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BRYAN CARMODY

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAY 16 2019

CLERK OF THE COURT
BY: ALICE N. BALANGA
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

IN RE SEARCH WARRANTS DIRECTED TO NON-PARTY JOURNALIST

Misc. Case
Assigned to the Hon. Samuel Feng

***EX PARTE* APPLICATION OF NON-PARTY JOURNALIST BRYAN CARMODY FOR ORDER QUASHING SEARCH WARRANTS AND FOR RETURN OF IMPROPERLY SEIZED NEWSGATHERING MATERIALS, OR, IN THE ALTERNATIVE, TO SHORTEN TIME; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF BRYAN CARMODY AND THOMAS R. BURKE WITH EXHIBITS A AND B**

[Proposed Order concurrently submitted]

Date: May 21, 2019
Time: 9:00 a.m.
Dept.: 22

DAVIS WRIGHT TREMAINE LLP

DAVIS WRIGHT TREMAINE LLP

APPLICATION FOR *EX PARTE* RELIEF

Non-party journalist Bryan Carmody respectfully requests that this Court quash and revoke the search warrants that it issued on May 9, 2019 for his home at 794 45th Ave., No. SW43687 / on May 10, 2019 for his office at 459 Fulton St., No. SW43684, and order the San Francisco Police Department ("SFPD") to return all of the seized property to him immediately, or, in the alternative, that this Court shorten time so that this request can be heard as soon as possible.

Mr. Carmody is a journalist engaged in gathering and disseminating news to the public, and the SFPD seized dozens of computers, phones, cameras, tablets, hard drives, and reporters notebooks which contained sensitive unpublished editorial information and which he has used and continues to use in his newsgathering. Carmody Decl. ¶¶ 1-16; Memorandum, Section II. The search and seizure of Mr. Carmody's constitutionally protected editorial materials was improper under Article I, § 2(b) of the California Constitution and California Evidence Code § 1070 (the "Shield Law"), California Penal Code § 1524(g), the federal Privacy Protection Act (42 U.S.C. §§ 2000aa-2000aa-12), the First and Fourteenth Amendments of the United States Constitution, and the free speech and press clause of the California Constitution. *See* Memorandum, Section III.

Because the search warrants are invalid and the ongoing seizure of these materials violates Mr. Carmody's constitutional rights, he requests that this Court exercise its inherent power and authority under California Penal Code §§ 1538-1540 to quash the warrants and direct the SFPD to return all of the materials immediately. *Id.*, Section III.A.

Ex parte relief is warranted because Mr. Carmody is suffering serious constitutional injury – and the public is being denied important information – with each passing day that the SFPD retains custody of his newsgathering materials. *See* Carmody Decl. ¶ 16. As the United States Supreme Court has made clear, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Mr. Carmody seeks relief under both the Court's inherent power and the statutory scheme embodied in "Penal Code sections 1538.5, 1539, 1540, the purpose of which is to provide one whose property is seized with a *speedy remedy* in a readily accessible court." *People v. De Renzy*, 275 Cal. App. 2d 380, 387 (1969) (quotation omitted; emphasis added). Through these provisions,

"California law affords a *prompt and speedy remedy*, including an adversary hearing, for the return of property improperly taken under a search warrant." *Id.* (emphasis added).

The search was conducted on May 10, 2019, and Mr. Carmody's counsel contacted the SFPD that day to attempt to resolve the matter without the need for the Court's intervention. *See* Burke Decl. ¶ 2. Mr. Carmody's counsel followed up with the SFPD several times over the weekend of May 11-12 and sent a formal letter on May 13, 2019, informing the Department that Mr. Carmody would move this Court for relief it did not promptly respond to his requests. *Id.* ¶¶ 3-4. Because the SFPD did not respond to this correspondence, Mr. Carmody's counsel provided *ex parte* notice in email correspondence on May 14, 2019, and in follow-up emails and telephone calls on May 16, 2019, to the SFPD's legal counsel, Alicia Cabrera and Sean Connolly, informing them of the relief sought in this Application. *See* Burke Decl. ¶ 6. Ms. Cabrera's contact information is as follows: Office of the City Attorney, 1 Carlton B Goodlett Pl, Ste 234, San Francisco, CA 94102, Phone Number: (415) 554-4673; Fax Number: (415) 554-4699; Email: alicia.cabrera@sfgov.org. As of the finalizing of this declaration counsel have not indicated if SFPD opposes the requested relief. *See* Burke Decl. ¶ 6.

Pursuant to Local Rule 16.11(A), Mr. Carmody seeks the return of all of the items which were seized from him pursuant to the search warrants, which are listed in the Property Receipt Form attached to his Declaration as Exhibit B. Pursuant to Local Rule 16.11(A)(2)-(3), the legal basis and authorities upon which Mr. Carmody relies for this Motion are set forth in Section III of the attached Memorandum of Points and Authorities.

