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1 **I. INTRODUCTION**

2 Defendants seek to justify their search and seizure of Plaintiffs' private information and  
3 property by presenting this Court with information that they failed to provide to the magistrate  
4 issuing the warrant. This effort should fail because (1) a warrant cannot be justified on the basis  
5 of information outside the four corners of the affidavit; (2) the information provided does not  
6 demonstrate probable cause to search or seize the Slingshot computers, the East Bay Prisoner  
7 Support (EBPS) computer, CDs, DVDs, the Slingshot photo file, EBPS mail, Long Haul's library  
8 lending logs, or any of the other information the officers reviewed or took from the premises, or to  
9 search Long Haul data for evidence of any crimes other than the identity of the person who sent  
10 the June 2008 threatening emails; (3) Defendants ignore facts that they knew or should have  
11 known which would have curtailed a reasonable officer's search and seizure to only information  
12 on the public access computers regarding the June emails; and (4) much of the information  
13 provided lacks foundation, authentication, personal knowledge and is hearsay.

14 The validity of a search warrant depends on the information presented in the affidavit, not  
15 on what an officer wished he had said after the fact. *Whiteley v. Warden*, 401 U.S. 560, 565-66,  
16 565 n.8 (1971); *Millender v. Los Angeles*, 620 F.3d 1016, 1029, 1034 (9th Cir. 2010) (en banc).  
17 The affidavit in this case could only have provided probable cause to search for logs of who used  
18 the public access computers during June of 2008, to seize those computers and to search them for  
19 evidence of who sent the June 2008 emails. This is a small fraction of the information the warrant  
20 purported to authorize, and an even smaller fraction of what the raid team and the Forensics Lab  
21 actually searched and seized. The warrant could not lawfully have authorized a search for  
22 evidence related to the March 2008 misdemeanor emails, the unmentioned-until-now May 2008  
23 emails, photos of protest activity in Seattle, the nature of EBPS's mail, or evidence that suspects in  
24 other animal rights activism cases used Long Haul computers.

25 Nor were Defendants authorized to seize computers behind locked doors that could not  
26 have been accessed or used by members of the public. The only information Kasiske provided to  
27 the magistrate regarding Long Haul's potential connection to the suspect was that (1) the March  
28 and June 14, 2008 email messages came from an IP address at Long Haul; (2) Long Haul is a

1 resource and meeting center for radical activists; (3) animal rights activists have held meetings at  
2 the Long Haul; and (4) Long Haul’s website advertises that they offer a computer room for  
3 “activist oriented access.” Kasiske Decl., Ex. N, at 2 (Statement of Probable Cause) (Docket No.  
4 115-14). From this information, the magistrate could have concluded that an animal rights activist  
5 may have used the Long Haul computer room to send the threatening emails, but nothing more.  
6 Yet the warrant language Kasiske drafted went far beyond the scope of probable cause, and the  
7 officers’ actions went far beyond even that.

8           Defendants now say that they viewed Long Haul as a potential bad actor. Of course, they  
9 did not communicate their prejudice to the magistrate, and for that reason alone, the defense fails.  
10 Moreover, the claim does not bear scrutiny. None of the aspersions that Defendants cast against  
11 Long Haul in their various new declarations establishes probable cause to believe that Long Haul  
12 was affiliated with the individual who sent the June threatening emails the officers were  
13 purportedly investigating. Instead, Defendants’ argument is further evidence that their conduct in  
14 this case was influenced by their negative perception of Long Haul’s constitutionally protected  
15 political views and activities.

16           As to the Privacy Protection Act, Defendants’ claimed ignorance of the fact that the  
17 Slingshot office and computers were used in any publishing activity is unreasonable in light of the  
18 uncontested facts that Defendants were familiar with Slingshot as an online publication, that they  
19 knew Slingshot “claimed an affiliation” with Long Haul, that every issue of Slingshot stated it was  
20 published from the Long Haul address, that the Infoshop had a rack of copies of the Slingshot  
21 newspaper, and that the locked middle loft door had a huge banner sign over it that said  
22 “Slingshot.” Similarly, their claim that they did not know the EBPS office and computer were  
23 used in any publishing activity is inconsistent with the facts that Kasiske reviewed the Long Haul  
24 webpage (which stated that EBPS had a “prison-related book/zine/video library” and that it hosted  
25 a regular event where people would “read and reply to prisoner mail” and “correspond with  
26 Political Prisoners”), that the EBPS office was locked with a large sign on the door which gave  
27 notice to the officers that that was a private office for EBPS, and that Kasiske specifically  
28

1 identified the office as the “downstairs offices – “East Bay Prisoner Support” in his sworn  
 2 inventory. Kasiske Decl., Ex. R, at 3 (Docket No. 115-18). In light of these undisputed facts,  
 3 Defendants cannot evade liability now merely by filing declarations asserting that they did not  
 4 believe that Slingshot or EBPS were publishers or even entities who had the “purpose to  
 5 disseminate to the public a newspaper, book, broadcast, or other similar form of public  
 6 communication.” 42 U.S.C. § 2000aa(b) (documentary materials may not be searched for or  
 7 seized).

## 8 **II. ARGUMENT**

### 9 **A. Defendants Retaliated Against Long Haul For Supporting Animal Rights** 10 **Activities Despite the Fact that These Activities Were First Amendment** 11 **Protected and But A Small Part of the Public Services Long Haul Provided In** 12 **2008.**

12 Defendants now confess<sup>1</sup> that they viewed individuals affiliated with Long Haul as  
 13 criminal suspects because Long Haul was “actively involved in animal rights activities in  
 14 Berkeley”, and it “supported animal rights activists who were harassing UCB researchers”.  
 15 Defendants’ Opposition and Cross Motion for Summary Judgment 30, hereinafter “Defendants’  
 16 MSJ Opp.”). Defendant officers’ distaste for Long Haul was manifest before the raid. *See*  
 17 Zimmerman Decl., Ex. 29 (Docket No. 106-8) (e-mail from Defendant Kasiske to Defendant  
 18 Alberts) (“Somehow I’m not surprised that the IP address comes back to the Long Haul. ... Maybe  
 19 if we go over there and ask them really nicely, they will tell us who was using their computer  
 20 room that night, ha, ha.”). Unsurprisingly, the officers’ actions illustrated their bias against Long  
 21 Haul. Long Haul has long alleged that the officers executed a search warrant instead of sending a  
 22 subpoena for information, and that, once inside the Infoshop, the officers rummaged through

23 <sup>1</sup> This assertion is new, which is another reason to disregard it. Defendant Kasiske was asked  
 24 during his deposition whether he believed Long Haul was any more likely than any other  
 25 establishment to fail to comply with a subpoena or other valid legal process. He answered, “Well,  
 26 I guess I’ll just go back to what I said is that the Long Haul was a place where animal rights  
 27 activists were going, and I didn’t know if who was running the Long Haul and if those people  
 28 were supporting or involved in the group Stop Cal Vivisection and if they would assist them or  
 share information with them if a subpoena was served. I don’t know if it’s more likely in that case  
 versus in another organization that you’re mentioning.” Zimmerman Suppl. Decl., Ex. 4, at 91:19-  
 92:2. Notably, Kasiske did not claim probable cause to believe Long Haul was “complicit” in  
 sending the emails, or even that it was “actively involved” in animal rights or “supported”  
 harassers.



