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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 FIRST AMENDMENT COALITION,
22 VIRGINIA LAROE, and EUGENE
23 VOLOKH,

24 Plaintiffs,

25 v.

26 DAVID CHIU, in his official capacity as
27 City Attorney of San Francisco; and
28 ROB BONTA, in his official capacity as
Attorney General of California,

Defendants.

Civil Case No. 3:24-cv-08343-TSH

**PLAINTIFFS' ADMINISTRATIVE
MOTION TO FILE PROVISIONALLY
UNDER SEAL PORTIONS OF:
MOTION FOR PRELIMINARY
INJUNCTION AND SUPPORTING
MEMORANDUM OF LAW,
SUPPORTING DECLARATION OF
ADAM STEINBAUGH AND
SUPPORTING EXHIBITS 2-5
AND 7-9**

Hon. Thomas S. Hixon

ADMINISTRATIVE MOTION

1
2 Plaintiffs First Amendment Coalition, Virginia LaRoe, and Eugene Volokh have
3 moved for a preliminary injunction prohibiting Defendants David Chiu and Rob Bonta, in
4 their official capacities, from enforcing a provision of the California Penal Code prohibiting
5 any person from “disseminat[ing]” any “information relating to a sealed arrest.” Cal. Penal
6 Code § 851.92(c). Plaintiffs contend the statute violates their First Amendment right to
7 publish information concerning a sealed arrest report that is publicly available or
8 otherwise legally obtained. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989). Defendant
9 Chiu, City Attorney for the City and County of San Francisco, has threatened to enforce
10 that statute against a journalist (and the company that hosts his publication) with respect
11 to the same information Plaintiffs have published or intend to publish. Compl. ¶¶ 51–86.

12 In establishing why Section 851.92(c) violates the First Amendment, Plaintiffs refer
13 to the circumstances of the sealed arrest in question, the publicity that the arrest report has
14 received, and subsequent civil litigation against the journalist who reported on it and
15 whom the City Attorney now threatens. But the broad language of the statute prohibits
16 anyone—including Plaintiffs—from “disseminat[ing]” that information to the public
17 through any means, arguably limiting Plaintiffs’ ability to share that information even on
18 this Court’s docket. Section 851.92(c)’s overbreadth and vagueness requires Plaintiffs to
19 challenge the statute’s constitutionality at least in part under seal in order to avoid
20 arguably violating it. Without the option of sealing, Plaintiffs would be denied their right to
21 bring “a pre-enforcement First Amendment challenge [by showing their] expressive
22 activity is chilled [by] a ‘realistic danger’ of prosecution under the [challenged] statute.”
23 *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1181 (9th Cir. 2024) (citation omitted).

24 Plaintiffs do not contend that this information should *remain* sealed. Just as the
25 First Amendment bars California from curtailing speech about information that is already
26 public, it also compels litigation in full view of the public—not behind closed doors or
27 heavily-redacted documents. Still, out of an abundance of caution, Plaintiffs
28 administratively move under Civil Local Rules 7-11 and 79-5 to temporarily file under seal

1 portions of their Motion, the supporting Declaration of Adam Steinbaugh, and portions of
 2 Exhibits 2–5 and 7–9 to the Declaration of Adam Steinbaugh.¹ So that Defendants have an
 3 opportunity to be heard, Plaintiffs respectfully request the Court issue an order to show
 4 cause why the relevant portions should not be unsealed. In the alternative, Plaintiffs ask
 5 the Court to treat the motion as an Administrative Motion to Consider Whether Another
 6 Party’s Material Should Be Sealed under Civil Local Rule 79-5(f), which applies where
 7 information has been “designated as confidential by another party or a non-party.”