This Motion is based on the accompanying Memorandum of Points and Authorities, the Declarations of Bryan Carmody and Thomas R. Burke with Exhibits A and B, the complete files and records in this matter, and such argument as may be presented at the hearing on this Motion.

DATED: May 16, 2019

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN

By: _____
Thomas R. Burke

Attorneys for Non-Party Journalist Bryan Carmody

DAVIS WRIGHT TREMAINE LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

The free flow of information to the public is jeopardized when the government uses its vast coercive power to commandeer a journalist's independent newsgathering efforts to further its own investigative aims. As the California Supreme Court has recognized, the "threat to the autonomy of the press is posed as much by a criminal prosecutor as by other litigants." *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999). To guard against such abuse and allow the press to carry out its "unique role in society" of keeping the public informed (*id.*), state and federal law make it virtually impossible for government officials to obtain and execute search warrants targeting journalists' newsgathering material. *See* Cal. Penal Code § 1524(g); 42 U.S.C. §§ 2000aa *et seq.* Instead, the Legislature and Congress both have adopted "subpoena-first" regimes which ensure that journalists have the opportunity to assert their rights against compelled disclosure in a noticed, contested court proceeding *before* a search takes place. *Morse v. Regents of the Univ. of Cal.*, 821 F. Supp. 2d 1112, 1121 (N.D. Cal. 2011); Cal. Penal Code § 1524(g); 42 U.S.C. §§ 2000aa *et seq.*

Despite this unambiguous controlling law, the San Francisco Police Department dispensed with the subpoena requirement entirely in this case and executed a pair of violent and breathtakingly overbroad searches of journalist Bryan Carmody's home and office after obtaining plainly invalid warrants. In a needless display of force, nearly a dozen armed officers used a sledgehammer to break into Mr. Carmody's residence and then kept him handcuffed for hours as they rummaged through his personal and professional belongings and seized *68 different items*, including numerous computers, phones, cameras, tablets, hard drives, and reporters notebooks which Mr. Carmody uses for his work as a journalist. *See* Carmody Decl. ¶¶ 13-16, Ex. B.

Mr. Carmody's counsel reached out to the SFPD immediately following the May 10, 2019 searches to demand that these editorial materials be returned and that officials refrain from reviewing them until his legal challenges are resolved. *See* Burke Decl. ¶¶ 2-3. But the SFPD has not responded, forcing Mr. Carmody to seek relief from this Court. *Id.* ¶ 4. Because the search warrants are contrary to state and federal law, and the SFPD's continued possession of Mr. Carmody's sensitive newsgathering materials violates his constitutional rights, this Court should

exercise its inherent power and authority under the Penal Code to quash and revoke the subpoenas and order the seized materials returned immediately. *See* Section III.A; Penal Code §§ 1538-40.

There are multiple legal grounds for granting Mr. Carmody this relief.

First, the search warrants were issued in direct violation of California Penal Code § 1524(g), which unambiguously provides that "[n]o warrant shall issue" for items covered by the California Shield Law. *See* Section III.B. The Shield Law protects against the compelled disclosure of journalists' unpublished editorial information and resource materials. *See* Cal. Const., art. I, § 2(b); Evid. Code § 1070. The law has been clear for decades that the Shield Law applies to freelance reporters like Mr. Carmody, and it broadly applies to any and all unpublished information obtained in the course of gathering and disseminating information to the public. *See* Section III.B. Mr. Carmody gathered the information at issue in his role as a journalist, and as a non-party embroiled in a criminal investigation his protection under the Shield Law is *absolute* and not subject to any balancing of countervailing interests. *Id.*

Second, Mr. Carmody's newsgathering materials independently are protected by the reporter's privilege arising from the First Amendment and the California Constitution's free speech and press clause. Memorandum, Section III.B; Cal. Penal Code § 1538.5(n) (recognizing right of journalists to challenge searches "on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions").

Third, the search warrants are deficient for the separate and additional reason that they plainly violate the federal Privacy Protection Act ("PPA"), which bars all public officials – state and federal – from searching and seizing documentary materials from journalists except in the most extreme circumstances. *See* 42 U.S.C. §§ 2000aa-2000aa-12. None of the PPA's limited exceptions applies here, as there was no exigency for the searches and Mr. Carmody was not, and could not be, a target of any criminal investigation himself. *See* Section III.C.