1 private photographs, library logs, sales logs and mail, among other improper actions, exactly  
2 because they did not like Plaintiff's politics. Long Haul was right. The "animal rights activities"  
3 to which Defendants now point to as justification for their disparate treatment of Long Haul were  
4 both protected by the First Amendment, and were but a small fraction of the free speech and  
5 assembly activities that Long Haul and its patrons have long participated in. Yet, Defendants  
6 intentionally, and improperly, treated Long Haul people like criminals as a result.

7 First, Defendants point to the April 2008 fundraiser/café night held at Long Haul for the  
8 group Stop Cal Vivisection, at which the group sought to raise money for an activist facing "two  
9 misdemeanor charges – disturbing the peace and trespassing" and also to help an individual  
10 "whose car was recently searched and impounded." Zimmerman Suppl. Decl., Ex. 8. This  
11 fundraiser, which was perfectly lawful political activity, did not involve support for anybody who  
12 threatened UC researchers or otherwise participated in felonious or dangerous activity. And the  
13 fact that it was held at Long Haul does not mean that Long Haul endorsed it: the Infoshop hosted  
14 café nights for a wide variety of causes every Sunday night, just as its website that Kasiske  
15 reviewed specified. Zimmerman Suppl. Decl., Ex. 2, at 186:21-25 (Deposition of Jesse Palmer,  
16 vol. 1 ("*Palmer I*"). For example, the website at the time of the raid advertised a café night for an  
17 art collective in Indonesia. Palmer Decl., Ex. 1, at 2 (Docket No. 108-1). It was Long Haul's  
18 practice to give groups holding a café night a matching grant of \$50, regardless of the group or  
19 cause.

20 Defendants next point to an event at which Peter Young spoke and where the movie  
21 "Behind the Mask" was screened as evidence that Long Haul was complicit with whomever was  
22 threatening UC Berkeley researchers. But Defendants' evidence relating to this event shows no  
23 connection between Mr. Young, the film, and harassing or threatening animal researchers. In fact,  
24 Mr. Young was prosecuted for freeing minks and foxes from fur farms in the Midwest in 1997.  
25 Kasiske Decl. ¶ 2 (Docket No. 115); Kasiske Decl., Ex. F, at 1 (Docket No. 115-6). Obviously,  
26 there was nothing unlawful about showing the film or about Mr. Young's speaking at the event,  
27 and the fact that Long Haul provided a forum for Mr. Young to speak about freeing animals from  
28

1 fur farms in Wisconsin in 1997 does not suggest that Long Haul was involved in sending  
2 threatening emails to animal researchers a decade later. Part of Long Haul's purpose is to provide  
3 a forum for political discourse, and it regularly held "radical movie nights": nine were advertised  
4 on the Long Haul website in August of 2008, including movies about shark protection, Black  
5 Panther George Jackson, the Attica Prison rebellion, New York's Critical Mass bicycle ride, a  
6 punk band, and El Salvador. Palmer Decl., Ex. 1, at 1-2 (Docket No. 108-1). Long Haul is no  
7 more complicit with animal rights activists – especially those few that threaten researchers – than  
8 it is with "black power" groups or vegan cyclists.

9 The final factor that Defendants point to in support of the idea that Long Haul was  
10 somehow complicit with animal rights activists is that there were "several instances where animal  
11 rights activists were followed before or after home demonstrations to Long Haul." Kasiske Decl.  
12 ¶ 8 (Docket No. 115). This vague claim lacks both illuminating detail and personal knowledge.  
13 Following people to a public space does not implicate the managers of that space, or people  
14 associated with it, in the activities of those people. There is no indication that any of these people  
15 had been engaged in anything other than lawful protest, no indication that they constituted  
16 anything more than a tiny percentage of the total number of the demonstrators that UCPD  
17 followed, and no reason to think that they had any particular affiliation with Long Haul other than  
18 as patrons who were having a cup of coffee or using the public-access computers or lending  
19 library while on their way to the nearby Ashby BART station (which Kasiske identifies as a  
20 meeting place for the demonstrators he was following). Kasiske Decl. ¶¶ 21-22 (Docket No. 115).

21 In its November 30, 2009 Order granting in part federal defendants' motion to dismiss the  
22 Plaintiffs' First Amendment claims, this Court held that no cause of action lies unless the  
23 Defendants acted with the impermissible motive of retaliating against Plaintiffs for or of curbing  
24 Plaintiffs' First Amendment activities. Order of November 30, 2009 at 15-16 (Docket No. 69). In  
25 their Opposition, however, Defendants admit<sup>2</sup> that it was the movie night, the Peter Young event,  
26 the café night, and the fact that Long Haul was open to the public that led them to move against

27 <sup>2</sup> Statements of fact in a brief constitute judicial admissions. *United States v. Adams*, 343 F.3d  
28 1024, 1030 n.3 (9th Cir. 2003).

1 Long Haul as if they were criminals. This certainly is what Plaintiffs claimed in their motion that  
2 the Court dismissed, and if this is not evidence of the retaliatory motive this Court held that the  
3 First Amendment claim requires, then it comes painfully close.

4 Moreover, Defendants' own words justify Plaintiffs' request for injunctive relief. If it is  
5 this kind of activity – showing “radical” movies, letting people speak about their activism and  
6 experience in prison, opening your doors to people who may be coming from or going to lawful  
7 demonstrations, or every week allowing a different group to hold a fundraiser on premises – that  
8 attracts police suspicion of criminal sympathies, then Plaintiffs will certainly need an injunction to  
9 protect themselves in the future, as well as an order that the government expunge all of the data  
10 from Long Haul's computers that it seized and continues to hold.

11 **B. Defendants Cannot Rehabilitate the Warrant Based on a New Declaration**  
12 **Drafted to Support Their Summary Judgment Motion.**

13 In arguing that the warrant was not overbroad, Defendants rely on lengthy new  
14 declarations drafted in support of this motion, rather than on the affidavit that Officer Kasiske  
15 actually submitted to the magistrate. This legal strategy ignores the fundamental rule that “an  
16 otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information  
17 possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.”  
18 *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971); *see Millender*, 620 F.3d at 1029, 1034 (9th Cir.  
19 2010) (en banc) (“[I]n reviewing a search warrant, we are limited to the information and  
20 circumstances contained within the four corners of the underlying affidavit.”) (citations omitted).  
21 Officer Kasiske's private thoughts about the significance of Long Haul's “sympathy for animal  
22 rights activists” and other political views, Defendants' MSJ Opp. 15 n.8 (Docket No. 114), while  
23 revealing about his motives in this case, are irrelevant to any probable cause determination. Nor  
24 are any additional assertions Kasiske now makes to defend his investigation, including new  
25 information never given to the magistrate about the May emails, of any relevance.

26 Instead, what matters under the Fourth Amendment is the affidavit that Kasiske actually  
27 presented to the magistrate. This affidavit includes information about two sets of emails, from  
28 March and June 2008. (The May 2008 emails Defendants raise in their motion were not

1 mentioned at all in the affidavit, and so any information regarding those is irrelevant.) The  
2 discussion of the March emails is cursory: several U.C. professors received “harassing email  
3 messages” between March 19 and March 25, all of which had been forwarded to Kasiske. Kasiske  
4 Decl., Ex. N, at 2 (Docket No. 115-14) (Statement of Probable Cause). These messages did not  
5 contain credible threats against safety, a required element for California’s stalking statute, and the  
6 sole crime mentioned in the affidavit. *See* Cal. Penal Code § 646.9(g) (West 2011); *People v.*  
7 *Borrelli*, 77 Cal. App. 4th 703, 714 (Cal. Ct. App. 2000). Nor could the sending of a single email  
8 to each professor constitute stalking, whatever its content, because the statute covers only  
9 “repeated[]” acts against a person. Cal. Pen. Code §§ 649(a), (e), (f). Indeed, Kasiske and Alberts  
10 “did not seek a warrant based on the March, 2008 emails because the harassment did not rise to  
11 the level of a felony,” Kasiske Decl. ¶ 37 (Docket No. 115), presumably because California law  
12 does not authorize search warrants to search for mere evidence of a misdemeanor. *See* Cal. Penal  
13 Code § 1524.

