IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

PASADENA POLICE OFFICERS ASSOCIATION (PPOA), OFFICER MATTHEW GRIFFIN, OFFICER JEFFREY NEWLEN, Petitioners/Plaintiffs, vs. LOS ANGELES COUNTY SUPERIOR COURT, Respondent. CITY OF PASADENA, et al., Defendants. KRIS OCKERSHAUSER, et al., Intervenors/Cross-Petitioners.	2d Civ. No. B260332 Los Angeles Superior Court Case No. BC 556464 Hon. James C. Chalfant, Presiding **EMERGENCY RELIEF REQUESTED**

OPPOSITION TO PETITIONERS' MOTION FOR UNCONSTITUTIONAL PRIOR RESTRAINT AND SEALING ORDER; REQUEST TO IMMEDIATELY VACATE MARCH 25 ORDER

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TABLE OF CONTENTS

Page

I. SUMMARY OF ARGUMENT 3

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE 7

III. BECAUSE THE COURT'S ORDER, EFFECTIVELY PROHIBITS DISSEMINATION OF PPOA'S PUBLICLY FILED REPLY BRIEF, IT IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH 10

A. Prior Restraints Are Presumptively Unconstitutional. 10

B. Courts Uniformly Reject Prior Restraints Where, As Here, The Information At Issue Already Has Been Made Public. 14

C. PPOA Cannot Come Close To Satisfying The Stringent Standard To Justify A Prior Restraint. 16

D. The Order Compelling Return Of The Reply That Cross-Petitioners Lawfully Acquired Is Itself A Prior Restraint. 20

IV. PETITIONERS HAVE NO BASIS FOR RETROACTIVELY SEALING THEIR PUBLICLY FILED REPLY BRIEF 21

A. Court Records Are Presumptively Open Under The First Amendment And California Rules Of Court. 22

B. PPOA Has Not Met The Constitutional And Statutory Requirements To Retroactively Seal Its Reply Brief. 23

V. CONCLUSION 26

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TABLE OF AUTHORITIES

Page

CASES

Ashcraft v. Conoco, Inc.,
218 F.3d 288 (4th Cir. 2000) 17

Association For Los Angeles Deputy Sheriffs (ALADS) v.
Los Angeles Times Communications LLC,
Case No. B253083 2

Bank Julius Baer & Co. Ltd. v. WikiLeaks,
535 F. Supp. 2d 980, 985 (N.D. Cal 2008) 15, 26

Brammer-Hoelter v. Twin Peaks Charter Academy,
602 F.3d 1175 (10th Cir. 2010) 18

CBS v. Davis,
510 U.S. 1315 (1994) 11

Cooper v. Rockford Newspapers, Inc.,
34 Ill. App. 3d 645, 339 N.E.2d 477 (1975) 15

Council of the City of New Orleans v. Washington,
13 So.3d 662 (La. App. 2009) 20

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 12

Flack v. Municipal Court,
66 Cal. 2d 981 (1967) 13

Florida Star v. B.J.F.,
491 U.S. 524 (1989) 2, 12

FMC Corp. v. Capital Cities/ABC,
915 F.2d 300 (7th Cir. 1990) 6, 20

Freedom Communications, Inc. v. Superior Court,
167 Cal. App. 4th 150 (2008) 13, 14, 16

Gilbert v. National Enquirer, Inc.,
43 Cal. App. 4th 1135 (1996) 19

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Goldblum v. NBC,
584 F.2d 904 (9th Cir. 1978) 20

Hurvitz v. Hoefflin,
84 Cal. App. 4th 1232 (2000) ..... passim

In re Charlotte Observer,
921 F.2d 47 (4th Cir. 1990) 15

In re Charlotte Observer,
882 F.2d 850 (4th Cir. 1989) 26

In re Continental Illinois Securities Litig.,
732 F.2d 1302 (7th Cir. 1984) 26

In re Marriage of Candiotti,
34 Cal. App. 4th 718 (1995) 13

In re Providence Journal Co.,
820 F.2d 1342 (1st Cir. 1986) (en banc), modified 820
F.2d 1354 (1st Cir. 1987) 18, 19

In re Steinberg,
148 Cal. App. 3d 14 (1983) 21

Kamakana v. City and County of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 26

Kansas v. Alston,
256 Kan. 571, 887 P.2d 681 (1994) 15

Kash Enters., Inc. v. City of Los Angeles,
19 Cal. 3d 294 (1977) 4

KCST-TV Channel 39 v. Municipal Court,
201 Cal. App. 3d 143 (1988) 14

KGTV Channel 10 v. Superior Court,
26 Cal. App. 4th 1673 (1994) 14

Landmark Commn's, Inc. v. Virginia,
435 U.S. 829 (1978) 12, 17

Littlejohn v. BIC Corp.,
851 F.2d 673 (3d Cir. 1988) 26

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Marcus v. Search Warrants of Property,
367 U.S. 717 (1961) 4

McNair v. National Collegiate Athletic Assn.,
234 Cal. App. 4th 25 (2015) 22

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,
20 Cal. 4th 1178 (1999) 22, 23, 25

Near v. Minnesota,
283 U.S. 697 (1931) 11, 26

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) ..... passim

New York Times Co. v. United States,
403 U.S. 713 (1971) 11, 18, 19, 26

Oklahoma Publishing Co. v. District Court,
430 U.S. 308 (1977) 12

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971) 16, 19

Proctor & Gamble v. Bankers Trust Co.,
78 F.3d 219 (6th Cir. 1996) 16, 17

Rico v. Mitsubishi Motors Corp.,
42 Cal. 4th 807 (2007) 24

Savaglio v. Wal-Mart Stores, Inc.,
149 Cal. App. 4th 588 (2007) 7, 24

South Coast Newspapers, Inc. v. Superior Court,
85 Cal. App. 4th 866 (2000) 13

State Comp. Ins. Fund v. WPS, Inc.,
70 Cal. App. 4th 644 (1999) 24

State ex rel. Superior Court v. Sperry,
79 Wn. 2d 69, 483 P.2d 608 (1971) 15

State v. Coe,
101 Wn. 2d 364, 679 P.2d 353 (1984) 15

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Steiner v. Superior Court,
220 Cal. App. 4th 1479 (2013) 13