Finally, in addition to the constitutional and statutory protections which render the search warrants invalid, basic principles of due process require government officials to carry out any search and seizure of sensitive personal information – particularly from non-parties – with special care. *See* Section III.D. The SFPD disregard these requirements and carried out an egregiously

overbroad and intrusive search, violently breaking into Mr. Carmody's home, threatening him with drawn guns, and seizing dozens of communications devices after rummaging through his residence and home for hours while he sat in handcuffs despite posing no conceivable threat. *Id* During the course of the search of his home, Mr. Carmody was also questioned by FBI agents who pressed to reveal his confidential source.

For all of the reasons set forth above, Mr. Carmody respectfully requests that the Court grant his Motion, quash and revoke the search warrants in their entirety, and order the SFPD officials with custody over the seized property to return all of it to him immediately.

II. FACTUAL BACKGROUND

Bryan Carmody is a veteran journalist with 30 years of news experience. *See* Carmody Decl. ¶¶ 2-5. He has worked full-time as a journalist since the early 1990s. *Id.* ¶ 5. As the founder and owner of North Bay News, Mr. Carmody and his associates report breaking news stories and distribute their reporting and video footage on a freelance basis to local, national, and international print, broadcast, and online media outlets. *Id.* ¶ 5. He focuses on law enforcement and public safety issues, and his work regularly appears on Bay Area television news broadcasts and print publications. *Id.* ¶¶ 5-7. Mr. Carmody has held an official press pass issued by the San Francisco Police Department for more than 16 years. *Id.* ¶ 3, Ex. A (copy of Mr. Carmody's current 2019 SFPD press pass).

In his capacity as a journalist, Mr. Carmody reported on the death of San Francisco Public Defender Jeff Adachi in February 2019. *Id.* ¶¶ 8-11. In the course of his reporting, Mr. Carmody passively received a copy of a police report about Mr. Adachi's death from a confidential source. *Id.* ¶ 10. Mr. Carmody did not ask the source to provide him with the document, nor did he pay the source or provide any compensation for the document. *Id.* Consistent with standard journalistic practices, Mr. Carmody agreed not to reveal the source's identity, and he has not done so. *Id.* Mr. Carmody prepared a news report about Mr. Adachi's death based on interviews that he conducted, video footage that he shot, and documentary materials including the police report, and placed it with three Bay Area television stations for broadcast to the public. *Id.* ¶ 11. Mr. Carmody exercised his editorial discretion in assembling the news package although the television

stations ultimately determined the final content and presentation of the reports that they aired, as is the standard practice in the news business. *Id.*

Any and all information and materials that Mr. Carmody received related to the death of Mr. Adachi, including the police report, were obtained in the course of his gathering, processing, and disseminating information to the public through these news reports. *Id.* ¶ 10.

On April 11, 2019, two San Francisco Police Department officers came to Mr. Carmody's home and asked him to identify the source who allegedly gave him the police report concerning Mr. Adachi's death. *Id.* ¶ 12. Mr. Carmody refused to provide information about his sources, prompting the officers to threaten him with a federal grand jury subpoena. *Id.* Mr. Carmody steadfastly refused to disclose source information, and the officers left. *Id.* Mr. Carmody did not have any further contacts with law enforcement for nearly a month until May 10, 2019, when San Francisco Police returned to his home to execute a search warrant. *Id.* ¶ 13. Officers used a sledgehammer to enter Mr. Carmody's home, and once inside armed officers handcuffed and detained him for several hours while nearly a dozen armed officers searched his home. *Id.*

While police searched Mr. Carmody's home, two individuals who identified themselves as FBI agents took him into a separate room and, with no SFPD officers present, repeatedly asked him to reveal his source. *Id.* ¶ 14. Mr. Carmody refused to do so. *Id.* During the search, officers learned of Mr. Carmody's office on Fulton Street and obtained a second search warrant; they drove Mr. Carmody to his office where they carried out a second search while Mr. Carmody remained in handcuffs. *Id.* ¶ 15. As a result of both searches, San Francisco Police confiscated 68 items, including multiple laptops, computers, cellphones, tables, hard drives, thumb drives, cameras, and reporters notebooks. *Id.* ¶ 16, Ex. B. Mr. Carmody uses and has used the seized items for his work as a journalist on hundreds of news investigations over the past three decades. *Id.* The seizure of virtually all of his newsgathering materials has interfered with Mr. Carmody's ability to make a living as a full-time journalist and report on issues of significant public interest *Id.*

