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Subpoenas, Shield Laws & the DOJ

The latest on the DOJ's new guidelines on seizure of reporters' material; the impact of leak investigations on the press; shield laws in the states.

Chairs: Jeffrey Portnoy, *Cades Schutte LLP*; David Vigilante, *CNN*

Department of Justice Regulations

On October 26, 2022, the Justice Department announced new regulations regarding obtaining materials and source information from members of the press. This section examines the strengths and weaknesses of the regulations, what led to their enactment, and how they have held up since.

After it was revealed that former Attorney General William Barr had subpoenaed telephone and email records from service providers for reporters for *The New York Times*, *The Washington Post*, and CNN during the Trump Administration, Attorney General Merrick Garland put in place a new temporary policy on obtaining journalists' records or information and instituted a year-long review process that included consulting with federal prosecutors and media representatives. The new regulations announced last October institutionalized and expanded that temporary policy.

The new regulations can be found at 28 C.F.R. § 50.10 and ban the use of subpoenas, warrants, court orders, or wire, oral, and electronic communication surveillance to seize reporters' communications or records or demand their notes or testimony except in very limited circumstances and apply in both the civil and criminal context.

Although the new regulations were warmly and optimistically received, a number of weaknesses remain. First, the regulations are not binding legislation but rather an internal policy.

Thus, they do not provide a remedy for journalists who believe they have not been followed. *See* Exhibit A (“This section is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”). This was emphasized by the prosecutor in the search and seizure of journalist Tim Burke’s computers and records, discussed in more detail below. Further, the regulations could be easily rescinded by an incoming administration.

Additionally, the regulations apply only to a “member of the news media,” and unlike the PRESS Act discussed below, they do not define or provide any criteria for this triggering classification. Thus, while full-time professional reporters for national news entities like *The New York Times* or *The Wall Street Journal* can safely assume the regulations are intended to apply to them, citizen journalists or independent, long-form writers are left with more uncertainty.

Moreover, the effectiveness of the regulations was quickly called into question even as to core journalists and issues. Just weeks after the regulations went into effect, a *Boston Globe* journalist, Joshua Miller, was forced to testify in Federal district court after the judge denied his motion to quash the subpoena. The motion cited the new DOJ regulations and was filed the same day they went into effect.

The PRESS Act: A Federal Shield Law

The Protect Reporters from Exploitative State Spying Act, or the “PRESS Act,” is a proposed federal shield law that saw strong support from press entities and civil liberty organizations last year. *See* Exhibit B. The Act was passed by the House in September 2022. Members of the Senate then attempted to fast-track the bill and pass it before year end via

unanimous consent, as opposed to a full vote, but this was ultimately blocked by Senator Tom Cotton (R-Ariz.). Despite the fact that it ultimately was not enacted, the fact that it even received a unanimous consent motion was significant, as it had never before reached the Senate floor, despite having passed the House with broad bipartisan support multiple times. On June 21, 2023, Senators Ron Wyden (D-Ore.), Mike Lee (R.-Utah), and Richard Durbin (D-Ill.) reintroduced the PRESS Act as S.2074. Representatives Kevin Kiley (R-Calif.) and Jamie Raskin (D-Md.) co-sponsored the companion legislation in the House of Representatives (H.R.4250).

The PRESS Act would provide broad protection for journalists by significantly limiting the circumstances under which the Federal government can compel disclosure of protected information from covered journalists. It would require a court to determine, by a preponderance of the evidence, and after providing notice and an opportunity to be heard to the journalist, that disclosure of the information was necessary (1) to prevent, or to identify a perpetrator of, an act of terrorism or (2) to prevent a threat of imminent violence, significant bodily harm, or death, before permitting any Federal entity to compel a covered journalist to disclose protected information. Even where such a finding was made, the PRESS Act would require that any compelled disclosure be “not overbroad, unreasonable, or oppressive” and “narrowly tailored in subject matter and period of time.”

Further, the definition of a “covered journalist” under the PRESS Act is relatively broad:

A person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

This definition includes anyone who “regularly” gathers or reports news or information of public interest, including citizen journalists who might be excluded under narrower definitions which focus exclusively on professional journalists.

The PRESS Act's definitions of the terms "journalism" and "protected information" are similarly broad. For example, it defines "protected information" as "any information identifying a source" and "any records, contents of a communication, or information that a covered journalist *obtained or created* as part of engaging in journalism" (emphasis added).

Although the Federal Privacy Protection Act of 1980 (the "PPA") currently provides some protection for journalists' work product and documentary materials, the PRESS Act would provide additional needed protection. Perhaps most importantly, it provides protection not only against subpoenas directed at journalists, but also covers those that attempt to get around existing protections for journalists by subpoenaing their service providers. The Act's anti-surveillance provision prohibits the Federal government from obtaining protected information stored on journalists' phones, computers, or other devices or storage accounts by subpoenaing their service providers directly, especially without notice to the journalist. The same exceptions apply.

State Shield Laws

Currently, forty-nine states and the District of Columbia have a shield law or equivalent judicial privilege. However, of those, only 17 states and the District of Columbia have shield laws that provide "absolute" protections except in certain defined circumstances; 24 states have shield laws that provide qualified protections; 8 states have no statutory shield law but recognize a qualified judicial privilege; and Wyoming has no shield law.

In 2008, Hawai'i enacted a state shield law that was widely hailed as one of the most progressive laws of its kind in the country at the time. However, it included a sunset provision that would repeal the statute in 2011 unless the legislature reauthorized it. In 2011, it was extended for two additional years, but in 2013 it was allowed to lapse in part due to a failure to agree on who should be included as a covered journalist. Thus, Hawai'i went from having a

shield law that served as a national model to being one of only two states with no reporter's privilege. This lasted for ten years, during which those paying attention reported observing a trend of increasing subpoenas and attempts to compel disclosure of sources from journalists. In 2023, Hawai'i reenacted and permanently codified the legislation, without the sunset provision. *See Exhibit C.*

One of the most closely watched reporter's privilege cases of the past two years involves a test to Nevada's state shield law, one of the strongest in the country. Nevada's shield law protects unpublished and published materials, as well as confidential sources, from disclosure in "any legal proceedings, trial or investigation." Although the Nevada Supreme Court has stated, without deciding, that exceptions to the statute could exist in certain limited circumstances, no known exceptions to its absolute privilege currently exist. Further, the statute expressly protects "former reporter[s]," although no precedent exists interpreting the application of that phrase to a deceased journalist.

In September, 2022, Jeff German, an investigative journalist for the *Las Vegas Review-Journal*, was found murdered outside his home. Shortly thereafter, Robert Telles, a former Clark County Public Administrator who had lost election in the midst of ongoing reporting about Telles by German, was arrested for German's murder. During the investigation, the Las Vegas Metropolitan Police Department ("Metro") seized German's car, phone, computers, and external hard drives. The *Review-Journal* demanded the return of German's devices, arguing that they were protected by the First Amendment and Nevada's shield law, and likely contained information that could be used to identify and retaliate against confidential sources within Metro and the District Attorney's Office, among other things.

Appeals surrounding a preliminary injunction against searching the journalist's devices reached the Nevada Supreme Court, which on March 28, 2023, ordered the District Court to determine a protocol for searching the devices within 60 days, so that the parties could then appeal to the high court. Metro's proposed protocol would have the devices searched by two Metro detectives and the two prosecutors on the case, which the *Review-Journal* argued could "easily lead to the very negative consequences the privileges are primarily designed to protect against." The newspaper wrote in a court filing that it would only agree to waive its privileges to the information on German's devices if the initial search was instead done by special hearing masters. Metro, having described the evidence already obtained against Telles as "overwhelming," has argued that it needs to search the devices in order to protect Telles' constitutional rights and prevent him from raising the issue on appeal. However, Telles agreed to the newspaper's proposed protocol for searching the devices.

Nonetheless, on May 26, District Court Judge Michelle Leavitt entered an order adopting Metro's proposed protocol, and noting that "[a]lthough the news shield statute provides an absolute privilege to reporters . . . , the Nevada Supreme Court recognizes that there may be certain situations when defendants' countervailing constitutional rights are at issue, in which the news shield statute might have to yield." *See* Exhibit D. The order then concludes that this is such a case, and the shield law must yield to the "constitutional rights of the defendant and the State of Nevada."

The *Review-Journal* has appealed this order, and briefing before the Nevada Supreme Court is ongoing. This includes multiple amicus briefs filed in support of the *Review-Journal*, including one signed by the Reporter's Committee for Freedom of the Press and 53 other media organizations.

Recent Developments

According to the U.S. Press Freedom Tracker, which provides an online database of press freedom incidents, there have been 63 reported press freedom incidents between January 1 and August 31, 2023. Of these, New York has the highest number with 10 incidents, followed by California with 6. Florida and the District of Columbia each have 5. However, these numbers are likely underreported. Of the reported incidents during this time, four are categorized as involving the seizure of a journalist's devices or notes.

First, on May 8th, 2023, FBI agents raided the Tampa, Florida, home of journalist Tim Burke and his wife, Tampa City Council member Lynn Hurtak. Burke is a former *Deadspin* editor and Director at *The Daily Beast* who now runs his own company called Burke Communications and was perhaps most well-known for breaking the Manti T'eo girlfriend hoax story. The FBI seized Burke's phones, computers, hard drives, notebooks, and entire digital newsroom, as well as Hurtak's home and campaign computers. The raid appears to be related to an investigation into allegations of unauthorized computer access, wire hacks, conspiracy, and other federal crimes related to unedited Fox News videos obtained by Vice News and Media Matters for America. However, Burke denies any unauthorized access and states that he only accessed videos that were publicly available online. His attorney filed a motion for return of the items seized on July 21, 2023, following a letter to the prosecutor decrying the search and seizure as unlawful. In its response, filed on August 9, three months after the search and seizure, the Government "recognize[d] its obligation to return to Burke any item seized determined to contain only information falling outside the authority to seize under . . . the warrant." However, the first return of property was not made available until July 27. As of the filing of its response

the Government remained unable to represent that it had returned all items falling outside the scope of the warrant.

Additionally, in the Government's response, the Associate United States Attorney argued the government had complied with the DOJ policy discussed above, but that even if it had not, "those policies do not create any substantive or procedural right or benefit, much less a right enforceable at this early stage of an investigation." The matter remains ongoing.

In a seizure of notes incident in North Carolina, on July 28, 2023, Kenwyn Caranna, a reporter for the *Greensboro News & Record*, was covering a juvenile court hearing when Judge Ashley Watlington-Simms directed bailiffs to seize her notes from the day and told her she was under a gag order. The judge reportedly denied Caranna's request to speak with an attorney and told her she could appeal the decision at a later date. Judge Watlington-Simms entered a formal protective order on August 2, sealing Caranna's notes and barring her from disclosing information from any of the cases she observed that day. The *News & Record* has requested a hearing on the matter.

Two of the reported device incidents involved the *Marion County Record*, a small weekly newspaper in Kansas. Law enforcement officers raided the newspaper's headquarters on August 11, 2023. The officers had a search warrant which authorized them to search and seize all electronic media and devices containing information related to alleged identify theft and unlawful acts concerning computers. *See* Exhibit E. The same day, officers also searched the home of the *Record's* publisher, Eric Meyer, and his 98-year-old mother, a co-owner of the paper and career journalist who died from cardiac arrest the day after police raided her home and seized her computer.

The raid appears to have been related to a dispute with a local restaurateur and caterer who asked Gideon Cody, Chief of the Marion Police Department, to remove Meyer and one of his reporters, Phyllis Zorn, from a public forum with U.S. Representative Jake LaTurner at her restaurant. Zorn was later sent evidence from a source that the restaurant owner, Kari Newell, had been convicted of drunken driving and continued to drive without a license. The source also alleged that local law enforcement was aware Newell did not have a valid license and had ignored repeated violations of driving laws by Newell. Zorn verified the information via the Kansas Department of Revenue's public Driver's License Check website. Nonetheless, the *Record* decided not to publish the story and instead notified Cody and the Marion County Sheriff of the tip and the allegation that law enforcement was aware of Newell's continued infractions.