Sun Co. of San Bernardino v. Superior Court,
29 Cal. App. 3d 815 (1973) 14

United States v. McKenzie,
735 F.2d 907 (5th Cir. 1984) 21

United States v. Smith,
123 F. 3d 140 ..... 14, 16

STATUTES

Evidence Code § 993 25

Penal Code § 832.7 25

RULES

California Rules of Court
2.550 22
2.550(d) 22, 23
2.551 22
8.46(d)(2) 23

CONSTITUTIONAL PROVISIONS

California Constitution, Article I, § 3, subd. (b)(2) 22, 23

First Amendment to the United States Constitution ..... passim

Sixth Amendment to the United States Constitution 11

United States Constitution 5, 14, 22

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SECOND APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA, DIVISION ONE:

Intervenors/Cross-Petitioners/Real Parties in Interest Los Angeles Times Communications LLC ("The Times") and Kris Ockershauser, et al. (collectively, "Cross-Petitioners") respectfully submit this Opposition to the Motion filed on March 25, 2015 by Petitioners Pasadena Police Officers Association, Officer Matthew Griffin, and Officer Jeffrey Newlen (collectively "PPOA"), which seeks to prevent The Times and the other Cross-Petitioners from disseminating information that they lawfully obtained, and which was contained in a publicly-filed brief to this Court.

Rather than calling their Motion what it is – a request for an unconstitutional prior restraint and sealing order – PPOA submitted what appeared to be a perfunctory administrative request to remedy a filing mistake.[1] Cross-Petitioners learned of PPOA's Motion when this Court's clerk electronically notified them of the Order sealing PPOA's Reply Brief and ordering Cross-Petitioners to "**immediately return**" the Reply Brief to the Clerk. See Order On Petitioners' Motion To Have Sealed Their Reply

[1] Notably, PPOA made no attempt to notify Cross-Petitioners of its intent to seek an order restricting Cross-Petitioners' constitutional rights; instead, it mailed a copy of its Motion to some of the counsel of record, in a transparent attempt to ensure that these parties would be unlikely to learn of the request until after the Court issued an order. And indeed, that is precisely what happened. See Section I, infra.

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etc., dated March 25, 2015 ("March 25 Order"); see also attached Declarations of Kevin L. Vick, Jeff Glasser, Jonathan L. Segal and Dale L. Gronemeier.

PPOA has made no showing – nor could it conceivably make the requisite showing – satisfying the strict constitutional burdens for orders, like this one, that effectively operate as prior restraints on speech.[2] As the United States Supreme Court repeatedly has made clear, courts may not enjoin or punish the publication of public records, even when those records are inadvertently disclosed and reveal allegedly confidential information. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 537 (1989) (reversing judgment against newspaper that published name of rape victim inadvertently disclosed in police report). Here, because the Los Angeles Times newsroom and as many as thirty non-parties have lawfully received the unredacted Reply Brief (Glasser Decl., ¶ 2; Gronemeier Decl., ¶¶ 3-4), any order that operates to punish or prevent the publication or dissemination of information in that Brief is a prior restraint that is presumptively unconstitutional. PPOA has not met, and cannot meet, the strict burden required to overcome that presumption.

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[2] PPOA's counsel are well aware of these strict constitutional tests: they are representing another law enforcement union in a matter currently pending in Division Three of this Court, in which they unsuccessfully sought a prior restraint to enjoin The Times' publication of police officer information. See Association For Los Angeles Deputy Sheriffs (ALADS) v. Los Angeles Times Communications LLC, Case No. B253083.

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Nor did PPOA even attempt to meet the constitutional requirements for sealing court records that have previously been available in a public file. For these reasons, and because Cross-Petitioners were not given proper notice or an opportunity to be heard on this serious infringement of their constitutional rights, this Court should immediately vacate its March 25 Order, and issue a new order denying PPOA's Motion in its entirety.

I. SUMMARY OF ARGUMENT

This matter arises from a lawsuit in which PPOA has attempted to prevent the release of a report prepared by the Office of Independent Review Group ("OIRG Report") that the City of Pasadena commissioned to review departmental policies in the wake of the shooting of an unarmed teenager, Kendrec McDade. PPOA has challenged findings by Superior Court Judge James C. Chalfant that the majority of the OIRG Report must be publicly disclosed under California's Public Records Act. On March 16, 2015, PPOA filed its Reply Brief, in which it liberally quoted portions of the OIRG Report in attempting to justify its position that Judge Chalfant's ruling should be reversed.

Nine days later, on March 25, 2015 – evidently realizing that their voluntary disclosure of significant portions of the OIRG Report could hurt their claim that the information contained in it must be kept secret – PPOA's counsel attempted an end run of Cross-Petitioners' (and the public's) constitutional rights, by filing the motion to immediately seal their

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Reply Brief and claw back the Brief from Cross-Petitioners. This request was intended to prevent Cross-Petitioners from disseminating the information that PPOA had disclosed, and was done in a manner that was designed to prevent Cross-Petitioners from having any opportunity to respond – by mailing a copy of the Motion, by regular mail, to some (but not all) of Cross-Petitioners' counsel of record. Vick Decl., ¶ 2; Gronemeier Decl., ¶ 5.

That same day, on March 25, 2015, this Court entered an Order granting the Motion, ordering that the document filed in the public court record be sealed, and ordering Cross-Petitioners to "immediately" return PPOA's brief to the court clerk. March 25 Order.[3]

Neither PPOA's Motion nor the [Proposed] Order it submitted, (which this Court entered), use the words "prior restraint," or expressly mention a restraint on dissemination; nor is there any explanation how the strict constitutional standards for such an order would be met in this case. Nonetheless, the result of the Court's Order has been the immediate and

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[3] Cross-Petitioners were entitled to notice and an opportunity to be heard before entry of the Order. See, e.g., Marcus v. Search Warrants of Property, 367 U.S. 717,736-37 (1961) (distributors suffered unconstitutional denial of due process where state seized allegedly obscene publications without notice or a hearing prior to seizure, impairing distributors' freedom of speech); Kash Enters., Inc. v. City of Los Angeles, 19 Cal. 3d 294, 308 (1977) ("the Constitution generally requires that an individual be accorded notice and some form of hearing before he is deprived of a protected property or liberty interest").

