

1 ERIC A. GRESSLER, SBN 186674  
egressler@orrick.com  
2 ORRICK, HERRINGTON & SUTCLIFFE LLP  
777 South Figueroa Street, Suite 3200  
3 Los Angeles, CA 90017-5855  
Tel (213) 629-2020/Fax (213) 612-2499  
4

MICHAEL J. MADIGAN, admitted *Pro Hac Vice*  
5 mmadigan@orrick.com  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
6 1152 15th Street, N.W.  
Washington, DC 20005  
7 Tel (202) 339-8523/Fax (202) 339-8500

8 CHRISTOPHER J. HAJEC, admitted *Pro Hac Vice*  
hajec@cir-usa.org  
9 MICHAEL E. ROSMAN, admitted *Pro Hac Vice*  
rosman@cir-usa.org  
10 CENTER FOR INDIVIDUAL RIGHTS  
1233 20th Street, N.W., Suite 300  
11 Washington, DC 20036  
Tel (202) 833-8400/Fax (202) 833-8410  
12

Attorneys for Defendant  
13 JAMES O'KEEFE III  
14

15 UNITED STATES DISTRICT COURT  
16 SOUTHERN DISTRICT OF CALIFORNIA  
17

18 JUAN CARLOS VERA, an  
individual,

19 Plaintiff,

20 v.

21 JAMES O'KEEFE III, an individual,  
22 HANNA GILES, an individual, and  
DOES 1-20 inclusive,

23 Defendants.  
24

Case No. CV 10-1422-L-JMA  
Hon. M. James Lorenz

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT JAMES O'KEEFE'S  
MOTION TO DISMISS (F.R.C.P.  
12(c))**

**Date: April 11, 2011**  
**Time: 10:30 a.m.**  
**Room: 14**  
**Judge: Honorable M. James Lorenz**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
ARGUMENT .....	3
I. SECTION 632 VIOLATES THE FIRST AMENDMENT BY CRIMINALIZING THE TAPE-RECORDING OF ALL “CONFIDENTIAL COMMUNICATIONS” BY PUBLIC OFFICIALS ACTING IN THE COURSE OF THEIR DUTIES .....	3
II. SECTION 632 UNCONSTITUTIONALLY CRIMINALIZES THE RECORDING OF INTIMATE FAMILY MOMENTS, AND ALSO A POPULAR FORM OF TELEVISION ENTERTAINMENT.....	11
III. SECTION 632 UNCONSTITUTIONALLY PENALIZES A GENRE OF EXPOSÉ NEWSGATHERING .....	14
CONCLUSION .....	18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

*Ashcroft v. Free Speech Coalition*,  
535 U.S. 234 (2002)..... 2, 11, 13

*Bd. Of Airport Commissioners of the City of Los Angeles v. Jews For Jesus, Inc.*,  
482 U.S. 569 (1987)..... 1, 3

*Branzburg v. Hayes*,  
408 U.S. 665 681 (1972)..... 14, 17

*Brockett v. Spokane Arcades, Inc.*,  
472 U.S. 491 (1985)..... 2

*City of Chicago v. Morales*,  
527 U.S. 41 (1999)..... 2

*Conchata, Inc. v. Miller*,  
458 F.3d 258 (3d Cir. 2006)..... 2

*Cuviello v. City of Oakland*,  
2007 WL 2349325 (N.D. Cal. Aug. 15, 2007) ..... 14

*Daily Herald Co. v. Munro*,  
838 F.2d 380 (9<sup>th</sup> Cir. 1988)..... 14

*Desnick v. American Broadcasting Companies, Inc.*,  
44 F.3d 1345 (7<sup>th</sup> Cir. 1995)..... 14, 17

*Deteresa v. American Broadcasting Companies, Inc.*,  
121 F.3d 460 (9<sup>th</sup> Cir. 1997)..... 4

*Dietemann v. Time, Inc.*,  
449 F.2d 245 (9<sup>th</sup> Cir. 1971)..... 14, 15, 16

*Flanagan v. Flanagan*,  
27 Cal. 4<sup>th</sup> 766, 41 P.3d 575, 117 Cal. Rptr. 2d 574 (Cal. 2002)..... 4

*Lambert v. Polk County*,  
723 F. Supp. 128 (S.D. Iowa 1989)..... 14

*McNamara v. Freedom Newspapers, Inc.*,  
802 S.W.2d 901 (Tex. Ct. App. 1991)..... 15

*Medical Laboratory Management Consultants v. American Broadcasting  
Companies, Inc.*,  
306 F.3d 806 (9<sup>th</sup> Cir. 2002)..... 15, 16

