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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MAURY BLACKMAN,
Plaintiff and Appellant,
v.
SUBSTACK, INC. et al.,
Defendants and
Respondents.

A173244 & A174800

(San Francisco City &
County
Super. Ct. No.
GC24618681)

“ ‘[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’ ” (*The Florida Star v. B.J.F.* (1989) 491 U.S. 524, 533 (*The Florida Star*).) This First Amendment principle lies at the center of this lawsuit, which presents a clash between plaintiff’s privacy rights and the freedom of the press.

Penal Code sections 851.91 and 851.92 provide for the sealing of arrest records in certain situations when the arrest did not result in a conviction, and the latter statute prohibits dissemination of sealed documents. (Pen. Code, §§ 851.91, subds. (a), (c), (e), 851.92, subds. (b), (c).) Plaintiff Maury Blackman’s 2021 arrest was sealed pursuant to these statutes, but the San Francisco Police Department (SFPD) publicly

released the investigative police report for the arrest to a third party without restriction, and an anonymous source subsequently sent that report to defendant Jack Poulson. Poulson wrote about Blackman’s arrest online, and Blackman sued Poulson and the entities that provided online platforms for Poulson’s postings.

Defendants filed special motions to strike Blackman’s complaint under the anti-SLAPP¹ statute (Code Civ. Proc.², § 425.16). The trial court granted the motions, concluding that Blackman’s suit arose from protected activity under section 425.16, subdivision (e)(3) (section 425.16(e)(3)), and his claims were barred by the First Amendment to the United States Constitution (First Amendment) and the Communications Decency Act (CDA) (47 U.S.C. § 230(c)). For the reasons explained herein, we affirm the court’s order granting the anti-SLAPP motions, and we affirm a related order granting defendants attorney fees under section 425.16, subdivision (c).

BACKGROUND

As is relevant here, Blackman filed a 15-count complaint against Poulson, Substack, Inc. (Substack), and Tech Inquiry, Inc. (Tech Inquiry).³ Each defendant moved to strike the complaint in its entirety under section 425.16.

¹ “ ‘SLAPP’ is an acronym for ‘strategic lawsuit against public participation.’ ” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1.)

² All further statutory references are to the Code of Civil Procedure unless otherwise stated.

³ Blackman asserted the following causes of action: (1) negligence, (2) gross negligence, (3) intentional interference with prospective economic relations, (4) negligent interference

The complaint and declarations submitted by the parties establish that Blackman was arrested in December 2021 for felony domestic violence when he was the CEO of Premise Data, a private company. Police officers prepared an investigative report for the arrest (the incident report). Ultimately, no charges were pursued against Blackman, and the San Francisco Superior Court entered an order sealing the arrest and related records under Penal Code sections 851.91 and 851.92 on February 15, 2022.

Defendants argued in their motions that their actions were protected by the First Amendment and the anti-SLAPP statute, and the First Amendment and the CDA barred Blackman's claims.

Poulson's declaration supporting his motion states that he is "an independent journalist focused on the intersection of technology and national security." He writes primarily through his publicly available newsletter, *All-Source Intelligence*, but he has done freelance investigative work for The Guardian and The Intercept. Poulson started *All-Source Intelligence* in April 2023. He writes the newsletter in his personal capacity, and he

with prospective economic relations, (5) intentional interference with contractual relations, (6) public disclosure of private facts, (7) false light, (8) intrusion into private affairs, (9) intentional infliction of emotional distress, (10) negligent infliction of emotional distress, (11) defamation, (12) violation of California Business and Professions Code, section 17200 (against Substack only), (13) violation of California Constitution Section 1, (14) violation of Penal Code section 851.92, and (15) violation of Penal Code section 11143.

publishes the newsletter through Substack. Poulson stated that he is also the executive director and founder of Tech Inquiry, a public website founded in 2019 that provides government records, articles, and data investigating the intersection between surveillance and weapons companies and the governments that contract with them. Tech Inquiry is an independent legal entity.

Poulson declared that, in late August and early September 2023, he wrote two articles on Premise Data. These articles discussed Premise Data's work for the United States government and Blackman's government security clearance, as well as a lawsuit the company filed against former employees for allegedly revealing this government work to the Bill and Melinda Gates Foundation.

On September 14, 2023, Poulson wrote an article about Blackman's arrest (the September 14 article). The article contained a link to a redacted copy of the incident report, which Poulson later embedded into the article. In his declaration, Poulson stated that he received the incident report through an unsolicited message on an "end-to-end encrypted messaging" platform from a confidential source in early September 2023. He was unaware that the incident report was sealed when he received it, and there were no markings to indicate it was sealed. Poulson attached to his declaration a copy of the incident report that he received. Poulson also reported that he called the SFPD after he received the report, provided the report number, and "asked for and received confirmation of each pertinent detail in the report." The SFPD did not inform him the report was sealed.

In November 2023, Poulson wrote in an article that someone purporting to represent Blackman had committed perjury by filing a fraudulent Digital Millennium Copyright Act (DMCA) takedown request with respect to the incident report, and further wrote that this same person tried to bribe Poulson to take down the incident report. Poulson also wrote that the public affairs office of U.S. Special Operations Command had not responded to his request for comment on whether Blackman's arrest or the fraudulent DCMA takedown request violated any Department of Defense policies for holding a security clearance.

In December 2023, Poulson wrote an article reporting on Blackman's resignation as CEO, expressing Poulson's conclusion that the resignation was a result of reckless behavior, including the arrest and the ongoing lawsuit. Poulson again wrote that someone purporting to represent Blackman had committed perjury by filing a fraudulent DMCA takedown request with respect to the incident report.

In January 2024, Poulson reported that Premise Data had settled its lawsuit against former employees. This article also mentioned the fraudulent DMCA takedown request and bribery attempt.

In April 2024, Poulson reported on court documents that had been unsealed in Premise Data's litigation with its former employees. He stated that his article about Blackman's arrest had become a focus of that lawsuit, with Premise Data attempting to unmask his sources.

In his opposition to the motions, Blackman maintained that “the challenged speech” does not implicate an issue of public interest under the anti-SLAPP statute, and the defendants’ acts were not protected under *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326 (*Flatley*) because the speech violated Penal Code sections 851.91, 851.92, 11143, and 166. Blackman’s declaration opposing the motions described, among other things, his attempts to have Poulson’s internet posts removed based on the sealing order. He declared that he informed Substack that the incident report had been sealed in November 2023 and thereafter, and, through counsel, he contacted Poulson and Tech Inquiry and requested they remove the sealed incident report from the internet in September 2024.

Blackman also described Premise Data’s lawsuit against former employees and stated that one of the attorneys representing these employees was Newton Oldfather. Blackman stated that the City of San Francisco had provided Blackman with documents related to the release of the incident report that showed that Oldfather made requests to the SFPD for copies of the incident report on May 3, 2022, and May 9, 2022; in response to the inquiry, “Describe your interest in this report,” Oldfather’s first request stated, “Attorney Investigator,” while his second request left that response blank. On May 17, 2022, the SFPD informed Oldfather that his request dated May 9, 2022, had been processed and the documents he requested were available via the San Francisco Public Records Portal. Blackman declared that the incident report that the SFPD provided to Oldfather had a

unique watermark identifier, and the incident report that Poulson published on September 14, 2023, contained this same unique watermark identifier.

