Appeal No. G058506

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

FRIENDS FOR FULLERTON'S FUTURE,JOSHUA FERGUSON, and DAVID CURLEE

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

Respondents,

CITY OF FULLERTON

Real Party in Interest.

APPEAL FROM THE SUPERIOR COURT FOR
THE COUNTY OF ORANGE
Hon. Thomas A. Delaney, (657) 622-5224
Superior Court No. 30-2019-01107063-CU-NP-CJC

PRELIMINARY OPPOSITION TO PETITION FOR WRITS OF MANDAMUS, PROHIBITION, AND REVIEW

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PRELIMINARY OPPOSITION TO PETITION FOR WRITS OF MANDAMUS, PROHIBITION, AND REVIEW

I.

INTRODUCTION

Real Party in Interest City of Fullerton ("City") respectfully submits this preliminary opposition as invited by the Court in its November 7, 2019 Order, in opposition to the Petition for Alternative and Peremptory Writs of Mandamus, Prohibition and Review ("Petition"). An injunctive order preventing Petitioners/Defendants from using or disseminating the City's records – which they took without permission from the City's private Dropbox account, and which include *many* privileged and confidential documents, is necessary and proper. In addition, writ relief is not proper because Petitioners have an available, adequate remedy at law -- a direct appeal -- and issuance of a writ of mandate or other writ is not justified or proper under the circumstances based on applicable equitable principles.

This Court must make no mistake about the nature of the Complaint and request for injunctive relief at issue in this matter. The case is *not* about the First Amendment, Petitioners' lofty arguments aside. What it is about is the City's right to the return and control over any further disclosure of records that belong to it and that were taken unlawfully without the City's permission *by Petitioners*. Notably, Petitioners are not innocent bystanders in this. Unlike news reporters in a long line of cases supporting

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First Amendment protection for news sources, Petitioners do not have in their possession records that were stolen by *others*. Instead, since it was Petitioners *themselves* that stole the City's records, there is no First Amendment protection for what they have and continue to wrongly do in connection with records that rightfully still belong to the City.

The primary fact in this matter is that Petitioners took records off the City's Dropbox account that they were never invited or authorized to access and/or download. In some instances, the files were not properly protected. However, the fact that something may be left unlocked or unguarded – and thus may invite theft, does not absolve someone of the responsibility *not* to take that which is *not theirs*. Just because theft might be open or easy does not make it not theft, i.e., the taking of someone else's property. Similarly, just because the link to the City's Dropbox account was provided to *a third party*, does not somehow grant permission or authorization for *Petitioners* to use that same link to access or download any or all of the City's files within the account, especially confidential or privileged files, which were never intended for review by the public or by Petitioners. And this is true whether the link to the City's Dropbox account was provided inadvertently and/or with direction to specific files, or by a failure to lock or protect the files.

In addition, this Court should see the Petition for what it really is – an attempt at an end-run around a standard appeal. This Court should deny

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writ relief for the simple reason that Petitioners have a direct right of appeal. Also, Petitioners are not entitled to any writ, in that applicable equitable principles bar such relief.

Indeed, since the Petition is not about the First Amendment at all, it should be denied in its entirety. Notably, Petitioners' claims are not about freedom of the press or ferreting out government corruption. Petitioners are not heroes or champions of freedom. They are just plunderers, operating by the trite childhood rule of "finders keepers," which has no actual validity under the law. The Superior Court got this right, and properly enjoined Petitioners from using or disseminating the City's records pending further hearing in this matter. The City has sufficiently established, by credible and detailed evidence, that Petitioners have taken the City's records without permission, that they have refused to return any of those taken records, that the vast majority of thousands of these records have never yet been published by Petitioners, and that the records are worthy of the utmost protection by the Court, since countless documents within the folders and files stolen by Petitioners contain personal information of City employees, such as medical, social security, and personnel information, as well as attorney-client privileged communications. The Superior Court's TRO is thus *not* a prior restraint, but is an order that recognizes and temporarily enforces the City's rightful ownership of its own records against Petitioners' wholesale download of such records from the City's Dropbox -

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- without authorization or permission and as to records not public and not intended for review or download by Petitioners or any members of the public, and as to a computer system not open to the public.

II.

STATEMENTS OF FACTS

For purposes of this preliminary response only, the City provides the following brief summary of pertinent facts. By this statement, the City does not concede that the facts as set forth by Petitioners are either accurate or relevant, but the City will address those facts in detail, if necessary, upon further briefing in this matter.

At issue in the Petition is a Temporary Restraining Order issued by the Superior Court on October 25, 2019 in favor of the City (the "TRO Order") (Petition at 414-418.) After issuance of the TRO Order, this Court stayed the following terms, by its order on November 7, 2019 Order, so that the following portions of the TRO Order are at issue presently:

> (j) Selling, publishing, distributing, disclosing or otherwise using any of the information or documents obtained from the City Dropbox folders and files listed at Exhibit A, without the City's permission, or a valid court order;
>
> (k) Conspiring with third parties to sell, publish, distribute, disclose or otherwise use any of the information or documents obtained from the City Dropbox folders and files listed at Exhibit A, without the City's permission, or a valid court order.

(Petition at 416:21-26). *See also*, Petition at 378 (Exhibit A to Proposed TRO).

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Exhibit A to the Proposed TRO Order listed the following specific documents that were downloaded by Petitioners without authorization from the City's Dropbox file and that were enjoined for further use, dissemination or publication on an interim basis:[1]

EXHIBIT A

Dropbox Folders and Files at Issue

"(Addendum No. 1 Plans).zip" "1_Laguna Lake Files" "129 W Commonwealth – Graphics" "1310 Sorrento Pl" "52588 BID" "56019 Fiber" "ACUSA_H21 Leases" "ACUSA_PRR.zip" "Airport Database/Fullerton Municipal Airport.mdb" "AxonPRR.zip" "CE_PRR_KC.zip" "Citywide Bicycle \u0026 Ped. Improvement Project" "COF_CADD_PACKAGE-REV-2015-08" "council_20180430.zip" "Drainage Master Plan/1996 Boyle/COF_ comprehensive master plan of drainage_1996.pdf" "Dukes" "FD_20180430.zip" "Hillcrest Park" "JF_PRR_2.zip" "JF_PRR20181012.zip" "JF_PRR_PD.zip" "KCCPRR - Redacted.zip" "Keith Cangiarella PRR Responsive E-mails.zip" "Kevin/COF_Kevin.docx" "Lease Files.zip"	"Lucity" "NARCOTICS" "Police" "PRR 18-225 Replogle Responsive E-mails.pdf" "PPR_18_326_Curlee.zip" "PR19-171VD_1_2.zip" "pr1919 - Josh Ferguson.zip" "PRR_1600_2.7z" "PRR_19-134_data@thehourlystruggle.com.zip" "PRR Accela 8-17-17" "PRR_AIR20180604.zip" "PRR_CE.zip" "PPR_Cox.zip" "PRR_JF_20181002.zip" "PRRS01082019" "PRRS01082019.zip" "PRRS01092019.zip" "PRRS01092019_all.zip" "PRRS01152019_JF.zip" "Public Records Request" "Vernoica Duarte PRR" [sic] "Veronica Duarte - Air Combat" "Veronica Duarte.zip" "VM.zip" "Water"

The City has provided very detailed and specific evidence, both in

[1] Exhibit A to the Proposed TRO filed by the City was not, for some reason, included with the TRO filed and signed by the Superior Court, even though the TRO Order refers to this Exhibit of specific file names. This appears to be a clerical error that the City is presently in the process of having the Superior Court correct. Notably, Petitioners' counsel has recently taken the position that the TRO is essentially ineffective because it has not yet been corrected to include the specific list of documents which were the subject of the Order. Given the Petitioners' contrary assertion to this Court that they are irreparably harmed by the Trial Court's order, this Court should deny the Petition out of hand.

