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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
11/12/2024
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JOHN DOE, an individual,

Plaintiff,

v.

SUBSTACK, INC., a Delaware Corporation; AMAZON WEB SERVICES, INC., a Delaware corporation; JACK POULSON, an individual; TECH INQUIRY, INC., a Delaware corporation; DOES 1-25, inclusive,

Defendants.

Case No. CGC-24-618681

OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND UNCONSTITUTIONAL PRIOR RESTRAINT

Date: November 13, 2024
Time: 11:00 a.m.
Dept.: 302

Action Filed: October 3, 2024

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I. SUMMARY OF ARGUMENT

Plaintiff asks this Court to enter a temporary restraining order ("TRO") requiring Defendant Amazon Web Services, Inc. ("AWS") to stop hosting a website containing news articles published in late 2023 about his 2022 arrest for felony domestic violence. Plaintiff's argument relies on the spurious premise that, because the arrest record was subsequently sealed pursuant to statute, the arrest did not happen at all. The Application does not come close to meeting the standard for a mandatory injunction, both because Plaintiff is unlikely to prevail on his claims and because—as his year-long delay in seeking the TRO indicates—he has failed to show he will suffer imminent irreparable harm unless it issues. The Court should deny the Application.

First, Plaintiff's delay defeats his *ex parte* application. By his own admission, Plaintiff became aware of the facts underlying his claims no later than November 2023. Yet he waited until November 2024 to seek an injunction. Plaintiff's failure to pursue this matter expeditiously undermines the purported urgency of his request and warrants denial of his Application.

Second, Plaintiff separately is not entitled to the TRO he seeks because he has not shown he is likely to succeed on the merits of his claims. The order is classic prior restraint, which cannot be justified under the United States or California Constitutions—as such restraints are permissible, if at all, only in the most exceptional circumstances, such as to prevent the dissemination of information about troop movements during wartime. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Plaintiff's claims fail for the independent reasons that the publication of an arrest record is privileged under California law and because AWS is entitled to the protections of Section 230 of the Communications Decency Act, 47 U.S.C. 230, which provides immunity to services that merely host content created by third parties.

Finally, even if Plaintiff had shown a likelihood of prevailing on the merits, he cannot show the harm he will suffer absent a TRO outweighs the TRO's harm. As Plaintiff admits, other outlets have reported the exact information at issue, so the order will not protect his identity. On the other hand, "[t]he first amendment informs us that the damage resulting from a prior restraint—even a prior restraint of the shortest duration—is extraordinarily grave." *CBS v. District Court*, 729 F.2d 1174, 1177 (9th Cir. 1983) (emphasis added). Indeed, the "loss of First Amendment freedoms, for

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even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

For these reasons, the Court should deny the Application.

II. BACKGROUND

Plaintiff's claims stem from a 2022 arrest report in which Plaintiff was suspected of committing felony domestic violence (the "Incident Report"). *See also* Doe Decl. Ex. A (attaching the Report). Plaintiff does not dispute that he was arrested. Instead, he alleges that the Incident Report was sealed by court order in February 2022 under Penal Code Sections 851.91 and 851.92, *id.* Ex. D, which permit a person who was arrested but not convicted to petition a court to seal his arrest records and for an order stating that the arrest "is deemed not to have occurred."

The Complaint alleges Defendant Jack Poulson, an "independent journalist," Compl. ¶ 4, first published the Incident Report in September 2023, and published additional articles about the Incident Report in October and November 2023. *Id.* ¶¶ 14, 25. It further alleges that Plaintiff became aware of the posts and their "illegal content" at least as early as November 2023. *Id.* ¶ 33.

Plaintiff has sued not only Poulson, but also AWS and Substack, Inc., on the basis that AWS allegedly hosts Substack's website, to which Poulson posted the allegedly unlawful content. *Id.* ¶¶ 36, 38.

In his Declaration in support of the Application, Plaintiff admits that multiple other entities, including The San Francisco Chronicle, have published their own news articles about the Incident Report, including by identifying Plaintiff by name. *See* Doe Decl. ¶ 13.

Plaintiff asserts negligence and other California claims. He asserts that absent the order he seeks, he will suffer irreparable harm from the "egregious stigmatization" associated with being "someone accused of a crime" as well as "severe emotional distress; loss of personal and professional opportunities; and loss of safety, happiness, and privacy." *Id.* ¶ 15.