Blackman also described in his declaration his alleged injuries — financial injuries and stigmatization — caused by Poulson’s “dissemination” of the incident report.

The trial court granted each defendant’s anti-SLAPP motion. The court concluded that all the claims asserted in Blackman’s complaint related to Poulson’s internet posts and the effect of their publication on Blackman. At the first step of the anti-SLAPP analysis, the court found that section 425.16(e)(3) applied to the complaint. “Poulson was reporting on a blog post about Blackman, the CEO of a company [] that Poulson had previously covered as part of his Substack newsletter, a public newsletter with at least 3,000 subscribers, concerning companies making surveillance technologies. [Citation.] This was a writing in a public forum. [Citation.] And it concerned the character and conduct of the CEO of a company with government contracts in the security and intelligence arena. [Citation.] The character and trustworthiness of members of the business community have been held to be of public significance where business leaders hold themselves out as trustworthy and advertise their businesses to members of the public (see *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1146); the court cannot see how the character and trustworthiness of the leader of a business with contracts with the U.S. government and a security clearance can be of any less public significance.” The court rejected Blackman’s

claims that defendants' alleged violations of Penal Code sections 851.91, 851.92, 11143, and 166 rendered the anti-SLAPP statute inapplicable under *Flatley*.

At the second step of the anti-SLAPP analysis, the court concluded that the First Amendment's protection for the truthful publication of information of public significance barred Blackman's claims, and the court also found that section 230(c)(1) of the CDA barred the claims against Substack and Tech Inquiry. The court thereafter granted defendants' request for attorney fees.

Blackman timely appealed the court's orders.

DISCUSSION

As noted at the outset of this opinion, this case involves a clash between privacy rights and the First Amendment. Both the United States Supreme Court and our Supreme Court have issued decisions addressing similar conflicts that guide our analysis in this case. Accordingly, we set forth the relevant precedents from the high courts before proceeding with our anti-SLAPP analysis.⁴

I. Truthful Publication of Lawfully Obtained Information of Public Significance

“ ‘In *Cox Broadcasting Corp. v. Cohn* [1975] 420 U.S. 469 [(*Cox*)], a 17-year-old woman was killed during a rape in Georgia. The crime received wide press coverage but the name of the

⁴ We take much of this summary from *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679 (*Gates*), a case we will discuss in detail *post*.

victim was not disclosed because of a Georgia law making it a crime to publish or broadcast such information. A reporter became aware of the name of the victim when shown an indictment . . . available to him in the courtroom. It was undisputed that the indictment was a public record available for inspection. The reporter's employer broadcast the name of the victim. The victim's father brought a privacy action. Cox argued its broadcast was privileged under the First and Fourteenth Amendments [to the United States Constitution]. The Georgia trial court rejected the argument, stating the Georgia statute gave a civil remedy to those injured by its violation. [Citation.] [¶] The Supreme Court stated the issue was whether consistent with the First and Fourteenth Amendments "a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime." ' ' ' (Gates, *supra*, 34 Cal.4th at p. 687.)

Cox acknowledged that, in the "sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." (Cox, *supra*, 420 U.S. at p. 491.) The high court thus found it appropriate to focus on the narrow interface between the press and privacy presented therein, "namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which

themselves are open to public inspection.” (*Ibid.*) The high court held “the State may not do so.” (*Ibid.*)

“ [Cox] explained that the reporting of information concerning the operation of every part of government, including the judiciary, was of great importance and entitled to strong protection. The court noted that the law of privacy recognized that the interest in privacy fades when the information involved was already in the public record. [Citation.] [¶] [Cox] emphasized that by putting information in an official court record, the state must presume that the public interest was being served. It stated that public records by their very nature are of interest to the public and an important benefit is performed when they are published. The court stated such reporting was important to our form of government and then concluded: “In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.” ’ ” (*Gates, supra*, 34 Cal.4th at p. 688.)

“ ‘In *Okla. Publishing Co. v. District Court* (1975) 430 U.S. 308 (*Oklahoma Publishing*), delinquency charges arising from a murder were brought against an 11-year-old boy. Members of the media were present in the courtroom during the detention hearing and learned the boy’s name. The name appeared in newspaper stories and in radio and television broadcasts. At a later closed hearing the trial court entered an order enjoining the press from revealing the boy’s name. Oklahoma Publishing’s

petition for a writ to quash the order was denied by the Oklahoma Supreme Court on the basis that Oklahoma law required juvenile proceedings be held in private unless ordered open by the trial court.

“The United States Supreme Court reversed. Citing *Cox* and other cases, it held that the existence of a state statute requiring closed juvenile hearings was irrelevant since members of the press had lawfully been present at a hearing where the boy’s name was revealed. The court noted the name was revealed in connection with “ ‘the prosecution of the crime,’ [citation], much as the name of the rape victim in [*Cox*] was placed in the public domain.” [Citation.] The Supreme Court found the trial court’s order unconstitutional. [Citation.]” (*Gates, supra*, 34 Cal.4th at pp. 688–689.)

In *Landmark Communications Inc. v. Virginia* (1978) 435 U.S. 829, 831, a newspaper published an article about a pending inquiry by the state judicial review commission and identified the judge whose conduct was being investigated. These judicial review proceedings were declared confidential under the Virginia Constitution and statutory law, and Virginia made it a misdemeanor to divulge confidential information regarding the judicial review proceedings. (*Id.* at p. 830, fn. 1.) The court held the statute was unconstitutional: “[T]he publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth’s interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of

the press which follow therefrom.” (*Id.* at p. 838.) “[N]either the Commonwealth’s interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here.” (*Id.* at p. 841.)

“ ‘In *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97 (*Daily Mail*), a 15-year-old student was shot and killed by a 14-year-old classmate in West Virginia. Newspaper reporters learned the classmate’s name from eyewitnesses to the crime. The assailant’s name was published in the newspaper. Indictments were returned, alleging that the publication of the assailant’s name violated a West Virginia statute making it a crime to publish the name of any child connected with a juvenile proceeding without court permission. The West Virginia Supreme Court found the statute unconstitutional as a prior restraint on the freedom of the press. [Citation.]

“ ‘The United States Supreme Court stated the issue of whether the West Virginia law was a prior restraint was not determinative. It stated that whether the statute was a prior restraint or a penal sanction for the publication of lawfully obtained truthful information, any justification required a showing that the state’s action furthers a state interest of the “highest order.” The state argued its interest was maintaining the juvenile’s anonymity as a means of promoting rehabilitation. The court concluded this was not an interest of the highest order. [Citation.]

“ ‘In *The Florida Star* [*supra*,] 491 U.S. 524 [], the court again visited the issue of the criminalization of the disclosure of the name of sex crime victims. A Florida statute made it unlawful to publish the name of the victim of a sexual offense. A report of a rape including the name of the victim was inadvertently released to the press by the police department and The Florida Star newspaper printed it. The rape victim sued the newspaper for printing her name in violation of the nondisclosure statute. The trial court found the newspaper negligent per se and a jury awarded the plaintiff \$100,000 in damages. [Citation.]

“ ‘The [United States] Supreme Court noted the case again raised the issue of the tension between the freedom of the press and the right of individuals to maintain the privacy of even truthful information. The court noted that while it had addressed this tension in *Cox*, *Oklahoma Publishing* and *Daily Mail*, its approach had been to deal with the discrete factual context of each case and therefore it had not exhaustively considered the issue. [Citation.]