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

**Page(s)**

*R.A.V. v. City of St. Paul, Minn.*,  
505 U.S. 377 (1992)..... 17

*Robinson v. Fetterman*,  
378 F. Supp. 2d 534 (E.D. Pa. 2005).....6, 14, 15

*Shulman v. Group W Productions, Inc.*,  
18 Cal. 4<sup>th</sup> 200, 955 P. 2d 469, 74 Cal. Rptr. 2d 843 (Cal. 1998)..... 16

**RULES**

Fed. R. Civ. P. 12(b)(6).....1, 3, 18

Fed. R. Civ. P. 12(c) .....1, 3, 18

**STATUTES**

Cal. Penal Code § 632.....passim

Cal. Penal Code § 637.2..... 1

**OTHER AUTHORITIES**

9 Writings of James Madison 103 (G. Hunt ed. 1910) ..... 17

1 Defendant James O’Keefe submits this brief in support of his motion for  
2 judgment on the pleadings in this action pursuant to Rules 12(b)(6) and 12(c), Fed.  
3 R. Civ. P., on the ground that the complaint fails to state a claim upon which relief  
4 can be granted.

### 5 INTRODUCTION

6 Plaintiff’s sole claimed basis for this suit is California Penal Code § 632 *et*  
7 *seq.* In § 632, *inter alia*, the audio recording of a “confidential communication,”  
8 without the consent of all parties to the communication, is made punishable (on the  
9 first offense) by a fine of up to \$2,500 and up to a year in prison. A private right of  
10 action for those allegedly harmed by a violation of the statute is also provided for.  
11 Cal. Penal Code § 637.2. Plaintiff alleges that defendant O’Keefe violated § 632  
12 simply by audiotaping confidential communications plaintiff made to him without  
13 plaintiff’s consent. Complaint at ¶¶ 11 and 27.

14 Section § 632 is a substantially overbroad restriction on First Amendment-  
15 protected freedoms. Accordingly, it is facially invalid and plaintiff’s complaint,  
16 whose sole claim is based on a facially unconstitutional statute, must be dismissed.  
17 Thus, even assuming *arguendo* that O’Keefe did violate § 632 in the way plaintiff  
18 alleges, and assuming further that the U.S. Constitution did not protect him in doing  
19 so, this action still should be dismissed.

20 The overbreadth doctrine is an exception to the usual rule that a litigant lacks  
21 standing to assert the constitutional rights of another; its purpose is to prevent the  
22 discouragement or “chilling” of speech and other activity protected by the First  
23 Amendment. *Bd. of Airport Commissioners of the City of Los Angeles v. Jews for*  
24 *Jesus, Inc.*, 482 U.S. 569 (1987) (holding airport resolution forbidding “First  
25 Amendment activities” unconstitutional as overbroad; “Under the First Amendment  
26 overbreadth doctrine, an individual whose own speech or conduct may be  
27 prohibited is permitted to challenge a statute on its face ‘because it also threatens  
28 others not before the court – those who desire to engage in legally protected

1 expression but who may refrain from doing so rather than risk prosecution or  
 2 undertake to have the law declared partially invalid.’’) (quoting *Brockett v.*  
 3 *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)); *Conchata, Inc. v. Miller*, 458  
 4 F.3d 258, 263 (3d Cir. 2006) (holding that an operator of a semi-nude dancing club  
 5 and two of its dancers could challenge state statute precluding any establishment  
 6 with a liquor license from permitting any “lewd, immoral, or improper  
 7 entertainment” and holding the law unconstitutional; “in making their overbreadth  
 8 claim, [dance club] may assert the rights of any liquor licensees subject to the  
 9 Challenged Provisions”). The doctrine comes into play if impermissible  
 10 applications of the law – that is, those that would penalize protected activity – are  
 11 substantial in relation to the statute’s plainly legitimate sweep. *City of Chicago v.*  
 12 *Morales*, 527 U.S. 41, 52 (1999). Given the purpose of the doctrine, the *degree* of  
 13 chill is important, and thus the severity of the penalties in the law is relevant to  
 14 overbreadth. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)  
 15 (holding that because of harsh criminal penalties, a challenge to a federal law aimed  
 16 at “virtual child pornography” “provides a textbook example of why we permit  
 17 facial [overbreadth] challenges to statutes that burden expression.”).

