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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**

10 PEOPLE OF THE STATE OF CALIFORNIA,

11 Plaintiff,

12 vs.

13 JEANINE T. WILLIAMS,

14 Defendant.
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Case No. 13035712

**MEMORANDUM OF POINTS
AND AUTHORITIES BY AMICI
CURIAE SOCIETY OF
PROFESSIONAL JOURNALISTS,
NORTHERN CALIFORNIA
CHAPTER, AND ELECTRONIC
FRONTIER FOUNDATION, IN
OPPOSITION TO STATE OF
CALIFORNIA'S MOTION FOR
PROTECTIVE ORDER**

Date: June 19, 2014

Time: 9:00 a.m.

Dept.: 17

Hon. Harold Kahn

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22 The Society of Professional Journalists, Northern California Chapter, and Electronic
23 Frontier Foundation, respectfully request leave to file this brief of *Amici Curiae* in opposition
24 to People of the State of California's Motion for Protective Order in the above-captioned
25 action.
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IDENTITY AND INTEREST OF THE AMICI CURIAE

The Society of Professional Journalists (“SPJ”) is a not-for-profit, national journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. SPJ was founded in 1909 as Sigma Delta Chi, a journalistic fraternity. It is the oldest, largest, and most representative organization serving journalists in the United States.

SPJ is dedicated to the perpetuation of a free press as the cornerstone of our nation and liberty. SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts. Among other things, SPJ actively follows administrative, legislative, and judicial developments and makes its voice heard through court filings and petitions on behalf of journalists who have been shut-out of hearings, denied access to information, or compelled to turn over notes and research. SPJ has nearly 9,000 members nation-wide, including broadcast, print, and online journalists, journalism educators and students, and other non-journalist members who support SPJ’s mission. The Northern California Chapter was founded in 1931 and has approximately 200 members.

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government, and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco, California and has members all over the world.

I. INTRODUCTION¹

One of the most enduring, exalted, and well-settled principles of our justice system is the presumption of openness. It has been long understood, and widely celebrated, that “a trial

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

1 is a public event” and “[w]hat transpires in the court room is public property.” (*NBC*
2 *Subsidiary (KNBC-TV), Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1197–98 (quoting *Craig v.*
3 *Harney* (1947) 331 U.S. 367, 374) [67 S.Ct. 1249, 1254].) Indeed, there is an “unbroken
4 tradition of openness” that “inheres in the very nature of a criminal trial under our system of
5 justice.” (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 573 [100 S.Ct. 2814,
6 2825].)

7 The State’s proposed protective order in this case, which seeks to shield now, and
8 forever, a video recording of public officers performing public duties in a public place, should
9 be of great concern to this court and to the Public.² With nothing more than speculation and
10 bare assertions of “potential” confidential information, the proposed protective order runs
11 afoul of the well-settled principles of access, transparency, and accountability that run deeply
12 through our State and Federal Constitutions, and the common law. The State has not come
13 close to making the particularized showing of harm that is required of a protective order, or
14 put forth any compelling reasons for such an overbroad demand for secrecy. The Court should
15 deny the Motion for Protective Order.

16 **II. THE PRESUMPTION THAT JUDICIAL PROCEEDINGS AND**
17 **RECORDS ARE OPEN TO THE PUBLIC IS THE RULE; SECRECY IS**
18 **THE EXCEPTION**

19 Under the Federal Constitution, the State Constitution, and the common law, court
20 proceedings and records are presumptively open to the public. (See, e.g., Cal. Const., art. I, §
21 3, subd. (b), par. (1) [“The people have the right of access to information concerning the
22 conduct of the people’s business, and, therefore, the meetings of public bodies and the
23 writings of public officials and agencies shall be open to public scrutiny.”]; *Nebraska Press*
24 *Assoc. v. Stuart* (1976) 427 U.S. 539, 559–60 [96 S.Ct. 2791, 2803]; *Press-Enterprise Co. v.*
25 *Super. Ct.* (1983) 464 U.S. 501, 505 [104 S.Ct. 819, 821] (*Press-Enterprise I*); *Richmond*

26 ² While the State’s Motion for Protective Order ostensibly seeks only to limit the
27 dissemination of information in this case, law enforcement agencies throughout California
28 (and nationwide) have increasingly moved to block access to similar video and audio
recordings. The proposed protective order at issue here is another step toward that trend of
secrecy, and the Court should, respectfully, be wary of such requests.