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absolute chilling of Cross-Petitioners' speech. Because the Order not only seals a previously public court record, but also demands the "immediate" "return" of the document, out of an abundance of caution and respect for this Court's processes, The Times has halted its anticipated publication of an article discussing the information in PPOA's Reply Brief, and Cross-Petitioners have stopped sharing copies of the Reply Brief with third parties. Glasser Decl. ¶ 3; Gronemeier Decl. ¶ 4. Thus, although PPOA never could satisfy the impossibly high bar to justify a prior restraint, and did not even try to do so, the Court's Order has had the same effect as a prior restraint – immediately "freezing" the dissemination of information that Cross-Petitioners lawfully acquired.

As discussed in more detail below, the First Amendment to the United States Constitution does not permit such a result. Indeed, the Supreme Court has described prior restraints as the "most serious and least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). The constitutional restrictions on such orders are particularly high where, as here, the information sought to be restrained already was made public; indeed, this Court rejected a restraining order in far more sympathetic circumstances involving records that were in a public court file for only one day. See Hurvitz v. Hoefflin, 84 Cal. App. 4th 1232, 1245 (2000) (rejecting request for restraining order as unconstitutional prior restraint; "once the information is released, unlike a

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physical object, it cannot be recaptured and sealed"). Demanding the return of documents that were lawfully obtained is no different – that, too, impermissibly interferes with the exercise of First Amendment rights. See, e.g., FMC Corp. v. Capital Cities/ABC, 915 F.2d 300, 301 (7th Cir. 1990) (applying California law, Seventh Circuit rejected demand that ABC news return all copies of documents that plaintiff alleged were "stolen" from it; court held that ABC was "free to retain copies of any of [the plaintiffs'] documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment.")

Similarly, PPOA's attempt to put the genie back in the bottle by asking this Court for a retroactive sealing order also runs afoul of constitutional protections. PPOA's Motion perfunctorily mentions this Court's sealing rules, without explaining how they have satisfied the constitutional requirements for sealing of court records – because they cannot. Where, as here, a document has been filed publicly, the justification for sealing the record – assuming one otherwise existed – disappears. See, e.g., Hurvitz, 84 Cal. App. 4th at 1237, 1244, 1246-47 (reversing retroactive sealing order for declaration with highly sensitive information that had been filed for one day in public court file); see also Savaglio v. Wal-Mart Stores, Inc., 149 Cal. App. 4th 588, 598 (2007) (holding Wal-Mart waived its right to "belatedly" seek a sealing order where it had already publicly filed the records at issue in the Court of

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Appeal "without a sealing order and without proper findings after a noticed motion.") (original emphasis).

For these reasons, explained in more detail below, this Court should immediately vacate the March 25 Order, and enter an Order denying PPOA's Motion.[4] Alternatively, the Court should issue an Order clarifying its prior ruling, to make clear that the March 25 Order does not restrict Cross-Petitioners' rights to publish or otherwise disclose the contents of the unredacted Reply Brief that appeared in public court files for nine days.

II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

In 2012, Pasadena Police Officers Jeffrey Newlen and Matthew Griffin shot and killed 18-year-old Kendrec McDade when responding to a 911 caller who claimed that two armed men had stolen the caller's laptop. T35:0856; T38:1781-1784.[5] The shooting spawned three investigations, as well as a lawsuit by Mr. McDade's mother. T35:1734-1736; T38:1775-1789. No charges were filed against the officers, and the civil lawsuit was settled for $850,000.00. T38:1787-1788; T27:0626; T27:0632; T35:0767.

In the aftermath of the shooting, the Pasadena Police Department initiated two internal investigations – one criminal and one administrative.

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[4] The Court entered an Order on the same day that PPOA's Motion was filed, and before Cross-Petitioners had even received a copy of the Motion – which PPOA served only by mail. Accordingly, as directed by the Clerk of the Court, Cross-Petitioners are opposing that Motion.

[5] "T" References are to the record on appeal in this matter.

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T35:1161-1162; T38:1777-1778. The City also commissioned a private consultant – the OIR Group – to conduct an investigation with a different focus than the criminal and administrative investigations. T38:1776. As explained in the merits briefs filed with this Court, PPOA filed this litigation in the hope of preventing the City from disclosing copies of that Report, and Cross-Petitioners intervened to compel disclosure of the Report under the California Public Records Act.[6] On October 16, 2014, the trial court ordered disclosure of a redacted copy of the OIRG Report. T60:1966-1981.

Petitioners filed a Petition for Writ of Mandate with this Court and on January 26, 2015, the Court issued an Order to Show Cause.

On March 16, 2015, PPOA filed its Reply Brief in this Court's public record. As part of its argument, PPOA included excerpts from the OIRG Report, which it described as "examples" of the OIRG's opinions and conclusions about the Officers' conduct, and a "Recommendation" from the OIRG Report. Reply Brief at 10-11.[7] It made no attempt to redact or seal the Reply Brief, and nothing on the caption of the brief or in the

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[6] See Return filed by The Times, February 23, 2015; Return filed by Ockershauser, et al., February 24, 2015.

[7] Although PPOA does not state whether the "examples" and Recommendation are in the portion of the OIRG Report that the trial court ordered to be publicly disclosed, Cross-Petitioners assume that is the case, since portions that would have been redacted under the trial court's order have no bearing on the merits appeal.

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filing suggested that it intended to do so.[8] The Reply Brief was available in the public record for nine full days before PPOA took any steps to secure the information within it. During that time, counsel for The Times distributed electronic copies of the Brief to its client, the Los Angeles Times (Glasser Decl. ¶ 2), and counsel for the other Cross-Petitioners distributed the Reply Brief broadly to their clients (who themselves distributed copies of the Brief), and to other interested third parties. Gronemeier Decl. ¶¶ 3-4.

On March 25, 2015, PPOA filed a Motion in the guise of a simple request to correct its allegedly "inadvertent" disclosure of the unredacted Reply Brief. The Motion was mailed to some, but not all, of the counsel of record for Cross-Petitioners. Vick Decl. ¶ 2; Gronemeier Decl. ¶ 5. Cross-Petitioners' counsel had not received the Motion – and were unaware that it had been filed – until they received this Court's Order, which was entered the same day the Motion was filed. Vick Decl. ¶ 2; Glasser Decl. ¶ 4; Gronemeier Decl. ¶ 5. When The Times contacted the Court's Clerk to inquire about the existence of a motion or application that resulted in the

[8] Notably, the Motion does not include a declaration from the counsel listed on the Reply Brief, nor is there any mention of what efforts had been made to keep the information in it confidential. Instead, the Motion appears to be an eleventh-hour change of heart about the information PPOA chose to include in the Reply Brief.

