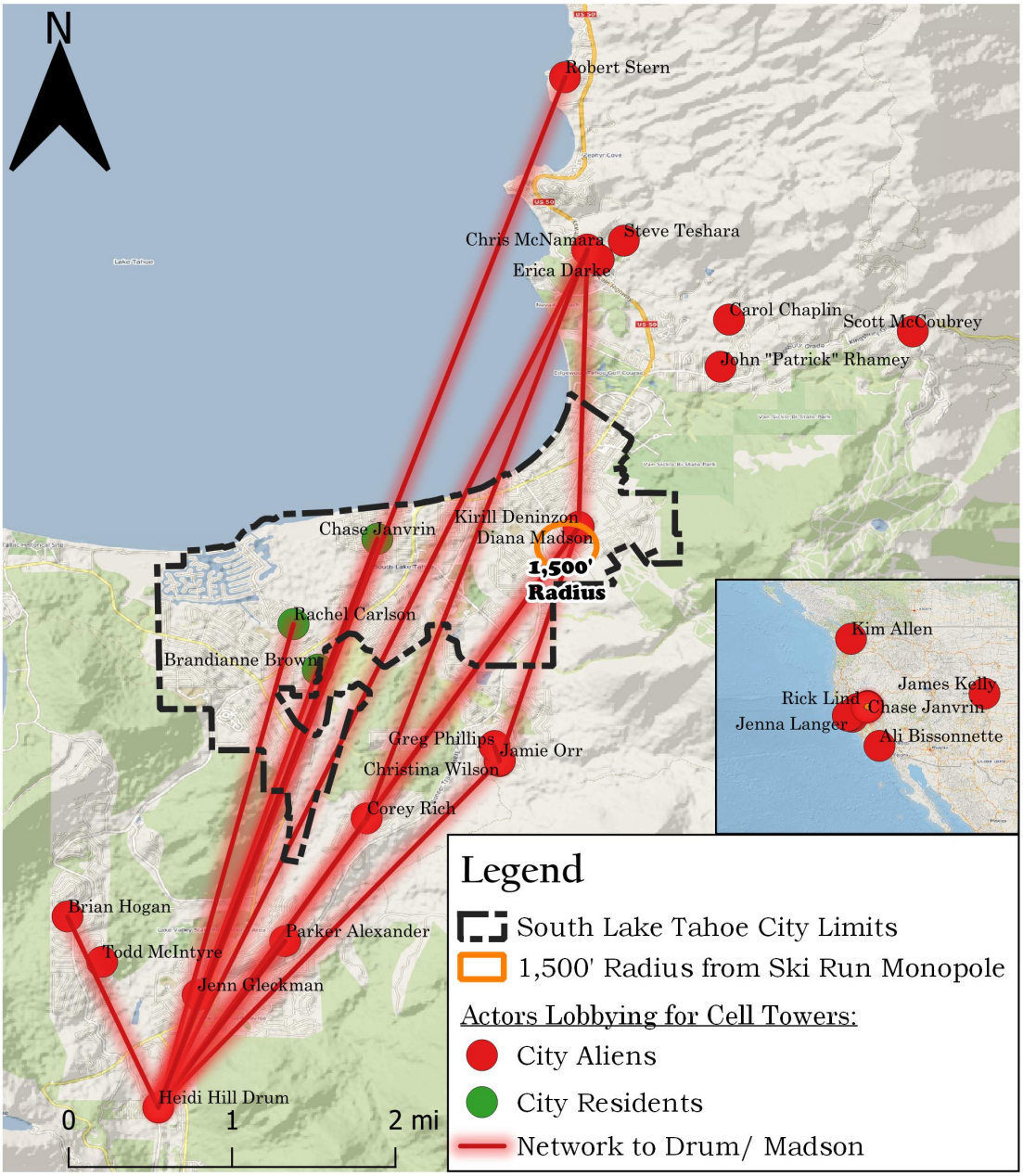
Scott Carey

From:	Edith Chase <edith.chase@barmail.ch>
Sent:	Sunday, October 30, 2022 9:58 PM
To:	Scott Carey
Subject:	NTRPA G.B. Meeting ~Item 2~ Public Comment—11-03-2022
Attachments:	Social Network Analysis.pdf; CellTowerInfluenceNetwork_Poster.pdf; PRA Record Request to TPC.pdf; Politicking.pdf; 023-271-023-100_ELDCO Recorder.pdf; 023-271-023-100_HPI.pdf; Madson Astroturfing.pdf; TPC-Madson—Tahoe Cell Tower Talking Points.pdf; TPC Bylaws 3-22-16.pdf; Publius v BoyerVine, 237 F.Supp.3d 997 (2017).pdf; Hurvitz v Hoefflin, 84 Cal.App.4th 1232 (2000).pdf; Cayley v Nunn, 190 Cal. App. 3d 300 (1987).pdf

Dear Nevada Tahoe Regional Planning Agency Governing Board:

I am deeply concerned about the TRPA's involvement with the Tahoe Prosperity Center which has been acting as a lobbyist organization. They are responsible for astroturfing the Ski Run Tower hearings by manufacturing purported "grassroots support" by individuals who do not indeed live anywhere close to the proposed tower and cannot get improved home cell service as they have claimed. Below is a diagram of this illicit network:

Actors Lobbying for Cell Towers; Their Connection to Center



The Actors lobbying fo
§ 4911(e)(2); CA. Gov.
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City Planning Commi
Heidi Hill-Drum. This
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Heidi Hill-Drum's app
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a city resident. The Ta
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Rhamey, and Carol Cl

None of the advocates
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lobbyist-actors are res
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multiple intermediate
are not affiliated with

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of Diana Madson and

Colluding telecommur
residents owning vaca
map; they reside hund

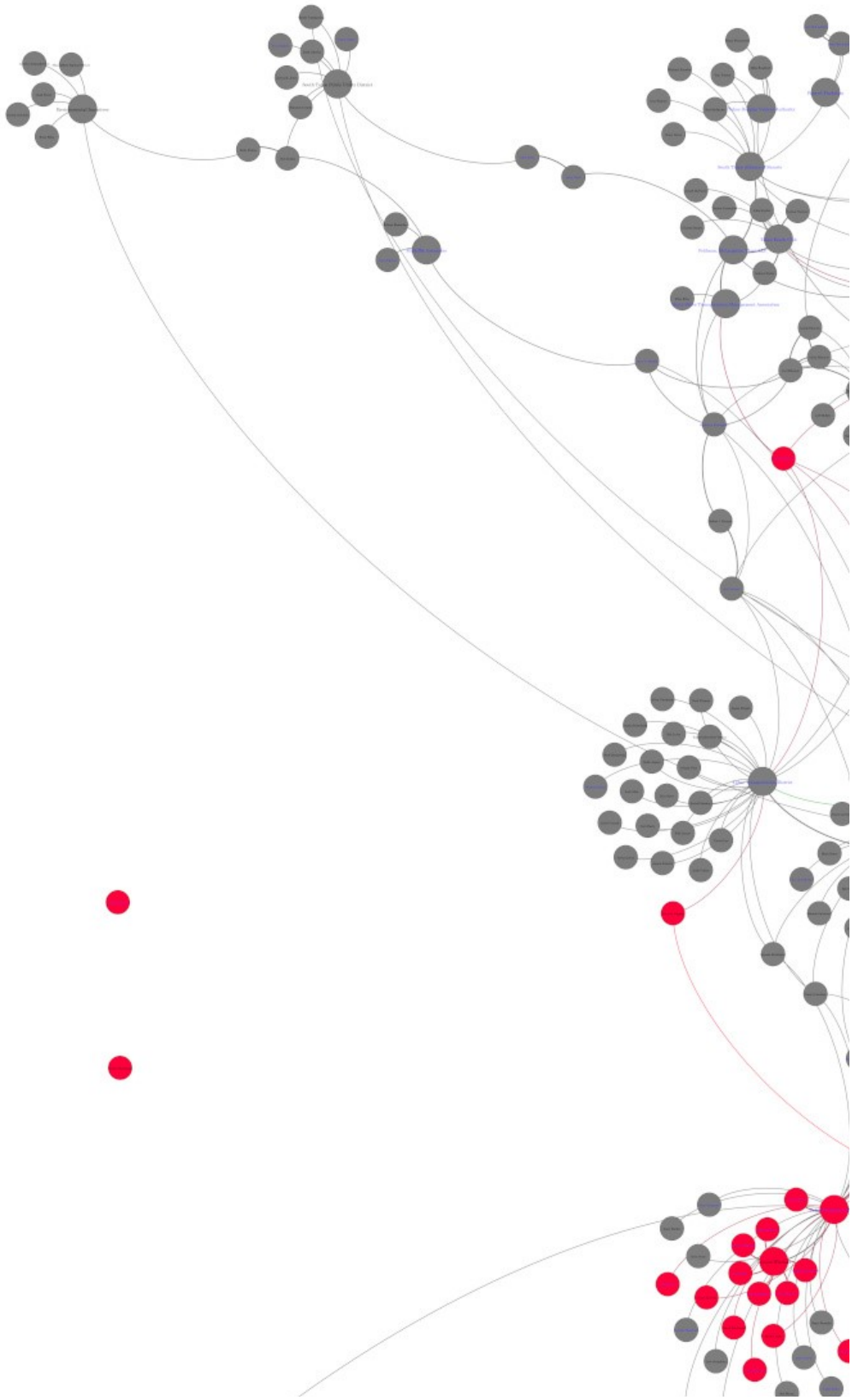
Or in tabular view:

Actors Lobbing City For WTF's Generally Do Not Live Within Ci Limits

Actor	Full Address	City Limits?
Kirill Deninzon	1695 12th Ave., Apt. #1, San Francisco, CA, 94122	N
Ali Bissonnette	8674 Falmouth Avenue #103, Playa Del Rey, CA, 90293	N
Robert Stern	112 Ponderosa Circle, Skyland, NV, 89448	N
Rick Lind	6221 Butterfield Way, Placerville, CA, 95667	N
Brian Hogan	660 Zuni Street, Meyers, CA, 96150	N
John "Patrick" Rhamey	4 Kjer Lane, Kingsbury, NV, 89449	N
Heidi Hill Drum	942 Kekin Street, Meyers, CA, 96150	N
Carol Chaplin	281 Chimney Rock Road, Kingsbury, NV, 89449	N
Jenn Gleckman	1811 Arrowhead Ave, Meyers, CA, 96150	N
Steve Teshara	282 Paiute Drive, Kingsbury, NV, 89448	N
Corey Rich	1944 Apalachee Drive, Meyers, CA 96150	N
Chris McNamara	466 Kent Way, Kingsbury, NV, 89449	N
Erica Darke	453 McFaul Way, Zephyr Cove, NV, 89448	N
Monica Walkenhorst	295 Parkshore Drive, Folsom, CA, 95630	N
Brad Kortick	295 Parkshore Drive, Folsom, CA, 95630	N
Cristobal Villegas	San Francisco, CA	N
Julie Skidmore	884 Bonita Avenue, Pleasanton, CA, 94566	N
Kim Allen	1420 West Gilman Boulevard #9030, Issaquah, WA, 98027	N
Bryant Milesi	Sacramento, CA	N
Christina Wilson	1784 Gentian Circle, South Lake Tahoe, CA, 96150	N
James Kelly	615 Laporte Avenue, Fort Collins, CO, 80521	N
Bobbi Babineau-Lounds	3514 Butters Drive, Oakland, CA, 94602	N
Scott McCoubrey	217 Ski Court #A, Stateline, NV, 89449	N
Jamie Orr	1776 Gentian Circle, South Lake Tahoe, CA, 96150	N
Jenna Langer	378 3rd Avenue, San Francisco, CA, 94118	N
Graham Kent	Reno, NV, 89557	N
Parker Alexander	1595 Skyline Drive, Meyers, CA, 96150	N
Greg Phillips	2401 Lupine Trail, Meyers, CA, 96150	N
Todd McIntyre	1780 Delaware Street, Meyers, CA, 96150	N
Diana Madson	3739 Terrace Drive, South Lake Tahoe, CA, 96150	Y
Rachel Carlson	2302 Washington Avenue, South Lake Tahoe, CA, 96150	Y
Brandianne Brown	1123 Winnwmucca Avenue, South Lake Tahoe, CA, 96150	Y
Chase Janvrin	840 Los Angles Ave, Unit B, South Lake Tahoe, CA, 96150	Y
Sandra Hutchings	South Lake Tahoe, CA, 96150	Y

Moreover, we had intelligence experts perform forensic analysis on these individuals to reveal the overt and covert networks and hidden intermediaries and cutouts (*e.g.,* James Kelly of 655 Eloise Ave, SLT 96150 who works for STPUD as a computer specialist):

The Role of Covert Network Connections in the Lobbying an



This network's members may try and keep their identities secret (as with criminal organizations); the network may form around activities which have to be kept secret because they are illegal or dangerous (such as covert social movements like the Suffragettes or spies), or for other reasons such as social unacceptability.

The network was clearly engaging in illegal lobbying and criminally violating the Ralph M. Brown Act and Public Records Acts:

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BERKELEY, CA 94710
PHONE: 510-900-9502 x 702
EMAIL: ASTRAUSS@GREENFIRELAW.C
WWW.GREENFIRELAW.COM

July 23, 2020

By Electronic Mail

To: Heidi Hill Drum, CEO, Tahoe Prosperity Center (heidi@tahoeprosperity.org)

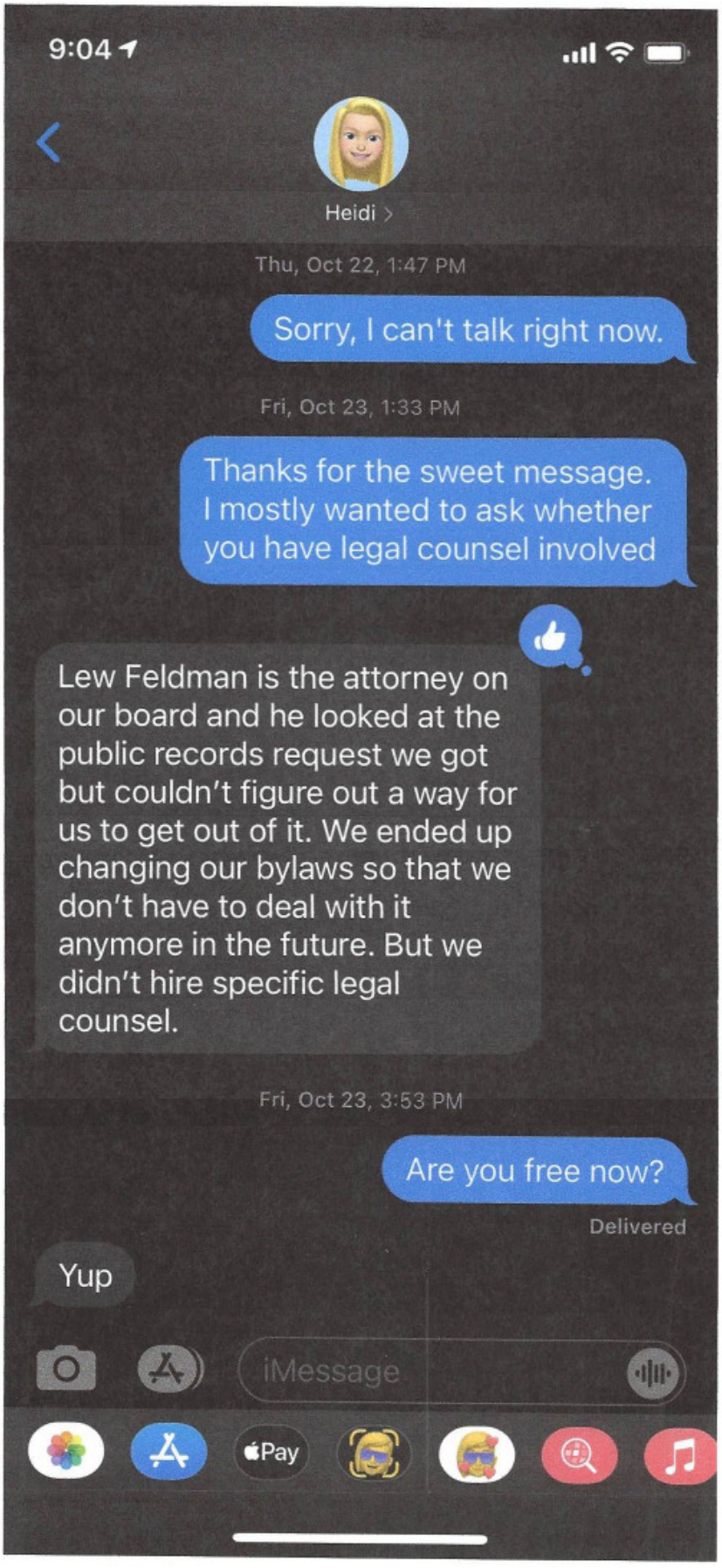
From: Ariel Strauss, on behalf of Monica Eisenstecken

Subject: Record Request to Tahoe Prosperity Center

Dear Ms. Hill Drum:

Under Government Code Sections 54952(c)(1)(B) and 6252(a), as a nonprofit corporatic that "[r]eceives funds from a local agency and the membership of whose governing body includ a member of the legislative body of the local agency appointed to that governing body as a fu voting member by the legislative body of the local agency[,]"[1] the Tahoe Prosperity Center subject to the Brown Act and Public Records Act.

Continued text messages between Planning Commissioner Dianna Madson and Heidi Hill-Drum show that she knew she was violating the Brown Act and could not "get out" of keeping her TPC public records an illegal secret:


9:04
Heidi >
Thu, Oct 22, 1:47 PM
Sorry, I can't talk right now.
Fri, Oct 23, 1:33 PM
Thanks for the sweet message. I mostly wanted to ask whether you have legal counsel involved
Lew Feldman is the attorney on our board and he looked at the public records request we got but couldn't figure out a way for us to get out of it. We ended up changing our bylaws so that we don't have to deal with it anymore in the future. But we didn't hire specific legal counsel.
Fri, Oct 23, 3:53 PM
Are you free now?
Delivered
Yup
iMessage
Pay

However Heidi Hill-Drum continued to make very public false denials of any wrongdoing by the Tahoe Prosperity Center. This text message is proof that she knew this activity was not protected speech, but she filed a vexatious anti-SLAPP motion months later. The fact is that the illegal lobbying activity was real:

Planning Commissioner Madson Recr Actors and Gave Them Talking

Hill-Drum asked Madson for help—*November 4, 2019:*

I appreciate you both being willing to speak up (or Travis if you can't Diana) because bein has been tough. Tahoe Prosperity Center shouldn't be the only vocal supporter of adding new technology. Please let folks that you know who are supportive to share the petition vi Council (email Sue Blankenship at: sblankenship@cityofslt.us and to show up at the hear the date if it is Dec 3 or Jan 7.

Madson obliges by writing City Council to uphold her Planning Commission de effect on her property—material financial interest in the decision (2 CCR § 187

I live and work less than a mile from the proposed cell tower 1360 Ski Run Boulevard. T is atrocious and regularly calls are dropped in front of my house and throughout my neig extremely helpful in addressing this problem.

Madson continues her grassroots lobbying by libeling her neighborhood; unable resorts to recruiting cronies which live far outside city limits—*January 5, 2020*:

I'm writing to ask for your help: I don't know if you've been following the frustrating Ski Ru is that the local crazies (a la Alex Jones) are on the verge of stopping the project, citing b passionate as hell. We desperately need to show public support for the tower to give cov My asks of you:

1. Now - could you sign the Tahoe Prosperity Center pro-cell tower petition and invite family to do the same?
2. January 14 - could you show up at the City Council meeting and give brief public c The anti-cell tower people will be there in the dozens and we need to offset them. I sending an email is the next best option.

Attached (if you find it useful) are some talking points and fact sheet that the Tahoe Prosp

Heidi Hill-Drum did not have a First Amendment right to violate constitutional due process of law through organizing illegal closed meetings to develop her entire "Connected Tahoe" cell tower network on backroom stipulation of local planning agencies—which deprived the public of its right to "notice of the proposed action and the grounds asserted for it" and "opportunity to present reasons why the proposed action should not be taken." Nor did Heidi Hill-Drum have any First Amendment right to violate violate the Ralph M. Brown Act—that is not protected speech, it is **a crime**! Nor was she entitled to file her **vexations litigation** anti-SLAPP motion. She is very lucky she was not SLAPPback-ed! Her **illicit closed meetings** and political activity while serving a 501(c) nonprofit were **not a "valid exercise of the constitutional rights of freedom of speech"** (CCP §§ 425.16(a) & 425.17(a)). The TPC was acting as a legislative body, and may not shield illegal acts in that capacity as free speech. The TPC "receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency" and therefore she was illegally operating a legislative body (GC. § 54952(c)(1)(B)). For example, El Dorado County RESOLUTION NO. 048-2016, appointed Sue Novasel "the District V Supervisor to sit as a voting member of the Tahoe Prosperity Center Board of Directors" and records—including IRS Form 990 and CA 199—prove the TPC receives funding from numerous local agencies:

TAHOE PROSPERITY CENTER

CA 199

CASH CONTRIBUTIONS
INCLUDED ON PART I, LINE 3

CONTRIBUTOR'S NAME	CONTRIBUTOR'S ADDRESS
COUNTY OF EL DORADO	360 FAIR LANE BLDG A PLACERVILLE, CA 95667
DOUGLAS COUNTY NEVADA	PO BOX 218 MINDEN, NV 89423
MORGAN FAMILY FOUNDATION	1 1ST ST STE 15 LOS ALTOS, CA 94022
PLACER COUNTY	175 FULWEILER AVENUE AUBURN, CA 95603
SOUTH TAHOE ALLIANCE RESORTS	PO BOX 5878 STATELINE, NV 89449
US BANK FOUNDATION	621 CAPITOL MALL, SUITE 990 SACRAMENTO, CA 95814
WASHOE COUNTY OF NEVADA	1001 E 9TH STREET RENO, NV 89512
CASF CONSORTIUM GRANT	505 VAN NESS AVENUE SAN FRANCISCO , CA 94102
CITY OF SOUTH LAKE TAHOE	1901 AIRPORT ROAD, SUITE 203 SOUTH LAKE TAHOE , CA 96150
BANK OF AMERICA CHARITABLE FOUNDATION	150 N COLLEGE ST CHAROLETTE , NC 28202

Her purposefully closed meetings were **a crime**, not a protected First Amendment assembly or speech right (GC. § 54959). Her constitutional rights were not violated, she violated the public's constitutional due process rights guaranteed under the Fifth and Fourteenth Amendments.

This is also a violation Nevada's Open Meeting Law:

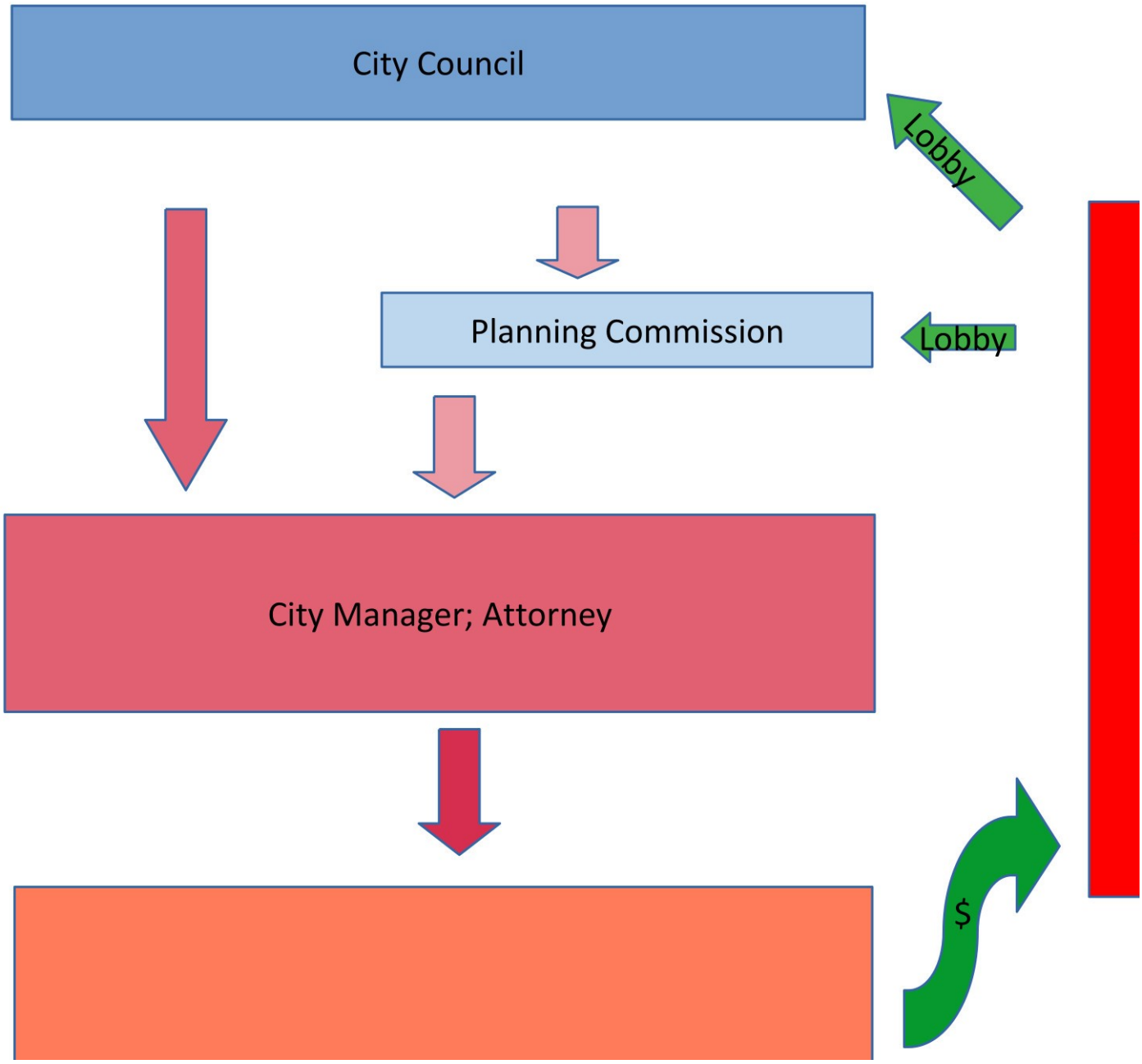
TAHOE REGIONAL PLANNING AGENCY

Applicability of the Open Meet

- The Open Meeting Law ("OML") applies to mee bodies. NRS 241.016(1).
- A “public body" is "[a]ny administrative, adviso legislative body of a State or a local governmen at least two persons which expends or disburse supported in whole or in part by tax revenue o or makes recommendations to any entity whic disburses or is supported in whole or in part by NRS 241.015(4).

