

1 David Greene (SBN 160107)  
Victoria Noble (SBN 337290)  
2 Electronic Frontier Foundation  
3 815 Eddy Street  
San Francisco, CA 94109  
4 Tel.: (415) 436-9333  
Fax: (415) 436-9993  
5 Email: davidg@eff.org  
tori@eff.org

6 *Attorneys for Defendant Jack Poulson*

7  
8 Susan E. Seager (SBN 204824)  
Law Office of Susan E. Seager  
9 128 N. Fair Oaks Ave.  
Pasadena, California 91103  
10 Tel: (310) 890-8991  
Email: susanseager1999@gmail.com

11 *Attorney for Defendant Tech Inquiry*

12  
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **COUNTY OF SAN FRANCISCO**  
15

16 JOHN DOE, an individual,  
17  
Plaintiff,  
18  
v.  
19  
SUBSTACK, INC., a Delaware  
20 Corporation; AMAZON WEB SERVICES,  
INC., a Delaware Corporation; JACK  
21 POULSON, an individual; TECH  
INQUIRY, INC., a Delaware corporation;  
22 DOES 1-25, inclusive,  
23  
Defendants.  
24

Case No.: CGC-24-618681

**DEFENDANTS JACK POULSON'S AND  
TECH INQUIRY'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR TEMPORARY  
RESTRAINING ORDER**

**DATE: November 13, 2024**  
**TIME: 11:00 a.m.**  
**DEPT: 302**

Judge: Richard B. Ulmer, Jr.  
Action Filed: October 3, 2024  
Trial Date: TBD

ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco  
**11/13/2024**  
Clerk of the Court  
BY: SANDRA SCHIRO  
Deputy Clerk

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES

Cases

<i>Arcara v. Cloud Books, Inc.</i> , 478 U. S. 687 (1986).....	11
<i>Ass'n for Los Angeles Deputy Sheriffs v. Los Angeles Times Commc'ns LLC</i> , 239 Cal. App. 4th 808 (2015) .....	16
<i>Assoc. of Los Angeles Sheriffs v. Los Angeles Times</i> , 239 Cal. App. 4th 808 (2015) .....	12, 18
<i>Bank Julius Baer &amp; Co. Ltd v. Wikileaks</i> , 535 F. Supp. 2d 980 (N.D. Cal. 2008) .....	14, 15
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	10
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001).....	6, 15, 16, 17
<i>Carney v. Santa Cruz Women Against Rape</i> , 221 Cal. App. 3d 1009 (1990) .....	17
<i>Carroll v. President &amp; Commissioners of Princess Anne</i> , 393 U.S. 175 (1968).....	6, 8
<i>Consolidated Const. Co. v. Pacific E. Ry. Co.</i> , 184 Cal. 244 (1920) .....	8
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	14
<i>Fashion Valley Mall, LLC v. National Labor Relations Bd.</i> , 42 Cal. 4th 850 (2007) .....	13
<i>Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989).....	14
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 US 46 (1989).....	10, 11
<i>Freedom Commc'ns, Inc. v. Superior Ct.</i> , 167 Cal. App. 4th 150 (2008) .....	12, 13
<i>Guzman v. Finch</i> , No. 19CV412-MMA, 2019 WL 1877184 (S.D. Cal., Apr. 26, 2019).....	17

1	<i>Jean v. Massachusetts State Police,</i>	
2	492 F.3d 24 (1st Cir. 2007) .....	6, 15
3	<i>Lieberman v. KCOP Television, Inc.,</i>	
4	110 Cal. App. 4th 156 (2003) .....	17
5	<i>Near v. Minnesota ex rel. Olson,</i>	
6	283 U.S. 713 (1931).....	10
7	<i>Neb. Press Ass’n v. Stuart,</i>	
8	427 U.S. 539 (1976).....	10, 15
9	<i>New York Times Co. v. United States,</i>	
10	403 U.S. 713 (1971).....	10, 11, 12, 18
11	<i>Nicholson v. McClatchy Newspapers,</i>	
12	177 Cal. App. 3d 509 (1986) .....	15, 16
13	<i>Okla. Publ’g Co. v. Okla. Cnty. Dist. Ct.,</i>	
14	430 U.S. 308 (1977).....	14
15	<i>Org. for Better Austin v. Keefe,</i>	
16	402 U.S. 415 (1971).....	10, 11
17	<i>People ex rel. Allstate Ins. Co. v. Suh,</i>	
18	37 Cal. App. 5th 253 (2019) .....	8
19	<i>Sipple v. Found. For Nat’l Progress,</i>	
20	71 Cal. App. 4th 226 (1999) .....	17
21	<i>Smith v. Compton,</i>	
22	No. CV 22-8439-MWF,	
23	2023 WL 4291672 (C.D. Cal., Feb. 15, 2023) .....	17
24	<i>Smith v. Daily Mail Pub. Co.,</i>	
25	443 U.S. 97 (1979).....	14
26	<i>Steiner v. Superior Court,</i>	
27	220 Cal. App. 4th 1479 (2013) .....	11
28	<i>Todd v. Lovecraft,</i>	
	No. 19-CV-01751-DMR,	
	2020 WL 60199 (N.D. Cal., Jan. 6, 2020) .....	17
	<i>Webb v. Webb,</i>	
	12 Cal. App. 5th 876 (2017) .....	8
	<i>Wilson v. Superior Court,</i>	
	13 Cal. 3d 652 (1975) .....	11, 12