Newell complained at a city council meeting that the *Record* had illegally obtained and disseminated sensitive documents. However, a spokesperson for the Department of Revenue confirmed that the website is public-facing and the online search was legal. When Newell made the public accusations against the paper, the *Record* published a story to set the record straight. The raids occurred the next day.

Meyer also stated that he suspects the *Record's* unpublished and ongoing investigation into Chief Cody may have been a motivating factor in the raid. Cody joined the small Marion police force in April after a 24-year career with the Kansas City Police Department. Meyer stated that the *Record* had been investigating multiple tips that Cody had been accused of sexual misconduct and had retired from KCPD to avoid demotion and punishment related to those accusations. Meyer further expressed concern that the names of the individuals who provided the confidential tips about Cody were on one of the seized computers.

Kansas' shield law, which was enacted by nearly unanimous vote in 2010, provides that a journalist may not be compelled to disclose any previously undisclosed information or the source of such information procured while acting as a journalist, unless the party seeking disclosure establishes by a preponderance of evidence that the information sought: (1) is material and relevant to the proceeding; (2) could not be reasonably obtained by other means; and (3) is of compelling interest. It further provides that a journalist relying on the privilege is entitled to a hearing, which should include a judge conducting an in camera review of the materials to determine whether they should be disclosed to the party seeking them. This law should have allowed the newspaper to have its day in court before any documents or information were turned over and prevented law enforcement from ever having access to information about the tips on Cody and other unpublished investigations by the *Record*.

Attorneys and legal experts have also suggested that the raid violated the federal Privacy Protection Act of 1980 (the "PPA"), 42 U.S.C. § 2000aa, which prohibits the search and seizure of journalists' work product materials, except in certain limited circumstances. Cody defended the raid as legal under an exception to the PPA for materials related to a criminal offense which authorities have probable cause to believe the person in possession of the materials committed. However, attorneys for the *Record* and its reporters have disputed whether there was probable cause to believe that any crime was committed, much less by Meyer or Gruver.

In spite of difficulties created by lack of access to their computers and servers, the *Record*'s staff worked long hours to make sure that week's paper still went to press, recreating articles and ads that were on the seized server. It took days to regain access to their e-mail accounts, with a temporary server in place by August 15. However, there has also been a national outpouring of support – the paper got more than 1,500 new digital subscribers in the days

following the raid, with hundreds more requests to subscribe via email and phone not yet processed. The paper went to press on schedule, with a front-page headline reading “SEIZED . . . but not silenced.” As it was delivered to newsstands on Wednesday, August 16, Marion County Attorney Joel Ensey said in a surprise announcement that police had “insufficient evidence” to search the office in the first place and ordered them to return all the seized items. Ensey stated that although he believed the affidavits attached to the search warrant application did provide probable cause to believe an employee of the *Record* may have committed unlawful acts, “insufficient evidence exists to establish a legally sufficient nexus between this alleged crime and the places searched and the items seized.” The Kansas Bureau of Investigation released a statement in conjunction with Ensey’s, noting that they would take over the investigation into any illegal data breach by *Record* reporters, without review or examination of any of the evidence seized on August 11.

A few days after the seized computers and cell phones were returned, however, reporters learned that police still had a thumb drive with electronic copies of thousands of files taken from the newspaper’s computers. The electronic copies were listed on the property inventory as “OS Triage Digital Data,” but that item was apparently left off the list subsequently provided to the court. Approximately two weeks after the initial seizure, a judge ordered authorities to hand over the electronic records and destroy any copies of them, as well as all photographs officers took during the raids.

On August 30, 2023, *Record* reporter Deb Gruver filed a § 1983 lawsuit against Cody for violating her First and Fourth Amendment rights. *See* Exhibit F. The complaint alleges that when police arrived at the *Record*’s newsroom on August 11 to conduct the search, publisher Eric Meyer was not present, and Cody personally served the warrant on Gruver. When Gruver pulled

out her personal cell phone, stating that she needed to contact Meyer, Cody allegedly reached over and grabbed the phone out of her hand. The complaint alleges that there was no basis for believing Gruver's cell phone was involved in any crime and was not covered by the description of evidence to be seized in the warrant. Nonetheless, Cody seized the phone and removed it from the premises with the other equipment. The complaint further alleges that Cody was aware of the *Record's* ongoing investigation into him and that Gruver was the primary reporter conducting the investigation. The lawsuit seeks more than \$150,000 in total compensatory and punitive damages, as well as costs and attorneys' fees. Additional lawsuits are anticipated, including one promised by Meyer.

EXHIBIT A

DEPARTMENT OF JUSTICE

28 CFR Part 50

Docket No. OAG 179; AG Order No. 5524-2022

**Policy Regarding Obtaining Information From or Records of Members of the News Media;
and Regarding Questioning, Arresting, or Charging Members of the News Media**

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule amends the regulations setting forth the policy of the Department of Justice regarding the use of compulsory legal process, including subpoenas, search warrants, and certain court orders for the purpose of obtaining information from or records of members of the news media. The rule also amends the Department's regulations establishing its policy regarding questioning, arresting, or charging members of the news media.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ashley Dugger, Acting Director, Office of Enforcement Operations, Criminal Division, (202) 514-6809.

SUPPLEMENTARY INFORMATION:

Discussion

On July 19, 2021, the Attorney General issued a memorandum revising the Department's policy regarding the use of compulsory legal process for the purpose of obtaining information from or records of members of the news media. The memorandum asked the Deputy Attorney General to undertake a review process to further explain, develop, and codify in regulations the

protections provided for in the memorandum. After the conclusion of that review and consultation with relevant internal and external stakeholders, the Attorney General is issuing this final rule to revise the existing provisions in the Department's regulations at 28 CFR 50.10.

The revisions replace the regulations' prior balancing test and codify the Attorney General's July 2021 directive that the Department of Justice will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering, except in limited circumstances. Other revisions are intended to clarify the scope of the policy, specify the approvals required in the circumstances in which compulsory legal process is allowed, tighten procedures for the review and safeguarding of information, and fill gaps in the previous regulations.

Regulatory Certifications

Administrative Procedure Act, 5 U.S.C. 553

Because, for purposes of the Administrative Procedure Act, this regulation concerns general statements of policy, or rules of agency organization, procedure, or practice, notice and comment and a delayed effective date are not required. See 5 U.S.C. 553(b)(A), (d).

Regulatory Flexibility Act

Because this final rule is not promulgated as a final rule under 5 U.S.C. 553 and was not required under that section to be published as a proposed rule, the requirements for the preparation of a regulatory flexibility analysis under 5 U.S.C. 604(a) do not apply. In any event, the Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because it pertains to administrative matters affecting the Department.

Executive Orders 12866 and 13563 - Regulatory Planning and Review

This action has been drafted and reviewed in accordance with Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, section 1(b), Principles of Regulation.

This rule is limited to agency organization, management, or personnel matters as described by section 3(d)(3) of Executive Order 12866, and therefore is not a “regulation” as defined by that Executive Order. Accordingly, this action has not been reviewed by the Office of Management and Budget.

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 of February 5, 1996.

Executive Order 13132 - Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 of August 4, 1999, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4.

Congressional Review Act

This action pertains to agency management and does not substantially affect the rights or obligations of non-agency parties; accordingly, this action is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure, Crime, News, Media, Subpoena, Search warrants.

Accordingly, for the reasons stated in the preamble, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50 – STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Section 50.10 is revised to read as follows:

§ 50.10 Policy regarding obtaining information from or records of members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) Statement of principles.

(1) A free and independent press is vital to the functioning of our democracy. Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department’s policy is intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering. The policy is not intended to shield from accountability members of the news media who are subjects or targets of a criminal investigation

for conduct outside the scope of newsgathering.

(2) The Department recognizes the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government. For this reason, with the exception of certain circumstances set out below, the Department of Justice will not use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering.

(3) In determining whether to seek, when permitted by this policy, information from or records of members of the news media, the Department must consider several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of a free press in fostering government accountability and an open society, including by protecting members of the news media from compelled disclosure of information revealing their sources. These interests have long informed the Department's view that the use of compulsory legal process to seek information from or records of non-consenting members of the news media constitutes an extraordinary measure, not a standard investigatory practice.

(b) Scope and definitions.

(1) Covered persons and entities. This policy governs the use of certain law enforcement tools and actions, whether criminal or civil, to obtain information from or records of members of the news media.

(2) Definitions.

(i) "Compulsory legal process" consists of subpoenas, search warrants, court orders issued pursuant to 18 U.S.C. 2703(d) and 3123, interception orders issued pursuant to 18 U.S.C.

2518, civil investigative demands, and mutual legal assistance treaty requests—regardless of whether issued to members of the news media directly, to their publishers or employers, or to others, including third-party service providers of any of the forgoing, for the purpose of obtaining information from or records of members of the news media, and regardless of whether the compulsory legal process seeks testimony, physical or electronic documents, telephone toll or other communications records, metadata, or digital content.

(ii) “Newsgathering” is the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.

(A) Newsgathering includes the mere receipt, possession, or publication by a member of the news media of government information, including classified information, as well as establishing a means of receiving such information, including from an anonymous or confidential source.

(B) Except as provided in paragraph (b)(2)(ii)(A) of this section, newsgathering does not include criminal acts committed in the course of obtaining information or using information, such as: breaking and entering; theft; unlawfully accessing a computer or computer system; unlawful surveillance or wiretapping; bribery; extortion; fraud; insider trading; or aiding or abetting or conspiring to engage in such criminal activities, with the requisite criminal intent.

(3) Exclusions.

(i) The protections of this policy do not extend to any person or entity where there is a reasonable ground to believe the person or entity is:

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting to commit the crimes of providing material support or resources to terrorists or designated foreign terrorist organizations, providing or collecting funds to finance acts of terrorism, or receiving military-type training from a foreign terrorist organization, as those offenses are defined in 18 U.S.C. 2339A, 2339B, 2339C, and 2339D; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(3)(i)(A) through (G) of this section.

(ii) The determination that an exclusion in paragraph (b)(3)(i) of this section applies must be made by the Assistant Attorney General for National Security.

(c) *Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering.* Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering is prohibited except under the circumstances set forth in paragraphs (c)(1) through (3). (Note that this prohibition on using compulsory legal process

applies when a member of the news media has, in the course of newsgathering, only received, possessed, or published government information, including classified information, or has established a means of receiving such information, including from an anonymous or confidential source.) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering, as follows:

(1) To authenticate for evidentiary purposes information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;

(2) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, in which case authorization as described in paragraph (i) of this section is required; or

(3) When necessary to prevent an imminent or concrete risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. 20911(7)), or incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. 5195c(e)), in which case the authorization of the Attorney General is required.

(d) Compulsory legal process for the purpose of obtaining information from or records of a member of the news media not acting within the scope of newsgathering.

(1) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media who is not acting within the scope of newsgathering:

(i) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense;

(ii) To obtain information or records of a non-member of the news media, when the non-member is the subject or target of an investigation and the information or records are in a physical space, device, or account shared with a member of the news media;

(iii) To obtain purely commercial, financial, administrative, technical, or other information or records unrelated to newsgathering; or for information or records relating to personnel not involved in newsgathering;

(iv) To obtain information or records related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which a member of the news media does not exercise editorial control prior to publication;

(v) To obtain information or records of a member of the news media who may be a victim of or witness to crimes or other events, or whose premises may be the scene of a crime, when such status (as a victim or witness or crime scene) is not based on or within the scope of newsgathering; or

(vi) To obtain only subscriber and other information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(2) Compulsory legal process under paragraph (d)(1) of this section requires the authorization of a Deputy Assistant Attorney General for the Criminal Division, except that:

(i) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, such compulsory legal process requires authorization as described in paragraph (i) of this section governing voluntary questioning and compulsory legal process following consent by a member of the news media; and

(ii) To seek a search warrant for the premises of a news media entity requires authorization by the Attorney General.