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support of the Ex Parte Application for TRO, and subsequently, relating to the Superior Court's on-going consideration of injunctive relief pending trial on the City's claims. This evidence demonstrates specific downloads by Petitioners of City records from the City's Dropbox account that have been without permission or authorization.

Specifically, the City filed the following declarations in support of its initial Ex Parte Application for TRO, among others:

- **Declaration of Matthew Strebe**, who is a computer data expert and conducted an analysis of the City's Dropbox account activity logs and downloads by Petitioners (Petition at 108-307);

  [This declaration establishes Petitioners' unauthorized downloads of multiple folders and files from the City's Dropbox account, connecting Petitioner Ferguson to PureVPN downloads and Petitioner Curlee to TOR downloads, and connecting various privileged and confidential documents contained within the Subject File with Petitioners' Blog posts.]

- **Declaration of Mea Klein**, who is the Assistant City Clerk for the City of Fullerton and handled the public records requests by Petitioners, and responses and providing documents and certain limited access to the City's Dropbox account (Petition at 309-338);

  [This declaration details the City's use of Dropbox specific Dropbox folders produced to Petitioners and the correspondence between the City and Petitioner Ferguson regarding Public Records Request (PRR) No. 19-19, and provides that Ms. Klein did not authorize any PRA requester to access (1) any Dropbox folders containing PST files prior to review and approval by legal counsel, or (2) any files other than specific files identified within the Public Records Act request.]

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In support of the City's request for preliminary injunction, and in accordance with the Superior Court's briefing schedule set in the TRO Order, the City filed the following supplemental declarations:

- **Supplemental Declaration of Matthew Strebe** (*See* Appendix of Supporting Documents filed concurrently herewith ("App.") at Vol. 1:14-109);

  [This declaration (1) establishes that Petitioners downloaded all of the Dropbox folders and files at issue before June 6, 2019, the date the City inadvertently sent Petitioner Curlee a link to the entire Dropbox account, (2) the details Petitioners' downloading history of the Dropbox folders and files containing privileged PST files, and (3) that the downloads attributed to the Fullerton Cameras and Christopher Tennyson Dropbox logins were in fact Petitioner Ferguson.]

- **Supplemental Declaration of Mea Klein** (App. Vol. 1: 110-156);

  [This declaration provides the history of the PRRs corresponding with the Dropbox folders and files containing privileged PST files, including identification of individuals who were provided links to the PST files, and direction to the specific password protected folder named "PRR Pro Card 5-29-19."]

- **Declaration of Christopher Tennyson** (App. Vol. 1: 169-171), who was a sales associate with Fullerton Cameras, where Petitioner Ferguson also worked, and where City files were downloaded;

  [This declaration establishes that Mr. Tennyson did not download any folders or files from the City's Dropbox account.]

- **Declarations of Marni and Michael J. Rice** (App. Vol. 1: 163-

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168), who are owners of Fullerton Cameras; and

[These declarations establish that neither Ms. Rice nor Mr. Rice downloaded any folders or files from the City's Dropbox account, and who had access to the computer from which downloads were made at the business, leaving only Mr. Ferguson with access.]

- **Declaration of Ivy M. Tsai** (App. Vol. 1: 157-162), Deputy City Attorney for the City of Fullerton, for whom files were deposited on the City's Dropbox account for her review and redaction.

  [This declaration provides the history of certain PRRs corresponding with the Dropbox folders and files containing privileged PST files, including identification of individuals who were provided links to those PST files.]

In connection with the City's Reply brief filed in the Superior Court, the City also filed the following declarations:

- **Second Supplemental Declaration of Mea Klein** (App. Vol. 2: 365-369);

  [This declaration identifies the password protections placed on the Dropbox folders containing privileged PST files.]

- **Second Supplemental Declaration of Matthew Strebe** (App. Vol. 2: 353-357);

  [This declaration responds to various points made in the declaration submitted by Petitioners, with expert analysis.]

- **Supplemental Declaration of Ivy M. Tsai** (App. Vol. 2: 370-372); and

  [This declaration identifies the password protections placed on the Dropbox folders containing privileged PST files.]

- **Declaration of Brooke A. Buchanan** (App. Vol. 2: 358-364),

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who is also an attorney with the City Attorney's Office.

[This declaration provides an overarching summary of the 730 privileged and confidential emails and/or attachments identified from a preliminary first level review of a privileged PST file, including the types of privileges and confidential materials contained therein.]

The above records are filed concurrently herewith so that this Court has the full evidence submitted to the Superior Court in connection with the records at issue in this matter. The City also filed a Request for Judicial Notice, requesting that the Superior Court take judicial notice of pleadings and declarations filed in support of the City's opposition to Petitioners' Anti-SLAPP Motion, including the following:

- **Further Supplemental Declaration of Matthew Strebe**;

  [This declaration establishes that the City's Dropbox account was private, not linked to the City's public website, and could not be navigated with a specific link or Dropbox account address.]

- **Declaration of John Gilbert**, who is an independent third party expert retained by *The Fullerton Observer*, a local newspaper, to review the City's computer forensic analysis;

  [This declaration concurs with Respondent's expert's analysis and conclusions.]

- **Declaration of Gretchen Beatty**, who is the Director of Human Resources for the City of Fullerton; and

  [This declaration establishes that (1) a privileged PST file at issue contains private information concerning 40 affected individuals, who have been notified by the City, (2) identification of individuals whose private data were included in the other 18 Dropbox folders containing PST files downloaded by Petitioners

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is ongoing, and that (3) the City has expended well over $5,000 in connection with its investigation of the data breach.]

- **Declaration of Monica Choi Arredondo**, Deputy City Attorney for the City of Fullerton and counsel of record.

  [This declaration provides information regarding the 48 PST files contained within a privileged PST file at issue, including identification of the 23 City employees and officials whose emails were harvested to create those PST files and the names and counts of each of the 48 PST files.]

(App. Vol. 2: 390-391.)

III.

LEGAL DISCUSSION

A. PETITIONERS DO NOT HAVE ANY LEGAL RIGHTS TO CITY RECORDS THAT THEY TOOK WITHOUT PERMISSION OR AUTHORIZATION, AND SO INJUNCTIVE RELIEF PROTECTING SUCH RECORDS IS APPROPRIATE.

A fundamental underlying and critical element of this matter is the fact that Petitioners took records from the City's Dropbox account without authorization. This was in violation of law, regardless of whether they had any malicious intent, or whether they were aware that they did not have permission or authorization to do so (even though the facts relating to their download of documents establish that there was sufficient basis for any reasonable person to have realized that the massive downloads were *not*

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authorized in any way). Additionally, the fact that Petitioners purportedly did not know the records that they took from the City were confidential or privileged, or even the fact that records may not have been protected in all instances with passwords or other measures to secure the records, does not negate the violation of law effected by Petitioners' improper taking of City records. Simply, one does not have a right to take something that does not belong to you; one cannot enter another's home or office and take records, just because the door may have been left open.

Specifically, California Penal Code Section 502 is *not* limited to intentional theft or malicious breaking into another's computer. Instead, it applies to both "computer crime[s]" *and* "other forms of *unauthorized access* to . . . computer data." Cal. Penal Code § 502 (a). Notably, Petitioners need not even have knowledge of unauthorized access, nor must protections of computer data be actively bypassed or compromised.