In other words, local agencies funneled monies to "a corporation"—which they directed in secret with "legislative officials"—to develop a large and very controversial regional planning regime in secret, which then turned around and lobbied and astroturfed the hearings at these very agencies to get controversial planning regime approved piecemeal. In this instant, the controversial planning was the entire "Connected Tahoe" cell tower network, however other controversial land use developments were laundered using the same method. This is a diagram of what was occurring:

City is Lobbying its Own Elected Of



Joanne Marchetta who enabled this scheme—embedded it into the 2012 Regional Plan—should have been fired! She is a Brown Act criminal and a dishonor to the TRPA!

Thank you for considering

Edith Chase

Cell Tower Talking Points for January 14, 2020 City Council Hearing

Public safety issues

- The issue is not if, but when there will be another fire or disaster in our community. With so many of our residents and all of our visitors only having a cell phone to communicate, the potential for loss of life is significant. People simply won't get the message to evacuate.[1]
- Most low-income families can only afford a cell phone. They do not have a land-line option at home. When cell service is non-existent, they are unable to use their phones.[2]
- During the recent fires in Sonoma county in October, numerous cell towers were damaged and out of service because they did not have backup power options. This proposed tower has a backup generator in the event of an emergency.
- Receiving an alert on mobile devices is vital for emergency preparedness.[3]

Visitors and cellular capacity issues

- Tahoe receives 15 million visitors a year.[4] An average "busy" summer weekend can mean 250,000 additional people visiting the area (total residency is 50,000) so 300,000 people, most with phones equals too high a demand for existing cell service capacity. That is why you see texts not going through or delayed response time on your phone.
- Not being able to make a call or send a text means not being able to:
    - call a cab or Uber/Lyft if you've been drinking and need a ride home;
    - reach your family to let them know you have a flat tire and need help;
    - call your kid/mom/dad on their birthday if it happens to fall on July 4 or President's Day;
    - use a map on your phone for directions

Business needs

- Current level of cellular and broadband service in South Lake Tahoe is graded F.[5]
- Most businesses use point of sale machines to complete customer purchases – these often rely on cellular and broadband data.
- Customers can't leave a positive Yelp review (because they won't when they return home) if they can't connect online while in Tahoe.
- Medical health records are all sent electronically. Telemedicine is important for more rural hospitals like in our area. Broadband and cellular service are needed to ensure connectivity.
- Remote workers need reliable service and speeds – bringing in jobs that pay higher wages, offer flexibility and promote diversity of types of jobs is not possible without improved service.

Environmental considerations

- The cell tower at 1360 Ski Run is a co-located tower, which means multiple providers will use it. That reduces the overall number of cell towers needed in our community, which means fewer large towers impacting our scenic views.

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[1] Dr. Graham Kent, University of Nevada Reno, Tahoe Daily Tribune article, November 23, 2019
[2] Silicon Valley Joint Venture (SVJV) Report, Bridging the Gap report, 2016
[3] Homeland Security, Wireless Emergency Alerts Report
[4] Measuring for Prosperity Report, 2017
[5] Stephen Blum, Independent Telecommunications Expert, City Council presentation, April 2, 2019

- Each tower goes through a two-step environmental review process including with the Tahoe Regional Planning Agency and local permitting. In this case, the tower at 1360 Ski Run Blvd also went through a National Environmental Policy Act (NEPA) review process as well.

Health Issues

- Cell towers do not cause cancer[6] as they are high above ground and are the types of radio frequency waves that are not harmful to humans.
- Using phones in areas of good reception decreases exposure as it allows the phone to transmit at reduced power.[7]
- Cell tower and cell phone radio frequency waves are non-ionizing – similar to radio and television waves.
- Cell tower and cell phones are listed as a Class 2b carcinogen[8] which means it can't be ruled out as possibly carcinogenic. Other Class 2b carcinogens include coffee, pickled vegetables and baby powder. Unlike Class 2a (probable carcinogenic) items such as styrene (found in Styrofoam) and Class 1 (known to be carcinogenic) such as radon and alcoholic beverages, Class 2b carcinogens have not been proven to cause cancer despite many years of study.

Property Values

- According to the National Association of Realtors, Valbridge study across the country, there was no measurable difference in property values of homes located near cell towers.[9]
- Closer to home, Zillow.com reports for homes located near cell towers in the 96150 zipcode also show no loss in value beyond the current market.
- Joint Venture Silicon Valley also conducted a study specific to homes in the Bay Area and found no discernable difference in home values located in close proximity to cell towers. [10]

Wireless data usage

- Wireless data use doubled in the past year (2018). [11] Wireless data use is primarily conducted on mobile phones. Broadband fiber is not able to serve the wireless data usage – cell towers are needed to ensure connectivity.
- In 2015, the average smartphone in North America consumed 3.7 GB of data per month, and this will increase to 22 GB per month by 2021.[12] Only additional cellular capacity can handle this increase in usage.
- According to the 2018 National Health Interview Study, more than 55% of adults and 64% of children under 18 only have wireless telephone service.[13]

[6] World Health Organization, American Cancer Society and FCC Radio Frequency Safety
[7] Electromagnetic fields and public health" mobile phones, WHO Fact Sheet #193
[8] World Health Organization
[9] Valbridge Study, September 14, 2018 "How does the proximity to a cell tower impact property value?"
[10] Joint Venture Wireless Facilities Impact on Property Values
[11] CTIA survey 2019 (Cellular Telecommunications and Internet Association)
[12] (Ericsson AB, 2016)
[13] National Center for Health Statistics, Centers for Disease Control and Prevention annual survey, December 2018

AMENDED BYLAWS
OF
TAHOE PROSPERITY CENTER
a Nevada Nonprofit Corporation
(March 2013)

The name of this corporation is Tahoe Prosperity Center, a Nevada nonprofit corporation.

I. Offices of the Corporation.

A. Principal Office. The principal office for the transaction of the activities and affairs of the corporation (principal office) is located at 948 Incline Way, Incline Village, Washoe County, Nevada. The Board of Directors may change the principal office from one location to another. Any change of location of the principal office shall be noted by the secretary on these bylaws opposite this section, or this section may be amended to state the new location.

B. Other Offices. The Board may at any time establish branch or subordinate offices at any place(s) where the corporation is qualified to conduct its activities.

II. Purposes and Limitations.

The corporation is organized exclusively for charitable purposes, including for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code. The specific purpose of the corporation is to convene and support economic development initiatives which would have the effect of improving the quality of life for businesses and residents while promoting environmental stewardships and sustainability within the Lake Tahoe Basin and adjoining regions. Activities may include but not be limited to serving as a research and data center for the region; facilitating business development, supporting and administering grant opportunities, functioning as a convener and facilitator for partnership opportunities, support activities of other entities that are related to the economic well being of the region's communities and support efforts to improve local infrastructure such as broadband, affordable housing, access to investment capital and transportation.

III. Members.

The corporation shall have no members. Any action that would otherwise require approval by the members shall require only approval of the Board of Directors. All rights which would otherwise vest under the nonprofit corporation laws in the members shall vest in the Directors.

IV. Board of Directors.

A. Number. The corporation shall have not less than thirteen (13) and not more than thirty-five (35) Directors. The initial number of Directors shall be thirteen (13) and this number shall be fixed from time to time, within the limits specified in this Bylaw, by amendment to this Bylaw duly adopted by approval of the Board of Directors.

B. Qualifications.

1. Age and Categories. Each Director shall be at least 18 years of age and shall be a representative of one or more of the following categories: (i) local governmental jurisdictions; (ii) non-profit entities or agencies; (iii) education/workforce; (iv) local utility/infrastructure providers; and (v) business and professional organizations. There shall be no more than ten (10) Directors from any one category on the Board at any time.

2. Restriction on Interested Persons as Directors. No more than twenty-five percent (25%) of the persons serving on the Board may be interested persons. An interested person is (a) any

person compensated by the corporation for services rendered to it within the previous twelve (12) months, whether as a full-time or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a director as director; and (b) any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of such person. However, any violation of the provisions of this paragraph shall not affect the validity or enforceability of any transaction entered into by the corporation.

C. Term. The initial Directors shall hold office for a three (3) year term, at which time Such Directors may elect to remain on the Board for terms of one (1), two (2), or three (3) years. Thereafter, a staggered number of Directors shall be elected to one (1), two (2), or three (3) year terms annually as determined by the Board. The individual elected to the office of the Vice Chair will automatically remain on the Board of Directors for one (1) additional year following his/her election to that position without having to run for re-election. The maximum number of years any one person may serve as a Director in consecutive years is six (6), following which that person may not again serve as a Director until he/she has been absent from the Board for one (1) year.

D. Vacancies.

1. Events Causing Vacancy. A vacancy or vacancies on the Board shall exist on the occurrence of the following: (a) the death or resignation of any Director; (b) the declaration by resolution of the Board of a vacancy in the office of a Director who has been declared of unsound mind by an order of court, convicted of a felony, or found by final order or judgment of any court to have breached a duty of a Director under Chapter 82 of the Nevada Revised Statutes; (c) the increase of the authorized number of Directors; or (d) removal of a Director pursuant to Section IV.D. 3, below.

2. Resignations. Except as provided below, any Director may resign by giving written notice to the Chairperson, President or Secretary of the Board. The resignation shall be effective when the notice is given unless it specifies a later time for the resignation to become effective. If a Director's resignation is effective at a later time, the Board may elect a successor to take office as of the date when the resignation becomes effective

3. Removal of Director. Any Director may be removed at any time, with or without cause or notice, by the vote or written approval of two thirds (2/3) of the Board of Directors. A director that fails to attend more than fifty percent (50%) of the Board of Directors' meetings during any preceding 12-month period may be removed by approval of a majority of the Board of Directors.

4. Filling Vacancies. Vacancies on the Board shall be filled by the Chair of the Board appointing a successor to take office from within the category held by the departing Director.

E. Powers.

1. General Corporate Powers. Subject to the provisions and limitations of the Nevada Nonprofit Corporation Law and any other applicable laws, and subject to any limitations of the articles of incorporation and bylaws, the corporation's activities and affairs shall be managed, and all corporate powers shall be exercised, by or under the direction of the Board.

2. Specific Powers. Without prejudice to the general powers set forth in these bylaws, but subject to the same limitations, the directors shall have those specific powers set forth in NRS 82.130, including, but not limited to:

(a) Appoint and remove, at the pleasure of the Board, all the corporation's officers, agents, and employees; prescribe powers and duties for them that are consistent with law, and with the articles of incorporation and bylaws; and require from them security for faithful performance of their duties.

(b) Change the principal office or the principal business office in Nevada from one location to another; cause the corporation to be qualified to conduct its activities in any other state, territory, dependency, or country and conduct its activities within or outside Nevada; and designate any place within or outside Nevada for holding any meetings.

(c) Adopt and use a corporate seal.

(d) Borrow money and incur indebtedness on behalf of the corporation and cause to be executed and delivered for the corporation's purposes, in the corporate name, promissory notes, bonds, debentures, deeds of trust, mortgages, pledges, hypothecations and other evidence of debt and securities.

(e) Manage the financial affairs of the corporation, including, but not limited to, the adoption of annual budgets.

F. Directors' Meetings.

1. Place of Meetings. Meetings of the Board shall be held at any place within or outside Nevada that has been designated by resolution of the Board or in the notice of the meeting or, if not so designated, at the principal office of the corporation.

2. Meetings by Telephone. Any meeting may be held by conference telephone or similar communication equipment, as long as all directors participating in the meeting can hear one another. All such directors shall be deemed to be present in person at such a meeting.

3. Annual Meeting. The Board's first regularly scheduled meeting during the calendar year shall be deemed the Annual Meeting for purposes of organization, election of officers, and transaction of other business. Notice of this meeting is not required

4. Other Regular Meetings. Other regular meetings of the Board may be held without notice at such time and place as the Board may fix from time to time.

5. Special Meetings.

(a) Authority to Call. Special meetings of the Board for any purpose may be called at any time by the Chairperson, the President if any, the Chair-elect any Vice Chair, or the Secretary or any three directors.

(b) Notice.

(i) Manner of Giving Notice. Notice of the time and place of special meetings shall be given to each director by one of the following methods: (a) by personal delivery of written notice; (b) by first-class mail, postage prepaid; (c) by telephone, either directly to the director or to a person at the director's office who would reasonably be expected to communicate that notice promptly to the director; (d) by facsimile; or (e) by email. All such notices shall be given or sent to the Director's physical address, telephone or facsimile numbers or email address as shown on the records of the corporation.

(ii) Notice Contents. The notice shall state the time of the meeting, and the place if the place is other than the principal office of the corporation. It need not specify the purpose of the meeting.

6. Quorum. A quorum of the Board shall consist of a majority of directors, and such majority is authorized to transact business on behalf of the corporation. Every action taken or decision made by a majority of the directors present at a duly held meeting at which a quorum is present shall be the act of the Board, subject to the more stringent provisions of the Nevada Nonprofit Corporation Law. The directors present at a duly called or held meeting at which a quorum is present may continue to do

business until adjournment, notwithstanding the withdrawal or abstention of enough directors to leave less than a quorum, if any action taken (other than adjournment) is approved by at least a majority of the directors required to constitute a quorum.

7. Waiver of Notice. Notice of a meeting need not be given to any Director who, either before or after the meeting, signs a waiver of notice, a written consent to the holding of the meeting, or an approval of the minutes of the meeting. The waiver of notice or consent need not specify the purpose of the meeting. All such waivers, consents, and approvals shall be filed with the corporate records or made a part of the minutes of the meetings. Notice of a meeting need not be given to any director who attends the meeting and does not protest, before or at the commencement of the meeting, the lack of notice to him/her.

8. Adjournment. A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place.

9. Notice of Adjourned Meeting. Notice of the time and place of holding an adjourned meeting need not be given unless the original meeting is adjourned for more than 24 hours. If the original meeting is adjourned for more than 24 hours, notice of any adjournment to another time and place shall be given, before the time of the adjourned meeting, to the directors who were not present at the time of the adjournment.

G. Action Without a Meeting. Any action that the Board is required or permitted to take may be taken without a meeting if all Directors consent in writing to the action. Such action by written consent shall have the same force and effect as any other validly approved action of the Board. All such consents shall be filed with the minutes of the proceedings of the Board.

H. Compensation and Reimbursement. Directors shall receive no compensation for their services, but may receive reimbursement of expenses as the Board may determine by resolution to be just and reasonable as to the corporation.

I. Committees. The Board of Directors shall appoint those standing committees and subcommittees as it deems appropriate. The Board may adopt rules for the government of any committee, provided they are consistent with these bylaws or, in the absence of rules adopted by the Board, the committee may adopt such rules.

1. Executive Committee. The Executive Committee shall consist of the Chairperson, the Vice Chair, the immediate past Chairperson, the Treasurer, the Secretary and up to four additional Directors appointed by the Chairperson. The Executive Committee is delegated authority to act on items of the Corporation's business which cannot be postponed until the next Board meeting.

V. Officers.

A. Officers of the Corporation. The officers of the corporation shall be a Chairperson, a Vice Chair, secretary and a treasurer. The Chairperson shall also serve as President, until such time as the Corporation appoints a President, whereupon the Chairperson and President shall each serve as an officer of the Corporation. Any number of offices may be held by the same person, except that neither the secretary nor the treasurer may serve concurrently as president.

B. Election of Officers. The officers of the corporation shall be chosen annually by the Board and shall serve at the pleasure of the Board, subject to the rights, if any, of any officer under any contract of employment.

C. Other Officers. The Board may appoint and may authorize the Chairperson, or other officer, to appoint any other officers that the corporation may require. Each officer so appointed shall have the title, hold office for the period, have the authority, and perform the duties specified in the bylaws or determined by the Board.

D. Removal of Officers. Without prejudice to any rights of an officer under any contract of employment, any officer may be removed with or without cause by the Board and also, if the officer was not chosen by the Board, by any officer on whom the Board may confer that power of removal.

E. Resignation of Officers. Any officer may resign at any time by giving written notice to the corporation. The resignation shall take effect as of the date the notice is received or at any later time specified in the notice and, unless otherwise specified in the notice, the resignation need not be accepted to be effective. Any resignation shall be without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party.

F. Vacancies in Office. A vacancy in any office because of death, resignation, removal, disqualification, or any other cause shall be filled in the manner prescribed in these bylaws for regular appointments to that office, provided, however, that vacancies need not be filled on an annual basis.

G. Responsibilities of Officers.

1. Chairperson and President. The Chairperson and President of the Corporation, if any, shall have those powers and duties as the Board or the bylaws may prescribe, with duties to include Fund Development, External Relations, Strategic Planning and Organization Leadership, as well as overseeing the day-to-day operations of the corporation, and any additional powers and duties the Board may prescribe.

2. Chairperson. The Chairperson shall preside at all Board meetings, and shall have such other powers and duties as the Board or the bylaws may prescribe. The Chairperson shall, with the President, if any, sign contracts and obligation of the Tahoe Prosperity Center that are long-term in nature that fall outside the normal day-to-day business transactions and/or budget with the majority approval of the board. In the absence of the Chairperson, the Vice Chairperson shall act in that capacity, followed by any officer selected by the Board of Directors. In the absence of all of the officers, a member of the Board of Directors shall be chosen from their number to act on behalf of the Corporation.

3. Secretary.

(a) Book of Minutes. The Secretary shall keep or cause to be kept, at the corporation's principal office or such other place as the Board may direct, a book of minutes of all meetings, proceedings, and actions of the Board, or committees of the Board. The minutes of meetings shall include the time and place that the meeting was held, whether the meeting was annual, regular, or special, and, if special, how authorized, the notice given, the names of those present at Board and committee meetings, and the number of Directors present at meetings. The Secretary shall keep or cause to be kept, at the principal office in Nevada, a copy of the articles of incorporation and bylaws, as amended to date.

(b) Notices, Seal and Other Duties. The Secretary shall give, or cause to be given, notice of all meetings, of the Board and of committees of the Board required by these bylaws to be given, and shall have such other powers and perform such other duties as the Board or the bylaws may prescribe.

4. Treasurer.

(a) Books of Account. The Treasurer shall keep and maintain, or cause to be kept and maintained, adequate and correct books and accounts of the corporation's properties and transactions. The Treasurer shall send or cause to be given to the directors such financial statements and reports as are required to be given by law, by these bylaws, or by the Board. The books of account shall be open to inspection by any director at all reasonable times.

(b) Deposit and Disbursement of Money and Valuables. The Treasurer shall deposit, or cause to be deposited, all money and other valuables in the name and to the credit of the corporation with such depositories as the Board may designate, shall disburse the corporation's funds as the Board may order, shall render to the President, chair of the Board, if any, and the Board, when requested, an account of all transactions as chief financial officer and of the financial condition of the corporation, and shall have such other powers and perform such other duties as the Board or the bylaws may prescribe.

H. Compensation and Reimbursement. The President and CEO if any, may receive such compensation for his/her services and such reimbursement of expenses as the Board may determine by resolution to be just and reasonable as to the corporation at the time that the resolution is adopted. The chairperson, secretary, treasurer, and other officers, shall receive no compensation for their services, but may receive reimbursement of expenses as the Board may determine by resolution to be just and reasonable as to the corporation.

VI. Indemnification.

A. Right of Indemnity. To the fullest extent permitted by law, this corporation may indemnify its directors, officers, employees, and other persons against expenses as provided in NRS 82.541, 78.751 and 78.7502.

VII. Dissolution of the Corporation.

On the winding up and dissolution of the corporation, its assets remaining after payment of, or provision for payment of, all debts and liabilities of this corporation, shall be distributed to a nonprofit fund, foundation or corporation which is organized exclusively for charitable purposes and which has established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

VIII. Records and Reports.

A. Maintenance of Corporate Records. The corporation shall keep at its registered office:

1. A copy, certified by the secretary of state, of its articles of incorporation and amendments thereto;

2. A copy, certified by an officer of the corporation, of its bylaws and amendments thereto;

3. Adequate and correct books and records of account;

4. Written minutes of the proceedings of its Board, and committees of the Board; and

B. Inspection Rights. The corporation's Articles of Incorporation and bylaws, as amended to date, shall be open to inspection by the directors at all reasonable times during office hours. Every director may, for a purpose reasonably related to the director's interest as a director, inspect the corporation's books of account and financial records during usual business hours on fifteen days' prior written demand on the corporation, which demand must state the purpose for which the inspection rights are requested. If the corporation reasonably believes that the information will be used for a purpose other than one reasonably related to a person's interest as a director, or if it provides a reasonable alternative under this section, it may deny the director access to such records. Any inspection and copying under this section may be made in person or by the director's agent or attorney. The right of inspection includes the right to copy and make extracts. Any right of inspection extends to the records of any subsidiary of the corporation.

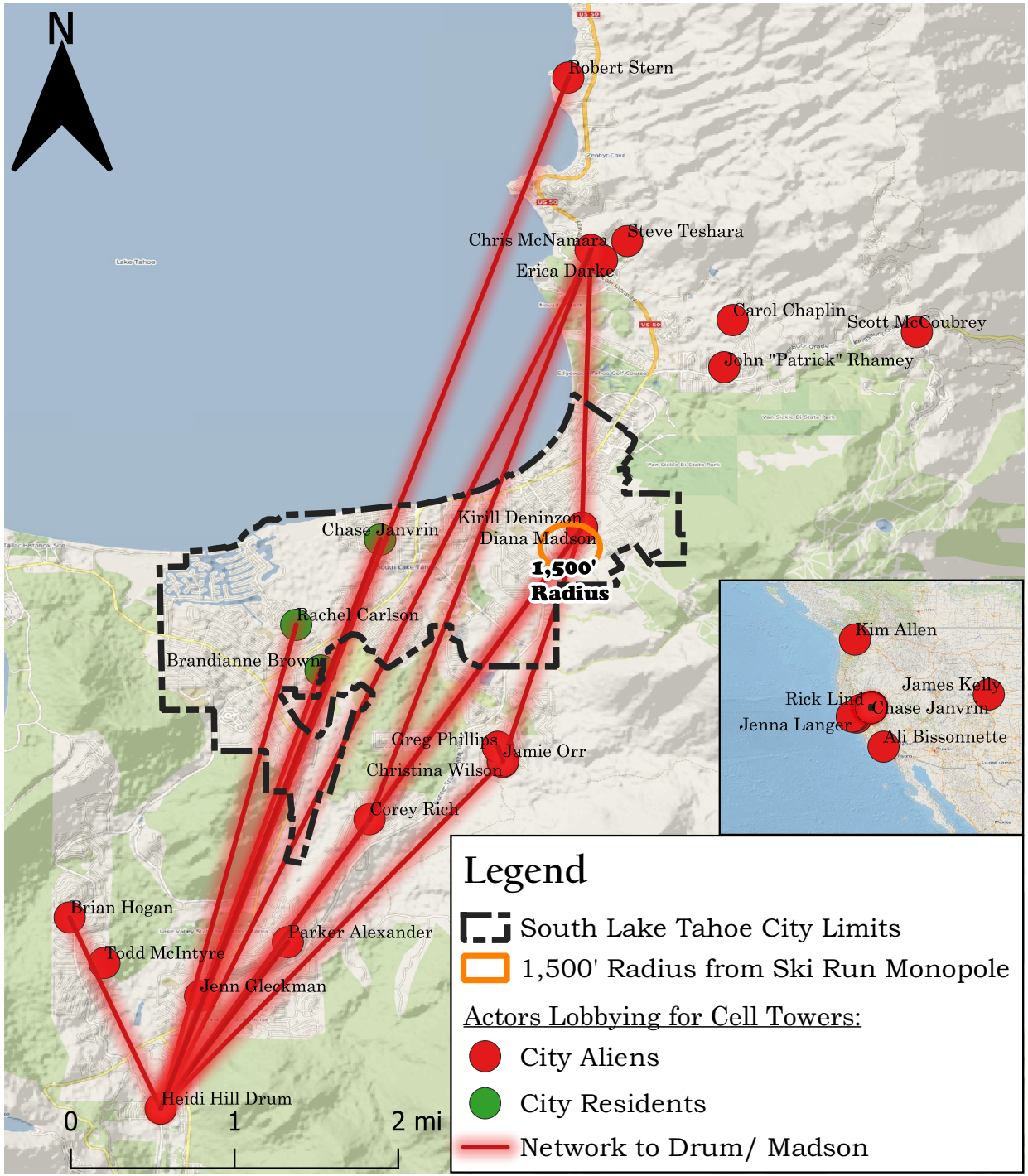
IX. Construction and Definitions.

Unless the context requires otherwise, the general provisions, rules of construction, and definitions in the Nevada Nonprofit Corporation Law shall govern the construction of these bylaws. Without limiting the generality of the preceding sentence, the masculine gender includes the feminine and neuter, the singular includes the plural, the plural includes the singular, and the term "person" includes both a legal entity and a natural person.

X. Amendments.

These bylaws may be amended upon the affirmative vote of two-thirds (2/3) of the Directors.

Actors Lobbying for Cell Towers; Their Connection to Tahoe Prosperity Center



The Actors lobbying for city legislative action (*Eg.* 26 U.S.C. § 4911(e)(2); CA. Gov. Code § 54952.6) pertaining to cell towers are generally not city residents, and are being directed to submit ghostwritten letters and talking points compiled by City Planning Commissioner Diana Madson on behalf of Heidi Hill-Drum. This is a direct and grassroots lobbying campaign by the Nevada-based Tahoe Prosperity Center. Heidi Hill-Drum's approximate $100,000 compensation from this organization is dependent on her completing her project to inject controversial cell towers within city limits. She is not a city resident. The Tahoe Prosperity Center was created by —and hence is a proxy of—the Nevada-based Tahoe Chamber of Commerce, which advocates tourism interests and is controlled by or affiliated with Steve Teshara, Patrick Rhamey, and Carol Chaplin.

None of the advocates for the Ski Run Macro Tower reside within the purported coverage gap, which signals measurement tests and RF modeling (Longley-Rice/Irregular Terrain Model) show does not exist. Only four of these lobbyist-actors are residents governed under city rule. Three of which, live on the other end of town which cannot be serviced by that tower, due to signal interference with multiple intermediate macro towers. There are no actors that are not affiliated with this orchestrated campaign.

