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ENDORSED
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San Francisco County Superior Court

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Deputy Clerk

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

14 IN RE SEARCH OF SF BAY AREA IMC
15 (INDYBAY) WWW.INDYBAY.ORG

Case No.: 24500108

**NOTICE & MOTION TO QUASH
SEARCH WARRANT AND
NONDISCLOSURE ORDER;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RELIEF**

Hearing: March 6, 2024
Time: 9:00 a.m.
Dept.: 23
Judge: Hon. Linda Colfax

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21 **NOTICE AND MOTION TO QUASH SEARCH WARRANT**
22 **AND NONDISCLOSURE ORDER**

23 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

24 PLEASE TAKE NOTICE THAT on March 6, 2024 at 9:00 a.m. in Dept. 23, of the above-
25 entitled court, located at 850 Bryant Street, San Francisco, 94103, non-party Movant San Francisco
26 Bay Area Independent Media Center (IndyBay) hereby moves for this Court to quash and revoke
27 the search warrant and associated nondisclosure order issued to the news organization on January
28 24, 2024, in SFPD Case 240038243. Indybay has standing to bring this motion and this court has

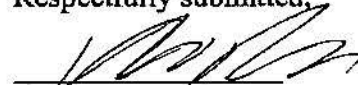
1 authority to grant relief under Cal. Penal Code. § 1546.4(c), § 1524.3(f), and its inherent authority.

2 The motion is based upon this Notice and Motion and attached Memorandum of Points and
3 Authorities; Declarations of MARK BURDETT, F. MARIO TRUJILLO with attached exhibits; and
4 any other pleadings, papers, evidence, and written or oral arguments that the parties may submit.

5 Indybay asks the Court to hold that: (1) the Search warrant violates California Penal Code
6 § 1524(g), which mandates that “No [search] warrant shall issue” for a news publisher’s
7 unpublished source material; (2) the search warrant also violates the federal Privacy Protection Act,
8 which generally makes it unlawful to “search for or seize” documentary materials of a news
9 organization. 42 U.S.C. §§ 2000aa(a)-(b); and (3) the nondisclosure order violates the First
10 Amendment to the federal Constitution and Article I, Section 2(a) of the California Constitution as a
11 content-based prior restraint on speech that cannot pass strict scrutiny.

12 Dated: February 21, 2024

13 Respectfully submitted,

14 
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The San Francisco Police Department [hereinafter Police Department] sought and obtained a
4 warrant to search an online news organization, Indybay, to find the source of an anonymous article
5 published on its website, in violation of unambiguous state and federal law. Based on that unlawful
6 warrant, it then obtained an associated order to prevent the news organization from writing or
7 speaking about it to anyone in violation of state and federal constitutional law. We ask that both the
8 search warrant and nondisclosure order be quashed.

9 This kind of unlawful warrant is burdensome to a small non-profit news outlet like Indybay,
10 chills newsgathering, and discourages sources from contributing. As the California Supreme Court
11 acknowledged: “Because journalists not only gather a great deal of information, but publicly
12 identify themselves as possessing it, they are especially prone to be called upon by litigants seeking
13 to minimize the costs of obtaining needed information.” *Miller v. Superior Ct.*, (1999) 21 Cal. 4th
14 883, 898 (cleaned up).

15 California and federal shield laws are rooted in long-standing constitutional principles that
16 protect press autonomy. California Penal Code § 1524(g) provides in absolute terms that “No
17 warrant shall issue” for a news outlet’s unpublished material. The federal Privacy Protection Act
18 protects much of the same, with minor exceptions that do not apply here. 42 U.S. Code § 2000aa.

19 These protections apply to evolving forms of journalism and electronic source material at
20 issue in this case. Indybay provides a unique online space for community-produced news in the Bay
21 Area, while also exercising editorial judgement familiar to traditional newspapers. And the
22 electronic information sought in the search warrant—including text messages, IP address, other
23 online identifiers, and information associated with the article—can just as easily reveal unpublished
24 source material as can a reporter’s notebook.