Consistent with the stated legislative intent to comprehensively provide vital protection to the computers of governmental agencies, the term "access" is broadly defined by Section 502 to simply "mean[] to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer, computer system, or computer network." Cal. Penal Code § 502 (b)(1). Data is also given a wide swath, so that it includes any "representation of information, knowledge, facts, concepts,

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computer software, or computer programs or instructions," which can "be in any form, in storage media, or as stored in the memory of the computer or in transit or presented on a display device." Cal. Penal Code § 502 (b)(8).

In combination with these broad definitions, a *violation* of Section 502 occurs when any person merely "[k]nowingly accesses" the government's computer data, and "without permission takes, copies, or makes use of any data from [such] a computer, computer system, or computer network." Cal. Penal Code § 502 (c)(2). Thus, "knowing" access and taking "without permission" constitute a violation of Section 502 -- with *no* requirement that there be any breaking into a computer system, any bypassing or even the presence of any security features, nor any fraudulent or malicious intent.

The Ninth Circuit Court of Appeal characterized Section 502 as follows:

> [T]he California statute does not require *unauthorized* access. It merely requires *knowing* access. . . . What makes that access unlawful is that the person "without permission takes, copies, or makes use of" data on the computer. Cal. Penal Code § 502(c)(2). A plain reading of the statute demonstrates that its focus is on unauthorized *taking or use* of information.

United States v. Christensen, 828 F.3d 763, 789 (9th Cir. 2016) (emphasis added). As the *Christensen* Court found, "the term 'access' as defined in the California statute includes logging into a database [even] *with* a valid

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password and subsequently taking, copying, or using the information in the database improperly." *Id.* at 789 (emphasis added).

Further, violation of this section is not limited to criminal liability, but the statute also provides a civil remedy that permits the owner of any computer data "who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) [to] bring a civil action against the violator for compensatory damages *and injunctive relief* or other equitable relief." Cal. Penal Code § 502 (e)(1) (italics added). Based on these statutory provisions and the evidence presented to the Superior Court in support of the City's Ex Parte Application for TRO, there was sufficient basis for the reasonable exercise of the Superior Court's discretion to determine temporary injunctive relief was warranted pending a further hearing on a preliminary injunction.

In this instance, detailed documentation and evidence by declaration was provided to the Superior Court in support of the City's Ex Parte Application for a TRO, to prevent destruction or any dissemination or further publication of any of the records, documents or information that were unlawfully downloaded and accessed by Petitioners from the City's Dropbox account. (Petition, Exhibit C at 108-307.) In particular, Petitioner Ferguson was shown to have accessed a file with thousands of emails from the City's Dropbox file that had been placed in the file for review by the City's *attorney,* for redaction and/or exemption under the Public Records

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Act; moreover, his download of this file was *prior* to any of the files being produced or disclosed to him in response to a Public Records Act request, thus at a time when he could not reasonably have believed that such records were intended for him. (Petition, at 315, ¶ 15 – 317, ¶ 22; 128, ¶ 69 – 130, ¶ 74.)

Numerous files were downloaded and reviewed by Petitioners, without proper authorization or access granted from the City to the specific Dropbox files downloaded. (Petition, at 126-127, ¶ 67 & Exhibit D; 315-316, ¶¶ 15 - 16.) In addition to invalid authorization to access or download any of the referenced documents, the documents are protected attorney work product, in that the files were created specifically for review by the City's *attorney* for determination of applicable exemptions and privileges. More importantly, most or all of the documents are exempt from disclosure under the Public Records Act because they are absolutely protected by the attorney-client privilege, as well as many of the files being subject to review and potentially redaction because they contain private, personal information and/or are protected personnel files, and to the extent there are "public records within the electronic files, they are not able to be segregated from privileged records." *See* Cal. Gov't Code § 6254(c) (personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy); Cal. Gov't Code § 6254(f) (law enforcement investigative records); Cal. Gov't Code § 6254(k) (records

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exempted from disclosure pursuant to federal and state law provisions, such as the attorney-client privilege, attorney work product doctrine, peace officer personnel records, etc.); Cal. Gov't Code § 6255 (public interest in not disclosing records).

In addition, since the filing of the Petition with this Court, the parties have submitted supplemental pleadings with the Superior Court, including additional declarations, in connection with the Order to Show Cause re: Preliminary Injunction hearing.[2] *See generally,* App. Vol. 1-Vol. 2, filed concurrently herewith. In declarations submitted in support of Petitioners by named Petitioners/Defendants Ferguson (App. Vol. 2: 303-305) and Curlee (App. Vol. 2: 282-302), the declarants *do not dispute* that they accessed and downloaded the specified City files, nor do they assert that they had any permission or authority to do so. Instead, they each only make the following bare assertions about their accessing and downloading of the City's files at issue herein *without permission*:

- "The City never told me that the Dropbox used by the City of Fullerton contained confidential files." (App. Vol. 2: 284, ¶ 14 (Curlee); App. Vol. 2: 304, ¶ 2 (Ferguson))
- "The City never told me that any file posted to its Dropbox account contained privileged information." (App. Vol. 2: 284, ¶ 15 (Curlee); App. Vol. 2: 304, ¶ 3 (Ferguson))

[2] This hearing was originally scheduled for November 21, 2019. However, Petitioners challenged the assigned judge (Cal. Civ. Proc. Code § 170.6), and the newly assigned judicial officer has re-set the hearing on preliminary injunction for February 27, 2020, continuing the TRO in effect, subject to the Court of Appeals' partial stay and future actions.

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- "The City never told me that the files on the City's Dropbox account required special permission from the City to open." (App. Vol. 2: 284, ¶ 16 (Curlee); App. Vol. 2: 304, ¶ 4 (Ferguson))

- "The City never told me that public access to any of the content of the City's Dropbox account was restricted." (App. Vol. 2: 284, ¶ 17 (Curlee); App. Vol. 2: 304, ¶ 5 (Ferguson))

As noted above, the law requires no communication of the fact that computer files are "confidential," "privileged," "restricted," or even that "permission" is required, particularly not some "special permission," in order for a taking of computer files be a violation of law. Moreover, the very nature of the City's Dropbox account establishes that there was no wide open or public access to its Dropbox files. Instead, the evidence submitted to the Superior Court establishes that the City's Dropbox account and files were *only* accessible through unique links to specific files or folders. (Petition, at 114:12-28 ("The only way to initiate access is to obtain a link from someone who has authorized access"; Dropbox's "mechanism constitutes a specific invitation to access a specific file or folder of files").) In other words, in order to access *any* of the files in the City's Dropbox account a specific link had to be provided or someone was required to manually enter a previously provided link or web address. (App. Vol. 2: 353-354, ¶ 4.)

Even where general access was provided to particular individuals (still through a specific link), whether intentionally or inadvertently by the City, such access was still provided for a particular purpose and any actions

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exceeding that specific permission, purpose or authority would constitute a violation of Section 502. In the same manner that a guest, licensee, invitee or easement holder entering real property can exceed a specific permission, license or easement given, and actions in excess can still constitute a trespass, access to the City's computer files that exceeded the particular authority given to an individual is a similar unauthorized use and access, which violates Section 502. *See, e.g., Civic W. Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 16 (1977) ("The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation. . . . [A] trespass may occur if the party, entering pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. 'A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.'") (quoting Rest.2d Torts, § 168.).