14 The June 14 emails, however, do contain threatening language. All three of these emails  
15 were received on a single afternoon; four of them within the space of seven minutes and a single  
16 email received one hour later. Kasiske Decl., Ex. I, at 1-13 (Docket No. 115-9) (e-mails with time  
17 stamps). The affidavit indicates that all were sent from an IP address associated with Long Haul’s  
18 physical address. Kasiske Decl., Ex. N, at 2 (Docket No. 115-14). The affidavit includes the  
19 following information, and only the following information about Long Haul: “I know that the  
20 Long Haul is a resource and meeting center for radical activists. I know that animal rights  
21 activists have held meetings at the Long Haul. The Long Haul’s website advertises that they offer  
22 a computer room with four computers for ‘activist oriented access.’” *Id.* Kasiske then concluded,  
23 based on his training and experience, that “establishments that offer public computer access often  
24 have some type of system for patrons to sign in or register to use the computers, [and a] “search of  
25 Long Haul’s premises could reveal logs or sign-in sheets indicating which patrons used the  
26 computers on particular dates.” *Id.* at 4. He also observes that a search of the computers “could  
27 reveal information the suspect stored on the computers,” including websites visited and other  
28

1 email accounts used. *Id.* Nothing in the affidavit suggests that evidence of who sent the June  
2 emails might be found on any computers or any other type of electronic-storage devices other than  
3 the public-access computers, or on logs, if any, of who used those computers.

4 The remainder of the affidavit indicates that the search was for evidence relating to a  
5 felony, as required by California Penal Code § 1524, which means that that the warrant authorized  
6 a search only for evidence relating to the June 14 emails.

7 A judge determining whether to issue a search warrant must “make a practical, common-  
8 sense decision whether, given all the circumstances set forth in the affidavit before him ... there is  
9 a fair probability that contraband or evidence of a crime will be found in a particular place.”  
10 *Illinois v. Gates*, 462 U.S. 213, 238 (1983). “While conclusive evidence of guilt is of course not  
11 necessary under this standard to establish probable cause, ‘[m]ere suspicion, common rumor, or  
12 even strong reason to suspect are not enough.’” *Torres v. City of Los Angeles*, 548 F.3d 1197,  
13 1206-07 (9th Cir. 2008) (arrest case) (quoting *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir.  
14 1984)). The magistrate must also ensure “that the scope of the warrant be limited by the probable  
15 cause on which [it] is based.” *Millender*, 620 F.3d at 1024 (citation omitted). The practical,  
16 common-sense reading of the affidavit is that a single suspect (Kasiske refers to “suspect,” not to  
17 “suspects,” Kasiske Decl., Ex. N, at 4 (Docket No. 115-14)) used the public-access computers at  
18 Long Haul to commit a felony by sending a series of harassing emails over the course of seventy  
19 minutes on June 14, 2008.

20 The warrant application is notable for what it did not contain. Kasiske did not ask to  
21 search or seize indicia of control of the premises, as is commonly done in cases where someone  
22 associated with the premises is suspected of a crime. *See Ewing v. City of Stockton*, 588 F.3d  
23 1218, 1229 (9th Cir. 2009). He did not assert, much less establish, any need to search for  
24 membership lists for Long Haul, or to search for privately owned computers, or to look for records  
25 of who has access to computers other than the public-access computers. He did not try to justify  
26 looking at photographs of protests in Seattle, or library lending logs, or mail from prisoners. The  
27

1 only mention was of public access computers and any logs relating to them; and that is all that the  
2 warrant could properly have authorized.

3         The cases that Defendants cite simply hold that those affidavits provided probable cause  
4 under circumstances that have nothing to do with the case at bar. In *Adjani*, for example, the court  
5 asked whether “there was probable cause to believe that evidence of the crime in question ...  
6 could be found on computers accessible to [the suspect].” *United States v. Adjani*, 452 F.3d 1140,  
7 1147 (9th Cir. 2006). In that case, because the computers were at the suspect’s home, the answer  
8 was yes. *Adjani* does not justify a search of computers in a business’s private, locked offices  
9 where the suspect was merely a patron who used the public-access computers.

10         And while a warrant may properly authorize the search of external storage devices,  
11 Defendants are wrong to state that this warrant did so. In *United States v. Hay*, the warrant  
12 properly authorized seizing an entire system, including external hard drives, only because the  
13 “affidavit explained why it was necessary to seize the entire computer system” to see whether its  
14 owner had stored child pornography on those devices. *United States v. Hay*, 231 F.3d 630, 637  
15 (9th Cir. 2000). The government already knew that Hay had a single computer in his apartment  
16 and that he was the only one who used it. *Id.* at 633. Similarly, in *United States v. Lacy*, 119 F.3d  
17 742, 746 (9th Cir. 1997), the affidavit explained that persons who collect child pornography “store  
18 it for long periods in a secure place, typically in their homes” and “established probable cause to  
19 believe Lacy’s entire computer system was likely to evidence criminal activity” relating to child  
20 pornography. Importantly, “[i]n the affidavit supporting the search warrant application, a Customs  
21 agent explained there was no way to specify what hardware and software had to be seized to  
22 retrieve the images accurately.” *Id.* at 746-47. In contrast, Kasiske’s affidavit provides no reason  
23 to believe that the storage media listed in the warrant would contain evidence of the identity of a  
24 person who had used a public access computer on June 14. The third case Defendants cite  
25 involved a man suspected of murdering his live-in girlfriend; the warrant authorized a search of  
26 his home and computer for “twelve items the police expected to find in Wong’s home that directly  
27 related to [her] murder.” *United States v. Wong*, 334 F.3d 831, 833-35, 837-38 (9th Cir. 2003).

1 Although the case mentions that the warrant authorized the seizure of disks, their inclusion is  
2 simply not an issue in the case.

3 The warrant should have limited the search and seizure to evidence showing persons who  
4 used the public-access computers on the afternoon of June 14 (and, perhaps, March 19-25).  
5 Instead, it broadly authorized the seizure of “[a]ny” records of any type “containing names or  
6 other identifying information of patrons who used the computers at the Long Haul Infoshop.”  
7 “Failure to limit broad descriptive terms by relevant dates, when such dates are available to the  
8 police, will render a warrant overbroad.” *United States v. Ford*, 184 F.3d 566, 576 (6th Cir.  
9 1999). The same is true with failure to specify the offense for which evidence is sought. *United*  
10 *States v. Stefonek*, 179 F.3d 1030, 1032-33 (7th Cir. 1999); *see also Groh v. Ramirez*, 540 U.S.  
11 551, 562-63 (2004) (citing *Stefonek*, 179 F.3d at 1032-33, for the same point). This warrant was  
12 obviously facially overbroad.