1 *Newspapers, Inc., supra*, 448 U.S. at 569.) This presumption of openness “serves to ensure
2 that the individual citizen can effectively participate in and contribute to our republican
3 system of self-government. [Citations.]” (*Globe Newspaper Co. v. Super. Ct. for Norfolk*
4 *County* (1982) 457 U.S. 596, 604 [102 S.Ct. 2613, 2619].) Moreover, the public’s access to
5 criminal trials and court records, often by way of the press, provides a critical check on state
6 power, promotes public confidence in the judicial system, fosters public discussion on public
7 issues, and ensures that justice is done. (*Id.* at 606; see also *Press-Enterprise I, supra*, 464
8 U.S. at 508; *Richmond Newspapers, Inc., supra*, 448 U.S. at 587 (conc. opn. of Brennan, J.);
9 *NBC Subsidiary, supra*, 20 Cal.4th at 1219, 1200–01.)

10 The State’s overbroad and wholly unsupported proposed protective order runs afoul of
11 all of these basic principles. Without making any showing of any actual harm, the State seeks
12 an end-run around the established burdens placed on a party requesting to shut out the public
13 and the press. Specifically, the proposed order asks that the MVAR not be “shown to any
14 member or associate of the media, or otherwise published . . . or to any third party, unless so
15 ordered by a court of appropriate jurisdiction” (*Not. of Mot. and Mot. For Prot. Order,*
16 *Pt.s and Auths. and Decl.*, Ex. 2, at p. 2:2–4.) It is difficult to read that provision, particularly
17 in light of the entire motion, as not seeking to close the courtroom if and when the MVAR is
18 played. In fact, if it were not closed, such a public showing would appear to violate the order.
19 The State’s sweeping and unsupported assertion of “potential” concerns do not come close to
20 making the required showing of “specific, on the record findings” that closure is “essential to
21 preserve higher values” or the “overriding interest” necessary to overcome the presumption of
22 openness. (*Press-Enterprise Co. v. Super. Ct.* (1986) 478 U.S. 1, 13–14 [106 S.Ct. 2735,
23 2743] (*Press Enterprise II*) (quoting *Press-Enterprise I, supra*, 464 U.S. at 510).) While the
24 right of access is not absolute, the circumstances under which the press and public can be
25 barred from a criminal trial are limited. (*Ibid.*; see also *Press-Enterprise I, supra*, 464 U.S. at
26 509.) The State’s motion does not meet this high bar.

27 In addition, if and when the MVAR is introduced into evidence, the right of access will
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1 once again attach. At that point (if not before) the MVAR would be a “public record[],
2 available to the public in general, including news reporters” (*Estate of Hearst* (1977) 67
3 Cal.App.3d 777, 782–83.) Inspection rights are presumptively guaranteed “[t]o prevent
4 secrecy in public affairs” (*Id.* at 783; see also *Copley Press, Inc. v. Super. Ct.* (1998) 63
5 Cal.App.4th 367, 373.) Again, the State has made no particularized showing that there is an
6 “overriding interest that supports sealing the record, there is a substantial probability that the
7 interest will be prejudiced by disclosure, the sealing is narrowly tailored to serve the
8 overriding interest, and [that] there is no less restrictive means of achieving the overriding
9 interest.” (*Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300, 319, fn.7 (citing *NBC*
10 *Subsidiary, Inc., supra*, 20 Cal.4th at 1218; Cal. Rules of Court, rule 2.550(d)).) In *NBC*, the
11 Supreme Court held that the trial court’s order excluding the public and journalists from all
12 proceedings in a civil action and delaying the release of transcripts until after the trial’s
13 conclusion could not be upheld where the trial court failed to identify “particular proceedings
14 that . . . contain[ed] information justifying closure.” (*NBC Subsidiary, Inc., supra*, 20 Cal.4th
15 at 1223.) There is simply no evidence that this is the rare case where such extreme measures
16 are justified. In fact, the State’s motion falls far short of instances where the court has denied
17 requests to block public access even where there was a particularized harm alleged. (See, e.g.,
18 *Copley Press, Inc., supra*, 63 Cal.App.4th at 376 [granting petition to unseal settlement in
19 sexual assault case because public’s interest outweighed minor’s privacy rights]; *Hearst*,
20 *supra*, 67 Cal.App.3d at 781,786 [denial of request to seal probate records despite allegations
21 that harm to family members may occur if identities of individuals and their properties
22 became public knowledge]; *KNSD Channels 7/39 v. Super. Ct.* (1998) 63 Cal.App.4th 1200,
23 1204–05 [absent showing that access to video tape of defendants’ conversation in police car
24 played for jury in criminal trial threatens integrity of the evidence press had right of access];
25 *New York Times Co. v. U.S.* (1971) 403 U.S. 713, 714 [91 S.Ct. 2140, 2141] [holding that
26 Government had not met its burden to enjoin newspapers from publishing classified study
27 regarding the U.S. decision-making process in Vietnam].)