III. THE COURT SHOULD DENY THE APPLICATION BECAUSE PLAINTIFF UNREASONABLY DELAYED IN BRINGING IT

"[F]iling an ex parte motion … is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!' There had better be a fire." *Mission Power Engineering Co. v. Continental*

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Casualty Co., 883 F. Supp. 488 (C.D. Cal. 1995). There is no fire here. By his own admission, Plaintiff learned of the allegedly "illegal nature of the content" no later than November 2023, two months after articles containing information about the Incident Report were first published. Compl. ¶¶ 14, 23, 24. Yet Plaintiff inexplicably waited 11 months to file this lawsuit and five more weeks to seek a TRO. Because Plaintiff has not even attempted to justify his lack of diligence, he has failed to show good cause, and the Court should deny his Application. *See Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, 175 Cal. App. 4th 64, 84 (2009) (affirming denial of *ex parte* application for order shortening time based on lack of diligence); *Mission Power*, 883 F. Supp. at 493 (good cause for *ex parte* relief requires diligence).

IV. PLAINTIFF HAS NOT COME CLOSE TO SHOWING THE EXTRAORDINARY RELIEF HE SEEKS IS WARRANTED HERE

To decide whether to issue a TRO, a trial court considers two factors: (1) "the likelihood that the plaintiff will prevail on the merits of its case at trial" and (2) the "interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction." *Abrams v. Saint John's Hospital*, 25 Cal. App. 4th 628, 635-36 (1994). "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo." *Id.* "When, as here, the preliminary injunction mandates an affirmative act that changes the status quo, it is scrutinized even more closely on appeal: The judicial resistance to injunctive relief increases when the attempt is made to compel the doing of affirmative acts. A preliminary mandatory injunction is rarely granted." *City of Corona v. AMG Outdoor Advert., Inc*., 244 Cal. App. 4th 291, 299 (2016), *as modified* (Jan. 26, 2016) (citations, quotation marks omitted). These factors require denying the Application.

A. Plaintiff Is Not Likely To Prevail On His Claims As To AWS.

1. Plaintiff Seeks An Unconstitutional Prior Restraint.

Plaintiff seeks a TRO "restrain[ing] and enjoin[ing]" Defendants from "disseminating incident report number 210-844-280 (the 'Incident Report') or any information related to or

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describing the contents of the sealed Incident Report." *See* Proposed Order at 2."[1] He also asks that the Court require Defendants to "(2) immediately remove all URLs, posts, articles, and other content under Defendants' control that reference, link to, or otherwise disclose the Sealed Report or any information related to it." *Id.* Each[2] is an unconstitutional prior restraint, which is "one of the most extraordinary remedies known to our jurisprudence" and "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976). *See also Hassell v. Bird*, 247 Cal. App. 4th 1336, 1359 (2016) ("[a]n order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint"). In fact, "a chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near*, 283 U.S. at 713. Every prior restraint request thus bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam) (Brennan, J., concurring) (same). Prior restraints are justified only in the most exceptional circumstances—such as to prevent publication of the sailing dates of transport ships or the number and location of soldiers in wartime, *Near*, 283 U.S. at 716, or to "suppress[] information that would set in motion a nuclear holocaust." *N.Y. Times Co.*, 403 U.S. at 726.[3]

[1] The requested TRO is independently defective because it is unconstitutionally vague and overbroad. In addition to restraining Defendants' publication of information from the Incident Report, it also seeks to prevent Defendants from publishing "any information **related to**" the Incident Report. (Emphasis added). Any order restricting speech rights must be narrowly tailored. *See, e.g., Nebraska Press*, 427 U.S. at 568.

[2] While many prior restraints enjoin speech before its initial publication, orders to stop or remove speech also are prior restraints and presumptively unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971) (injunction restraining distribution of leaflet already distributed to public was unconstitutional prior restraint). Thus, in *Flack v. Municipal Court*, 66 Cal.2d 981, 990 (1967), this California Supreme Court rejected a seizure of materials that *already had been publicly displayed*, explaining that it "effects a prior restraint upon freedom of speech or press and constitutes a denial of procedural due process of law." (Citation omitted.) *See also Steiner v. Superior Court*, 220 Cal. App. 4th 1479, 1482 (2013) (trial court's order requiring attorney to remove pages from website during trial was "unlawful prior restraint on the attorney's free speech rights"); *Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. 2015) ("[t]he panel's takedown order of a film of substantial interest to the public is a classic prior restraint of speech") (citations omitted)).

