

Colorado Court Grants News Anchor's Anti-SLAPP Motion

Dismisses Libel Case Premised on Report About Plaintiff's Involvement in the Events of January 6, 2021

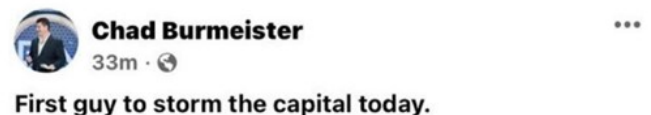
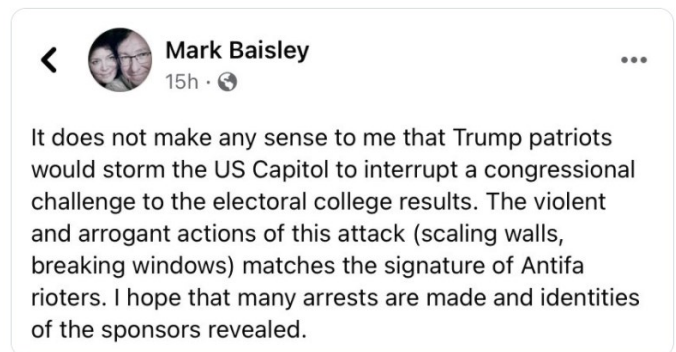
By Steven D. Zansberg

In only the second case to date to apply Colorado's anti-SLAPP Act (passed into law in 2019) to a news outlet, a trial court judge tossed a defamation case against Kyle Clark, the nightly news anchor at KUSA-TV/9News, the TEGNA-owned NBC affiliate in Denver. The court found the challenged news report, and its online counterpart (as well as Clark's tweets promoting the television report) were substantially true and, alternatively, plaintiff had not demonstrated a "reasonable likelihood" that he could prove actual malice.

What Prompted the Publication At Issue

The news report that gave rise to the suit aired at 6:00 p.m. on January 7, 2021, the night after the insurrection at the U.S. Capitol. Earlier that day, a member of Colorado's state House of Representatives, Mark Baisley, tweeted that those who had violently assaulted police officers and infiltrated the U.S. Congress shouting "Hang Mike Pence!" were not actual supporters of then-President Trump, but likely were Antifa operatives.

Shocked to see this comment, Clark set out to debunk that claim for his broadcast that evening. He came upon (or was tipped off to) the Facebook page of one Chad Burmeister, a Colorado resident, and CEO of an artificial intelligence-based marketing firm in Littleton, Colorado, who had posted (and boasted) that he'd been on the Capitol Mall on January 6. In fact, Burmeister had posted the "selfie" on the right showing himself standing beside a younger man who claimed he was "the first guy to storm the capital [sic] today."



Turning to prong two, the defendants' Special Motion to Dismiss argued that Burmeister could not show a likelihood of prevailing because he could not satisfy two elements of his libel. First, material falsity (or lack of substantial truth): Clark's broadcast statements describing Burmeister's social media postings characterizing them as showing Burmeister having boasted about his being on the grounds of the Capitol during the insurrection, and "bragging" about standing beside the fellow who claims to have been the first one to gain entry to the Capitol were substantially true. The fact that the broadcast and online reports included Burmeister's statement declaring he'd not personally entered the Capitol building, and had broken no laws, made it impossible for him to show that he was falsely accused of having done so. Lastly, Clark's actual statement, that Burmeister's "Facebook page is full of QAnon conspiracies about 'the storm,'" was also substantially true (and did not necessarily imply that he was a member of those organizations).

Second, actual malice (required under Colorado law even for a private figure plaintiff when suing on a publication addressing a matter of legitimate public concern): accompanying the Special Motion to Dismiss was Clark's sworn declaration attesting to the steps he had taken to prepare his report, including having reviewed Burmeister's postings above on Facebook, Twitter and LinkedIn, as well as exchanging communications with Burmeister eliciting his statements that were *included in the broadcast* report. Accordingly, defendants argued, Burmeister could not present competent "clear and convincing evidence" of actual malice.