On the evening of the searches on Friday, May 10, Mr. Carmody's counsel, Thomas R. Burke, telephoned the San Francisco Police Department and conveyed his concerns about the

search to an officer and requested that the SFPD not review any of the seized materials. *See* Burke Decl. ¶ 2. Mr. Burke placed follow-up calls to SFPD officials later that evening and again on Saturday, May 11, and was informed that SFPD officials were aware of his concerns and would respond soon. *Id.* ¶ 3. Having received no response by Monday, May 13, 2019, Mr. Burke sent a letter to SFPD Chief William Scott[1] requesting that the SFPD respond promptly and advising that otherwise Mr. Carmody would seek relief from the Court. *Id.* ¶ 4. That same day, SFPD Lieutenant Pilar E. Torres sent an email to Mr. Carmody apologizing for his "inconvenience" and stating that the Department might return some items "deemed as having no evidentiary value" at an undisclosed date, but indicating that the SFPD would not return any newsgathering items that it considers "relevant to our criminal investigation." *See* Carmody Decl. ¶ 18. The email did not address Mr. Carmody's request that the SFPD not review his property until his legal challenge is resolved, but confirmed that officials are in fact actively reviewing his newsgathering materials. *Id.* The SFPD did not respond to Mr. Burke's letter, and therefore counsel gave *ex parte* notice to the SFPD's counsel on May 16, 2019 . *See* Burke Decl. ¶ 6.

III. MR. CARMODY'S NEWSGATHERING MATERIALS WERE IMPROPERLY SEIZED IN VIOLATION OF STATE AND FEDERAL LAW AND MUST BE RETURNED

A. The Court Has The Authority To Quash The Improperly Obtained Search Warrants And Order The Return Of The Seized Material.

"Due process of law entitles the claimant of seized property to an early court hearing to determine whether the articles were subject to seizure." *Williams v. Justice Court for Oroville Judicial Dist.*, 230 Cal. App. 2d 87, 98 (1964). "The purpose of Penal Code sections 1539 and 1540 is to provide the owner of seized property with a readily accessible court to pass on lawfulness of the seizure." *Id.* In addition to these provisions, the Penal Code specifically contemplates that a journalist can bring "a motion, otherwise permitted by law, to return [seized] property, … on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions." Cal. Penal Code § 1538.5(n).

[1] A copy of this letter was also hand-delivered to the Hon.Garrett L. Wong and the Hon. Samuel Feng.

Moreover, the Court independently can quash a warrant and order seized property returned "in the exercise of its inherent power to prevent the abuse of court processes." *People v. Superior Court*, 28 Cal. App. 3d 600, 608 (1972) (entertaining nonstatutory motion for return of seized property, noting that "an officer seizing and holding property under a search warrant does so on behalf of the court; possession by the officer is in contemplation of the law possession by the court").

Grounds for deeming a search warrant invalid and ordering property returned include, *inter alia*, that the property is protected by the First Amendment and California Constitution (Cal. Penal Code § 1538.5(n)); that the search and seizure was unreasonable (*Id.* § 1538.5(a)(B)); that the warrant lacked probable cause (*Id.* § 1538.5(a)(B)(iii); § 1540); that the manner in which the warrant was executed violated constitutional standards (*Id.* § 1538.5(a)(B)(iv); or that "[t]here was any other violation of federal or state constitutional standards" (*Id.* § 1538.5(a)(B)(v)). *All* of these defects apply in the current case because the SFPD sought and obtained grossly overbroad search warrants and seized unpublished newsgathering materials from Mr. Carmody that are squarely protected by the California Constitution, the First Amendment, and state and federal laws expressly prohibiting the issuance of search warrants for journalists' editorial work product. Consequently, the search warrants should be quashed and revoked entirely and the property seized from Mr. Carmody must be returned immediately. *See* Cal. Penal Code §§ 1538.5(n); 1540.

B. The Search Warrants Are Invalid Because The Seized Material Is Protected By The Shield Law And Reporter's Privilege.

California Penal Code § 1524(g) unequivocally provides that "*[n]o [search] warrant shall issue for any item or items described in Section 1070 of the Evidence Code.*" (Emphasis added.) Evidence Code § 1070 contains California's statutory journalist's Shield Law, which is virtually identical to the Constitutional provision. *See* Evid. Code §§ 1070; Cal. Const., art. I, § 2(b). The Shield Law provides that a journalist "shall not be adjudged in contempt .... for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Cal. Const., art. I § 2(b); Evid. Code § 1070.

The purpose of the Shield Law 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." *In*

re Willon, 47 Cal. App. 4th 1080, 1091 (1996) (quotation omitted). The California Supreme Court has recognized that the Shield Law is necessary in light of "the press' unique role in society," explaining that, "[a]s the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information." *Miller v. Superior Court*, 21 Cal. 4th 883, 898 (1999) (quotations omitted). Not only is this burdensome, but using the power of the state to compel journalists to become investigative arms of one side of a legal dispute undermines their editorial independence and erodes the trust of their sources, which frustrates their ability to gather information to the ultimate detriment of the public. In recognizing this dynamic, the Supreme Court specifically noted that the "threat to the autonomy of the press is posed as much by a *criminal prosecutor* as by other litigants." *Id.* (original emphasis).