[3] The draconian nature of the prior restraint is underscored by the fact that "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

The prior restraint Plaintiff seeks also would violate the California Constitution. Following the unbroken line of United States Supreme Court authorities discussed above, California courts also have rejected prior restraints. In fact, because the guarantee of free speech and press found in Article I, Section 2(a) of the California Constitution "is more definitive and inclusive than the First Amendment," the burden on a party seeking a prior restraint in this state is even more onerous, and may be insurmountable. *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 724 (1995). A century ago, the California Supreme Court explained the breadth of the state's protection of speech and press rights:

> The wording of [Article I, section 2(a)] is terse and vigorous, and its meaning so plain that construction is not needed. **The right of the citizen to freely … publish his sentiments is unlimited[.] …** He shall have no censor over him …, but he shall be held accountable to the law for … what he publishes.

Dailey v. Superior Court, 112 Cal. 94, 97 (1896) (emphasis added).

California courts have relied on this state guarantee, as well as the First Amendment, in rejecting prior restraints, which the California Supreme Court has denounced as "the most severe method of intellectual suppression known in modern times." *Flack*, 66 Cal. 2d at 988 n.5. For example, reversing a prior restraint barring a television station from broadcasting a sketch of a criminal defendant, one court emphasized that "if permissible at all, [prior restraints] are permissible only in the most extraordinary of circumstances." *KCST-TV Channel 39 v. Municipal Court*, 201 Cal. App. 3d 143, 146 (1988).

The California Court of Appeal's decision in *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232 (2000), is particularly instructive here. There, the court held that neither the statutory physician-patient privilege nor the plaintiff's privacy interest could justify a prior restraint. 84 Cal. App. 4th at 1243. The court was unequivocal, noting that "respondent can point to no case where any court in the nation has held that a threatened violation of the physician-patient privilege, or any other privilege, justifies a prior restraint of speech." *Id.* The court also dismissed the plaintiff's asserted "right to privacy" as a sufficient justification for a prior restraint. The court acknowledged that "the things [that the defendant, a plastic surgeon,] is alleged to have done to his anaesthetized patients are vulgar and crude in the extreme, and we do not doubt that those patients, if identified, would suffer embarrassment and shame." *Id.* at 1244. Even on such facts, however, the court

made clear that "sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh the guarantees of free speech in our federal and state Constitutions." *Id.* The court concluded: "[W]e are aware of no case in any jurisdiction in which a prior restraint has been imposed to prevent an intrusion into privacy." *Id. See also Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1147 (1996) (rejecting injunction barring ex-husband's from revealing intimate details about actress notwithstanding claims that her privacy would be invaded).

Here, Plaintiff's justification for the requested prior restraint—that the posts and Incident Report harm his reputation and disclose private information—does not come close to meeting these standards.

2. Republication Of The Incident Report Is Privileged.

Plaintiff separately is unlikely to succeed because the challenged conduct—publication of an official arrest record and information from it—is privileged under binding Supreme Court and California law. ***First***, the U.S. Supreme Court consistently has held that the First Amendment protects a journalist's[4] right to publish information about matters of public concern that it lawfully obtained through "routine newspaper reporting techniques." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). That constitutional protection applies even if state law mandates that the information be kept confidential,[5] or the source of the information violated a legal obligation to keep it secret.[6] As the Supreme Court has explained, the fact that *a source* may be obligated not to publicly disclose certain confidential information does not "make the newspaper's ensuing *receipt* of this information unlawful." *Florida Star*, 491 U.S. at 536 (emphasis added).

[4] That Mr. Poulson is a freelance reporter does not change the analysis. California courts have made clear that bloggers are journalists under California law. *See O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1457 (2006). *See also People v. Von Villas*, 10 Cal. App. 4th 201, 231-32 (1992) (freelance reporters are entitled to protections afforded to traditional media journalists); *Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 28-29 (1984) (same).

[5] *E.g.*, *Smith*, 443 U.S. at 103 (under First Amendment, statute barring publication of information about juvenile criminal defendant could not be applied to newspaper publisher that obtained information by monitoring police band and interviewing witnesses); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (striking down law criminalizing publication of information from confidential judicial misconduct commission proceedings).

[6] *E.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 526-29 (1989) (First Amendment precluded holding newspaper liable for publishing identity of rape victim in violation of state law).