1	<b>Statutes</b>	
2	California Labor Code section 432.7(g)(3) .....	16
3	California Penal Code Section 11105(a)(2) .....	16
4	California Penal Code Section 11140(a) .....	16
5	California Penal Code Section 11143 .....	16
6	California Penal Code Section 653.2(a) .....	16
7	California Penal Code section 851.92(c) .....	17
8		
9	<b>Rules</b>	
10	California Rule of Court 3.1202(c) .....	6, 8, 17
11	<b>Constitutional Provisions</b>	
12	Cal. Const., art. I, § 2(a) .....	12, 13
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Defendants Jack Poulson and Tech Inquiry, Inc. (“Journalist Defendants”) respectfully  
2 submit the following Opposition to Plaintiff John Doe’s Ex Parte Application for Order to Show  
3 Cause and Temporary Restraining Order.

#### 4 INTRODUCTION

5 Fourteen months after first learning that the Arrest Report at issue was publicly available  
6 and reported about on the internet, and after publication of the same information by non-parties who  
7 cannot be enjoined by this court, Plaintiff Doe<sup>1</sup> now comes to this Court claiming urgency. In doing  
8 so, Doe asks this Court to forgo its constitutionally mandated procedures to adjudicate requested  
9 restrictions on First Amendment rights.

10 Ex parte applications for temporary restraining orders are constitutionally inadequate  
11 procedures for adjudicating First Amendment rights, *see Carroll v. President & Commissioners of*  
12 *Princess Anne*, 393 U.S. 175, 180 (1968), especially where all parties do not have the meaningful  
13 opportunity to participate. Indeed, where, as here, a prior restraint is sought, the U.S. Supreme  
14 Court “has insisted upon careful procedural provisions, designed to assure the fullest presentation  
15 and consideration of the matter which the circumstances permit.” *Id.* at 181.

16 And the TRO here will indeed infringe on Poulson’s and the other defendants’ First  
17 Amendment rights. This case is controlled by *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which  
18 the Supreme Court held that publishers may not be punished—let alone enjoined—for publishing  
19 information about a matter of public significance that they lawfully obtained, even if their source  
20 broke the law in obtaining it. *Id.* at 528. *Bartnicki* applies even if the publisher knew or should have  
21 known that their source obtained the information illegally, a fact that has not been established here.  
22 *Jean v. Massachusetts State Police*, 492 F.3d 24, 31-32 (1st Cir. 2007).

23 In the face of these important First Amendment issues, Doe fails to allege facts of  
24 “irreparable harm” or “immediate danger,” as required for ex parte applications by Rules of Court,  
25 Rule 3.1202(c), or to set forth or support the elements of any of his various causes of action. Nor  
26

---

27 <sup>1</sup> Journalist Defendants herein refer to plaintiff as Doe even though it is unclear whether he has  
28 complied with the procedures to file a case as a Doe defendant. Journalist Defendants preserve any  
arguments they may make in the future challenging the propriety of this case as a Doe case.

1 does Doe explain how an injunction will not be futile given that the information is already,  
2 admittedly, matters of common knowledge, having been published in the *San Francisco Chronicle*  
3 and elsewhere. [See Declaration of John Doe in Support of Order to Show Cause And Temporary  
4 Restraining Order (“Doe Decl.”) ¶ 13].

5 This Court should deny the application for the temporary restraining order.

6 For the sake of efficiency, Journalist Defendants join the arguments presented by co-  
7 defendants Substack and Amazon Web Services. Journalist Defendants write separately only to  
8 emphasize certain arguments particular to them.