By elevating the Shield Law from the Evidence Code to the state constitution in 1980, the California electorate made clear that those who gather and disseminate information to the public must be given the strongest possible protection against the compelled disclosure of unpublished editorial information. As one Court of Appeal noted:

> The elevation to constitutional status must be viewed as an intention to favor the interest of the press in confidentiality over [competing interests]. …
>
> It has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state.

Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14, 27-28 (1984).

The materials that the SFPD forcibly seized from Mr. Carmody fit squarely within the scope of the Shield Law, which renders the search warrants invalid under Penal Code § 1524(g).

First, it has been settled law for nearly 30 years that the Shield Law applies to freelance journalists like Mr. Carmody. In *People v. Von Villas*, 10 Cal. App. 4th 201 (1992), the Shield Law defeated a subpoena seeking a freelance writer's notes and interview tapes in connection with articles that he wrote for Hustler and Los Angeles Magazine. *Id.* at 228. The court held that the "constitutional provision plainly encompasses [his] position as a freelance writer," and it rejected

an argument that the Shield Law should apply only to information that he gathered after entering into a contract to sell his article to one of the magazines. *Id.* at 231-32. The court explained that the journalist "had been a reporter or freelance writer for some 13 years prior to his involvement with the instant articles. The clear language of article I, section 2, subdivision (b) provided him with newsperson's shield protection *both before and after* the execution of the written Hustler contract." *Id.* at 232 (emphasis added). *See also Playboy*, 154 Cal. App. 3d at 18-19 (Shield Law barred compelled disclosure of freelance journalist's notes and interview recordings).

More recently, the Sixth Appellate District broadly interpreted the Shield Law to include an online blogger who wrote about Apple products, holding that the Shield Law barred the company's attempt to force him to reveal his sources. *See O'Grady v. Superior Court*, 139 Cal. App. 4th 1423 (2006). In resounding terms, the court rejected any attempt to limit the scope of the Shield Law based on the type of journalism involved, explaining:

> we decline the implicit invitation to embroil ourselves in questions of what constitutes 'legitimate journalis[m].' The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here.
>
> We 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, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.

Id. at 1457 (original emphasis).

It is plain from these authorities that the Shield Law protects Mr. Carmody's editorial materials. As discussed above, he is a journalist with 30 years of experience covering breaking news and law enforcement and public safety issues for a variety of different print and broadcast news outlets. *See* Section II; Carmody Decl. ¶¶ 1-8. Mr. Carmody holds an official SFPD press pass. *Id.* ¶ 3, Ex. A. To the extent that the SFPD raided Mr. Carmody's home seeking evidence related to the disclosure of the police report about Mr. Adachi's death, Mr. Carmody covered this story and obtained any materials solely in his capacity as a journalist, and provided a related news package to three Bay Area television stations for broadcast to the public. *Id.* ¶¶ 8-11. He plainly

is a journalist protected by the Shield Law. *See Von Villas*, 10 Cal. App. 4th at 232.[2]

Second, the Shield Law broadly applies to *any and all* unpublished editorial materials. As the Supreme Court explained in *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990):

> The language of article I, section 2(b) is clear and unambiguous . . . . The section states plainly that a newsperson shall not be adjudged in contempt for 'refusing to disclose *any* unpublished information.' ... The use of the word 'any' makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. Words used in a constitutional provision 'should be given the meaning they bear in ordinary use.' *In the context of article I, section 2(b), the word 'any' means without limit and no matter what kind.*

Id. at 798 (emphasis added; internal citations omitted); *accord New York Times Co. v. Superior Court*, 51 Cal. 3d 453, 461-62 (1990) (unpublished photographs of public event protected).

The Shield Law thus immunizes from compelled disclosure *any* information received, or materials generated or compiled, during the newsgathering process that have not actually been published or broadcast. *Id.* For example, in *Playboy*, the court rejected a claim that a freelancer's unpublished notes should be produced because related information was published. 154 Cal. App. 3d at 21. The court cited language in Article I, Section 2(b) which expressly defines "unpublished information" to include any information "not disseminated to the public by the person from whom disclosure is sought, *whether or not related information has been disseminated.*" *Id.* at 23-24 (emphasis added).