(e) Matters where there is a close or novel question as to the person's or entity's status as a member of the news media or whether the member of the news media is acting within the scope of newsgathering.

(1) When there is a close or novel question as to the person's or entity's status as a member of the news media, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division.

(2) When there is a close or novel question as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division. When the Assistant Attorney General finds that there is genuine uncertainty as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Attorney General.

(f) Compelled testimony.

(1) Except as provided in paragraph (f)(2) of this section, members of the Department must obtain the authorization of the Deputy Attorney General when seeking to compel grand jury or trial testimony otherwise permitted by this section from any member of the news media.

(2) When the compelled testimony under paragraph (f)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) Such authorization may only be granted when all other requirements of this policy

regarding compulsory legal process have been satisfied.

(g) *Exhaustion.*

(1) Except as provided in paragraph (g)(2) of this section, the official authorizing the compulsory legal process must find the following exhaustion conditions are met:

(i) The Government has exhausted all reasonable avenues to obtain the information from alternative, non-news-media sources.

(ii) The Government has pursued negotiations with the member of the news media in an attempt to secure the member of the news media's consent to the production of the information or records to be sought through compulsory legal process, unless the authorizing official determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation or pose the risks described in paragraph (c)(3) of this section. Where the nature of the investigation permits, the Government must have explained to the member of the news media the Government's need for the information sought in a particular investigation or prosecution, as well as its willingness or ability to address the concerns of the member of the news media.

(iii) The proposed compulsory legal process is narrowly drawn. It must be directed at material and relevant information regarding a limited subject matter, avoid interference with unrelated newsgathering, cover a reasonably limited period of time, avoid requiring production of a large volume of material, and give reasonable and timely notice of the demand as required by paragraph (j) of this section.

(2) When the process is sought pursuant to paragraphs (d)(1), (i), or (l) of this section, the authorizing official is not required to find that the exhaustion conditions in paragraphs (g)(1)(i)–(ii) of this section have been satisfied, but should consider requiring those conditions as

appropriate.

(h) Standards for authorizing compulsory legal process.

(1) In all matters covered by this section, the official authorizing the compulsory legal process must take into account the principles set forth in paragraph (a) of this section.

(2) Except as provided in paragraph (h)(3) of this section, when the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, the official authorizing the compulsory legal process must take into account the following considerations:

(i) In criminal matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The compulsory legal process may not be used to obtain peripheral, nonessential, or speculative information.

(ii) In civil matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The compulsory legal process may not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(3) When paragraph (h)(2) of this section would otherwise apply, but the compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, the authorizing official is not required to, but should, take into account whether the information sought is essential to a successful investigation, prosecution, or litigation as described in paragraphs (h)(2)(i)–(ii) of this section.

(4) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense, before authorizing compulsory legal process, the authorizing official is not required to, but should, take into account the considerations set forth in paragraphs (h)(2)(i)–(ii) of this section as appropriate.

(i) Voluntary questioning and compulsory legal process following consent by a member of the news media.

(1) When the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, authorization by a United States Attorney or Assistant Attorney General responsible for the matter must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process. When there is any nexus to the person's activities as a member of the news media, such authorization must be preceded by consultation with the Criminal Division.

(2) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense, authorization by a Deputy Assistant Attorney General for the Criminal Division must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process.

(j) Notice of compulsory legal process to the affected member of the news media.

(1) Members of the Department must provide notice to the affected member of the news media prior to the execution of authorized compulsory legal process under paragraph (c) of this section unless the authorizing official determines that, for compelling reasons, such notice would

pose the risks described in paragraph (c)(3) of this section.

(2) Members of the Department must provide notice prior to the execution of compulsory legal process authorized under paragraphs (d)(1)(ii)–(vi) of this section to a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense, unless the authorizing official determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and so informs the Deputy Attorney General in advance.

(3) If the member of the news media has not been given notice under paragraphs (j)(1) or (j)(2) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must provide notice to the member of the news media as soon as it is determined that such notice would no longer pose the concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(4) In any event, such notice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization under paragraphs (c) or (d)(1)(ii)–(vi), except that the authorizing official may authorize delay of notice for one additional 45-day period if the official determines that, for compelling reasons, such notice continues to pose the same concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(5) Members of the Department are not required to provide notice to the affected member of the news media of compulsory legal process that was authorized under paragraph (d)(1)(i) of this section if the affected member of the news media is the subject or target of an investigation

and suspected of having committed an offense.

(i) The authorizing official may nevertheless direct that notice be provided to the affected member of the news media.

(ii) If the authorizing official does not direct that such notice be provided, the official must so inform the Deputy Attorney General, and members of the Department who are responsible for the matter must provide the authorizing official with an update every 90 days regarding the status of the investigation. That update must include an assessment of any harm to the investigation that would be caused by providing notice to the member of the news media. The authorizing official will consider such update in determining whether to direct that notice be provided.

(6) Notice under this policy may be given to the affected member of the news media or a current employer of that member if that employer is also a member of the news media.

(7) A copy of any notice to be provided to a member of the news media shall be provided to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations at least 10 business days before such notice is provided, and immediately after such notice is provided to the member of the news media.

(k) *Non-disclosure orders.*

(1) In seeking authorization to use compulsory legal process to obtain information from or the records of a member of the news media, members of the Department must indicate whether they intend to seek an order directing the recipient of the compulsory legal process not to disclose the existence of the compulsory legal process to any other person or entity and shall articulate the need for such non-disclosure order.

(2) An application for a non-disclosure order sought in connection with compulsory legal

process under paragraph (c) of this section may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(3) An application for a non-disclosure order sought in connection with compulsory legal process under paragraphs (d)(1)(ii)–(vi) of this section regarding a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(4) An application for a non-disclosure order sought in connection with compulsory legal process under paragraph (d)(1)(i) of this section regarding a member of the news media that is a subject or target of an investigation and suspected of having committed an offense may be authorized if the application otherwise complies with applicable statutory standards and Department policies.

(5) Members of the Department must move to vacate any non-disclosure order when notice of compulsory legal process to the affected member of media is required (after any extensions permitted) by paragraph (j) of this section.

(1) *Exigent circumstances involving risk of death or serious bodily harm.*

(1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of compulsory legal process that would otherwise require authorization from the Attorney General or the Deputy Attorney General if the Deputy Assistant Attorney General for the

Criminal Division determines that:

(i) The exigent use of such compulsory legal process is necessary to prevent the risks described in paragraph (c)(3) of this section; and

(ii) Those exigent circumstances require the use of such compulsory legal process before the authorization of the Attorney General or the Deputy Attorney General can, with due diligence, be obtained.

(2) In authorizing the exigent use of compulsory legal process, a Deputy Assistant Attorney General for the Criminal Division should take into account the principles set forth in paragraph (a) of this section; ensure that the proposed process is narrowly tailored to retrieve information or records required to prevent or mitigate the associated imminent risk; and require members of the Department to comply with the safeguarding protocols described in paragraph (p) of this section.

(3) As soon as possible after the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (l)(1) of this section, the Deputy Assistant Attorney General must provide notice to the designated authorizing official, the Deputy Attorney General, and the Director of the Office of Public Affairs. Within 10 business days of the authorization under paragraph (l)(1) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide a statement to the designated authorizing official containing the information that would have been provided in a request for prior authorization.

(m) Arresting or charging a member of the news media.

(1) Except as provided in paragraph (m)(2) of this section or in circumstances in which prior authorization is not possible, members of the Department must obtain the authorization of

the Deputy Attorney General to seek a warrant for an arrest, conduct an arrest, present information to a grand jury seeking a bill of indictment, or file an information against a member of the news media.

(2) Except in circumstances in which prior authorization is not possible, when the arrest or charging of a member of the news media under paragraph (m)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) When prior authorization was not possible, the member of the Department must ensure that the designated authorizing official is notified as soon as possible.

(n) *Applications for authorizations under this section.*

(1) Whenever any authorization is required under this section, the application must be personally approved in writing by the United States Attorney or Assistant Attorney General responsible for the matter.

(2) Whenever the authorizing official under this section is the Attorney General or the Deputy Attorney General, the application must also be personally approved in a memorandum by the Assistant Attorney General for the Criminal Division.

(3) The member of the Department requesting authorization must provide all facts and applicable legal authority necessary for the authorizing official to make the necessary determinations, as well as copies of the proposed compulsory legal process and any other related filings.

(4) Whenever an application for any authorization is made to the Attorney General or the Deputy Attorney General under this section, the application must also be provided to the

Director of the Office of Public Affairs for consultation.

(o) *Filter protocols.*

(1) In conjunction with the use of compulsory legal process, the use of filter protocols, including but not limited to keyword searches and filter teams, may be necessary to minimize the potential intrusion into newsgathering-related materials that are unrelated to the conduct under investigation.

(2) While the use of filter protocols should be considered in all matters involving a member of the news media, the use of such protocols must be balanced against the need for prosecutorial flexibility and the recognition that investigations evolve, and should be tailored to the facts of each investigation.

(3) Unless compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, members of the Department must use filter protocols when the compulsory legal process relates to a member of the news media acting within the scope of newsgathering or the compulsory legal process could potentially encompass newsgathering-related materials that are unrelated to the conduct under investigation. The Attorney General or the Deputy Attorney General may waive the use of filter protocols only upon an express finding that there is a *de minimis* risk that newsgathering-related materials that are unrelated to the conduct under investigation would be obtained pursuant to the compulsory legal process and that any filter protocol would pose a substantial and unwarranted investigative burden.

(4) Members of the Department should consult the Justice Manual for guidance regarding the use of filter protocols to protect newsgathering-related materials that are unrelated to the conduct under investigation.

(p) *Safeguarding.* Any information or records that might include newsgathering-related

materials obtained from a member of the news media or from third parties pursuant to this policy must be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department must consult the Justice Manual for specific guidance regarding the safeguarding of information or records obtained from a member of the news media or from third parties pursuant to this section and regarding the destruction and return of information or records as permitted by law.

(q) *Privacy Protection Act.* All authorizations pursuant to this section must comply with the provisions of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa(a) et seq. Members of the Department must consult the Justice Manual for specific guidance on complying with the PPA. Among other things, members of the Department are not authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, see 42 U.S.C. 2000aa(a)(1) and (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(r) *Anti-circumvention.* Members of the Department shall not direct any third party to take any action that would violate a provision of this section if taken by a member of the Department.

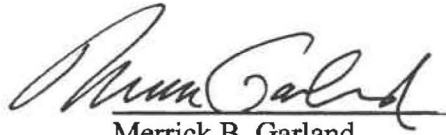
(s) *Failure to comply.* Failure to obtain the prior authorization required by this section may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(t) *General provision.* This section is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United

States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

10.26.22

Date



Merrick B. Garland
Attorney General

EXHIBIT B

118TH CONGRESS
1ST SESSION

S. 2074

To maintain the free flow of information to the public by establishing appropriate limits on the federally compelled disclosure of information obtained as part of engaging in journalism, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 21, 2023

Mr. WYDEN (for himself, Mr. LEE, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by establishing appropriate limits on the federally compelled disclosure of information obtained as part of engaging in journalism, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protect Reporters from
5 Exploitative State Spying Act” or the “PRESS Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

1 (1) COVERED JOURNALIST.—The term “covered
2 journalist” means a person who regularly gathers,
3 prepares, collects, photographs, records, writes,
4 edits, reports, investigates, or publishes news or in-
5 formation that concerns local, national, or inter-
6 national events or other matters of public interest
7 for dissemination to the public.