13 **C. Defendants Cannot Save This Facially Overbroad Warrant by Reference to**  
14 **the Statement of Probable Cause or by Arguing that Their Search Was**  
15 **Otherwise “Reasonable.”**

16 In defending the rummaging through Long Haul’s and EBPS’s offices, computers and  
17 paper files, Defendants argue that the raid team limited its activities to searching for evidence of  
18 those matters set forth in the affidavit.

19 As a legal matter, even if the search was narrowly conducted, which it was not, self-  
20 restraint cannot cure a facially invalid warrant. In *Groh*, the officer presented a detailed warrant  
21 application that established probable cause to search a ranch for particular weapons. 540 U.S. at  
22 555. The search warrant, however, listed the street address of the home to be searched in the box  
23 on the form that was for items to be seized. *Id.* There was an itemized list of things to be seized  
24 in the warrant application, but that document was neither incorporated by reference nor attached to  
25 the warrant. *Id.* The agents orally described what they were looking for to the residents of the  
26 home, and left the search warrant following the intrusion, but they did not leave a copy of the  
27 warrant application. *Id.* The Court held that, even though the scope of that search did not exceed  
28

1 probable cause set forth in the affidavit, the Fourth Amendment requires a facially valid warrant  
2 and thus the search was invalid. *Id.* at 563.

3 Similarly, the search here is not saved by incorporation of the affidavit. Kasiske  
4 intentionally did not distribute copies of the affidavit to the raid team. Kasiske Decl. ¶ 69 (Docket  
5 No. 115). At his deposition, when asked if he had a copy of the statement of probable cause  
6 during the search, answered, “I believe it was probably likely that I did, but I'm not sure.”  
7 Zimmerman Suppl. Decl., Ex. 4, at 124:15-19. Kasiske now says he believes that he may have  
8 had the statement of probable cause with him tucked away in “a folder with relevant paperwork.”  
9 Kasiske Decl. ¶ 111 (Docket No. 115). This is far too little far too late. A single copy of an  
10 affidavit that is hidden in a folder during the search is not “available” to the search team,  
11 particularly where there is no evidence that any member of the team referred to it or even knew  
12 about its presence. *Millender*, 620 F.3d at 1025-26 (affidavits must be made available in a useable  
13 way).

14 Nor could Kasiske’s pre-raid briefing serve the role of properly limiting the search. Even  
15 if Kasiske had properly described the scope of the search authorized by the magistrate (which is  
16 highly doubtful), an oral briefing is no substitute for a review of a written document. *United*  
17 *States v. McGrew*, 122 F.3d 847, 849 (9th Cir. 1997) (rejecting government’s argument that “so  
18 long as its agents are aware of the contents of the affidavit listing the items they may seize, the  
19 Fourth Amendment’s particularity requirement is satisfied”); *see also Groh*, 540 U.S. at 558  
20 (search’s scope must be described in the warrant or affidavit, not described after the fact); *Ramirez*  
21 *v. Butte-Silver Bow County*, 298 F.3d 1022, 1026-27 (9th Cir. 2007) (oral statements cannot  
22 substitute for written description of property to be seized). Instead, Kasiske’s new declaration  
23 vaguely states that he informed the team of the time frame that the emails were sent. Kasiske  
24 Decl. ¶ 71 (Docket No. 115). This information no doubt included the March emails for which the  
25 officers could not lawfully obtain a search warrant and probably also the May emails that Kasiske  
26 failed to mention in the affidavit. Also, when asked during his deposition, Kasiske said that, with  
27 regard to what could or could not be searched or seized, he merely showed his fellow officers  
28



1 Exhibit 1B to the search warrant. Zimmerman Suppl. Decl., Ex. 4, at 76:22-24; Zimmerman  
2 Decl., Ex. 1, at 2 (Docket No. 116-1). This cannot cure a facially defective warrant.

3 In any case, the facts do not support Defendants' claim that their searches and seizures  
4 were properly tailored to probable cause. Most obviously, there is no mention of May 2008  
5 emails in the Statement of Probable Cause, and yet Defendants claim to this day they were  
6 "indisputably" "authorized to search for and seize documents identifying individuals who used the  
7 computers from March through June, 2008." Defendants' MSJ Opp. 18 (Docket No. 114). That  
8 search unnecessarily swept up innocent users, when the officers could have targeted their  
9 investigation to the specific dates and times when the offending emails were sent. The affidavit  
10 does not mention how relevant information could have been stored on any electronic devices other  
11 than computers, yet the team seized a flash drive from the EPBS officer and "misc. CDs/cassettes"  
12 from that office and from the Slingshot office. Kasiske Decl., Ex. R, at 2-3 (Docket No. 115-18).  
13 Defendants searched through files that could not possibly have contained anything mentioned in  
14 the affidavit, including a file containing only photographs and artwork, as discussed below. Given  
15 this general rummaging through Long Haul's and EPBS's papers, Defendants cannot claim that  
16 their search was limited by the affidavit.

17 **D. The Execution of the Search Violated the Fourth Amendment.**

18 Defendants' own bowdlerized account of their actual search of Long Haul, while self  
19 serving, nonetheless shows that their conduct violated core Fourth Amendment principles.

20 1. The Search Of The Slingshot Office Violated The Fourth Amendment.

21 Zuniga and Shaffer examined materials well beyond the scope of the warrant in the  
22 Slingshot office. For example, Zuniga looked through a thick folder of photographs that had been  
23 collected for inclusion in the Slingshot newspaper. Zuniga Decl. ¶ 57 (Docket No. 117); Miller  
24 Decl. ¶¶ 7-8 (Docket No. 109). As broad as the warrant was, it did not authorize the search of  
25 photographs, and Zuniga should not have been searching through a file of them at all. *Arizona v.*  
26 *Hicks*, 480 U.S. 321, 325 (1987) (Fourth Amendment violated when officer searching for weapons  
27 moved stereo equipment to locate serial number); *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir.

1 2004) (“[A] search may not exceed the scope of the search warrant.”). And this was no  
2 momentary lapse: Zuniga went through the scores of photographs in the file, Miller Decl. ¶ 8  
3 (Docket No. 109), and extracted five to six pictures to show to Agent Shaffer because “one of  
4 them appeared to be of a protest in Seattle” and Zuniga knew that Shaffer had been stationed there,  
5 Zuniga Decl. ¶ 57 (Docket No. 117); Shaffer Decl. ¶ 15 (Docket No. 121). He then “called”  
6 Shaffer, who was downstairs in the shelving area, “to [the] room to look at [the] photographs.”  
7 Shaffer Decl. ¶ 14 (Docket No. 121). Zuniga claims that he did this because one of the photos  
8 “looked as if it may have evidence of criminal activity.” Zuniga Decl. ¶ 57 (Docket No. 117).  
9 This self-serving attempt to invoke the plain-view doctrine is inadequate. First, the doctrine is  
10 inapplicable because Zuniga should not have been looking through a folder of photos as all.  
11 Second, it can justify a search only the incriminating character of the materials is “immediately  
12 apparent,” *Horton v. California*, 496 U.S. 128, 136-37 (1990), such that the officer has probable  
13 cause to believe the item is evidence before he moves it in any way. *Hicks*, 480 U.S. at 324-25,  
14 327-29. Defendants present no facts to show that there was anything incriminating about the  
15 photos, much less that it was immediately apparent that they contained probable cause of a crime.  
16 Zuniga’s conclusory language, to the extent it indicates that he felt there was probable cause, is  
17 inadequate under the Fourth Amendment: “[I]f there is one bright star in the Fourth Amendment  
18 heaven, it is that probable cause must be shown on the basis of facts rather than mere  
19 conclusions.” *Poolaw v. White*, 2007 WL 6970817, \*6 (D. N.M. 2007) (quoting 2 LaFave *Search*  
20 *and Seizure* § 3.2(d) 64 (4th ed. 2004)); accord *Whiteley v. Warden*, 401 U.S. 560, 564-65 (1971).  
21 Zuniga’s general rummaging through the photographs and then calling another officer to look at  
22 some that he found interesting is exactly what the Fourth Amendment prohibits.