“ ‘The Florida Star argued that the trilogy of prior cases produced the rule that the press may never be punished civilly or criminally for publishing the truth. The plaintiff countered that in each of the trilogy cases the information published was already in the public record and the privacy interest in those earlier cases was far less profound than in hers.’ ” (*Gates, supra*, 34 Cal.4th at pp. 689–690.)

The United States Supreme Court found that *Cox* was not controlling because it dealt with the publication of the name of

the crime victim from the public record of a judicial proceeding; however, the court also rejected the rule that truthful publications may never be punished, preferring to avoid categorical directives given the significance of the issues involved. (*The Florida Star, supra*, 491 U.S. at pp. 532–533.) Instead, the court applied the rule articulated in *Daily Mail*: “‘[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’” (*The Florida Star*, at p. 533, see *id.* at pp. 532–534.)

Three separate considerations justify this rule. (*The Florida Star, supra*, 491 U.S. at p. 534.) First, when information is “‘lawfully obtain[ed],’” the government generally has sufficient means to protect confidential information without punishing its publication. (*Ibid.*) For sensitive information in private hands, the government may under some circumstances forbid its nonconsensual acquisition, and for information in government custody, the government may classify information, enact and enforce procedures for redacted release, and extend a damages remedy against the government where the government’s mishandling of sensitive information leads to its dissemination. (*Ibid.*) “Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.” (*Ibid.*)

Second, the publication of information already available to the public does little to protect the right of privacy. (*The Florida Star, supra*, 491 U.S. at p. 535.) “[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release.” (*Ibid.*)

Third, “ ‘timidity and self-censorship’ may result from allowing the media to be punished for publishing truthful information.” (*The Florida Star, supra*, 491 U.S. at p. 535.) “[Cox] noted this concern with overdeterrence in the context of information made public through official court records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government. A contrary rule, depriving protection to those who rely on the government’s implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper’s sole object was to reproduce, with no substantial change, the government’s rendition of the event in question.” (*The Florida Star*, at pp. 535–536.)

The Florida Star court held that the First Amendment protected the defendant’s publication of the rape victim’s name. (*The Florida Star, supra*, 491 U.S. at p. 541.) The article was truthful and involved “a matter of paramount public import: the commission, and investigation, of a violent crime which had been

reported to authorities.” (*The Florida Star*, *supra*, 491 U.S. at pp. 536–537.) Although police reports with the identity of sexual offense victims were not matters of public record open to public inspection in Florida and mass publication of the victim’s name was outlawed, the defendant obtained the victim’s name lawfully. (*Id.* at p. 536.) The privacy of victims, their physical safety, and the need to encourage victims to report offenses were significant state interests, but the Florida statute was “too precipitous a means of advancing these interests.” (*Id.* at pp. 537–538.) The court reached this conclusion for the independent reasons that the imposition of damages against the press “can hardly be said to be a narrowly tailored means of safeguarding anonymity” where the government gave out the information, the statute called for strict liability, and the statute was underinclusive in that it prohibited only mass disclosure. (*Id.* at pp. 538–541.)

“ ‘In *Bartnicki v. Vopper* (2001) 532 U.S. 514, the court dealt with the protection, if any, given by the First Amendment to the disclosure of the contents of an illegally intercepted communication. In that case the media was provided and published the contents of illegally intercepted cellular telephone conversations between a teacher’s union president and the union’s labor negotiator concerning collective bargaining matters. The officials sued various members of the media who published the intercepted communications, noting that such interceptions were illegal under state and federal law and that it was illegal for anyone to disclose the content of such communication [if that person] knew or ha[d] reason to know it was illegally intercepted.

“ ‘In addressing the issue the court began by assuming that the media defendants were aware the recordings were of illegally intercepted communications and that disclosing their content was illegal. The court also noted that the media defendants lawfully obtained tapes of the conversation even though they knew the information was itself illegally intercepted. The court further found that the content of the tapes was of public concern. [Citation.]

“ ‘The court noted the rule that absent a need of the highest order a state may not punish the publication by a newspaper of truthful information lawfully obtained. It was argued that the state had two such interests, removing the incentive to intercept conversations and the interest in minimizing harm to persons whose conversations were intercepted. The court stated these interests met the constitutional test with regard to the person who illegally intercepted the conversation. It quickly rejected, however, the argument that an interest in removing the incentive to intercept applied to one who later lawfully obtained and disclosed . . . the information. [Citation.]

“ ‘The court stated that the issue of whether the states had a sufficiently high interest in protecting the privacy of those whose conversation was intercepted was a more difficult question. The court noted that allowing the disclosure of such intercepted conversations might have a chilling effect on private speech. The court concluded, however, under the facts before it, criminalizing disclosure of the conversations implicated the core

purpose of the First Amendment because it punished the publication of truthful information of public concern.

[Citation.]’ ” (*Gates, supra*, 34 Cal.4th at pp. 691–692.)

Turning to California Supreme Court authority, we begin with *Briscoe v. Reader’s Digest Ass’n* (1971) 4 Cal.3d 529 (*Briscoe*). *Briscoe* addressed at the pleading stage whether an actionable invasion of privacy may occur through a magazine’s publication of true information about an 11-year-old crime, including the convict’s identity, where the plaintiff allegedly had reformed and not done anything to reattract the public eye. (See *id.* at pp. 533–534, 537.) The court recognized “the potential conflict between freedom of the press and the right of privacy” (*id.* at p. 534), and it distinguished between reports of current crimes protected by the First Amendment as newsworthy, and reports of the facts of past crimes and the identification of past offenders where the former are newsworthy, but the latter may not be. (*Id.* at pp. 536–539.) Considering the state’s interest in the integrity of the rehabilitative process, the court concluded that the general interest in an unfettered press may be outweighed at times. (*Id.* at pp. 537–541.) The court held the truthful publication of a past convict’s identity is protected only if it is newsworthy.⁵ (*Briscoe*, at p. 541.) Newsworthiness in

⁵ One passage in *Briscoe* stated that “a truthful publication is constitutionally protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community’s notions of decency.” (*Briscoe, supra*, 4 Cal.3d at p. 541.) In *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 221, fn. 6, our Supreme Court later explained that *Briscoe* had “derived this dual standard from [] dictum” in a United States Supreme Court

Briscoe was a jury question with the following factors to be considered: “ [1] the social value of the facts published, [2] the depth of the article’s intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.’ ” (*Ibid.*)

In *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at pp. 209, 228–230, the court addressed the balance between privacy and press freedom, finding newsworthy as a matter of law portions of a documentary depicting an automobile accident rescue. The court focused on “the presence or absence of legitimate public interest, i.e., newsworthiness” as an aspect of the tort of public disclosure of private facts. (*Id.* at pp. 214–215.) In doing so, it observed that “lack of newsworthiness” was an element of the tort, but newsworthiness was at the same time a constitutional defense to, or privilege against, liability for publication of truthful information. (*Id.* at p. 216.) The court noted that the requirements of tort law and the First Amendment have “generally been assumed to be congruent,” and further observed that courts have struggled to define the boundaries of what is “newsworthy,” with the high court providing very little guidance in *Cox* and *The Florida Star* on the contours of the constitutional privilege. (*Id.* at pp. 216–219.)

case involving a New York statute, and ultimately concluded that “[r]ather than establishing a requirement separate from newsworthiness,” the reference to community outrage “appears to fit within the analysis of newsworthiness as a balancing of intrusion against justification” that the court had adopted and applied in *Briscoe*.