Moreover, Penal Code Section 502 does not require any breaking into a computer system, or the existence or avoidance of computer passwords. *See Facebook, v. Power Ventures*, 844 F.3d 1058 (9th Cir. 2015) ("knowing access" includes access through log-in credentials voluntarily provided by third parties); *Satmodo, v. Whenever Communs.*, 2017 U.S. Dist. LEXIS 203469, at *13-14 (S.D. Cal. 2017) (allowing § 502(c)(5) claim based on access gained through use of valid password, to

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improperly produce invalid clicks on plaintiff's paid advertisements to increase defendant's revenues); *NovelPoster v. Javitch Canfield Grp.*, 140 F.Supp.3d 954, 967 (N.D. Cal. 2014) (denying motion to dismiss section 502 claim against individual who "used technically-operable log-in information to access portions of a computer system which the individual knew he was not permitted to access"); *DocMagic v. Ellie Mae*, 745 F.Supp.2d 1119 (N.D. Cal. 2010) (defendant's repeated unauthorized access into plaintiff's servers using others' license keys and log-in credentials satisfied CFAA).

Indeed, Petitioner/Defendant Curlee flatly admits in his declaration filed with Superior Court that he initially had accessed the City's Dropbox files in 2017 *without* any express permission from the City or access that had been given to him. Instead, he lifted an "address" which would redirect a person to the City's Dropbox link from emails sent by the City to *someone else*, which he had gotten from emails and other records that were provided to him in a public records request. (App. Vol. 2: 283, ¶ 7.) He apparently took it upon himself to type in the link provided to the third person in the email, and access and download records not prepared for him and to which he had been given *no* express access, authority or permission to review, access or download.

Further, Mr. Curlee notes that, as to a public records request response provided to him on September 26, 2017, "the City used Dropbox

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to fulfill [this] large . . . request." What Mr. Curlee noticeably omits from this statement is the fact that he was at that time provided a specific link only to a *particular* Dropbox subfolder called "Pro-Card.zip," which was password protected and contained only the specific records that were responsive to his public records request. (Petition at 314, ¶ 14 (a) & 319-320 (Ex. A).)

Whether or not he was at that time informed regarding the fact that his permission to access the City's Dropbox account was then limited to a specific folder, his access was so limited. In addition, the access given to him to a specific subfolder would not reasonably lead him to believe that he had somehow been given *un*limited access or authorization as to any and all other folders in, or the whole of, the City's Dropbox account. Just as a guest may be given admission to certain rooms in one's house, a guest is not thereby given open access to root around in files, drawers, cupboards, closets, attics and every nook and cranny in the whole house merely because initial access or permission was given to one limited area – whether the initial access was expressly limited or not. And, access at one time to one limited area does not mean a guest can return at any other time and access all other parts of the house or areas to which the guest was never invited.

Even more importantly, Penal Code Section 502 requires *no* knowledge of the scope of permission given -- just that files were taken in

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excess of authorization actually given. In any event, no reasonable permission or authorization could be found based on facts admittedly known to Mr. Curlee. In the instance specified above, Mr. Curlee was *actually* given access to *only one subfolder* in the City's Dropbox account, so the access actually provided to him would not have even given him the ability to download or even review files in other folders of the City's account. Therefore, access of other files was by some other means than the permission and authorization actually provided to him. Indeed he admits in his declaration that his access was by *unauthorized* means since he admits he accessed other City documents through a link given to *someone else*. His taking of documents by this means is an unlawful violation of Section 502, and thus is not protected.[3]

In direct contrast to Mr. Curlee's declaration, Mr. Ferguson's declaration is notably lacking in *any* specific details as to his accessing and downloading of the City's Dropbox files. (App. Vol. 2: 304, ¶¶ 2-6). And thus the City's evidence conclusively establishes – without contradiction -- that Mr. Ferguson was *never* provided access to the following Dropbox files or folders: "pr1919-Joshua Ferguson.zip"; "ACUSA_PRR.zip"; etc. (Petition, at 315.) However, he downloaded the contents of these folders

[3] Although Mr. Curlee did *later* receive a link to the City's entire Dropbox account, by the time he received that, he and Mr. Ferguson had *already* downloaded all of the Dropbox folders containing the City's privileged PST files. (App. Vol. 1: 17, ¶ 7 & 28-30 (Ex. 1).)

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without authorization between December 19, 2017 and June 10, 2019. (Petition, at 126-127.)

The City added both of these files to its Dropbox account for the purpose of having the City's *attorney* review these electronic files. (App. Vol. 1:158, ¶ 3; Vol. 1:115, ¶ 15.) In fact, Mr. Ferguson was explicitly informed by the City on May 24, 2019 that his very broad public records request had yielded 11,000+ potentially responsive records and that attorney review of these would be required (particularly because his designated search terms had included reference to matters that would likely yield exempt or protected records, such as "personnel records" and "personnel files"). In response to the request on that date for his consent and responsibility for the estimated cost of that necessary *attorney* review, he informed the City he would consult with his legal counsel, but never again communicated with the City as to the request. (Petition, at 316, ¶ 17 – 317, ¶ 21 & 319-320 (Ex. A).) Of course, he did not need to have the records reviewed by the City and produced to him, because he had at that time *already* taken it upon himself to hunt around in subfolders within the City's Dropbox file – folders to which he had *not* been given any authority to review, and download the raw electronic file that had been placed in the City's Dropbox account for *attorney* review on May 10, 2019. (Petition, at 124-126, ¶ 65; 128, ¶ 70; & 207-208 (Ex. A).) At the time of his download, he had *not* been provided any direction to access that file or that his

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responsive records were ready. Not that his actual knowledge of authorized access is necessary, but even so it would be unfathomable under these circumstances that he could have any reasonable belief that he had any permission to access or download these files. Moreover, he used a foreign computer network service for this download, for the purpose of disguising or obscuring his identity in doing so, and these actions also negate any implication that he innocently downloaded these files. (Petition, at 128.)

Based on the above, Petitioners have erroneously sought to shield themselves from the consequences of their own wrongdoing in taking City records which had never been produced to them. Instead, in each instance when they were actually provided direct links to the City's records in its Dropbox account, they were provided direct access to a specific folder by a link that related to a specific public records request. In fact, as to these responses, Petitioners were either given a link only to a particular subfolder in the Dropbox account, and only on one occasion was Mr. Curlee provided a link to the entire account, but with the specific name of the folder and password containing the records responsive to such request and to which he was given permission to access. (Petition, at 314-315, ¶ 14 (a)-(e) & 319-329 (Exhs. A-E).)

The fact that Petitioners may have been able to locate other records that they could access (unknown to the City) in the City's Dropbox account did not give them any lawful authority to either access or download those

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files without permission. The First Amendment does not protect Petitioners from their actions in violation of Penal Code Section 502, and the TRO enjoining them from using, disseminating or publishing such unlawfully obtained records is most certainly *not* a prior restraint as to these records taken without permission. Instead, the TRO Order validly protects against further conversion of documents belonging to, and improperly taken from, the City without permission.

No legal authority relied upon by Petitioners holds otherwise.

In all cases relied upon by Petitioners, the publisher or other person exercising First Amendment rights was an innocent third party, *not* the person who was actually responsible for misappropriating the documents. "There is no First Amendment interest in protecting news media from calculated misdeeds"). *Dietemann v. Time*, 449 F.2d 245, 249-50 (9th Cir. 1971) (citing *Time v. Hill*, 385 U.S. 374, 389-90 (1967)).