On March 9, 2022 Judge Ross Buchanan of the Denver District Court [granted the defendants' Special Motion to Dismiss](#), finding that Burmeister had not met his burden under Colorado's anti-SLAPP Act of establishing a reasonable likelihood that he could prevail on his claim for defamation. Buchanan essentially adopted the arguments that had been presented in the defendant's Special Motion to Dismiss, but also distinguished between stating the Burmeister had actually entered the Capitol and the erroneous statement (in the online version, not uttered by Clark) that Burmeister had "claimed" to have done so.

As noted above, the trial judge's ruling marks only the second time to date in which a member of the "mainstream"/legacy news media has invoked Colorado's anti-SLAPP statute, resulting in dismissal both times. Mr. Burmeister, through his attorney Steven Biss, has announced their intention to appeal the District Court's order granting the special motion to dismiss.

Steve Zansberg of The Law Office of Steven D. Zansberg, L.L.C. in Denver, Colorado represented Kyle Clark and TEGNA Inc. d/b/a KUSA-TV. Chad Burmeister was represented by Steven S. Biss of Charlottesville, Virginia.

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The Fight for the Public’s Right to Access Videos of the Landmark Prop 8 Trial Again Moves to the U.S. Supreme Court

By Sara A. Fairchild, Thomas R. Burke, & Rochelle L. Wilcox

More than a decade after the landmark trial that found California’s Proposition 8 unconstitutional, the proposition’s proponents have now asked the U.S. Supreme Court to review a recent Ninth Circuit decision that would finally allow the public to access video recordings of the trial. [Hollingsworth v. Perry](#) (petition for cert.).

Heard in a federal courtroom in San Francisco five years before *Obergefell v. Hodges*, the trial on Prop 8’s same-sex marriage ban was one of the most socially and culturally significant trials in our nation’s history. Yet the contemporaneous recordings of the trial remain sealed. After a decade of litigation over the public’s right to view the recordings, including multiple rounds in the Ninth Circuit and a trip to the U.S. Supreme Court, in November 2021, the Ninth Circuit held the Prop 8 proponents lacked standing to challenge a district court order declining to extend the seal. *Perry v. Newsom*, 18 F.4th 622 (9th Cir. 2021). Because the proponents have now brought this fight to the Supreme Court, we provide this history of the litigation and summarize the issues at stake.

A Decade of Litigation

In 2008, California voters passed Proposition 8, which amended the California Constitution to provide that “Only marriage between a man and a woman is valid or recognized in California.” Cal. Const. Art. 1, § 7.5. Two same-sex couples sued to challenge Prop 8’s constitutionality in the Northern District of California in a case assigned to then-Chief Judge Vaughn Walker. Because the named state defendants refused to defend the amendment, the official proponents of the initiative intervened. The case garnered international attention as it teed up the question whether same-sex couples have a right to marry under the U.S. Constitution.

Leading up to the January 2010 bench trial, a coalition of media entities (including San Francisco public television and radio station KQED) sought permission to televise the trial. At a hearing on the motion, Judge Walker discussed the possibility of livestreaming the trial to other courthouses across the country and issued an order indicating he intended to do so under a Ninth Circuit pilot program. The Prop 8 proponents petitioned the Ninth Circuit for a writ of mandamus that would prevent such broadcasting, without success. They then turned to the U.S. Supreme Court which, that weekend, asked the parties and the media coalition to brief the issue.

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The morning of the first day of trial, the U.S. Supreme Court issued a temporary stay of the live broadcast, and two days later, it extended the stay. The Court concluded the Northern District of California likely had not properly amended its Local Rules to allow livestreaming.