### 9 **FACTUAL AND PROCEDURAL BACKGROUND**

10 Defendant Jack Poulson published the Arrest Report at issue in this matter and reported on  
11 the arrest as part of his journalistic coverage of the intersection of technology and national security.  
12 [See Declaration of Jack Poulson in Support of Opposition to Temporary Restraining Order and  
13 Preliminary Injunction (“Poulson Decl.”) ¶¶1,4] Through his weekly newsletter, he frequently  
14 reported on the connectedness of companies making surveillance and weapons technologies and the  
15 governments that contract with them. [Poulson Decl. ¶4] Among these companies is the one of  
16 which plaintiff Doe was formerly the chief executive officer. [Poulson Decl. ¶4] Poulson wrote  
17 about this company because of its role as a human intelligence provider for U.S. Special Operations  
18 Command. [Poulson Decl. ¶4] This company has been the subject of seven articles in his newsletter.  
19 [Poulson Decl. ¶4] Poulson’s newsletter currently has more than 2,900 subscribers. [Poulson Decl.  
20 ¶1]

21 Poulson did not know that the Arrest Report had been sealed when he reported on it.  
22 [Poulson Decl. ¶ 6] He received the Arrest Report from a confidential source without soliciting it.  
23 [Poulson Decl. ¶ 5] There was no marking on the face of the document that he understood indicated  
24 it had been sealed. [Poulson Decl. ¶6] Upon receiving the Arrest Report from the confidential  
25 source, Poulson communicated with the San Francisco Police Department (“SFPD”) to verify the  
26 authenticity of the Arrest Report and its contents. [Poulson Decl. ¶6] The SFPD verified that the  
27 Arrest Report was authentic that its contents were accurate. [Poulson Decl. ¶6] The SFPD did not  
28 inform Poulson that the Arrest Report had been sealed. [Poulson Decl. ¶6]

1 More than one year after Poulson’s initial reporting, Doe Defendant filed the instant action  
2 seeking \$25 million in damages and an injunction against multiple articles published between  
3 September 14, 2023 and June 3, 2024 (the “Articles”).

## 4 ARGUMENT

### 5 **I. DOE HAS FAILED TO MAKE THE NECESSARY SHOWING OF IRREPRABLE 6 HARM TO JUSTIFY A TEMPORARY RESTRAINING ORDER, ESPECIALLY IN A FIRST AMENDMENT CASE**

#### 7 **A. Plaintiff Fails to Meet the Requirements for Ex Parte Relief**

8 Plaintiff’s Application should be denied for the simple reason that it fails to meet the  
9 requirements for ex parte relief. A court should not grant ex parte relief “in any but the plainest and  
10 most certain of cases.” *Consolidated Const. Co. v. Pacific E. Ry. Co.*, 184 Cal. 244, 246 (1920)  
11 (citation omitted). “For this reason, the rules governing ex parte applications in civil cases require  
12 that ‘[a]n applicant...make an affirmative factual showing...of irreparable harm, immediate danger,  
13 or any other statutory basis for granting relief ex parte.’” *People ex rel. Allstate Ins. Co. v. Suh*, 37  
14 Cal. App. 5th 253, 257 (2019) (citing Cal. R. 3.1202(c); *Webb v. Webb*, 12 Cal. App. 5th 876, 879  
15 (2017)). “A trial court should deny an ex parte application absent the requisite showing.” *Id.*  
16 (citations omitted).

17 This rule must be applied with exactitude in First Amendment cases where the U.S.  
18 Supreme Court “has insisted upon careful procedural provisions, designed to assure the fullest  
19 presentation and consideration of the matter which the circumstances permit.” *Carroll*, 393 U.S. at  
20 181.

21 Here, Plaintiff failed to “make an affirmative factual showing in a declaration containing  
22 competent testimony based on personal knowledge of irreparable harm, immediate danger, or any  
23 other statutory basis for granting relief ex parte,” as required by the Rules of Court, Rule 3.1202(c).  
24 Plaintiff has not cited facts establishing that he now faces “immediate danger” of “irreparable harm”  
25 without injunctive relief; instead, he admits that Poulson first reported on and published a copy of  
26 the Arrest Report identifying Plaintiff by his real name *over one year and two months ago*. Plaintiff  
27 states in his declaration, “On September 13, 2023, I learned that Jack Poulson wrote a blog post on  
28



1 Substack that included a link” to the Arrest Report and “described in detail the events set forth” in  
2 the Arrest Report. [Doe Decl. ¶ 3]