## 23 2. The Search Of EBPS Violated The Fourth Amendment.

24 Defendants should not have searched the EBPS office once they entered Long Haul and  
25 saw that it was a locked office belonging to a separate organization under *Mena v. City of Simi*  
26 *Valley*, 226 F.3d 1031, 1038 (9th Cir. 2000). See Plaintiffs’ Mot. 17 (Docket No. 110). Kasiske  
27 admits he “had seen the name ‘East Bay Prisoner Support’ listed as a ‘friend’” on another  
28

1 organization's webpage. Kasiske Decl. ¶ 30 (Docket No. 115). In his original report describing  
2 the raid he notes that he seized a computer and storage media from a padlocked rooms "labeled  
3 'East Bay Prisoner Support.'" Kasiske Decl., Ex. R, at 3 (Docket No. 115-18). The EBPS office  
4 was clearly labeled as such. So while the officers may not have known about EBPS's tenancy at  
5 the Long Haul prior to the search, once they arrived, they should not have taken advantage of the  
6 warrant to search their separate and private office.

7 The cases Defendants cite relate to whether the police should have recognized before  
8 applying for a warrant that a building contained separate units, not what the officers should have  
9 done once they discovered their error during the search. A closer reading of these cases shows  
10 they support EBPS's position. In one, the court upheld the search because when the agents  
11 realized they were searching a multi-unit building they were careful to limit their search to the  
12 business that was named in the warrant. *United States v. Ofshe*, 817 F.2d 1508, 1514 (11th Cir.  
13 1987). In the other, the house did not contain multiple units; it was a single house with two  
14 families living in it. *United States v. Hinds*, 856 F.2d 438, 441-42 (1st Cir. 1988).

15 Here, when the raid team came upon a separate, locked office with a sign on the door  
16 saying "East Bay Prisoner Support" they should have refrained, as the agents in *Ofshe* did, from  
17 searching that separate business. Instead, they entered the office, rifled the organization's papers,  
18 looked through its mail and left the materials in disarray on the floor, and seized its computer and  
19 storage devices.

20 Shaffer also admits looking at two of EBPS's letters, though Defendants do not explain  
21 how this review resulted in EBPS's organized mail being left in a disorganized pile in the middle  
22 of their office floor. Regardless, letters could not reasonably contain any information about who  
23 sent the June 14 emails, and Shaffer should not have touched the mail at all. *Hicks*, 480 U.S. at  
24 324-25, 327-29.

25 3. The Lab's Forensic Search Of Long Haul's Computers Violated The Fourth  
26 Amendment.

27 The warrant purported to authorize a search of Long Haul's computers for "evidence."  
28 This is clearly overbroad. *United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995) (collecting cases

1 in which the Ninth Circuit has “criticized repeatedly the failure to describe in a warrant the  
2 specific criminal activity suspected”); *see also Stefonek*, 179 F.3d at 1033 (same); *Groh*, 504 U.S.  
3 at 557 (citing with approval *Stefonek*, 179 F.3d at 1033). Not surprisingly, the actual search of  
4 those computers went far beyond the scope of probable cause, that is, beyond that which would  
5 reasonably identify the sender of the June 14 emails. Kasiske asked the Lab to search for terms  
6 such as “animal research” and “vivisection”, and not just for terms specific to the June 14 (or  
7 March 2008, or even May 2008) emails. Kasiske Decl., Ex. V, at 1 (Docket No. 115-22). Kasiske  
8 even took the opportunity to search the computers for the names of other “suspects” and  
9 researchers whose names do not appear in the warrant or the affidavit and for whom Kasiske had  
10 no evidence connecting them to the June 14 messages. *See id.* Kasiske expressly asked the lab to  
11 look for “[e]vidence pertaining to threatening email messages” with no date limitation, as well as  
12 for evidence of other crimes there was no probable cause for, including “arson, vandalism, or other  
13 harassment.” *Id.* Because the search was so overbroad, it revealed an enormous amount of  
14 information about perfectly legal research and communications by Long Haul patrons, including  
15 the email addresses of patrons and the web pages they visited. *See* Kasiske Decl., Exs. X, Y  
16 (Docket No. 115-24, 25) (results of search). This information ranged from the political to the  
17 mundane. *See* Kasiske Decl. Ex. Y, 3-4 (Docket No. 115-25) (list of email addresses); *id.* 5-6 (list  
18 of Myspace pages visited); *id.* 7 (“[F]ile was a discussion forum ... related to veganism and diet);  
19 *id.* 9 (“[S]omeone was looking up a skin care or cosmetic product on Amazon.com. The product  
20 was made by a company called Beauty ‘Without Cruelty.’”). Innocent communications were  
21 revealed unnecessarily, while nothing of evidentiary value was recovered. *See* Kasiske Decl., Ex.  
22 Y, at 1 (Docket No. 115-25). Far from being reassuring, this is exactly the sort of harm the Fourth  
23 Amendment was designed to prevent. Exacerbating matters, Defendants refuse to destroy their  
24 copy of the data copied from these computers.

25 **E. The Defendants are Not Entitled to Qualified Immunity.**

26 Defendants do not enjoy qualified immunity because they violated Plaintiffs’ clearly  
27 established rights.

1 First, the search warrant was unconstitutionally overbroad on its face. It would have been  
2 readily apparent to any reasonable officer that a warrant authorizing a search “for evidence” but  
3 not specifying a crime or a date range violates the long-standing particularity requirements of the  
4 Fourth Amendment. Any reasonable officer should have known that the information in the  
5 affidavit about emails on a few days in March and a single afternoon in June could not authorize a  
6 warrant to search for and seize records of anybody who had used the Infoshop computers without  
7 temporal limit. *See, e.g., KRL*, 512 F.3d at 1193; *Ford*, 184 F.3d at 576 (citing *United States v.*  
8 *Cardwell*, 680 F.2d 75, 79 (9th Cir. 1982));<sup>3</sup> *Kow*, 58 F.3d at 427 (warrant for records must “limit  
9 the scope of the seizure to a time frame within which the suspected criminal activity took place”).  
10 Additionally, any reasonable officer would have known that searching for “evidence,” without  
11 limitation or elaboration, was improper. *See, e.g., Kow*, 58 F.3d at 427; *United States v.*  
12 *Washington*, 797 F.2d 1461, 1474 (9th Cir. 1986); *United States v. Gomez-Soto*, 723 F.2d 649,  
13 653-54 (9th Cir. 1984). The Supreme Court has in fact used a case invalidating a warrant for  
14 “evidence of crime” as the prototypical example of an inadequate description. *Groh*, 540 U.S. at  
15 563 (citing *Stefonek*, 179 F.3d at 1033).