Hollingsworth v. Perry, 558 U.S. 183, 189 (2010) (per curiam). Four of the Court's justices dissented, describing the decision as an "unusual" and "extraordinary intervention" into local court administration. *See id.* at 207-08 (Breyer, J., dissenting).

Before the full Court's decision, Judge Walker had videotaped the first two days of trial in the event the Court lifted its temporary stay. Following the decision, Judge Walker stated he would continue recording for use in chambers, as permitted by Local Rule, and "not ... for purposes of public broadcasting or television." No party objected.

In August 2010, Judge Walker held that Prop 8 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and enjoined its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *rev'd sub nom.*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (proponents lacked standing to appeal). In that order, Judge Walker also directed the clerk to file the recordings of the trial in the record under seal.

The following year, upon learning that then-retired Judge Walker had used excerpts of the recordings of the trial in public appearances, the Prop 8 proponents moved for the return of all copies to the district court. Plaintiffs and a coalition of media companies cross-moved to unseal the recordings. The district court ordered the recordings unsealed based on the common-law right of access and the proponents' failure to show compelling reasons that outweighed it. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). The Ninth Circuit reversed, holding the proponents had reasonably relied on Judge Walker's assurances "that the recordings would not be broadcast to the public, at least in the foreseeable future." *Perry v. Brown*, 667 F.3d 1078, 1084-85 (9th Cir. 2012). The Ninth Circuit noted, however, that under then-Local Rule 79-5(f) (now (g)), "[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed." *Id.* at n.5.

In 2017, KQED moved to unseal the trial recordings. The district court again agreed the common-law right of access applied and found the proponents offered no facts showing disclosure would cause them harm. Nevertheless, the court held the proponents' reliance interest continued to justify sealing until the seal presumptively expired at the 10-year mark. [*Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047 \(N.D. Cal. 2018\)](#). The court thus ordered the recordings be unsealed in August 2020 "absent further order from this Court that compelling reasons exist to continue to seal them." The Prop 8 proponents appealed, but the Ninth Circuit dismissed for lack of jurisdiction, concluding the district court's order was neither a final order nor an appealable collateral order. *Perry v. Schwarzenegger*, 765 F. App'x 335 (9th Cir. 2019).

As the 10-year mark approached, the Prop 8 proponents requested to extend the seal and make it permanent. The district court denied their request, finding that the proponents still had offered

no evidence “that any Proponent or witness ... wants the trial recordings to remain under seal.” *Perry v. Schwarzenegger*, 2020 WL 12632014 (N.D. Cal. July 9, 2020). The proponents appealed, and the Ninth Circuit stayed release of the recordings pending its review.

Ninth Circuit Decision

Weighing in for the third time on the dispute over public release of the Prop 8 trial recordings, the Ninth Circuit held the proponents’ lack of injury deprived them of Article III standing. *Perry v. Newsom*, 18 F.4th 622 (9th Cir. 2021). Judge Fletcher wrote for the majority, and Judge Ikuta dissented.

The court distinguished the posture of this appeal from the proponents’ previous appeals, pointing out that a decade ago, when the court found a compelling reason to keep the recordings under seal, the proponents’ merits appeal was pending and the proponents had presented evidence of harassment. Releasing the recordings then could have deterred witnesses from testifying at a retrial had the Ninth Circuit vacated Judge Walker’s decision on the merits. A decade later, none of these concerns still existed.

The court found no indication that releasing the recordings today would result in harm to the proponents or anyone aligned with them. Although the record showed supporters of Prop 8 had experienced harassment in 2009 and earlier, the proponents presented no evidence of harassment in the years since, despite having multiple opportunities to do so. The one proponent who testified at trial had not participated in the proponents’ efforts to block the recordings’ release for years. And neither of the two other witnesses the proponents called at trial had ever expressed fear of harassment.