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Order, she advised The Times' counsel that Cross-Petitioners could file papers "opposing" PPOA's Motion. Segal Decl. ¶ 2.

III. BECAUSE THE COURT'S ORDER EFFECTIVELY PROHIBITS DISSEMINATION OF PPOA'S PUBLICLY FILED REPLY BRIEF, IT IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH.

This Court's March 25, 2015 Order seals the unredacted copy of the Reply Brief, and Orders the parties to "immediately" return the Reply Brief to the Clerk of the Court. The clear intent of PPOA's Motion, and the effect of this Court's Order, are to prevent Cross-Petitioners from disseminating information in their possession that they lawfully obtained – which is a classic prior restraint. Because the Order does not meet the constitutional requirements for prior restraints – nor can PPOA conceivably do so – it should be immediately vacated.

A. Prior Restraints Are Presumptively Unconstitutional.

As the United States Supreme Court repeatedly has recognized, prior restraints constitute "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Because prior restraints are so antithetical to the First Amendment, they are "presumptively unconstitutional." Id. (emphasis added). The Court has declared that prior restraints may be justified, if at all, only in the most exceptional circumstances, such as to limit dissemination of information about troop movements in wartime, Near v.

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Minnesota, 283 U.S. 697, 716 (1931), or to "suppress[] information that would set in motion a nuclear holocaust." New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring). Similarly, in granting an emergency stay of a prior restraint against a news organization, Justice Blackmun declared that such orders are a "most extraordinary remedy" that may be used "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." CBS v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers).

Not surprisingly, given the antipathy toward prior restraints, the Supreme Court consistently has invalidated such orders, even where substantial interests would be impaired by the publication sought to be enjoined. See, e.g., Near, 283 U.S. at 716-718 (invalidating prior restraint against defamatory and racist publication that allegedly disturbed the "public peace"); Nebraska Press, 427 U.S. at 556-561 (invalidating prior restraint against publication of information about criminal defendant's confession, despite alleged risk to Sixth Amendment rights); New York Times, 403 U.S. at 714 (invalidating prior restraint against publication of the "Pentagon Papers," despite the government's argument that disclosure of that information posed a "grave and immediate danger" to national security).

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The Supreme Court has been particularly hostile to prior restraints that prohibit the press from publishing information obtained during court proceedings or from other government proceedings or records. In Nebraska Press, for example, the Court announced that the "protection against prior restraint should have particular force as applied to reporting of criminal proceedings." 427 U.S. at 559. Absent a "clear and present danger" to a "state interest of the highest order," such restraints are flatly unconstitutional. Thus, "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975); see also, e.g., Landmark Commn's, Inc. v. Virginia, 435 U.S. 829, 831-832 (1978) (invalidating a newspaper's conviction for publishing information from confidential judicial disciplinary proceedings in violation of a criminal statute).

Indeed, the Supreme Court has held that not even protecting the identity of a rape victim (Florida Star v. B.J.F., 491 U.S. 524, 537 (1989); Cox Broadcasting, 420 U.S. at 496), or the identity of a child charged with murder (Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311 (1977), justifies a restriction on the press' right to publish. As one California appellate court observed, it is "unaware of any case, in either federal or state court, that has upheld a prior restraint under the Nebraska

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Press criteria." South Coast Newspapers, Inc. v. Superior Court, 85 Cal. App. 4th 866, 870 (2000) (emphasis added).

California's state constitutional guarantee of free speech and free press "is more definitive and inclusive than the First Amendment"; as a consequence, the burden on a party seeking a prior restraint in this state is even more onerous, and may be insurmountable. In re Marriage of Candiotti, 34 Cal. App. 4th 718, 724 (1995). Courts applying the state constitution, as well as the First Amendment, consistently have rejected prior restraints, which the California Supreme Court has denounced as "the most severe method of intellectual suppression known in modern times." Flack v. Municipal Court, 66 Cal. 2d 981, 988 n.5 (1967).

Accordingly, state courts repeatedly have rejected orders restricting the media's ability to publish information about court proceedings – even where the entity or individual sought to be restrained was a party to the proceedings. See, e.g., Freedom Communications, Inc. v. Superior Court, 167 Cal. App. 4th 150, 154 (2008) (newspaper could not be enjoined from reporting certain information concerning a trial to which that newspaper was a party; "[e]very moment's continuance of [a prior restraint] amounts to a flagrant, indefensible, and continuing violation of the First Amendment"); Steiner v. Superior Court, 220 Cal. App. 4th 1479, 1482 (2013) (order requiring attorney to remove pages from her website during trial was "unlawful prior restraint on the attorney's free speech rights").

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See also KCST-TV Channel 39 v. Municipal Court, 201 Cal. App. 3d 143, 145 (1988) (court order prohibiting TV station from broadcasting sketch of criminal defendant was "unconstitutional prior restraint"); KGTV Channel 10 v. Superior Court, 26 Cal. App. 4th 1673, 1677 (1994) (striking order barring press from publishing photographs of criminal defendants).