All of the items seized from Mr. Carmody are within the purposefully broad scope of the Shield Law. Not only did the SFPD search for items in connection with its investigation regarding the police report about Mr. Adachi's death, but it conducted a far broader raid, rummaging through and confiscating Mr. Carmody's entire news operation. *See* Carmody Decl. ¶ 16. The SFPD seized dozens of computers, cell phones, tablets, cameras, hard drives, and other devices which

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[2] Organizations such as the Society of Professional Journalists, Reporters Committee for Freedom of the Press, and many others have issued statements in the wake of the SFPD raids strongly affirming Mr. Carmody's status as a journalist protected by the Shield Law. *See* Burke Decl. ¶ 5. Mr. Carmody's reporting on Mr. Adachi's death involved extensive original journalistic work including conducting interviews, reviewing various documents, shooting video footage, and obtaining public records. *See* Carmody Decl. ¶¶ 8-11. But the law is clear that the Shield Law applies even to the dissemination of a "verbatim" document. *O'Grady*, 139 Cal. App. 4th at 1457 (rejecting Apple's claim that Shield Law should not apply to blogger who posted its documents online, reasoning that "an absence of editorial judgment cannot be inferred merely from the fact that some source material is published verbatim" and "[t]he shield exists not only to protect editors but equally if not more to protect newsgatherers").

Mr. Carmody uses for his newsgathering and which contain unpublished editorial information related to Mr. Carmody's journalistic projects. *Id.* The seized material falls well within the scope of the Shield Law, and therefore was subject to the restrictions of Penal Code § 1524(g).[3]

Third, Mr. Carmody enjoys *absolute* protection under the Shield Law. The California Supreme Court has made clear that the *only* interest to be balanced against a journalist's Shield Law rights is the right of a *criminal defendant* to a fair trial; in all other instances the Shield Law is absolute. *See Miller*, 21 Cal. 4th at 896-97 (Shield Law is absolute for a non-party reporter subpoenaed by the People in a criminal case and is not balanced against any competing interest of the prosecution); *People v. Vasco*, 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"); *New York Times*, 51 Cal. 3d at 461 (Shield Law absolute for non-party reporters in civil litigation).

Because the government is seeking information from Mr. Carmody to further a criminal investigation and potential prosecution, this is a context in which there is no countervailing interest capable of overcoming his rights, and the Shield Law is *absolute*. *See Miller*, 21 Cal. 4th at 896-97; *Fost v. Superior Court*, 80 Cal. App. 4th 724, 731 (2000) (Shield Law immunity "need *never* yield to any superior constitutional right of the People") (emphasis added).[4]

Finally, in addition to the absolute protection offered by the California Shield Law, Mr. Carmody also is entitled to protection under the privilege created by the First Amendment to the U.S. Constitution and Article I, Section 2(a) of the state constitution, which California courts recognize as an independent ground for rejecting compelled disclosure of unpublished editorial

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[3] The SFPD's May 13 email to Mr. Carmody implicitly conceded that the Department conducted a grossly overbroad search and seizure of his entire newsgathering operation that went far beyond the investigation related to Mr. Adachi. *See* Carmody Decl. ¶ 18.

[4] Because only a criminal *defendant* has a countervailing interest that can be balanced against the Shield Law, Mr. Carmody's protection against compelled disclosure is absolute regardless of whether police or prosecutors are seeking the information. *See Miller*, 21 Cal. 4th at 896-97. But in any event, in the City and County of San Francisco, the police, the prosecution, and the Board of Supervisors (which apparently called for the current investigation) are all part of the same governmental entity. Moreover, the Shield Law broadly applies to *any* "judicial, legislative, or administrative body, or any other body having the power to issue subpoenas." Cal. Const. Art. I § 2(b); Evid. Code § 1070(a). This applies to court proceedings and criminal investigations including grand jury probes. *See Miller*, 21 Cal. 4th at 899 (explaining that California purposefully adopted a broad state Shield Law that would apply to criminal grand jury proceedings in response to a contrary U.S. Supreme Court ruling under federal law).

information. *See Mitchell v. Superior Court*, 37 Cal. 3d 268, 277-279 (1984); *O'Grady*, 139 Cal. App. 4th at 1466-68. This protection broadly applies 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." *O'Grady*, 139 Cal. App. 4th at 1467.

Like the Shield Law, the reporter's privilege protects against the compelled disclosure of both confidential and non-confidential information. *See Shoen v. Shoen*, 5 F.3d 1289, 1294 (9th Cir. 1993) ("*Shoen I*"). It recognizes that compelled production of even non-confidential information "can constitute a significant intrusion into the newsgathering and editorial processes. … [I]t may substantially undercut the public policy favoring the free flow of information that is the foundation for the privilege." *Id.* (quotation omitted). The reporter's privilege ensures that "compelled disclosure from a journalist must be a *last resort* after pursuit of other opportunities has failed." 5 F.3d at 1297-98 (emphasis added).

