct of law enforcement officers.”).

12 Speech on “matters of public concern ... is at the heart of the First Amendment’s  
13 protection” and “occupies the highest rung of the hierarchy of First Amendment values,” and it is  
14 thus “entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (citations and  
15 quotation marks omitted). Plaintiff cites no authority, for there is none, authorizing the Court to  
16 enjoin a newspaper’s publication of information of public concern about a police officer.

17 Plaintiff cannot prevail in seeking to “restrain publication of a statement regarding the  
18 official conduct of a public officer on the ground that the statement was not wholly true or was  
19 presented in a deceptive manner.” *Wilson v. Superior Ct.*, 13 Cal. 3d 652, 662 (1975); *Gilbert v.*  
20 *Nat’l Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1145 (1996). Allegations about “invasion of privacy”  
21 are likewise insufficient to justify a prior restraint on speech. *Org. for a Better Austin v. Keefe*, 402  
22 U.S. 415, 419–20 (1971). If “even the publication of the purloined Pentagon Papers concerning  
23 matters of national security could not be restrained,” then certainly an article about a police  
24 officer’s conduct may not be censored by prior restraint on the alleged ground it would invade the  
25 “right of privacy” or lead to “threatened harm to [his] reputation.” *Gilbert*, 43 Cal. App. 4th at  
26 1144, 1147 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)); *see also, e.g.*,  
27 *Providence J.*, 820 F.2d at 1350 (holding alleged invasion of “privacy rights” was “insufficient  
28 basis for issuing a prior restraint” against newspaper).



1           Indeed, the California Court of Appeal rejected an attempt similar to Plaintiff’s to impose  
2 an unconstitutional prior restraint on speech about law enforcement officers. *Ass’n for L.A. Deputy*  
3 *Sheriffs*, 239 Cal. App. 4th at 824 (affirming denial of injunction “to restrain a newspaper from  
4 publishing news articles on a matter of public concern: the qualifications of applicants for jobs as  
5 law enforcement officers”). As the court noted, the “cases invalidating prior restraints—especially  
6 restraints on publication by the press—are legion.” *Id.* at 822 (citing cases). Plaintiff “has cited no  
7 case” justifying a prior restraint on the Vallejo Sun “because there is no such case. For more than  
8 100 years, federal and state courts have refused to allow the subjects of potential news reports to  
9 stop journalists from publishing reports about them.” *Id.* at 824 (citing *Providence J.*, 820 F.2d at  
10 1348–49). Even if the Court had authority to issue an injunction against the Vallejo Sun, the prior  
11 restraint sought by Plaintiff would clearly violate the First Amendment.

12           It is no answer to suggest the materials discussed in the article are confidential and should  
13 have been filed under seal, which is not conceded. First, they were not in fact filed under seal, and  
14 any member of the press or public had a perfect right to view them. Second, even if the filing and  
15 posting of those materials on the Court’s public docket was somehow inadvertent or improper, the  
16 Vallejo Sun retains the unquestioned First Amendment right to access and report on them as  
17 matters of public concern. *E.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001); *Fla. Star v. B.J.F.*,  
18 491 U.S. 524, 536–37 (1989); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 107 (1979); *Landmark*  
19 *Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838–40 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S.  
20 469, 494–96 (1975); *Ass’n for L.A. Deputy Sheriffs*, 239 Cal. App. 4th at 819–20. Accordingly,  
21 Plaintiff’s attempt to impose an unconstitutional prior restraint on the Vallejo Sun is meritless and  
22 must be rejected.

23 **IV. CONCLUSION**

24           For the foregoing reasons, the Court is respectfully requested to deny Plaintiff’s ex parte  
25 application to the extent it seeks a prior restraint on the speech of the Vallejo Sun.

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18  
19 The Court, having considered the Application of *Amicus Curiae* Vallejo Sun LLC for leave to  
20 file an amicus brief, and good cause appearing therefor, it is hereby ordered that the application is  
21 hereby GRANTED and the amicus brief is deemed filed.  
22

23 Dated: \_\_\_\_\_

24 \_\_\_\_\_  
Hon. Kimberly J. Mueller  
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