25 Finally, the content-based prior restraint imposed on Indybay to not disclose the existence of
26 the warrant cannot pass the strict scrutiny required to satisfy the First Amendment and associated
27 provision of the California constitution. While protecting a criminal investigation may be a worthy
28 interest in some cases, hiding unlawful investigative techniques targeting the press is not. The

1 Police Department should have chosen the less restrictive alternative: to refrain from seeking the
2 unlawful warrant against the press in the first place.

3 **II. FACTUAL BACKGROUND**

4 The Police Department served a warrant on a local independently run online news
5 organization, Indybay, to unmask the author of an anonymous letter-to-the-editor-styled article
6 published on its news website. Indybay promptly asked that the warrant be withdrawn, stressing the
7 legal protections for news organizations and noting that it did not possess any non-public
8 information at issue in the warrant. Seven days later, the Police Department said it would take no
9 further action on the warrant “at this time.” To Indybay’s knowledge, the warrant and nondisclosure
10 order have not been withdrawn.

11 **A. The Search Warrant**

12 On January 24, 2024, a magistrate judge of the Superior Court of California, County of San
13 Francisco, Department No. 23 signed a warrant that commanded the search of news website of the
14 San Francisco Bay Area Independent Media Center (Indybay) with a deadline of January 31, 2024
15 to comply. (Trujillo Decl., Ex. A [hereinafter, Warrant]). It is unclear if the warrant affidavit
16 completely disclosed to the judge Indybay’s status as a news organization or its associated
17 protections.¹ The warrant sought information related to an article posted on Indybay’s breaking
18 newswire by a member of the public. *Id.* The article alleged vandalism to the San Francisco Police
19 Credit Union, (Trujillo Decl., Ex. C), and was sought as evidence that tends to show a felony has
20 been committed. (Warrant at 1).

21 Among other things, the warrant sought the IP address of the author; other personal
22 identifying information of the author including username, email address, and phone number;
23 messages sent to Indybay’s email list related to the article; and other data related to the article. *Id.* at
24 1-2.

26 ¹ Indybay does not have a copy of the complete warrant affidavit. When serving the warrant, the
27 Police Department provided only pages 1, 2, and 10. (Trujillo Decl. ¶ 2, Ex. A). According to Police
28 Department regulations, it must “ensure all warrant applications fully disclose any information that
could indicate an individual falls within the Reporters’ Shield Law protections” and seek approval
from other officials. SFPD General Order 5.16.06(C)

1 In addition to the warrant, an associated court order restrained Indybay from speaking about
2 the warrant for 90 days. *Id.* at 2, 10. The order restrains Indybay from revealing to “any other
3 person” “the existence of the application or this Order of the Court, or the existence of the
4 investigation.” *Id.*

5 **B. Indybay’s Response To The Search Warrant**

6 On January 24, 2024—the day the warrant was issued—San Francisco Police Department
7 Sergeant Michael Canning served the warrant on Indybay through email.

8 On January 29, 2024, through pro bono counsel, Indybay requested that the Police
9 Department withdraw the warrant, citing Cal. Penal Code § 1524(g) and the prior restraint included
10 in the warrant. (Trujillo Decl., Ex. B). In addition, Indybay noted that it did not retain or possess any
11 information sought by the warrant, aside from information publicly displayed on the webpage
12 where the article is located. *Id.*

13 Later, Indybay’s counsel pointed the Police Department to other legal protections for news
14 outlets and again asked the Police Department to withdraw the warrant or delay its execution. *Id.*
15 Those authorities include The Privacy Protection Act, 42 U.S.C. section 2000aa *et seq.*; SFPD
16 General Order 5.16.06(C); and the settlement agreement in *Bryan Carmody v. City and County of*
17 *San Francisco* and related orders to quash the search warrants executed against the journalist in that
18 case. *Id.*

19 At 5:03 pm on January 31, 2024—the deadline for compliance—Sergeant Michael Canning
20 emailed IndyBay’s counsel, providing some but not complete relief: “After reviewing your
21 communications, we understand your position is that Bay Area Independent Media Center is
22 granted protections under California’s Shield Law and Evidence Code section 1070. At this time,
23 we are taking no further action on the search warrant dated January 24, 2024.” *Id.*