In *Florida Star v. B.J.F.,* 491 U.S. 524, 531-532 (1989), the newsgathering consisted of copying a police report that had been voluntarily provided in the police department's pressroom, and "at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified." In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the publisher of information that was obtained by a third party in violation of the federal wiretapping law could not be penalized, since the publisher had not *himself* engaged in the illegal conduct. In *Smith v. Daily Mail Pub.*

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Co., 443 U.S. 97 (1979), the newspapers learned of the name of a juvenile suspect in a murder case legally and through valid newsgathering – by asking witnesses at the scene. Notably, the *Smith* Court's holding was limited because "[t]here is no issue . . . of *unlawful* press access" and "no issue here of *privacy*," which are issues that are precisely of concern here. *Id.* (italics added). In *Landmark Communications v. Va.,* 436 U.S. 829 (1978), there was no indication that the press had illegally obtained confidential information regarding a judicial council inquiry. In *Oklahoma Pub. Co. v. Dist. Court of Oklahoma*, 430 U.S. 308 (1977), the identification and photo of a juvenile criminal suspect was legally obtained by the press during courtroom proceedings that were open to the public. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the information obtained by the press was evidence that had been offered in open court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974), the information sought to be reported was obtained from a public record made available in a courtroom to the reporter. In *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1971), there was no criminal conduct on the part of the newspaper in obtaining information. That case challenged a right of reply statute requiring publication of a response, which the paper had refused to publish, by political candidates to critical editorials printed by a paper. In *Nicholson v. McClatchy Newspapers,* 177 Cal. App. 3d 509 (1986), someone within the State Bar leaked confidential information relating to rejection of a

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judicial candidate to the press. In *Ass'n of Los Angeles Deputy Sheriffs v. Los Angeles Times,* 239 Cal. App. 4th 808 (2015), confidential documents were similarly leaked by someone within the Sheriff's Department to an innocent, third party reporter. *See also, e.g.*, *Dietemann v. Time*, 449 F.2d 245, 249 (9th Cir. 1971) (undercover reporters' use of lies to enter private residence and use hidden cameras and recording devices not protected under First Amendment); *Shulman v. Group W Prods.*, 18 Cal. 4th 200, 239 (1998) (holding members of news media have no constitutional privilege to eavesdrop in violation of Penal Code § 632 "or otherwise to intrude tortiously on private places, conversations or information."); *Marin Indep. J. v. Municipal Ct.*, 12 Cal. App. 4th 1712 (1993) (trial court's seizure of reporter's film did not violate First Amendment where photographs were obtained unlawfully, in deliberate violation of trial court's order in criminal proceedings).

To the extent Petitioners claim that some of the records that they took are "public records," this fact alone does not give them any legal entitlement to the stolen records, nor does it undermine the Superior Court's granting of the TRO, for several important reasons. First, privileged files – which are exempt from disclosure -- are not able to be segregated from other public records. Specifically, records that were taken by Petitioners and that included private and attorney-client privileged material were in an electronic format (.pst) that does not allow separation of

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separate email messages and/or attachments to emails. (Petition at 128, ¶ 69 – 130, ¶ 73.) In other words, the records taken were *single* files, and thus the whole file must be restrained and returned. Second, the .pst files taken by Petitioners were only "*potentiall*y responsive to a Public Records Act (PRA) request" and were specifically created "for attorney review." (Petition at 117, ¶ 33.) Thus, they have not yet been determined to be *disclosable* public records.

Indeed, this fact presents a bigger obstacle to Petitioners retention of the stolen records – in that the files were specifically created for attorney review and are thus attorney work product and not disclosable. In fact, Petitioners' theft of the electronic files constitutes an end-run around the Public Records Act itself, because the City has been deprived of its ability *in the first instance* to determine under the Act *which* records are responsive and disclosable versus those that are exempt, privileged, or private and *not* disclosable. *See Ardon v. City of Los Angeles,* 62 Cal. 4th 1176 (2016) (inadvertent disclosure of privileged information in response to a Public Records Act request is not a waiver of the confidentiality of such materials, including the attorney-client or attorney work product privileges).

In this way, Petitioners create a false comparison altogether. They assert that the records that they took without permission are "presumptively public and disclosable under the CPRA," as if to dismiss the City's right to

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the return and control of its stolen records -- with the simple use of the magic words "public records." What Petitioners ignore is the fact that the City did *not* produce these records under the Public Records Act, they were only compiled to be able to comply with the Public Records Act. For each of the public records requests corresponding with the Dropbox folders containing privileged .pst files taken by Petitioners, the City had either made a determination that the requests were overly broad and burdensome, the responsive records were exempt from disclosure, or had actually made a formal production of documents in response, all of which the City is entitled to do under the law. (App. Vol. 1: 110-117 & 157-162.)

Indeed, the underlying legal action is *not* one that has been brought by *Petitioners* to enforce any purported right to the disclosure of records under the Public Records Act. Instead, Petitioners are attempting to usurp the City's ability and right to make the determination of what records are subject to disclosure in the first place, by way of their circuitous Petition.

Petitioners are attempting to turn the Public Records Act on its head. Essentially, they have taken it upon themselves to make a wholesale theft of the City's privileged collection of records. And, they seek by this Petition to have this Court determine that *all* of the City's records are *public*, without the City first having an opportunity to review these records and make that determination itself – which is within the City's right in the first instance.

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This is not how the Public Records Act is supposed to operate. Instead, only once the City has reviewed and made a determination as to which records will be disclosed -- and which will be exempt from review -- can Petitioners assert any legal right to the disclosure of records that have been withheld. Petitioners seek to have this Court impermissibly circumvent this process altogether, and make determinations about the nature of the records before such issues are properly before this Court, or were even properly before the Superior Court. This poses an inappropriate and dangerous use of writ relief.

In fact, this presents yet another insurmountable problem for the granting of the writ relief that Petitioners seek from this Court, since they do, indeed, have an adequate legal remedy available to them. Petitioners could have sought, or could still seek writ relief with the Superior Court as to the stolen records, if any are improperly withheld from them. Or course, this can only occur *after* the City is first afforded its right to even review the records, make exemption determinations, and produce responsive records to Petitioners. Petitioners' self-help tactics to take records that have not yet been reviewed or prepared for production in compliance with the Act, cannot be sanctioned or validated by this Court. Instead, this Court must do as the Superior Court did – to protect the City's stolen records, and order their return, if warranted, upon further hearing and/or trial. The determination of whether some or all of the stolen records are, in fact,

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public records is a matter for another day.

B. AS A MATTER OF LAW AND FACT THE TRIAL COURT PROPERLY EXERCISED ITS VALID DISCRETION TO GRANT TEMPORARY INJUNCTIVE RELIEF IN ORDER TO PRESERVE LEGALLY PROTECTED CITY DOCUMENTS

As set forth above, Petitioners have no First Amendment or legal right in or to retain, use or disseminate the records that they have taken from the City without permission. On this basis, the Superior Court properly concluded that there was a sufficient showing for issuance of the TRO Order.

A temporary restraining order may be granted when "[i]t appears from the facts shown by affidavits or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice . . . ." Cal. Civ. Proc. Code § 527(c)(1). Specifically, a court is authorized to grant a temporary restraining order when the requesting party is likely to prevail on the merits of its claims, and the balancing of the harms to the parties weighs in favor of granting injunctive relief on an interim basis. *Church of Christ in Hollywood v. Superior Ct.*, 99 Cal. App. 4th 1244, 1251 (2002). *See also, White v. Davis,* 30 Cal. 4th 528, 554 (2003) (court required to find likelihood plaintiff will prevail on the merits and to balance harm likely to result from granting or denying interim

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injunctive relief). Specifically, "if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits" or "that the balance of harms tips in [that party's] favor," the trial court has discretion to issue the requested injunction. *Common Cause v. Board of Supervisors*, 49 Cal.3d 432, 441-42 (1989). The Supreme Court has emphasized that such a decision by the trial court "will not be modified or dissolved on appeal except for an abuse of discretion." *Salazar v. Eastin*, 9 Cal. 4th 836, 849-50 (1995) (internal quotations and citations omitted).