In *Gates*, facing again the issue of whether media defendants could be held liable for airing an account (a documentary) of the plaintiff's crime many years after his conviction, the court overruled *Briscoe*. (*Gates, supra*, 34 Cal.4th at pp. 683–685.) *Gates* recognized the binding intervening decisions of the United States Supreme Court (described *ante*) and held: “[A] media defendant may [not] be held liable in tort for recklessly publishing true but not newsworthy facts concerning a rehabilitated former criminal [citation], insofar as that holding applies to facts obtained from public official court records.” (*Gates*, at p. 692.) Further, the state’s “interest in protecting for rehabilitative purposes the long-term anonymity of former convicts” did not satisfy the applicable strict scrutiny test. (*Id.* at p. 693)

The plaintiff in *Gates* sought to distinguish *Cox* and its progeny on the basis that those cases involved reports of current events. (*Gates, supra*, 34 Cal.4th at p. 693.) The *Gates* court noted, however, “[T]he high court has never suggested, in *Cox* or in any subsequent case, that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents. *Cox*’s holding was unqualified: ‘Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.’ [Citation.] *Cox*’s rationale, moreover, related to the ‘very nature’ [citation] of court records per se, not the age of the particular records at issue in that case. As the high court explained, ‘[p]ublic records by

their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.’ ” (*Gates*, at p. 693.)

Gates observed that the high court’s jurisprudence contained several key considerations that “neither logically nor practically lend themselves to temporal limitation.” (*Gates*, *supra*, 34 Cal.4th at p. 695.) First, a core concern in *Cox* was “ ‘the “responsibility of the press to report the operations of government” . . . including judicial proceedings regarding crimes.’ ” (*Gates*, at p. 695.) Second, *Cox* was premised on the notion “ ‘that “[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.” ’ ” (*Gates*, at p. 695.) Third, “[T]he high court’s decision in *The Florida Star* ‘rested in large part on the fact that the government had, by making the information available to the press, impliedly determined its dissemination was in the public interest, and could not then [fairly] punish a newspaper for’ relying on that determination.” (*Gates*, at p. 695.)

Gates thus concluded that the historical nature of the documentary before it did not “diminish[] any constitutional protection it enjoys.” (*Gates*, *supra*, 34 Cal.4th at p. 695.) “And, as the high court of a sister state recently observed in deciding a similar privacy case, ‘[t]here is no indication that the First Amendment provides less protection to historians than to those reporting current events.’ (*Uranga v. Federated Publs., Inc.*

(2003) 138 Idaho 550, 556; see also *id.* at pp. 556–557 [citing *Cox* in holding that the First and Fourteenth Amendments to the United States Constitution ‘do not permit’ a newspaper ‘to be held liable in damages for accurately publishing a document contained in a court record open to the public’ for over 40 years)].” (*Gates*, at pp. 695–696.)

II. The Anti-SLAPP Statute and Standard of Review

“The anti-SLAPP statute is ‘designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. [Citations.] To that end, the statute authorizes a special motion to strike a claim “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” ’ ” (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1008–1009.) Section 425.16 should be “construed broadly” to encourage “continued participation in matters of public significance.” (§ 425.16, subd. (a).)

An anti-SLAPP motion involves a familiar two-step process. At the first step, the defendant bears the burden of establishing that the plaintiff’s claims arise from protected activity. (*Bonni v. St. Joseph Health System*, *supra*, 11 Cal.5th at p. 1009.) If the defendant meets this burden, step two requires the plaintiff to show that he or she has a reasonable probability of prevailing on the claim. (*Ibid.*) The plaintiff must show the complaint is legally sufficient and supported by a *prima facie* factual showing. (*Paredes v. Credit Consulting Services, Inc.* (2022) 82 Cal.App.5th

410, 424.) The court considers the pleadings and affidavits of fact, and it accepts as true the evidence favorable to the plaintiff, evaluating defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. (*Ibid.*) We review an order denying a motion to strike under section 425.16 de novo. (*Flatley, supra*, 39 Cal.4th at pp. 325–326.)

A judgment or order of the lower court is presumed to be correct on appeal, and appellant bears the burden to affirmatively show error through cogent argument supported by legal analysis and citation to the record. (*Los Angeles Unified School Dist. v. Torres Construction Corp.* (2020) 57 Cal.App.5th 480, 492.) The appellant bears this burden regardless of the applicable standard of review. (See *ibid.* [these principles apply to appeal from any judgment].)

A. Step One – Protected Activity

Section 425.16, subdivision (e), clarifies what speech or conduct constitutes an “ ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’ ” It includes: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a

public forum in connection with an issue of public interest; or
(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(1)–(4).)

The trial court concluded that the conduct that gave rise to Blackman’s claims was Poulson’s blog posts (speech), and this speech was protected under section 425.16, subdivision (e)(3). Blackman disputes these findings on appeal by arguing that: (1) his claims arise from the privacy rights created by the order sealing his arrest record under Penal Code sections 851.91 and 851.92, not protected speech; (2) regardless, any speech was not “in connection with an issue of public interest”; and (3) defendants’ acts were illegal as a matter of law. We address Blackman’s first two arguments and then turn to his illegality contention.

1. Section 425.16(e)(3) Applies

Blackman correctly quotes, but fails to correctly apply, the governing standard with his contention that his claims did not arise from speech. “A claim arises from protected activity when that activity underlies or forms the basis for the claim.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.) The court considers the elements of the challenged claim and the conduct of the defendant underlying those elements as alleged in the complaint, with a focus on the injury-producing conduct. (*Id.* at p. 1063.) Blackman argues that his claims “arise from his privacy rights,” which were created by the

sealing of his arrest record. His “privacy rights” are clearly not the injury-causing conduct, and Blackman makes no attempt to analyze what conduct of defendants gives rise to his alleged injuries for his various claims. Without such analysis we have no cause to reverse the trial court’s finding that the injury-producing conduct was Poulson’s speech. (See *Los Angeles Unified School Dist. v. Torres Construction Corp.*, *supra*, 57 Cal.App.5th at p. 492 [appellant bears burden of showing ruling below was inaccurate].) We accordingly conclude that speech gave rise to the claims at issue.

Blackman does not dispute that the public forum requirement is met, so we turn to the contested question of whether the speech was made “in connection with an issue of public interest.” (§425.16(e)(3).) “Most often, courts strive to discern what the challenged speech is really ‘about’ — a narrow, largely private dispute, for example, or the asserted issue of public interest.” (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149 (*FilmOn*)). To do so, courts apply a two-pronged test, first identifying the public issue that the statements concern. (*FilmOn*, at p. 149.) Second, courts examine “the ‘functional relationship’ between the challenged activity and the public issue it implicates, and ask whether the activity contributed to public discussion of that issue.” (*Geiser v. Kuhns* (2022) 13 Cal.5th 1238, 1246.)