24 To Indybay’s knowledge, the warrant and nondisclosure order have not been withdrawn.

25 **C. Indybay’s Structure As A News Website**

26 Started in 2000, Indybay is a local non-profit, collectively run news organization in the Bay
27 Area. (Burdett Decl. ¶¶ 1-4). It acts as a source of community-produced news and maintains a
28 frequently updated news website, run by an editorial collective of about 12 volunteers. *Id.* As one

1 court put it in its summary judgment record resolving a claim of unlawful arrest of an Indybay
2 journalist, “IndyBay is an online newspaper, press association, and wire service that generates and
3 distributes audio, visual, and print stories of local events for various media outlets.” *Morse v. San*
4 *Francisco Bay Area Rapid Transit Dist. (BART)*, (N.D. Cal. Feb. 11, 2014) 2014 WL 572352, at *1.

5 Others have recognized Indybay’s news status. In 2010, for example, one of its then-editors
6 successfully quashed a search warrant under California’s Shield law. *Morse v. Regents of Univ. of*
7 *California, Berkeley*, (N.D. Cal. 2011) 821 F. Supp. 2d 1112, 1117 (describing the order to quash).
8 (Trujillo Decl. ¶7, Ex. F).² Indybay itself has covered its own legal battles to defend the news status
9 of itself and journalists, archiving primary source material on its website.³ In addition, it has
10 recieved awards issued by other journalists. (Burdett Dec ¶ 1). Indybay also issues press credentials
11 to assist Indybay reporters and photographers to gain access to press areas and to identify
12 themselves as members of the working press. (Burdett Dec ¶ 5). Currently, ten individuals have
13 Indybay press credentials. *Id.*

14 Indybay has two main sources of news on its website: “newswire” stories written by any
15 member of the public in the field, and “feature” articles that are compiled by members of the
16 Indybay editorial collective, which can use newswire stories as source material. (Burdett Decl. ¶ 6).

17 First, Indybay maintains a breaking “newswire.” (Burdett Decl. ¶ 7). The newswire is a
18 forum for open publishing that allows the public to publish their stories, photographs, and other
19 media to the Indybay newswire. *Id.* The public can publish to the newswire using a simple online
20 form on the website. (Burdett Decl. ¶ 7). If analogized to traditional media, these breaking newswire
21 articles can function like letters to the editor or a tip line that provides source material for Indybay
22 editors. (Burdett Decl. ¶ 9). As the website tells visitors, “We want to hear your story.” (Trujillo
23 Decl., Ex. E). Once newswire stories are published, Indybay editors can combine, classify, promote,
24 copyedit, or hide these articles in accordance with its editorial policy. (Burdett Decl. ¶ 8); (Trujillo
25 Decl., Ex. D).

26
27
28 ² See <https://www.indybay.org/newsitems/2010/06/25/18651867.php>.

³ See <https://www.indybay.org/newsitems/2010/04/20/18645226.php>.

1 Second, Indybay editors produce “feature articles.” (Burdett Decl. ¶¶ 8-9). For these feature
2 articles, Indybay’s editors compile related stories from the newswire to use as source material. *Id.*
3 Editors can also repackage stories to be used by other publications. *Id.* ¶ 10. Indybay’s editors are
4 made up of a collective of about a dozen volunteer journalists who help create these feature news
5 articles and maintain the website. *Id.* ¶ 4.

6 **D. The Article At Issue In the Warrant**

7 The article at issue in the warrant was published to the newswire by an anonymous member
8 of the public on January 18, 2024, using the online webform detailed above. (Burdett Decl. ¶ 11);
9 (Trujillo Decl., Ex. C). The article is titled “SF Police Credit Union Attacked for Tortuguita.” *Id.* In
10 the byline, the author wrote “some anarchists.” *Id.* The article is 54 words long:

11 In the early hours of January 18, one year after the police murder of
12 Tortuguita, we smashed 18 windows at the San Francisco Police Credit Union as
13 an act of vengeance for it. We also honor the memories of Klee Benally, Sekou
Odinga, and Banko Brown. Fight for the dead, fight for the living!

14 *Id.* The article remains live on the Indybay website at the following URL:
15 <https://www.indybay.org/newsitems/2024/01/18/18862190.php>.

16 After publication, an Indybay editor reviewed and classified it as local news, finding it
17 newsworthy as apparent first-person source material. (Burdett Decl. ¶ 11). Indybay does not know
18 the identity of the author. *Id.* ¶ 12.