3 Plaintiff submits only vague, speculative allegations of harm that fall far short of  
4 establishing imminent harm absent the injunction. He states only that he will suffer “egregious  
5 stigmatization as someone accused of a crime; severe emotional distress; loss of personal and  
6 professional opportunities; and loss of safety, happiness, and privacy” and “fear[] for myself,  
7 friends, and family because Defendants continue to disseminate my home address” and “posts  
8 designed to paint me in an extremely negative light.” [Doe Decl. ¶ 15]

9 The apparent present urgency is new news coverage of the event; as Plaintiff admits, those  
10 article simply reported on this lawsuit. [Doe Decl. ¶ 13] Plaintiff admits in his declaration that, “On  
11 October 29, 2024, the *San Francisco Chronicle* wrote an article titled, “Tech exec sues journalist  
12 for \$25M for publishing his sealed arrest report” that “refers to my name,” and “as a result of these  
13 publications that came after the Complaint was filed, the sealed” Arrest Report “and its contents  
14 were spread to a much wider audience, and this spread will continue without an injunction.” [Doe  
15 Decl. ¶ 13] That same article was then indexed on the Judicial Branch of California’s own  
16 California Courts Newsroom website.<sup>2</sup>

17 There is no emergency that permits ex parte relief in this case after Plaintiff waited one year  
18 and two months after the Arrest Report was first published to file his Ex Parte Application for  
19 injunctive relief and filed a public lawsuit bringing even more public scrutiny to the Articles and  
20 Arrest Report.

21 **B. A TRO Would Be Futile Because the Articles, Arrest Report, and Plaintiff’s**  
22 **Name Are Already in the Public Domain**

23 Granting a TRO against the Journalist Defendants would be futile because the news reports  
24 about the Articles, and Arrest Report, and Plaintiff’s Complaint identifying John Doe by his real  
25 name have been published across the internet by numerous websites and remain available to the  
26 public. [Doe Decl. ¶13]

---

27 <sup>2</sup> “Tech exec sues journalist for \$25M for publishing his sealed arrest report,”  
28 <https://newsroom.courts.ca.gov/news/tech-exec-sues-journalist-25m-publishing-his-sealed-arrest-report>

1 **II. DOE WILL NOT LIKELY PREVAIL ON HIS CLAIMS BECAUSE THE FIRST**  
2 **AMENDMENT AND LIBERTY OF SPEECH CLAUSE BAR THE RELIEF HE**  
3 **SEEKS**

4 **A. The relief sought would be an unconstitutional prior restraint under both the**  
5 **First Amendment and the Liberty of Speech Clause**

6 **1. The Injunction would be an unconstitutional prior restraint under the**  
7 **First Amendment**

8 For more than 100 years, federal courts have struck down court orders enjoining  
9 publications by journalists, known as prior restraints. A prior restraint “comes to this Court bearing  
10 a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403  
11 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). “The  
12 Government ‘thus carries a heavy burden of showing justification for the imposition of such a  
13 restraint.’” *Id.* (quoting *Org. for Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). “[P]rior  
14 restraints on speech and publication are the most serious and the least tolerable infringement on  
15 First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

16 In *Near v. Minnesota*, the United States Supreme Court described a court order barring  
17 journalists from publishing information “the essence of censorship.” *Near v. Minnesota ex rel.*  
18 *Olson*, 283 U.S. 713, 713 (1931). “The fact that for one hundred and fifty years there has been  
19 almost an entire absence of attempts to impose previous restraints upon publications relating to the  
20 malfeasance of public officers is significant of the deep-seated conviction that such restraints would  
21 violate constitutional right.” *Id.* at 718. The First Amendment’s disfavor of prior restraints directed  
22 at journalists is grounded on “the general conception that liberty of the press, historically considered  
23 and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity  
24 from previous restraints or censorship.” *Id.* at 716.

25 It is of no consequence that the Plaintiff claims he is seeking a prior restraint to stop  
26 allegedly unlawful acts. “As far back as the decision in *Near v. Minnesota ex rel. Olson*, 283 U. S.  
27 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is  
28 ‘characterized’ under state law is of little consequence.” *Fort Wayne Books, Inc. v. Indiana*, 489 US  
46, 66 (1989). In *Fort Wayne Books*, the court held that the government seizure of “literally  
thousands of books and films” violated the First Amendment, notwithstanding that the case was a

1 racketeering case, noting that “the State cannot escape the constitutional safeguards of our prior  
2 cases by merely recategorizing [the case]...as ‘racketeering.’” *Id.* at 67. *See also Arcara v. Cloud*  
3 *Books, Inc.*, 478 U. S. 687, 708 (1986) (O'Connor, J., concurring) (noting that if a “city were to use  
4 a nuisance statute as a pretext for closing down a bookstore because it sold indecent books...the  
5 case would clearly implicate First Amendment concerns”).