These constitutional protections apply even if a reporter "*knew or had reason to know*" that the source of information was prohibited from disclosing it. *Bartnicki v. Vopper*, 532 U.S. 514, 520 (2001) (emphasis added). Consistent with these principles, courts around the country have long recognized that the First Amendment protects "routine" newsgathering conduct, such as "asking questions of people with information ('including those with confidential or restricted information')." *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 207, 237 (1998) (citation omitted). As the Court in *Bartnicki* explained, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535.[7]

California courts similarly have rejected efforts to hold publisher defendants liable for publishing truthful information on matters of public concern, even if their sources allegedly acted unlawfully[8] in disclosing the materials. *E.g., Ass'n for Los Angeles Deputy Sheriffs v. Los Angeles Times Comm'ns LLC*, 239 Cal. App. 4th 808, 819-20 (2015) (rejecting argument that newspaper acted illegally by receiving and publishing confidential law enforcement files); *Jenni Rivera Enterp., LLC v. Latin World Entmt. Holdings, Inc.*, 36 Cal. App. 5th 766, 800 (2019) (applying *Bartnicki*, TV broadcaster could not be held liable even if producer of program allegedly breached a non-disclosure agreement). Such is the case here. In his Application, Plaintiff argues that Poulson received the Incident Report from Newton Oldfather, who in turn had access to it through his position on the San Francisco City Attorney's Office or the Department of Policy Accountability. App. at 1 n.2 (alleging "Poulson came into possession of the sealed arrest report, either directly or indirectly, through attorney Newton Oldfather").

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[7] *See also Jean v. Massachusetts State Police*, 492 F.3d 24, 31-32 (1st Cir. 2007) (website publisher could not be held liable for disseminating information that her source acquired illegally, despite allegations that they worked in "active collaboration" to publicize the information); *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 435-36, 449 (S.D.N.Y. 2019); *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 787 (3d Cir. 2005) ("[a]lthough [the source] violated Pennsylvania law prohibiting the release of juvenile arrest records by doing so, his unlawful release of the information does not make receipt of that information by the Herald Standard unlawful").

[8] For this reason, Plaintiff's citation to *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) for the proposition that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news" is a red herring. App. at 6. The whole point of the *Bartnicki* line of cases is that "generally applicable laws" cannot constitutionally be applied to media defendants in these circumstances.

These protections doom all of Plaintiff's claims. Courts uniformly have held that, where reputational damages are sought, "[l]iability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication." *Reader's Digest Ass'n v. Super. Ct.*, 37 Cal. 3d 244, 265 (1984). *See also Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1042-43 (1986); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50, 54-56 (1988) (First Amendment barred emotional distress claim for same reasons as defamation claim); *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1014 (2001) (same; rejecting interference with economic advantage claim). Because each of Plaintiff's claims seek reputational damage, they are subject to the same constitutional requirements as his libel claim, regardless of the claims' labels, and fail.

None of Plaintiff's arguments to the contrary are meritorious. *First*, contrary to Plaintiff's argument, alleged felony domestic violence by a tech executive is a matter of public interest. *E.g., Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164 (2003) ("[n]ews reports concerning current criminal activity serve important public interests"); *Sipple v. Found. For Nat'l Progress*, 71 Cal. App. 4th 226, 238 (1999) (magazine article about domestic violence claims concerned issue of public interest). The public interest here is further demonstrated by the media coverage of this case. *E.g., Cross v. Cooper*, 197 Cal. App. 4th 357, 378 n.13 (2011) ("extensive media coverage" of speech established public interest); *Sipple*, 71 Cal. App. 4th at 238-39 ("public interest can be 'evidenced by media coverage'"). *See also* Doe Decl. ¶ 13. *Third*, Plaintiff's claim that the privilege applies only where information is obtained "from the government" is a non-sequitur: Plaintiff alleges that Poulson received the Incident Report from Oldfather, who accessed it via his role with the government. App. at 1 n.2. *Fourth*, as discussed above, that the Incident Report was sealed and made a legal nullity does not make the articles false.

Nor is Plaintiff helped by the cases he cites. App. at 5-6. In *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121 (1999), the court approved an injunction addressing conduct that took the form of speech, which a jury had determined constituted sexual harassment. *Id.* at 135, 142 (quotation omitted).[9] *Flatley v. Mauro*, 39 Cal. 4th 299 (2006) is inapposite: there, the California

[9] *Aguilar* also does not apply to a situation like this one, where a plaintiff seeks to stop a media entity from publishing information. *See, e.g., Lyle v. Warner Brothers TV Prods*., 38 Cal. 4th 264, 297 (2006) (Chin, J., concurring) ("[i]n *Aguilar* … the workplace was a car rental company ….