The court also specifically rejected the proponents’ claim that Judge Walker had promised the trial recordings would never be made public and that releasing the recordings would breach that promise. As the court explained, in an earlier argument to the court the proponents had conceded they understood the recordings would not remain permanently sealed—the local rule required a showing of good cause to extend the seal beyond 10 years. And Judge Walker’s statement that he was not recording “for purposes of public broadcasting or television” did not create an enforceable contract.

The court was also unpersuaded by the proponents’ claims that unsealing would harm “the sanctity of the judicial process” and future litigants. As the court held, any purported injury to the judicial system would be an “impermissible ‘generalized grievance’” common to all members of the public, and any purported injury to future litigants was unrelated to the proponents. Neither claim could support Article III standing.

The Ninth Circuit’s decision thus reconciled the preceding decade of litigation—including Judge Walker’s statement about the recordings’ purpose, the Ninth Circuit’s 2012 ruling that the

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proponents' reliance on that statement precluded unsealing at that time, and Local Rule 79-5(g), which mandates unsealing of court records unless compelling reasons exist to maintain the seal.

In dissent, Judge Ikuta accused the majority of distorting the court's rules and standards "to ensure this single high-profile trial is broadcast." In her view, Judge Walker's statement was an enforceable promise not to broadcast the video, and the proponents relied on this promise by not objecting to his continued recording. Releasing the videos to the public would therefore violate the proponents' legal rights and cause an injury in fact under Article III. Judge Ikuta further reasoned the proponents' awareness that the promise would not last indefinitely goes to the merits, not standing.

The proponents petitioned for rehearing en banc, but the court denied the petition after no judge requested a vote. In late March 2022, the proponents filed a petition for certiorari in the U.S. Supreme Court. The cert. petition contends the Ninth Circuit erred because Judge Walker's statement was a binding promise that the recordings would *never* be broadcast and the district court's breach of that promise confers Article III standing.

The Videos' Significance

The Prop 8 trial is the only federal trial to hear testimony on whether same-sex couples have the right to marry. It remains a critical chapter in the history of the gay rights movement and marriage equality. It also represents a shining moment for the federal judiciary when the right of same-sex couples to marry was put to a trial with evidence and testimony bearing on this issue of profound importance to millions in California and throughout the world.

With only the transcripts available, actors have attempted to recreate the trial testimony. A noted play based on the trial, *8*, was performed on Broadway, later broadcast, and adapted for a radio play. A docuseries on ABC, *When We Rise*, featured an extended recreation of the trial with acclaimed actors playing Chief Judge Walker, the attorneys, and the witnesses. Multiple documentaries have been made about the case, including *The Case Against 8*, which was released in theaters and aired on HBO. But none of these reenactments or stories of the trial are a substitute for the video recordings sitting under seal in the court record.


During the trial, the same-sex couples challenging Prop 8 testified to prove their relationships were worthy of legal recognition. As the couples described in declarations supporting the unsealing efforts, the videos of their testimony uniquely show the human impact of discriminatory laws like Prop 8 and the fight to overturn them. Kristin Perry wrote,

Seeing the video, you will be able to see how terrified I was, you will see how personal this was for me. You will see on my face that I was carrying the weight of not only my family but the lesbian and gay community as well, ... and I felt the pressure of that with every word I said at trial.

The cert. petition contends the Ninth Circuit erred because Judge Walker's statement was a binding promise that the recordings would never be broadcast.

Her partner, Sandy Stier, commented that while the reenactments and transcript give “the impression of someone that is very brave and confident,” the video reveals “I was vulnerable.” It shows a lesbian woman on the witness stand in a courtroom dominated by straight men “testifying about the most personal part of my life, with fear on my face.”

Paul Katami and Jeff Zarrillo described the feeling of being under attack—particularly given their desire to have kids and the Prop 8 campaign’s narrative that same-sex marriage poses a threat to children. Paul stated, “If you see the trial tapes, you will be able to see the tears in my eyes, and you will hear the way my voice quivers when I talk about what Jeff means to me.” Jeff added, “Reading a transcript is different than seeing a human being pour his heart out while under oath, and that is what I did.”