19 **III. ARGUMENT**

20 **A. The Court Has Authority To Quash The Warrant And Nondisclosure Order**

21 Indybay has standing to challenge the warrant and the court has authority to quash and
22 revoke it based on California criminal procedure governing searches of electronic communication
23 information and its inherent authority. While the Police Department has said it will not pursue the
24 warrant further “at this time,” Indybay brings this motion to confirm that the warrant will be
25 quashed rather than merely delayed and to confirm the news organization is not subject to the
26 associated nondisclosure order.

27 In order to obtain certain electronic communication information—like an IP address—from
28

1 a service provider, law enforcement must obtain a warrant “issued pursuant to Chapter 3 [governing
2 search warrants].” § 1546.1(b)(1)⁴. These warrants “shall comply with all other provisions of
3 California and federal law,” including those “prohibiting . . . use of search warrants.” §
4 1546.1(d)(3). Any recipient of the warrant “may petition the issuing court to void or modify the
5 warrant.” § 1546.4(c). Alternatively, a provider served with a warrant under § 1524(a)(7)⁵ may
6 promptly petition the court to quash or modify a warrant if compliance would cause an “undue
7 burden.” § 1524.3(f).

8 Separately, the Court can independently quash a warrant “in the exercise of its inherent
9 power to prevent the abuse of court processes.” *People v. Superior Court*, (1972) 28 Cal. App. 3d
10 600, 608 (entertaining nonstatutory motion for return of seized property, noting that “an officer
11 seizing and holding property under a search warrant does so on behalf of the court; possession by
12 the officer is in contemplation of the law possession by the court”). While the Police Department in
13 this case has yet to seize any property,⁶ (Trujillo Decl., Ex. B), its failure to withdraw the warrant is
14 done “on behalf of the court.” *People v. Superior Court*, 28 Cal. App. 3d at 608.

15 Here, the Police Department’s warrant is not properly issued under Chapter 3 and does not
16 comply with “all other provisions” of California and federal law because those laws specifically
17 prohibit the type of search warrant served on Indybay as a news organization, allowing Indybay to
18 petition to void the warrant. §§ 1546.1(b)(1) & (d)(3); § 1546.4(c). Similarly, Indybay would suffer
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21 ⁴ The warrant to Indybay specifically acknowledges it is governed by CalECPA, as it references the
22 delayed notification provision of the law in § 1546.2. It also implicitly acknowledge it is governed
23 by CalECPA by ordering “that all information obtained through the execution of the warrant that is
24 unrelated to the objective of the warrant shall be sealed and not subject to further review, use, or
disclosure without a court order.” § 1546.1(d)(2) (identical language). Moreover, the warrant
requests specific pieces of information covered by the law, including “IP address.” 1546(d)
(definition of “electronic communication information”).

25 ⁵ The warrant to Indybay also notes that there is probable cause under § 1524(a)(7). Unlike
CalECPA, however, this provision covers only a narrow set of investigations.

26 ⁶ Separate California criminal procedure specifically authorizes a news organizations making a
27 motion to “return property, brought on the ground that the property obtained is protected by the free
28 speech and press provisions of the United States and California Constitutions.” § 1538(n). *See also*
§ 1539 (describing special hearing if warrant is controverted and a motion to return property is
made); § 1540 (requiring restoration of property if warrant was not based on probable cause).

1 an “undue burden” by complying with the unlawfully issued warrant, undermining the new
2 organization’s editorial independence and eroding the trust of its sources. § 1524.3(f). This motion
3 is brought before the judge who signed the search warrant. *See* Local Rule 16.11(D)(1). For these
4 reasons, Indybay has standing to petition to quash the warrant and the court has authority to grant
5 the motion.

6 **B. California Law Prohibits The Issuance Of A Search Warrant For Indybay’s**
7 **Information Covered By The Shield Law**

8 The Police Department obtained a warrant to compel an online news periodical to turn over
9 unpublished source information received in relation to a published article. The warrant violates the
10 explicit terms of Penal Code § 1524(g) and is therefore invalid.