There are over two-hundred anti-cell tower comments on the city record, and the appeal hearing of the Ski Run Macro Tower contained two hours of anti-cell tower pleas. In contrast, the minority pro-cell tower dialogue is contained to the 20 or so actors on this map. These "border ruffians" descended onto the city council hearings under the direction of Diana Madson and Heidi Hill-Drum.

Colluding telecommunications representatives and bay area residents owning vacation property are shown on the inset map; they reside hundreds of miles away.

237 F.Supp.3d 997
United States District Court, E.D. California.

Doe PUBLIUS and Derek Hoskins, Plaintiffs,
v.
Diane F. BOYER–VINE, in her official capacity as Legislative Counsel of California, Defendant.

1:16–cv–1152–LJO–SKO
|
Signed February 27, 2017

Synopsis

Background: Writer of political blog who had compiled and posted the names, home addresses, and phone numbers of California legislature members who had voted in favor of gun control measures, and operator of online forum for discussion of issues related to firearms, brought § 1983 action against counsel for California state legislature, alleging that state statute that made it unlawful to post online home addresses and telephone numbers of certain government officials violated the First Amendment, the Commerce Clause, and the Communications Decency Act (CDA). Plaintiffs moved for preliminary injunction preventing counsel from enforcing statute against them.

Holdings: The District Court, Lawrence J. O'Neill, J., held that:

[1] takedown demand letter coupled with plaintiffs' compliance with demand constituted cognizable constitutional injury, for purposes of standing;

[2] writer's injury would have been redressed by favorable decision, for purposes of standing;

[3] counsel acted under color of state law in demanding removal of list from websites, for purposes of § 1983 liability;

[4] addresses and telephone numbers of legislators touched on matters of public concern, and thus publication of information was protected speech;

[5] statute was not narrowly tailored to state's asserted compelling interest;

[6] statute was underinclusive with respect to state's asserted compelling interest for regulating speech;

[7] operator was likely to succeed in challenging statute as invalid under the dormant Commerce Clause's extraterritoriality doctrine, supporting issuance of injunction; and

[8] public interest supported grant of preliminary injunction.

Motion granted in part and denied in part.

West Headnotes (41)

[1] Injunction Grounds in general; multiple factors

To secure injunctive relief prior to a full adjudication on the merits, a plaintiff must show that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

[2] Injunction Extraordinary or unusual nature of remedy

Injunction Clear showing or proof

Injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

[3] Injunction Balancing or weighing factors; sliding scale

Under "sliding scale" approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.

[4] **Federal Civil Procedure** In general; injury or interest

Federal Courts Case or Controversy Requirement

Standing is a judicially created doctrine that is an essential part of the case-or-controversy requirement of Article III. U.S. Const. art. 3, § 2, cl. 1.

[5] **Federal Courts** Injury, harm, causation, and redress

To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[6] **Federal Civil Procedure** In general; injury or interest

Doctrine of Article III standing requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. U.S. Const. art. 3, § 2, cl. 1.

[7] **Constitutional Law** Criminal Law

Where a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury for purposes of Article III standing as long as it is based on an actual and well-founded fear that the challenged statute will be enforced. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[8] **Constitutional Law** First Amendment in General

When the threatened enforcement of challenged statute implicates First Amendment rights, the inquiry into whether plaintiff suffered a constitutionally sufficient injury tilts dramatically toward a finding of standing. U.S. Const. Amend. 1.

[9] **Constitutional Law** Facial challenges

Constitutional Law As applied challenges

First Amendment challenges may be brought as "facial" or "as-applied" challenges. U.S. Const. Amend. 1.

[10] **Constitutional Law** Freedom of Speech, Expression, and Press

Takedown demand letter sent by legislative counsel for state legislators pursuant to state statute that made it unlawful to post legislators' home addresses and phone numbers on public forum, threatening legal action against operator of online forum for discussion of issues related to firearms if he did not immediately comply and remove posting on forum of names, home addresses, and phone numbers of California legislature members who had voted in favor of gun control measures, coupled with operator's compliance with the demand, constituted a cognizable constitutional injury, and thus operator had Article III standing to challenge statute both on its face and as applied to him as violating his First Amendment right to distribute and facilitate protected speech on the site. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

1 Cases that cite this headnote

[11] **Constitutional Law** Freedom of Speech, Expression, and Press

The mere threat of prosecution under a challenged statute that results in actual self-censorship constitutes a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[12] **Constitutional Law** Freedom of Speech, Expression, and Press

Finding that California statute that prohibited publication online of home addresses and telephone numbers of certain government officials was invalid would have redressed asserted constitutional injury of writer of political blog who compiled and posted the names, home addresses, and phone numbers of California legislature members who had voted in favor of gun control measures, and thus writer had Article III standing to challenge statute as violative of the First Amendment; although website that hosted writer's blog could have removed the post because it violated website's terms of service, website removed post immediately after receiving takedown demand letter from counsel, and explained to writer that post was taken down because state demanded its removal. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[13] **Civil Rights** Officers and public employees, in general

Civil Rights Pursuit of private or judicial remedies

Office of state legislative counsel acted under color of state law when it sent letters demanding removal from websites of list of names, home addresses, and phone numbers of California legislators who voted in favor of gun control measures to website that was host to writer's blog and operator of online forum for firearms issues, for purposes of § 1983 liability; although defendant argued that legislators were acting as private citizens who made private decisions to threaten private lawsuits if their personal information was not removed, office sent takedown demands at request of legislators, and explicitly stated that office represented state legislature. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[14] **Civil Rights** Liability of Public Employees and Officials

State official defendants named in their official capacities are subject only to suit for prospective declaratory and injunctive relief to enjoin an alleged ongoing violation of federal law under § 1983. 42 U.S.C.A. § 1983.

[15] **Civil Rights** Color of Law

An individual acts under color of state law, for purposes of § 1983 liability, when he or she exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. 42 U.S.C.A. § 1983.

[16] **Civil Rights** Officers and public employees, in general

Test for determining whether an individual acts under color of state law, for purposes of § 1983 liability, is generally satisfied when a state employee wrongs someone while acting in his official capacity or while exercising his responsibilities pursuant to state law. 42 U.S.C.A. § 1983.

[17] **Constitutional Law** Substantial impact, necessity of

A law may be invalidated as overbroad under the First Amendment if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. U.S. Const. Amend. 1.

[18] **Constitutional Law** Third-party standing in general

Constitutional Law Freedom of Speech, Expression, and Press

A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights, but the First Amendment overbreadth doctrine carves out a narrow exception to that general rule. U.S. Const. Amend. 1.

[19] **Constitutional Law** Content-Based Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

Content-based laws, i.e., those that target speech based on its communicative content, are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests; this requires the government to show that the law is the least restrictive means to further a compelling interest. U.S. Const. Amend. 1.

[20] **Constitutional Law** Internet

Individuals who use the internet to disseminate their speech are entitled to full First Amendment protections. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[21] **Constitutional Law** Website content

States Members

Home addresses and telephone numbers of California legislators who voted in favor of gun control measures touched on matters of public concern in the context of speech of political blog writer and operator of online forum, and thus publication of information, which was prohibited under California law, was speech that was protected by the First Amendment; although viewed in isolation, legislators' home address and phone numbers did not constitute a matter of public significance, specific context of plaintiffs' political protest against legislation that required government to maintain database with personal information of individuals who bought firearms and ammunition in California rendered information a matter of public concern. U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[22] **Constitutional Law** Freedom of Speech, Expression, and Press

When lawfully obtained, the truthful publication of information falls within the First Amendment's ambit. U.S. Const. Amend. 1.

[23] **Constitutional Law** Matters of public concern

When an individual's personal information is relevant to issues of public significance, its truthful dissemination, particularly when already in the public domain and lawfully obtained, triggers exacting First Amendment scrutiny. U.S. Const. Amend. 1.

[24] **Constitutional Law** Website content

States Police power

California statute that prohibited posting or displaying online home addresses and telephone numbers of certain government officials was not narrowly tailored to state's asserted compelling interest for regulating speech, i.e., protecting the personal safety of covered officials and their families; statute did not require that threat was credible or that a third-party review of whether official's request to remove information was well-founded, made no distinction between those who published a covered official's home address or phone number online for wholly lawful reasons and those who did so for wholly unlawful reasons, and did not differentiate between acts that made public previously private information and those that made public information that was already publicly available. U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[25] **Constitutional Law** Website content

States Police power

California statute that prohibited posting or displaying online home addresses and telephone numbers of certain government officials was underinclusive with respect to state's asserted compelling interest for regulating speech, i.e., protecting the personal safety of covered officials and their families, where statute proscribed the dissemination of a covered official's home address and phone number only on the internet, regardless of the extent to which it was available or disseminated elsewhere. U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[26] **Constitutional Law** Necessity of Determination

Under the canon of constitutional avoidance, a court should avoid deciding unnecessary constitutional issues.

[27] **Constitutional Law** Necessity of Determination

Constitutional Law Resolution of non-constitutional questions before constitutional questions

Doctrine of constitutional avoidance, under which a court should avoid deciding unnecessary constitutional issues, generally applies only when there is a viable alternate, nonconstitutional ground to reach the same result.

[28] **Commerce** Telecommunications and internet

As both the means to engage in commerce and the method by which transactions occur, the internet is an instrumentality and channel of interstate commerce; thus, regulation of the internet impels traditional Commerce Clause considerations. U.S. Const. art. 1, § 8, cl. 3.

[29] **Commerce** Powers Remaining in States, and Limitations Thereon

Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state. U.S. Const. art. 1, § 8, cl. 3.

[30] **Commerce** Powers Remaining in States, and Limitations Thereon

The dormant Commerce Clause doctrine bars state regulations that unduly burden interstate commerce. U.S. Const. art. 1, § 8, cl. 3.

[31] **Commerce** Powers Remaining in States, and Limitations Thereon

A statute violates the dormant Commerce Clause per se when it directly regulates interstate commerce. U.S. Const. art. 1, § 8, cl. 3.

[32] **Commerce** Powers Remaining in States, and Limitations Thereon

Direct regulation occurs, for purposes of the dormant Commerce Clause, when a state law directly affects transactions that take place across state lines or entirely outside of the state's borders. U.S. Const. art. 1, § 8, cl. 3.

[33] **Commerce** Powers Remaining in States, and Limitations Thereon

Under the extraterritoriality doctrine, any statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting state's authority and is invalid under the dormant Commerce Clause regardless of whether the statute's extraterritorial reach was intended by the legislature, and regardless of whether or not the commerce has effects within the state. U.S. Const. art. 1, § 8, cl. 3.

2 Cases that cite this headnote

[34] **Commerce** Powers Remaining in States, and Limitations Thereon

To determine whether state legislation violates the dormant Commerce Clause, the critical inquiry is whether the practical effect of the legislation is to control conduct beyond the boundaries of the state. U.S. Const. art. 1, § 8, cl. 3.

1 Cases that cite this headnote

[35] **Civil Rights** Preliminary Injunction

Operator of online forum for firearms issues was likely to succeed in § 1983 action challenging California statute that prohibited posting or displaying online home addresses and telephone

numbers of certain government officials as invalid under the dormant Commerce Clause's extraterritoriality doctrine, so as to support issuance of preliminary injunction preventing counsel for state legislators whose names, home addresses, and phone numbers were posted on forum from enforcing statute against operator; statute regulated conduct occurring wholly outside borders of state, and statute required operator, who did not live in California, to remove post from his forum and ensure that legislators' contact information was not reported on forum, even if only people accessing it were located outside of state. U.S. Const. art. 1, § 8, cl. 3; 42 U.S.C.A. § 1983; Cal. Gov't Code § 6254.21(c).

1 Cases that cite this headnote

[36] **Commerce** Telecommunications and internet

Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other states, for purposes of the dormant Commerce Clause. U.S. Const. art. 1, § 8, cl. 3.

[37] **Telecommunications** Persons and entities liable; immunity

Communications Decency Act (CDA) precludes liability that treats a website as the publisher or speaker of information users provide on the website; in general, CDA protects websites from liability for material posted on the website by someone else. Communications Act of 1934 § 230, 47 U.S.C.A. § 230.

[38] **Telecommunications** Persons and entities liable; immunity

Immunity under the Communications Decency Act (CDA) applies when (1) the defendant is a provider or user of an interactive computer service; (2) the cause of action treats the defendant as a publisher or speaker of information; and (3) the information at issue is provided by another information content provider. Communications Act of 1934 § 230, 47 U.S.C.A. § 230.

[39] **Telecommunications** Persons and entities liable; immunity

Counsel for California state legislature did not violate purported immunity of operator of online forum for firearms issues for content created on website by third parties under the Communications Decency Act (CDA), when counsel demanded operator take down posting by third party user of forum that listed names and home addresses of California state legislators who voted in favor of gun control measures; takedown letter was not a cause of action, and only liability operator faced was a potential lawsuit and attorney's fees and costs if he failed to comply with request. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1); Cal. Gov't Code § 6254.21(c).

[40] **Telecommunications** Damages and other relief

California statute that prohibited posting or displaying online home addresses and telephone numbers of certain government officials was likely to cause irreparable harm to writer of political blog and operator of online forum for discussion of issues related to firearms, supporting grant of plaintiffs' motion for preliminary injunction to enjoin enforcement of statute against them, in action challenging statute as violative of the First Amendment and the Commerce Clause. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

[41] **Telecommunications** Damages and other relief

Preliminary injunction prohibiting enforcement of California statute that prohibited posting or displaying online home addresses and telephone numbers of certain government officials against writer of political blog and operator of online

forum for discussion of issues related to firearms was in the public interest, supporting issuance of injunction in action challenging statute as violative of the First Amendment and the Commerce Clause, where ongoing enforcement of the potentially unconstitutional statute would have infringed right to freedom of expression of plaintiffs and other members of the public. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 1; Cal. Gov't Code § 6254.21(c).

West Codenotes

Validity Called into Doubt
Cal. Gov't Code § 6254.21(c)

Attorneys and Law Firms

***1003** Bradley A. Benbrook, Stephen M. Duvernay, Benbrook Law Group, Sacramento, CA, Eugene Volokh, UCLA School of Law, Los Angeles, CA, for Plaintiffs.

Fredric D. Woocher, Jenna Lauter Miara, Strumwasser & Woocher LLP, Los Angeles, CA, for Defendant.

MEMORANDUM DECISION AND ORDER RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Doc. 19)

Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE

I. INTRODUCTION

Plaintiffs Doe Publius[1] and Derek Hoskins bring this civil rights case under 42 U.S.C. § 1983 ("§ 1983"), challenging California Government Code § 6254.21(c) ("§ 6254.21(c)") under the First Amendment, the Commerce Clause, and 47 U.S.C. § 230 ("§ 230"). Plaintiffs move for a preliminary injunction that prevents Defendant Diane F. Boyer–Vine, Legislative Counsel for the Office of Legislative Counsel of California ("the Office"), from enforcing § 6254.21(c) against them. *See* Doc. 19–1 at 26.

The Court took the matter under submission on the papers pursuant to Local Rule 230(g). Doc. 23. For the following reasons, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2016, California Governor Jerry Brown signed several gun control bills into law. Doc. 12, First Amended Complaint ("FAC"), at ¶ 15. One of those bills established a database tracking all ammunition purchases in California. *See* Cal. Penal Code §§ 30352, 30369. The database includes the driver's license information, ***1004** residential address and telephone number, and date of birth for anyone who purchases or transfers ammunition in California. *See id.*

Publius maintains a political blog under the name, "The Real Write Winger." FAC at ¶ 15. On July 5, 2016, in response to the California legislature's gun control legislation, he posted the following blog entry, titled "Tyrants to be registered with California gun owners":

> If you're a gun owner in California, the government knows where you live. With the recent anti gun, anti Liberty bills passed by the legisexuals in the State Capitol and signed into law by our senile communist governor, isn't it about time to register these tyrants with gun owners?
>
> Compiled below is the names, home addresses, and home phone numbers of all the legislators who decided to make you a criminal if you don't abide by their dictates. "Isn't that dangerous, what if something bad happens to them by making that information public?" First, all this information was already public; it's just now in one convenient location. Second, it's no more dangerous than, say, these tyrants making it possible for free men and women to have government guns pointed at them while they're hauled away to jail and prosecuted for the crime of exercising their rights and Liberty.
>
> These tyrants are no longer going to be insulated from us. They used their power we entrusted them with to exercise violence against us if we don't give up our rights and Liberty. This common sense tyrant registration addresses this public safety hazard by giving the public the knowledge of who and where these tyrants are in case they wish to use their power for violence again.
>
> So below is the current tyrant registry. These are the people who voted to send you to prison if you exercise your rights and liberties. This will be a constantly updated list

> depending on future votes, and if you see a missing address or one that needs updating, please feel free to contact me. And please share this with every California gun owner you know.
>
> To be fair, the only way for a tyrant to have their name removed from the tyrant registry is to pass laws which repeal the laws that got them added to the list, or upon the tyrant's death. Otherwise, it is a permanent list, even after the tyrant leaves office. The people will retain this information and have access to it indefinitely.

FAC at ¶ 17. Through searching public records for free on zabasearch.com[2], Publius compiled the names, home addresses, and phone numbers of 40 California legislature members who had voted in favor of the gun control measures. *Id.* at ¶¶ 17–18. He then posted that information on his blog. *Id.* at ¶ 17.

In the days that followed, several legislators received threatening phone calls and social media messages that appeared to have been prompted by Publius's blog entry. Doc. 21, Declaration of Frederic ***1005** Woocher ("Woocher Decl."), at ¶ 2. Specifically,

> there were reports from at least four different State Senators that either they or one of their family members had received a phone call at their residence from an unidentified male speaker saying, "I know your address and don't you wish you knew who I am?" One of the calls was received by the step-son of a Senator who was alone in the home while the Senator and his wife were away. At least two other Senators had reported receiving (and forwarded to the [California Senate] Sergeant-at-Arms) threatening social media messages; one warned: "You have no right to pass laws to take my constitutional rights away. (2nd & 1st amendments) Let alone pass a bill that makes you exempt from the very same laws. I've have [sic] shared your home address in the Internet. The People will be acting on this."

Id.

The Senate Sergeant-at-Arms sent the Office "a request to seek the removal of the legislators' home addresses from the internet pursuant to section 6254.21(c)." Doc. 20 at 13. In response, on July 8, 2016, Deputy Legislative Counsel Kathryn Londenberg sent a written demand to WordPress.com, who hosted Plaintiff's blog. FAC at ¶ 19. The demand stated:

> To whom it may concern:
>
> My office represents the California State Legislature. It has come to our attention that the home addresses of 14 Senators and 26 Assembly Members have been publically posted on an Internet Web site hosted by you without the permission of these elected officials. Specifically, the user on your platform by the name of "therealwritewinger" posted the home addresses of these elected officials on his or her Web site....
>
> This letter constitutes a written demand under subdivision (c) of Section 6254.21 of the Government Code that you remove these home addresses from public display on that Web site, and to take steps to ensure that these home addresses are not reposted on that Web site, a subsidiary Web site, or any other Web site maintained or administered by WordPress.com or over which WordPress.com exercises control. Publicly displaying elected officials' home addresses on the Internet represents a grave risk to the safety of these elected officials.
>
> On the "therealwritewinger" blog site, the user describes the listed legislators as "tyrants," encourages readers to share the legislators' home addresses with other gun owners, and threatens that the home addresses will not be removed unless the legislator repeals specified gun laws or "upon the tyrant's death." The Senators and Assembly Members whose home addresses are listed on this Web site fear that the public display of their addresses on the Internet will subject them to threats and acts of violence at their homes.
>
> To comply with the law, please remove the home addresses of these elected officials from your Web site no later than 48 hours after your receipt of this letter (cl. (i), subpara. (D), para. (1), subd. (c), Sec. 6254.21, Gov. C.). You are also required to continue to ensure that this information is not reposted on that Web site, any subsidiary Web site, or any other Web site maintained by you (subpara. (D), para. (1), subd. (c), Sec. 6254.21, Gov. C.).
>
> .... If these home addresses are not removed from this Web site in a timely manner, we reserve the right to file an action seeking injunctive relief, as well as associated court costs and attorney's ***1006** fees (para. (2), subd. (c), Sec. 6254.21, Gov. C.).

Id. WordPress immediately removed Publius's entire blog entry. *Id.* at ¶ 20. Publius requested a copy of the demand from WordPress. Doc. 12–2 at 1. WordPress forwarded the letter, explaining that "[u]nder subdivision (c) of Section 6254.21 of the Government Code, an authorized representative from the

state of California ha[d] demanded that we disable" Publius's blog entry. *Id.*

Hoskins, a resident of Massachusetts, *id.* at ¶ 13[3] owns and moderates the website Northeastshooters.com, "a popular New England online forum for discussing firearms issues and shooting sports activities." *Id.* at ¶ 21. On July 11, 2016, Northeastshooters.com users began a discussion about the Legislative Counsel's takedown demand to WordPress concerning Publius's blog entry. *Id.* at ¶ 22. One commenter, under the name "headednorth," reposted Publius's compiled list of names, addresses, and home addresses of the California legislators. *Id.* at ¶ 23. Legislative Counsel Londenberg immediately emailed Hoskins, noted that headednorth had reposted the legislators' personal information removed from Publius's blog on Northeastshooters.com, and demanded that Hoskins remove it immediately via a takedown demand that was "materially identical" to the one sent to WordPress. *Id.* at ¶ 24. Hoskins complied. *Id.* at ¶ 5.

Plaintiffs seek a declaratory judgment from the Court that § 6254.21(c) violates (1) the First Amendment both facially and as applied to both of them; (2) the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, as applied to Hoskins's out-of-state speech; and (3) § 230 as to Hoskins and other computer service providers. FAC at 16. Plaintiffs currently seek a preliminary injunction on these grounds, and ask the Court to enjoin Defendant from "enforcing or applying" § 6254.21(c) against them. Doc. 19 at 2. Defendant argues, among other things, that: (1) Plaintiffs lack standing; (2) Plaintiffs fail to state a claim under § 1983; and (3) the statute is entirely lawful. Doc. 20 at 8.

III. STANDARD OF DECISION

[1] **[2]** **[3]** To secure injunctive relief prior to a full adjudication on the merits, a plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22, 129 S.Ct. 365. The Ninth Circuit follows a "sliding scale" approach to preliminary injunctions. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at 1131–32. For example, if the moving party is unable to establish a likelihood of success on the merits, preliminary injunctive relief may still be proper if the party can show that (1) there are at least "serious questions" going to the merits; (2) the balance of the hardships tips "sharply" in ***1007** its favor; and (3) the other factors listed in *Winter* (*i.e.*, irreparable harm and in the public interest) are satisfied. *Id.* at 1135.

IV. ANALYSIS

A. Plaintiffs have standing

1. Standing principles

[4] **[5]** **[6]** Standing is a judicially created doctrine that is an essential part of the case-or-controversy requirement of Article III. *Pritikin v. Dept. of Energy*, 254 F.3d 791, 796 (9th Cir. 2001). "To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The doctrine of standing "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155–56, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002).

[7] **[8]** Generally, to have standing, a plaintiff must show three elements.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

> Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations and quotations omitted). First Amendment cases, however, "present unique standing considerations." *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences" *Id.* (citations omitted). "[A]s the Supreme Court has recognized, a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Id.* Accordingly, "the Supreme Court has dispensed with rigid standing requirements [in First Amendment cases] and recognized 'self-censorship' as a harm that can be realized even without an actual prosecution." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010).[4] "[W]here a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Id.* at 1001 (quotation ***1008** marks omitted). Thus, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000).

[9] First Amendment challenges may be brought as "facial" or "as-applied" challenges. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006). The Ninth Circuit succinctly described the challenges as follows:

> Facial constitutional challenges come in two varieties: First, a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance is unconstitutionally vague or ... impermissibly restricts a protected activity. Second, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court. The former sort of challenge ... may be paired with the more common as-applied challenge, where a plaintiff argues that the law is unconstitutional as applied to his own speech or expressive conduct.

Id. at 1033–34 (citations and quotation marks omitted). "It is within this framework that [Plaintiffs] ... must establish standing." *Id.* at 1034.

2. Analysis

Defendant contends Plaintiffs cannot demonstrate that Defendant caused them to suffer any injury that could be favorably addressed by the Court. As to Publius, the thrust of Defendant's position is that it is "quite plausible, if not probable" that WordPress removed Publius's blog entry on its own accord because it violated WordPress's terms of service and, in any event, Plaintiffs have not presented any evidence that WordPress would permit the blog entry even if Defendant never invoked § 6254.21(c) or if the Court found the statute unlawful. *See* Doc. 20 at 18–19. As to Hoskins, Defendant concedes (and the Court agrees) that "there is no issue regarding the causation and redressability prongs of the constitutional standing requirements," but argues that Hoskins did not suffer any injury. *Id.* at 19. Instead, Defendants argue that only the user of his site, "headednorth," whose post Hoskins removed, suffered any asserted injury. *Id.*

[10] **[11]** That Hoskins did not produce the content contained in headednorth's removed post does not mean he did not and cannot suffer a First Amendment injury. As the owner of Northeastshooters.com, Hoskins has a First Amendment right to distribute and facilitate protected speech on the site. *See Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) (striking down statute imposing strict liability on a seller of obscene books as violating First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (striking down statute prohibiting movie producer's distribution of movie); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59–61, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (holding book distributors had standing to challenge law restricting the sale of certain books). The mere threat of prosecution under a challenged statute that results in actual self-censorship constitutes "a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Human Life*, 624 F.3d at 1001. Defendant's takedown demand letter threatening legal action against Hoskins if he did not immediately comply and remove headednorth's post, coupled with Hoskins's compliance with the demand, constitutes a cognizable constitutional injury. *See id.*;*Bayless*, 320 F.3d at 1006 (finding that plaintiff, who was "forced to modify its speech and behavior to comply with the ***1009** statute," had suffered sufficient injury even though it had "neither violated

the statute nor been subject to penalties for doing so").[5] The Court therefore finds that Hoskins has standing to challenge § 6254.21(c) both on its face and as-applied to him.

[12] Defendant does not dispute that Publius suffered a constitutional injury, but disputes whether the Office caused his asserted injury and whether the Court could redress it favorably. Defendant essentially argues that there is no evidence that WordPress removed Publius's blog post as a result of the Office's demand letter, and that it is plausible that WordPress did so on its own accord because the post violated WordPress's terms of service. Thus, Defendant claims, it is plausible that WordPress would remove the post regardless of the Court's decision.