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Now over a decade later, the public’s right to view the recordings of this landmark trial remains uncertain. If the U.S. Supreme Court denies review, the public will finally be able to see this important chapter of history and witness the testimony themselves.

Sara A. Fairchild, Thomas R. Burke, & Rochelle L. Wilcox are lawyers with Davis Wright Tremaine LLP. Thomas R. Burke and Rochelle L. Wilcox represent KQED in this litigation.

New Jersey Supreme Court Rules to Release Police Disciplinary Records

By CJ Griffin and Brittany Burns

The New Jersey Supreme Court issued two major unanimous decisions ordering the disclosure of records involving law enforcement misconduct and access to settlement agreements that resolve discipline which reshape the landscape for the state's Open Public Records Act and common law access. [Libertarians for Transparent Government v Cumberland County](#) (March 7, 2022); [Rivera v. Union County Prosecutor's Office](#), (March 14, 2022)

In the first case, Libertarians for Transparent Government (Libertarians) requested access to a settlement agreement between the Cumberland County Jail and a former corrections officer after learning that the officer was permitted to retire in good standing despite admitting to having inappropriate sexual relationships with two inmates confined at the facility. County officials withheld the settlement agreement, and instead, provided a false statement claiming that the officer in question was terminated from his position.

Libertarians then sued the county, arguing that it had the right to access the settlement agreement under OPRA and the common law right of access. The trial court ruled that the settlement agreement could be disclosed with certain personnel information redacted. The state appeals court later reversed, ruling that settlement agreements are exempt under OPRA and must be withheld.

In [Libertarians for Transparent Government v. Cumberland County](#), (No. A-1661-18T2, 2022 N.J. LEXIS 187 (N.J. Mar. 7, 2022)), the Supreme Court reversed the Appellate Division's ruling and reinstated the trial court's decision to allow access to a redacted version of the actual settlement document. The court explained that the plain language of N.J.S.A. 47:1A-10 calls for a balancing of the right of access to government records versus the need to protect certain personnel information and permits the redaction of "information that should not be disclosed" prior to being made available to the requestor.

Declaring that OPRA permits the public to guard against corruption and misconduct, Chief Justice Stuart Rabner, writing for the Court, ruled that "access to public records fosters transparency, accountability, and candor. That applies to questions about sexual abuse in prison as well as the overall operation of prison facilities and other aspects of government."

In the second case, [Richard Rivera v. Union County Prosecutor's Office](#) (No. A-2573-19T3, 2022 N.J. LEXIS 190 (N.J. Mar. 14, 2022)), Rivera, a retired police officer, filed an OPRA request with the Union County Prosecutor's Office for an internal affairs report concerning a

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former police director. The director had reportedly used racist and sexist language to refer to employees on multiple occasions. When the prosecutor's office denied his request, Rivera sued under OPRA and the common law right of access.

Although the trial court ruled that the records should be made public under OPRA, the state appeals court later denied access to the records on the basis that they were not available under OPRA or the common law and asserted that disclosure would discourage future witnesses from reporting misconduct.

The Supreme Court reversed that ruling, holding that internal affairs reports should be disclosed under the common law when interests that favor disclosure outweigh reasons for confidentiality. The Court explained that in order to release a record, the requester must first establish the public's interest in the subject matter of the record, and then weigh that interest against the state's interest in confidentiality. This new balancing test specifically asks the court to consider whether the alleged misconduct was substantiated; the nature of the discipline imposed; the nature of the official's position; and the nature and seriousness of the misconduct. The ruling was a marked expansion of common law access for police records.

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In the opinion, Chief Justice Rabner wrote, "There are good reasons to protect the confidentiality of internal affairs reports under the common law in many instances. This is not one of them." He continued, "In a matter like this, the public interest in disclosure is great." Rabner then remanded the case to the trial court directing it to "expeditiously" review the report to complete the balancing test prescribed by the common law and enter an order of disclosure.