11 California Penal Code § 1524(g) provides in absolute terms that “No [search] warrant shall
12 issue for any item or items described in Section 1070 of the Evidence Code.”⁷ Evidence Code §
13 1070 contains California’s statutory journalist’s Shield Law, which is virtually identical to the
14 California Constitution provision. *See* Evid. Code § 1070; Cal. Const., art. I § 2(b).

15 The “items described” in the Shield Law include “the source of any information procured
16 while so connected or employed for publication in a newspaper, magazine or other periodical
17 publication,” or “any unpublished information obtained or prepared in gathering, receiving or
18 processing of information for communication to the public.” Evid. Code § 1070. *See also* Cal.
19 Const., art. I § 2(b).

20 The purpose of the Shield Law is “to safeguard the free flow of information from the news
21 media to the public, one of the most fundamental cornerstones assuring freedom in America.” *In re*
22 *Willon*, (1996) 47 Cal. App. 4th 1080, 1091 (quotation omitted). “Because journalists not only
23 gather a great deal of information, but publicly identify themselves as possessing it, they are
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26 ⁷ California passed the law in 1978 in order to strengthen state protections for news outlets
27 following a federal Supreme Court ruling that found that a search warrant issued to a newspaper did
28 not violate the Fourth Amendment. *Zurcher v. Stanford Daily*, (1978) 436 U.S. 547, 567. The court
made clear that states like California could enact more expansive protections through statute: “Of
course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to
establish nonconstitutional protections against possible abuses of the search warrant procedure.” *Id.*

1 especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed
2 information.” *Miller*, 21 Cal. 4th at 898 (quotations omitted). Using the power of the state to compel
3 journalists to turn over unpublished information burdens newsrooms, undermines editorial
4 independence, and erodes the trust of their sources. In recognizing this dynamic, the California
5 Supreme Court specifically noted that the “threat to the autonomy of the press is posed as much by
6 a criminal prosecutor as by other litigants.” *Id.*

7 By elevating the Shield Law from the Evidence Code to the state constitution in 1980, the
8 California electorate made clear that those who gather and disseminate information to the public
9 must be given the strongest possible protection against the compelled disclosure of unpublished
10 editorial information. As one Court of Appeals noted:

11 The elevation to constitutional status must be viewed as an intention to favor
12 the interest of the press in confidentiality over [competing interests] It has long
13 been acknowledged that our state Constitution is the highest expression of the will of
14 the people acting in their sovereign capacity as to matters of state law. When the
15 Constitution speaks plainly on a particular matter, it must be given effect as the
16 paramount law of the state.

17 *Playboy Enters., Inc. v. Superior Court*, (1984) 154 Cal. App. 3d 14, 27-28.

18 The materials that the Police Department attempted to seize from the publisher of Indybay
19 fit squarely within the scope of the Shield Law, which renders the search warrants invalid under
20 Penal Code § 1524(g). To determine the law’s scope, courts first look at the words themselves.
21 *Delaney v. Superior Ct.*, (1990) 50 Cal. 3d 785, 798 (noting that “if the language is clear and
22 unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent”
23 of legislatures or voters) (citation omitted).

24 First, the Shield Law applies to independent, online news publishers like Indybay. The text
25 of the law covers a “publisher” or “other person” connected with a “newspaper, magazine, or other
26 periodical publication.” *See* Evid. Code § 1070. Those protections extend to independent
27 “freelance” writers, *People v. Von Villas*, (1992) 10 Cal. App. 4th 201, 232, as well as independent
28 “online” news sites and the people who run them. *O’Grady v. Superior Ct.*, (2006) 139 Cal. App.
4th 1423, 1462. In evaluating these definitions, the court should not “cling too fiercely to traditional
preconceptions” of a news outlet. *Id.*

1 As an independent online news outlet, Indybay fits within the definition of a “publisher” of a
2 “magazine” or other “periodical” given its continuous publication and distribution of news on its
3 website (Burdett Decl. ¶¶ 2, 6, 10); its editorial process of writing, editing, and curating original and
4 community articles, *id.* ¶ 8; its press credentialing process, *id.* ¶ 4; and its ongoing status as a news
5 outlet in the eyes of the community and the courts, *id.* ¶ 1; (Trujillo Decl., Ex. F). At bottom,
6 Indybay’s reason for being since 2000 is the “dissemination of a particular kind of information to an
7 interested readership.” *O’Grady*, 139 Cal. App. 4th at 1458.