6 Courts have also made clear that a court order restricting *any* publication is a prior restraint,  
7 whether it requires removal of a *past* publication or bars a *future* one. In *Organization for a Better*  
8 *Austin*, the Supreme Court held that an injunction barring a group from continuing to pass out  
9 pamphlets was an unconstitutional “prior restraint” even though the group had already distributed  
10 the pamphlets to the public. 402 U.S. at 417-18. Likewise, in *Steiner v. Superior Court*, the Court of  
11 Appeal held that a court order requiring an attorney to remove two pages after she had already  
12 published them on her website was an “unlawful prior restraint.” 220 Cal. App. 4th 1479, 1486  
13 (2013). In *Wilson v. Superior Court*, the California Supreme Court held that an injunction to  
14 restraining further publication of existing newsletters “no doubt...constituted a prior restraint.” 13  
15 Cal. 3d 652, 658 (1975).

16 Here, Plaintiff asks that “Defendants are restrained and enjoined from...disseminating” the  
17 Arrest Report and “ordered to...remove all URLs, posts, articles, and other content under  
18 Defendants’ control that reference, link to, or otherwise disclose the [Arrest] Report or any  
19 information related to it.” Pl.’s Proposed Order, p. 2. This is a request for a prior restraint.

20 Plaintiff’s request for a prior restraint also fails because he has not adequately alleged harm.

21 The Supreme Court has listed an “extremely narrow” set of circumstances that would justify  
22 a prior restraint.” *New York Times*, 403 U.S. at 726 (Brennan, J., concurring). A court may grant a  
23 prior restraint “only when the Nation is at war” to prevent “actual obstruction” to the military draft,  
24 block “publication of the sailing dates of transports or the number and location of troops,” or  
25 “suppress[] . . . information that would set in motion a nuclear holocaust.” *Id.* (citation, brackets,  
26 and quotation marks omitted). It is not enough for the moving party to argue that future publication  
27 “could,” or “might,” or “may” harm a government interest. *New York Times*, 403 U.S. at 725.

1 “[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon  
2 surmise or conjecture that untoward consequences may result.” *Id.* at 725-26.

3 California courts have also rejected prior restraints based on mere conjecture of harm caused  
4 by the publication. *See Assoc. of Los Angeles Sheriffs v. Los Angeles Times*, 239 Cal. App. 4th 808,  
5 811-12, 815, 822 (2015) (“ALADS”); *Freedom Commc'ns, Inc. v. Superior Ct.*, 167 Cal. App. 4th  
6 150, 154 (2008), as modified (Sept. 29, 2008). In *ALADS*, a labor union for Sheriff’s Department  
7 deputies failed to win an injunction against the *Los Angeles Times* due to the same failure to submit  
8 sufficient evidence of imminent harm.

9 Here, too, Plaintiff submits vague, speculative allegations of harm: he alleges he will suffer  
10 “egregious stigmatization as someone accused of a crime; severe emotional distress; loss of  
11 personal and professional opportunities; and loss of safety, happiness, and privacy” and “fear[] for  
12 myself, friends, and family because Defendants continue to disseminate my home address” and  
13 “posts designed to paint me in an extremely negative light.” Pl’s Dec., ¶ 15. As in the *New York*  
14 *Times* and *ALADS*, Plaintiff’s allegations are mere conjecture.

15 Plaintiff therefore fails to meet his heavy burden to provide any evidence to justify a prior  
16 restraint blocking the Journalist Defendants from publishing the Articles, Arrest Report, and any  
17 other related content.

## 18 **2. The California Constitution Bars Plaintiff’s Requested Prior Restraint**

19 Unlike the First Amendment, the California Constitution expressly forbids prior restraint. As  
20 the California Supreme Court has explained, the “state constitutional guarantee of the right of free  
21 speech and press” is a “protective provision more definitive and inclusive than the First  
22 Amendment” because Article 1, § 2(a) of the state constitution expressly provides that “[a] law may  
23 not restrain or abridge liberty of speech or press.” *Wilson*, 13 Cal. 3d at 658 (quoting Cal. Const.,  
24 art. I, § 2(a)). *See also Freedom Commc’ns, Inc.*, 167 Cal. App. 4th at 154 (prior restraints are  
25 barred by California Constitution because it “provides an even broader guarantee of the right of free  
26 speech and the press than does the First Amendment”) (citation omitted).