The anti-SLAPP statute does not define “‘an issue of public interest,’ ” but our Supreme Court has recognized that intermediate California courts have “ably distilled” the

characteristics of the term. (*FilmOn, supra*, 7 Cal.5th at p. 149, citing *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919–924 (*Rivero*) & *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133 (*Weinberg*).) A non-exhaustive list is speech concerning a person or entity in the public eye, speech that could directly affect many people beyond the direct participants, and speech involving a topic of widespread, public interest. (*Rivero*, at pp. 919–924.) Drawing from First Amendment jurisprudence (including *Briscoe*), *Weinberg* additionally observed that “ ‘public interest’ ” does not mean mere curiosity; it includes something of concern to a substantial number of people; there should be some degree of closeness between the statements and the asserted public interest; a broad and amorphous public interest is not sufficient; the focus of the speaker’s conduct should not be to gather ammunition for a private controversy; and one cannot turn otherwise private information into a matter of public interest by communicating it to many people. (*Weinberg*, at pp. 1132–1133.)

Defendants contend on appeal that Poulson’s article implicated numerous issues of public interest — police activity and arrests, domestic violence, the status of women in the technology sector, and the arrest of a CEO of a United States military contractor with security clearance. Looking to *Chaker v. Mateo, supra*, 209 Cal.App.4th at page 1146 (*Chaker*), the trial court agreed with the last argument. *Chaker* involved derogatory statements about the plaintiff and his forensics business posted

by the plaintiff's former girlfriend's mother on the Ripoff Report website and a social networking site. (*Id.* at pp. 1142, 1146.) These statements included: " 'You should be scared. This guy is a criminal and a deadbeat dad.' " " 'I would be very careful dealing with this guy. He uses people, is into illegal activities, etc. I wouldn't let him into my house if I wanted to keep my possessions or my sanity.' " (*Id.* at p. 1142.) *Chaker* stated: "We also have little difficulty finding the statements were of public interest. The statements posted to the 'Ripoff Report' Web site about Chaker's character and business practices plainly fall within the rubric of consumer information about Chaker's 'Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness." (*Id.* at p. 1146.)⁶

Unlike in *Chaker*, the record here suggests that Premise Data sold its product (at least in part) to government entities, as opposed to individual consumers, but we conclude that Poulson's writings nonetheless implicated an issue of public interest for two

⁶ Other courts have recognized the anti-SLAPP statute protects consumer warnings. (*Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 943, 947 [statements made by medical entity and professionals about doctor's qualifications, competence, and medical ethics]; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898–900 [warning not to use insurance broker "ostensibly provided to aid consumers" choosing brokers]; but see *Woodhill Ventures, LLC v. Yang* (2021) 68 Cal.App.5th 624, 634 ["consumer information" goes beyond recounting one-time dispute between buyer and seller; buyer's "quest for revenge" did not give other consumers information beyond one transaction].)

reasons. First, Poulson’s reporting of truthful information obtained from an arrest report that the police released without restriction can be considered publicly significant under the First Amendment as explained in our analysis of Poulson’s First Amendment defense, *post*. Second, Premise Data’s work for the federal government was a matter of public interest and Poulson’s articles implicated this work.

As to our latter conclusion, it seems undisputed that the federal government’s operations with respect to national security and defense are matters of legitimate public interest. (See *Snyder v. Phelps* (2011) 562 U.S. 443, 451, 453 [matter of “public concern” under First Amendment is “ ‘any matter of political, social, or other concern to the community’ ”].) And the record contains evidence showing that the media reported specifically on Blackman’s work with Premise Data and Premise Data’s work for the government. Specifically, the record contains two online publications from 2018, including one from the Wall Street Journal Pro Venture Capital, reporting on Blackman becoming the CEO of Premise Data. The Wall Street Journal published an article in June 2021 reporting on Premise Data and (according to the article) stating its gig workers were “unwittingly” providing “basic intelligence to the U.S. military using only a consumer app on their smartphones.” This article reported on Blackman’s apparent role in seeking military contracts, Premise Data’s apparently lucrative government contracts, and the company’s apparent posting of jobs requiring security clearances. And a February 2022 Wall Street Journal article reported that Premise

Data had (according to the article) temporarily suspended its app in Ukraine after the Ukrainian government accused the app of being used by Russia to bomb Ukraine. This article also reported that Premise Data derived the majority of its revenue from the U.S. defense community and provided its personnel with top-secret security clearances to U.S. military and intelligence programs.⁷

Next, in late August and early September 2023, Poulson published two online articles through Substack about Premise Data. The August 2023 article, entitled, “Pollster for Niger Coup Support Is a Surveillance Platform for U.S. Special Operations Forces,” discussed a “prominent poll” conducted by Premise Data and recently published by The Economist purporting to show that a Nigerian coup had overwhelming support from neighboring countries. Poulson wrote that The Economist had not mentioned that Premise Data performed covert work gathering intelligence abroad for the U.S. government, reporting from earlier in the month revealed that the U.S. had trained many members of the Nigerian junta, and Premise Data had represented in prior government pitches that it could gather information in some

⁷ Defendants requested that we take judicial notice of these articles on appeal. They requested that the trial court take judicial notice of these documents, but the trial court did not rule on this request. Blackman opposes judicial notice on relevancy grounds. We find the existence of these articles is relevant and take judicial notice of their existence on appeal. (See *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807, fn. 5.) We deny the remainder of defendants’ request for judicial notice on appeal as irrelevant to our disposition.

countries that allegedly supported the coup. Poulson also wrote that Premise Data received a government contract to collect data in Venezuela and shortly thereafter U.S. special forces attempted to overthrow the Venezuelan government. Poulson discussed another company performing work for the government similar to Premise Data and concluded the media had “little appetite” to “interrogate” those companies’ roles in ongoing U.S. information operations.

Poulson’s September 2023 article reported on a declaration that Blackman filed in late August 2023 in a lawsuit Premise Data brought against former employees for allegedly revealing its government contracts to the Bill and Melinda Gates Foundation. Poulson wrote that Blackman confirmed Premise Data’s covert work for the United States government in his declaration, disclosed that he held a security clearance with the Department of Defense, and claimed further disclosure related to Premise Data’s government work could endanger Premise Data app users abroad. Poulson concluded that foreign governments “have a right to be skeptical” of Premise Data’s surveillance work in their countries.

Poulson then published the September 14 article central to this case: “The Covert Gig-Work Surveillance CEO Arrested for Felony Domestic Violence.” After reporting the details related to Blackman’s December 2021 arrest, Poulson wrote that Blackman started a blog not long after his arrest and his first guest was an attorney and crisis manager who had represented Harvey Weinstein. Poulson continued that Premise Data was most

known for being accused of assisting Russia in targeting Ukraine just months after Blackman’s arrest, noted that Blackman had confirmed in court filings that Premise Data performed work for the United States government, and — similar to the article earlier in September — stated that Blackman sought to keep further details of this work confidential, based on his view that further disclosure could endanger Premise Data app users abroad.

Considering the above-described publications, we conclude that Premise Data’s work for the United States government was a matter of public interest. (See, e.g., *Sexton v. Apple Studios LLC* (2025) 110 Cal.App.5th 183, 187, 193 [matter reported on by media is evidence of public interest].)