18 Here, in a number of areas, the scope of which clearly is substantial in  
 19 relation to § 632’s sweep,<sup>1</sup> § 632 menaces those who engage in constitutionally  
 20 protected activity with harsh criminal penalties. In each of these areas, as will be  
 21 shown, tape-recording confidential communications in ways violative of § 632  
 22 enjoys strong First Amendment protection, and no interest the state has in

23  
 24 <sup>1</sup> And in some areas that, alone, perhaps are not “substantial” in scope. For  
 25 example: one party, A, to a three-party “confidential” conversation records the  
 26 communications therein of another party, B, with B’s consent, and neither records  
 27 the communications of the remaining party, C, nor obtains C’s consent to record  
 28 B’s communications. Or more simply: In a confidential conversation between A  
 and B, A records his own communications, but not B’s, and does not obtain B’s  
 consent for the recording. It is difficult to imagine any interest the state has in  
 outlawing such recordings, yet they are outlawed in § 632. *See also* discussion  
*infra* at 13-14 (noting that the statute is vague because it does not define who a  
 “party” to a communication is).

1 penalizing that activity outweighs the First Amendment interest in protecting it.  
 2 Accordingly, § 632 should be overturned because it unconstitutionally interferes  
 3 with the exercise of First Amendment-protected rights. *See, e.g., Jews for Jesus,*  
 4 482 U.S. at 574-575 (striking down airport ban on “First Amendment activity” as  
 5 overbroad because no conceivable government interest could justify banning all  
 6 such activity, including “talking and reading,” in an airport).

### 7 ARGUMENT

8 When a motion on the pleadings pursuant to Rule 12(c) relies upon the  
 9 complaint’s failure to state a claim for relief under Rule 12(b)(6), the usual rules for  
 10 resolving such motions are applicable. The allegations of the complaint must be  
 11 deemed to be true, and all reasonable and non-conclusory inferences from the  
 12 complaint should favor the pleader. These rules are applicable here, to be sure, but  
 13 they are of minimal relevance because this motion attacks the statute as a whole.

14 At issue in this motion is the constitutionality of the statute. Within a  
 15 number of classes of activity, broad areas of conduct are both protected by the First  
 16 Amendment and criminalized by § 632. These classes of activity include: 1) the  
 17 recording of “confidential communications” made by public officials to members of  
 18 the public, such as in police traffic stops; 2) the wholly innocent use of audio  
 19 recording in intimate family settings and in popular entertainment; and 3) the  
 20 production of a recognized genre of exposé journalism. And in each area of  
 21 conduct, as will be shown, the state lacks a governmental interest that is sufficient  
 22 to justify § 632’s ban.

#### 23 **I. SECTION 632 VIOLATES THE FIRST AMENDMENT** 24 **BY CRIMINALIZING THE TAPE-RECORDING OF ALL** 25 **“CONFIDENTIAL COMMUNICATIONS” BY PUBLIC** **OFFICIALS ACTING IN THE COURSE OF THEIR DUTIES.**

26 The Supreme Court of California has defined a “confidential  
 27 communication,” for purposes of § 632 solely, as one for which there exists an  
 28 objectively-reasonable expectation that it will not be overheard or recorded.

1 *Flanagan v. Flanagan*, 27 Cal. 4<sup>th</sup> 766, 777, 41 P.3d 575, 582, 117 Cal. Rptr. 2d  
2 574, 581 (Cal. 2002) (“[A] conversation is confidential under section 632 if a party  
3 to that conversation has an objectively reasonable expectation that the conversation  
4 is not being overheard or recorded”).<sup>2</sup> In so holding, that court has put its seal on  
5 the application of § 632 to a particular kind of communication: those made to  
6 individuals by public officials in the course of their duties. Thus, for a journalist or  
7 citizen to record anything a police officer, building inspector, sanitation official, or  
8 public officeholder says to him without the official’s consent, provided the official  
9 has an objectively reasonable expectation that the conversation is not being  
10 overheard or recorded, violates § 632 as authoritatively construed by California  
11 state courts. And this is so even if the official has every expectation that the  
12 conversation will be repeated to others or made known to the public at large.

13 Obviously, such communications occur constantly. To take the most  
14 common example, police officers routinely conduct conversations with drivers by  
15 the side of the road during traffic stops, out of earshot of anyone else; this must  
16 occur an untold number of times every day on California roads. Given the ubiquity  
17 today of small, personal recording devices, included in most cell phones, it does not  
18 seem a matter of speculation that a great many motorists in California, after being  
19 stopped, have both the ability and the inclination to make audio recordings of the  
20 ensuing conversations.