To ensure that the privilege prevails "in all but the most exceptional cases," a subpoenaing party must show that the requested material is "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*"). The government has not, and could not, make such a showing in this case, in which it has engaged in a breathtakingly overbroad fishing expedition by seizing dozens of electronic devices containing massive volumes of data related to all of Mr. Carmody's newsgathering activities, with no particularized showing of need for any particular piece of information, and no showing of exhaustion of alternative sources.[5]

For all of these reasons, Mr. Carmody's editorial materials clearly are protected both by the

[5] Notably, the United States Department of Justice's Guidelines on gathering information from members of the news media includes a similar standard, explaining that the "Department views the use of certain law enforcement tools, including subpoenas [and] search warrants to seek information from, or records of, non-consenting members of the news media as *extraordinary measures, not standard investigatory practices*." 28 C.F.R. § 50.10(a)(3) (emphasis added). The Guidelines direct officials to use such tools *only* with authorization from the highest-ranking DOJ officials and when the information is "essential" and "after all reasonable alternative attempts have been made to obtain the information from alternative sources; and after negotiations with the affected member of the news media have been pursued and appropriate notice to the affected member of the news media has been provided." *Id.* It is noteworthy that *none* of these procedures were followed or safeguards applied in the current case, even though the SFPD apparently brought FBI agents (who are subject to the DOJ Guidelines) in to help conduct the raid and attempt to interrogate Mr. Carmody about his confidential source. *See* Carmody Decl. ¶ 14.

Shield Law and the reporter's privilege arising from the "free speech and press provisions of the United States and California Constitutions," and therefore the warrants were invalid and the seized property must be returned. *See* Penal Code §§ 1524(g), 1538.5(n), 1540.

C. The Search Warrants Also Violate Federal Law.

The seizure of Mr. Carmody's editorial materials also violated the federal Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (the "PPA"). Like California's Penal Code § 1524(g), the PPA creates a "subpoena-first rule" for government searches directed at journalists which "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.*, 821 F. Supp. 2d 1112, 1120-21 (N.D. Cal. 2011) (quotation omitted). The statute broadly applies both to editorial "work product" and any other "documentary materials," and it applies whenever the target of a search is "reasonably believed to have a purpose to disseminate to the public" information in a "newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. §§ 2000aa(a)-(b).

The law, which applies to state and local officials, "presents a straightforward statutory scheme for protecting those engaged in information dissemination from government intrusion by prohibiting searches and seizures of documentary materials except where government officials have a reasonable belief that a statutory exception applies." *Citicasters v. McCaskill*, 89 F.3d 1350, 1355 (8th Cir. 1996) (local prosecutor could be held liable under PPA based on seizure of videotape from television station); *Morse*, 821 F. Supp. 2d at 1121 (journalist whose camera was seized could bring PPA claim against chief of UC Berkeley police department); *see also Smith v. Fair Employment & Hous. Comm'n*, 12 Cal. 4th 1143, 1236 n.11 (1996) (recognizing the PPA's effect of "restricting the ability of government investigators to obtain documents from the media").

The narrow exceptions to the PPA do not apply in this case. There plainly were no exigent circumstances in which immediate seizure was necessary to protect someone's physical safety or prevent the destruction of evidence. 42 U.S.C. § 2000aa(a)(2), (b)(2)-(3). To the contrary, the SFPD first visited Mr. Carmody and tried to interrogate him *more than a month before the search*, and when he refused to disclose any source information they left and took no further action for

weeks. *See* Carmody Decl. ¶ 12; Section II. There is no basis to believe that anyone's safety is at risk or that evidence will be destroyed, rendering the primary exception to the PPA inapplicable. Nor is there any probable cause to believe that Mr. Carmody "has committed or is committing the criminal offense to which the materials relate." 42 U.S.C. § 2000aa(a)(1), (b)(1). The SFPD did not arrest Mr. Carmody, and at no point has any official told him that he is being investigated on suspicion of committing any crime. *See* Carmody Decl. ¶ 17.

Authorities are not targeting Mr. Carmody because they *cannot do so* consistent with the First Amendment and the California Constitution. It is black letter constitutional law that a reporter cannot be held liable, criminally or civilly, for receiving, possessing, or publishing truthful information on matters of public concern merely because government officials were supposed to keep the information secret. "While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques." *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519-520 (1986). "Such techniques, of course, include asking persons questions, *including those with confidential or restricted information.*" *Id.* at 519 (emphasis added). The court thus held that the First Amendment prevented journalists from being punished for obtaining and publishing information from a confidential report about a judicial nominee. *Id.* at 513.[6]

As the U.S. Supreme Court explained when it held that a journalist could not be held liable for receiving, possessing, and broadcasting a phone call that was illegally intercepted and recorded by a third-party and leaked to the media, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). Applying these authorities under analogous circumstances, the Court of Appeal soundly rejected the proposition that a reporter engaged in "illegal conduct" by receiving and possessing "confidential" background investigation files about sheriff's deputies that allegedly

[6] Here, the report at issue is *not required to be kept confidential by law*, and the police have the discretion to release it to the public. The California Public Records Act expressly provides that the exemption for police investigative records is *permissive* and *not mandatory*. *See* Gov't Code § 6254(f); *Berkeley Police Ass'n v. City of Berkeley*, 76 Cal. App. 3d 931, 942 (1977) (exemption does not prevent agencies from disclosing police records).

had been leaked by a third-party in violation of the law. *See Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC*, 239 Cal. App. 4th 808, 820 (2015). The court noted the "wealth of both State and Federal case law, discussing the protection journalists and the press enjoy under the First Amendment where there have been allegations that published or disclosed content had been illegally obtained." *Id.* at 819 (quotation omitted).