The harder question is whether Blackman’s arrest was also an issue of public interest. Blackman contends that his arrest was a purely private matter with no connection to his work for Premise Data, and Poulson’s publication constituted nothing more than “morbid and sensational prying into private lives for its own sake.” He cites *Weinberg*’s statement that “a ‘public controversy’ does not equate with any controversy of interest to the public[.]” (*Weinberg, supra*, 110 Cal.App.4th at p. 1131) and *Time, Inc. v. Firestone* (1976) 424 U.S. 448, 454, which held that a divorce action between well-known people may have been of interest to the public, but the wife was not a public figure for purposes of defamation law. Poulson counters that Blackman’s role as CEO for an entity paid to gather data abroad for the federal government and his security clearance in connection with

this role placed Blackman in a position of public trust. Poulson points out that federal regulations require the government to consider allegations of criminal conduct, regardless of whether the person was formally charged, when assessing whether to grant or continue security clearance. We conclude that Poulson has the better argument here.

Per federal regulations, “allegations or admissions of criminal conduct, regardless of whether the person was formally charged” can raise a security concern and are considered in the adjudicative process related to the grant and retention of security clearance, although the age and isolated nature of the allegations can be considered as mitigating factors in this process. (32 C.F.R. §§ 147.12(a)–(c), 147.2(a)–(e).) Our federal government has nonetheless concluded that prior arrests should be considered in the predictive calculus of whether to entrust a person with sensitive government information during his or her employment. Poulson’s September 14 article disclosed Blackman’s arrest, and his subsequent November 2023 article discussed the arrest and reported that Poulson had requested that the government comment on whether the incident violated any policies for security clearance holders. As a result, we cannot conclude that Blackman’s arrest was a matter completely untethered to his work for the federal government as CEO of Premise Data.

Blackman argues that the Legislature enacted Penal Code sections 851.91 and 851.92 to protect his privacy interests, and, because the incident report and his arrest record were sealed, his arrest cannot be a matter of public interest. Analogous United

States Supreme Court precedent does not support Blackman's broad assertion that there is no legitimate public interest in any information that should have remained confidential. (*Landmark Communications Inc. v. Virginia*, *supra*, 435 U.S. at pp. 834–835, 839 [public interest existed in information from judicial disciplinary proceedings despite fact that Virginia Constitution and statute provided for confidentiality]; *The Florida Star*, *supra*, 491 U.S. at pp. 526, 536–537 [finding police report about a rape that included the victim's name publicly significant despite Florida statutes prohibiting disclosure].) From these authorities, we conclude that speech can implicate an issue of public interest even though statutory protections exist to keep that information confidential.

Next, we examine the functional relationship between the speech and the matter of public interest, paying attention to context. (*FilmOn.com*, *supra*, 7 Cal.5th at p. 148 [contextual cues — “whether speech was private or public, to whom it was said, and for what purpose” bear on whether speech was made in furtherance of free speech in connection with public issue].) When Poulson published the September 14 article, media had reported on Premise Data's work for the government, and The Economist had recently released a Premise Data poll relevant to foreign affairs. Poulson published the information at issue in his newsletter, which was dedicated to reporting on the intersection of technology and national security. The newsletter was publicly available on the internet, and Poulson wrote about Premise Data's work for the government and revealed Blackman's arrest

in his newsletter. We conclude that this speech participated in, or furthered, the discourse that makes an issue one of public interest. (*FilmOn.com*, at pp. 150–151.)

2. The Illegality Exception Does Not Apply

Blackman contends that the principles set forth in *Flatley*, *supra*, 39 Cal.4th 299, deprive defendants of protection under section 425.16 because their acts are illegal under Penal Code sections 851.92, 11143, 13304, and 166, and Labor Code section 432.7. We disagree.

Our Supreme Court “made it clear in *Flatley* that conduct must be illegal *as a matter of law* to defeat a defendant’s showing of protected activity. The defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step.” (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424 (*Vasquez*).) In *Vasquez*, a waste disposal contractor who had been awarded a government contract subsequently gave campaign contributions to the defendants, and the plaintiff sued the defendants for allegedly voting on a contract in which they had a financial interest in violation of Government Code section 1090. (*Vasquez*, at pp. 413–415, & fn. 3.) Our high court found that section 425.16 applied to the defendants’ conduct, and, in doing so, it rejected the plaintiff’s claim that the “illegal conflict of interest that infected the council member defendants’ votes deprive[d] them of protection under section 425.16.” (*Vasquez*, at p. 424; see *id.* pp. 413, 415, 424.) As a factual matter, the defendants denied the existence of a quid pro quo in connection with the campaign

contributions, and they disputed the legal issue of whether Government Code section 1090 prohibited them from acting on matters involving campaign contributors. (*Vasquez*, at p. 424.) “Accordingly, the City’s reliance on the alleged illegality of defendants’ conduct gains it no traction on the question of whether its cause of action arises from protected activity.” (*Id.* at pp. 424–425.)

Here, Blackman asserts that defendants violated Penal Code sections 851.92, 11143, 13304, and 166, and Labor Code section 432.7.⁸ Defendants do not concede the illegality of their conduct; instead, they vigorously dispute that these statutes apply and further deny that the statutes can punish them without running afoul of the First Amendment. In other words, like the defendants in *Vasquez*, defendants here factually and legally dispute whether their conduct is actionable under the

⁸ With respect to knowing receipt or possession of the incident report, Blackman argued below only that knowing receipt or possession of the incident report was illegal under Penal Code section 11143. The trial court correctly ruled that this statute, which addresses defined records compiled by the Attorney General, does not cover the incident report. (Pen. Code, §§ 11143, 11140, subd. (a), 11105, subd. (a)(2)(A)–(B).) Penal Code section 13304 also does not conclusively cover the incident report. (Pen. Code, §§ 13304, 13301, subd. (a), 13300, subd. (a)(1)–(2) [applying to “master local summary criminal history information” or a copy thereof and excluding records of complaints to or investigations by the local agency].) And Blackman does not discuss the meaning of “criminal . . . records information” under Labor Code section 432.7, subdivision (g)(3) in his opening brief on appeal or show that this subdivision conclusively applies.

statutes at issue, and the evidence does not conclusively demonstrate illegality. “Accordingly, [plaintiffs] reliance on the alleged illegality of defendants’ conduct gains it no traction on the question of whether its cause of action arises from protected activity.” (*Vasquez, supra*, 1 Cal.5th at pp. 424–425.)

B. Step Two – Probability of Prevailing

1. The First Amendment Bars Blackman’s Claims Against Poulson

“ ‘[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’ ” (*The Florida Star, supra*, 491 U.S. at p. 533.) This legal principle applies to protect Poulson’s publications.

First, the evidence in this case establishes that Poulson lawfully obtained the incident report. Blackman contends that *The Florida Star* and *Bartnicki v. Vopper* are distinguishable because those cases did not involve a law that criminalized the receipt of the information at issue, whereas Penal Code sections 11134 or 13304 and Labor Code section 432.7, subdivision (g)(3) allegedly criminalize the knowingly unauthorized receipt and possession of the incident report in certain circumstances.⁹ It is undisputed, however, that Poulson did not know that the incident report was sealed when he received it. And, in any event, we

⁹ Blackman seems to imply that it was illegal to receive the incident report under Penal Code section 851.92, but that statute addresses disclosure and dissemination, not receipt. (Pen. Code, § 851.92, subds. (b), (c).)

agree with the trial court that Poulson was exempt from any illegality created pursuant to these statutes. (See Pen. Code, §§ 11143, 11304 & Lab. Code, § 432.7, subd. (g)(3) [exempting from their application persons described in Evid. Code, § 1070].)