8 Second, the Shield Law broadly protects “the source” of any information procured for
9 publication and any “unpublished information” obtained in gathering information for publication,
10 including “data of whatever sort.” Evid. Code § 1070. The California Supreme Court explained in
11 *Delaney* that these definitions are broad:

12 The language of article I, section 2(b) is clear and unambiguous. The section
13 states plainly that a newsperson shall not be adjudged in contempt for ‘refusing to
14 disclose any unpublished information.’ The use of the word ‘any’ makes clear that
15 article I, section 2(b) applies to all information, regardless of whether it was obtained
16 in confidence. Words used in a constitutional provision ‘should be given the meaning
17 they bear in ordinary use.’ In the context of article I, section 2(b), the word ‘any’ means
18 without limit and no matter what kind.

19 50 Cal. 3d at 798 (internal citations omitted); *accord New York Times Co. v. Superior Court*,
20 (1990) 51 Cal. 3d 453, 461-62 (unpublished photographs of public event protected).

21 The law protects an expansive amount of material to both protect “confidential and sensitive
22 sources” and safeguard the “autonomy of the press.” *Miller*, 21 Cal. 4th at 898. In the analogous
23 First Amendment context, at least one court has found that “names, email address, IP address, and
24 MAC addresses” associated with a news outlet may be entitled to protection because those
25 identifiers can reveal identity or location. *Republic of Kazakhstan v. Does*, (E.D. Cal. Mar. 3, 2016)
26 2016 WL 829409, at *5; *Burse v. United States*, (9th Cir. 1972) 466 F.2d 1059, 1085 (superseded
27 on other grounds) (“Questions about the identity of persons who were responsible for the editorial
28 content and distribution of a newspaper and pamphlets . . . cut deeply into press freedom.”).

Here, the Police Department has sought information that fits both definitions of
“unpublished information” and “source” material.

The Police Department is seeking “unpublished information.” In fact, the Police Department

1 has only sought the warrant because it wants additional data that it cannot obtain on Indybay's
2 publicly available news website.⁸ (Trujillo Decl., Ex. C). While this information does not amount to
3 a reporter's notebook or unpublished story drafts, the sought after IP address, contact information,
4 and messages in this case, (Trujillo Decl., Ex A), undoubtably amount to unpublished "data of
5 whatever sort." Cal. Evid. Code § 1070(c). *See also Republic of Kazakhstan*, 2016 WL 829409, at
6 *5. By compelling this information, the Department is invading the "autonomy of the press." *Miller*,
7 21 Cal. 4th at 898.

8 The information sought also independently fits the definition of "the source" of information
9 procured for publication on Indybay. Community-produced articles like the one at issue in this case
10 can function like letters to the editor or source material for Indybay editors. (Burdett Decl. ¶¶ 6, 9).
11 In this way, by attempting to unmask the author of a community article, the Police Department is
12 seeking Indybay's "confidential and sensitive sources." *Miller*, 21 Cal. 4th at 898. *See also*
13 *Gastman v. N. Jersey Newspapers Co.*, (App. Div. 1992) 254 N.J. Super. 140, 146 (finding that the
14 identity of the author of an anonymous letter to the editor was protected under New Jersey law).

15 Third, any unpublished source material associated with the article here would have been
16 obtained by Indybay in relation to receiving "information for communication to the public." The
17 information sought is directly related to an article ("information") published on Indybay's news
18 website ("communication to the public"). (Burdett Decl. ¶ 11). (Trujillo Decl., ex. C)

19 Moreover, Indybay is not "indifferent" to the content of the community-produced articles,
20 *Rancho Publications v. Superior Ct.*, (1999) 68 Cal. App. 4th 1538, 1546, nor does it "relinquish[]
21 any newsgathering function" by allowing the public to directly publish articles. *O'Grady*, 139 Cal.
22 App. 4th at 1458. Instead, Indybay exercises editorial judgement when its editors review a
23 community-produced article, classify it, promote it, edit it, hide it, or use it as source material in
24 accordance with its editorial policies. (Burdett Decl. ¶ 8-9); (Trujillo Decl., ex. D). In this case,
25 Indybay reviewed the article at issue and classified it as "local" news but chose not to promote it or
26

27
28 ⁸ As Indybay communicated to police, it does not retain or possess additional information sought by
the warrant, aside from what is publicly available on the website. (Trujillo Decl., Ex. B).