1 **III. THE PUBLIC INTEREST IN VIDEO AND AUDIO RECORDINGS OF**
2 **PUBLIC OFFICIALS PERFORMING PUBLIC DUTIES IS HIGH**

3 The State’s attempt to set a precedent for shielding the public from video showing
4 peace officers performing their duties on public streets is troubling. Video and audio records
5 of police activity are a critical check on individual misconduct and potential system-wide
6 abuse.³ It is in the public’s interest to be informed about how peace officers are doing their
7 job, and the State’s attempt to shut the public out from these recordings is difficult to
8 reconcile with basic speech and press freedoms.⁴

9 Recently, the Tenth Circuit held that an Illinois state law barring citizens from openly
10 recording police officers performing their official duties in public burdened First Amendment
11 rights of free speech and press. (*ACLU of Ill. v. Alvarez* (7th Cir. 2012) 679 F.3d 583, 597,
12 cert. den. (2012) 133 S.Ct. 651.) While the factual and procedural history of that case is
13 different than the facts here, the Tenth Circuit’s analysis of the First Amendment interests are
14 relevant. The court explained that: “[T]here is practically universal agreement that a major
15 purpose of ‘the First Amendment’ was to protect the free discussion of governmental affairs .
16 . . . [Citations.]” (*Ibid.*) This agreement “reflects our profound national commitment to the
17 principle that debate on public issues should be uninhibited, robust, and wide-open.
18 [Citations.]” (*Ibid.*)

19 Similarly, in a recent First Circuit case also addressing a citizen’s right to film police
20 officers performing their public duties in a public place, the court stated that, “gathering
21 information about government officials in a form that can be readily disseminated ‘serves a
22 cardinal First Amendment interest in protecting and promoting ‘the free discussion of
23 governmental affairs.’” (*Gericke v. Begin* (1st Cir., May 23, 2014, No. 12-2326) __ F.3d __
24 [2014 WL 2142519 at 5] (citing *Glik v. Cunniffe* (2011) 655 F.3d 78, 82).) Such activity “not

25 ³ While there is no reason to believe the MVAR at issue here shows any misconduct, the
26 State’s apparent attempt to make such protective orders routine could, in the future, very well
frustrate efforts to root out unlawful behavior.

27 ⁴ Again, the State’s intention to keep these videos away from the public is apparent from the
28 proposed order itself. (See *Not. of Mot. and Mot. For Prot. Order, supra*, at p. 2:2-4.)

1 only aids in the uncovering of abuses, but also may have a salutary effect on the functioning
2 of government more generally. [Citations.]” (*Id.* at 82–83.)

3 While these cases address the right of an individual to film police activity, the same
4 principles apply here. Any restriction on the dissemination of these non-private encounters
5 involving public officials and matters of public concern should be treated with a high degree
6 of skepticism as they necessarily implicate state and federal constitutional concerns.

7 **IV. CONCLUSION**

8 While there certainly may come a time when confidential information on an MVAR
9 does demand that the Court enter a protective order, the State’s generic, boiler-plate
10 allegations of “potential concerns” do not warrant one here. For the foregoing reasons, and
11 also based on the Public Defender’s Opposition to Motion for Protective Order, we
12 respectfully urge this court to deny the State’s Motion for Protective Order.

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16 Date: June 18, 2014

Respectfully submitted,

FIRST AMENDMENT PROJECT

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Cherokee D.M. Melton
James Wheaton

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21 Attorneys for *Amici Curiae* Society of
22 Professional Journalists, Northern California
23 Chapter, and Electronic Frontier Foundation
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PROOF OF SERVICE

I, Nicole Feliciano, hereby declare:

I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is First Amendment Project, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

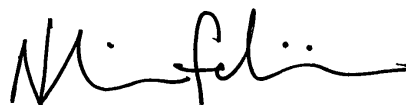
On June 18, 2014, I caused to be served the attached:

**MEMORANDUM OF POINTS AND AUTHORITIES BYAMICI CURIAE
SOCIETY OF PROFESSIONAL JOURNALISTS,
NORTHERN CALIFORNIA CHAPTER, AND ELECTRONIC FRONTIER
FOUNDATION IN OPPOSITION TO STATE OF CAL.'S MOT. FOR
PROTECTIVE ORDER**

 X **BY MAIL.** I caused the above identified document(s) addressed to the party(ies) listed below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

 BY HAND DELIVERY. I caused the above-identified document(s) to be delivered via courier by hand to the party(ies) listed below.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Oakland, California on June 18, 2014.



Nicole Feliciano
DECLARANT

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