8 (2) COVERED SERVICE PROVIDER.—

9 (A) IN GENERAL.—The term “covered
10 service provider” means any person that, by an
11 electronic means, stores, processes, or transmits
12 information in order to provide a service to cus-
13 tomers of the person.

14 (B) INCLUSIONS.—The term “covered
15 service provider” includes—

16 (i) a telecommunications carrier and a
17 provider of an information service (as such
18 terms are defined in section 3 of the Com-
19 munications Act of 1934 (47 U.S.C. 153));

20 (ii) a provider of an interactive com-
21 puter service and an information content
22 provider (as such terms are defined in sec-
23 tion 230 of the Communications Act of
24 1934 (47 U.S.C. 230));

1 (iii) a provider of remote computing
2 service (as defined in section 2711 of title
3 18, United States Code); and

4 (iv) a provider of electronic commu-
5 nication service (as defined in section 2510
6 of title 18, United States Code) to the
7 public.

8 (3) DOCUMENT.—The term “document” means
9 writings, recordings, and photographs, as those
10 terms are defined by Federal Rule of Evidence 1001
11 (28 U.S.C. App.).

12 (4) FEDERAL ENTITY.—The term “Federal en-
13 tity” means an entity or employee of the judicial or
14 executive branch or an administrative agency of the
15 Federal Government with the power to issue a sub-
16 poena or issue other compulsory process.

17 (5) JOURNALISM.—The term “journalism”
18 means gathering, preparing, collecting,
19 photographing, recording, writing, editing, reporting,
20 investigating, or publishing news or information that
21 concerns local, national, or international events or
22 other matters of public interest for dissemination to
23 the public.

24 (6) PERSONAL ACCOUNT OF A COVERED JOUR-
25 NALIST.—The term “personal account of a covered

1 journalist” means an account with a covered service
2 provider used by a covered journalist that is not pro-
3 vided, administered, or operated by the employer of
4 the covered journalist.

5 (7) PERSONAL TECHNOLOGY DEVICE OF A COV-
6 ERED JOURNALIST.—The term “personal technology
7 device of a covered journalist” means a handheld
8 communications device, laptop computer, desktop
9 computer, or other internet-connected device used by
10 a covered journalist that is not provided or adminis-
11 tered by the employer of the covered journalist.

12 (8) PROTECTED INFORMATION.—The term
13 “protected information” means any information
14 identifying a source who provided information as
15 part of engaging in journalism, and any records,
16 contents of a communication, documents, or infor-
17 mation that a covered journalist obtained or created
18 as part of engaging in journalism.

19 (9) SPECIFIED OFFENSE AGAINST A MINOR.—
20 The term “specified offense against a minor” has
21 the meaning given that term in section 111(7) of the
22 Adam Walsh Child Protection and Safety Act of
23 2006 (34 U.S.C. 20911(7)).

1 **SEC. 3. LIMITS ON COMPELLED DISCLOSURE FROM COV-**
2 **ERED JOURNALISTS.**

3 In any matter arising under Federal law, a Federal
4 entity may not compel a covered journalist to disclose pro-
5 tected information, unless a court in the judicial district
6 in which the subpoena or other compulsory process is, or
7 will be, issued determines by a preponderance of the evi-
8 dence, after providing notice and an opportunity to be
9 heard to the covered journalist, that—

10 (1) disclosure of the protected information is
11 necessary to prevent, or to identify any perpetrator
12 of, an act of terrorism against the United States; or

13 (2) disclosure of the protected information is
14 necessary to prevent a threat of imminent violence,
15 significant bodily harm, or death, including specified
16 offenses against a minor.

17 **SEC. 4. LIMITS ON COMPELLED DISCLOSURE FROM COV-**
18 **ERED SERVICE PROVIDERS.**

19 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In
20 any matter arising under Federal law, a Federal entity
21 may not compel a covered service provider to provide testi-
22 mony or any document consisting of any record, informa-
23 tion, or other communications stored by a covered provider
24 on behalf of a covered journalist, including testimony or
25 any document relating to a personal account of a covered
26 journalist or a personal technology device of a covered

1 journalist, unless a court in the judicial district in which
2 the subpoena or other compulsory process is, or will be,
3 issued determines by a preponderance of the evidence that
4 there is a reasonable threat of imminent violence unless
5 the testimony or document is provided, and issues an
6 order authorizing the Federal entity to compel the disclo-
7 sure of the testimony or document.

8 (b) NOTICE TO COURT.—A Federal entity seeking to
9 compel the provision of testimony or any document de-
10 scribed in subsection (a) shall inform the court that the
11 testimony or document relates to a covered journalist.

12 (c) NOTICE TO COVERED JOURNALIST AND OPPOR-
13 TUNITY TO BE HEARD.—

14 (1) IN GENERAL.—A court may authorize a
15 Federal entity to compel the provision of testimony
16 or a document under this section only after the Fed-
17 eral entity seeking the testimony or document pro-
18 vides the covered journalist on behalf of whom the
19 testimony or document is stored pursuant to sub-
20 section (a)—

21 (A) notice of the subpoena or other com-
22 pulsory request for such testimony or document
23 from the covered service provider not later than
24 the time at which such subpoena or request is
25 issued to the covered service provider; and

1 (B) an opportunity to be heard before the
2 court before the time at which the provision of
3 the testimony or document is compelled.

4 (2) EXCEPTION TO NOTICE REQUIREMENT.—

5 (A) IN GENERAL.—Notice and an oppor-
6 tunity to be heard under paragraph (1) may be
7 delayed for not more than 45 days if the court
8 involved determines there is clear and con-
9 vincing evidence that such notice would pose a
10 clear and substantial threat to the integrity of
11 a criminal investigation, or would present an
12 imminent risk of death or serious bodily harm,
13 including specified offenses against a minor.

14 (B) EXTENSIONS.—The 45-day period de-
15 scribed in subparagraph (A) may be extended
16 by the court for additional periods of not more
17 than 45 days if the court involved makes a new
18 and independent determination that there is
19 clear and convincing evidence that providing no-
20 tice to the covered journalist would pose a clear
21 and substantial threat to the integrity of a
22 criminal investigation, or would present an im-
23minent risk of death or serious bodily harm, in-
24cluding specified offenses against a minor,
25 under current circumstances.

1 **SEC. 5. LIMITATION ON CONTENT OF INFORMATION.**

2 The content of any testimony, document, or protected
3 information that is compelled under sections 3 or 4 shall—

4 (1) not be overbroad, unreasonable, or oppres-
5 sive, and, as appropriate, be limited to the purpose
6 of verifying published information or describing any
7 surrounding circumstances relevant to the accuracy
8 of such published information; and

9 (2) be narrowly tailored in subject matter and
10 period of time covered so as to avoid compelling the
11 production of peripheral, nonessential, or speculative
12 information.

13 **SEC. 6. RULE OF CONSTRUCTION.**

14 Nothing in this Act shall be construed to—

15 (1) apply to civil defamation, slander, or libel
16 claims or defenses under State law, regardless of
17 whether or not such claims or defenses, respectively,
18 are raised in a State or Federal court; or

19 (2) prevent the Federal Government from pur-
20 suing an investigation of a covered journalist or or-
21 ganization that is—

22 (A) suspected of committing a crime;

23 (B) a witness to a crime unrelated to en-
24 gaging in journalism;

25 (C) suspected of being an agent of a for-
26 eign power, as defined in section 101 of the

1 Foreign Intelligence Surveillance Act of 1978
2 (50 U.S.C. 1801);

3 (D) an individual or organization des-
4 ignated under Executive Order 13224 (50
5 U.S.C. 1701 note; relating to blocking property
6 and prohibiting transactions with persons who
7 commit, threaten to commit, or support ter-
8 rorism);

9 (E) a specially designated terrorist, as that
10 term is defined in section 595.311 of title 31,
11 Code of Federal Regulations (or any successor
12 thereto); or

13 (F) a terrorist organization, as that term
14 is defined in section 212(a)(3)(B)(vi)(II) of the
15 Immigration and Nationality Act (8 U.S.C.
16 1182(a)(3)(B)(vi)(II)).

○

EXHIBIT C



GOV. MSG. NO. 1227

EXECUTIVE CHAMBERS
KE KE'ENA O KE KIA'ĀINA

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA

June 23, 2023

The Honorable Ronald D. Kouchi
President of the Senate,
and Members of the Senate
Thirty-Second State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki
Speaker, and Members of the
House of Representatives
Thirty-Second State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

This is to inform you that on June 23, 2023, the following bill was signed into law:

HB1502 HD1 SD1 CD1

RELATING TO EVIDENCE.
ACT 126

Sincerely,

Josh Green, M.D.
Governor, State of Hawai'i

on JUN 23 2023

HOUSE OF REPRESENTATIVES
THIRTY-SECOND LEGISLATURE, 2023
STATE OF HAWAII

H.B. NO. 1502
H.D. 1
S.D. 1
C.D. 1

A BILL FOR AN ACT

RELATING TO EVIDENCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that Act 210, Session
2 Laws of Hawaii 2008 (Act 210), temporarily established a limited
3 news media privilege against the compelled disclosure of sources
4 and unpublished information to a legislative, executive, or
5 judicial officer or body, or to any other person who may compel
6 testimony. Subsequently, Act 113, Session Laws of Hawaii 2011,
7 extended the repeal date of Act 210 from June 30, 2011, to
8 June 30, 2013, and required the judiciary, through its standing
9 committee on the rules of evidence, to report to the legislature
10 and recommend whether to:

- 11 (1) Codify Act 210 under chapter 621, Hawaii Revised
12 Statutes, relating to evidence and witnesses,
13 generally;
- 14 (2) Codify Act 210 under chapter 626, Hawaii Revised
15 Statutes, the Hawaii rules of evidence; or
- 16 (3) Allow Act 210 to be repealed.



1 In December 2011, the supreme court standing committee on
2 the rules of evidence submitted a report to the legislature
3 recommending that the sunset provision under Act 210 be repealed
4 and the news media privilege be codified under chapter 621,
5 Hawaii Revised Statutes.

6 The purpose of this Act is to enact the recommendation made
7 by the supreme court standing committee on the rules of evidence
8 by enacting a permanent news media privilege.

9 SECTION 2. Chapter 621, Hawaii Revised Statutes, is
10 amended by adding a new section to be appropriately designated
11 and to read as follows:

12 "§621- Limitation on compellable testimony from
13 journalists and newscasters; exceptions. (a) A journalist or
14 newscaster presently or previously employed by or otherwise
15 professionally associated with any newspaper, magazine, news
16 agency, press association, wire service, radio or television
17 transmission station or network, or digital news website shall
18 not be required by a legislative, executive, or judicial officer
19 or body, or any other authority having the power to compel
20 testimony or the production of evidence, to disclose, by
21 subpoena or otherwise:



1 (1) The source, or information that could reasonably be
2 expected to lead to the discovery of the identity of
3 the source, of any published or unpublished
4 information obtained by the person while so employed
5 or professionally associated in the course of
6 gathering, receiving, or processing information for
7 communication to the public; or

8 (2) Any unpublished information obtained or prepared by
9 the person while so employed or professionally
10 associated in the course of gathering, receiving, or
11 processing information for communication to the
12 public.