The only evidence concerning WordPress's motivation in removing Publius's blog entry does not support Defendant's position. As explained above, WordPress removed the blog post immediately after the Office sent the takedown demand. Publius, somehow cognizant of the Office's demand, requested a copy of it. WordPress forwarded the Office's demand to Publius, and explained that "[u]nder subdivision (c) of Section 6254.21 of the Government Code, an authorized representative from the state of California has demanded that we disable [your blog entry]." Doc. 19–2 at 13. WordPress provided no other explanation for its removing the blog entry. On the current record, Defendant's assertion that WordPress removed the entry because it violated the site's terms of service is entirely speculative, not "quite plausible, if not probable." Doc. 20 at 18. Likewise, because the only evidence (direct and circumstantial) submitted suggests that WordPress removed the blog post because of the Office's takedown demand, it is plausible that it would not have been removed but for the demand.

Further, Publius does not simply claim his asserted First Amendment right is to post as he sees fit on WordPress alone, as Defendant suggests. Publius challenges § 6254.21(c)'s prohibition on his ability to repost the legislators' personal information anywhere online—or "through any other medium." § 6254.21(c)(1)(D)(ii). Although this case does not present the Court with any jurisdiction to control the content on WordPress, a private entity, the Court does have the authority (and obligation) to determine whether legislation violates the First Amendment. The Court's finding that § 6254.21(c) does so would redress Publius's asserted injury. Accordingly, the Court finds that Publius has standing to challenge § 6254.21(c).

***1010 B. Defendant's conduct was under color of law**

[13] **[14]** "To state a claim for relief under section 1983, the Plaintiffs must plead two essential elements: 1) that the Defendant[ ] acted under color of state law; and 2) that the Defendant[ ] caused them to be deprived of a right secured by the Constitution and laws of the United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997).[6] Defendant asserts Plaintiffs fail to state a claim under § 1983 because the Office's sending the takedown demand letters was not "under color of law" and, consequently, the Court lacks jurisdiction over this case. Doc. 20 at 20–21; *West v. Atkins*, 487 U.S. 42, 46, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (holding that acting under color of state law is "a jurisdictional requisite for a § 1983 action"). Distilled, Defendant argues that the Office's sending the takedown demand letters to WordPress and Hoskins on behalf of the California legislators was not state action because the legislators were acting as private citizens who made private decisions to threaten private lawsuits if their personal information was not removed. Doc. 20 at 20.

[15] **[16]** "An individual acts under color of state law when he or she exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015) (citations and quotation marks omitted). "This test is generally satisfied when a state employee ... wrongs someone while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* (citations and quotation marks omitted).

Defendant relies primarily on *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001), and *Laxalt v. McClatchy*, 622 F.Supp. 737 (D. Nev. 1985), for her position that the Office's conduct was not state action. In *Gritchen*, the plaintiff (Gritchen) filed a formal complaint against a police officer, Collier, claiming that Collier "had been discourteous, argumentative, and that his breath smelled like alcohol." 254 F.3d at 809. After the police department "found no misconduct," Collier, through his attorney, sent Gritchen a letter threatening to bring suit for defamation under California Civil Code § 47.5, which permits peace officers to bring defamation actions against someone who files a false complaint. *Id.* at 809–10. Gritchen then filed a § 1983 suit alleging, among other things, that § 47.5 violates the First Amendment. *Id.* at 810. The Ninth Circuit held that Collier's conduct—threatening to sue Gritchen for defamation under § 47.5—was not "under color of state law" because

he acted "entirely by himself, without assistance from state officials." *Id.* at 813–14.

In *Laxalt*, the plaintiff (Laxalt), a United States Senator, brought suit against numerous newspapers and their staff for their allegedly defamatory articles. 622 F.Supp. at 739. The defendants counterclaimed against Laxalt under § 1983, arguing that the Senator had violated their ***1011** First Amendment rights by using his office to chill their speech. *Id.* at 746. The basis for their claims was that, shortly after the defendants published their articles, Laxalt sent them a letter on Senate stationary with his signature demanding the sources for the articles and that they be retracted. *Id.* at 747. The defendants construed the letter as a threat from Laxalt that he would use his office "to retaliate against them if they did not comply." *Id.* The court rejected the defendants' claim, finding that Laxalt "ha[d] proceeded, as any other private citizen would have, to clear his name ... and to recover damages for an alleged libel." *Id.* at 748.

Gritchen and *Laxalt* are easily distinguishable from this case. In both of those cases, the government officials acted individually as wholly private citizens without the aid of any other government official. That is not what happened here. At the legislators' request, the Office sent the takedown demands to WordPress and Hoskins, which explicitly stated that the Office "represents the California State Legislature." The letter concluded: "If these home addresses are not removed from this Web site in a timely manner, *we reserve* the right to file an action seeking injunctive relief, as well as associated court costs and attorney's fees." FAC at ¶ 19 (Emphasis added.). Unlike *Gritchen* and *Laxalt*, this case does not involve a state employee's private attorney threatening legal action on behalf of one individual. The Office informed WordPress and Hoskins that if they did not comply, the Office—on behalf of the legislators—would consider legal action, including attempting to recover the Office's statutorily available fees and costs. The Office, a government entity, therefore provided legal services on behalf of 40 state legislators *at their request* and made that clear to WordPress and Hoskins when doing so. In the Court's view, it is difficult to conceive how this could not constitute state action. *See Frey*, 789 F.3d at 1036.

C. Plaintiffs' First Amendment challenge

Plaintiffs contend § 6254.21(c) is a content-based restriction on constitutionally protected speech that violates the First Amendment on its face and as applied to them. *See* Doc. 19–1 at 15. Defendant does not dispute the statute is content-based, but argues it is nonetheless lawful under the First Amendment. *See* Doc. 20 at 15.

[17] **[18]** As to Plaintiffs' facial challenge, they contend § 6254.21(c) is impermissibly overbroad. "[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). "Technically, the overbreadth doctrine does not apply if the parties challenging the statute engage in the allegedly protected expression," as Plaintiffs did here, because the doctrine is used "to overcome what would otherwise be a plaintiff's lack of standing." *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997). "A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights," but "[t]he First Amendment overbreadth doctrine carves out a narrow exception to that general rule." *United States v. Stevens*, 559 U.S. 460, 483, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (Alito, J., dissenting) (citations omitted). Plaintiffs, however, may still "seek, as a remedy, the facial invalidation of [a statute] if it is an overly broad regulation that create[s] an unacceptable risk ***1012** of the suppression of ideas." *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 790 n.9 (9th Cir. 2006) (citation and quotation marks omitted).

But "because a successful overbreadth challenge renders a statute unconstitutional and, therefore, invalid in *all* its applications ... the doctrine is employed sparingly and only as a last resort." *United States v. Alvarez*, 617 F.3d 1198, 1236 (9th Cir. 2010) (emphasis in original) (citations and quotation marks omitted), *aff'd*, 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012). Accordingly, when a litigant brings both an as-applied and facial challenge, the Supreme Court has strongly suggested that courts should address the facial challenge only if the as-applied challenge fails. *See Serafine v. Branaman*, 810 F.3d 354, 363 n.19 (5th Cir. 2016) (collecting cases). The Court therefore turns first to Plaintiffs' as-applied challenge.

1. Background on § 6254.12(c)

Section § 6254.21(c)(1)(A) prohibits anyone from posting or displaying the home address or telephone number of certain government officials, *see* § 6254.21(f), if the official makes "a written demand" that his or her personal information not be displayed. The written demand must "include a statement

describing a threat or fear for the safety of that official or of any person residing at the official's home address." § 6254.21(c)(1)(B). A written demand is "effective for four years." § 6254.21(c)(1)(C). After receiving such a written demand, the recipient must remove the official's home address and/or phone number from the internet within 48 hours, and may not "transfer" it to anyone through any medium. § 6254.21(c)(1)(D)(i)–(ii).

"An official whose home address or telephone number is made public as a result of a violation of [§ 6254.21(c)(1)] may bring an action seeking injunctive or declarative relief." § 6254.21(c)(2). "If a court finds that a violation has occurred, it may grant injunctive or declarative relief and shall award the official court costs and reasonable attorney's fees." *Id.*

Briefly summarized, if someone publishes the home address or telephone number of certain officials on the internet, those officials may demand that it be removed. The official must make the demand in writing, and must describe the threat or fear for safety the official feels personally or for his or her family who reside at the official's home address. Anyone who receives such a demand must remove it within 48 hours, must takes steps to ensure it is not reposted, and may not communicate the information to anyone through any medium. If the official's home address or telephone number "is made public" because someone posted the information online without the official's consent, the official may seek a court order to have the information removed from the internet. If the court finds that the individual who posted the information online failed to comply timely with the official's demand, then the court must award attorney's fees to the official, regardless of the relief the court orders.[7]

2. Section 6254.21(c) is content-based

Section 6254.21(c)(1)(A) states, "[n]o person, business, or association shall publicly post or publicly display on the Internet the home address or telephone number of any elected or appointed [California] official" if the official makes a written demand that his or her personal contact information be removed. An enforcing official could not ***1013** determine whether § 6254.21(c)(1) applies to particular speech without determining if (1) the speech contains a home address and/or phone number of (2) a covered official. The statute is therefore content-based on its face: it applies only to speech that contains certain content—the "home address or telephone number of any elected or appointed [California] official." *See Reed v. Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." (citations omitted)); *see also S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (holding that regulations that require officials to examine content of speech to determine whether regulation applies are content-based (collecting cases)).

3. Analysis

[19] "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S.Ct. at 2226. This requires the government to show that the law is "the least restrictive means to further a compelling interest." *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998) (citation omitted). Because § 6254.21(c)(1) is content-based, Defendant must establish that, when applied to Plaintiffs' speech, the statute is narrowly tailored to a compelling state interest. *See Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 974 (9th Cir. 2009), *rev'd on other grounds*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236.

[20] "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.' " *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979)). "More specifically, [the Supreme Court] has repeatedly held that 'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need ... of the highest order.' " *Id.* at 527–28, 121 S.Ct. 1753 (quoting *Daily Mail*, 443 U.S. at 103, 99 S.Ct. 2667).[8]

a. The legislators' personal information is a matter of public significance

[21] Defendant suggests, in a footnote, that it is "questionable" whether the legislators' personal information is "a matter of public significance." Doc. 20 at 23 n.12. For decades, the Supreme Court has broadly held that "[p]ublic records by their very nature are of interest to those connected with the administration of government, and a public benefit

is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).[9] Thus, several ***1014** cases demonstrate that the First Amendment protects the right to publish highly personal information of private individuals, such as the names of rape victims and juveniles involved in legal proceedings, when they relate to matters of public concern.[10]

Viewed in isolation, the legislators' home address and phone numbers may not, in and of themselves, constitute "a matter of public significance." But when considered in the specific context of Plaintiffs' speech—political protest, which is "core political speech," with First Amendment protection "at its zenith," *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186–87, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999)—the information takes on new meaning. Publius searched publicly available documents and compiled, and headednorth reposted, the legislators' personal information specifically in response to legislation that required the government to maintain a database with the personal information of individuals who buy firearms and ammunition in California. When viewed in that context of political speech, the legislators' personal information becomes a matter of public concern. *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community" (citation and quotation marks omitted)); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (holding injunction on dispersing pamphlets with realtor's home phone number and urging recipients to call him to urge certain political stance was prior restraint that violated First Amendment). Four cases on which Plaintiffs primarily rely support this proposition well: *Florida Star*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443; *Brayshaw v. City of Tallahassee*, 709 F.Supp.2d 1244 (N.D. Fla. 2010); *Sheehan v. Gregoire*, 272 F.Supp.2d 1135 (W.D. Wash. 2003); and *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010).

Florida Star involved a challenge to a Florida statute ("§ 794.03") that made "it unlawful to 'print, publish, or broadcast ... in any instrument of mass communication' the name of the victim of a sexual offense." 491 U.S. at 524, 109 S.Ct. 2603. A sheriff's department investigating a reported rape "prepared a report, which identified [the victim] by her full name, and placed it in the Department's press room," which was open to the public. *Id.* A reporter for *The Florida Star* "copied the press report verbatim, including [the victim's] full name," and subsequently published her full name in an article about the reported crime and the department's investigation of it. *Id.* at 528, 109 S.Ct. 2603. The victim successfully sued *The Florida Star* under § 794.03 for publishing her name.

***1015** The Supreme Court reversed, and held the First Amendment prohibited imposing liability on *The Florida Star* for publishing the victim's name under the circumstances of the case. *Id.* at 537, 109 S.Ct. 2603. The Court held that "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 536–37, 109 S.Ct. 2603. The Court therefore concluded that, under its precedent, the article concerned "a matter of public significance." *See id.* at 536–37, 109 S.Ct. 2603 ("*Cox Broadcasting*, *supra* (article identifying victim of rape-murder); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (article identifying juvenile alleged to have committed murder); *Daily Mail*, *supra* (same); *cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (article identifying judges whose conduct was being investigated).").

In *Brayshaw*, the plaintiff truthfully posted the personal information of a peace officer, including her personal address, phone number, and email, all of which was publicly available. 709 F.Supp.2d at 1247. The plaintiff was charged with a misdemeanor for violating a Florida statute that provided:

> Any person who shall maliciously, with intent to obstruct the due execution of the law or with the intent to intimidate, hinder, or interrupt any law enforcement officer in the legal performance of his or her duties, publish or disseminate the residence address or telephone number of any law enforcement officer while designating the officer as such, without authorization of the agency which employs the officer, shall be guilty of a misdemeanor of the first degree.

Id. at 1247.

The court rather summarily rejected the government's argument that the plaintiff's speech was unprotected because it was not a matter of public significance. *Id.* at 1249. The court found that the issue of police accountability was "of legitimate public interest," and the "publication of truthful personal information about police officers is linked" to that interest "through aiding in achieving service of process, researching criminal history of officers, organizing lawful pickets, and

other peaceful and lawful forms of civic involvement that publicize the issue." *Id.*

Sheehan involved an overbreadth challenge to a Washington statute that provided:

> A person or organization shall not, with the intent to harm or intimidate, sell, trade, give, publish, distribute, or otherwise release the residential address, residential telephone number, birthdate, or social security number of any law enforcement-related, corrections officer-related, or court-related employee or volunteer, or someone with a similar name, and categorize them as such, without the express written permission of the employee or volunteer unless specifically exempted by law or court order.

272 F.Supp.2d at 1139. The plaintiff removed from his website the personal information of numerous officials covered by the statute, then challenged it as overbroad. *Id.* As in *Brayshaw*, the court found the officials' personal information to be a matter of public concern because it was related to the issue of police accountability and could be relevant "to achieve service of process, research criminal history, and to 'organize an informational picket [at individual officers' homes] or other lawful ***1016** forms of civic involvement to force accountability.' " *Id.* at 1139, 1139 n.2.

Ostergren, 615 F.3d 263, a case Plaintiffs characterize as "closely analogous" to this one, is particularly illustrative here. In that case, the plaintiff brought an as-applied challenge to a Virginia statute that prohibited "[i]ntentionally communicat[ing] another individual's social security number ("SSN") to the general public." *Id.* at 266. "Calling attention to Virginia's practice of placing land records on the Internet without first redacting SSNs, [the plaintiff] displayed copies of Virginia land records containing unredacted SSNs on her website." *Id.* By doing so, she sought "to publicize her message that governments are mishandling SSNs and generate pressure for reform." *Id.* at 269 (footnote omitted). The information the plaintiff posted on her website was publicly available for a nominal fee, but her website made the public records "more accessible to the public than they [we]re through Virginia's [records] system." *Id.*

Before she could be prosecuted for posting the SSNs on her website, the plaintiff challenged the Virginia statute as applied to her website on First Amendment grounds. *Id.* As a threshold matter, the Fourth Circuit rejected the government's position that unredacted SSNs are entirely unprotected speech under the First Amendment. *Id.* at 271. The court reasoned that, in the plaintiff's case, the unredacted SSNs "are integral to her message," and, in fact, "they *are* her message" because her "[d]isplaying them proves Virginia's failure to safeguard private information and powerfully demonstrates why Virginia citizens should be concerned." *Id.* (emphasis in original and footnote omitted). Although the plaintiff could have redacted the SSNs, the First Amendment protected the plaintiff's "freedom to decide how her message should be communicated." *Id.* at 271 n.8. The Fourth Circuit therefore concluded that the plaintiff's speech "plainly concern[ed] a matter of public significance ... because displaying the contents of public records and criticizing Virginia's release of private information convey political messages that concern the public, *see Cox Broad.*, 420 U.S. at 495, 95 S.Ct. 1029, ('Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.')." *Id.* at 276 (citation omitted).

Florida Star, *Brayshaw*, *Sheehan*, and *Ostergren* thus show that highly personal information has public significance when inextricably associated with political speech. That principle applies here. Plaintiffs oppose, among other things, California legislation that requires the creation and maintenance of a database run by the California Department of Justice that compiles the residential address and telephone number of anyone who purchases or transfers firearms ammunition in California. *See* Cal. Penal Code § 30352(a)(6). Plaintiffs' means of protesting the legislation is by compiling their own "database" of the legislators' residential addresses and phone numbers. Like the plaintiff in *Ostergren*, that information is not just "integral to [Plaintiffs'] message," it *is* their message. 615 F.3d at 271.

At its core, Plaintiffs' speech is a form of political protest.[11] The Court therefore finds that the legislators' home address and telephone number touch on matters of public concern in the context of Plaintiffs' speech.

***1017 b. § 6254.21(c) is not narrowly tailored**

[22] **[23]** There is no dispute that Plaintiffs lawfully obtained and truthfully published information that was readily available online. When lawfully obtained, the truthful publication of that information falls within the First Amendment's ambit. *See Florida Star*, 491 U.S. at 524, 109 S.Ct. 2603; *see also Bartnicki*, 532 U.S. at 516, 121 S.Ct. 1753 (holding First Amendment protected radio

commentator's playing anonymously and illegally wiretapped recording on air). And as *Florida Star*, *Sheehan*, *Brayshaw*, and *Ostergren* demonstrate, when an individual's personal information is relevant to issues of public significance, its truthful dissemination—particularly when already in the public domain and lawfully obtained—triggers exacting First Amendment scrutiny under Supreme Court precedent.[12] *See Florida Star*, 491 U.S. at 533, 109 S.Ct. 2603. Specifically, if an individual publishes lawfully obtained, "truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need ... of the highest order." *Daily Mail*, 443 U.S. at 103, 99 S.Ct. 2667. Any law that seeks to meet that need must be narrowly tailored. *Florida Star*, 491 U.S. at 540–41, 109 S.Ct. 2603.

The Court in *Florida Star* seemingly assumed without deciding that protecting a rape victim's identity is a state interest "of the highest order," but held the challenged Florida statute was not narrowly tailored to that interest for three reasons. *See Florida Star*, 491 U.S. at 538, 541, 109 S.Ct. 2603; *see also id.* at 550, 109 S.Ct. 2603 (White, J., dissenting). First, the state had released the victim's name, though inadvertently, in a publicly available document. *Id.* at 538, 109 S.Ct. 2603. The Court found that when "the government has failed to police itself in disseminating information, it is clear ... that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity," reasoning that the government's doing so "can only convey to recipients that the government considered dissemination lawful, and indeed expected the recipients to disseminate the information further." *Id.* at 538–39, 109 S.Ct. 2603.

Second, the Florida statute imposed a "negligence *per se* standard" in that it did not permit "case-by-case findings" concerning liability, but instead imposed it "automatically." *Id.* at 539, 109 S.Ct. 2603. Liability followed publication regardless of the publisher's intent, and "regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern-because, perhaps, questions have arisen whether the victim fabricated an assault ***1018** by a particular person." *Id.* The Court therefore concluded the statute imposed an impermissible "categorical prohibition" even when "important First Amendment interests are at stake." *Id.*

Third, the Florida statute was facially underinclusive. *Id.* at 540, 109 S.Ct. 2603. Although it prohibited publication in "instrument[s] of mass communication," it did not prohibit the same information from being published and distributed through other means. *Id.* The Court noted that "[a]n individual who maliciously spreads word of the identity of a rape victim is thus not covered [by the statute], despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers." *Id.* For these reasons, the Court held that *The Florida Star* could not be held liable under § 794.03 because the statute was not narrowly tailored under the facts of the case. *Id.* at 541, 109 S.Ct. 2603.

In *Ostergren*, the court assumed without deciding that Virginia's asserted state interest was "of the highest order" because, even if it were, the statute was not narrowly tailored to that interest in the plaintiff's case. *Id.* at 280. The court succinctly reasoned that the statute could not be narrowly tailored to protecting individuals' privacy when Virginia made the records publicly available online and the plaintiff obtained the records through Virginia's online records system. *Id.* at 286. The court noted that, at the very least, Virginia could have redacted the SSNs before making the documents accessible to the public. *Id.* Accordingly, the Fourth Circuit held that the Virginia statute violated the First Amendment as applied to the plaintiff. *Id.* at 287.

The courts in *Brayshaw* and *Sheehan* likewise found the contested laws were not narrowly tailored without much difficulty. In *Brayshaw*, the court found that the challenged statute was both overinclusive and underinclusive. 709 F.Supp.2d at 1249. The court reasoned:

> It is overinclusive in proscribing speech that is not a true threat. It is underinclusive both in its failure to prohibit dissemination of the same information by other entities to third-parties who do intend to harm or intimidate officers, and in its failure to punish parties who actually wish to harm or intimidate police officers and obtain the officer's identifying information.

Id. at 1249–50. Further, the court found that "punishing Plaintiff for his dissemination of information which is already publicly available is relatively unlikely to advance the interests claimed by the State." *Id.* (citing *Florida Star*, 491 U.S. at 535, 109 S.Ct. 2603 ("punishing the press for its dissemination of information which is already publicly

available is relatively unlikely to advance the interests in the service of which the State seeks to act")).

The court in *Sheehan* used largely the same reasoning. *See* 272 F.Supp.2d at 1145. Additionally, the court observed:

> [W]hen the government itself injects personal identifying information into the public domain, it cannot credibly take the contradictory position that one who compiles and communicates that information offends a compelling state interest. Further, defendants can demonstrate no compelling interest because the statute hinges solely on the subjective intent of the speaker. Any third party wishing to actually harm or intimidate these individuals may freely acquire the personal identifying information from myriad public and private sources, including for-profit commercial entities, without entering the scope of the statute.

Id. at 1147 (footnotes omitted).

[24] The Court assumes that the interest underlying § 6254.21(c)—protecting ***1019** the personal safety of covered officials and their families—is a state interest of the highest order. But the Court need not decide whether it is because the statute is not narrowly tailored to further that interest. The logic of *Florida Star*, *Ostergren*, *Brayshaw*, and *Sheehan* applies here, and shows that there are a number of reasons why § 6254.21(c) is not narrowly tailored.

First, § 6254.21(c) makes no attempt to prohibit or prevent true threats. Under the statute, a covered official need only subjectively fear for his or her safety (or that of his or her family) due to his or her home address or telephone number being online. § 6254.21(c)(1). To make a compliant request that the information be removed, the official need only send the publisher of the information a "statement describing a threat or fear for the safety of that official or of any person residing at the official's home address." *Id.* If the official does so, the recipient must comply or face a lawsuit. An official can therefore make an effective takedown demand by informing someone who has posted the official's home address or phone number that doing so has made the official fear for his or her safety. On its face, § 6254.21(c)(1) does not require that the threat be credible or that a third-party review whether the official's request is well-founded. The statute makes no distinction between those who publish a covered official's home address or phone number online for wholly lawful reasons and those who do so for wholly unlawful reasons. So long as an official subjectively feels threatened, the official may make a takedown request under § 6254.21(c)(1). And if the publisher fails to comply with an official's takedown request within 48 hours, then he or she has violated § 6254.21(c)(1), which will entitle the official to bring suit in which attorney's fees would be awarded automatically to the official. *See id.* §§ 6254.21(c)(1)(D)(i), 6254.21(c)(2). This lack of case-by-case oversight and effective *per se* liability suggests that § 6254.21(c) is not narrowly tailored. *See Florida Star*, 491 U.S. at 539, 109 S.Ct. 2603.

Defendant disputes this characterization of the statute. *See* Doc. 20 at 25 n.15. Defendant argues that § 6254.21(c)(2)'s mandatory attorney's fees and costs award does not impose "automatic liability" for two reasons:

> First, of course, no fees are awarded unless the Court has already determined that issuance of an injunction, with the resulting fee award, would not violate the First Amendment. Second, it is well-established that attorney's fee awards under fee-shifting statutes like section 6254.21(c) are considered "costs," not "damages," and are not provided to "punish" the defendant in any way but merely to ensure that the plaintiff will be fully compensated.

Id. (citations omitted). Defendant provides no authority for her first point, and the plain language of the statute contradicts it. On its face, § 6254.21 does not contemplate a First Amendment defense, and no court has found one applicable. (In fact, the Court cannot find any court decision that even mentions the statute.) As the Court interprets the provision, under § 6254.21(c)(2), if a court finds that the defendant has violated § 6254.21(c)(1)—that is, whether the defendant has failed to timely comply with a covered official's appropriate and effective takedown request—then the court *must* award the plaintiff-official attorney's fees and costs, regardless of the whether the court orders injunctive or declaratory relief.

Defendant's second point is a straw man. Regardless of whether attorney's fees are "damages," the imposition of attorney's fees and costs is a form of liability, particularly in the First Amendment context, where even their mere potential may have ***1020** a chilling effect on First Amendment rights. *See, e.g.*, *Dean v. Riser*, 240 F.3d 505, 510 (5th Cir. 2001); *Riddle v. Egensperger*, 266 F.3d 542, 551 (6th Cir. 2001); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) ("would-be critics of official conduct may be deterred from voicing their criticism ... because of doubt whether it can be proved in court *or fear of the expense of having to do so*" (emphasis added)). Defendant does not cite, and the Court cannot find, any authority that suggests First Amendment scrutiny of a content-based statute should be any different simply because

attorney's fees and costs are the only financial relief possible under the statute.