Based on these legal principles, the Superior Court properly exercised its discretion. As a matter of law, Petitioners have been shown to have taken the City's records without permission. Therefore, the City has satisfied the requirement that it show that it has a likelihood of success on the merits of its claims.

Further, the evidence and facts provided to the Superior Court support the finding that the City's interests in restraining further use or dissemination of its records outweighs Petitioners' interests in using or disseminating these records that it took without permission. In particular, Petitioners do not have a legally recognized interest or constitutional interest in retaining or using these documents.

Most important here is the public interest and the City's interest in preserving the protections afforded to the documents taken by Petitioners. As set forth above, the records taken are inextricably intertwined with

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personal information and attorney-client privileged communications and attorney work product. When a court considers the balancing of harms for purposes of injunctive relief, it *must* consider public policy concerns. *O'Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1471 (2006) (consideration of public policy is "mandatory"); *Tahoe Keys Prop. Owners' Assn. v. State Water Res. Control Bd.*, 23 Cal. App. 4th 1459, 1472-73 (1994) (same).

As established, Petitioners have no interest in maintaining records that they obtained unlawfully without the City's permission. Extending First Amendment protection to bloggers and others, as to stolen document of other persons, governmental entities or businesses documents by the very persons claiming a First Amendment right would turn the First Amendment into a weapon against all privacy rights, rather than a shield from government overreach. In addition, even assuming *arguendo* that this was a point that had not been sufficiently established by the City – even though it has, the harm to the City would be irreversible from a failure enjoin use or dissemination of its protected records. Once its protected and privilege records are further disclosed, there will be no ability for those acts and the further release of such information to be taken back; the City's protected and privileged records could be made public without recourse – even if the City is able to finally establish the wrongful taking of its records by Petitioners at trial.

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The narrow TRO Order here, which merely prevents use or dissemination of the City's stolen records, is valid, particularly because the City has made a sufficient showing by detailed and extensive evidence of Petitioners' taking of such records without the City's permission. *See, e.g., Wolfson v. Lewis*, 924 F.Supp.1413, 1434-35 (E.D. Penn. 1996) (news reporters not irreparably harmed by injunction narrowly tailored to preclude their harassing, hounding, following, intruding, frightening, terrorizing or ambushing of plaintiff and his wife and children; such an injunction allowed them to continue using legal newsgathering means).

In point of fact, the City has the same interest as any citizen in protecting its private communications with its attorneys. *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 371 (1993) ("[T]he [attorney-client] privilege applies not only to communications [of public agencies] made in anticipation of litigation, but also to legal advice when no litigation is threatened.") Critical statutory protections are also in place as to the stolen records, and the important public policies protecting such private and privileged information is without question – putting public policy plainly on the side of the issuance of injunctive relief by the Superior Court. *See* [Cal. Gov't Code § 6254(k) (exempting from disclosure records exempted under federal or state law, including Evidence Code provisions relating to privilege); Cal. Evid. Code § 950 et seq. (attorney-client privilege); Cal. Civ. Proc. Code § 2018.010 et seq. (attorney work product)]; [Cal. Gov't

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Code § 6254(k); Cal. Gov't Code §54957.2(a) (exempting from disclosure closed session minutes); Cal. Gov't Code § 54963 (prohibiting disclosure of confidential closed session information)]; [Cal. Gov't Code § 6254(c) (exempting from disclosure "medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy")]; [Cal. Gov't Code §§ 6254(k); Civ. Code §§ 56.10(a), 56.05(g); 42 U.S.C. § 1320(d)(1)-(d)(3) (individually-identifiable medical information protected under state and federal law)]; [Cal. Gov't Code § 6254(c) (exempting from disclosure "personnel . . . or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); Gov't Code § 6254(f) (exempting from disclosure records pertaining to law enforcement investigations)]; [Gov't Code § 6255; *BRV v. Superior Ct.*, 143 Cal. App. 4th 742, 755 (2006); *Copley Press v. Superior Ct.,* 39 Cal. 4th 1272 (2006)]; [Cal. Gov't Code §§ 6254(b) (exempting from disclosure documents relating to pending and anticipated litigation); Gov't Code § 6254(k); Cal. Civ. Proc. Code § 2018.010 et seq. (attorney work product)]; [*Bank of Amer. v. Superior Ct.*, 212 Cal. App. 4th 1076, 1083, 1093-1096 (2013) (communications between counsel and either the insurer or insured are privileged.); *Garcia v. City of Imperial*, 270 F.R.D. 566 (S.D. Cal. 2010) (investigative reports entitled to qualified immunity under work-product doctrine)].

Further, the preliminary evidence thus far establishes that Petitioners

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have posted on the website blog for Friends for Fullerton's Future excerpts of numerous privileged and confidential documents unlawfully obtained from the City's Dropbox file sharing account from June 11, 2019 to September 17, 2019. (*See* Petition, at 130, ¶ 75 – 143, ¶ 84, for examples of Blog posts reflecting excerpts from privileged and confidential City documents, which included privileged attorney-client communications, a draft settlement agreement and records pertaining to confidential personnel matters). Further, on October 10, 2019, Defendant Ferguson filed a Petition for Writ of Mandate against the City (Case No. 30-2019-01103679-CU-WM –CJC), attaching additional privileged and exempted records to the publicly filed pleading, including a copy of a draft settlement agreement that is not a public record and is subject to attorney work product protections and the attorney-client privilege. (Petition, at 318, ¶ 24 & 380-381.)

In response to cease and desist letters to Petitioners from the City as to the records taken from its Dropbox file, Petitioners have to-date refused to return these records, and they have provided no evidence that they had any authority to take such records. (Petition, at 345-349; App. Vol. 2: 282-305.) Instead, the evidence presented shows Defendants downloaded and copied privileged .pst files from multiple folders and zip files in the City's Dropbox account, without the City's permission. (*See* Petition, at 128, ¶ 69 - 130, ¶ 74 & 135-220 (Ex. A); 313-314, ¶ 12 & 315-316, ¶ 16). As set

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forth above, even the declarations of Petitioners Ferguson and Curlee have admitted such access and downloads without City permission.

Of the thousands of documents Petitioners took, only a very few – a handful, have already been posted on the website blog for Friends for Fullerton's Future. Of these, Petitioners published attorney-client privileged communications, an excerpt from a privileged closed session memo, a privileged draft separation agreement, human resources disciplinary records, and a confidential insurance claim document, among others. (Petition, at 130, ¶ 75 – 132, ¶ 84). As such, these records, and the many others taken from the City, deserve this Court's protection, since they invariable contain private personal information of employees, and contain documents protected absolutely from disclosure by the attorney-client privilege. Thus, the City's interest, that of the public in furthering these important protections, and the interests of justice in not rewarding Petitioners for their wrongdoing, require a balancing of harms in favor of the City and its request for temporary injunctive relief simply to keep the City's records protected in the interim time period until further hearing and/or trial.

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C. THE WRIT MUST ALSO BE DENIED OUTRIGHT BECAUSE PETITIONERS HAVE AN ADEQUATE REMEDY AT LAW BY DIRECT APPEAL AND EQUITABLE RELIEF IS UNWARRANTED UNDER THE CIRCUMSTANCES.

Petitioners assert that they have no adequate remedy at law from the granting of the TRO Order. (Petition, at 18, ¶ 5.) Even though they readily recognize that "the issuance of a temporary restraining order is an *appealable order,*" they nonetheless assert that they are not subject to this statutorily provided direct remedy, simply because "here an appeal is not a speedy or adequate remedy." (Petition, at 18, ¶ 6.) These bare conclusions are nowhere supported by any facts.