Supreme Court was examining the SLAPP statute's "very narrow" illegality exception, and held that under "specific and extreme circumstances" where it is *undisputed* that the defendant engaged in criminal extortion, the SLAPP statute does not apply. *Id.* at 332 n.16. Because the speech at issue here was not "between purely private parties" but rather publication of an official government record, and also plainly was not made with "no legitimate purpose," *E.G. v. M.L.*, 105 Cal. App. 5th 688 (2024) and *Brekke v. Wills*, 125 Cal. App. 4th 1400 (2005) also are inapposite.

3. Section 230 Prohibits The Court From Entering The Requested Injunction.

Section 230(c)(1) of the Communications Decency Act, prohibits courts from imposing legal obligations on (i) interactive computer services (ii) to publish, block, remove, edit, or monitor (iii) third-party content. *See Wozniak v. YouTube, LLC*, 100 Cal. App. 5th 893, 910 (2024) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102, 1105 (9th Cir. 2009) and interpreting 47 U.S.C. §§ 230(c)(1) and (e)(3)). The statute "confer[s] broad immunity on Internet intermediaries," *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006), including from injunctions that would compel them to publish or remove content. *See Hassell*, 5 Cal. 5th at 545 (Section 230 barred court order enjoining Yelp to remove user-generated content from publication).

The elements of Section 230 immunity bar Plaintiff's requested TRO.

First, AWS is an "interactive computer service" since it is an "access software provider" alleged to provide "client or server software" to websites to support their publication of speech. 47 U.S.C. §§ 230(f)(2), (f)(4). It is accordingly eligible for the immunity Section 230(c)(1) provides. *See Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1008 (9th Cir. 2023) ("website hosting provider" is an interactive computer service); *see also, e.g., Does #1-50 v. Salesforce.com, Inc.*, 2021 WL 6143093, at *6 (Cal. Ct. App. Dec. 30, 2021) (unpublished) (similar).

Second, Plaintiff unambiguously seeks to impose legal obligations affecting AWS's publishing activities—i.e., its decisions "whether to publish, withdraw, postpone or alter content." *Barrett*, 40 Cal.4th at 43 (quotation omitted). Although Plaintiff claims California Penal Code § 11143 only criminalizes the possession of information and not its publication, App. at 7-8, "what

When, as here, the workplace product is the creative expression itself, free speech rights are paramount").

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matters is not the name of the cause of action" but rather "the conduct [the plaintiff] alleges is injurious" and the substantive "duty" the plaintiff seeks to impose on the defendant to remedy that injury. *Prager Univ. v. Google LLC*, 85 Cal. App. 5th 1022, 1033 (2022) (quoting *Barnes*, 570 F.3d at 1102). Thus, in *Barnes*, the plaintiff's negligent undertaking claim was barred because it would have imposed on Yahoo! a duty to remove allegedly offensive content. 570 F.3d at 1103. So too in *Prager*, where plaintiff's claims failed because they sought to alter editorial decisions YouTube made to publish certain videos to certain audiences, regardless of the cause of action or body of law under which they were "styled." 85 Cal. App. 5th at 1033; *see also, e.g., Wozniak*, 100 Cal. App. 5th at 909-18 (Section 230 barred negligent security, design defect, and failure-to-warn claims against that would have required YouTube to screen for and block harmful content).

The same follows here. Putting aside labels, the relief Plaintiff seeks is not related to possession, but an injunction forcing AWS to "stop[] disseminating" the Incident Report. App. at 1 (motion seeks to prevent "wider dissemination" of this information); *see also* Proposed Order ¶¶ 1-2 (relief sought is an order "enjoining" AWS from "[d]isseminating" this information and requiring its "removal of all URLs, posts, articles, and other content" on its service). Removing content from its service is indeed the only way AWS could divest itself of the records at all. *See Est. of Bride by & through Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1177 & n.3 (9th Cir. 2024) (Section 230 preempts any duty that "requires" a defendant to "moderate content to fulfill its duty"). Any order requiring AWS to take down content necessarily treats it as a publisher and regulates AWS's publication activities. *See Hassell*, 5 Cal. 5th at 545-48.

Third, the content is "information provided by another information content provider" and not AWS. *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 24 (2021) (quoting *Barnes*, 570 F.3d at 1100-01). There is no allegation that AWS created the Incident Report or posts, nor that AWS materially contributed to their creation. These are simply records created by police and posted online by an independent journalist to a website that AWS allegedly hosts. *See* Compl. ¶¶ 33, 39.