21 As an initial matter, the First Amendment gives some protection to such  
22 recording by citizens, and indeed to the making of audio recordings generally. The  
23 selective recording of sound is best seen as an act of expression, akin to taking a  
24 photograph, or taking notes, or the act of speaking itself. *See Commonwealth v.*  
25 *Oakes*, 518 N.E.2d 836, 837 (Mass. 1988) (holding unconstitutional a law that

26 <sup>2</sup> The *Flanagan* court explicitly rejected an earlier interpretation the Ninth Circuit  
27 had applied in *Deteresa v. American Broadcasting Companies, Inc.*, 121 F.3d 460,  
28 464 (9th Cir. 1997), according to which “a conversation is confidential only if the  
party has an objectively reasonable expectation that the content will not later be  
divulged to third parties.” *Flanagan*, 27 Cal. 4th at 768.

1 prohibited posing anyone under eighteen years of age nude in order to create a  
 2 photograph; “Photography is a form of expression protected by the First  
 3 Amendment just as the written or spoken word is protected . . . . First Amendment  
 4 analysis does not sever conduct from speech”), *vacated and remanded on other*  
 5 *grounds*, 491 U.S. 576 (1989); *Aldrich v. Knab*, 858 F. Supp. 1480, 1497 (W.D.  
 6 Wash. 1994) (holding the mere drafting of a letter, which was never distributed,  
 7 was an act protected by the First Amendment); *Giles v. Davis*, 427 F.3d 197, 212  
 8 n.14 (3d Cir. 2005) (dicta) (“[P]hotography or videography that has a  
 9 communicative or expressive purpose enjoys some First Amendment protection”).  
 10 Rather obviously, a hypothetical law banning the use of audio recorders to record  
 11 even one’s own speech, or another’s with that other’s consent, would raise First  
 12 Amendment concerns – no less clearly than would a law banning, say, the use of  
 13 word processors to write text, or the recording of music. *See, e.g., Vincenty v.*  
 14 *Bloomberg*, 476 F.3d 74, 77, 88-89 (2d Cir. 2007) (upholding, under the First  
 15 Amendment, grant of request by creators of lawful graffiti for injunction against a  
 16 ban on minors’ possessing aerosol spray paint cans and other means of producing  
 17 graffiti, because these materials were necessary to produce this form of artistic  
 18 expression).

19 In addition, there is a basic First Amendment right to obtain information in  
 20 traditionally open fora; the press and public have a First Amendment right, for  
 21 example, to attend court hearings. As Chief Justice Burger explained in *Richmond*  
 22 *Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980):

23 In guaranteeing freedoms such as those of speech and  
 24 press, the First Amendment can be read as protecting the  
 25 right of everyone to attend trials so as to give meaning to  
 26 those explicit guarantees. ‘[T]he First Amendment goes  
 27 beyond protection of the press and the self-expression of  
 28 individuals to prohibit government from limiting the stock  
 of information from which members of the public may  
 draw.’ *First National Bank of Boston v. Bellotti*, 435 U.S.  
 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978).  
 Free speech carries with it some freedom to listen. ‘In a  
 variety of contexts this Court has referred to a First

1 Amendment right to ‘receive information and ideas.’  
 2 *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576,  
 3 2581, 33 L.Ed.2d 683 (1972). What this means in the  
 4 context of trials is that the First Amendment guarantees of  
 5 speech and press, standing alone, prohibit government  
 6 from summarily closing courtroom doors which had long  
 7 been open to the public at the time that Amendment was  
 8 adopted. ‘For the First Amendment does not speak  
 9 equivocally. . . . It must be taken as a command of the  
 10 broadest scope that explicit language, read in the context  
 11 of a liberty-loving society, will allow.’ *Bridges v.*  
 12 *California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86  
 13 L.Ed. 192 (1941) (footnote omitted).

14 *Id.* at 575-76. See also *Press-Enterprise Co. v. Superior Court of California for*  
 15 *Riverside County*, 478 U.S. 1, 10 (1986) (“The considerations that led the Court to  
 16 apply the First Amendment right of access to criminal trials in *Richmond*  
 17 *Newspapers* . . . . lead us to conclude that the right of access applies to preliminary  
 18 hearings as conducted in California.”).