These landmark rulings acknowledge the importance of government transparency and accountability in misconduct investigations. Not only did the Court order these records to be released, but they have also provided an important framework for public access to internal affairs reports. We've now received crucial guidance on OPRA and common law right of access issues. This is sea change.

The court also mentioned the amicus briefs submitted by attorney Bruce S. Rosen on behalf of The Reporter's Committee for Freedom of the Press, New Jersey Press Association, and a host of additional media organizations in both opinions.

Both rulings serve to affirm the importance of offering public access to records that would otherwise conceal acts of misconduct within law enforcement. These landmark holdings set crucial precedent for New Jersey courts in deciding open records cases.

CJ Griffin is a partner with DCS member Pashman Stein Walder Hayden, P.C. in Hackensack, NJ. Ms. Burns is a law clerk with the firm. CJ Griffin argued the cause for appellant Libertarians for Transparent Government; and appellant Richard Rivera. Bruce S. Rosen, Pashman Stein, submitted media amicus briefs in both cases.

Ninth Circuit Reaffirms CFAA Does Not Prohibit Web Scraping in *hiQ v. LinkedIn*

By Grayson Clary, Gillian Vernick and Gabe Rottman

Three years ago, in [hiQ Labs, Inc., v. LinkedIn Corp.](#), the U.S. Court of Appeals for the Ninth Circuit issued an important opinion finding that scraping a publicly available website does not violate the federal Computer Fraud and Abuse Act (CFAA). But after the Supreme Court’s intervening opportunity to interpret the CFAA in *Van Buren v. United States*, the Justices vacated *hiQ* and sent it back to the Ninth Circuit to consider *Van Buren*’s relevance to that issue, leaving the question in limbo again. On April 18, 2022, the Ninth Circuit reaffirmed its initial view—an important early test of *Van Buren*’s significance for scraping and other data journalism techniques. [hiQ Labs, Inc., v. LinkedIn Corp.](#)

Background

In May 2017, LinkedIn, the professional networking site, served data analytics company hiQ with a cease-and-desist letter. hiQ built its products in part by scraping public-facing LinkedIn profiles, a practice that LinkedIn alleged was in violation of state and federal law, including the CFAA, the Digital Millennium Copyright Act (“DMCA”), California’s computer crime statute, and the California common law of trespass. In response, hiQ demanded that LinkedIn recognize its right to access the site’s public-facing content.

A week later, hiQ filed an action seeking an injunction that would require LinkedIn to withdraw its letter, as well as a declaratory judgment that LinkedIn could not invoke the previously asserted laws against it. The U.S. District Court for the Northern District of California granted a preliminary injunction; LinkedIn promptly appealed.

In its initial opinion, the Ninth Circuit found that hiQ raised serious questions on the merits sufficient to uphold the district court’s preliminary injunction. With respect to the CFAA in particular, the panel concluded that the statute contemplated “three kinds of computer information: (1) information for which access is open to the general public and permission is not required, (2) information for which authorization is required and has been given, and (3) information for which authorization is required but has not been given.” Because the pages hiQ had scraped were “available to anyone with an Internet connection,” the court found that they fell in the first category—and therefore beyond the scope of the CFAA’s prohibition on “unauthorized access.”

hiQ built its products in part by scraping public-facing LinkedIn profiles, a practice that LinkedIn alleged was in violation of state and federal law, including the CFAA, the DMCA, California’s computer crime statute, and the California common law of trespass.