13 (b) The limitation on compellable testimony established by
14 this section may also be claimed by and afforded to any
15 individual who can demonstrate by clear and convincing evidence
16 that:

17 (1) The individual has regularly and materially
18 participated in the reporting or publishing of news or
19 information of substantial public interest for the
20 purpose of dissemination to the general public by
21 means of tangible or electronic media;



- 1 (2) The position of the individual is materially similar
2 or identical to that of a journalist or newscaster,
3 taking into account the method of dissemination;
- 4 (3) The interest of the individual in protecting the
5 sources and unpublished information under subsection
6 (a) is materially similar to the interest of the
7 individuals referenced under subsection (a); and
- 8 (4) The public interest is served by affording the
9 protections of this section in a specific circumstance
10 under consideration.
- 11 (c) This section shall not apply if:
- 12 (1) Probable cause exists to believe that the person
13 claiming the privilege has committed, is committing,
14 or is about to commit a crime;
- 15 (2) The person claiming the privilege has observed the
16 alleged commission of a crime; provided that the
17 privilege granted by this section may be asserted if:
- 18 (A) The interest in maintaining the privilege granted
19 by this section outweighs the public interest in
20 disclosure; and



- 1 (B) The commission of the crime is the act of
2 communicating or providing the information or
3 documents at issue;
- 4 (3) There is substantial evidence that the source or
5 information sought to be disclosed is material to the
6 investigation, prosecution, or defense of a felony, or
7 to a civil action for defamation, and the source or
8 information sought is:
- 9 (A) Unavailable, despite exhaustion of reasonable
10 alternative sources;
- 11 (B) Noncumulative; and
- 12 (C) Necessary and relevant to the charge, claim, or
13 defense asserted;
- 14 (4) The information sought to be disclosed is critical to
15 prevent serious harm to life or public safety; or
- 16 (5) The source consents to the disclosure of unpublished
17 documents or other tangible materials provided by the
18 source.
- 19 (d) No fine or imprisonment shall be imposed against a
20 person claiming the privilege pursuant to this section for



1 refusal to disclose information privileged pursuant to this
2 section.

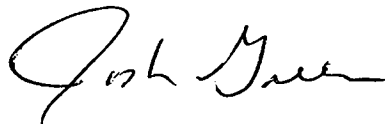
3 (e) The privilege described in this section may be claimed
4 by journalists and newscasters as described in subsection (a)
5 and individuals as described in subsection (b). The privilege
6 shall not be claimed by persons who were the source of
7 information."

8 SECTION 3. New statutory material is underscored.

9 SECTION 4. This Act shall take effect upon its approval.

10

APPROVED this 23rd day of June , 2023



GOVERNOR OF THE STATE OF HAWAII



HB No. 1502, HD 1, SD 1, CD 1

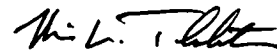
THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: May 2, 2023
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Thirty-Second Legislature of the State of Hawaii, Regular Session of 2023.



Scott K. Saiki
Speaker
House of Representatives

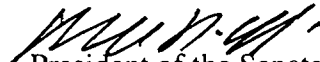


Brian L. Takeshita
Chief Clerk
House of Representatives

THE SENATE OF THE STATE OF HAWAI'I

Date: May 2, 2023
Honolulu, Hawai'i 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the Senate of the Thirty-Second Legislature of the State of Hawai'i, Regular Session of 2023.


President of the Senate



Clerk of the Senate

EXHIBIT D



**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Electronically Filed
May 26 2023 03:44 PM
Elizabeth A. Brown
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

May 26, 2023

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: In the Matter of STATE vs. TELLES
S.C. CASE: 85553 c/w 85634
D.C. CASE: A-22-859361-C

Dear Ms. Brown:

Pursuant to your Order of Limited Remand and Order Lifting Temporary Injunction, dated March 28, 2023, enclosed is a certified copy of the Interim Order Dissolving the Preliminary Injunction and Setting Forth the Protocol in the Search of the Seized Devices filed May 26, 2023 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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ORDR

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

LAS VEGAS REVIEW JOURNAL, Inc.)
)
Plaintiff,)
)
vs.)
)
THE STATE OF NEVADA, ROBERT)
TELLES, AND LAS VEGAS)
METROPOLITAN POLICE)
DEPARTMENT)
)
Defendants.)

CASE NO.: A-22-859361-C

DEPT. NO.: XII

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
ROBERT TELLES,)
#5641107)
)
Defendant.)

CASE NO.: C-22-368935-1

DEPT. NO.: XII

**INTERIM ORDER DISSOLVING THE PRELIMINARY
INJUNCTION AND SETTING FORTH THE PROTOCOL
IN THE SEARCH OF THE SEIZED DEVICES**

The Court, having reviewed all relevant pleadings in the matter, and after hearing extensive oral argument from all interested parties, and in the interests of protecting the respective rights of the interested parties, including the defendant, Mr. Telles, does hereby order as follows:

This order addresses the electronic devices Metro represented constitute the only electronic devices or other information in its possession that a reasonable person would understand may

1 contain Newsgathering Materials of Jeff German and/or the Review Journal, including but not
2 limited to identifying information about sources, research, interview notes, draft articles, and other
3 information related to Mr. German’s newsgathering for the Review Journal.

4 This order also addresses any additional electronic devices, information, documents, or other
5 materials that have come into the possession of Metro and/or any party in this matter, that a
6 reasonable person would understand may contain Newsgathering Materials of Jeff German and/or
7 the Review Journal, including but not limited to identifying information about sources, research,
8 interview notes, draft articles, and other information related to Mr. German’s Newsgathering for the
9 Review Journal.

10 The Review Journal has asserted that the Newsgathering privilege provided by NRS 49.275
11 is an absolute privilege.

12 The Las Vegas Metropolitan Police Department (“LVMPD”) seized the following electronic
13 devices from the body and home of Jeffrey German pursuant to LVMPD Event #220900010486
14 (“Seized Devices”).

- 15 a. Black Apple iPhone in Black Case;
- 16 b. Silver iMac;
- 17 c. “G” External Hard Drive;
- 18 d. Silver MacBook;
- 19 e. Silver and Black iMac; and
- 20 f. Blue Apple iMac.

21 The LVMPD obtained a lawful warrant to search the Seized Devices. SW-22-04823.

22 Mr. Jeffrey German was a journalist who published stories for the Las Vegas Review-Journal
23 (“LVRJ”). Mr. German is the victim in the underlying matter and the State of Nevada alleges a
24 motive in part due to Mr. German’s reporting on the Public Administrators office. Accordingly,
25 materials found on the seized devices *may* be relevant, material and within the scope of the search
26 warrants. Further, the State of Nevada may be obligated pursuant to the relevant discovery statutes
27 to turn over certain materials to the Defendant. *See* NRS 174.235; NRS 174.295. *See also* *Brady v.*
28 *Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

The Review Journal asserts that it is likely there are materials on the Seized Devices that are
confidential, privileged journalistic materials—i.e., published or unpublished information obtained

1 or prepared, by Mr. German or a journalistic colleague in their professional capacity in gathering,
2 receiving or processing information for communication to the public, or the source of any
3 information procured or obtained by Mr. German or a journalistic colleague. *See* NRS 49.275.

4 The court recognizes there are significant constitutional and due process rights at issue in this
5 matter. Further, although the news shield statute provides an absolute privilege to reporters engaged
6 in the newsgathering process, the Nevada Supreme Court recognizes **that there may be certain**
7 **situations when defendants' countervailing constitutional rights are at issue, in which the news**
8 **shield statute might have to yield so that justice may be served.** *See Diaz v. Eighth Judicial*
9 *District Court*, 116 Nev. 88, 101(2008).

10 Based on the unique facts and circumstances of this case, the news shield statute must yield
11 to the constitutional rights of the defendant and the State of Nevada in the criminal matter.
12 Therefore, the court in balancing the rights and interests of the interested parties imposes the
13 following protocol that must be followed when executing any search of the Seized Devices.

14 **IT IS ORDERED** that the following individuals are permitted to access and search the Seized
15 Devices ("Search Team"):

16 Detective Justine Gatus, P#9868, LVMPD;
17 Detective Arthur Hawkins, P#13505, LVMPD
18 Chief Deputy District Attorney Pamela Weckerly;
19 Chief Deputy District Attorney Christopher Hamner.

20 **IT IS FURTHER ORDERED** that the search team is to take all necessary steps to preserve
21 confidentiality, and may not discuss or disseminate any Journalistic Materials with or to any person
22 who is not a member of the search team, except by order of this court.

23 **IT IS FURTHER ORDERED** that the Seized Devices shall remain secured in the designated
24 search location and shall not be removed except by order of the court.

25 **IT IS FURTHER ORDERED** that the search team shall search the seized devices and determine
26 what, if any materials are both relevant to the underlying prosecution (*State of Nevada v. Robert*
27 *Telles*, Case No. C-22-368935-1) and within the scope of the search warrants. The materials that
28 are determined by the search team to be irrelevant to the underlying prosecution, or are outside the

1 scope of the search warrants, shall be provided to the court to be sealed and made a part of the
2 record. These materials will remain sealed and not subject to public disclosure until further order of
3 the court and the final adjudication of the rights of the Review Journal and/or any other entity or
4 person to those materials.

5 **IT IS FURTHER ORDERED** that the Search Team shall provide imaged copies of the materials to
6 the Review Journal as follows:

- 7 (1) Those materials that are sealed pursuant to the prior paragraph that a reasonable person
would understand may constitute Journalistic Materials; and
- 8 (2) All remaining materials on the Seized Devices that a reasonable person would understand
9 may constitute Journalistic Materials.

10 The Search Team shall provide those imaged copies within ten (10) days of searching the devices to
11 the Review Journal.

12 **IT IS FURTHER ORDERED** that the Review Journal shall review items provided by the Search
13 Team to determine and identify those items the Review Journal asserts are privileged under the
14 Nevada shield statute, NRS 49.275, the First Amendment to the United States Constitution, the
15 Nevada Constitution and/or any other law. (“The Privilege Log”).

16 **IT IS FURTHER ORDERED** the Review Journal will then advise the court within ten (10) days
17 whether it will agree to relinquish its rights to asserted privilege materials to narrow or eliminate any
18 dispute. If the Review Journal declines to relinquish its rights, the Review Journal shall describe
19 with specificity the rights it continues to assert, including which item is at issue.

20 **IT IS FURTHER ORDERED** that at the end of the process, if there remains any dispute over
21 whether materials on the Seized Devices are subject to privilege, that dispute will be adjudicated by
22 the court.

23 **IT IS FURTHER ORDERED** that, except as set forth specifically herein, no person may search,
24 inspect, disseminate, or provide access to the Seized Devices or any Journalistic Materials.

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IT IS FURTHER ORDERED that any Journalistic Materials are protected from public disclosure and are confidential absent further order of the Court.

IT IS FURTHER ORDERED that this Order is stayed. The Stay shall remain in effect until the Nevada Supreme Court rules on a Request for Stay.

IT IS SO ORDERED.