Section § 6254.21(c)(1) is not narrowly tailored for the additional reason that it does not differentiate between acts that "make public" previously private information and those that "make public" information that is already publicly available. There is no dispute that the information Publius compiled and posted, and a member of Hoskins's forum re-posted, was publicly available and readily accessible online. "[P]unishing [Plaintiffs] for [their] dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Florida Star*, 491 U.S. at 535, 109 S.Ct. 2603. When "the government has failed to police itself in disseminating information, it is clear ... that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means" to further the state's interests. *Id.* at 538, 109 S.Ct. 2603. Because the information Plaintiffs published came from freely available public records, § 6252.21(c)(1) is not narrowly tailored to protecting the safety of covered officials and their families. *See id.*; *Ostergren*, 615 F.3d at 286.[13]

[25] Third, § 6254.21(c)(1) is underinclusive. *See Florida Star*, 491 U.S. at 540, 109 S.Ct. 2603 (holding that statute was not narrowly tailored in part because it was underinclusive on its face). A statute is underinclusive when it affects "too little speech," such that there are "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S.Ct. 1656, 1668, 191 L.Ed.2d 570 (2015) (emphasis, quotation marks, and citation omitted). "The Supreme Court has looked skeptically on statutes that exempt certain speech from regulation, where the exempted speech implicates the very same concerns as the regulated speech." *Chaker v. Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005) (citations omitted). In *Florida Star*, for instance, the challenged statute only prohibited the publication of information identifying a rape victim on "an instrument of mass communication." 491 U.S. at 540, 109 S.Ct. 2603. That the statute did not prohibit the same information being spread by other means raised "serious doubts" as to whether the statute was serving the interests it purportedly served.*Id.* at 525, 540, 109 S.Ct. 2603.

Section 6254.21(c)(1) is similarly underinclusive. It proscribes the dissemination of a covered official's home address and phone number only on the internet, regardless of the extent to which it is available ***1021** or disseminated elsewhere.[14] That the statute does not prohibit a major newspaper[15] or television channel from publishing the information, but would potentially prohibit an online blog with a limited audience from doing so, raises serious questions about whether it is serving its intended goals. *See id.* "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 541–42, 109 S.Ct. 2603 (Scalia, J., concurring) (citation and quotation marks omitted).

The Court therefore concludes § 6254.21(c)(1) is not narrowly tailored to serve its underlying interests. In addition, because the statute is content-based, Defendant had to show that it is "the least restrictive means to further a compelling interest." *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (1998) (citation omitted). Defendant has failed to do so. In fact, Defendant made no attempt to explain how § 6254.21 is the least restrictive means to further the statute's goal of protecting covered officials. As noted above, the statute could be less restrictive in that it could proscribe only true threats, or it could require a neutral third-party to determine if the official's fear is objectively sound, or it could permit an objective case-by-case determination for liability instead of permitting a covered official to trigger its protections due to the official's subjective concerns. In summary, the Court finds that Plaintiffs are likely to succeed on their claim that § 6254.21(c)(1) is unconstitutional as applied to them.

D. Hoskins's Commerce Clause challenge[16]

[26] **[27]** Plaintiffs contend that § 6254.21(c) violates the dormant Commerce Clause as applied to Hoskins and out-of-state actors[17] because the statute ***1022** restricts speech that occurs wholly outside California's borders. Doc. 19–1 at 23 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)) ("The 'Commerce Clause ... precludes the application of state statutes to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State").

Defendant counters that the extraterritoriality doctrine articulated in *Healy* does not apply to § 6254.21(c) because the statute does not control prices. Doc. 20 at 26. Defendant argues that, even if the doctrine applies, "[§] 6254.21(c) does not significantly burden interstate commerce." *Id.* at 27. Specifically, Defendant asserts that the statute does not

project any regulatory regimes or affirmative obligations onto Hoskins, but rather "authorizes California public officials to request to have certain specifically identified sensitive personal information removed from a particular post." *Id.* Although Defendant acknowledges that § 6254.21(c) requires Hoskins to remove the information specific in the Office's takedown request or face the possibility of a suit for injunctive and declaratory relief, Defendant argues that § 6254.21(c) does not impose any substantial burden on Hoskins. *Id.* Defendant also contends there is no evidence that § 6254.21(c) conflicts with or is incompatible with New Hampshire or any other State's laws. *Id.*

[28] "[A]s both the means to engage in commerce and the method by which transactions occur, 'the Internet is an instrumentality and channel of interstate commerce,' " *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (quoting *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam)). Thus, "regulation of the Internet impels traditional Commerce Clause considerations." *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 173 (S.D.N.Y. 1997).

[29] "The Commerce Clause of the United States Constitution assigns to Congress the authority '[t]o regulate Commerce with foreign Nations, and among the several States.' " *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (quoting U.S. Const. art. I, § 8, cl. 3). "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336, 109 S.Ct. 2491.

[30] **[31]** **[32]** "Courts have long read a negative implication into the clause, termed the 'dormant Commerce Clause,' that prohibits states from discriminating against interstate commerce." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 846 (9th Cir. 2013). The doctrine "bars state regulations that unduly burden interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (citation omitted). "[A] statute violates the dormant Commerce Clause per se when it directly regulates interstate commerce." *Pharm. Research and Mfrs. of America v. Cty. of Alameda*, 768 F.3d 1037, 1043 (9th Cir. 2014) (quoting *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 949 (9th Cir. 2013)) (internal quotation marks omitted). "Direct regulation occurs when a state law directly affects transactions that take place across state lines or entirely outside of the state's borders." *Id.* (quoting *S.D. Myers, Inc. v. City and Cty. of S.F.*, 253 F.3d 461, 467 (9th Cir. 2001)) (internal quotation marks omitted).

***1023** **[33]** **[34]** Under the extraterritoriality doctrine, any "statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature," *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) ("*RMFU*") (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)), and regardless of "whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336, 109 S.Ct. 2491. To determine whether state legislation violates the dormant Commerce Clause, "[t]he critical inquiry is whether the practical effect of the [legislation] is to control conduct beyond the boundaries of the State." *Id.*

"Although the Ninth Circuit has not reached this issue, courts in several circuits have invalidated state laws regulating the internet" where the statute regulates conduct occurring outside the borders of the state. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 958 (N.D. Cal. 2006) (collecting cases). In contrast, courts have upheld state regulation of the internet where application of the law has been limited to only local conduct, or where "[a] state would enforce the law only against conduct occurring within the state." *Id.* (collecting cases); *see also Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 432–33 (9th Cir. 2014) ("*Agency on Deafness*") (holding that California statute that required captioning of online videos for California viewers did not regulate out-of-state conduct because CNN could create a separate website specific to California users).

[35] Defendant claims that the extraterritoriality doctrine articulated in *Healy* is inapplicable to this case because *Healy* has been limited to its facts, namely, "price control or price affirmation statutes that involve tying the price of ... in-state products to out-of-state prices." Doc. 20 at 26. For support, Defendant cites to *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 669, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003), *Harris*, 729 F.3d at 951, and *RMFU*, 730 F.3d at 1101.

These cases do not support Defendant's position. *Walsh*, *Harris*, and *RMFU* all concerned state laws that regulated in-state conduct which were found not to directly regulate extraterritorial behavior, and thus, *Healy* was inapplicable.

See Walsh, 538 U.S. at 669, 123 S.Ct. 1855 ("the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect"); *Harris*, 729 F.3d at 951 ("Section 25982 applies to both California entities and out-of-state entities and precludes sales within California of products produced by force feeding birds regardless of where the force feeding occurred.")[18]; *RMFU*, 730 F.3d at 1104 ("[California] does not control the production or sale of ***1024** ethanol wholly outside California."). As the Ninth Circuit observed in *RMFU*, "[c]ourts have extended the [extraterritoriality] rule from *Healy* and *Brown–Forman* to cases where the 'price' floor being imposed on another jurisdiction was not monetary but rather a minimum standard of environmental protection." 730 F.3d at 1102.

Sam Francis Foundation, 784 F.3d at 1323–24, and *Agency on Deafness*, 742 F.3d at 432–33, a case Defendant cites (albeit for a different proposition), make clear that extraterritoriality doctrine applies beyond statutes that regulate out-of-state prices. *Sam Francis Foundation* involved a challenge to California's Resale Royalty Act, which required "the payment of royalties to the artist after a sale of fine art whenever 'the seller resides in California *or* the sale takes place in California.' " 784 F.3d at 1323 (emphasis in original). The plaintiff challenged the statute as violating the dormant Commerce Clause because it regulated sales that took place outside California. *Id.* The Ninth Circuit "easily conclude[d]" that the royalty requirement violated the dormant Commerce Clause because it mandated that royalties be paid for sales that had no connection to California. *Id.*

Agency on Deafness involved the California Disabled Person Act ("DPA"), a law having nothing to do with prices or sales of any kind.[19] 742 F.3d at 419. The plaintiffs in that case argued that the defendant's failure to provide closed captioning for its online videos for California viewers violated the DPA, which mandated the captioning. *Id.* The defendant argued the DPA violated the dormant Commerce Clause because it attempted to regulate conduct wholly outside of California. *Id.* at 433. The Ninth Circuit rejected the argument, holding instead that the DPA did not have the practical effect of regulating conduct outside of California because the defendant could enable close captioning for California residents only, thereby limiting the statute's effect to California's borders. *Id.* Although the court found that the DPA did not violate the dormant Commerce Clause, there is no indication that the plaintiffs' challenge under that provision was improper.

[36] Accordingly, the Court finds that Defendant's contention that the extraterritoriality doctrine is limited to price control or price affirmation statutes is without merit. The Court now turns to analyze § 6254.21(c) for its extraterritorial effects as applied to Hoskins and out-of-state actors. "Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without project[ing] its legislation into other States." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (internal quotation marks omitted). For example, if "[a] person outside [California] posts information on a website or on an electronic discussion group ... for the intended benefit of other people [outside California], that person must assume that someone from [California] may also view the material." *Id.* As a result, posters outside of California must comply with § 6254.21(c) or risk subsequent litigation and attorney's fees. California therefore has projected § 6254.21(c) "onto the rest of the nation." *Id.*

Defendant's alternative argument that § 6254.21(c) does not significantly burden interstate commerce ignores that § 6254.21(c) as applied to out-of-state actors, such as Hoskins, directly regulates wholly out-of-state conduct. ***1025** Section 6254.21(c) requires the recipient of a demand letter—anywhere in the country—sent by an elected official to remove the "official's home address or telephone number from public display on the internet," and to "continue to ensure that this information is not reposted on ... any ... Internet Web site maintained by the recipient of the written demand." Cal. Gov. Code. § 6254.21(c)(1)(D)(i). It also prohibits the demand recipient from "transfer[ring] the appointed or elected official's home address or telephone number to *any* other person, business, or association through *any* other medium." Cal. Gov. Code. § 6254.21(c)(1)(D)(ii) (emphasis added). The statute does not limit its application to California, nor does it require that websites displaying officials' home address or telephone numbers bar California only internet users' access. *See Agency on Deafness*, 742 F.3d at 432–33 (rejecting dormant Commerce Clause challenge to statute requiring website to provide captioning for California residents who access its online videos because captioning could be limited to only California residents).

Rather, § 6254.21(c) requires Hoskins, a Massachusetts resident, to remove a post from his online forum, FAC ¶ 45, and mandates that he "continue to ensure that [the legislators' contact information] is not reported on the forum or any

other website maintained by him," Doc. 19–1 at 23 (internal quotation marks omitted), even if the only people accessing the forum are New Hampshire residents (or citizens of states other than California). Section § 6254.21(c) also prohibits Hoskins from transferring the specified information to any other entity, "through any medium," even if Hoskins and the recipient have no connection to California or the transfer "takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336, 109 S.Ct. 2491. Thus, California has projected § 6254.21(c) "onto the rest of the nation." *Dean*, 342 F.3d at 103. The Court therefore concludes that Hoskins is likely to succeed on his claim that § 6254.21(c), as applied to out-of-state actors like Hoskins, violates the dormant Commerce Clause. *See Sam Francis Found.*, 784 F.3d at 1324 (holding that statute "regulating out-of-state art sales where 'the seller resides in California,' ... and no other connection to California need exist, violates the dormant Commerce Clause as an impermissible regulation of wholly out-of-state conduct."); *see also Dean*, 342 F.3d at 103 (holding that Vermont statute that directly regulated speech on the internet outside of Vermont was a "*per se* violation of the dormant Commerce Clause").

E. Hoskins's § 230 challenge

[37] **[38]** Under § 230(c)(1) "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Under § 230(e), "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Section 230 therefore "precludes liability that treats a website as the publisher or speaker of information users provide on the website. In general, this section protects websites from liability for material posted on the website by someone else." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016). More specifically, § 230 immunity applies when "(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider." *Hassell v. Bird*, 247 Cal.App.4th 1336, 1362, 203 Cal.Rptr.3d 203 (2016) (citation and quotation marks omitted).

***1026** **[39]** Hoskins claims that, as owner and operator of Northeastshooters.com, he is a "provider of an interactive computer service" under § 230(c)(1), who is entitled to immunity from any liability for the content created on the website by third parties. Doc. 19–1 at 24 (citing § 230(c)). He argues that the Office's takedown request "treat[s] [him] as the publisher or speaker of third-party content in violation of § 230." Doc. 19–1 at 24 (internal quotation marks omitted). Hoskins further asserts § 6254.21(c) is inconsistent with § 230(e), which provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *See* FAC at ¶ 56. Hoskins therefore requests "a declaratory judgment stating that the Defendant has violated his rights under Section 230." *Id.* at 17 ¶ 3.[20]

Defendant takes no position on whether Hoskins qualifies as "a provider of an interactive computer service" or whether he is entitled to immunity under § 230(c). *See* Doc. 20 at 28. Instead, Defendant argues that § 6254.21(c) is entirely consistent with § 230(c) in that both preclude Hoskins from facing any liability because "subdivision (e) of section 6254.21 ... provides Hoskins with the same immunity from liability, using the exact same definition of interactive computer service, as does 47 U.S.C. § 230." *Id.*[21]

Hoskins's claim is premised on the assumption that the Office's takedown request violates his § 230 immunity. Although the Office's takedown demand may have erroneously assumed Hoskins qualified as a "publisher" or "speaker" of the speech at issue here (headednorth's re-posting the legislators' personal information)—an issue the Court need not and does not decide—the demand did not violate his purported immunity under § 230.[22]

To the extent Plaintiffs assert § 6254.21(c)'s mandatory attorney's fees provision violates § 230, that issue is not properly before the Court. As explained in detail above, attorney's fees are not available under § 6254.21(c) unless and until (1) the plaintiff brings a lawsuit in state court for declaratory and/or injunctive relief and (2) the court finds that the defendant violated § 6254.21(c)(1). If the defendant asserts it is entitled to § 230 immunity as an "interactive computer service provider or access software provider," the court would have to determine (1) whether that is correct; and, if so, (2) whether imposing attorney's fees would amount to "liability" in violation of § 230 immunity; and, if so, (3) whether § 6254.21(e) precludes a fee award. Those issues are not ripe for the court's review.

Though not on all fours with the facts of this case, *Google, Inc. v. Hood*, 822 F.3d 212, 225–26 (5th Cir. 2016), guides the Court's analysis here as the only analogous case the Court can find. *Hood* involved Google's declaratory judgment challenge to a state attorney general's administrative

subpoena that "sought information on Google's ***1027** platforms, advertising practices, and knowledge of and efforts to police 'dangerous' or 'illegal' content." *Id.* at 218. The subpoena stated that if Google refused to comply, the attorney general " 'may apply to' a state court 'for an order compelling compliance.' " *Id.*

Before responding to the subpoena or seeking relief in state court, Google filed a declaratory judgment case in federal court. *Id.* at 219. Google alleged, among other things, that the attorney general's investigation violated its § 230 immunity, and that any further proceedings to enforce the subpoena would likewise violate that immunity. *Id.* at 219–20. The attorney general moved to dismiss the case on numerous grounds, including that Google's claims were not ripe for adjudication. *See Google, Inc. v. Hood*, 96 F.Supp.3d 584, 592 (S.D. Miss. 2015), *rev'd*, 822 F.3d 212. The district court disagreed, and found that the claims were ripe because "Google is not required to expose itself to civil or criminal liability before bringing a declaratory action to establish its rights under federal law, particularly where the exercise of those rights have been threatened or violated." *Id.* at 594 (citing *MedImmune*, 549 U.S. at 128–29, 127 S.Ct. 764).

The Fifth Circuit reversed, holding that the "administrative subpoena was not ripe for adjudication." *Hood*, 822 F.3d at 224. The court so held because (1) the subpoena was "non-self-executing," meaning that Google could not be sanctioned for not complying with it; (2) the attorney general could, but did not file a state court action to enforce Google's compliance; and (3) if the attorney general did file such a suit, Google could raise its claimed § 230 immunity as a defense. *See id.* at 224–26; *see also id.* at 227 n.12 ("[W]e do not suggest that section 230 of the CDA would not apply if Hood were to eventually bring an enforcement action, or cannot be applied at the motion-to-dismiss stage."). For these reasons, the Fifth Circuit held that Google's "pre-enforcement challenge" was unripe. *Id.* at 226.

This is consistent with the Court's understanding that § 230 immunity is an affirmative defense. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Barnes*, 570 F.3d at 1109. As the Ninth Circuit explained, § 230(c)(1) "*only* protects from liability (1) a provider or user of an interactive computer service (2) whom a *plaintiff* seeks to treat, *under a ... cause of action*, as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (emphasis added); *see also Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (observing that courts have interpreted § 230 to provide immunity from "claims"). Section 230(c)(1) therefore "protects certain internet-based actors from certain kinds of *lawsuits*." *Barnes*, 570 F.3d at 1099 (emphasis added)); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding "lawsuits seeking to hold a service provider liable [for third party content] ... are barred" under § 230(c)(1)).

As § 6254.21(c) and the demand letter make clear, the only liability Hoskins faced was a potential lawsuit and attorney's fees and costs if he failed to comply with the Office's request. Despite extensive research, the Court cannot find any authority that suggests the Office's letter even triggers Hoskins's purported § 230 immunity, much less violates it, as the letter is not a "cause of action," and did not impose any kind of "liability" on Hoskins—even if he ignored it. *See Barnes*, 570 F.3d at 1099; *Hassell*, 247 Cal.App.4th at 1363, 203 Cal.Rptr.3d 203 ("The [court's] removal order does not violate section 230 because it does not impose any liability on ***1028** Yelp."). Assuming that Hoskins is entitled to § 230 immunity, Hoskins does not cite, and the Court cannot find, any case holding that the mere *threat* of a lawsuit that ostensibly would violate his § 230(c) immunity constitutes a violation of § 230 itself. Likewise, the Court is unaware of any authority that suggests the Court has jurisdiction over a declaratory judgment claim that a threatened lawsuit would violate § 230. *Hood*, the only case with similar circumstances the Court can locate, suggests otherwise. Accordingly, the Court finds that Hoskins's claim that Defendant "violated Hoskins' rights under Section 230," FAC at ¶ 55, is not ripe for review.[23] Hoskins is therefore not likely to succeed on the merits of his § 230 claim.

F. Remaining preliminary injunction factors

[40] As outlined above, the Court finds that Plaintiffs are likely to succeed on the merits of their challenges to § 6254.21(c) under the First Amendment and the Commerce Clause. "Both [the Ninth Circuit] and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). "The harm is particularly irreparable where, as here, [Plaintiffs] seek[ ] to engage in political speech." *Id.* Plaintiffs have

"therefore demonstrated a likelihood of irreparable injury in the absence of an injunction." *Id.*

[41] Plaintiffs have also demonstrated that an injunction is in the public interest, and that the equities tip in their favor. The Ninth Circuit has broadly held that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("the [district] court acknowledged the obvious [when issuing an injunction]: enforcement of an unconstitutional law is always contrary to the public interest" (collecting cases)). Further, any "ongoing enforcement of the potentially unconstitutional regulations ... would infringe not only the free of expression interests of [Plaintiffs], but also the interests of other people" subjected to § 6254.21(c). *Klein*, 584 F.3d at 1208 (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). "The balance of equities and the public interest thus tip sharply in favor of enjoining the [statute]." *Id.*; *see also id.* (noting that Ninth Circuit "caselaw clearly favors granting preliminary injunctions to a plaintiff ... who is likely to succeed on the merits of his First Amendment claim"). Accordingly, the Court finds that a preliminary injunction restraining and enjoining the Office from enforcing § 6254.21(c) against Plaintiffs is proper.[24]

*1029 V. CONCLUSION AND ORDER

For the foregoing reasons, the Court finds that Plaintiffs are likely to succeed on their claims that § 6254.21(c) violates the First Amendment as applied to them, and also violates the dormant Commerce Clause as applied to Hoskins. The Court further finds that the remaining preliminary injunction factors weigh in Plaintiffs' favor. The Court therefore preliminarily RESTRAINS AND ENJOINS Defendant from applying or enforcing § 6254.21(c) against Plaintiffs.

Under Federal Rule of Civil Procedure 65(c), the Court "may issue a preliminary injunction ... only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to be wrongfully enjoined or restrained." Plaintiffs request that the Court set a nominal bond of $1.00. Doc. 19–5 at 2. Defendant offers no opinion on the matter, and has not indicated it will suffer any financial loss as a result of the injunction. Accordingly, Plaintiffs shall post a nominal bond of $1.00 before the preliminary injunction will issue.

On or before March 10, 2017, the parties shall file a joint status report informing the Court how they wish to proceed.

IT IS SO ORDERED.

All Citations

237 F.Supp.3d 997, 45 Media L. Rep. 1827, 66 Communications Reg. (P&F) 343

Footnotes

1 Publius brings this suit anonymously under *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000), because he believes doing so is "necessary to preserve [his] First Amendment right to speak anonymously when criticizing the government ... and to guard against the risk of retaliatory and unfounded prosecution under the criminal provisions of the statutory scheme [he] challenges," specifically, California Government Code § 6254.21(c). Doc. 12, First Amended Complaint ("FAC"), at ¶ 12 n.1. Publius states in the FAC that he intends to file a motion to pursue this case anonymously, but, to date, he has not done so. *Id.* Defendant, however, has not objected to his anonymity.

2 Defendant describes zabasearch as "a commercial vendor," and therefore contends Publius "did not obtain the legislators' addresses from public records." Doc. 20 at 24–25. But, according to zabasearch.com, "[a]ll information found using ZabaSearch comes from public records databases. That means information collected by the government, such as court records, country records, state records, such as the kind of information that becomes public when you buy a new house or file a change-of-address form with the United States Postal Service." *See* www.zabasearch.com/faq (last visited February 7, 2017). Defendant therefore does not dispute that the legislators' personal information Publius posted was publicly available.

3 In the FAC, Plaintiffs allege Hoskins is a resident of Massachusetts, but in their moving papers they claim he is a resident of New Hampshire. *See, e.g.*, Doc. 19–1 at 23. His residency is relevant only insofar as he challenges § 6254.21(c)'s reach beyond California, so the analysis of his claims is the same whether he is a resident of Massachusetts or New Hampshire.

4 Self-censorship for fear of civil liability may be a sufficient injury for standing purposes. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 277, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

5 In any event, Defendant seemingly does not dispute that headednorth would have standing to challenge § 6254.21(c) under the First Amendment. *See* Doc. 20 at 19. Though Plaintiffs do not make the argument, Hoskins, as the owner and operator of Northeastshooters.com, has third-party standing to assert the First Amendment rights of its anonymous users, such as headednorth. *Enterline v. Pocono Med. Ctr.*, 751 F.Supp.2d 782, 785 (M.D. Pa. 2008) (holding as matter of first impression that website owner may assert First Amendment rights of third-party anonymous users of its site);*McVicker v. King*, 266 F.R.D. 92, 95–96 (W.D. Pa. 2010) (relying on *Enterline* and holding the same);*In re Drasin*, No. ELH-13-1140, 2013 WL 3866777, at *2 n.1 (D. Md. July 24, 2013) (same); *In re Verizon Internet Servs., Inc.*, 257 F.Supp.2d 244, 257–58 (D.D.C. 2003) (holding that Verizon had standing to assert First Amendment rights of its customers), *rev'd on other grounds*, 351 F.3d 1229, 1239 (D.C. Cir. 2003) *see also Trawinski v. Doe*, No. L-8026-12, 2015 WL 3476553, *4–5 (N.J. Super. Ct. App. Div. June 2, 2015) (applying First Amendment standing principles); *Indiana Newspapers, Inc. v. Miller*, 980 N.E.2d 852, 858–59 (Ind. 2012) (same).

6 Although not raised in the briefs, the Court notes that the "Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials acting in their official capacities." *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). State official defendants named in their official capacities are subject only to suit "for prospective declaratory and injunctive relief ... to enjoin an alleged ongoing violation of federal law" under § 1983. *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007) (citation omitted); *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1072 (9th Cir. 2014) ("[The Eleventh Amendment does not bar actions when citizens seek only injunctive or prospective relief against state officials who would have to implement a state law that is allegedly inconsistent with federal law.") (citations omitted).

7 Defendant disputes how § 6254.21(c)'s attorney's fees and costs provision operates. The Court discusses its disagreement with Defendant's interpretation in a more relevant context below.

8 Individuals who use the internet to disseminate their speech, such as Plaintiffs, are entitled to full First Amendment protections. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). ("We agree with [the district court's] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]."). Cases that concern other forms of media (*e.g.*, newspapers) therefore apply with full force to speech on the internet.

9 *Cox* concerned only information contained and placed into the public record through "official court records." 420 U.S. at 495, 95 S.Ct. 1029. But the Supreme Court has long "recognize[d] a general right to inspect and copy public records and documents." *Nixon v. Warner Commnc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). This is true even if the government inadvertently releases the information. *See Florida Star v. B.J.F.*, 491 U.S. 524, 534, 538, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (holding First Amendment protected newspaper's publishing a rape victim's name that local police department had inadvertently released to the public).

10 *See, e.g.*, *Cox*, 420 U.S. at 496–97, 95 S.Ct. 1029 (holding television reporter had First Amendment right to publish name of 17–year-old rape victim when learned through court documents); *Florida Star*, 491 U.S. at 526, 109 S.Ct. 2603 (holding newspaper had First Amendment right to publish name of rape victim inadvertently disclosed by police); *Oklahoma Publishing Co. v. Dist. Ct.*, 430 U.S. 308, 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (holding media had First Amendment right to publish name and photograph of 11–year-old involved in criminal proceedings that media had attended); *Daily Mail*, 443 U.S. at 99, 99 S.Ct. 2667 (holding newspapers had First Amendment right to publish names of juvenile offenders)

11 Defendant does not suggest Publius's speech was a threat or otherwise not protected by the First Amendment.

12 The Court is not suggesting that the truthful dissemination of an individual's personal information is always entitled to First Amendment protections under any circumstance, even if it is already in the public domain. *See Florida Star*, 491 U.S. at 532, 109 S.Ct. 2603 ("Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." (collecting cases)). As the Fourth Circuit recognized: "*Cox Broadcasting* and its progeny avoided deciding the ultimate question of whether truthful publication could ever be prohibited. Each decision resolved this ongoing conflict between privacy and the First Amendment 'only as it arose in a discrete factual context.' " *Ostergren*, 615 F.3d at 276 (quoting *Florida Star*, 491 U.S. at 530, 109 S.Ct. 2603).