B. Courts Uniformly Reject Prior Restraints Where, As Here, The Information At Issue Already Has Been Made Public.

Prior restraints are particularly inappropriate where, as here, the information sought to be suppressed already has been made available to the public. As this Court explained when it denied a request for a prior restraint in Hurvitz, 84 Cal. App. 4th at 1245, "neither the state nor the federal Constitution permits the court to lock the barn door after the horse is gone." See also United States v. Smith, 123 F. 3d 140, 154 n.16, 155 n.17 (3d Cir. 1997) ("under prior restraint law, orders prohibiting the media from publishing information already in its possession [and publicly known] are strongly disfavored"); Sun Co. of San Bernardino v. Superior Court, 29 Cal. App. 3d 815, 829-830 (1973) (reversing order restraining disclosure of information from criminal trial; "First Amendment rights may not be 'sacrificed' on the basis of a possibility that some evil might occur if the utterance is published"); Freedom Comm'n, 167 Cal. App. 4th at 153-154 (order barring a news organization from publishing lawfully obtained

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information about trial proceedings "is unconstitutional under both the United States and California Constitutions," and "must immediately fall").[9]

The Fourth Circuit's decision in In re Charlotte Observer, 921 F.2d 47 (4th Cir. 1990), is instructive. There, the district court enjoined two reporters from publishing the name of the target of an ongoing grand jury investigation after it was inadvertently disclosed in open court in violation of confidentiality laws. Id. at 49-50. The appellate court vacated the injunction as an impermissible prior restraint, noting that "[o]nce announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction." Id. at 50. See also Bank Julius Baer & Co. Ltd. v. WikiLeaks, 535 F. Supp. 2d 980, 985 (N.D. Cal 2008) (refusing to enjoin further publication of bank

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[9] See also Kansas v. Alston, 256 Kan. 571, 581-584, 887 P.2d 681 (1994) (reversing a newspaper's contempt conviction for violating a trial court's order not to publish information discussed in open court); Cooper v. Rockford Newspapers, Inc., 34 Ill. App. 3d 645, 646-648, 652, 339 N.E.2d 477 (1975) (reversing trial court that barred newspaper from writing editorials about lawsuit in which it was a party, on grounds that order was an unconstitutional prior restraint on the defendant's First Amendment rights); see also State ex rel. Superior Court v. Sperry, 79 Wn. 2d 69, 483 P.2d 608 (1971) (reversing trial court order in criminal proceeding prohibiting the media from publishing information revealed outside of the presence of the jury; "[t]he judiciary cannot under circumstances like those before us, suppress, edit, or censor from the public those events which occur in open court proceedings"); State v. Coe, 101 Wn. 2d 364, 366, 381, 679 P.2d 353 (1984) (court order prohibiting television station from airing tape recordings of a criminal defendant's meetings and telephone calls with an undercover police officer that had been admitted into evidence was unconstitutional, notwithstanding the defendant's evidence that she would suffer psychiatric harm if the tapes were broadcast).

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records and related documents that had been posted on defendant's website).

Likewise, once PPOA publicly filed its Reply Brief, and served it on counsel without restriction, "the information lost its secret characteristic, an aspect that could not be restored by the issuance of" any order restricting the dissemination of the contents of that public court record. Id.

C. PPOA Cannot Come Close To Satisfying The Stringent Standard To Justify A Prior Restraint.

As the cases cited in the preceding sections show, a request for a prior restraint comes "with a heavy presumption against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). See also Freedom Communications, 167 Cal. App. 4th at 154 (holding prior restraint is a "most extraordinary remedy that may be used only in exceptional cases.") A court may not issue even a temporary prior restraint unless the restriction is necessary "to further a state interest of the highest order," Smith, 443 U.S. at 102, and the publication "threaten[s] an interest more fundamental than the First Amendment itself." Proctor & Gamble v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996).

This is an extremely strict standard. The court must find evidence of a "clear and present danger" of harm to a paramount state interest; "speculati[on]" or "factors unknown and unknowable" never will justify a prior restraint. Nebraska Press, 427 U.S. at 563. Thus, for example, "[i]t is

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not enough for a court to decide that the fair trial may be affected by the exercise of free speech." Hurvitz, 84 Cal. App. 4th at 1241. Instead, the proponent of the restraint bears "the burden of producing evidence to establish the prejudice." Id. PPOA did not come close to meeting this standard, nor could it do so.

First, the constitutional presumption against prior restraints applies regardless of whether information was disclosed inadvertently or was confidential under a statute or court order. See, e.g., Landmark Commn's, 435 U.S. at 831-32 (invalidating newspaper's punishment for publishing information from confidential judicial disciplinary proceedings);[10] Ashcraft v. Conoco, Inc., 218 F.3d 288, 293 n.2, 301 (4th Cir. 2000) (reversing contempt order against reporter who published the amount of a confidential settlement after court clerk inadvertently provided reporter with sealed documents).

In Procter & Gamble., a district court enjoined a magazine from publishing information from sealed court records, which an attorney had inadvertently provided to a reporter. 78 F.3d at 223. The Sixth Circuit

[10] In a passage that is directly relevant here, Justice Stewart explained that the "government cannot take it upon itself to decide what a newspaper may and may not publish," and although "government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming." Id. at 849 (Stewart, J., concurring) (emphasis added).

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reversed, criticizing the district court for not "realiz[ing] that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution." Id. at 225. See also New York Times, 403 U.S. at 714 (prior restraint not justified by need to prevent publication of "classified study" improperly leaked to the press); In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986) (en banc), modified 820 F.2d 1354 (1st Cir. 1987) (refusing to enjoin publication "[n]otwithstanding that the source who had provided the documents had obtained them possibly as a result of criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security"); Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 1187 (10th Cir. 2010) (prior restraint not justified by need to protect "confidential student information").

Thus, even where sealed records are released due to mistake or inadvertence, courts consistently have held that both pre-publication restraints and post-publication sanctions violate the First Amendment, absent exceptional circumstances that are not present here.

Second, PPOA's reliance on the Pitchess statutes does not remotely justify a prior restraint. Even assuming, for sake of argument, that the information PPOA included in its Reply Brief was protected – a point that is disputed in the underlying merits appeal – that is irrelevant. The Supreme Court has made clear that merely "[d]esignating the conduct as an

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invasion of privacy" does not warrant a prior restraint. Organization for a Better Austin, 402 U.S. at 419-420 (rejecting claim that privacy interests justified restraint against distribution of leaflets).[11] Indeed, courts have repeatedly held that the media cannot be prevented from publishing information even based on such serious harms such as threats to national security, e.g., New York Times, 403 U.S. at 714, or a criminal defendant's fair trial rights, e.g., Nebraska Press Ass'n, 427 U.S. at 567.

Once again, this Court's decision in Hurvitz is on point. There, this Court rejected as an impermissible prior restraint an order limiting the dissemination of retroactively sealed court records containing sensitive medical information, explaining that the proponent of sealing could "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." 84 Cal. App. 4th at 1243 (emphasis added). For this same reason, an alleged breach of statutory confidentiality under the Pitchess statutes is no justification for the prior restraint issued here.