This 26th day of May, 2023

Dated this 26th day of May, 2023



**574 FB1 C6B4 C541
Michelle Leavitt
District Court Judge**

May 26, 2023



CERTIFIED COPY
ELECTRONIC SEAL (NRS 1.190(3))

1 **CERTIFICATE OF SERVICE**

2 I hereby certify on the date filed, this document was electronically served to the email
3 addresses and/or by Fax transmission or by standard mail to:

4 Pamela Weckerly, Chief Deputy District Attorney
Pamela.Weckerly@Clarkcountyda.com

5 Christopher Hamner, Chief Deputy District Attorney
6 Christopher.Hamner@clarkcountyda.com

7 Maria Case-Bateson Maria.Case-Bateson@clarkcountyda.com
8 Deana Daniels Deana.daniels@clarkcountyda.com

9 Margaret McLetchie, Esq.
10 Maggie@nvlitigation.com

11 David Z. Chesnoff, Esq.
12 dzchesnoff@cslawoffice.net

Richard Schonfeld, Esq.
rschonfeld@cslawoffice.net

13 Rosemary Reyes
14 rreyes@cslawoffice.net

David Chavez, Esq.
Cahvezd@ballardspahr.com

15 Joel E. Tasca, Esq.
16 tasca@ballardspahr.com

Adam Hosmer-Henner, Esq.
ahosmerhenner@mcdonaldcarano.com

17 Ashley Kissinger, Esq.
18 kissingera@ballardspahr.com

Kristen T. Gallagher, Esq.
kgallagher@mcdonaldcarano.com

19 Matthew Christian, Esq.
20 M16091C@LVMPD.com

Liesl Freedman, Esq.
L8706F@LVMPD.com

21 Robert Telles#5641107
22 330 S. Casino Center Blvd.
23 Las Vegas, NV. 89101

Julie Smith
9408 Hollycrest Drive
Las Vegas, NV 89117
Special Administrator of the Estate

24
25 *Pamela Osterman*

26 _____
27 Pamela Osterman
28 Judicial Executive Assistant
to the Honorable Michelle Leavitt
District Court Department XII

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Las Vegas Review-Journal, Inc.,
7 Plaintiff(s)

CASE NO: A-22-859361-C

8 vs.

DEPT. NO. Department 12

9 The State of Nevada,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 5/26/2023

16 Krista Busch

kbusch@maclaw.com

17 Jackie Nichols

jnichols@maclaw.com

18 Las Vegas Docket

LVDocket@ballardspahr.com

19 Joel Tasca

tasca@ballardspahr.com

20 Richard Schonfeld

rschonfeld@cslawoffice.net

21 Matthew Christian

m16091c@lvmpd.com

22 Pamela Weckerly Chief Deputy District
23 Attorney

Pamela.Weckerly@clarkcountyda.com

24 Ashley Kissinger

KissingerA@ballardspahr.com

25 Kennison Lay

layk@ballardspahr.com

26 Shandell Auten

S5496A@LVMPD.COM

27
28

1	Rosemary reyes	rreyes@cslawoffice.net
2	Docket Clerk	DocketClerk_LasVegas@ballardspahr.com
3		
4	David Chavez	chavezd@ballardspahr.com
5	Joseph Dagher	dagherj@ballardspahr.com
6	David Chesnoff	dzchesnoff@cslawoffice.net
7	Mari Mesquita	mesquitam@ballardspahr.com
8	Adam Hosmer-Henner	ahosmerhenner@mcdonaldcarano.com
9		
10	Kristen Gallagher	kgallagher@mcdonaldcarano.com
11	Marianne Carter	mcarter@mcdonaldcarano.com
12	Matthew Christian	m16091c@lvmpd.com
13	Adam Crawford	crawforda@ballardspahr.com
14	Camie Linnell	clinnell@cslawoffice.net
15		

16 If indicated below, a copy of the above mentioned filings were also served by mail
17 via United States Postal Service, postage prepaid, to the parties listed below at their last
18 known addresses on 5/30/2023

18	Public Defender	Clark County Public Defender
19		309 S. 3rd Street , Suite #2
20		Las Vegas, NV, 89101
21		
22		
23		
24		
25		
26		
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EXHIBIT E

AUG 14 2023

THE 8TH JUDICIAL DISTRICT OF MARION COUNTY, KANSAS

8:23 AM _____ PM

MN 2023M RWJ

IN RE: SEARCH WARRANT FOR: the premises commonly known as 117 S 3rd Street, Marion, Marion County, Kansas. The premise is described as a two-story building that has a red brick facade facing street to the east. There are steps going into a glass door area on the north side of the front of the building. Above the glass is a sign that says "Marion County Record".

SEARCH WARRANT

State of Kansas, Marion County, SS:

THE STATE OF KANSAS TO:

Chief Gideon Cody, Marion Police Department, or any peace officer of the State of Kansas.

Having evidence under oath before me from which I find there is probable cause to believe that an offense against the laws of the State of Kansas, including but not limited to violations of K.S.A. 21-6107 - Identity theft and K.S.A. 21-5839 - Unlawful acts concerning computers, has been committed and that certain contraband, fruits, instrumentalities and evidence of such offense, to-wit:

1. Forensically process and analyze in a controlled setting all listed electronic media, for the purpose of viewing and or retrieving for evidentiary purposes all data including electronic images, documents and stored electronic communications.
2. Digital communications devices allowing access to the Internet or to cellular digital networks which were or have been used to access the Kansas Department of Revenue records website.
3. A computer or digital device that has been used to access the Kansas Department of Revenue records website.
4. Documents and records pertaining to Kari Newell
5. Conduct a preview search of all located digital communications devices and digital storage media to exclude from seizure those which have not been involved in the identity theft, by use of manual or automated preview tools.
6. Digital storage media and the digital content which are, or have been, used to store documents and items of personal information as defined by K.S.A. 21-6107.
7. Digital software and application software installation and operation media.

8. Computer software, hardware or digital contents related to the sharing of Internet access over wired or wireless networks allowing multiple persons to appear on the Internet from the same IP address.
9. If computers or other digital devices are found in a running state, the investigator may acquire evidence from the devices prior to shutting the devices off. This acquisition may take several hours depending on the volume of data. This will include the contents of volatile memory related to computers and other digital communication devices that would tend to show the current and recent use of the computer, use of encryption, use of other communications devices, routes of Internet and other digital communications traffic and passwords, encryption keys or other dynamic details necessary to preserve the true state of running evidence.
10. Manuals and other documents (whether digital or written) which describe operation of items or software seized.
11. Items containing or displaying passwords, access codes, usernames, or other identifiers necessary to examine or operate items, software or information seized.
12. Correspondence or other documents (whether digital or written) pertaining to Kari Newell
13. Items or digital information that would tend to establish ownership or use of computers and Internet access equipment and ownership or use of any Internet service accounts and cellular digital networks to participate in the identity theft of Kari Newell.
14. Items that tend to show dominion and control of the property searched, to include utility bills, telephone bills, correspondence, rental agreements, and other identification documents.
15. Pictures of the exterior and interior of the premises.

The items listed in the Application for Search Warrant and the affidavit of probable cause are incorporated herein by reference and are located in or upon the above-described persons, places, things or means of conveyance.

YOU ARE THEREFORE COMMANDED forthwith to search the persons, place, thing, or means of conveyance herein before specified for such items holding them to be dealt with according to law and make due return of this warrant within (10) days of the date hereof.

Issued this 11th day of August, 2023 at 9:00 o'clock A.M.


 JUDGE, District Court, Marion County Kansas

Page 2 of 3

AUG 14 2023

RETURN

8:23 AM PM
MN2023MR65

I received this warrant on the 11 day of AUGUST, 2023, at approximately 945 o'clock A.m., and executed the same on the 11 day of AUGUST, 2023, by seizing the property described on the inventory and receipt attached hereto or shown on the reverse side hereof.

OFFICER SUPERVISING SEARCH



TITLE: OFFICER Z. HUDLIN

REPORT OF MONEY AND PROPERTY RECOVERED

MARION POLICE DEPARTMENT • MARION, KS 66861

23-108

Complaint Number <u>HUDLIN</u>	Offense	Date <u>08/11/2023</u>	Leave Blank <u>1056</u>
Officer(s) <u>117 S 3RD</u>			
Recovered From <u>MARION COUNTY RECORDS</u>	Address		Phone
Owner or Claimant	Address		Phone

Is property to be held for release by investigating officer? Yes ___ No ___ Has Record Bureau been checked for report of loss? Yes ___ No ___

Is property to be used as evidence? Yes No ___ Has owner been notified property is in Property Room? Yes ___ No ___

For safekeeping? Yes ___ No ___ May property be released to owner by Property Room? Yes ___ No ___

Party Arrested _____ Placed in Property Room by _____

NO.	Quantity	Description of Property	Est. Value
1	1	DEB GRUVER CELL PHONE IPHONE	
2	1	PHYLLIS TOWER THERMALTAKE CASE	
3	1	PHYLLIS PHONE MOTOROLA	
4	1	ERIC TOWER COOLERMASIER	
5	1	SERVER TOWER ANTEC CASE	
6	1	KISOR RECORD	
7	1	DEB GRUVER THERMALTAKE TOWER	
8	1	WESTERN DIGITAL EXTERNAL DRIVE	
9	1	OS TRIAGE DIGITAL DATA	
10			
11			
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Z. HUDLIN
Property Officer
08/11/2023
Date
Nº 791

EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DEBBIE K. “DEB” GRUVER,

Plaintiff,

vs.

CHIEF GIDEON CODY,
MARION, KANSAS POLICE DEPARTMENT,
in his individual capacity,

Defendant.

Case No.

COMPLAINT

COMES NOW the plaintiff, DEBBIE K. “DEB” GRUVER, through her undersigned counsel of record, and in support of her claims against the defendant, CHIEF GIDEON CODY, MARION, KANSAS POLICE DEPARTMENT, in his individual capacity, hereby states and alleges as follows:

INTRODUCTION

1. This action arises from a shocking, unprecedented and unconstitutional police raid in Marion, Kansas, a small Kansas town of approximately 1,900 citizens. Targeted in the Friday, August 11, 2023, raid were the offices and personnel of the local newspaper, the *Marion County Record*.

2. Separately targeted by police during the August 11 raids were two other nearby homes: (1) the home of the paper’s co-owner and publisher, Eric Meyer, and the paper’s 98-year-old co-owner – Eric’s mother, Joan Meyer; and (2) the home of the city’s Vice-Mayor, Ruth Herbel. Joan Meyer died the following day at 2:53 p.m. of sudden cardiac arrest.

3. On August 11, Chief Gideon Cody of the Marion Police Department obtained and executed on three search warrants for a newspaper's offices and two private homes ostensibly because a previously identified *Record* reporter, Phyllis Zorn, had accessed a local citizen's driving records from a public website, culminating in the seizure of 18 items including computer towers, a server tower, personal cellular phones, laptops, a router and an external hard drive.

4. *Marion County Record* reporter Deb Gruver, whose personal cellular phone was snatched away by Chief Cody during the raid on the *Record's* offices, now seeks justice and accountability under 42 U.S.C. § 1983 for Chief Cody's malicious and recklessly indifferent violation of her rights under the First and Fourth Amendments of the United States Constitution.

STATEMENT OF FACTS

Plaintiff hereby adopts by reference paragraphs one through four (1-4) inclusive, and, in addition, further states and alleges:

Lead-Up to the Raid

5. Deb Gruver is an award-winning journalist who began working as a Staff Writer with the *Marion County Record* in 2022 under Eric Meyer, the paper's co-owner and publisher. The *Record* is a weekly newspaper with offices located directly across the street from the Marion County District Courthouse.

6. In August 2022, Ms. Gruver was new to town and sought out popular local establishments for review. She ended up dining at the Parlour 1886 restaurant inside the Historic Elgin Hotel and wrote a glowing review, complimenting chef Kari Newell's spatchcock chicken with whole new potatoes and asparagus, followed by the "Death by Chocolate" cake for dessert. Chef Newell "outdid herself," Gruver wrote.

7. On February 1, 2023, chef Newell took over ownership of the restaurant, changing the name to Chef's Plate at Parlour 1886. The restaurant remained within the Historic Elgin Hotel, which was owned and operated by Tammy Ensey along with her husband, Jeremy.

8. Ms. Gruver and Ms. Newell maintained a friendly relationship until late April 2023, around the time of Chief Cody's hiring, when the relationship broke down. Ms. Newell criticized Ms. Gruver's reporting and complained about her talking to "sources" while inside the restaurant – apparently after overhearing a telephone call.

9. "I'm not the one [to mess with]," Ms. Newell told Ms. Gruver in a contentious text exchange.