1 use it further. *Id.* ¶ 11.

2 **C. The Federal Privacy Protection Act Independently Prohibits The Issuance Of A**
3 **Search Warrant In This Case**

4 The search and seizure of Indybay's editorial materials also violated the federal Privacy
5 Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (the "PPA"). Unless an exception applies, the
6 statute broadly protects both editorial "work product" and any other "documentary materials," and it
7 applies whenever the target of a search is "reasonably believed to have a purpose to disseminate to
8 the public" information in a "newspaper, book, broadcast, or other similar form of public
9 communication." 42 U.S.C. §§ 2000aa(a)-(b).

10 The PPA creates a "subpoena-first rule" for government searches directed at journalists
11 which "generally prohibits government officials from searching for and seizing documentary
12 materials possessed by a person in connection with a purpose to disseminate information to the
13 public." *Morse*, 821 F. Supp. 2d at 1120-21 (regarding Indybay journalist subject to illegal search
14 warrant) (quotation omitted).

15 The law applies to state and local officials, and it "presents a straightforward statutory
16 scheme for protecting those engaged in information dissemination from government intrusion by
17 prohibiting searches and seizures of documentary materials except where government officials have
18 a reasonable belief that a statutory exception applies." *Citicasters v. McCaskill*, (8th Cir. 1996) 89
19 F.3d 1350, 1355 (local prosecutor could be held liable under PPA based on seizure of videotape
20 from television station); *Morse*, 821 F. Supp. 2d at 1121 (Indybay journalist whose camera was
21 searched and seized could bring PPA claim against chief of UC Berkeley police department); *see*
22 *also Smith v. Fair Employment & Hous. Comm'n*, (1996) 12 Cal. 4th 1143, 1236 n.11 (recognizing
23 the PPA's effect of "restricting the ability of government investigators to obtain documents from the
24 media").

25 For all the reasons stated above, *supra* Part III(B), the warrant violates the PPA because it
26 sought information identifying a confidential source (documentary materials) possessed by Indybay
27 in connection with its dissemination of news content on its website (communication similar to a
28 newspaper).

1 Moreover, the four narrow exceptions to the PPA do not apply to Indybay.

2 First, there is no probable cause to believe that Indybay has committed or is committing the
3 criminal offense that prompted the warrant. 42 U.S. Code § 2000aa(a)(1) & (b)(1). While the article
4 at issue in the warrant references alleged destruction of property, there is no reason to suspect that
5 Indybay, as a news publisher, is responsible. (Burdett Decl. ¶ 12). At no point has any official told
6 Indybay that it is being investigated on suspicion of committing any crime. As detailed above, an
7 unknown member of the public used a simple webform to publish the article on Indybay’s website.
8 *Id.* ¶¶ 11-12. The author is analogous to an Indybay source or an anonymous reader that sent in a
9 letter to the editor.

10 Second, there is no reason to believe that the immediate seizure of Indybay’s material is
11 necessary to prevent serious bodily injury. 42 U.S. Code §§ 2000aa(a)(2) & (b)(2). The alleged
12 crime at issue is based on destruction of property, not bodily harm. (Trujillo Dec., Ex. C).
13 Moreover, the Police Department has all but conceded that immediate seizure is not necessary
14 because as of January 31, 2024, the Department decided not to take further action on the warrant “at
15 this time.” (Trujillo Decl., Ex. 2).

16 Third, there is no reason to believe that giving Indybay notice pursuant to a subpoena duces
17 tecum, if allowed by other law, would result in the destruction, alteration, or concealment of such
18 materials. 42 U.S. Code § 2000aa(b)(3). In the first instance, the Police Department pursued this
19 warrant similar to a subpoena duces tecum by demanding Indybay promptly turn over the
20 information, rather than seizing it by force without notice. (Trujillo Decl., Ex. A). This suggests the
21 Police Department did not see any reasonable risk of destruction, alteration, or concealment.