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[11] See also Gilbert v. National Enquirer, Inc., 43 Cal. App. 4th 1135, 1147 (1996) (rejecting injunction barring ex-husband from revealing intimate details about actress notwithstanding claims that her privacy would be invaded); In re Providence Journal, 820 F.2d at 1350 ("[t]hat publication would prove embarrassing or infringe [his] privacy rights is, however, an insufficient basis for issuing a prior restraint").

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D. The Order Compelling Return Of The Reply Brief That Cross-Petitioners Lawfully Acquired Is Itself A Prior Restraint.

PPOA may claim that its Motion, and the resulting March 25 Order, do not directly forbid publication; although that is true, it does not solve the constitutional defects in the Order.[12] The constitutional prohibition against prior restraints extends to requests for court orders to review or confiscate editorial materials, just as it does to direct orders forbidding publication. See Goldblum v. NBC, 584 F.2d 904, 907 (9th Cir. 1978) (vacating order requiring NBC to submit film for prebroadcast review because "[t]he order to produce the film in aid of a frivolous application for a prior restraint suffers the constitutional deficiencies of the application for an injunction"). For example, as referenced above, in FMC Corp. v. Capital Cities/ABC, 915 F.2d 300 (7th Cir. 1990), the Seventh Circuit applied California law in addressing a claim that an ABC news report featured stolen documents. Id. at 301. The court held that ABC was "free to retain copies of any of [the plaintiffs'] documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment." Id. (emphasis added); see also Council of the City of New Orleans v. Washington, 13 So.

[12] If anything, this fact would make the Order unenforceable, if Cross-Petitioners had elected to disregard it rather than seeking relief from this Court. Nebraska Press, 427 U.S. at 568 (rejecting part of order that was "too vague and too broad to survive the scrutiny [the Supreme Court has] given to restraints on First Amendment rights").

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3d 662 (La. App. 2009) (vacating judgment compelling return, and restraining publication, of privileged records that agency had released pursuant to a public records request, when records were widely disseminated over a ninety-day period).[13] Here, too, Cross-Petitioners are entitled to retain copies of the Reply Brief and publish the information in it, which they lawfully acquired. Any Order to the contrary violates Cross-Petitioners' constitutional rights.

IV. PETITIONERS HAVE NO BASIS FOR RETROACTIVELY SEALING THEIR PUBLICLY FILED REPLY BRIEF

PPOA's request that the Court claw back a Reply Brief that PPOA filed in the public record nine days earlier also violates California and federal constitutional law. This Court previously has rejected a retroactive sealing order where the records were in a public court file for only one day. See Hurvitz, 84 Cal. App. 4th at 1247. Here, PPOA has not come close to meeting its strict burden to justify an attempt to erase information that it submitted to a public court file nine days ago.

[13] See also United States v. McKenzie, 735 F.2d 907, 910 (5th Cir. 1984) (order requiring CBS to turn over script of "60 Minutes" for review was unconstitutional); In re Steinberg, 148 Cal. App. 3d 14, 18-19 (1983) (order requiring party to submit film for review was prior restraint).

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A. Court Records Are Presumptively Open Under The First Amendment And California Rules Of Court.

The First Amendment to the United States Constitution requires a presumptive right of public access to civil court proceedings and documents. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1218-19 (1999). Following NBC Subsidiary, the Judicial Council implemented Rules of Court 2.550 and Rule 2.551, which codify the public's First Amendment right of access. Under the Rules, a judicial record cannot be sealed unless and until the court "expressly finds" that:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and,

(5) No less restrictive means exist to achieve the overriding interest. Cal. R. Ct. 2.550(d).

"As the party seeking an order sealing appellate court records, [PPOA] has the burden to 'justify the sealing,'" and in deciding the issue, the California Constitution requires this Court "to broadly construe a court rule 'if it furthers the people's right of access' and to narrowly construe the court rule 'if it limits the right of access.'" McNair v. National Collegiate

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Athletic Assn., 234 Cal. App. 4th 25, 32 (2015) (quoting Cal. Const., art. I, § 3, subd. (b)(2); Cal. R. Ct. 8.46(d)(2)). As described below, PPOA's cursory Motion seeking to retroactively seal a publicly filed appellate brief does not come close to satisfying these strict constitutional requirements.

B. PPOA Has Not Met The Constitutional And Statutory Requirements To Retroactively Seal Its Reply Brief.

PPOA makes no effort whatsoever in its perfunctory Motion to satisfy the five-part test that is a prerequisite to sealing a presumptively public court brief. See NBC Subsidiary, 20 Cal. 4th at 1218-19; Cal. R. Ct. 2.550(d). Where, as here, a document was publicly filed and has been generally available to the public without any restriction for nine days, PPOA cannot meet the requirements of showing an overriding interest in confidentiality sufficient to justify sealing.

First, this Court has made clear that retroactive sealing requests such as PPOA's are inconsistent with the constitutional right of access. In Hurvitz, a litigant publicly filed a declaration that presented highly sensitive information, including the names of patients whose doctor allegedly subjected them to "vulgar and crude" acts while they were anaesthetized. 84 Cal. App. 4th at 1237, 1244. The trial court ordered the declaration sealed the day after it was filed, but this Court reversed, holding that it was improper to retroactively seal the presumptively open record. Id. at 1246. The Court noted that the "declaration was part of the public record

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for one day, during which time it was widely reported in the media, and it makes little sense to seal information after the fact." Id. at 1247.

Similarly, in Savaglio v. Wal-Mart Stores, Inc., 149 Cal. App. 4th 588 (2007), the First Appellate District held that Wal-Mart waived its right to "belatedly" seek a sealing order where it had already publicly filed the records at issue in the Court of Appeal "without a sealing order and without proper findings after a noticed motion." Id. at 598 (original emphasis). Just as PPOA does here, Wal-Mart tried to rely on a "claim of inadvertence," but the Court found that this did not justify retroactive sealing, as "Wal-Mart's counsel [was] duty bound to know and apply" the constitutional and statutory sealing rules. Id. at 599-600. PPOA's attempt to "belatedly" seal information that it already publicly filed while "duty bound to know and apply" the sealing rules should also be rejected. Id.[14]

[14] This situation is easily distinguishable from the context in which privileged information is inadvertently disclosed to opposing counsel in discovery. See Savaglio, 149 Cal. App. 4th at 598-601 (distinguishing discovery cases and rejecting "inadvertent disclosure" argument where party publicly filed material with Court of Appeal then sought retroactive sealing order). Cases where the courts have declined to find a waiver due to inadvertent disclosure generally have been based on the rationales of "the importance which the attorney-client privilege holds in the jurisprudence of this state," State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 657 (1999), and the modern "discovery process" in which "document production may involve massive numbers of documents," Rico v. Mitsubishi Motors Corp., 42 Cal. 4th 807, 818 (2007). Neither of these justifications is implicated where, as here, a party makes the disclosures at issue in a merits brief that was publicly filed with the court, and served on all parties without any indication that the filing was unintended.