13 Plaintiffs also point out that the voter registration affidavit of any voter, which includes his or her "home address, telephone number, [and] email number," Cal. Elec. Code § 625.4, "[s]hall be provided with respect to any voter ... to any person for

election, scholarly, journalistic, or political purposes." Cal. Elec. Code § 2194(a)(3). So, even if the legislators' personal information was not freely available online, Plaintiffs potentially could have obtained it through lawful means.

14 The statute does prohibit the recipient of an official's takedown demand from "transfer[ring]" the information on "any other medium." § 6254.21(c)(1)(D)(ii). But there can be no liability under § 6254.21(c)(1) unless an official's home address or phone number is posted on the internet.

15 Ironically, a newspaper could face no liability under § 6254.21(c)(1) for publishing in print the same information that it posts online.

16 Under the canon of constitutional avoidance, a court should avoid deciding unnecessary constitutional issues. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). The doctrine generally applies only when "there is a viable alternate, nonconstitutional ground to reach the same result." *Ariz Dream Act Coal. v. Brewer*, 855 F.3d 957, 962–63, 2017 WL 461503, at *6 (9th Cir. Feb. 2, 2017) (citations omitted). But when a plaintiff challenges a law on multiple constitutional grounds, courts have discretion to decide which ground (or grounds) on which to decide the case. *Compare Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102–03 (2d Cir. 2003) (finding federal statute unconstitutional under First Amendment and dormant Commerce Clause), *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (same) *with Old Coach Dev. Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1231 n.2 (3d Cir. 1989) (declining to address whether challenged statute violated the First Amendment after finding that it violated the dormant Commerce Clause). And because the Court concludes Hoskins's § 230 challenge is unlikely to succeed, the Court may address his constitutional claims.

17 It appears Plaintiffs' Commerce Clause claim is an as-applied challenge brought by Hoskins only. *See* FAC at 17 ¶ 2 ("Plaintiff Hoskins respectfully requests that this Court enter a declaratory judgment stating that applying California Government Code section 6254.21(c) to Hoskins' out-of-state speech violates the Commerce Clause."); *see also id.* at ¶ 45 ("The application of Section 6254.21(c) to out-of-state actors like Hoskins violates the so-called dormant Commerce Clause"), ¶ 53 ("Defendant, acting under color of state law, has applied California Government Code section 6254.21(c) in violation of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, thus in turn violating 42 U.S.C. § 1983."). To the extent Hoskins brings both a facial and as-applied dormant Commerce Clause challenge, the Court need only address his as-applied challenge.

18 The court in *Harris* analyzed the statute at issue for whether it was directed wholly at extraterritorial activity. 729 F.3d at 949. While the court did not explicitly mention *Healy* during its analysis, it applied the extraterritoriality doctrine to determine that the statute was not directed solely at out-of-state producers. *Id.* To the extent Defendant relies on the court's statement that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product" for support that the extraterritoriality doctrine is limited to price-fixing statutes, the court's own application of the extraterritoriality doctrine in that case to a statute that does not dictate the price of a product undermines Defendant's argument. *Id.* at 951. Furthermore, subsequent decisions apply *Healy* and the extraterritoriality doctrine to non-price-fixing statutes. *See, e.g.*, *Sam Francis Found.*, 784 F.3d at 1323–24.

19 The California Disabled Person Act assures that "[i]ndividuals with disabilities or medical conditions have the same rights as the general public to the full and free use" of public places and areas open to the public. Cal. Civ. Code §§ 54(a)–(b).

20 The Court notes that this is a particularly narrow request and, accordingly, the Court limits its analysis to its confines.

21 Section 6254.21(e) provides in full:

> (e) An interactive computer service or access software provider, as defined in Section 230(f) of Title 47 of the United States Code, shall not be liable under this section unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official.

22 Neither party addresses whether Hoskins has standing to assert his § 230 claim. The Court notes, however, that the Office's threat to bring suit under § 6254.21(c) is sufficient to confer Hoskins with standing to bring the claim. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 118–19, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007).

23 Because of this conclusion, the Court need not address Hoskins's alternative argument that § 6254.21(e) is inconsistent with § 230 because the former excludes immunity for interactive computer service providers, as defined in § 230(f), if the "provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official." First, Hoskins made this argument for the first time in reply. Doc. 22 at 11; *Ass'n of Irritated Residents v. C & R Vanderham Dairy*, 435 F.Supp.2d 1078, 1089 (E.D. Cal. 2006) ("It is inappropriate to consider arguments raised for the first time in a reply brief."). Second, it is questionable whether Hoskins can challenge that aspect of § 6254.21(e), which is wholly inapplicable to this case.

24 Because the Court only addressed Plaintiffs' as-applied challenge and because Plaintiffs ask only for an order directing the Office not to enforce § 6254.21(c) against them, *see* Doc. 19–1 at 26, the Court limits the preliminary injunction to preclude enforcement of § 6254.21(c) against Plaintiffs only.

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July 23, 2020

By Electronic Mail

To: Heidi Hill Drum, CEO, Tahoe Prosperity Center (heidi@tahoeprosperity.org)

From: Ariel Strauss, on behalf of Monica Eisenstecken

Subject: Record Request to Tahoe Prosperity Center

Dear Ms. Hill Drum:

Under Government Code Sections 54952(c)(1)(B) and 6252(a), as a nonprofit corporation that "[r]eceives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency[,]"[1] the Tahoe Prosperity Center is subject to the Brown Act and Public Records Act.

Consequently, please provide all non-exempt records within the following description:

(1) agendas and minutes for all TPC Board meetings held between January 1, 2018 and July 23, 2020;

(2) copies of fiscal year 2018 and 2019 financial statements;

(3) the fiscal year 2018 and 2019 budgets for the Connected Tahoe project;

(4) a document (or multiple documents if necessary) showing the dollar amount and date of donations received by TPC between January 1, 2018 and July 1, 2020 from Verizon Wireless or organizations known to be controlled by Verizon Wireless;

(5) any communications (including text messages) between any TPC staff person (including Board members and consultants) and either Devin Middlebrook or Sue Novasel in 2019 or in 2020 prior to July 1st discussing or mentioning a prospective wireless facility at 1360 Ski Run Boulevard;

(6) any communications (including text messages) between any TPC staff person (including Board members and consultants) and staff or Councilmembers of the City of South Lake Tahoe in 2019

[1] Attached is El Dorado County Board of Supervisors Resolution No. 048-2016 appointing the District V Supervisors as a voting member of TPC.

or in 2020 prior to February 1st discussing or mentioning a prospective wireless facility at 1360 Ski Run Boulevard; and

(7) communications between any TPC staff person (including Board members and consultants) and Verizon Wireless (including dbas), Sacramento Valley Limited Partnership or Mackenzie & Albritton, LLP, in 2019 and in 2020 prior to July 1st.

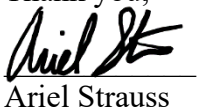
As you are aware, covered communications "do not cease to be public records just because they were sent or received using a personal account" (City of San Jose v. Superior Court (2017) 2 Cal. 5th 608, 625 (requiring release of text messages)).

A determination regarding the documents that will be made available and any legal basis for withholding identifiable records is required no later than Monday, August 3rd (Gov. Code § 6253(c)). Once such a determination is made, please provide records "promptly," presumably the same day as the determination, and by email in an electronic format (Gov. Code §§ 6253(b); 6253.9). Please consider each of the above six categories to constitute a separate request and provide responsive records for each as they become available; a piecemeal response is appreciated.

If any costs will be passed on, please contact me with a cost estimate prior to incurring costs in excess of $50.

In order to fully comply with the Public Records Act, please contact me immediately with any questions or practical issues you anticipate encountering in fulfilling this request.

Thank you,



Ariel Strauss

RESOLUTION NO. 048-2016

OF THE BOARD OF SUPERVISORS OF THE COUNTY OF EL DORADO

Establishes Participation on the Board of Directors for the Tahoe Prosperity Center

WHEREAS, El Dorado County has participated in a leadership capacity to help fund and guide the Tahoe Prosperity Center that was created in 2011 as a result of a collaborative process with the 2010 Lake Tahoe Basin Prosperity Plan; and,

WHEREAS, collaboration and participation among the original participating public agencies continues as members of the Tahoe Prosperity Center Board of Directors, including City of South Lake Tahoe, Placer County, Carson City, Douglas and Washoe Counties, Nevada; and,

WHEREAS, the mission of the Tahoe Prosperity Center is to unite Lake Tahoe communities to strengthen regional prosperity, to partner with governments on economic and community development, to expand the opportunities for broadband infrastructure placement and improvements, and to compete for federal, state and local grant funds that will contribute to this mission; and,

WHEREAS, the Purposes and Limitations contained in Article II of the Tahoe Prosperity Center Bylaws outline that the corporation is organized exclusively for charitable purposes as a 501(c)(3) with the specific purpose to convene and support economic development initiatives which would have the effect of improving the quality of life for businesses and residents while promoting environmental stewardship and sustainability within the Lake Tahoe Basin and adjoining regions; and, for activities that facilitate business development; supply data and research; administer grants; and to better facilitate opportunities that improve local infrastructure such as broadband, affordable housing and increase access to transportation capital.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Supervisors supports the mission and purpose of the Tahoe Prosperity Center, and, hereby appoints the District V Supervisor to sit as a voting member of the Tahoe Prosperity Center Board of Directors. The District V Supervisor's term on the Tahoe Prosperity Center Board of Directors shall run concurrently with the Supervisor's term on the Board of Supervisors.

PASSED AND ADOPTED by the Board of Supervisors of the County of El Dorado at a regular meeting of said Board, held the 22nd day of March, 2016, by the following vote of said Board:

Ayes: Mikulaco, Ranalli, Frentzen, Veerkamp, Novasel

Noes: None

Absent: None

Attest:

James S. Mitrisin
Clerk of the Board of Supervisors

By: _____
Deputy Clerk

_____
Chair, Board of Supervisors
Ron Mikulaco

Planning Commissioner Madson Recruited Outside Actors and Gave Them Talking Points.

Hill-Drum asked Madson for help—*November 4, 2019:*

I appreciate you both being willing to speak up (or Travis if you can't Diana) because being the lone wolf on promoting this has been tough. Tahoe Prosperity Center shouldn't be the only vocal supporter of adding cell coverage, broadband and new technology. Please let folks that you know who are supportive to share the petition via email and social, to write to Council (email Sue Blankenship at: sblankenship@cityofslt.us and to show up at the hearing (will share as soon as I know the date if it is Dec 3 or Jan 7.

Madson obliges by writing City Council to uphold her Planning Commission decision; she alleges substantial effect on her property—material financial interest in the decision (2 CCR § 18702.2(b))—*November 4, 2019:*

I live and work less than a mile from the proposed cell tower 1360 Ski Run Boulevard. The service surrounding my home is atrocious and regularly calls are dropped in front of my house and throughout my neighborhood. This cell tower will be extremely helpful in addressing this problem.

Madson continues her grassroots lobbying by libeling her neighborhood; unable to find local support, she resorts to recruiting cronies which live far outside city limits—*January 5, 2020*:

I'm writing to ask for your help: I don't know if you've been following the frustrating Ski Run cell tower drama but the latest is that the local crazies (a la Alex Jones) are on the verge of stopping the project, citing bunk science. They are passionate as hell. We desperately need to show public support for the tower to give cover to the council.
My asks of you:

1. Now - could you sign the Tahoe Prosperity Center pro-cell tower petition and invite your colleague, friends and family to do the same?
2. January 14 - could you show up at the City Council meeting and give brief public comment in support of the tower? The anti-cell tower people will be there in the dozens and we need to offset them. If you absolutely cannot be there, sending an email is the next best option.

Attached (if you find it useful) are some talking points and fact sheet that the Tahoe Prosperity Center put together. They're asking everyone to just pick one or two points that resonate with them for public comment.

Here are the email addresses of the council and city clerk:

- Brooke Laine <blaine@cityofslt.us>,
- Jason Collin <jcollin@cityofslt.us>,
- dmiddlebrook@cityofslt.us,
- cbass@cityofslt.us,
- Tamara Wallace <twallace@cityofslt.us>
- sblankenship@cityofslt.us

Let me know your thoughts or if you'd like to discuss further. Thanks!

Best,
Diana

Madson disseminated talking points to numerous non-residents, having them make false and deceptive statements to the City Council purporting they personally needed this tower for basic home coverage.

Actors Lobbing City For WTF's Generally Do Not Live Within City Limits

Actor	Full Address	City Limits?
Kirill Deninzon	1695 12th Ave., Apt. #1, San Francisco, CA, 94122	N
Ali Bissonnette	8674 Falmouth Avenue #103, Playa Del Rey, CA, 90293	N
Robert Stern	112 Ponderosa Circle, Skyland, NV, 89448	N
Rick Lind	6221 Butterfield Way, Placerville, CA, 95667	N
Brian Hogan	660 Zuni Street, Meyers, CA, 96150	N
John "Patrick" Rhamey	4 Kjer Lane, Kingsbury, NV, 89449	N
Heidi Hill Drum	942 Kekin Street, Meyers, CA, 96150	N
Carol Chaplin	281 Chimney Rock Road, Kingsbury, NV, 89449	N
Jenn Gleckman	1811 Arrowhead Ave, Meyers, CA, 96150	N
Steve Teshara	282 Paiute Drive, Kingsbury, NV, 89448	N
Corey Rich	1944 Apalachee Drive, Meyers, CA 96150	N
Chris McNamara	466 Kent Way, Kingsbury, NV, 89449	N
Erica Darke	453 McFaul Way, Zephyr Cove, NV, 89448	N
Monica Walkenhorst	295 Parkshore Drive, Folsom, CA, 95630	N
Brad Kortick	295 Parkshore Drive, Folsom, CA, 95630	N
Cristobal Villegas	San Francisco, CA	N
Julie Skidmore	884 Bonita Avenue, Pleasanton, CA, 94566	N
Kim Allen	1420 West Gilman Boulevard #9030, Issaquah, WA, 98027	N
Bryant Milesi	Sacramento, CA	N
Christina Wilson	1784 Gentian Circle, South Lake Tahoe, CA, 96150	N
James Kelly	615 Laporte Avenue, Fort Collins, CO, 80521	N
Bobbi Babineau-Lounds	3514 Butters Drive, Oakland, CA, 94602	N
Scott McCoubrey	217 Ski Court #A, Stateline, NV, 89449	N
Jamie Orr	1776 Gentian Circle, South Lake Tahoe, CA, 96150	N
Jenna Langer	378 3rd Avenue, San Francisco, CA, 94118	N
Graham Kent	Reno, NV, 89557	N
Parker Alexander	1595 Skyline Drive, Meyers, CA, 96150	N
Greg Phillips	2401 Lupine Trail, Meyers, CA, 96150	N
Todd McIntyre	1780 Delaware Street, Meyers, CA, 96150	N
Diana Madson	3739 Terrace Drive, South Lake Tahoe, CA, 96150	Y
Rachel Carlson	2302 Washington Avenue, South Lake Tahoe, CA, 96150	Y
Brandianne Brown	1123 Winnwmucca Avenue, South Lake Tahoe, CA, 96150	Y
Chase Janvrin	840 Los Angles Ave, Unit B, South Lake Tahoe, CA, 96150	Y
Sandra Hutchings	South Lake Tahoe, CA, 96150	Y

(This list is generally the complete extent of actors on recent record)

84 Cal.App.4th 1232
Court of Appeal, Second District, Division 7, California.

James S. HURVITZ, Plaintiff, Cross-Defendant and Appellant,
v.
Steven M. HOEFFLIN et al., Defendants, Cross-Complainants and Respondents; Jackie Hurvitz, Cross-Defendant and Appellant.
Steven M. Hoefflin, Plaintiff and Respondent,
v.
James S. Hurvitz et al., Defendants and Appellants.
James S. Hurvitz et al., Plaintiffs and Appellants,
v.
Steven M. Hoefflin, Defendant and Respondent.

No. B130805.
|
Nov. 20, 2000.
|
Review Denied March 21, 2001.*

Synopsis
In consolidated actions involving various claims involving cosmetic surgeon, many of whose patients were celebrities, surgeon's former business partner, and former employees of surgeon, the Superior Court, Los Angeles County, Nos. SC043313, SC049883, and SC051519, Victoria G. Chaney, J., entered order which sealed court documents, and barred disclosure of "confidential information," which was defined as any information which would identify any patient. Appeal was taken. The Court of Appeal, Johnson, P.J. (acting), held that pretrial gag order was an impermissible prior restraint on speech in violation of First Amendment and State Constitution.

Affirmed in part and reversed in part.

West Headnotes (18)

[1] **Evidence** Mode of ascertaining facts required to be noticed; motions and notice of reliance

Court of Appeal would take judicial notice of existence of press clippings included in request for judicial notice, but could not take judicial notice of the truth of the matters contained therein.

3 Cases that cite this headnote

[2] **Constitutional Law** First Amendment

First Amendment's free speech guarantee applies to the states through the due process clause of the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14.

[3] **Constitutional Law** Prior Restraints
Constitutional Law Presumption of invalidity

An order which restricts or precludes a citizen from speaking in advance is known as a "prior restraint," and is disfavored and presumptively invalid under First Amendment and State Constitution. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

9 Cases that cite this headnote

[4] **Constitutional Law** Publicity Regarding Proceedings
Constitutional Law Attorney speech about pending proceedings

Gag orders on trial participants are unconstitutional as prior restraints on speech, in violation of First Amendment and State Constitution, unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest, (2) the order is narrowly tailored to protect that interest, and (3) no less

restrictive alternatives are available. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

11 Cases that cite this headnote

[5] **Constitutional Law** Publicity Regarding Proceedings

Constitutional Law Attorney speech about pending proceedings

For a gag order on trial participants to withstand scrutiny under First Amendment and State Constitution, trial court must make express findings showing that it applied standard under which such restraints are permissible only if speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest, order is narrowly tailored to protect that interest, and no less restrictive alternatives are available, and that it considered and weighed the competing interests. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

8 Cases that cite this headnote

[6] **Appeal and Error** Constitutional Rights, Civil Rights, and Discrimination in General

Reviewing court makes an independent examination of the entire record to determine the constitutionality of a gag order on trial participants under First Amendment and State Constitution. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

2 Cases that cite this headnote

[7] **Constitutional Law** Publicity Regarding Proceedings

Trial Gag orders and similar restraints

Pretrial order in consolidated actions involving claims pending between cosmetic surgeon, whose patients included many celebrities, surgeon's former business partner, and numerous former employees of surgeon, in which court barred disclosure of any information which would identity any patient treated by surgeon, was an impermissible prior restraint in violation of First Amendment and State Constitution; assertion that dissemination might prejudice jurors was speculative, claimed physician-patient privilege could not support order, and patients' privacy right was likewise insufficient to justify such a restraint, since information had already been made public through other means. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

[8] **Trial** Gag orders and similar restraints

Where a party contends that his or her right to a fair trial has been or will be compromised by pretrial publicity, that party has burden of producing evidence to establish prejudice sufficient to warrant pretrial gag order, and it is not enough for a court to decide that the fair trial right may be affected by the exercise of free speech.

1 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality** Physician-Patient Privilege

As a rule of evidence, physician-patient privilege applies only if properly invoked in a proceeding in which testimony can be compelled.

[10] **Privileged Communications and Confidentiality** Scope of privilege in general

While physician-patient privilege protects patient from forced disclosure in the course of litigation, it may not be extended to cover the dissemination of information already made known outside of litigation.

1 Cases that cite this headnote

[11] **Constitutional Law** Health care professions

While an unauthorized disclosure in violation of statutes prohibiting health care providers from disclosing confidential health care information may give rise to a cause of action in tort,

or various administrative sanctions against the physician, they cannot support a prior restraint on speech. West's Ann.Cal.Bus. & Prof.Code § 2263; West's Ann.Cal.Civ.Code § 56 et seq.

[12] **Constitutional Law** 🔑 False Statements in General

Constitutional Law 🔑 Defamation

Publication of information about a person, without regard to truth, falsity, or defamatory character of that information, is protected by First Amendment and State Constitution and is not subject to prior restraint, and while a party may be held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

3 Cases that cite this headnote

[13] **Constitutional Law** 🔑 Health care professions

A threatened violation of the physician-patient privilege cannot justify a prior restraint on speech. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

1 Cases that cite this headnote

[14] **Constitutional Law** 🔑 Particular Issues and Applications in General

Sparing citizens from embarrassment, shame, or even intrusions into their privacy does not outweigh the guarantees of free speech in Federal and State Constitutions. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

[15] **Constitutional Law** 🔑 Particular Issues and Applications in General

Just as First Amendment and State Constitution bar a court from enjoining speech which constitutes the tort of defamation, courts also may not bar speech which may or may not ultimately be found to constitute the tort of invasion of privacy. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

[16] **Constitutional Law** 🔑 Injunctions and restraining orders

A court may enjoin certain forms of speech after that speech has been adjudicated as unlawful without violating First Amendment or State Constitution. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 2(a).

[17] **Records** 🔑 Particular Judicial Records

Court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic.

3 Cases that cite this headnote

[18] **Records** 🔑 Particular Judicial Records

Joint declaration filed by former employees of cosmetic surgeon in connection with their lawsuit against surgeon, in which they repeated allegations of wrongdoing on part of surgeon during his treatment of famous patients which they had made in prior sexual harassment lawsuit against surgeon, which had resulted in confidential settlement, was not subject to seal, where there was no overriding public interest warranting seal, and declaration had previously been part of public record for one day, after which it had been widely reported in media.

4 Cases that cite this headnote

Attorneys and Law Firms

****561** ***1235** Horvitz & Levy, Lisa Perrochet, Mary–Christine Sungaila, Encino, Robert Wright; King & Ferlauto and Thomas M. Ferlauto, for Appellants.

Keller, Price & Moorhead and Leslie M. Price, Jr., Redondo Beach, for Respondents.

Opinion

JOHNSON, Acting P.J.

In this case we hold an order by the trial court sealing certain court documents and barring disclosure of certain information, whether obtained through discovery or otherwise, is an unconstitutional prior restraint on speech.

FACTUAL AND PROCEDURAL BACKGROUND[1]

[1] This appeal arises from a daisy chain of litigation among Dr. Steven Hoefflin, a cosmetic surgeon whose patients included many celebrities, and several of his former employees and associates. Appellant Dr. James S. Hurvitz is also a cosmetic surgeon, and had a business relationship with Hoefflin until the two reached a parting of the ways in 1996. Hurvitz filed suit against Hoefflin and his medical corporation, alleging causes of action for breach of contract and various torts, including misrepresentation, breach of fiduciary duty, and slander per se. Hoefflin denied the allegations and filed a cross-complaint against Hurvitz and his wife, appellant Jackie Hurvitz, alleging various business torts on the part of the Hurvitzes.

Also in 1996, four members of Hoefflin's administrative and medical staff, Barbara Maywood, Kim Moore–Mestas, Lydia Benjamin and Donna Burton (the "former employees"), filed a lawsuit against him alleging sexual harassment (the "harassment action"). The case settled shortly after it was filed, with each of the former employees receiving $42,500 in exchange for their agreement to: (1) waive all claims against Hoefflin; (2) seal the Los Angeles Superior Court case file in the matter; (3) keep the subject matter of their claims and the terms of the settlement confidential; (4) not disclose the names of Hoefflin's patients or try to solicit them for two years following the settlement; and (5) not "criticize, defame or disparage" Hoefflin or any persons or entities related to him and his medical corporation.

***1236** As part of the settlement of the harassment action, the former employees' attorneys executed a letter addressed "to whom it may concern," stating as follows: "In connection with our initial representation of [the former employees] a working draft of a proposed complaint was prepared before our investigation was completed. Regrettably, the complaint was inadvertently filed through an internal secretarial misunderstanding and immediately dismissed the same day when we learned of the mistaken filing. [¶] Upon further investigation, we have concluded that the allegations contained in the mistakenly filed complaint were without sufficient factual or legal basis. [¶] We regret any inconvenience or embarrassment the filing of the complaint has caused to Steven M. Hoefflin, M.D." Under the terms of the settlement Hoefflin was permitted to "use and disclose" the letter "if anyone inquires regarding the complaint or the subject matter of the complaint." The former employees, on the other hand, under the terms of the settlement could "only state that the matter has been resolved" and ****562** "say nothing further." Finally, Hoefflin agreed not to "criticize, defame or disparage" the former employees to third parties.

On October 26, 1997, the *Washington Post* published an article containing allegations of wrongdoing by Hoefflin, based on the allegations in a complaint prepared in connection with the former employees' action, but never filed. These allegations included highly inappropriate behavior by Hoefflin with respect to patients who had been anesthetized for surgical procedures. For example, Hoefflin was alleged to have exposed and ridiculed the genitals of unconscious patients. The *Post* reported Hurvitz had notified its reporters about the allegations against Hoefflin, and quoted Hurvitz as saying "My motive was to do the right thing. I was given this information and what could I do? I came forward, I had a conscience. There needs to be an independent, objective investigation of these charges." According to press reports, the California Medical Board did indeed launch an investigation into "a telephone complaint in 1996 alleging that [Hoefflin] used drugs and fondled and photographed patients—many of them in the entertainment industry while they were under anesthesia."

Hoefflin filed a separate action against appellants, alleging libel and slander per se in connection with the allegations published by the *Post.* This action was consolidated with the original *Hurvitz v. Hoefflin* action in January, 1998. In his answer in the second action, Hurvitz admitted having provided information and documents to the *Post* reporter.

In April, 1998, appellants filed another complaint for defamation and interference with economic advantage against Hoefflin, alleging he had defamed them in his public response to the *Post* article. On October 6, 1998, ***1237** the Superior Court found the Hoefflin/Hurvitz cases related to three other cases pending between Hoefflin and the former employees and their attorneys.

On May 15, 1998, Hoefflin sued the former employees for various torts relating to the dissemination of the allegations in the *Post* article, and for breach of the settlement agreement in the harassment action. On October 29, 1998, the former employees sued Hoefflin for defamation and breach of contract. This complaint included the allegations of wrongdoing by Hoefflin with respect to anaesthetized patients, but did not give the patients' names. On February 1, 1999, Hoefflin filed a motion for sanctions against the former employees and their attorney, arguing their defamation suit was filed in bad faith and for the purpose of harassment.