8 LEGAL STANDARD

9 “We begin with the presumption that the public and the press have a right of access
 10 to criminal proceedings and documents filed therein.” *CBS, Inc. v. U.S. Dist. Ct. for Cent.*
 11 *Dist. of Cal.*, 765 F.2d 823, 825 (9th Cir. 1985) (citations omitted). The right is “grounded
 12 in the First Amendment and in common law,” *id.* (citation omitted), which has long
 13 recognized “a general right to inspect and copy . . . judicial records and documents.” *Nixon*
 14 *v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

15 Of course, “the right to inspect and copy judicial records is not absolute.” *Id.* at 598.
 16 Still, a party seeking to seal a judicial record must overcome the presumption of access by
 17 articulating “compelling reasons” to justify sealing the records at issue. *Kamakana v. City*
 18 *& Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). After considering all relevant
 19 factors, “the district court must base its decision on a compelling reason and articulate the
 20 factual basis for its ruling, without relying on hypothesis or conjecture.” *Hagestad v.*
 21 *Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing *Valley Broad. Co. v. U.S. Dist. Ct. for*
 22 *Dist. of Nev.*, 798 F.2d 1289, 1295 (9th Cir. 1986)).

23 Civil Local Rule 79-5(c) permits parties to administratively move to file under seal
 24 portions of their own documents. The motion must include a statement setting forth the
 25 “applicable legal standard and the reasons for keeping a document under seal, including an
 26 explanation of: (i) the legitimate private or public interests that warrant sealing; (ii) the
 27

28 ¹ Plaintiffs certify that they have reviewed and complied with Civil Local Rule 79-5 and the
 Standing Order for Magistrate Judge Thomas S. Hixon.

1 injury that will result if sealing is denied; and (iii) why a less restrictive alternative to
2 sealing is not sufficient.” Civil L.R. 79-5(c)(1), (f)(3). Civil Local Rule 79-5(f) permits
3 parties to administratively move to consider whether another party’s material should be
4 sealed. Under that rule, the party that designates the material as confidential has the onus
5 to satisfy the factors listed in Civil Local Rule 79.5(c)(1).

6 **ARGUMENT**

7 **I. The Court Should Temporarily Seal the Material Under Civil Local Rule**
8 **79-5(c) and Order Defendants to Show Cause Why the Material Should**
9 **Not Be Unsealed.**

10 California Penal Code § 851.92(c) imposes a civil penalty between \$500 and \$2,500
11 on “a person or entity, other than a criminal justice agency or the person whose arrest was
12 sealed, who disseminates information relating to a sealed arrest.” This litigation concerns
13 Section 851.92(c)’s unconstitutional chilling effect on Plaintiffs, who intend to publish
14 articles and post social-media content concerning a sealed arrest report that now resides in
15 the public domain, and about a related civil lawsuit. Compl. ¶¶ 37–39, 73–80, 85–92, 94.
16 Plaintiffs’ content would include discussion of “information relating to [the] sealed arrest,”
17 Cal. Penal Code § 851.92(c), and a lawfully obtained copy of the sealed arrest report.

18 In litigating their case, Plaintiffs must include some information arguably “relating
19 to” the sealed arrest in question. Defendant Chiu claims that information relating to a
20 sealed arrest is confidential, including the information here. Through his deputy, he has
21 already threatened to enforce the statute against a journalist for publishing the same
22 information. By extension, that same threat plausibly hangs over Plaintiffs for filing on the
23 public docket documents with information “relating to” the sealed arrest.² That is a
24 compelling reason sufficient for this Court to grant Plaintiffs leave to file temporarily under
25 seal the portions of their filings that may be interpreted as “relating to” a sealed arrest.

26 But permanent sealing is inappropriate, as it would violate the public’s common-law
27 and First Amendment rights to access judicial records concerning criminal investigations.

28 _____
² There is also a plausible threat that filing on the public docket would subject at least
Volokh, a California attorney, to discipline under the California Rules of Professional
Conduct. Compl. ¶ 91.

1 *See Fla. Star*, 491 U.S. at 536–37 (holding the First Amendment protected newspaper’s
 2 publication of name of rape victim obtained from publicly released police report because
 3 “investigation of a violent crime which had been reported to the authorities” was “matter of
 4 public significance”). That is especially so where the information in question has been in
 5 the public domain for over a year. Compl. ¶ 50; *see CBS, Inc.*, 765 F.2d at 825 (explaining
 6 that interest warranting confidentiality is diminished where “most of the information the
 7 government seeks to keep confidential concerns matters that might easily be surmised
 8 from what is already in the public record”). Therefore, Plaintiffs condition their request for
 9 leave to temporarily file under seal on Defendants promptly showing cause why the
 10 material should remain permanently sealed.