16 Because Officer Kasiske “himself prepared the invalid warrant, he may not argue that he  
17 reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description  
18 of the things to be seized and was therefore valid.” *Groh*, 540 U.S. at 564. Alberts, who also  
19 reviewed the affidavit and warrant as Kasiske’s supervisor, is in the same position as a leader of  
20 the team. Alberts Decl. ¶ 23-24 (Docket No. 118); *see KRL*, 512 F.3d at 1190 (“Officers who plan  
21 and lead a search ‘must actually read the warrant and satisfy themselves that they understand its  
22 scope and limitations, and that it is not defective in some obvious way.’”). So is Zuniga, who may  
23 have reviewed it at the pre-raid meeting and participated in the general investigation. *See Zuniga*  
24 Decl. ¶¶ 27-30, 37 (Docket No. 117) (does not remember the statement of probable cause but it is  
25 his practice to review probable-cause statement); *KRL*, 512 F.3d at 1190.

26 Nor does qualified immunity save the other officers from their participation in the illegal

27 <sup>3</sup> Decisions from other circuits may defeat qualified immunity. *Sorrels v. McKee*, 290 F.3d 965,  
28 970 (9th Cir. 2002).

1 raid. “It is incumbent on the officer executing a search warrant to ensure the search is lawfully  
2 authorized and lawfully conducted.” *Groh*, 540 U.S. at 563. The officers all read the warrant and  
3 at least some of them the statement of probable cause. Hart Decl. ¶ 6 (Docket No. 119) (warrant  
4 and affidavit); MacAdam Decl. ¶ 10 (Docket No. 120) (warrant); Shaffer Decl. ¶¶ 10-11 (Docket  
5 No. 121) (warrant and affidavit). Defendants were integral participants in the search and assisted  
6 in removing computers and electronic-storage devices that they should have known would be  
7 subject to the illegal search for evidence. The assertion that Shaffer and Hart’s assistance was  
8 minimal because all they did was carry Plaintiffs’ property to police cars is both factually and  
9 legal inaccurate. Hart provided armed guard during the illegal search and he and Shaffer  
10 personally seized computers. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (seizure occurs  
11 when “there is some meaningful interference with an individual’s possessory interests in that  
12 property.”). Shaffer was the officer who looked through the Slingshot photo file and examined  
13 EBPS’s mail. Both were more than minimal players in the raid at Long Haul. *James v. Sadler*,  
14 909 F.2d 834, 837 (5th Cir. 1990) (armed officers who did not pat down the plaintiff and stayed on  
15 the lawn were integral to the search and liable); *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir.  
16 1989) (officer who does not enter an apartment, but stands at the door, armed with his gun, while  
17 other officers conduct the search, can be a “full, active participant” in the search).

18 The search in this case is much like the one in *Groh*, and Defendants are similarly not  
19 entitled to qualified immunity. In *Groh*, the Supreme Court found the warrant “plainly invalid”  
20 because it did not contain a list of things to be searched for and seized. 540 U.S. at 557. The  
21 Court denied qualified immunity because no reasonable officer could believe that a warrant that  
22 plainly did not comply with the particularity requirement was valid. *Id.* As with the warrant in  
23 *Groh*, the one here is facially invalid because it authorized a search for “evidence” without  
24 limitation as to offense or date. As in *Groh*, Defendants are not entitled to qualified immunity  
25 because the warrant’s infirmity would be apparent to a reasonable officer.

26 Second, any reasonable officer would have known that a search for evidence of who used  
27 public access computers to send threatening emails does not include a search of separate locked  
28

1 offices that belong to other tenants who may or may not have computers inside. When officers  
2 search through the books and papers of an activist organization they should be particularly alert to  
3 the Fourth Amendment's particularity requirement. *Stanford v. Texas*, 379 U.S. 476, 511-12 &  
4 n.16 (1965). Probable cause to search for and seize public-access computers that may have been  
5 used by an animal rights activist visiting Long Haul does not support seizure of other computers  
6 and devices that the officers happen to find in locked private offices on the premises. *See, e.g.*,  
7 *United States v. Weber*, 923 F.2d 1338, 1340, 1346 (9th Cir. 1990) (in 1987, "the law was clear  
8 that a warrant could not be broader than the probable cause on which it was based.").

9 Third, the affidavit in support of the warrant does not establish probable cause to search for  
10 or seize anything other than the public access computers and logs, if any, of who used those  
11 computers on June 14.

12 Additionally, Defendants Kasiske and the United States violated Long Haul's clearly  
13 established rights by indiscriminately searching Long Haul computers for suspects, crimes,  
14 victims and date ranges unrelated to probable cause. This too violates the particularity  
15 requirement that goes back to the very text of the Constitution. Particularly in cases where the  
16 computer is merely a storage device for evidence, failure to focus on the relevant files may lead to  
17 a Fourth Amendment violation. For example, in *United States v. Riccardi*, 405 F.3d 852, 862  
18 (10th Cir. 2005), which involved an investigation into harassing phone calls, the court held that a  
19 warrant authorizing seizure of all storage media and "not limited to any particular files" violated  
20 the Fourth Amendment. Agents cannot simply request permission to seize "all records" from an  
21 operating business unless agents have probable cause to believe that the criminal activity under  
22 investigation pervades the entire business. *See Ford*, 184 F.3d at 576 (collecting cases); *In re*  
23 *Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 857 (9th Cir. 1997).  
24 Asking for "any and all data, including but not limited to" a list of items, has been held to turn a  
25 computer search warrant into an unconstitutional general warrant. *United States v. Fleet*  
26 *Management Ltd.*, 521 F. Supp. 2d 436, 443-44 (E.D. Pa. 2007); *see also United States v. Otero*,  
27 563 F.3d 1127, 1132 (10th Cir. 2009) (warrant authorizing seizure of "any and all information

1 and/or data” fails the particularity requirement). “To withstand an overbreadth challenge, the  
2 search warrant itself, or materials incorporated by reference, must have specified the purpose for  
3 which the computers were seized and delineated the limits of their subsequent search.” *United*  
4 *States v. Hunter*, 13 F. Supp. 2d 574, 584 (D. Vt. 1998) (citing *Kow*, 58 F.3d at 423).

5 Defendants Zuniga and Shaffer violated Long Haul’s clearly established rights by going  
6 through the Slingshot photo file, among other files in that office. Defendant Shaffer and others  
7 violated EBPS’s rights by looking through EBPS’s mail. Defendant Alberts and others violated  
8 Long Haul’s rights by searching through lending library logs and sales logs that had nothing to do  
9 with patron computer use. In at least these ways, Defendants acted contrary to longstanding  
10 Fourth Amendment principles and are not entitled to qualified immunity.

11 **F. Plaintiffs are Entitled to Summary Judgment on Their PPA Claims.**

12 Defendants claim they are not liable under the PPA because they did not know that their  
13 searches of, and seizures of the computers from, the Slingshot and EBPS offices involved  
14 protected materials. This defense is both legally and factually insufficient.

15 PPA immunity is limited to an officer who had a “reasonable good faith ... in the  
16 lawfulness of his conduct.” S. Rep. 96-874, at 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950,  
17 3961. Even if this Court credits the Defendants’ assertions that they did not know the Slingshot  
18 and EBPS materials they searched and seized were used to disseminate information to the public,  
19 their asserted ignorance was unreasonable. Several of the officers on the raid team admit that they  
20 knew Slingshot was an online publication and that it was a project of Long Haul. Kasiske Decl. ¶¶  
21 26-27, 29 (Docket No. 115); Zuniga Decl. ¶¶ 26, 29 (Docket No. 117). They claim, however, that  
22 they didn’t know that the Slingshot office housed Slingshot. But the Slingshot office has for many  
23 years (and at the time of the raid) had a large banner over the door proclaiming what it is:





See, e.g., Miller Suppl. Decl. ¶ 3.