27 In *Fashion Valley Mall, LLC v. National Labor Relations Bd.*, the California Supreme Court  
28 reaffirmed that the “free speech clause in article I of the California Constitution differs from its

1 counterpart in the federal Constitution both in its language and its scope.” 42 Cal. 4th 850, 851-52  
2 (2007). That’s because Article I, § 24 of the California Constitution states that “‘rights guaranteed  
3 by the California Constitution are not dependent on those guaranteed by the United States  
4 Constitution.’” *Id.* (brackets omitted) (quoting art. I, § 24). “For the California Constitution is now,  
5 and has always been, a document of independent force and effect particularly in the area of  
6 individual liberties.” *Id.* (citation and quotation marks omitted). “[A]s a general rule, ... article I’s  
7 free speech clause and its right to freedom of speech are not only as broad and as great as the First  
8 Amendment’s, they are even broader and greater.” *Id.* (citation and quotation marks omitted)).

9       In *Freedom Communications*, the Court of Appeal held that a court order prohibiting a  
10 newspaper from reporting on trial testimony of witnesses was “an impermissible restraint violative  
11 of the both the United States and California Constitution.” 167 Cal. App. 4th at 154. Even though  
12 the restriction was meant to protect a fair trial by “prevent[ing] witnesses from being influenced,”  
13 the order was a prior restraint which is the “most extraordinary remedy” that should be used “only  
14 in ‘exceptional cases’. . . where the evil that would result from the reportage is both great and  
15 certain and cannot be militated by less intrusive means.” *Id.* at 152-53. The court held that the  
16 restraint was unconstitutional for the additional reason that “the gag order applies only to *The*  
17 *Register* and not to other newspapers that cover the trial.” *Id.* at 154.

18       Just as Plaintiff’s requested prior restraint would violate the First Amendment, so, too,  
19 would Plaintiff’s requested prior restraint violate Article 1, § 2(a) of the California Constitution.

20       **B.     The First Amendment Bars Plaintiff from Seeking Legal Relief Against the**  
21       **Journalist Defendants for Publishing Lawfully Obtained Information of Public**  
22       **Concern**

23       Even if the injunction were not considered a prior restraint, it would still be constitutionally  
24 barred.

25       The Supreme Court has repeatedly reaffirmed that the First Amendment bars legal action  
26 against media publications for publishing lawfully obtained information that is a matter of public  
27 significance, absent extraordinary circumstances. “[O]ur synthesis of prior cases attempting to  
28 punish truthful publication: ‘[I]f a newspaper lawfully obtains truthful information about a matter of  
public significance then state officials may not constitutionally punish publication of the

1 information, absent a need to further a state interest of the highest order.” *Florida Star*, 491 U.S. at  
2 533 (quoting *Daily Mail*, 443 U.S. at 103). Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S.  
3 469, 495 (1975), the Supreme Court held that the First Amendment barred civil damages against  
4 television station for broadcasting name of rape-murder victim lawfully obtained by a reporter from  
5 a public court proceeding because “[s]tates may not impose sanctions on the publication of truthful  
6 information contained in official court records open to public inspection.” *See also Okla. Publ’g Co.*  
7 *v. Okla. Cnty. Dist. Ct.*, 430 U.S. 308 (1977) (First Amendment barred injunction blocking  
8 publication of name/photograph of minor charged in a juvenile proceeding lawfully obtained by  
9 reporters during juvenile court hearing); *Daily Mail*, 443 U. S. 97 (First Amendment barred criminal  
10 indictment of newspaper for violating statute forbidding press from publishing names of minors  
11 charged in juvenile court proceeding lawfully obtained by reporters from police radio, witnesses,  
12 police, and prosecutor);.

13         In *Florida Star*, a local police department mistakenly released the name of a rape victim to a  
14 reporter, who published in the rape victim’s name in the newspaper, which violated a state law. The  
15 Supreme Court held that the statute violated the First Amendment protection for the press,  
16 reaffirming that, “where a newspaper publishes truthful information which it has lawfully obtained,  
17 punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the  
18 highest order, and no such interest is satisfactorily served by imposing liability” on the press. *Id.* at  
19 541. The court held that the statute violated the First Amendment because the newspaper lawfully  
20 obtained the rape victim’s name from the police; its article concerned a matter of public importance  
21 because it reported about “the commission, and investigation, of a violent crime that had been  
22 reported to authorities” (*id.* at 537); and the rape victim had not shown that imposing liability on the  
23 newspaper was a “punishment . . . narrowly tailored to a state interest of the highest order[.]” *Id.* at  
24 541.