Indeed, under the facts here, it would be more appropriate for the *City* to obtain mandamus relief. Like the situation in *Holm v. Overholt*, 214 Cal. 431, 433-34 (1931), it is the City that could be harmed without recourse by this Court's Stay order and by the failure of the TRO -- in its present form as modified by the Stay order, to protect the City's records from further use or dissemination. In *Holm*, the Supreme Court found that

> [a]n appeal from the order dissolving the temporary restraining order of the superior court would not have had the effect of staying the hand of the sheriff pending the appeal, and the threatened execution sale, if consummated pending the appeal, would have rendered the appeal ineffectual . . . .

The sale at issue in *Holm* would have transferred title and possession in the subject property to one free from claims against the property, which would

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mean "the purchaser would be free to divert the property to the channels of trade and leave the petitioner without remedy." This is precisely the problem presented here. Since Petitioners are the ones in possession of the City's documents, and were the ones who wrongly took them without authorization, the City's valid claims for return of the documents and/or other relief asserted in the City's action, are only against these wrongdoers. Others would be immune from such claims. Thus it is necessary that this Court, as the Superior Court did with the TRO, must protect against further use or disclosure of the City's records, so as to protect the return of the records to the City as the rightful owner. Only injunctive relief will properly protect the private, personal, and privileged information replete in the documents, by preventing disclosure of the records, which disclosure would result in irreparable to the above-identified interests, and which harm could not later be undone. *See, e.g., In re Marriage of Dover*, 15 Cal. App. 3d 675, 680 (1971) ("[H]ad the defendant been permitted to resume its [ground] fill activities, it would have been able, as a practical matter, to render the appeal moot and the fruits of a reversal would be irrevocably lost.") (citing *People ex rel. San Francisco Bay etc. Com. v. Town of Emeryville*, 69 Cal. 2d 533 (1968)).

Moreover, Petitioners do have a valid legal remedy – in that they have the statutory right to seek a direct and immediate appeal of the Superior Court's TRO. The Court of Appeal has explicitly recognized that,

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"'[w]here . . . there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and *should be considered adequate* unless petitioner can show some *special reason* why it is rendered inadequate by the *particular circumstances* of his case.' The most petitioner shows in this regard is that an appeal will *take time* and cost money. *This is insufficient*." *Mitchell v. Superior Court of Los Angeles County*, 98 Cal. App. 2d 304, 304-05 (1950) (italics added) (omission in original). Furthermore, to the extent Petitioners here have (only vaguely) asserted the very same purported inadequacy of the time that would be required to seek a traditional appellate remedy, there are other procedural mechanisms available to them *other* than the extraordinary remedy presented by the writ relief that they now seek to use as an end-run around their right to appeal. The Supreme Court has reiterated that allowing mandamus relief is improper where

> [n]o sound basis has been shown for concluding that petitioner's remedy by appeal is not plain, speedy and adequate. If we hold that she is entitled to a writ of mandate upon the showing here, we shall be laying the foundation for the contention that, regardless of the availability of a remedy by appeal. . . . We reaffirm that 'Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise.'

Lincoln v. Superior Court of Los Angeles County, 22 Cal. 2d 304, 311 (1943) (quoting *Andrews v. Police Court*, 21 Cal. 2d 479, 480 (1943)), disapproved on other grounds by *Robinson v. Superior Court of Los Angeles County*, 35 Cal. 2d 379, 386 (1950).

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In fact, Petitioners sought no other relief from the Superior Court before seeking the extraordinary relief of a writ of mandate, etc. from this Court. However, this procedural prerequisite is well-known: "[b]efore seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue . . . ." *Phelan v. Superior Court of San Francisco*, 35 Cal. 2d 363, 372 (1950).

Indeed, the Superior Court has the ability to grant a limited stay, so that a party may seek an appeal and/or a stay from this Court, but Petitioner never even requested or sought relief from Superior Court as to its TRO Order in the first instance. Cal. Civ. Proc. Code § 918. *See also, Tulare Irrigation Dist. v. Superior Court of Tulare County*, 197 Cal. 649, 665 (1925) ("We have no doubt of the inherent power of a court of original jurisdiction [including "superior court[s] in this state"] to grant a suspension of injunctive decrees pending appeal, when justice may require it, and where the status of the parties is not changed, providing such right is not taken away by statute."). Petitioners also could have requested, but did not, that the Superior Court permit an undertaking to stay its order pending an appeal. Cal. Civ. Proc. Code §§ 529, 917.1. These failures to seek other remedies short of this Court's extraordinary intervention negate the provision of writ relief from this Court now.

Further, Petitioners could have sought a stay from this Court in

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connection with a valid direct appeal. Cal. Rules of Court, Rule 8.112. Petitioners also could have sought expedited review by this Court on their direct appeal. *See, e.g.*, Cal. Rules Ct., Rule 8.68 (permitting shortened time); *Aktar v. Anderson*, 58 Cal. App. 4th 1166, 1172-73 (1997) (ordering petition [for writ of mandate based on new law] to be heard concurrently with the appeal, and order[ing] the appeal expedited"); *National Res. Def. Council v. City of Los Angeles*, 103 Cal. App. 4th 268, 280 (2002) (ordered appeal expedited as to project construction). *See also, e.g.*, Cal. Civ. Proc. Code § 527 (e) ("When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law.").

In fact, the point of an appeal by right is not merely a procedural hurdle, but a guarantee that the issues appealed from will receive the full attention and consideration of the Court, as well as affording the parties the ability to fully and fairly present factual and legal issues to this Court. In bypassing ordinary procedures for full consideration of the merits of their appellate claims, the City is severely prejudiced in its ability to respond. *See, e.g., Nuckolls v. Bank of Cal., Nat'l Asso.*, 7 Cal. 2d 574, 577 (1936) ("Inasmuch as the legislature has provided a method by which the trial court, in a proper case, may grant the stay, the appellate courts, assuming that they have the power, should not, except in some unusual emergency,

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exercise their power until the petitioner has first presented the matter to the trial court.").

This is particularly an unfair hardship to the City because Petitioners' bypassing of standard appellate procedures requires the City to respond on multiple fronts all at the same time, as well as shortcutting this Court's full review of the underlying substantive issues. Petitioners' procedural maneuvers in this case effectively guarantee a multiplicity of proceedings to which the City must respond simultaneously by multiple substantive filings in the Superior Court in addition to this Preliminary Opposition, including responses in relation to the OSC re: Preliminary Injunction and in response to an Anti-SLAPP motion filed by Petitioners on or about November 1, 2019.

Here, there is no reason to proceed by writ. *See Omaha Indemnity Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1273 (1989) ("The Court of Appeal is generally in a far better position to review a question when called upon to do so in an appeal instead of by way of a writ petition. When review takes place by way of an appeal, the court has…more time for deliberation and, therefore, more insight into the significance of the issues"). It is nearly a maxim of writ practice that a "trial does not generally meet the definition of 'irreparable injury,' being at most an irreparable inconvenience. Also, it is not fair to parties on appeal who have often waited years for the final resolution of their disputes to have litigants

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in the pretrial state elbow their way into the line at our door." *Ordway v. Superior Court*, 198 Cal.App.3d 98, 101 n.1 (1988), disapproved on other grounds in *Knight v. Jewett* (1992) 3 Cal.4th 296, 306-309; *Unnamed Physician v. Board of Trustees*, 93 Cal. App. 4th 607, 620 (2001) ("A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law. [Citations.]' Inconvenience does not equal irreparable injury"); *Omaha Indemnity*, 209 Cal. App. 3d at 1269.