11 **II. Alternatively, The Court Should Apply Local Civil Rule 79-5(f), Directing**
 12 **Defendants to Show Cause Within Ten Days Why the Records Should Be**
 13 **Sealed.**

14 Because Defendant Chiu’s office insists the information at issue is confidential,
 15 Compl. ¶¶ 52–64, there is another framework the Court can apply that is appropriate to
 16 these circumstances, where information filed by one party is claimed to be confidential by
 17 a non-filing party. Civil Local Rule 79-5(f) is appropriate where a party seeks to file
 18 information that another party (or non-party) has designated “confidential.” While that
 19 typically occurs in the context of a protective order, California Penal Code § 851.92(c)
 20 operates in the same manner, designating an ambiguous range of information as
 21 “confidential” and not for dissemination.³ Under Local Rule 79-5(f), the non-filing party
 22 bears the burden to demonstrate within seven days⁴ why materials should remain sealed.

23 **A. These records should be unsealed in ten days if Defendants fail to**
 24 **make a showing to establish why they should remain sealed.**

25 Civil Local Rule 79-5(f) requires the filing party to list the material sought to be
 26 sealed but does not require it to satisfy the showing required in Civil Local Rule 79-5(c)(1).
 27 Civil L.R. 79-5(f)(1). Exhibit A to this motion identifies the material that Defendants have
 28 essentially designated by statute as confidential and that Plaintiffs seek to file temporarily

³ Nothing in Civil Local Rule 79-5 restricts its ambit to protective orders.

⁴ Given the Thanksgiving holiday, a longer period of ten days is appropriate.

1 under seal. Within ten days of this motion’s filing, Defendants (the “Designating Party”)
 2 “must file a statement and/or declaration” stating “(i) the legitimate private or public
 3 interests that warrant sealing; (ii) the injury that will result if sealing is denied; and
 4 (iii) why a less restrictive alternative to sealing is not sufficient.” *Id.* 79-5(c)(1), (f)(3). If
 5 Plaintiffs wish to file a response, they must do so no later than four days after Defendants
 6 files their statement and/or declaration. *Id.* 79-5(f)(4). After that, it is left to the Court’s
 7 discretion whether to unseal the material.

8 **B. Defendants cannot show that these records should remain sealed.**

9 As illustrated above, Defendants cannot present compelling reasons to permanently
 10 seal the information at issue. Permanent sealing would deprive the public of its First
 11 Amendment “right of access to criminal proceedings and documents filed therein.” *CBS,*
 12 *Inc.*, 765 F.2d at 825; *see also Fla. Star*, 491 U.S. at 536–37. Nor can they allege an injury
 13 that will result if sealing is denied. The information at issue has been in the public record
 14 for over a year. Compl. ¶ 50; *see CBS, Inc.*, 765 F.2d at 825 (finding confidentiality interest
 15 unconvincing where “most of the information the government seeks to keep
 16 confidential . . . might easily be surmised from what is already in the public record”).⁵

17 **CONCLUSION**

18 Plaintiffs respectfully request that the Court grant leave under Civil Local Rule 79-
 19 5(c) to temporarily file the portions of their motion arguably containing information
 20 “relating to” a sealed arrest, as enumerated in the proposed order filed concurrently with
 21 this motion. Plaintiffs ask that, subsequently, the Court order Defendants to promptly
 22 show cause why the material should not be unsealed. In the alternative, Plaintiffs request
 23 that the Court treat this motion as one under Civil Local Rule 79-5(f). Both approaches
 24 achieve the objectives of respecting the public’s right to access judicial records and the
 25 First Amendment’s protection for sharing lawfully obtained information on matters of
 26 public concern, while maintaining Defendants’ prerogative to be heard on this issue.

27 _____
 28 ⁵ As explained in their Motion for Preliminary Injunction, though the material in question
 is publicly available, Plaintiffs’ challenge to the statute is broader and includes any material
 lawfully obtained. The Court need not yet address that issue in deciding this motion.

1 DATED: November 25, 2024

Respectfully submitted,

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