None of the Defendants deny that this banner was there at the time of the raid, nor can they. Instead, the U.C.P.D. members of the raid team uniformly aver that they “do not recall ever seeing a sign over the door to the ‘Slingshot office’ at any time during the execution” of the warrant. Kasiske Decl. ¶¶ 87, 104 (Docket No. 115); Zuniga Decl. ¶ 56 (Docket No. 117); Alberts Decl. ¶ 61 (Docket No. 118); MacAdam ¶ 25 (Docket No. 120). The Federal Defendants do not

1 say one way or the other whether they noticed the banner. Plaintiffs have thus established that the  
2 banner was hanging above the door, because “[a]n affiant’s failure to remember an event is not a  
3 specific denial that the event occurred for purposes of summary judgment.”<sup>4</sup> *Broadcast Music,*  
4 *Inc. v. Allis*, 667 F. Supp. 356, 358 (S.D. Miss. 1986); *accord Hideout Records and Distributors v.*  
5 *El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984); *Bodney v. Pima County Sheriff’s Dept.*,  
6 2009 WL 2513786, \*10 (D. Ariz. 2009).

7 Reasonable officers entering the locked office depicted in the photograph would have  
8 understood that the office housed Slingshot, particularly if they were also aware that Slingshot was  
9 a publication and a project of Long Haul. An office need not have printing presses or “industrial  
10 printers” (whatever those might be) in order to qualify for protections under the PPA, since both  
11 the text of the statute and its legislative history show that Congress “rejected the idea of a ‘press  
12 only’ bill” in favor of one that would protect “all those who have a purpose to disseminate  
13 information to the public.” S. Rep. 96-874, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950,  
14 3956; *see* 42 U.S.C. § 2000aa. Although the officers’ lack of knowledge of the PPA may well  
15 have led them to ignore this clear indication that they were entering the Slingshot office, ignorance  
16 of a twenty-eight-year-old federal statute is neither reasonable nor a defense.

17 As to the EBPS materials, Defendants claim they “had no reason to believe” that EBPS  
18 was a distributor of information to the public. To the contrary, Defendants Kasiske, Alberts, and  
19 Zuniga had reviewed Long Haul’s website prior to the search. Kasiske Decl. ¶ 16 (Docket No.  
20 115); Zuniga Decl. ¶ 12 (Docket No. 117); Alberts Decl. ¶ 11 (Docket No. 118). That website  
21 stated that EBPS offered a “prison-related book/zine/video library” and that it hosted a regular  
22 event where people would “read and reply to prisoner mail” and “correspond with Political  
23 Prisoners.” Palmer Decl. ¶ 11 (Docket No. 108); Palmer Decl., Ex. 1, at 3 (Docket No. 108-1).  
24 That was enough to put the officers on notice that EBPS distributed books, zines and videos to the  
25 public and to prisoners. Upon entering Long Haul, when the officers saw the locked and labeled  
26

27 <sup>4</sup> This rule is particularly appropriate in this matter, because since none of the Defendants knew  
28 about the PPA they had no reason to take note of the banner, any more than they had reason to  
take note of the huge number of issues of Slingshot that were at Long Haul.

1 EBPS door in a hallway of other locked and labeled offices, a reasonable officer would have  
2 paused to determine whether EBPS or these other organizations were separate from Long Haul  
3 and whether those offices were within the scope of the warrant. The officers could have asked  
4 the landlord, or Ms. Miller, but the most trivial investigation on the Internet and would have found  
5 EBPS's Myspace page, which indicated that EBPS possessed "information about political  
6 prisoners, prison conditions, grand jury resistance, security culture, campaigns, event information,  
7 and resources for prisoners" as well as a "prison-related zine, book, and video library." Lyons  
8 Decl. ¶ 4 (Docket No. 107). It was unreasonable for the officers to disregard the evidence in front  
9 of their faces, and to fail to do further investigation, and thus to violate the PPA by searching and  
10 seizing EBPS's work product and documentary materials. *Maryland v. Garrison*, 480 U.S. 79, 88  
11 n.14 (1987) (approving search where officers' conduct was consistent with a reasonable effort to  
12 ascertain and identify the place intended to be searched within the meaning of the Fourth  
13 Amendment and noting that if after the police begin to execute the warrant and set foot upon the  
14 described premises they discover a factual mistake, they must then reasonably limit their search  
15 accordingly).

16 Finally, as Plaintiffs explain in their opening brief, the PPA's protections for documentary  
17 (as opposed to work-product) materials do not depend on whether the officers believed or knew of  
18 the nature of those materials. Rather, the officers' knowledge (or lack thereof) goes to whether  
19 individual officers, but not entities, may assert the good-faith defense of 47 U.S.C. § 2000aa-6(b).  
20 Thus, this defense is not available to the United States. 47 U.S.C. § 2000aa-6(b). The United  
21 States is liable for the PPA violations that occurred when Hart seized the computers containing  
22 PPA documentary materials and because both Hart and Shaffer were integral participants in the  
23 raid. Hart Decl. ¶ 9 (Docket No. 119); *see* 47 U.S.C. § 2000aa(b) (unlawful to "search for *or* seize  
24 documentary materials") (emphasis added).

25 **G. Plaintiffs are Entitled to Injunctive and Declaratory Relief to Require the**  
26 **Government to Return Information It Unlawfully Seized.**

27 An injunction properly lies to expunge information seized in violation of the Fourth  
28 Amendment. *Cardwell v. Kurtz*, 765 F.2d 776, 779 (9th Cir. 1985); *Klitzman, Klitzman and*

1 *Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984) (ordering return of papers seized under  
2 overbroad warrant); *see Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260,  
3 1274-75 (9th Cir. 1998). As this Court held in ruling on Defendants' Motion to Dismiss, this is  
4 also a proper remedy for violations of the PPA. Order of November 30, 2009 at 15-16 (Docket  
5 No. 69); *see Citicasters, Inc. v. McCaskill*, 883 F. Supp. 1282, 1289 (W.D. Mo. 1995), *rev'd on*  
6 *other grounds*, 89 F.3d 1350 (8th Cir. 1996). Defendants' claim that Plaintiffs should seek return  
7 of property under Cal. Penal Code § 1536 is irrelevant for two reasons. First, Defendants have  
8 already returned Plaintiffs' property; it is their information that Plaintiffs seek to have expunged,  
9 and § 1536 does not provide for the expungement of information. Second, Plaintiffs need not  
10 exhaust state remedies before seeking injunctive relief in federal court for a violation of their  
11 rights. *Stewart v. Pearce*, 484 F.2d 1031, 1033 (9th Cir. 1974); *see Patsy v. Board of Regents*, 457  
12 U.S. 496, 509 (1982). Declaratory relief is also proper, because such relief is also properly issued  
13 even in cases where an injunction is not warranted. *See Olagues v. Russoniello*, 770 F.2d 791, 803  
14 (9th Cir. 1985).

15 Thus, the Court should grant an injunction requiring expungement against the state  
16 defendants, including UCPD Chief Celaya who is sued in his official capacity only. The Court  
17 should grant declaratory relief against all defendants other than the United States, stating that  
18 retention, use, or dissemination of Plaintiffs' data would violate the Fourth Amendment and the  
19 PPA.