On February 16, 1999, in opposition to the motion for sanctions, the former employees filed a joint declaration in which they repeated the allegations of wrongdoing from the harassment complaint and the *Post* article, but for the first time gave the names of the patients against whom the alleged wrongdoing was directed. The patients included very well-known celebrities, and the contents of the declaration were widely reported in the media. The trial court sealed the declaration the following day.

Hoefflin immediately moved to shorten time for a protective order to prevent any further disclosure of confidential information concerning patients of any of the physicians involved in the five related cases. A hearing on Hoefflin's motion was held on February 25, 1999. At the conclusion of the hearing, the trial court issued an interim gag order, as follows:

"First, the court's sealing order regarding the declarations of Barbara Maywood, Kim Moore–Mestas, Lydia Benjamin and Donna Burton was done in order to protect the privacy rights of both public and private individuals who were referred to in these declarations as well as to preserve the patient-physician privilege held by those individuals.

"This court is required to recognize, respect and protect the rights of those persons not parties to this action.

****563** "It is this court's goal to allow the parties freedom to fully litigate this matter. This right to litigate does not include the right to share with others, including the press, privileged information about third persons not involved in this lawsuit on the basis that the need to share this information is permitted on the First Amendment right to free speech. This court is also mindful of the right of all parties in this litigation to an unbiased jury.

***1238** "Needless dissemination of this privileged information, this court finds, might prejudice potential jurors. Although some of this prejudice might inure against the defendant doctors, other prejudice could run against the plaintiff and plaintiffs' attorneys for what might be viewed as grandstanding or attempting to grab the spotlight at the expense of nonparty patients.

"Consequently, after balancing the rights to free speech of the attorneys and the parties, the right to a fair and impartial jury panel for all parties, the physician-patient privilege of both celebrity and noncelebrity patients and their right to privacy, and finally the right to dignity of all the parties and third persons, this court finds that a protective order is necessary.

"Further, as it pertains to the declarations contained in the opposition papers filed on February 16th, 1999, by parties Maywood, Moore–Mestas, Benjamin and Burton and sealed by this court on February 17, 1999, these declarations have been thoroughly reviewed by myself for two purposes:

"One, to understand these plaintiffs' opposition to the request for sanctions; and secondly to consider the various parties' requests to unseal these declarations. These declarations contain specific information about both celebrity and noncelebrity patients.

"These declarations set forth not only the names but also the treatment rendered, physical oddities, treatment complications and other personal information. This court considered redacting the names of the patients but finds that this procedure would be inadequate protection because of their physician-patient privilege and their rights to privacy and dignity.

"Because of the nature of the patient descriptions, including events surrounding the treatment of these individuals and the types of treatment, it would be impossible to guarantee that these rights would remain unsullied.

"The reason for this protective order and sealing order is that identifying these individuals by name, since confidential information concerning their medical treatment has been disclosed in the pleadings filed in this case, would violate the physician-patient privilege held by these third parties under Evidence Code Section 993.

"The party physicians are not the holders of this privilege. I want to stress that. The holders of the privilege are not

the physicians and not the attorneys in this case, and lack the authority—the party physicians are not holders of this privilege, and they lack the authority and capacity to waiver [sic] their patients' privilege under Evidence Code section 993. Rather, it is the patients who hold the privilege.

***1239** "Under Evidence Code section 994, a physician is authorized to claim the privilege to prevent disclosure of confidential communication between a patient and a physician. Further, this court finds that courts generally are obligated to protect the privileges and rights of third parties not involved in litigation.

"And I'm not just referring to physician-patient rights or rights of privacy here, but I'm talking about all rights of persons not involved actively in the litigation.

"Plaintiffs argue that since the patients were unconscious and under anesthesia there was no, quote, 'communication,' close quote, between the physician and the patient and, therefore, the privilege does not apply. However, confidential communications, quote, 'means information, including information obtained by an examination of ****564** a patient ....,' close quote. That's under Evidence Code section 992.

"Therefore, any information that these doctors obtained as a result of communicating with or examining these patients during their treatments or consultations is privileged.

"While the plaintiffs cite case law to support their argument that a patient's name is not protective [sic] communication if its disclosure would reveal nothing regarding the person's medical condition—that's under Rudnick, R–U–D–N–I–C–K, versus Superior Court, a 1974 case found at 11 Cal.3d 924 at 933, 114 Cal.Rptr. 603, 523 P.2d 643.

"In this case these individuals' medical condition, type of treatment and surgeries have been disclosed in intimate detail in these declarations. To reveal their names would expose these individuals to an unwarranted invasion of their privacy rights and rights to dignity and would violate their physician-patient privilege.

"Consequently, this court finds it necessary to order the following:

"Number 1, the declarations contained in the plaintiff's opposition filed in Maywood, et al. versus Hoefflin, et al. on or about February 16, 1999, are to remain sealed based on the physician-patient privilege and the patients' rights to privacy and dignity.

"Secondly, counsel are ordered to meet and confer and establish a system for identifying the individuals in neutral terms, such as 'patient number 1' or 'visitor number 1.'

***1240** "The use of a neutral patient identification system, this court finds, will protect the privileges of the patients and yet allow for complete discovery in the aggressive litigation of this matter.

"No party, attorney, or their agents and employees shall reveal or state nor in any manner release or publish any information which would identify any patient of Dr. Hoefflin, Dr. Hurvitz, or Dr. Goodstein by name or initials, occupation, physical attributes and/or distinguishing physical features.

"I want to make it clear, ladies and gentlemen, that I am not preventing you from talking about what you believe happened to the patients or happened in the rooms, in the operating room or wherever else. I simply am trying to protect the right to privacy and the physician-patient privileges and the right to dignity of people who are not part of this lawsuit. I am not in any way trying to restrain you from discussing or talking about, sending e-mails, writing your friends, calling your mother, or any other communication that deals with the actions that you believe occurred during the treatment of these people. I'm simply trying to protect the rights of nonparties to this lawsuit.

"Any documents filed with this court in the future shall have the names of these patients redacted and substituted with a neutral designation previously agreed to among the parties. This order also applies to depositions distributed to others apart from the attorneys, parties and their agents and employees.

"Each party, all witnesses and deposition officers shall be provided with a copy of this order in giving testimony in connection with this lawsuit or being interviewed in connection therewith."

After the February 26 hearing, counsel for the parties engaged in several sessions, among themselves and with the trial court, in an attempt to agree on a final protective order. At a final hearing on March 5, 1999, the trial court rejected

appellants' proposed order restricting only the dissemination of information obtained through discovery.

The trial court's written order, filed on March 19, 1999, contained the trial court's findings as expressed at the February 26 hearing, and contained more details about how patients should be referred to in connection with the lawsuit and procedures regarding depositions and deposition transcripts. ****565** The order defined "Confidential Information" as "any information which would identify any Patient, including but not limited to the Patients' name or initials, occupation, physical attributes, and/or distinguishing physical features." It specifically prohibited "revealing, stating or in any manner releasing or publishing" any Confidential Information without prior court approval, whether the information was obtained via discovery or independently.

***1241** The Hurvitzes appealed and contend the order, as well as the trial court's order sealing the former employees' declaration, constitutes an unconstitutional prior restraint on free speech to the extent it enjoins them from disseminating information learned outside the discovery process.

DISCUSSION

[2] The right to free speech is, of course, one of the cornerstones of our society. The First Amendment to the United States Constitution provides "Congress shall make no law ... abridging the freedom of speech, or of the press."[2] The California Constitution is even broader: "Every person may freely speak, write and publish his or her sentiments, on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[3]

As our Supreme Court explained over 100 years ago, "The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes."[4]

[3] **[4]** **[5]** **[6]** Orders which restrict or preclude a citizen from speaking in advance are known as "prior restraints," and are disfavored and presumptively invalid.[5] Gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available.[6] The trial court must make express findings showing it applied ***1242** this standard and considered and weighed the competing interests.[7] As the reviewing court, we make an independent examination of the entire record to determine the constitutionality of the trial court's order in light of this standard.[8]

[7] Here, the trial court found the Confidential Information was protected by the physician-patient privilege. It further found the dissemination of the information "might prejudice potential jurors." Finally, it found the information was protected by the patients' rights of "privacy and dignity." While we agree with the trial court these are important considerations, we cannot agree they are sufficient to justify ****566** prior restraint on the parties' speech in this case.[9]

I. *THE MERE POSSIBILITY OF PREJUDICE TO POTENTIAL JURORS DOES NOT JUSTIFY THE PRIOR RESTRAINT.*

[8] The trial court based its order in part on its finding "needless dissemination of this privileged information ... might prejudice potential jurors." This does not constitute a finding a risk of prejudice actually exists, and indeed there is no evidence in the record to support such a finding. Where a party contends his or her right to a fair trial has been or will be compromised by pretrial publicity, the law has long imposed on that party the burden of producing evidence to establish the prejudice.[10] "It is not enough for a court to decide that the fair trial right *may* be affected by the exercise of free speech."[11] Here, the trial court's ruling relies on just such speculation. This is not enough to support the prior restraint on speech.[12]

***1243** II. *THE PHYSICIAN–PATIENT PRIVILEGE DOES NOT JUSTIFY THE PRIOR RESTRAINT.*

[9] **[10]** The trial court also found the Confidential Information was protected by the physician-patient privilege. The parties dispute whether the privilege applies, but even if we assume the information is covered by the physician-patient privilege, its dissemination may not be subject to prior restraint of the type in the trial court's order. As a rule

of evidence, the physician-patient privilege applies only "if properly invoked *in a proceeding in which testimony can be compelled.*"[13] The California Supreme Court made this clear in *Rudnick v. Superior Court,*[14] when it stated "it is perhaps pertinent to remember the obvious, namely, that the physician-patient privilege is a rule of evidence concerning the admissibility of evidence in court and is not a substantive rule regulating the conduct of physicians." Thus, while the privilege protects the patient from forced disclosure in the course of litigation, it may not be extended to cover the dissemination of information already made known outside of litigation.

[11] **[12]** **[13]** To be sure, there are statutes prohibiting health care providers from disclosing confidential health care information.[15] However, while under these statutes an unauthorized disclosure may give rise to a cause of action in tort, or various ****567** administrative sanctions against the physician, they cannot support a prior restraint on speech. To the contrary, in *Gilbert,* the court held "publication of information about a person, without regard to truth, falsity, or defamatory character of that information, is not subject to prior restraint. (Citation.) While [a party] may be held responsible for abusing his right to speak freely in a subsequent tort action, he has the initial right to speak freely without censorship."[16] This rationale applies with equal force to speech which is violative of a privilege or which subjects the speaker to administrative or professional sanctions. And indeed, respondent can point to no case where any court in the nation has held a threatened violation of the physician-patient privilege, or any other privilege, justifies a prior restraint on speech.[17]

***1244** III. *THE PATIENTS' RIGHT TO PRIVACY DOES NOT JUSTIFY THE PRIOR RESTRAINT.*

[14] **[15]** Finally, the trial court based its order on a finding that publication of the Confidential Information would violate the patients' rights of "privacy and dignity." The things Hoefflin is alleged to have done to his anaesthetized patients are vulgar and crude in the extreme, and we do not doubt those patients, if identified, would suffer embarrassment and shame. However, sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh the guarantees of free speech in our federal and state constitutions. Just as a court may not enjoin speech which constitutes the tort of defamation,[18] it also may not enjoin the speech at issue here, which may or may not ultimately be found to constitute the tort of invasion of privacy. Indeed, we are aware of no case in any jurisdiction in which a prior restraint has been imposed to prevent an intrusion into privacy.

In re Marriage of Candiotti[19] demonstrates a prior restraint on speech may not be constitutionally imposed to prevent the dissemination of information obtained outside the discovery process, even if it is libelous and even if it invades a person's privacy. In *Candiotti,* the family law court restrained a mother, Debra, from "disseminating information to third parties about the background of her ex-husband['s] present wife, Donna." The trial court based its order on concern for the welfare of the minor children, who it feared would be harmed by exposure to negative information about their stepmother.[20] Notably, even the trial court rejected a justification based on Donna's right to privacy, and concluded "if Donna's privacy right alone was at issue, Debra's right to free speech would clearly prevail."[21] The Court of Appeal struck down the order to the extent it covered information obtained outside the discovery process, holding the order "constitutes undue prior restraint of speech" to the extent it "actually imping [ed] on a parent's right to speak about another adult, outside the presence of the children."[22] The Court held the order was unconstitutional because it was "aimed at conduct that might cause others, outside the immediate family, to think ill of Donna. Such remarks by Debra may be rude or unkind. They may be motivated by hostility. To the extent they are libelous, they ****568** may be actionable. But they are too attenuated from conduct directly affecting the children to support a ***1245** prior restraint on Debra's constitutional right to utter them."[23] In this case, too, there can be no constitutional justification for a prior restraint on speech, solely because it may invade the patients' privacy or cause others to think ill of them.

The order in this case is particularly troubling because of its chilling effect on the litigants' ability to properly prepare for trial. Every third party witness must be shown the order, and agree to be bound thereby, before counsel can interview them about the case. Thus, unless a witness agrees to voluntarily have his or her right of free speech curtailed on penalty of contempt of court, he or she may not be interviewed or deposed. This burden on the parties' ability to freely communicate with witnesses and potential witnesses is not justified, even by the patients' right to privacy.

The burden on the parties' ability to prepare for trial is especially unwarranted because at this point the Confidential

Information has already been made public by means of the former employees' declarations, which were in the public record for one day before they were sealed, and the contents were widely reported as a result. Indeed, those reports are available on the Internet even now. As the court held in *Sipple v. Chronicle Publishing Co.,*[24] "there can be no privacy with respect to a matter which is already public or which has previously become part of the 'public domain.' "[25] In its order, the trial court acknowledged "once the information is released, unlike a physical object, it cannot be recaptured and sealed." We agree with this assessment, and we agree with appellants that it reveals why the order is unconstitutional: because the information is already public, the harm to the patients' privacy has already occurred and cannot be prevented by the order. While we are sympathetic to the trial court's concerns, neither the state nor the federal Constitution permits the court to lock the barn door after the horse is gone.

[16] ***1246** At oral argument, respondents cited *Michaels v. Internet Entertainment Group*[26] in support of their contention the right to privacy constitutes a "compelling interest" sufficient to justify a prior restraint on speech. *Michaels* is distinguishable. In *Michaels,* a well-known actress and a rock star sought and obtained an injunction against the dissemination of a video of them having sexual relations, on three grounds: copyright infringement, violation of the state law right to publicity, and tortious violation of the right to privacy.[27] The trial court granted the requested injunction, finding the plaintiffs had, on all three of their claims, showed the requisite combination of likelihood of success on the merits and the possibility of irreparable injury.[28] In this case, as appellant points out, respondents did not even attempt to comply with the requirements for obtaining a preliminary injunction, including demonstrating likelihood of success on the merits and the possibility of irreparable injury, or posting a bond. Indeed, as ****569** there is no claim for tortious invasion of privacy before the court, it is difficult for us to imagine how respondents would even begin to meet those requirements. Therefore, *Michaels* does not provide authority for the trial court's order in this case.[29]

IV. *THE TRIAL COURT'S SEALING ORDER IS ALSO UNJUSTIFIED.*

[17] **[18]** In light of our conclusion the trial court's order restricting dissemination of the Confidential Information does not withstand constitutional scrutiny, we also must vacate the trial court's order sealing the former employees' declaration.[30] "Court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic."[31] No such specific exception applies in this case because, as we have seen, there is no overriding public interest to justify ***1247** restrictions on the dissemination of confidential information obtained outside of the discovery process. Moreover, as discussed above, the former employees' declaration was part of the public record for one day, during which time it was widely reported in the media, and it makes little sense to seal information after the fact.

DISPOSITION

The order is reversed to the extent it applies to information obtained independently of discovery. To the extent it applies to information obtained through discovery, it is affirmed. The order sealing the records in the trial court is vacated, and the record on appeal is also ordered unsealed. All parties to bear their own costs on appeal.

WOODS, J., and NEAL, J., concur.

All Citations

84 Cal.App.4th 1232, 101 Cal.Rptr.2d 558, 29 Media L. Rep. 1215, 2000 Daily Journal D.A.R. 12,327

Footnotes

* Baxter, J., dissented.

1 Appellants' brief contains a 24–page "statement of the case," consisting in large part of statements of purported fact supported only by reference to the many press clippings included in their Request for Judicial Notice. While we can and do take judicial notice of the existence and contents of the materials provided in the Request for Judicial Notice, we cannot and do not take judicial notice of the truth of the matters contained therein. However, we include some of the press reports in order to aid understanding of the context of the trial court's order.

2 The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 412, fn. 1, 113 S.Ct. 1505, 123 L.Ed.2d 99.)

3 Cal. Const., Art. I, § 2, subd. (a).

4 *Dailey v. Superior Court* (1896) 112 Cal. 94, 97, 44 P. 458.

5 *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. [Citations.]"); *Gilbert v. National Enquirer* (1996) 43 Cal.App.4th 1135, 1136, 51 Cal.Rptr.2d 91.

6 *Levine v. U.S. District Court for C. Dist. of Cal.* (9th Cir.1985) 764 F.2d 590, 595.

7 See *Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 563, 96 S.Ct. 2791, 49 L.Ed.2d 683.

8 *Los Angeles Teachers Union, Local 1021 v. Los Angeles City Bd. of Ed.* (1969) 71 Cal.2d 551, 557, 78 Cal.Rptr. 723, 455 P.2d 827.

9 Appellant does not challenge the order insofar as it applies to materials obtained through discovery. Therefore our analysis pertains only to the portion of the order pertaining to information obtained independently of discovery. (See *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 [protective order is permissible under the First Amendment so long as it is limited to information obtained through discovery]; *In Re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 724, 40 Cal.Rptr.2d 299 ["the part of the protective order restricting the dissemination of information obtained through [appellant's] discovery request is a proper restriction"].)

10 *County of Los Angeles v. Superior Court* (1967) 253 Cal.App.2d 670, 683–684, 62 Cal.Rptr. 435.

11 *Levine, supra,* 764 F.2d 590, 603 (Nelson, J., concurring and dissenting) (emphasis added).

12 See *In re Agent Orange Product Liability Litigation* (E.D.N.Y.1983) 99 F.R.D. 645, 649 ("the risk of prejudice to a defendant's right to a fair trial must be based on more than mere speculation").

13 *Reynaud v. Superior Court* (1982) 138 Cal.App.3d 1, 9, 187 Cal.Rptr. 660 (emphasis added).

14 (1974) 11 Cal.3d 924, 932 fn. 10, 114 Cal.Rptr. 603, 523 P.2d 643.

15 See, e.g., Bus. & Prof.Code, § 2263 [willful and unauthorized violation of a professional confidence constitutes unprofessional conduct]; Civil Code, § 56 et seq. [Confidentiality of Medical Information Act intended to preserve patients' right to confidentiality regarding their medical treatment].)

16 *Gilbert, supra,* 43 Cal.App.4th 1135, 1145–1146, 51 Cal.Rptr.2d 91 (internal quotation marks omitted).

17 Because we find the physician-patient privilege does not support the trial court's order, we need not decide whether or to what extent there may have been a waiver of the privilege. We also need not decide whether, as appellant contends, various statutory exceptions to the privilege should apply in this case.

18 *Gilbert, supra,* 43 Cal.App.4th 1135, 1145–1146.

19 *Supra,* 34 Cal.App.4th 718, 40 Cal.Rptr.2d 299.

20 *Ibid.*

21 *Id.* at p. 721, 40 Cal.Rptr.2d 299.

22 *Id.* at p. 725, 40 Cal.Rptr.2d 299.

23 *Candiotti, supra,* 34 Cal.App.4th at p. 726, 40 Cal.Rptr.2d 299, footnote omitted. See also *Gilbert, supra,* 43 Cal.App.4th 1135, 1147, 51 Cal.Rptr.2d 91 ("The threatened invasion to Gilbert's right of privacy and the threatened harm to her reputation are not the sort of 'extraordinary circumstances' required to justify a prior restraint.").

24 (1984) 154 Cal.App.3d 1040, 1047, 201 Cal.Rptr. 665.

25 See also *Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469, 494–495, 95 S.Ct. 1029, 43 L.Ed.2d 328 (no invasion of privacy where newspaper publishes name of crime victim, gleaned from court records); *Fort Wayne Journal–Gazette v. Baker* (N.D.Ind.1992) 788 F.Supp. 379, 388 ("in the face of the First Amendment the interests of privacy fade when the information involved appears in the public record").

26 (C.D.Cal.1998) 5 F.Supp.2d 823.

27 *Id.* at p. 828.

28 *Ibid.*

29 The fact a court may enjoin certain forms of speech, after that speech has been adjudicated as unlawful, is not in dispute. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 138, 87 Cal.Rptr.2d 132, 980 P.2d 846 [injunction prohibiting derogatory racial epithets in the workplace is not an unconstitutional prior restrain on speech, "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity"].) In this case, however, there has been no judicial decree establishing the disclosure of the Confidential Information is in any way unlawful.

30 See *Gilbert, supra,* 43 Cal.App.4th 1135, 1149, 51 Cal.Rptr.2d 91 ("the issues regarding the preliminary injunction [restraining disclosure of certain information] and the sealing of the record are intertwined").

31 *Gilbert, supra,* 43 Cal.App.4th 1135, 1149, 51 Cal.Rptr.2d 91. See also *NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217–1218, 86 Cal.Rptr.2d 778, 980 P.2d 337 (court records presumably public unless trial court finds sealing order narrowly tailored to address substantial probability of harm to an overriding interest).

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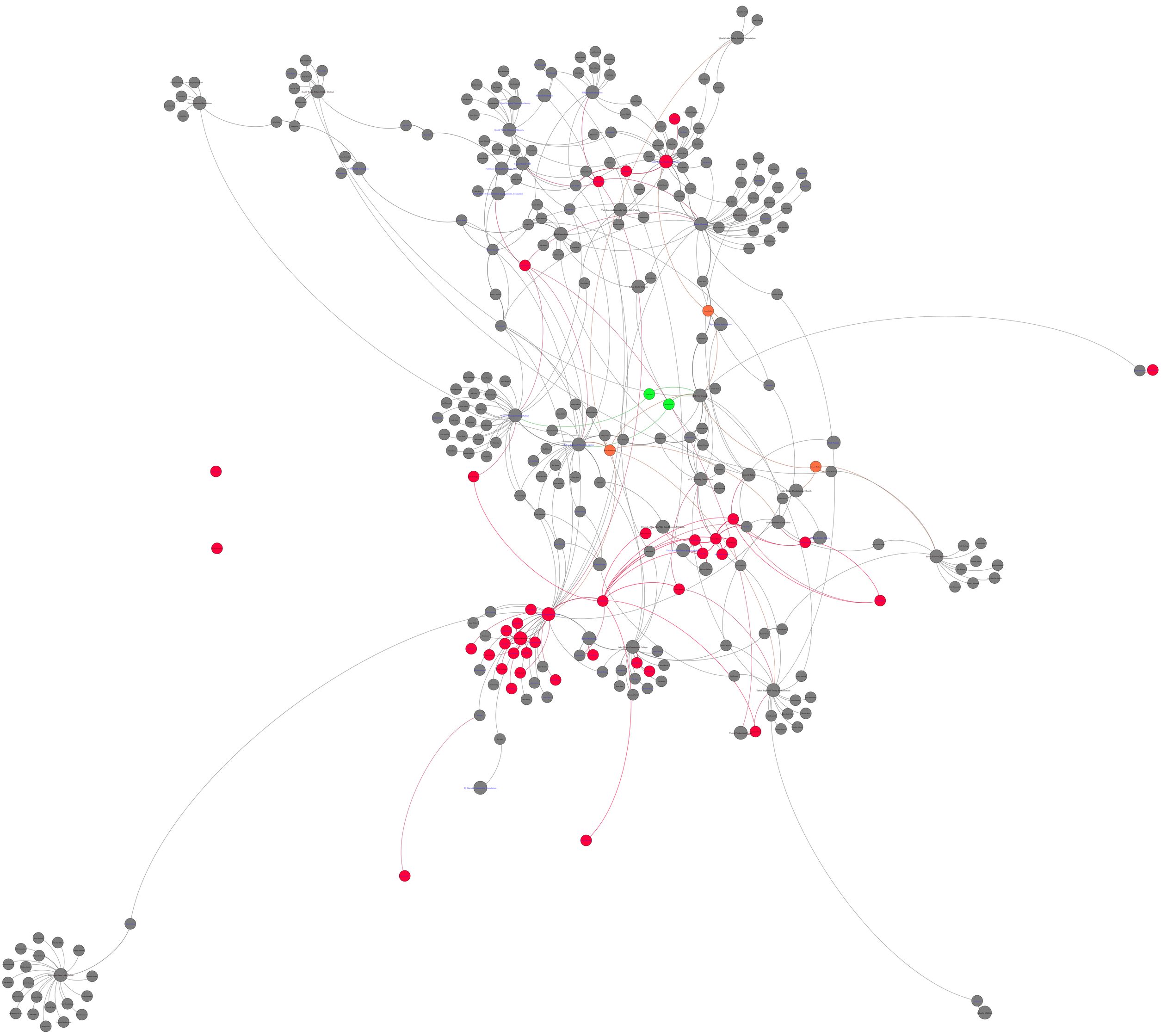
The Role of Covert Network Connections in the Lobbying and Passage of Legislative Cell Tower Actions in South Lake Tahoe



Actors denoted by red nodes have actively lobbied the City Council in advocacy of Verizon's wishes. Entities labeled in blue are known to reside outside the South Lake Tahoe city limits and are not governed by the very decisions they advocate. Successfully influenced Council members are colored orange; non-influenced are green. Roughly 80% of lobbyist actors live outside the city limits and hence are red nodes with blue labels. This pattern of concerted lobbing activity associated with an out-of-city tax-exempt non-profit constitutes a substantive covert network.

Covert networks have to be organized so as to facilitate the efficient achievement of their aims (efficiency), but this demand is often overridden by their concern to keep their identities, activities, and connections hidden (secrecy), a trade off which shapes a network in quite specific ways.

The number of connections a person has (degree) is a metric of how efficient they would be at directly broadcasting information. To this end, Heidi Hill-Drum/TPC is very efficient at broadcasting lobbyist talking points in favor of cell towers. The criticality of a person in connecting groups together (betweenness) is a measure of their ability to move information between groups. Individuals serving on the boards on multiple groups, like Rhamey, and Middlebrook, rank high in this metric.