10. In June 2023, Ms. Newell opened a coffee shop, Kari's Kitchen, directly across the street from the Elgin Hotel.

11. By June 2023, Ms. Newell's two restaurants, the offices of the *Marion County Record* and the Marion Police Department were all located within blocks of each other near downtown Marion.

12. Meanwhile, on April 21, 2023, the *Record* confirmed that Gideon Cody had accepted a job offer from Marion Mayor David Mayfield to become the new Chief of the Marion Police Department. Chief Cody came to Marion after 24 years with the Kansas City, Missouri Police Department, where he had most recently served as a Captain.

13. In mid-to-late April 2023, around the time of Chief Cody's application for the job, the *Marion County Record* began investigating various allegations of misconduct against Cody, based on anonymous sources who had worked with Cody in Kansas City but declined to go on record with their claims.

14. The *Record* could not obtain Cody's personnel file from the KCMO police department to independently verify the allegations, so it did not publish the story at the time.

15. Cody, however, was aware of the *Record's* investigation into his prior misconduct.

16. Specifically, Cody was aware that Ms. Gruver was the one conducting the investigation, having discussed the investigation with her around the time of his hiring in April 2023.

17. On August 1, 2023, Kari's Kitchen hosted a public meet-and-greet event with United States Representative Jake LaTurner (R, 2nd Dist.), whose constituents as a congressman included the citizens of Marion.

18. Three of the five members of the Marion County Board of County Commissioners were present at the public event.

19. Mr. Meyer and a *Record* reporter, Phyllis Zorn, attended the event and were in line attempting to buy coffee when Chief Cody approached them and advised that Ms. Newell had asked them to leave.

20. Newell later confirmed to reporters that she had asked Meyer and his reporter, Zorn, to leave, because she believed the newspaper "has a long-standing reputation for twisting and contorting comments within our community."

21. Mr. Meyer wrote and published a story about Ms. Newell which was published on Wednesday, August 9, 2023.

22. The story, titled "Restaurateur accuses paper, councilwoman¹" states that Ms. Newell appeared before the Marion City Council less than one week after ejecting *Record* reporters

1

http://peabodykansas.com/direct/restaurateur_accuses_paper_councilwoman+5447newell+52657374617572617465757220616363757365732070617065722c20636f756e63696c776f6d616e (accessed August 22, 2023).

from Congressman LaTurner's reception and accused the *Record* of illegally obtaining drunken-driving information about her and then providing it to a city council member, Vice-Mayor Herbel.

23. The story further stated that the *Record* and Vice-Mayor Herbel had both separately received information from a confidential source indicating that Ms. Newell's license had been suspended in 2008 due to a drunken-driving conviction and other driving infractions.

24. The story further stated that Ms. Newell had confirmed to the *Record* directly after the council meeting in a discussion she initiated that the information was accurate.

25. The story further stated that the *Record* had separately verified the information was accurate and had been obtained from a public website but had nevertheless decided against publishing the story.

26. In fact, *Record* reporter Phyllis Zorn had confirmed the accuracy of this information – which she had originally received from a local resident, Pam Magg, via a screenshot sent through Facebook – on the public Kansas Department of Revenue Driver's License Check website.

27. After receiving the screenshot and seeking to independently verify the information, Ms. Zorn had reached out to the Department of Revenue to ask how to obtain the information, and they directed her to the same link she ultimately utilized.

28. Kansas Department of Revenue spokesperson Zack Denney would later confirm to news outlets that the online search was legal. "The website is public-facing, and anyone can use it," he said.

29. The federal Driver's Privacy Protection Act, 18 U.S.C. 2721 (b)(5), allows access to information about a person's driver's status for research activities, so long as the personal information is not published, redisclosed, or used to contact individuals. In this instance, the information was used to verify the confidential source's information and was not published.

30. Instead of publishing the story, the *Record* consulted with an attorney and notified Chief Cody and the Marion County Sheriff that the source had alleged local law enforcement was aware that Ms. Newell did not have a valid driver's license and had ignored repeated violations of driving laws by Ms. Newell. Marion police had apparently notified Ms. Newell of the situation that past Monday, August 7, 2023.

31. According to the story, Ms. Newell also accused Vice-Mayor Herbel of "negligently and recklessly" sharing her personal information during the council meeting – she wanted to speak to the council so her colleagues would know "how vile [Herbel's] behavior can be."

32. At the time of the city council meeting, Ms. Newell did not have a Kansas liquor license and the liquor license for her new restaurant, Chef's Plate at Parlour 1886, was still carried under the name of the prior owner, Ms. Ensey.

33. Ms. Ensey's liquor license was apparently set to expire later in August.

34. The story further stated that during the post-council meeting discussion with the *Record*, Ms. Newell also indicated she thought the information had been supplied to the source – whose identity she speculated about – by her estranged husband as part of an attempt in divorce proceedings to retain ownership of vehicles on the grounds that she did not possess a license.

The Warrant

35. On Friday, August 11, 2023, Chief Cody delivered an *Application for Search Warrant* to Marion County District Court Magistrate Judge Laura E. Viar, who had been a Magistrate Judge since 2022.

36. By August 11, Chief Cody had been serving as Marion Police Chief while knowingly under investigation by Ms. Gruver and the *Record* for alleged prior misconduct since

the time of his application and hiring, had removed *Record* personnel from a public meet-and-greet session with a United States Congressman at the request of a restaurant owner, Ms. Newell, and had become aware of the *Record's* acquisition of public information about Ms. Newell's past drunken-driving arrest, which had caused an inflamed response by Ms. Newell – the same person who had become angry after apparently overhearing Ms. Gruver's telephonic conversation with a source in April.

37. By August 11, Chief Cody had also directly expressed to reporter Phyllis Zorn his support for her work – telling her that Eric Meyer and Deb Gruver were the real problem with the paper.

38. Investigation remains ongoing as to whether Marion County Attorney Joel Ensey had any direct involvement in reviewing, approving and/or presenting the *Application*.

39. In the Affiant's attestation to the application, Magistrate Judge Viar scratched out the "Notary" line and verified Chief Cody's signature as "Magistrate Viar."

40. In the sworn *Application*, Chief Cody recounted in some detail the recent history involving the *Record's* ouster from Kari's Kitchen on August 1 and the access of Kari Newell's KDOR records on the public website by *Record* personnel.

41. While referencing Pam Maag in the *Application*, Chief Cody provided no indication he had ever made the effort to interview Ms. Maag about the situation.

42. In the *Application*, Chief Cody claimed that downloading of the KDOR records involved "either impersonating the victim or lying about the reasons why the record was being sought."

43. In the *Application*, Chief Cody stated that the alleged perpetrator of this alleged crime was not unknown – it was *Record* reporter Phyllis Zorn.

44. In the *Application*, Chief Cody did not address or acknowledge any federal or state laws which might preclude his intended search or reflect that Ms. Zorn’s online search was not, in fact, illegal.

45. In the *Application*, Chief Cody did not assert any specific nexus between plaintiff Deb Gruver’s personal cellular phone and the alleged crime being investigated – Deb Gruver was never once mentioned in the nine-page *Affidavit*, and neither was her personal cellular phone.

46. In the *Application*, Chief Cody did not assert any factual basis for believing that any *Record* employee’s cellular phone or device aside from Phyllis Zorn’s could have possibly been used to access the Kansas Department of Revenue records website.

47. Chief Cody did not separately submit an application seeking to search either Ms. Gruver’s residence or Ms. Zorn’s residence – only the *Record*’s offices, the publisher’s home and the Vice-Mayor’s home.

48. In the *Application* and resulting *Warrant*, Chief Cody sought and was granted access to “2. Digital Communications devices allowing access to the Internet or to cellular digital networks which **were or have been used** to access the Kansas Department of Revenue records website.” (emphasis added)

49. In the *Application* and resulting *Warrant*, Chief Cody sought and was granted access to “3. A computer or digital device that **has been used** to access the Kansas Department of Revenue records website.” (emphasis added)

50. In the *Application* and resulting *Warrant*, Chief Cody sought and was granted access to “5. **Conduct a preview search** of all located digital communications devices and digital storage media **to exclude from seizure those which have not been involved in the identity theft,** by use of manual or automated preview tools.” (emphasis added)

51. Magistrate Judge Viar executed the *Search Warrant* at 9:00 a.m. on Friday, August 11, 2023.

The Raid



52. The photograph above shows Chief Cody directing and participating in the raid while his officers seize equipment from the *Record's* offices. Ms. Gruver's desk is shown on the bottom right.

53. After obtaining Magistrate Judge Viar's signature on the *Search Warrant*, Chief Cody ventured across the street to the *Record's* offices and spearheaded the raid, with the assistance of four other Marion Police Department officers and two Sheriff's Deputies.

54. Chief Cody first handed Ms. Gruver the *Warrant* when he arrived, and as she began to read it, she began to access her personal cellular phone – telling Chief Cody that she needed to call Eric Meyer.

55. Chief Cody responded by reaching over the papers and snatching the phone out of her hand.

56. The personal cellular phone was taken directly from Ms. Gruver's person and had not been left in the offices.

57. There was no factual basis to believe Ms. Gruver's personal cellular phone was evidence of the alleged crime, or any crime.

58. Ms. Gruver's cellular phone was not verified as having "been used to access the Kansas Department of Revenue records website."

59. Rather than conducting a preview search on site to "exclude from seizure" a personal cellular phone which had "not been involved in the [alleged] identity theft," Chief Cody seized the phone and removed it from the premises along with the other equipment.

60. One of the officers also read Ms. Gruver, Ms. Zorn and an office administrator their *Miranda* rights while Chief Cody watched, though she was never placed under arrest.

61. At Chief Cody's direction, the law enforcement officers began removing equipment, including the computer towers of Mr. Meyer, Ms. Zorn and Ms. Gruver, a server tower, an external drive and the personal cellular phones of Ms. Gruver and Ms. Zorn.

62. The raid continued unabated for three-plus hours while Ms. Gruver and the other *Record* staff were forced to wait outside in temperatures that had reached 100°F by 4:00 p.m.

63. After leaving the *Record's* offices, Chief Cody and his law enforcement team proceeded to execute the two additional signed warrants at the two private residences – Eric and Joan Meyer's and Vice-Mayor Herbel's – seizing additional equipment at those locations.

64. In the below photograph, 98-year-old Joan Meyer is seen speaking with officers during the August 11, 2023, raid on her home – one day prior to her death from cardiac arrest:



The Aftermath

65. Later that day, after Chief Cody’s raid on the *Record’s* offices was completed, Ms. Gruver went over to the Marion County Sheriff’s office in an attempt to retrieve her personal cellular phone.

66. Ms. Gruver spoke with Chief Cody inside the office and requested her phone back – telling Chief Cody she had nothing to do with any search of the driving records.

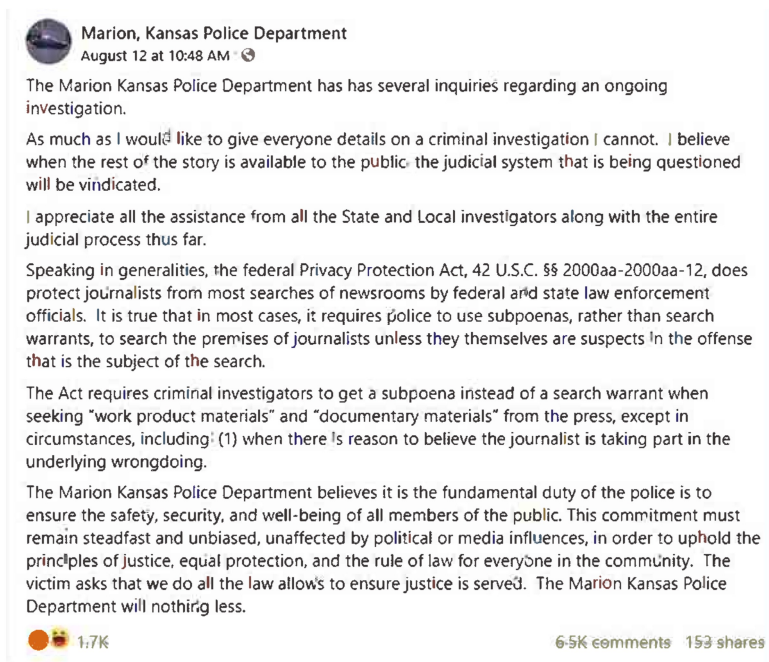
67. “I actually believe you,” Chief Cody replied with a grin.