22 Finally, no subpoena was issued in the first instance. 42 U.S. Code § 2000aa(b)(4).

23 **D. The Nondisclosure Order Is An Unconstitutional Content Based Prior Restraint**
24 **On Speech**

25 Indybay has been unconstitutionally restrained from speaking publicly about the fact of the
26 warrant. This constitutes an unconstitutional content-based prior restraint on speech that cannot pass
27 strict scrutiny. In this case, the Police Department has a diminished government interest in
28 concealing unlawful investigative techniques and its nondisclosure order is not the least restrictive

1 option.

2 Courts considering the issue have almost uniformly found that nondisclosure orders issued
3 under analogous statutes, are prior restraints and/or content-based restrictions. *See In re Sealing &*
4 *Non-Disclosure of Pen/Trap/2703(d) Orders*, (D. Tex. 2008) 562 F. Supp. 2d 876, 881-83 (both);
5 *Matter of Grand Jury Subpoena for: [Redacted]@yahoo.com*, (N.D. Cal. 2015) 79 F. Supp. 3d
6 1091, 1091 (prior restraint); *Microsoft Corp. v. United States Dep't of Just.*, (W.D. Wash. 2017) 233
7 F. Supp. 3d 887, at 905-907 (both); *In re Application of the United States of Am. for Nondisclosure*
8 *Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, (D.D.C.
9 Mar. 31, 2014) 2014 WL 1775601, at *2 (both).

10 To pass constitutional muster, a content-based prior restraints must be necessary to further a
11 governmental interest of the highest magnitude. *See Nebraska Press Ass'n v. Stuart*, (1976) 427
12 U.S. 539, 562, 562-63; *Smith v. Daily Mail Pub. Co.*, (1979) 443 U.S. 97, 102. Thus, “[i]f a less
13 restrictive alternative would serve the Government’s purpose,” that alternative must be used. *United*
14 *States v. Playboy*, (2000) 529 U.S. 803, 813.

15 Here, the Police Department’s interest, necessity, and tailoring do not pass strict scrutiny.
16 The magistrate signed a 90-day nondisclosure order restraining Indybay from revealing to “any
17 other person” “the existence of the application or this Order of the Court, or the existence of the
18 investigation.” (Trujillo Decl., Ex. A). In the order, the Police Department asserts an interest in not
19 seriously jeopardizing its criminal investigation. *Id.*

20 However, the Department’s interest is diminished in this case because it engaged in
21 unlawful investigative techniques by obtaining a warrant to search a news outlet. *Supra*, Part III(A)-
22 (B). The need for “disinfecting rays of public scrutiny,” *In re Sealing*, 562 F. Supp. 2d at 886, are
23 particularly strong in this instance. This nondisclosure order should not act to “silence those who
24 know of unlawful conduct or irregularities on the part of public officials.” *Butterworth v. Smith*,
25 (1990) 494 U.S. 624, 636. Moreover, the nondisclosure order is less necessary in this case because
26 Indybay could not directly notify the author of the article it issue. It does not know the author’s
27 identity (Burdett Decl. ¶ 12) or possess helpful information. For the same reason, there are less
28 restrictive alternatives. The Police Department could have in the first instance refrained from

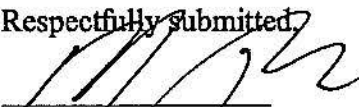
1 seeking an invalid warrant and, instead, engaged in other lawful investigation techniques. In
2 addition, the court could have limited the nondisclosure order only to specific details or only until
3 Indybay had an opportunity to contest it. Nonetheless, Indybay's injury stemming from
4 nondisclosure has existed "from the outset." *New York Times Co. v. United States*, (1971) 403 U.S.
5 713, 727 (Brennan, J., Concurring) (noting prior restraint isn't justified to provide time "necessary
6 to afford the courts an opportunity to examine the claim more thoroughly").

7 **IV. CONCLUSION**

8 For the reasons stated above, the Court must quash the search warrant and nondisclosure
9 order issued to the news organization Indybay, pursuant to its statutory and inherent authority.

10 Dated: February 21, 2024

Respectfully submitted,


11
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