25         The instant case is also similar to *Bank Julius Baer & Co. Ltd v. Wikileaks*, 535 F. Supp. 2d  
26 980 (N.D. Cal. 2008), where a bank sought an injunction against Wikileaks after the website  
27 published confidential bank information. The court denied the requested injunction in part because  
28 the “private, stolen material was [already] transmitted over the internet via mirror websites which

1 are maintained in different countries all over the world,” and since “the case is out of the bag,” the  
2 court was “not convinced that Plaintiffs have made an adequate showing that any restraining  
3 injunction in this case would serve its intended purpose.” *Id.* at 985 (citing *Neb. Press Ass’n v.*  
4 *Stuart*, 427 U.S. 539, 569 (1976)). The court also observed that the bank’s lawsuit and injunction  
5 against another defendant “had exactly the opposite effect as was intended,” noting that “the press  
6 generated by this Court’s action increased public attention to the fact that such information was  
7 readily accessible online.” *Id.* Plaintiff caused the same publicity about his Arrest Report by filing  
8 his \$25-million lawsuit.

9 **C. This matter is controlled by *Bartnicki v. Vopper***

10 The First Amendment protects one’s right to disclose material received from a source  
11 regarding a matter of public concern—even if the *source* obtained it unlawfully. *Bartnicki*, 532 U.S.  
12 at 535. In *Bartnicki*, the U.S. Supreme Court held that the First Amendment protected journalists  
13 who repeatedly reported the contents of a telephone conversation about a public issue, which they  
14 obtained from a source who illegally intercepted the conversation. *Id.* at 517–18. Despite that the  
15 journalists knew—or had reason to know—that their source obtained the conversation unlawfully,  
16 they were free to disclose its contents because “a stranger’s illegal conduct does not suffice to  
17 remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 535. *See*  
18 *also Jean*, 492 F.3d at 31-32.

19 *Bartnicki*, which itself dealt with a statutory command of secrecy, governs even if the  
20 government requires that information be kept confidential. As the Court of Appeal has recognized,  
21 “it may not impose criminal or civil liability upon the press for obtaining and publishing  
22 newsworthy information through routine reporting techniques,” which “of course, include asking  
23 persons questions, including those with confidential or restricted information.” *Nicholson v.*  
24 *McClatchy Newspapers*, 177 Cal. App. 3d 509, 519–20 (1986).

25 The plaintiff here simply “has not distinguished, and cannot distinguish, the wealth of both  
26 State and Federal case law, discussing the protection journalists and the press enjoy under the First  
27 Amendment where there have been allegations that published or disclosed content had been  
28

1 illegally obtained.” *Ass’n for Los Angeles Deputy Sheriffs v. Los Angeles Times Commc’ns LLC*, 239  
2 Cal. App. 4th 808, 819–820 (2015) (quotation omitted) (collecting cases).

3 Even as pleaded by Doe, Poulson’s conduct falls squarely within *Bartnicki*’s protection. It is  
4 undisputed that Poulson obtained the Arrest Report from a source. [Poulson Decl. ¶ 5; Plf’s Br. ISO  
5 TRO, 7:7-9; Compl. ¶¶ 43, 46] Although Doe alleges without support in a footnote that Poulson  
6 knew or had reason to know that the Arrest Report was sealed. [Plf’s Br. ISO TRO n.2], it is  
7 undisputed that Poulson did not himself illegally obtain the report from the SFPD.

8 Nor did Poulson violate the law merely by receiving the report from his source. Obtaining  
9 confidential information from a source is a constitutionally protected newsgathering technique, and  
10 cannot be “stripped” of its constitutional shield by “calling” it “tortious.” *Ass’n for Los Angeles*  
11 *Deputy Sheriffs*, 239 Cal. App. 4th at 819 (quoting *Nicholson*, 177 Cal. App. 3d at 513 (quotation  
12 marks omitted)).