As these authorities make clear, Mr. Carmody's news reporting is fully protected by the First Amendment and California Constitution, and none of the narrow exceptions to the PPA apply here.[7] Thus, the government's conduct clearly violated federal law.

D. The Search Violated Constitutional Due Process And Free Speech Principles

Finally, the government's search and seizure, and its refusal to immediately return the materials seized from Mr. Carmody, are unreasonable and in violation of his First and Fourteenth Amendment rights because the Fourth Amendment's requirements were not applied with "scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (where "the materials sought to be seized [from the media] may be protected by the first amendment, the requirements of the fourth amendment must be applied with 'scrupulous exactitude'"). *See also Rouzan v. Dorta*, 2014 U.S. Dist. LEXIS 61012, at *26 (C.D. Cal. Mar. 12, 2014) ("the seizure and search of Plaintiff's cellphone are assessed under the heightened protection afforded First Amendment materials") (citing *Zurcher*, 436 U.S. at 564).

Even in non-media situations, wide-ranging searches of non-parties' homes, offices, papers, and electronic devices like the one experienced by Mr. Carmody are strongly disfavored and subject to rigorous safeguards. For example, federal regulations recognize that a "search for documentary materials necessarily involves intrusions into personal privacy," especially when "the privacy of a person's home or office may be breached" and "private papers" examined. 28

[7] The PPA's other exceptions apply when materials "have not been produced in response to a court order directing compliance with a subpoena" and "all appellate remedies have been exhausted," 42 U.S.C. §§ 2000aa(b)(2), (3), and (4)(A), and when a court has ordered the media to respond to a subpoena for the materials and "there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice." *Id.* §§ 2000aa(b)(3) and (4)(B). Concerning this "interests of justice" exception, the Act provides that the media "shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure." *Id.* § 2000aa(c). These exceptions are inapplicable, as there have been no such prior proceedings, and Mr. Carmody was afforded none of the requisite procedural protections.

C.F.R. § 59.1(a). Therefore, the regulations direct public officials "to recognize the importance of these personal privacy interests, and to protect against unnecessary intrusions." *Id.* at § 59.1(b). This means that, "[g]enerally, when documentary materials are held by a disinterested third party, *a subpoena, administrative summons, or governmental request will be an effective alternative to the use of a search warrant and will be considerably less intrusive*." *Id.* (emphasis added).

The SFPD disregarded these safeguards and obtained two warrants which apparently were virtually boundless in scope given that investigators rummaged through Mr. Carmody's home and office for hours and seized **68 different items** – including numerous computers, hard drives, cell phones, tablets, and reporters notebooks. *See* Carmody Decl. ¶ 16, Ex. B. Although most of the warrant materials remain sealed and inaccessible to Mr. Carmody, it is inconceivable under the circumstances that the warrant was supported with sufficient detail to achieve the "scrupulous exactitude" required to support a search that infringed so seriously upon core First Amendment rights. *See Armstrong v. Asselin*, 734 F.3d 984, 994 (9th Cir. 2013) (search warrant affidavit would be "insufficient under *Zurcher*" if it did not include enough detail for judges "to 'focus searchingly' on the question of whether" the seized items were constitutionally protected). This is particularly true given how the search was conducted: despite the fact that they were dealing with a journalist who posed no actual or potential safety threat, nearly a dozen armed SFPD officers handcuffed Mr. Carmody for hours and used a sledgehammer to enter his home. *Id.* ¶¶ 13-15. The needlessly violent, intrusive, and extremely overbroad search and seizure violated basic due process principles, rendering the search warrants invalid on this additional independent basis.

IV. CONCLUSION

At all relevant times here Mr. Carmody acted as a journalist using "routine reporting techniques," entitling him to the full protection of the First Amendment and state and federal laws prohibiting the search and seizure of his editorial materials. *Nicholson*, 177 Cal. App. 3d at 519. It was the SFPD that flouted the law in this case by resorting to "extraordinary measures, not standard investigatory practices," with no justification. 28 C.F.R. § 50.10(a)(3). Mr. Carmody respectfully requests that the Court grant this Motion, quash and revoke the search warrants in their entirety, and order the SFPD to return all of the seized property to him immediately.

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