68. The raid ultimately made international news in the days to follow, with Chief Cody’s behavior being universally questioned by major news outlets, constitutional scholars and even addressed by the White House Press Secretary in a daily press briefing.

69. In the days which followed, Chief Cody remained insistent that his search and seizure had been lawful. He made the following Facebook post on the Marion, Kansas Police Department’s page on August 12, 2023, at 10:48 a.m.²:

2

https://www.facebook.com/story.php?story_fbid=pfbid02g2orRAMmqkGGCeRxMUPL8E5kjL5N3QMJiiejzmSQbQQbviRKOUGMjYiZZxDsv57TI&id=100064381373990&mibextid=ZbWKwL (accessed August 30, 2023).



70. In his post, Chief Cody acknowledged that he had been aware of the “Privacy Protection Act of 1980,” found at 42 U.S.C. § 2000aa *et seq.*, which requires in most situations that law enforcement seek to obtain material from journalists through a subpoena, rather than through a surprise search conducted with a warrant.

71. Chief Cody claimed an exception to the statute, however, which applies when “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate.” 42 U.S.C. § 2000aa(b)(1).

72. Chief Cody did not explain in his post how there could have been probable cause to believe that Ms. Gruver had committed identity theft, or any other crime.

73. Chief Cody also failed to acknowledge K.S.A. 60-483 in his post, which provides that a journalist shall be entitled to a hearing when asserting a claim of privilege for any information gathered, received or processed.

74. Contrary to Chief Cody’s statement that the department would be “vindicated,” Marion County Attorney Ensey announced in a release on Wednesday, August 16th that he was

withdrawing the August 11 warrants and had asked the court to release the evidence seized so that it could be returned to the owners of the property by law enforcement.

75. In support of his determination, County Attorney Ensey stated in the release: “I have come to the conclusion that insufficient evidence exists to establish a legally sufficient nexus between this alleged crime and the places searched and the items seized.”

76. The Kansas Bureau of Investigation announced in an August 16, 2023, release that the investigation into the underlying data breach would continue under its jurisdiction, without review or examination of any of the evidence seized on Friday, August 11, 2023.

THE PARTIES, JURISDICTION & VENUE

Plaintiff hereby adopts by reference paragraphs one through seventy-six (1-76) inclusive, and, in addition, further states and alleges:

77. Plaintiff, DEB GRUVER (“plaintiff Gruver” or “Ms. Gruver”) is an adult individual and a citizen of Kansas, residing in Wichita, Sedgwick County.

78. Defendant, CHIEF GIDEON CODY, MARION, KANSAS POLICE DEPARTMENT (“Chief Cody” or “defendant Cody”), was at all times relevant herein, and remains at the time of this filing the Chief of the Marion, Kansas Police Department. Chief Cody is a citizen of the State of Kansas and upon belief maintains his principal residence in Marion County, Kansas. Chief Cody is being sued in his individual capacity for plaintiff Gruver’s 42 U.S.C. § 1983 claims. Chief Cody may be served with process personally.

79. Jurisdiction of this action is conferred by 28 U.S.C. § 1331, which provides original “federal question” jurisdiction over all civil actions arising under the United States Constitution and laws or treaties of the United States. Jurisdiction is further conferred by 28 U.S.C. § 1343(a)(3), which provides for original jurisdiction in suits authorized by 42 U.S.C. § 1983.

80. Plaintiff Gruver's claims for damages herein are authorized by: (1) 42 U.S.C. § 1983, which provides for redress for the deprivation under color of any statute, ordinance, regulation, custom or usage of any state or territory of any rights, privileges or immunities secured to all the citizens or persons within the jurisdiction of the United States; (2) the First Amendment of the United States Constitution, which protects freedom of speech and the press; (3) the Fourth Amendment of the United States Constitution, which protects the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; (4) 42 U.S.C. § 1988, which allows the prevailing party to collect a reasonable attorney's fee as costs in any action or proceeding to enforce 42 U.S.C. § 1983.

81. Venue is proper in the U.S. District Court for the District of Kansas under 28 U.S.C. § 1391(b)(1) & (2), as defendant Cody is a citizen of Marion, Kansas and the events giving rise to plaintiff Gruver's claims occurred in Marion, Kansas.

82. This action asserts no claims under the Kansas Tort Claims Act and thus the notice provisions of K.S.A. 12-105b(d) are inapplicable.

FIRST COUNT: *Violation of Plaintiff Gruver's Rights under the First Amendment of the United States Constitution & 42 U.S.C. § 1983*

Plaintiff hereby adopts by reference paragraphs one through eighty-two (1-82) inclusive, and, in addition, further states and alleges:

83. Under 42 U.S.C. § 1983, a person may recover damages for a deprivation of his or her constitutionally protected rights when that injury is inflicted under color of state law. Chief Cody acted in his individual capacity as Chief of the Marion, Kansas Police Department under color of state law when he signed an unreasonable and unlawful *Application for Search Warrant* and executed on an unreasonable and unlawful *Search Warrant* on August 11, 2023.

84. The *Application* was facially invalid in that it contended a search on a public-facing governmental website was illegal and contradicted the federal and/or state laws protecting journalists from search and seizure of journalistic materials.

85. The *Application* and *Warrant* were substantively invalid as existing evidence did not establish a legally sufficient nexus between the alleged crime and the places searched and items seized.

86. In executing on the unreasonable and unlawful *Search Warrant*, Chief Cody exceeded the scope of the warrant by seizing Ms. Gruver's personal cellular phone from her person, despite the fact that neither Ms. Gruver nor her personal cellular phone were referenced anywhere in the *Application* or *Warrant*, there was no evidence to suggest that the seized property was evidence of a crime, there was no evidence to establish that the personal cellular phone had been used to access the Kansas Department of Revenue records website, the scope of the warrant only authorized at most a preview to exclude the personal cellular phone from seizure, and Kansas law established that a person's mere nearness to others independently suspected of criminal activity does not, without more evidence, give rise to probable cause to search that person.

87. In seizing Ms. Gruver's personal cellular phone despite the seizure exceeding the scope of the unreasonable and unlawful search warrant, Chief Cody acted in unreasonable and unnecessarily violent fashion, causing injury to plaintiff's Gruver's rights and her person.

88. Such acts were done by Chief Cody in retaliation for Ms. Gruver exercising her protected rights under the First Amendment of the United States Constitution as a reporter for the *Record*, which protects freedom of speech and freedom of the press.

89. Upon belief, Ms. Gruver's affiliation with the *Marion County Record*, which had investigated his alleged prior acts of misconduct and recently published the story about Ms.

Newell's prior driving history, sparked Chief Cody's desire for retaliation against her personally, in violation of her First Amendment rights.

90. Defendant Cody is liable in his individual capacity for his conduct violating Ms. Gruver's constitutional rights. Because his action was malicious and recklessly indifferent to plaintiff Gruver's federally protected rights, he may be subjected to punitive damages.

91. Chief Cody's unlawful and unreasonable *Applications, Warrants*, searches and seizures at the homes of Eric & Joan Meyer and Ruth Herbel are further evidence of his malicious intent.

92. As a direct and proximate result of defendant Cody's conduct violating Ms. Gruver's constitutional rights, plaintiff Gruver has sustained damages, including, but not limited to, emotional distress, mental anguish and physical injury. Defendant Cody's malicious and recklessly indifferent acts justify an award of punitive damages.

SECOND COUNT: *Violation of Plaintiff Gruver's Rights under the Fourth Amendment of the United States Constitution & 42 U.S.C. § 1983*

Plaintiff hereby adopts by reference paragraphs one through ninety-two (1-92) inclusive, and, in addition, further states and alleges:

93. Under 42 U.S.C. § 1983, a person may recover damages for a deprivation of his or her constitutionally protected rights when that injury is inflicted under color of state law. Chief Cody acted in his individual capacity as Chief of the Marion, Kansas Police Department under color of state law when he signed an unreasonable and unlawful *Application for Search Warrant* and executed on an unreasonable and unlawful *Search Warrant* on August 11, 2023.

94. The *Application* was facially invalid in that it contended a search on a public-facing governmental website was illegal and contradicted the federal and/or state laws protecting journalists from search and seizure of journalistic materials.

95. The *Application* and *Warrant* were substantively invalid as existing evidence did not establish a legally sufficient nexus between the alleged crime and the places searched and items seized.

96. In executing on the unreasonable and unlawful *Search Warrant*, Chief Cody exceeded the scope of the warrant by seizing Ms. Gruver's personal cellular phone from her person, despite the fact that neither Ms. Gruver nor her personal cellular phone were referenced anywhere in the *Application* or *Warrant*, there was no evidence to suggest that the seized property was evidence of a crime, there was no evidence to establish that the personal cellular phone had been used to access the Kansas Department of Revenue records website, the scope of the warrant only authorized at most a preview to exclude the personal cellular phone from seizure, and Kansas law established that a person's mere nearness to others independently suspected of criminal activity does not, without more evidence, give rise to probable cause to search that person.

97. In seizing Ms. Gruver's personal cellular phone despite the seizure exceeding the scope of the unreasonable and unlawful search warrant, Chief Cody acted in unreasonable and unnecessarily violent fashion, causing injury to plaintiff's Gruver's rights and her person.

98. Such acts were done by Chief Cody in violation of Ms. Gruver's protected rights under the Fourth Amendment of the United States Constitution, which protects citizens from unreasonable and unlawful searches and seizures.

99. No reasonable officer in Chief Cody's position would have believed the seizure of Ms. Gruver's personal cellular phone constitutionally complied with the Fourth Amendment of the United States Constitution.

100. Defendant Cody is liable in his individual capacity for his conduct violating Ms. Gruver's constitutional rights. Because his action was malicious and recklessly indifferent to plaintiff Gruver's federally protected rights, he may be subjected to punitive damages.

101. Chief Cody's unlawful and unreasonable *Applications, Warrants*, searches and seizures at the homes of Eric & Joan Meyer and Ruth Herbel are further evidence of his malicious intent.

102. As a direct and proximate result of defendant Cody's conduct violating Ms. Gruver's constitutional rights, plaintiff Gruver has sustained damages, including, but not limited to, emotional distress, mental anguish and physical injury. Defendant Cody's malicious and recklessly indifferent acts justify an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, plaintiff DEBBIE K. "DEB" GRUVER prays for damages against the defendant as follows: (1) compensatory damages in excess of \$75,000.00; (2) punitive damages in excess of \$75,000.00; and (3) costs, expenses and reasonable attorney's fees pursuant to K.S.A. 42 U.S.C. § 1988. Plaintiff further requests any other relief the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff DEBBIE K. "DEB" GRUVER hereby demands a trial by jury. Pursuant to D. Kan. Local R. 40.2, plaintiff will file a Designation of Place of Trial contemporaneous to the filing of her Complaint, designating Wichita, Kansas as the Place of Trial.

Respectfully submitted,

HUTTON & HUTTON

/s/ Blake A. Shuart, #24463

Blake A. Shuart, #24463

Andrew W. Hutton, #10264

J. Darin Hayes, #16755

Matthew M. Dwyer, #22492

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