13 Even if the State *could* prohibit a journalist from receiving a sealed Arrest Report from a  
14 source, or subsequently possessing it, Plaintiff has not cited a single statute that actually purports to  
15 do so. Section 11143 of the California Penal Code only governs the possession or receipt of a  
16 “record or information obtained from a record,” defined by Sections 11140(a) and 11105(a)(2) to  
17 mean “state summary criminal history information”—“the master record of information...pertaining  
18 to the identification and criminal history of a person”—maintained by the Attorney General.” This  
19 statute simply does not apply to a sealed police report maintained by local law enforcement. By its  
20 terms, California Penal Code Section 653.2(a) only applies if the defendant acted with the “intent to  
21 place another person in reasonable fear for his or her safety, or the safety of the other person’s  
22 immediate family,” and for “the purpose of imminently causing that other person unwanted physical  
23 contact, injury, or harassment, by a third party”—neither of which Plaintiff even alleges here.  
24 California Labor Code section 432.7(g)(3) governs the conduct of a person’s employer—not  
25 journalists who report on plaintiff’s conduct. Article 1, Section 1 of the California Constitution is  
26 not applicable, either. Given that Plaintiff has not pointed to a single statute that Poulson’s alleged  
27 conduct would violate, Plaintiff cannot overcome *Bartnicki*’s protections for Poulson’s receipt and  
28 possession of the arrest report.



1 Finally, Poulson does not ask the Court to deem California Penal Code section 851.92(c)  
2 unconstitutional on its face, merely that it cannot be applied here consistent with the First  
3 Amendment.

4 **1. Bartnicki applies because sexual assault is a matter of public significance.**

5 Sexual assault and harassment are issues of public significance, regardless of the status of  
6 the perpetrator and the victim. *See Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d  
7 1009, 1021 (1990) ([“S]exual harassment and violence against women is a pressing public  
8 concern.”); *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164 (2003)

9 (“[n]ews reports concerning current criminal activity serve important public interests”);  
10 *Sipple v. Found. For Nat’l Progress*, 71 Cal. App. 4th 226, 238 (1999) (magazine article about  
11 domestic violence claims concerned issue of public interest). *Todd v. Lovecraft*, No. 19-CV-01751-  
12 DMR, 2020 WL 60199, at \*13 (N.D. Cal., Jan. 6, 2020) (“[T]he public has an interest in identifying  
13 individuals who commit sexual abuse and accusations of abuse are matters of public concern”);  
14 *Smith v. Compton*, No. CV 22-8439-MWF, 2023 WL 4291672, at \*8 (C.D. Cal., Feb. 15, 2023).  
15 These topics implicate the public interest regardless of whether a public figure was involved. Courts  
16 have regularly found allegations of sexual misconduct to be of the public interest without  
17 determining whether the parties involved were public figures. *See Guzman v. Finch*, No. 19CV412-  
18 MMA, 2019 WL 1877184, at \*6 (S.D. Cal., Apr. 26, 2019) (finding sexual assault and domestic  
19 violence were a matter of public concern without acknowledging that parties involved were private  
20 figures); *Todd*, No. 19-CV-01751-DMR, 2020 WL 60199, at \*12-\*13 (N.D. Cal., Jan. 6, 2020)  
21 (finding the same without addressing whether “‘highly-regarded’” member of cryptography sector  
22 was public figure); *Smith*, No. CV 22-8439-MWF, 2023 WL 4291672, at \*2, \*8 (C.D. Cal., Feb. 15,  
23 2023) (finding the same without determining whether plaintiff artist was public figure).

24 **CONCLUSION**

25 Plaintiff’s Application fails for several reasons.

26 *First*, Plaintiff fails to “make an affirmative factual showing in a declaration containing  
27 competent testimony based on personal knowledge of irreparable harm, immediate danger, or any  
28 other statutory basis for granting relief ex parte,” as required by Rule of Court 3.1202(c)..

1        *Second*, granting the injunction would be futile given that Doe admits that the information  
2 he seeks to restrain is already widely public.

3        *Third*, Plaintiff's request for a temporary restraining order is a prior restraint in violation of  
4 state and constitutional rights to free speech and a free press. See *New York Times Co. v. United*  
5 *States*, 403 U.S. 713, 714 (1971); *ALADS*, 239 Cal. App. 4th at 811-12, 815, 824.

6        *Fourth*, Plaintiff cannot establish prob of prevailing because his claims seek to punish  
7 publication of lawfully obtained information that is a matter of public concern.

8  
9        DATED: November 13, 2024

ELECTRONIC FRONTIER FOUNDATION

10        /s/ David Greene

11        David Greene

Victoria Noble

12        *Attorneys for Defendant Jack Poulson*

13  
14        LAW OFFICE OF SUSAN E. SEAGER

15        /s/ Susan E. Seager

16        Susan E. Seager

17        *Attorney for Defendant Tech Inquiry*