Section 230 bars Plaintiff's request for a TRO.

B. Plaintiff Cannot Establish That He Will Suffer Irreparable Harm Absent A TRO

California law requires that parties seeking injunctive relief demonstrate that they will suffer "irreparable harm" in the absence of an injunction. C.C.P. § 526(a)(2)[10]. Such a showing requires evidence that the moving party will suffer an imminent, severe injury that cannot later be addressed by way of a suit for damages. *People ex rel. Gow v. Mitchell Bros.*, 118 Cal. App. 3d 863, 870-71 (1981); *accord E. H. Renzel Co. v. Warehousemen's Union*, 16 Cal. 2d 369, 373 (1940) (mere allegation that "great and irreparable injury" will result does not satisfy plaintiff's burden; plaintiff must "prove actual or threatened" irreparable injury); *7978 Corporation v. Pitchess*, 41 Cal. App. 3d 42, 46 (1974) (same). If interim injunctive relief would cause the defendants to suffer greater hardship than the plaintiff would suffer from a denial of the relief, the court should deny injunctive relief. *Continental Baking Co. v. Katz*, 68 Cal. 2d 512, 528 (1968) (court must consider "whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it"); *accord Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 633 (1995).

Plaintiff cannot satisfy this requirement for at least two reasons.

First, a party's lengthy delay before filing suit or seeking injunctive relief provides compelling evidence that the plaintiff has not suffered and will not suffer irreparable harm.[11] Here, Plaintiff has delayed both. Plaintiff's Complaint reveals that he has been aware of the at-issue articles for nearly a year, since November 2023, but waited until October 2024 to bring suit. Plaintiff then waited more than a month to seek "emergency" injunctive relief. This delay independently suggests that Plaintiff has not suffered and will not suffer irreparable harm.

Second, Plaintiff cannot show that any harm he would suffer in the absence of the requested TRO would outweigh the harm resulting from a prior restraint. As the Ninth Circuit has recognized, "[t]he first amendment informs us that the damage resulting from a prior restraint—

[10] *Ex parte* relief also requires an applicant must make a showing of "irreparable harm." Cal. Rule of Ct. 3.1202(c). The Application should independently be denied on this procedural ground.

[11] *E.g., Youngblood v. Wilcox*, 207 Cal. App. 3d 1368, 1376 (1989); *accord Nutro Products v. Cole Grain Co.*, 3 Cal. App. 4th 860, 866 (1992) ("delay in moving for a preliminary injunction may be considered in determining whether the claimed injury is 'irreparable'"); *Burnett v. Whitesides*, 13 Cal. 156 (1859) (a preliminary injunction should be denied "where long delays have intervened since the alleged injury" and the filing of the requested injunctive relief).

even a prior restraint of the shortest duration—is extraordinarily grave." *CBS*, 729 F.2d at 1177. Indeed, it is black letter law that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373-74. *See also In re King World Prods.*, 898 F.2d 56, 60 (6th Cir. 1990) (because a prior restraint in this circumstance "impinges on the exercise of editorial discretion," it, "by definition, has an immediate and irreversible sanction").

On the flip side, Plaintiff cannot show that the TRO would actually *prevent* any harm to him whatsoever, since multiple other outlets have reported the same information Plaintiff seeks a prior restraint of here. *See* Doe Decl. ¶ 13. In the analogous sealing context, courts routinely find there is no justification for sealing "records that contain only facts already known or available to the public." *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 898 (2007) (holding that sealing was improper because "plaintiff has provided no basis for a conclusion that keeping the records in question under seal will prevent the public from learning anything it does not already know, or cannot find out"). *See also Hurvitz*, 84 Cal. App. 4th at 1245 (refusing to seal a declaration that "was part of the public record for one day" because "neither the state nor the federal Constitution permits the court to lock the barn door after the horse is gone").

The TRO should additionally be denied on this ground.

DATED: November 12, 2024

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Sarah E. Burns
Sarah E. Burns

Attorneys for Defendant
AMAZON WEB SERVICES, INC.

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 50 California Street, 23rd Floor, San Francisco, California 94111.

On November 12, 2024, I caused to be served a copy of the following document(s):

OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND UNCONSTITUTIONAL PRIOR RESTRAINT

I caused the above document(s) to be served on each of the persons listed below by the following means:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2024 at Oakland, California.

/s/ Sarah E. Burns

Sarah E. Burns