Further, writ relief is also not proper based on applicable equitable principles, for instance when the party seeking the remedy has unclean hands, as Petitioners do. The Court of Appeal has described this doctrine as follows:

> The doctrine of "unclean hands," which applies equally to law and equity, "demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." This doctrine, which is often tendered as an affirmative defense, actually exists to promote the court's interest in "protect[ing] judicial integrity and promot[ing] justice" by preventing a wrongdoer from benefitting from his or her misconduct.

DD Hair Lounge, LLC v. State Farm Gen. Ins. Co., 20 Cal. App. 5th 1238, 1246 (2018) (internal citations omitted). *See also, Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 727 (1964) ("It cannot be questioned that the defense of unclean hands may be urged against a party seeking the aid of equity by way of an injunction."). *See*

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also, e.g., *Aguayo v. Amaro*, 213 Cal. App. 4th 1102, 1112 (2013) (defense of unclean hands properly applied based on deceitful interference with the owner's ability to defeat adverse possession claim); *DeGarmo v. Goldman*, 19 Cal. 2d 755, 765 (1942) ("The burden is on the one coming into a court of equity for relief to prove not only his legal rights but his clean hands."). Since Petitioners have engaged in wrongdoing by the unauthorized taking of City records, their own bad behavior cannot then justify this Court's stay or alteration of a valid TRO, which enjoins them temporarily from benefitting from the fruits of their deceit or furthering their violations of law by continuing to disseminate or use the stolen documents – until the Superior Court can afford all of the parties a more full hearing and consideration of the evidence.

Moreover, equitable relief is not proper because the matter will be moot when the Court conducts its hearing on the preliminary injunction. *See, e.g., Pacific Gas & Elec. Co. v. Superior Court of San Francisco*, 10 Cal. 2d 545, 546 (1938) (petition denied when "questions raised by petitioners herein have become moot"); *Environmental Coal. of Orange County v. Local Agency Formation Com.*, 110 Cal. App. 3d 164, 170 (1980) ("'[A]n action which originally was based upon a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.'").

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At the time that the Superior Court issues any order on the preliminary injunction, the TRO will be automatically terminated. *Landmark Holding Group, Inc. v. Superior Court*, 193 Cal. App. 3d 525, 529 (1987). Since a preliminary injunction would supersede and replace the TRO (or the TRO would otherwise be vacated, if the preliminary injunction were denied), the TRO as a "provisional remedy [would be] merged in the perpetual injunction thereby granted to the plaintiff, and [would] cease to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing [temporary] 'order' granting an injunction from which an appeal [or writ] could be taken." *Peoples Ditch Co. v. Foothill Irrigation Dist.*, 103 Cal. App. 321, 326 (1930). This Court should permit the Superior Court to make a more full and robust determination of the merits of preliminary injunctive relief in this matter, and thus should refrain from its exercise of extraordinary relief and summarily deny the Petition as unnecessary and improvident. This Court should also rescind its order staying portions of the TRO Order, so that the City's records can be fully protected until further hearing by the Superior Court.

Indeed, the parties will likely be going through these very same steps all over again once the preliminary injunction hearing occurs, since one party or the other is likely to be dissatisfied with the Superior Court's ruling at its subsequent hearing. This is all the more reason why this Court should refrain from exercising any substantive review on the Petition, since it is

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likely to be of limited value, and the issues will likely return to this Court in connection with the Superior Court's ruling on the preliminary injunction, with a much more complete record as well.

In fact, this Court's review of the Superior Court's TRO Order is extremely limited, since the Superior Court has wide discretion to determine whether to permit temporary injunctive relief. *Killeen v. Hotel & Rest. Employees' Int'l All. & Bartenders' Int'l League*, 84 Cal. App. 2d 87, 95 (1948) ("The granting or denial of a temporary restraining order is left to the sound discretion of the trial court."). The Superior Court's order "may not be disturbed on appeal, except upon a clear showing of abuse of discretion." *Id.* The "trial judge['s] . . . order [for a temporary restraining order] . . . will not be disturbed on appeal except upon a showing of clear abuse of discretion. *Gray v. Bybee*, 60 Cal. App. 2d 564, 569 (1943) (citing *Asiatic Club v. Biggy*, 160 Cal. 713 (1911)).

IV.

CONCLUSION.

Based on all of the evidence and the Superior Court's proper balancing of the potential harm to the parties until the hearing on the preliminary injunction, its discretion was properly exercised, and this Court has no sufficient basis for overturning that decision as an abuse of discretion. In fact, "a trial court *abuses* that discretion by denying a preliminary injunction where the plaintiffs establish a 'reasonable

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probability' of success on the merits and that they will suffer more harm from its denial than the defendant will from its grant." *MaJor v. Miraverde Homeowners Ass'n*, 7 Cal. App. 4th 618, 624 (1992). Here, the Superior Court properly took into account the potential severe harm to the City – in that many thousands of documents, including personal, private and attorney-client privileged ones – could be published or disseminated by Petitioners with impunity if the Superior Court had not issued the TRO Order. Further, Petitioners have no legal interest whatsoever in records that they took from the City illegally and without its permission. Further, writ relief is likely to be moot, is not warranted by the unclean hands doctrine, and would otherwise be unjust. Moreover, this Court's Order staying portions of the TRO should be vacated, since the TRO Order is necessary to protect and preserve the City's significant interests in its records. For all of the foregoing reasons, this Court must deny the Petition and restore the TRO Order to its original scope, so that Petitioners may not use, disseminate or otherwise further their improper possession and distribution of private and privileged records which they had no authority to take or use.

Respectfully submitted,

Dated: November 18, 2019 JONES & MAYER

Kimberly Hall Barlow
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Attorneys for Real Party in Interest,
CITY OF FULLERTON

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CERTIFICATE OF WORD COUNT

(Cal. Rules Ct., Rule 8.204 (c)(1))

I hereby certify, pursuant to California rules of Court, Rule 8.204 (c) that the foregoing Preliminary Opposition contains 11,143 words, including footnotes, relying on the word count of the mputer program used to prepare this brief.

Respectfully submitted,

JONES & MAYER

Dated: November 18, 2019

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DECLARATION OF SERVICE

I am employed in the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 3777 N. Harbor Boulevard, Fullerton, California 92835.

On November 18, 2019, pursuant to Local Rule 1 of the Court of Appeal Fourth Appellate District, I caused the following documents to be served on all counsel of record as identified below:

1. PRELIMINARY OPPOSITION TO PETITION FOR WRITS OF MANDAMUS, PROHIBITION, AND REVIEW;

2. APPENDIX OF EXHIBITS IN SUPPORT OF PRELIMINARY OPPOSITION VOLUME 1 OF 2, EXHIBITS 1-7a, pp. 1-174; and

3. APPENDIX OF EXHIBITS IN SUPPORT OF PRELIMINARY OPPOSITION VOLUME 2 OF 2, EXHIBITS 8-20, pp. 175-385.

On November 18, 2019, I also electronically filed and served the above-referenced documents via this Court's electronic TrueFiling system

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Counsel for Defendants and Petitioners Friends for Fullerton's Future, Joshua Ferguson, and David Curlee

I also caused copies to be delivered to the trial court by placing a true and correct copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Fullerton, California, addressed as follows:

Honorable Richard Y. Lee,
Judge, Dept. C31
Orange County Superior Court
700 W Civic Center Dr.
Santa Ana, CA 92701

By Mail only

I declare under penalty of perjury under the laws of the State of California that he above is true and correct. Executed on November 18, 2019, at Fullerton, California.

Sandra K. Sandoval

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