190 Cal.App.3d 300
Court of Appeal, Second
District, Division 4, California.

Paul W. CAYLEY and Irene B. Cayley, Plaintiffs and Appellants,
v.
John H. NUNN and Maureen D. Nunn, Defendants and Respondents.

B015207.
|
March 17, 1987.

Synopsis

Plaintiffs brought action against their former neighbors alleging denial of their constitutional rights and slander. Plaintiffs alleged that defendants made certain slanderous comments in effort to obtain signatures on petition allowing defendants to obtain height variance from city council. The Superior Court, Los Angeles County, Norman L. Epstein, J., granted defendants summary judgment on ground that alleged slander was absolutely privileged. Appeal was taken. The Court of Appeal, Kingsley, Acting P.J., held that allegations in complaint that defendants' statements on wiretapping were made to encourage neighbors to sign defendants' petition seeking height variance and to attempt to influence outcome of city council vote on variance alleged relation and connection between alleged slander and privileged judicial or legislative proceeding; thus, defendants' remarks had benefit of absolute privilege for publication or broadcast made in any legislative, judicial, or other official proceeding.

Judgment affirmed.

West Headnotes (10)

[1] **Libel and Slander** Statements Made in Judicial and Official Proceedings

Privilege for publication or broadcast made in any legislative, judicial or other official proceeding is unaffected by malice. West's Ann.Cal.Civ.Code §§ 47, 47, subd. 2.

[2] **Libel and Slander** Legislative Proceedings

Absolute privilege for publication or broadcast made in legislative, judicial proceeding, or any other official proceeding, applies to local city council proceedings. West's Ann.Cal.Civ.Code § 47, subd. 2.

6 Cases that cite this headnote

[3] **Libel and Slander** Judicial Proceedings

Communications made prior to legal action itself are privileged if they have some logical connection to suit and are made to achieve objects of litigation. West's Ann.Cal.Civ.Code § 47, subd. 2.

1 Cases that cite this headnote

[4] **Libel and Slander** Absolute Privilege

It is not necessary that defamatory matter be relevant or material to issue before tribunal to be entitled to absolute privilege, but rather, defamatory matter need only have proper connection or relation to proceedings. West's Ann.Cal.Civ.Code § 47, subd. 2.

[5] **Libel and Slander** Absolute Privilege

Privilege for publication or broadcast made in legislative, judicial, or other official proceeding applies even where made outside courtroom and no function of court or its officers is involved. West's Ann.Cal.Civ.Code § 47, subd. 2.

[6] **Libel and Slander** Absolute Privilege

Privilege for communications made in legislative, judicial, or other official proceeding embraces preliminary conversations attendant upon such proceeding so long as they are in some way related to or connected to pending or contemplated action. West's Ann.Cal.Civ.Code § 47, subd. 2.

4 Cases that cite this headnote

[7] **Libel and Slander** Absolute Privilege

To partake in privilege for publication or broadcast made in legislative, judicial or other official proceeding, publication need not be pertinent, relevant or material in technical sense to any issue in proceeding. West's Ann.Cal.Civ.Code § 47, subd. 2.

[8] **Libel and Slander** Absolute Privilege

Privilege for publication or broadcast made in legislative, judicial, or other official function is denied to participant in legal proceeding only when matter is so palpably irrelevant to subject matter that no reasonable man can doubt its irrelevancy and impropriety. West's Ann.Cal.Civ.Code § 47, subd. 2.

2 Cases that cite this headnote

[9] **Judgment** Use of Affidavits

In ruling on summary judgment, plaintiff cannot rely on complaint, and defendant cannot rely on answer, but either party can rely on other's pleading.

[10] **Libel and Slander** Legislative Proceedings

Allegations in complaint that defendants' statements on wiretapping were made to encourage their neighbors to sign defendants' petition seeking height variance and to attempt to influence outcome of city council vote on variance alleged relation and connection between alleged slander and privileged judicial or legislative proceeding; thus, defendants' remarks had benefit of absolute privilege for publication or broadcast made in any legislative, judicial, or other official proceeding. West's Ann.Cal.Civ.Code § 47, subd. 2.

9 Cases that cite this headnote

Attorneys and Law Firms

***302** ****386** David S. Kirbach, Rolling Hills Estate, for plaintiffs and appellants.

Michael C. Donaldson, Los Angeles, for defendants and respondents.

Opinion

KINGSLEY, Acting Presiding Justice.

The Nunns and Cayleys were neighbors in Rancho Palos Verdes. The Nunns applied for a height variance to add a bedroom over their garage. The Cayleys opposed the construction, claiming the addition would block their scenic view. The Planning Commission denied the variance. The Nunns appealed to the City Council, and in preparation for the hearing, they circulated a petition to evidence neighborhood support for their position. At the City Council hearing the Nunns presented expert and lay testimony, and they presented their petition. The City Council approved the height variance and the Cayleys brought suit against the City of Rancho Palos Verdes, and the Nunns as Real Parties in Interest. The Cayleys' writ was denied, the Cayleys appealed, and the writ was denied by the Court of Appeal. The Cayleys then sued the Nunns for a permanent injunction, damages and legal fees for failure to follow the covenants and restrictions. The Nunns obtained a summary ****387** judgment, the Cayleys appealed, and the judgment was affirmed.

Appellants herein, Cayleys, then sued for denial of their constitutional rights and slander. The Cayleys allege that the Nunns made certain slanderous comments. The Cayleys claim that "John Nunn said that the telephone people came to the Cayley house and found his telephone line in the Cayley's house and that the Cayleys had connected illegal wires to a listening device, and that is how they tapped his phone."

Defendants Nunns were granted summary judgment on the grounds that the alleged slander is absolutely privileged under Civil Code section 47.

***303** Civil Code section 47 reads in pertinent part as follows:

"A privileged publication or broadcast is one made—

"...

"2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; ..."

[1] The privilege of Civil Code section 47, subdivision 2 is unaffected by malice. (*Tiedmann v. Superior Court* (1978) 83 Cal.App.3d 918, 924, 148 Cal.Rptr. 242.) The absolute privilege of Civil Code section 47, subdivision 2, has been held to apply when (1) the publication is made in a judicial proceeding, (2) has some logical relation to the action, (3) was made to achieve objects of the litigation, and (4) involved litigants or other participants authorized by law. (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 106 Cal.Rptr. 718.)

Therefore, the question before the court is whether the absolute privilege of Civil Code section 47, subdivision 2 applies to the above alleged slanderous remarks made by defendants to potential petition signers, where the remarks were made while defendants were circulating a petition to be given to the City Council, and where the purpose of the petition was to support defendants' request for a height variance. In order to determine these questions we must first determine whether the privilege attaches to City Council proceedings. Secondly, if the privilege of Civil Code section 47, subdivision 2 attaches to City Council proceedings, we must determine whether the privilege will be extended to alleged slanderous remarks where the remarks were made to the neighbors by defendants, while defendants were circulating a petition that defendants were planning to use to support their request for a height variance at a City Council meeting.

[2] First, the privilege of Civil Code section 47, subdivision 2 applies to local city council proceedings. (*Scott v. McDonnell Douglas Corp.* (1974) 37 Cal.App.3d 277, 280, 285, 286, 112 Cal.Rptr. 609.) The privilege which applies to City Council proceedings also applies to those before a city planning commission where certain property owners filed a written protest before the city planning commission against the plaintiff's application for a use variance. (*Whelan v. Wolford* (1958) 164 Cal.App.2d 689, 331 P.2d 86.)

[3] **[4]** **[5]** **[6]** Second, communications made prior to a legal action itself are privileged if they have some logical connection to the suit and are made to achieve ***304** the objects of the litigation. (*Lerette v. Dean Witter Organizations, Inc.* (1976) 60 Cal.App.3d 573, 131 Cal.Rptr. 592.) It is unnecessary that the defamatory matter be relevant or material to the issue before the tribunal but need only have some proper connection or relation to the proceedings. (*Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865, 100 Cal.Rptr. 656.) The privilege applies even where made outside the courtroom and no function of the court or its officers is involved. (*Ascherman v. Natanson, supra,* 23 Cal.App.3d 861, 865, 100 Cal.Rptr. 656.) The privilege embraces preliminary conversations attendant upon such proceeding so long as they are in ****388** some way related to or connected to the pending or contemplated action. (*Tiedmann v. Superior Court, supra,* (1978) 83 Cal.App.3d 918, 925, 148 Cal.Rptr. 242.) As the court said in *Brody v. Montalbano* (1978) 87 Cal.App.3d 725 at 734, 151 Cal.Rptr. 206 quoting from *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 490, 491, 104 Cal.Rptr. 650:

" 'To accomplish the purpose of judicial or quasi-judicial proceedings, it is obvious that the parties or persons interested must confer and must marshal their evidence for presentation at the hearing. The right of private parties to combine and make presentations to an official meeting and, as a necessary incident thereto, to prepare materials to be presented is a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings. To make such preparations and presentations effective, there must be an open channel of communication between the persons interested and the forum, unchilled by the thought of subsequent judicial action against such participants; provided always, of course, that such preliminary meetings, conduct and activities are directed toward the achievement of the objects of the litigation or other proceedings...."

[7] **[8]** To partake in the privilege a publication need not be pertinent, relevant or material in a technical sense to any issue in the proceedings. (*Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 90, 53 Cal.Rptr. 706, 23 A.L.R.3d 1152, 23 A.L.R.3d, *Brody v. Montalbano, supra,* (1978) 87 Cal.App.3d 725, 151 Cal.Rptr. 206.) The privilege is denied to any participant in legal proceedings only when the matter is so palpably irrelevant to the subject matter that no reasonable man can doubt its irrelevancy and impropriety. (*Profile Structures, Inc. v. Long Beach Bldg. Material Co.* (1986) 181 Cal.App.3d 437, 443, 226 Cal.Rptr. 192.)

In the case at bench it is clear that the alleged slanderous statements were made during preliminary conversations

while defendants were marshalling evidence and preparing for their presentation at the City Council meeting. Therefore, defendants' statements cannot be considered irrelevant to the proceedings and they were directed toward the achievement of the objects of the proceeding.

A question remains as to whether the connection or relation to the proceeding can be determined on a motion for summary judgment.

***305** Although a case has language to suggest that it is a jury question as to whether there was a logical connection between the defamatory statement and the objective of the meeting[1] (see *Frisk v. Merrihew* (1974) 42 Cal.App.3d 319 at 325, 116 Cal.Rptr. 781), in the case at bench appellants Cayleys alleged the relation or connection between the defamatory statement and the objective of the meeting in the complaint itself. In ****389** *Profile Structures, Inc. v. Long Beach Building Material Co.,*[2] *supra,* (1978) 181 Cal.App.3d 437, 441–443, 226 Cal.Rptr. 192, the appellate court found a sufficient connection or relation to the proceedings from the complaint where a demurrer had been sustained without leave to amend by the lower court and the action had been dismissed. The appellate court said (at page 443), "[I]f the complaint herein shows on its face that the privilege was applicable, the demurrer was properly sustained."

In the case at bench the complaint showed on its face the connection or relation between the alleged defamatory remark and the City Council proceeding to consider a height variance. The complaint reads in pertinent part:[3]

"17. The defendants Nunn did communicate to numerous persons, including neighbors and members of the Rancho Palos Verdes City Council, general allegations of criminal and moral improprietous acts by the plaintiffs Cayley. Specifically, the plaintiffs Cayley, on information and belief, allege that the defendants Nunn stated to the persons aforedescribed that the Cayleys placed and maintained an illegal 'wire-tap' on the Nunns household phone. Said statement is defamatory *per se* because it accuses the plaintiffs Cayley of (1) a felonious criminal act and (2) morally reprehensible conduct which would hold that the plaintiffs Cayley up to public contempt, obloquy and ridicule in the community.

***306** "18. The immediate purpose of such slander was to expose the plaintiffs, and each of them, to hatred, contempt, embarassment [*sic*], ridicule and obloquy, and to injure plaintiffs, and each of them, in their respective professions, so as to impair their individual and collective reputations and standing in the community and public and thereby to encourage the aforesaid neighbors to sign the Nunns petition to the Rancho Palos Verdes City Council for approval of Height Variance No. 170 and, if applicable, to repudiate prior support of the plaintiffs Cayley in their efforts to lawfully prevent construction of the proposed Nunn addition.

"19. The defendants Nunn, and each of them, similarly and unlawfully, attempted and succeeded in their attempt to influence the outcome of the City Council vote on the Nunn Height Variance No. 170 appeal, by using the petition so garnered with signatures obtained by the aforesaid slander and by informally and directly communicating the aforedescribed slander and defamation to members of the Rancho Palos Verdes City Council.

"20. As a result of said slander and other wrongful conduct of defendants, the Rancho Palos Verdes City Council reversed the prior decision of the Rancho Palos Verdes Planning Commission."

[9] **[10]** We also note that in ruling on a summary judgment, a plaintiff cannot rely on the complaint, and a defendant cannot rely on the answer, but either party can rely on the other's pleading. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 147, 148, 60 Cal.Rptr. 377, 429 P.2d 889.) Therefore, defendants here can rely on plaintiffs' allegations in their complaint to show a connection between the remarks and the privileged proceeding, in determining the propriety of a summary judgment. And, as we said before, by plaintiffs' own admission in their complaint, the Cayleys' statements on wire tapping were made to "encourage the neighbors to sign the Nunns' petition" and to "attempt to influence the outcome of the city council vote." Therefore, plaintiffs themselves have alleged the relation and connection between the alleged slander and the privileged judicial or legislative proceeding. Since there was a logical connection or relatedness between defendants' remarks and the City Council proceedings, and the remarks were made while marshalling support of their position, defendants' remarks had the benefit of the absolute privilege of Civil Code section 47, subdivision 2, and the summary judgment is affirmed.

We do not agree that this is a frivolous appeal. Whether or not there was sufficient relation or connection between the alleged slanderous remarks made while circulating ****390** the petition and the privileged proceeding and whether or not

this could be determined on a summary judgment and without a trial, were legitimate questions and not merely delaying tactics.

***307** The judgment is affirmed.

McCLOSKY and ARGUELLES, JJ., concur.

All Citations

190 Cal.App.3d 300, 235 Cal.Rptr. 385

Footnotes

1 *Frisk* reads in pertinent part (at pp. 324–325): "In an attempt to justify his intervention and the defamatory statement made therein, respondent produced evidence at the trial that the meeting was chaired by Dr. Johnson, the vice president of the board, who was inexperienced as a chairman and was unable to control the meeting. Sensing a lack of firmness on the part of the chairman, appellant had risen on several occasions to speak. The meeting became increasingly boisterous and respondent, as secretary of the board, felt compelled to take control of the meeting and restore order. [¶] "Although respondent's showing of justification displays a noticeable infirmity upon its face, we express no opinion on whether the evidence produced by respondent would have been sufficient for the jury to find the requisite logical connection between the defamation and the objective of the meeting. In the instant case we are not invited to pass upon the sufficiency of evidence supporting a jury verdict but merely to determine whether in the situation here presented the trial court was justified in directing a verdict in favor of respondent. For the reasons which follow we are impelled to conclude that under the circumstances of the present case the direction of a verdict for respondent was erroneous and the judgment entered thereon cannot stand."

2 *Profile Structures,* an abuse of process case, pointed out that the privilege of Civil Code section 47, subdivision 2, applies to several tort decisions, including abuse of process.

3 We take judicial notice of the complaint. (Evid.Code, § 352.)

Office of the Assessor

Historical Property Information

Parcel Number: 023-271-23-100

Property Address: 655 ELOISE AVE

Assessor's information is for assessment and tax purposes only and should not be relied upon for status of development or building purposes.

Property Description:

Primary Use**: **12, IMPROVED MULTI RES (2 OR 3 LIVING UNITS)**
Subdivision Tract Number: **49**
Subdivision Tract Name:
APN Status: **00, Active**
Reference: **PM 4/25/A**
Tax Rate Area: **002-002**
School District:
Last Appraisal Effective Date: **7/8/2016**
Last Appraisal Reason: **100% CHANGE IN OWNERSHIP**
MPR Card: **023-271-23**

The **USE is only reviewed at the time of the last taxable event, and may not be a legal use

Associated Maps for: **023-271-23-100**

Most Recent Plat:	Assessor's Plat 023-27
Historical Plat:	Historical Plat 023-27
Subdivision Maps:	Tamarack Add 2: A-059
	Tamarack Add 2: A-059A

2021 - 2022 Taxable Property Values for: **023-271-23-100**

Property	Value
Land	$153,000
Land Total	**$153,000**
Improvement Structures	$387,600
Improvement Total	**$387,600**
Personal property Total	**$0**
Total Roll	**$540,600**

(Exemptions Total)	$0
Net Roll	$540,600

Event List for: **023-271-23-100**

Roll	Event Date	Bill Status	Event Status	Seq #	Event Type	Stmt. Status	ID	Tax Bill #	Value
2018	1/1/2018	Active	Annual Roll	1	Roll	Pending			$540,600
2017	1/1/2017	Active	Annual Roll	1	Roll	Paid		009680	$530,000
2016	12/21/2016	Inactive Suppl	Not to be billed	1	Change in Ownership		0062695		
2016	7/8/2016	Active Suppl	Billed	1	Change in Ownership	Paid	0030838	212510S	$530,000
2016	1/1/2016	Active	Annual Roll	1	Roll	Paid		009690	$281,662
2015	1/1/2015	Active	Annual Roll	1	Roll	Paid		009694	$277,434
2014	1/1/2014	Active	Annual Roll	1	Roll	Paid		009730	$272,000
2013	7/10/2013	Active Suppl	Billed	1	Change in Ownership	Paid	0039089	202050S	$272,000
2013	1/1/2013	Active	Annual Roll	1	Roll	Paid		009725	$187,205
2012	1/1/2012	Active	Annual Roll	1	Roll	Paid		009726	$183,536
2011	1/1/2011	Active	Annual Roll	1	Roll	Paid		009736	$179,938
2010	1/1/2010	Active	Annual Roll	1	Roll	Paid		009737	$178,595
2009	1/1/2009	Active	Annual Roll	1	Roll	Paid		009734	$179,021
2008	1/1/2008	Active	Annual Roll	1	Roll	Dflt_Abstr		009724	$175,511
2007	1/1/2007	Active	Annual Roll	1	Roll	Dflt_Abstr		009728	$172,071
2006	1/1/2006	Active	Annual Roll	1	Roll	Paid		009607	$168,698
2005	1/1/2005	Active	Annual Roll	1	Roll	Paid		009602	$165,391
2004	1/1/2004	Active	Annual Roll	1	Roll	Dflt_Abstr		009597	$162,149
2003	10/20/2003	Inactive Suppl	Not to be billed	1	Change in Ownership		0107753		
2003	10/10/2003	Inactive Suppl	Not to be billed	1	Change in Ownership		0105373		
2003	1/1/2003	Active	Annual Roll	1	Roll	Paid		009599	$159,180

2002	1/1/2002	Active	Annual Roll	1	Roll	1st_Paid		009596	$156,060
2001	1/1/2001	Active	Annual Roll	1	Roll	Paid		009597	$153,000
2000	1/14/2000	Inactive Suppl	Not to be billed	1	Change in Ownership		0002514		
2000	1/1/2000	Active	Annual Roll	1	Roll	Paid		009611	$150,000
1999	1/14/2000	Inactive Suppl	Not to be billed	1	Change in Ownership		0002514		
1999	7/23/1999	Active Suppl	Billed	1	Change in Ownership	Paid	0046183	303358S	$150,000
1999	7/20/1999	Active Suppl	Billed	1	Change in Ownership	Cncld_Ex	0045301	303357S	$150,000
1999	1/1/1999	Active	Annual Roll	1	Roll	Paid		009576	$141,821
1998	1/1/1998	Active	Annual Roll	1	Roll	Paid		009576	$139,242
1997	1/1/1997	Active	Annual Roll	1	Roll	Paid		009581	$136,513
1996	3/1/1996	Active	Annual Roll	1	Roll	Paid		009581	$133,837
1995	3/1/1995	Active	Annual Roll	1	Roll	Paid		009602	$132,369
1994	2/16/1995	Inactive Suppl	Not to be billed	1	Change in Ownership	Pending	4444358		$131,588
1994	11/4/1994	Inactive Suppl	Not to be billed	1	Change in Ownership	Not_Avl	4373073		
1994	3/1/1994	Active	Annual Roll	1	Roll	Not_Avl			$131,588
1993	3/1/1993	Active	Annual Roll	1	Roll	Not_Avl			$129,009
1992	3/1/1992	Active	Annual Roll	1	Roll	Not_Avl			$126,480
1991	10/29/1991	Inactive Suppl	Not to be billed	1	Change in Ownership	Not_Avl	3654647		
1991	3/1/1991	Active	Annual Roll	1	Roll	Not_Avl			$124,000
1990	10/23/1990	Active Suppl	Billed	1	Change in Ownership	Not_Avl	3449499	307726R	$130,026
1990	3/1/1990	Active	Annual Roll	1	Roll	Pending			$136,052
1989	3/1/1989	Active	Annual Roll	1	Roll	Pending			$133,386
1988	3/1/1988	Active	Annual Roll	1	Roll	Pending			$130,771

Property Characteristics for: **023-271-23-100**

Property Characteristic	Description
Acreage	0.500 ac

Lot Depth	209 ft
Lot Width	104 ft
Square Foot Range	1.01 - 2.5 Acres
Topography	Level
Ground Cover	Pine Trees
Water Source	Public Water Service
Sewer Service	Y
Natural Gas Service	Y
Living Area	21840 sqft
Access Type	County or City Road
Road Type	Asphalt
Architectural Attractiveness	Average
Building Type	Modern
Building Shape	More Complex - 8 Corners
Construction Type	Wood Frame
Construction Quality	5.5/10
Percent Good	99%
Year Built	1963
Effective Year Built	1965
Approximate Area of Improvements	1852 sqft
Total Units	3
Stories	1.5
First Floor Square Feet	1291 sqft
Bedrooms	6
Bathrooms	3.0
Bathrooms on First Floor	2.0
Bathrooms on Second Floor	1.0
Total Rooms	6
Fireplace and Wood Stove Count	2
Building Design	Duplex
Functional Plan	Average
Building Use	Duplex

Proper Building Use	Yes
Workmanship	Average
Building Condition	Good
Garage Converted To Living Area	No
Book Category Number	2023
Air Conditioner	No
Conformity Code	Average
Current Record Flag	Yes
Replacement Cost Less Depriciation	0
Miscellaneous Cost	1920

Parcel Split Background for: **023-271-23-100**

This Parcel Has No Split Background Records.

Related Accounts for: **023-271-23-100**

Account Number	Property Type	Status
4-037-000-4370	Apartment	Inactive

Owner Change History for: **023-271-23-100**

Recorded Document: 2016-0062695
Record Change Date: 12/21/2016
Effective Owner Change Date: 12/21/2016
Preliminary Change of Ownership: **2016-0062695**

Recorded Document: 2016-0030838
Record Change Date: 7/8/2016
Effective Owner Change Date: 7/8/2016
Proposition 13 Appraisal: Yes
Value Change: 100%
Document Transfer Tax: $583.00
Preliminary Change of Ownership: **2016-0030838**

Recorded Document: 2013-0039089
Record Change Date: 7/25/2013
Effective Owner Change Date: 7/10/2013
Proposition 13 Appraisal: Yes
Value Change: 100%
Document Transfer Tax: $0.00
Preliminary Change of Ownership: **2013-0039089**

Recorded Document: 2003-0107753
Record Change Date: 10/20/2003
Effective Owner Change Date: 10/20/2003
Preliminary Change of Ownership: **2003-0107753**

Recorded Document: 2003-0105373
Record Change Date: 10/10/2003
Effective Owner Change Date: 10/10/2003
Preliminary Change of Ownership: **2003-0105373**

Recorded Document: 2000-0002514
Record Change Date: 1/14/2000
Effective Owner Change Date: 1/14/2000
Preliminary Change of Ownership: **2000-0002514**

Recorded Document: 1999-0046183
Record Change Date: 7/23/1999
Effective Owner Change Date: 7/23/1999
Proposition 13 Appraisal: Yes
Value Change: 100%
Document Transfer Tax: $165.00
Preliminary Change of Ownership: **1999-0046183**

Recorded Document: 1999-0045301
Record Change Date: 7/20/1999
Effective Owner Change Date: 7/20/1999
Proposition 13 Appraisal: Yes
Value Change: 100%
Document Transfer Tax: $165.00
Preliminary Change of Ownership: **1999-0045301**

Recorded Document: 1995-4444358
Record Change Date: 3/30/1995
Effective Owner Change Date: 2/16/1995
Preliminary Change of Ownership: **1995-4444358**

Recorded Document: 1995-4373073
Record Change Date: 11/4/1994
Effective Owner Change Date: 11/4/1994
Preliminary Change of Ownership: **1995-4373073**

Recorded Document: 1991-3654647
Record Change Date: 10/29/1991
Effective Owner Change Date: 10/29/1991
Preliminary Change of Ownership: **1991-3654647**

Recorded Document: 1991-3449499
Record Change Date: 10/23/1990
Effective Owner Change Date: 10/23/1990
Proposition 13 Appraisal: Yes
Value Change: 50%
Document Transfer Tax: $0.00
Preliminary Change of Ownership: **1991-3449499**

Recorded Document: 1990-3370211
Record Change Date: 6/14/1990
Effective Owner Change Date: 6/14/1990
Preliminary Change of Ownership: **1990-3370211**

Recorded Document: 1982-2105064
Record Change Date: 9/15/1982
Effective Owner Change Date: 9/15/1982
Preliminary Change of Ownership: **1982-2105064**

Recorded Document:
Recorder's Book and Page: 1912-436
Record Change Date: 9/29/1980
Effective Owner Change Date: 9/29/1980
Preliminary Change of Ownership: **1-1912436**

Recorded Document:
Recorder's Book and Page: 1744-353
Record Change Date: 4/6/1979
Effective Owner Change Date: 4/6/1979
Preliminary Change of Ownership: **1-1744353**

Assessor Parcel Number 023271023000

2020-0042049 • • GRANT DEED

Recording Date	Grantor (4)	Grantee (2)
08/14/2020 02:46 PM	**BENTON KAREN TR** **BENTON STEVE TR** **BENTON STEVE TRUST** **BENTON KAREN TRUST**	**KELLY JAMES P** **MCINERNEY MOLLY M**