LinkedIn sought certiorari; in the meantime, the Supreme Court decided another case concerning the CFAA, *Van Buren v. United States*, 141 S. Ct. 1648 (2021). In *Van Buren*, the Court decided that a police sergeant did not violate the CFAA’s complementary prohibition on “exceed[ing] authorized access” when he accessed a law enforcement database to obtain license-plate reader information for money. The Court read the CFAA to require a “gates-up-or-gates-down inquiry,” in which a user “either can or cannot access a computer system” (or “certain areas within the system”). As a result, the Court reasoned, the statute does not punish actors who simply have an “improper motive[.]” for using the access they otherwise have. The Justices warned, too, that a broader reading “would attach criminal penalties to a breathtaking amount of commonplace computer activity” that violates the purpose-based restrictions routinely embedded in website terms of service, including—in a nod to an amicus brief filed by the Reporters Committee for Freedom of the Press—routine “journalism activity.”

The strong hint seemed to be that terms of service that prohibit scraping cannot be the basis for CFAA liability. But the Supreme Court didn’t squarely resolve the question and, in the wake of *Van Buren*, granted LinkedIn’s petition for a writ of certiorari for the limited purpose of vacating the Ninth Circuit’s judgment and remanding the case for further consideration.

Ninth Circuit Ruling

On remand, LinkedIn urged that its gates were ‘down’ within the meaning of *Van Buren* after hiQ received its cease-and-desist letter, while hiQ argued that *Van Buren* had underlined the impermissibility of enforcing terms of service through the CFAA. The Reporters Committee again filed a friend-of-the-court brief—highlighting the power LinkedIn’s interpretation would give firms to quash data journalism—as did the Electronic Frontier Foundation. And the Ninth Circuit again sided with hiQ, affirming the district court’s preliminary injunction.

Addressing “[t]he pivotal CFAA question whether once hiQ received LinkedIn’s cease-and-desist letter, any further scraping and use of LinkedIn’s data was ‘without authorization’” within the meaning of the statute, the Ninth Circuit found that hiQ’s argument that “where access is open to the general public, the CFAA ‘without authorization’ concept is inapplicable” raised a serious question on the merits.

Reiterating its original analysis, Ninth Circuit noted that a prohibition on “access without authorization” suggested a baseline where access is generally not available and permission would be required. But “[w]here the default is free access without authorization,” the court explained, selective exclusion would more naturally be characterized as a ban than a lack of authorization, putting hiQ’s conduct outside of the scope of the statute.

When looking at the legislative history, the Ninth Circuit pointed out that the CFAA was enacted to prevent computer hacking, with lawmakers specifically analogizing “unauthorized access” as “breaking and entering.” Here, the Ninth Circuit found hiQ raised serious questions as to whether its scraping of LinkedIn’s data could be considered “breaking and entering” when there was no authentication requirement for a platform “made freely accessible on the Internet.”

And most importantly, the Ninth Circuit found that *Van Buren*'s "gates-up-or-down" inquiry reaffirmed its interpretation of the CFAA as contemplating three types of computer systems: (1) those that have no gates at all, (2) those whose gates are raised because a user has the requisite authorization, and (3) those whose gates are lowered because a user lacks the requisite authorization. In applying this analogy to LinkedIn, the Ninth Circuit found that a publicly available website has "no gates to lift or lower in the first place." Guided by *Van Buren*, then, the Ninth Circuit reaffirmed its conclusion that the CFAA's prohibition on accessing a computer system "without authorization" was inapplicable to public websites like LinkedIn.

As it had before, the Ninth Circuit favored this narrow interpretation of the CFAA to avoid "turn[ing] a criminal hacking statute into a 'sweeping Internet-policing mandate.'" And while the court highlighted alternative remedies LinkedIn could potentially pursue—from copyright infringement to trespass to chattels—its decision closed the door to wielding the CFAA for this purpose. The opinion will be an important guide to other courts confronting the question of what *Van Buren* means for scraping—and the other digital investigative techniques that increasingly power contemporary journalism.

Grayson Clary is Stanton Foundation National Security/Free Press Fellow and Gillian Vernick is Technology and Press Freedom Project Fellow at the Reporters Committee for Freedom of the Press. They are overseen by attorney and director of the Technology and Press Freedom Project, Gabe Rottman.

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