#### 20 **H. Defendants' Evidence Is Irrelevant and Lacks Foundation.**

21 Plaintiffs make the following objections to Defendants' evidence; the exact language or  
22 exhibit objected to, as well as the grounds for the objection that applies to that specific piece of  
23 proffered evidence, are set forth in the proposed order.

24 Much of Defendants' evidence lacks a sufficient foundation as to personal knowledge  
25 under Federal Rule of Evidence ("FRE") 602. A declaration must affirmatively show that each  
26 matter set forth is based on the declarant's personal knowledge. *Shakur v. Schriro*, 514 F.3d 878,  
27 889-90 (9th Cir. 2008). A boilerplate recitation that the declaration is made on personal  
28

1 knowledge is insufficient. *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1023 (N.D. Cal. 2006);  
2 *Sun v. Governmental Authorities on Taiwan*, 2001 WL 114443, at \* 4 (N.D. Cal. 2001). Unlike  
3 Plaintiffs' evidence which comes from two long term Long Haul volunteers and one of the  
4 founders of East Bay Prisoner Support group, there is no indication that Defendants' proffered  
5 evidence regarding the surveillance of activists, the activities of groups that met at Long Haul, and  
6 crimes committed in other parts of the state are based on the declarants' personal knowledge.  
7 Indeed, the context suggests that this evidence is based on reports from other persons. *See, e.g.*,  
8 Kasiske Decl. ¶¶ 4, 6-12, 20 (Docket No. 115). Defendants also speculate about the motives and  
9 knowledge of other persons, including activists, *id.* ¶¶ 22, 40 , and other police officers, *id.* ¶¶ 45,  
10 46; Zuniga Decl. ¶¶ 6, 17 (Docket No. 117), without giving any indication that this is based on  
11 personal knowledge or is a permissible lay or expert opinion, in violation of FRE 602, 701, 702.

12 Evidence in a summary-judgment motion "must set forth 'concrete particulars. It is not  
13 sufficient merely to assert a conclusion without supplying supporting arguments or facts. In  
14 addition, ultimate or conclusory facts and conclusions of law cannot be utilized on a summary  
15 judgment motion." *BellSouth Telecomm. v. W.R. Grace & Company-Conn.*, 77 F.3d 603, 615 (2d  
16 Cir. 1996) (citations omitted); *see Flintkote Co. v. General Acc. Assur. Co.*, 410 F. Supp. 2d 875,  
17 885 (N.D. Cal. 2006). Defendants repeatedly present conclusions without providing the  
18 supporting facts that are necessary to evaluate the validity of the conclusion. For example, they  
19 opine that "[t]here was no indication" that EBPS was a tenant, that Slingshot was published from  
20 Long Haul, or that offices were being used for publishing activities. Kasiske Decl. ¶¶ 99, 106  
21 (Docket No. 115). But without an indication of what the witness would have considered to be an  
22 indication that, for example, EBPS was a tenant, the validity of this conclusion cannot be  
23 evaluated. Thus, although witnesses may properly state that they did not encounter specified  
24 items associated with publishing a newspaper, they cannot simply opine that there was no  
25 indication of publishing activity without saying what would have indicated such activity. Nor can  
26 they simply declare they were acting "in good faith," *id.* ¶ 112, or that certain actions were  
27

1 supported by probable cause, *id.* ¶ 72, or that the warrant authorized certain searches, *id.* ¶ 66.  
2 These are legal determinations for the Court.

3 Much of the proffered evidence is simply irrelevant. For example, Kasiske’s extended  
4 explanation of what he intended the affidavit to mean and his subjective reasons for writing the  
5 warrant, *id.* ¶¶ 52-76, are irrelevant, because the validity of the warrant must be judged solely on  
6 the affidavit. *Whiteley*, 401 U.S. at 565 n.8 (1971); *Millender*, 620 F.3d at 1029, 1034. Equally  
7 irrelevant is his intent in drafting the parameters for the searches of computers, because he never  
8 communicated those limitations to the Lab.

9 Many documents taken from the websites of various organizations lack authentication and  
10 are hearsay. *See, e.g.*, Kasiske Decl., Exs. A, C, D, F (Docket Nos. 115-1, 115-3, 115-4, 115-6).  
11 And Defendants’ description of these documents, as well as their description of other documents,  
12 violates FRE 1002, which generally requires that the contents of a document be proved by a copy  
13 of the document itself.

14 **I. Defendants’ Objections Should Be Overruled Because Plaintiffs’ Evidence Is**  
15 **Based on Sworn Testimony, Documents Produced In Discovery, and**  
16 **Delcarations Of Witnesses Who are Acknowledged to be the Persons Most**  
17 **Knowledgeable About Long Haul and EBPS.**

18 Defendants object to the testimony of witnesses whom plaintiffs designated under F.R.C.P.  
19 30(b)(6) as the persons most knowledgeable about the affairs of Long Haul and EBPS. This  
20 objection fails because “[e]ach of the declarants occupies a position at [the organization] from  
21 which personal knowledge of the facts to which he testifies can be inferred.” *Edwards v. Toys ‘R’*  
22 *Us*, 527 F. Supp. 2d 1197, 1101-02 (C.D. Cal. 2007); *see In re Kaypro*, 218 F.3d 1070, 1075 (9th  
23 Cir. 2000) (“Personal knowledge may be inferred from a declarant’s position” in an  
24 organization.”). Jesse Palmer, for example, testified on behalf of Long Haul and is an attorney  
25 who has been a member of Long Haul since 1994. Zimmerman Suppl. Decl., Ex. 2, at 21:14-21.  
26 He has been involved with Slingshot continuously since 1988, other than one year when he lived  
27 on the East Coast. *Id.* 78:21-79:13. He has authority to sign checks on Long Haul’s bank account,  
28 as well as a key to the building. *Id.* 23:21-24:6, 75:22-76:5. He knows the process by which

1 Long Haul rents office space. *Id.* 99:16-100:7. Mr. Palmer's personal knowledge can be inferred  
2 from his tenure and position at the organization.

3 Similarly, Patrick Lyons, who testified on behalf of EBPS, is a founder and one of the  
4 three members of that organization. Zimmerman Suppl. Decl., Ex. 5, at 7:23-8:14. He was in the  
5 office soon after the raid. *Id.* 81-86. He would certainly know what the door to the EBPS office  
6 usually looks like and that it had been damaged.

7 Finally, Kathryn Miller has worked on Slingshot since 1999. Miller Decl. ¶ 2 (Docket No.  
8 109). She watched the officers searching Long Haul through the front window and then entered  
9 the Slingshot office immediately after the raid and saw the condition of the office. *Id.* ¶¶ 3-7. A  
10 person who returns to her office of ten years immediately after the police have raided it and finds  
11 the door pried open and the files in disarray may legitimately infer that the police were responsible  
12 for the changed state of affairs. Her 12 years of experience working on Slingshot also qualify her  
13 to testify as to the newspapers' practices and policies.

### 14 **III. CONCLUSION**

15 In sum, Defendants do not dispute Plaintiffs' factual assertions regarding the matters  
16 necessary for this Court to rule on summary judgment, including the content of the Statement of  
17 Probable Cause, the language of the warrant, the information available to the officers prior to and  
18 during the raid, the condition and appearance of the Long Haul and EBPS offices prior to and after  
19 the raid, and the officers' conduct during the raid. Based on these undisputed facts and the legal  
20 arguments set forth above, Plaintiffs' motion for summary judgment should be granted and  
21 Defendants' denied.

22 DATED: February 28, 2011

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