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Second, the only interest that PPOA identifies to support its retroactive sealing request is its assertion that the information at issue falls within Penal Code § 832.7, the so-called "Pitchess" statute. Mot. at 1. While Cross-Petitioners dispute PPOA's claim, as indicated above, that dispute is irrelevant. Even if the information that PPOA voluntarily disclosed is protected by the Pitchess Statutes, that protection was lost when the information was included in a public court record. Indeed, this Court rejected a similar argument in Hurvitz, holding that there was "no overriding public interest to justify" retroactively sealing the declaration containing sensitive medical information, even though the sealing proponents argued that the disclosure violated individuals' privacy rights and the physician-patient privilege under Evidence Code § 993. 84 Cal. App. 4th at 1243, 1246-47. As the Court explained, "because the information is already public, the harm to the patients' privacy has already occurred and cannot be prevented by the order." Id. at 1245.

Similarly, because PPOA already made the information public, any purported harm under the Pitchess statute "has already occurred and cannot be prevented by" a retroactive sealing order. Id. Consequently, PPOA did not, and cannot, show that an overriding interest would actually be prejudiced absent the requested sealing order. See NBC Subsidiary, 20 Cal. 4th at 1222-23, n.47 (sealing inappropriate where court could not find "that prejudice to that interest was substantially probable absent closure and

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temporary sealing" because "some of the most sensitive of the information sought to be suppressed" had already been disclosed) (original emphasis).[15]

V. CONCLUSION

Over the last 75 years, the United States Supreme Court repeatedly has struck down prior restraints that limited the press' right to report about court proceedings. The Court has made clear that a prior restraint may be contemplated only in the rarest circumstances, such as where necessary to prevent the dissemination of information about troop movements during wartime, Near, 283 U.S. at 716, or to "suppress[] information that would set in motion a nuclear holocaust." New York Times, 403 U.S. at 726 (Brennan, J., concurring).

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[15] Numerous other courts have recognized this same principle. Simply put, once "the cat is out of the bag," the information may no longer be kept under seal, because sealing is "ineffective" in advancing the countervailing compelling interest in secrecy. Bank Julius Baer, 535 F. Supp. 2d at 985. See also In re Charlotte Observer, 882 F.2d 850, 854-855 (4th Cir. 1989) (stating that "once the genie is out of the bottle," court may not close court proceeding, as the information is available and closing the court proceedings will only encourage speculation); In re Continental Illinois Securities Litig., 732 F.2d 1302, 1312-13 (7th Cir. 1984) (references and scattered quotes made public were sufficient to support public access; it did not matter that entire report was not read aloud in court); Littlejohn v. BIC Corp., 851 F.2d 673, 680 (3d Cir. 1988) (release of information by court "is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its future use"); Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1184 (9th Cir. 2006) (because "many names or references for which the United States sought redaction were either already publicly available or were available in other documents being produced" to the press intervenor, government could not meet its burden of showing the information could remain confidential).

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This case does not come close to presenting such extraordinary circumstances. Cross-Petitioners, therefore, respectfully request that the Court immediately vacate its March 25, 2015 Order, and enter an Order denying PPOA's Motion in its entirety.

DATED: March 26, 2015

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DECLARATION OF JEFF GLASSER

I, JEFF GLASSER, declare and state as follows:

1. I am an attorney licensed to practice law before all the courts of the State of California and before this Court. I am Vice President, Legal for the Los Angeles Times, and I am one of the attorneys representing Los Angeles Times Communications LLC in this case. The facts stated in this Declaration are true and correct of my own personal knowledge.

2. On March 19, 2015, I received an unredacted copy of the Reply Brief that was filed by Petitioners in this action. I forwarded it to my clients in the newsroom at the Los Angeles Times.

3. My clients were planning to do an article to be published in the Los Angeles Times, discussing the information disclosed in the Reply Brief. However, The Times did not publish an article because of concern about the Court's Order entered on March 25, 2015, which could be interpreted as a prior restraint, prohibiting publication of information from the Reply Brief.

4. I first received notice of Petitioners' Motion filed on March 25 when I received an electronic copy of this Court's Order granting the Motion, which was entered that date. Although I am counsel of record, and have been counsel of record since The Times became involved in this matter in 2014, the proof of service for Petitioners' Motion does not show that a copy was sent to me. I have not received a service copy of Petitioners' Motion. According to the proof of service, Petitioners mailed a copy of their Motion to a Kevin Vick, a lawyer at one of the two law firms representing for The Times, but not to anyone at the other law firm, Davis Wright Tremaine LLP. Davis Wright Tremaine has been counsel of record in all the proceedings before the Court of Appeal.

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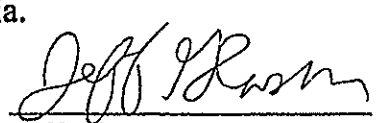
I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on March 26, 2015, at Los Angeles, California.



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DECLARATION OF DALE L. GRONEMEIER

I, DALE L. GRONEMEIER, declare and state as follows:

1. I am an attorney at law, duly licensed and entitled to practice law in the courts of the State of California, the United States Supreme Court, the Ninth Circuit Court of Appeals, and the United States District Court for the Central District of California. I am one of the attorneys representing in the trial court and in this proceeding Real Parties in Interest Anya Slaughter, the Pasadena Branch of the National Association for the Advancement of Colored People, ACT, the Interdenominational Ministerial Alliance of Greater Pasadena, and Kristen Ockershauser.

2. Unless the context indicates otherwise, I have personal and first-hand knowledge of the facts set forth herein, and, if called as a witness, I could and would competently testify thereto.