O'Grady v. Superior Court (2006) 139 Cal.App.4th 1423, relied on by Poulson, is instructive on the question of whether Poulson constitutes an exempt “publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication” under Evidence Code section 1070, subdivision (a). In *O'Grady*, the petitioner bloggers resisting discovery were authors of articles on, and the proprietors of, “O'Grady's PowerPage” and “Apple Insider,” which published news about Apple computers and products online. (*O'Grady*, at p. 1432.) These publications had fixed internet sites, published multiple times per week, and had operated for many years with hundreds of thousands of visitors per month. (*Ibid.*) The court found that Evidence Code section 1070, subdivision (a) applied to petitioners as “covered persons” because petitioners “flatly declared that they are also editors and reporters” and the respondent offered no basis to question that characterization. (*Id.* at pp. 1459–1460.) The court then determined that the statute did not exclude online media, and the term “periodical publication” was ambiguous in the online context. (*Id.* at pp. 1462–1466.) Looking to the statute's purpose, the court concluded that the Legislature intended the phrase “periodical publication” to include all ongoing, recurring news publications while excluding non-recurring publications such as

books, pamphlets, flyers, and monographs. (*Id.* at p. 1466.) The court thus concluded that the statute protects publications like the petitioners', "which differ from traditional periodicals only in their tendency, which flows directly from the advanced technology they employ, to continuously update their content." (*Ibid.*)

Here, Poulson's undisputed declaration states that he is "an independent journalist focused on the intersection of technology and national security." Poulson writes primarily through his publicly available newsletter, *All-Source Intelligence*, started in April 2023 and published through Substack, but he has also done freelance investigative work for The Guardian and The Intercept. Poulson provided the website for his newsletter, stated that he publishes it approximately once a week, and he declared that he had 3,000 subscribers at the time of his declaration. Similar to *O'Grady*, Poulson's declaration provides sufficient evidence that he is a reporter connected with an ongoing, recurring online news periodical publication. (*O'Grady v. Superior Court, supra*, 139 Cal.App.4th at pp. 1460, 1466.)

Next, the publications discussing the arrest and the posting of the incident report itself were truthful publications on a matter of public significance. We accept the trial court's determination that the publications were truthful because Blackman does not dispute the truthfulness of the publications on appeal. (See *Los Angeles Unified School Dist. v. Torres Construction Corp., supra*, 57 Cal.App.5th at p. 492 [appellant bears burden of establishing error on appeal].) With respect to the "public significance"

requirement, Blackman seeks to distinguish *Daily Mail*, *The Florida Star*, and *Bartnicki v. Vopper* on the grounds that this case does not involve “newsworthy” information, but, as explained *post*, we conclude that the information is publicly significant under the reasoning of *The Florida Star* and *Gates*.

This case bears a strong resemblance to *The Florida Star*. The incident report is the same type of government record as the police report in *The Florida Star*. The incident report was ordered sealed, and, similarly, state law prohibited the release of the name of the rape victim in *The Florida Star*. (*The Florida Star*, *supra*, 491 U.S. at p. 536; *id.* at p. 546–547 (dis. opn. of White, J.).) The government in both cases nonetheless publicly released the government records at issue without restriction, and Poulson, like the reporters in *The Florida Star*, reported on significant information from the publicly released police record. (See *The Florida Star*, at pp. 536–537 [deeming “commission, and investigation, of a violent crime which had been reported to authorities” publicly significant].)

With respect to the one factual difference from *The Florida Star* — the 18-month lapse in time between the arrest and Poulson’s September 14 article — the reasoning of *Gates*, as well as the high court’s justifications for the rule it adopted in *The Florida Star*, lead us to reject Blackman’s request that we find the lapse in time to be dispositive. As discussed, *ante*, the plaintiff in *Gates* urged our Supreme Court to distinguish *Cox* and its progeny on similar grounds. (*Gates*, *supra*, 34 Cal.4th at p. 693.) *Gates* declined to do so, reasoning that the following

considerations that drove the high court’s decisions did not lend themselves to temporal limitation: (1) the press’ responsibility to report the operations of government, including judicial proceedings regarding crimes¹⁰; (2) by placing the information in the public domain on official court records, the State must be presumed to have concluded the public interest was thereby being served; and (3) *The Florida Star* “ ‘rested in large part on the fact that the government had, by making the information available to the press, impliedly determined its dissemination was in the public interest, and could not then [fairly] punish a newspaper for’ relying on that determination.” (*Gates, supra*, 34 Cal.4th at p. 695.)

These considerations lead to the same result here. The press is responsible for reporting on government operations, including those of the police, and, by publicly releasing the incident report without restriction, the government impliedly determined its dissemination was in the public interest. (*Gates, supra*, 34 Cal.4th at p. 695.) The government cannot fairly punish a media defendant for relying on that determination. (*The Florida Star, supra*, 491 U.S. at pp. 535–536; *Gates*, at p. 695.) Furthermore, *The Florida Star* explained that affording the press ample protection for the publication of lawfully

¹⁰ *Gates* found this to be a justification to reject a temporal limitation despite the fact the criminal proceedings at issue there had long since concluded. (*Gates, supra*, 34 Cal.4th at pp. 683–684, 693 [“the high court has never suggested, in *Cox* or in any subsequent case, that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents”].)

obtained, truthful information is supported where, as here, the government generally has sufficient means to protect confidential information without punishing its publication, the government released the information publicly, and “ ‘timidity and self-censorship’ ” may result from allowing the media to be punished for publishing truthful information. (*The Florida Star*, at p. 535.) And so, while we are mindful that the United States Supreme Court has purposefully proceeded on a case-by-case basis in this sensitive area of law and none of the high court’s prior opinions is factually on all fours with this case, we conclude that the First Amendment protects the lawfully obtained truthful publication of the information at issue absent “ ‘a need to further a state interest of the highest order.’ ” (*The Florida Star*, at p. 533.)

Blackman contends there is a significant state interest at issue, but he does not show that this case presents “ ‘a need to further a state interest of the highest order.’ ” (*The Florida Star*, *supra*, 491 U.S. at p. 533.) The only logical inference to be drawn from Blackman’s evidence that the SFPD released an unrestricted copy of the incident report with a unique watermark and that the report Poulson published contained this unique watermark is that the government originally disclosed the copy of the incident report at issue without restriction. Accordingly, although the state interest in protecting Blackman’s privacy interests is significant, it does not survive strict scrutiny. “Once the government has placed such information in the public domain, ‘reliance must rest upon the judgment of those who decide what to publish or broadcast,’ [citation], and hopes for

restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.” (*Id.* at p. 538.)¹¹

Blackman argues that “no case stands for the proposition that truthful publication may never be punished,” and *The Florida Star* is distinguishable because Poulson received the incident report from a third party. It is undisputed that some third party sent Poulson the incident report, but again Blackman’s own declaration below provides undisputed evidence that the SFPD initially had custody of the incident report and released the copy at issue to a member of the public. Because the government was the initial source of the released incident report and released it without restriction to a member of the public, we see no basis to distinguish this case from *The Florida Star*.¹²

Finally, Blackman maintains that defendants’ First Amendment argument is really a “thinly veiled request to unseal Judge Gold’s Sealing Order,” the “history and utility test” from *Electronic Frontier Foundation, Inc. v. Superior Court* (2022)

¹¹ Because Blackman does not argue the common law claims or the statutes at issue are narrowly tailored, we do not embark upon an analysis of whether these laws would violate the narrow tailoring requirement for additional reasons. (See *The Florida Star*, *supra*, 491 U.S. at pp. 539–541.)