3. Upon receiving the Petitioners' "Reply to Preliminary Opposition to Petition for Writ of Mandate and Opposition to Petition for Writ of Mandate" (the "Reply") on March 19, 2015, my assistant Marcela Sanchez scanned and emailed to clients and client contact persons a copy of the Reply, which is our usual office practice upon receiving any pleadings in a case. On the evening of March 19, I emailed a copy of the Reply to a much larger group of 12 people, only 4 of whom were parties to this proceeding or representatives of parties to this proceeding; my email pointed out that the attorneys for the police officers who shot and killed Kendric McDade had directly quoted a page and a half of the very report that they were trying to suppress.

4. Prior to receiving the Court's March 25, 2015 Order requiring return of the Reply that had been served upon my office, I had given

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hard-copies of the Reply to several additional people who are not parties. I have discussed with approximately 20 additional people both the fact that the Reply contains approximately 1-2 pages of direct quotations from the OIR Report and the substance of those quotations from the OIR Report. I have gotten feedback from persons to whom I gave the Reply that they have passed it on to other persons; I have not gotten feedback on how many persons have indirectly received the copy of the Reply that I sent out, but I would estimate that at least 30 people have now gotten the Reply directly or indirectly from me; only 5 of those are clients over whom I have any control on the distribution of the Reply.

5. I first received notice of Petitioners' Motion filed on March 25 when I received an electronic copy of this Court's Order granting the Motion, which was entered that date. I note that the proof of service for Petitioners' Motion reflects service by mail. I have not yet received a service copy of the Motion.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on March 26, 2015, at Los Angeles, California.

Dale L. Gronemeier

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DECLARATION OF JONATHAN SEGAL

I, JONATHAN SEGAL, declare and state as follows:

1. I am an attorney licensed to practice law before all the courts of the State of California and before this Court. I am an associate at the law firm of Davis Wright Tremaine LLP, and I am one of the attorneys representing Los Angeles Times Communications LLC in this case. The facts stated in this Declaration are true and correct of my own personal knowledge.

2. On March 25, 2015, I received an Order from the Court of Appeal in Pasadena Police Officers Association et. al. v. Superior Court Appellate Case No. B60332, via electronic mail. The Order granted PPOA's "Motion to Have Sealed Their Reply." I was unaware of any such Motion previous to receiving the Court's Order, and as of today's date, our office has not received any service copy of the Motion.

3. I spoke with Shirley Stahl, a Clerk of the Court of Appeal, by telephone on March 25. Ms. Stahl stated that although the Court had ruled on the Motion, Los Angeles Times Communications LLC could file a brief in opposition to the Motion.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on March 26, 2015, at Los Angeles, California.

Jonathan Segal

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA STREET, SUITE 2400
LOS ANGELES, CALIFORNIA 94111
Phone: (213) 633-6800
Fax: (213) 276-6899

DECLARATION OF KEVIN VICK

I, KEVIN VICK, declare and state as follows:

1. I am an attorney licensed to practice law before all the courts of the State of California and before this Court. I am a partner in the law firm Jassy Vick Carolan LLP, and I am one of the attorneys representing Los Angeles Times Communications LLC ("The Times") in this case. The facts stated in this Declaration are true and correct of my own personal knowledge.

2. I have reviewed an electronic version of Petitioners' Motion filed March 25, 2015, which sought immediate relief from this Court. I received notice of this Motion on March 25, 2015, when I received an email from the Clerk of the Court, transmitting this Court's Order entered on that date. I am the only attorney for The Times listed on the proof of service with Petitioners' Motion, which indicates that it was served by regular mail. The Motion did not arrive with the morning mail delivery at my office on March 26, 2015, and as of the time that I executed this Declaration I have not received a service copy of Petitioners' Motion.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on March 26, 2015, at Los Angeles, California.

Kevin Vick

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA STREET, SUITE 2400
LOS ANGELES, CALIFORNIA 90017
Phone: (213) 633-6800
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Proof of Service

I, Ellen Duncan, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of Los Angeles, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017-2566.

I caused to be served the following document:

OPPOSITION TO PETITIONERS' MOTION FOR UNCONSTITUTIONAL PRIOR RESTRAINT AND SEALING ORDER; REQUEST TO IMMEDIATELY VACATE MARCH 25 ORDER

on each person on the attached list by the following means:

☒ **I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on March 26, 2015 for overnight delivery on March 27, 2015.**

☒ **A true and correct copy of said document was emailed on March 26, 2015 to the email addresses referenced in the attached Service List.**

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

☒ State I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on March 26, 2015, at Los Angeles, California.

Ellen Duncan

Service List

Service Type	Counsel Served	Party Represented
Federal Express; Email	Richard A. Shinee, Esq. GREEN & SHINEE, A.P.C. 16055 Ventura Blvd., Suite 1000 Encino, CA 91436 Tel: (818) 986-2440; Fax: (818) 789-1503 Email: gsras@socal.rr.com	Attorneys for Petitioners/Plaintiffs *Pasadena Police Officers Association (PPOA), Officer Matthew Griffin, Officer Jeffrey Newlen*
Federal Express; Email	Javan N. Rad, Esq. Chief Assistant City Attorney CITY OF PASADENA 100 North Garfield Ave., Suite N210 Pasadena, CA 91109-7215 Tel: (626) 744-4141; Fax: (818) 744-4190 Email: jrad@cityofpasadena.net	Attorneys for Defendant *City of Pasadena*
Federal Express; Email	Dale L. Gronemeier, Esq. Elbie J. Hickambottom, Jr., Esq. GRONEMEIER & ASSOCIATES, P.C. 1490 Colorado Blvd. Eagle Rock, CA 90041 Tel: (323) 254-6700; Fax: (323) 254-6722 Email: dlg@dgronemeier.com; ehickambottom@gmail.com	Attorneys for Intervenors/ Cross-Petitioners *Kris Ockershauser, Anya Slaughter, Pasadena Chapter of the National Advancement of Colored People, Interdenominational Ministerial Alliance of Greater Pasadena, ACT*
Federal Express ONLY	Los Angeles County Superior Court Civil Appeal Unit, Room 111 111 North Hill Street Los Angeles, CA 90012-3117 Tel: (213) 974-5889	