¹² We granted the application of Foundation for Individual Rights and Expression, First Amendment Coalition, and Eugene Volokh to file an *amici curiae* brief in this case. Given our conclusion, we do not address the separate argument of *amici curiae* and Tech Inquiry that Penal Code section 851.92 is facially unconstitutional.

83 Cal.App.5th 407, 423, applies to the request to unseal documents, and defendants' request fails that test. The "history and utility test" does not apply. The issue here is whether the First Amendment protects the lawfully obtained truthful disclosure of information of public significance at issue here, not whether defendants can unseal documents sealed by the court.¹³

2. The CDA Bars Blackman's Claims Against Substack and Tech Inquiry

Section 230(c)(1) of the CDA immunizes providers of interactive computer services against liability arising from content created by another information content provider. The CDA protects from liability only "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100–1101.)

Blackman does not dispute that Substack and Tech Inquiry are providers of interactive computer services. He argues instead that they were information content providers because they were responsible in part for the development of the content, and he contends that his claims do not treat defendants as the publisher or speaker of the information. He also briefly asserts that the

¹³ We note that Blackman does not approach this First Amendment defense at issue in this case on a claim-by-claim basis or argue that even if the defense is implicated in this case, the trial court erred in applying it to all rather than some of his claims.

CDA does not immunize violation of a court order. We address each argument in turn.

The CDA defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” (47 U.S.C. § 230(f)(3).) An interactive computer service can become an information content provider with respect to third-party content if it “ ‘materially contribut[es] to [the content’s] alleged unlawfulness.’ ” (*Wozniak v. YouTube, LLC* (2024) 100 Cal.App.5th 893, 921.) This test draws a “ ‘ ‘ ‘crucial distinction between, on the one hand, taking actions” to “display actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable.” ‘ ‘ ” (*Ibid.*)

Blackman focuses on the CDA’s use of the word “development” and urges us to conclude that, when “[D]efendants exposed the [incident report] and the information contained in it to public view, that constituted ‘development’ of the information.” He relies mainly on *F.T.C. v. Accusearch Inc.* (10th Cir. 2009) 570 F.3d 1187, 1190, wherein the Federal Trade Commission sued the defendant website that sold various personal data, including telephone records in violation of federal law. The defendant’s customers placed search orders for records, paid the defendant a fee, the defendant forwarded the requests to researchers who performed the searches, and the defendant then provided the results to the customers. (*Id.* at p. 1191.)

Accusearch determined that “a service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.” (*Id.* at p. 1199.) The “offending content was the disclosed confidential information itself,” and the defendant there “solicited requests for [] confidential information,” “paid researchers to obtain it,” “knew that its researchers were obtaining the information through fraud or other illegality,” and “knowingly sought to transform virtually unknown information into a publicly available commodity” by selling it on its website. (*Ibid.*) The defendant was thus responsible for the conversion of the legally protected phone records from confidential material to publicly exposed information. (*Ibid.*) The court cautioned, however, that “to be ‘responsible’ for the development of offensive content, one must be more than a neutral conduit for that content.” (*Ibid.*)

Here, the evidence from Poulson’s declaration is that he, in his personal capacity, published his article with a link to the incident report through Substack’s website and posted the incident report and links to his article on Tech Inquiry’s website. Blackman presented no contrary evidence. The evidence thus shows that Substack and Tech Inquiry were neutral conduits for the content at issue, not “internet content providers” under section 230(c)(1) of the CDA.

Under the CDA, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions, such as deciding whether to publish, withdraw,

postpone or alter content, are barred. (*Wozniak v. YouTube, LLC*, *supra*, 100 Cal.App.5th at p. 908.) Defamation is the prototypical cause of action, but the name of a cause of action is not dispositive; what matters is “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” (*Barnes*, *supra*, 570 F.3d at p. 1102; *id.* at p. 1101.) “[C]ourts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes liability.” (*Barnes*, p. 1102.)

Blackman argues that the court erred in finding that his claims treat Substack or Tech Inquiry as a publisher, but his briefing on this issue is insufficient to preserve an appellate challenge. (*Bishop v. The Bishop’s School* (2022) 86 Cal.App.5th 893, 910.) Blackman states that his “claims are not an attempt to regulate [d]efendants’ editorial functions; this is an action to hold [d]efendants accountable for their own statutory violations. [Citation.] Indeed, [d]efendants’ duties spring directly from the California Labor and Penal Codes.” But his argument must demonstrate, through citation to the record, that the trial court erred in determining that the duties that Blackman alleges the defendants violated derive from their status or conduct as a publisher. Blackman cites a variety of cases discussing the CDA, but he does not support his specific claims with citations to the record or argue on a claim-by-claim basis why the duties at issue do not derive from defendants’ status or conduct as a publisher or

speaker.¹⁴ We decline to do this work for him. (See *Los Angeles Unified School Dist. v. Torres Construction Corp.*, *supra*, 57 Cal.App.5th at pp. 488–489; see also *Bishop v. The Bishop’s School*, at p. 910 [appellant “was required to convince us, by developing his arguments, stating the law, and calling out relevant portions of the record, that the trial court committed reversible error”].)

Finally, we are not convinced by Blackman’s brief argument that the CDA does not apply to claims alleging violation of a state court order. The CDA states, “ ‘No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.’ ” (*Hassell v. Bird* (2018) 5 Cal.5th 522, 527, citing 47 U.S.C., § 230(e)(3).) Blackman quotes the dissenting opinion in *Hassell*, a case addressing whether Yelp Inc. (who had not been sued) had to comply with an order to take down defamatory consumer reviews, which stated, “None of the policies within section 230(b) state or suggest an express immunity from compliance with state court orders.” (*Hassell*, at p. 571 (dis. opn. of Cuéllar, J.)). But that dissent also states, “What this case does not implicate is the kind of situation where section 230 does confer immunity —

¹⁴ Blackman urges this court to adopt *Henderson v. Source for Public Data, L.P.* (4th Cir. 2022) 53 F.4th 110, 123, which holds that a claim treats an interactive web service as a publisher only where it seeks to impose liability based on the information’s improper content. We need not opine on the applicability of *Henderson* because it requires a specific examination of each claim to assess whether the standard is met (*ibid.*), and Blackman fails to undertake this analysis.

against a cause of action filed directly against the platform, seeking to hold it liable for conduct as the publisher of third party content.” (*Id.* at pp. 567–568, italics omitted.) Blackman simply has not established that the trial court’s ruling was incorrect.

III. Appeal No. A174800

The sole issue in Blackman’s appeal of the order awarding attorney fees award under the anti-SLAPP statute is whether the award must be reversed because defendants’ anti-SLAPP motion was improperly granted. Having concluded that the trial court correctly granted defendants’ anti-SLAPP motion, we affirm the trial court’s attorney fees order.

DISPOSITION

The court’s order granting defendants’ anti-SLAPP motions and the order granting attorney fees are affirmed.

BROWN, P. J.

WE CONCUR:

CHOU, J.*

SWEET, J.**

*Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Blackman v. Substack (A173244, A174800)

Trial Court: San Francisco County Superior Court

Trial Judge: Hon. Christine Van Aken

Counsel: The Marek Law firm, Inc., David Marek, Ami Sanghvi for
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