19 More specifically, the Ninth Circuit and other federal courts have held that  
 20 the First Amendment protects videotaping matters of public interest, including  
 21 police conduct in public. See, e.g., *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9<sup>th</sup>  
 22 Cir. 1995) (holding that plaintiff arrested for videotaping a demonstration on a  
 23 public street had a “First Amendment right to film matters of public interest” and  
 24 was entitled to a trial on his claim that police interference with his doing so, which  
 25 interference took a physical form and was included on the videotape, violated the  
 26 First Amendment); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11<sup>th</sup> Cir. 2000)  
 27 (holding there is a “First Amendment right, subject to reasonable time, manner and  
 28 place restrictions, to photograph or videotape police conduct,” explaining that  
 “[t]he First Amendment protects the right to gather information about what public  
 officials do on public property, and specifically, a right to record matters of public  
 interest”); *McCormick v. City of Lawrence*, 271 F. Supp. 2d 1292, 1302-1303 (D.  
 Kan. 2003) (holding that the First Amendment protected the activity of persons  
 videotaping and protesting a police traffic stop from a nearby sidewalk); *Robinson*  
*v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding police violated

1 plaintiff's First Amendment right to gather information when they arrested him for  
2 videotaping truck inspections).

3 In addition, very often when a recording of police is made by someone who  
4 is the object of their interest, the recording will be an act incidental to petitioning,  
5 because it will be part of the preparation of a potential defense case against the  
6 charges the police are making or investigating. The Ninth Circuit has held that acts  
7 incidental to petitioning are protected in the petitioning clause. *See, e.g., Sosa v.*  
8 *DIRECTV, Inc.*, 437 F.3d 923, 935-936 (9<sup>th</sup> Cir. 2006) (holding pre-litigation  
9 demand letters sent by a cable company protected as incidental to its petitioning of  
10 the courts); *see also Tichinin v. City of Morgan Hill*, 177 Cal. App. 4<sup>th</sup> 1049,1058,  
11 1064-1074, 99 Cal. Rptr. 3d 661, 668, 673-681 (Cal. App. 6 Dist. 2009), *review*  
12 *denied* (Jan. 13, 2010) (following *Sosa* and holding that an attorney's alleged hiring  
13 of a private investigator and conducting an investigation, including videotape  
14 surveillance, of a rumored inappropriate romantic relationship between a city  
15 manager and a city attorney was activity protected in the petition clause for  
16 purposes of the attorney's § 1983 retaliation claim against the city for censoring  
17 him for his investigation, because the attorney, had his investigation produced  
18 evidence of an inappropriate relationship, would have made a claim before the city  
19 council or in a lawsuit against the city that the city manager had a conflict of  
20 interest).

21 Also, the recording of a public official's "confidential communications" on  
22 duty sometimes will be newsgathering activity, for example, by a news organization  
23 or individual investigating reports of police misconduct or abuse. *Cf. Fordyce,*  
24 *supra*. As discussed below, newsgathering enjoys protection in the press clause.

25 Against these strong First Amendment interests citizens have in recording  
26 what public officials say to them in the course of their duties, the state has no  
27 countervailing interest that justifies the ban. Generally, the First Amendment sets  
28 strong limits on the degree to which state laws may protect privacy where either

1 public officials or matters of legitimate public interest are involved. For this  
2 reason, police officers and other public officials have at most a reduced privacy  
3 interest in the manner in which they do their jobs. *See, e.g., Cox Broadcasting*  
4 *Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (holding that under the First  
5 Amendment, a state could not sanction the accurate publication of the name of a  
6 rape victim); *Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1<sup>st</sup> Cir. 2007)  
7 (holding privacy interest of police officers “virtually irrelevant” where their  
8 communications were intercepted by a private citizen during their warrantless  
9 search of his home); *Gray v. Udevitz*, 656 F.2d 588, 591 (10<sup>th</sup> Cir. 1981) (holding  
10 street level police officers to be public officials for purposes of First Amendment  
11 defamation analysis, and explaining they are public officials under the test of  
12 *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d  
13 1210, 1219-22 (10<sup>th</sup> Cir. 2007) (holding that because the publication in a television  
14 broadcast of the undercover status of undercover police officers was a matter of  
15 public concern, since the broadcast was about their possible misconduct as police  
16 officers, the broadcast was not actionable under the tort of public disclosure of  
17 private facts, and noting that making an exception for undercover police officers,  
18 due to the risks such disclosure posed to the officers or the difficulties it might pose  
19 to the recruitment of undercover police officers, “could run afoul of the First  
20 Amendment”; that state law defined torts involving publication to take into account  
21 First Amendment restrictions; and that “the determination of what is a ‘legitimate  
22 concern to the public’ often dovetails with the explanation for ‘public official’  
23 designations for purposes of analyzing a publisher’s First Amendment defense”);  
24 *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F. Supp. 377, 385-86,  
25 390 (D.C. Pa. 1985) (holding that police officers are public officials for purposes of  
26 First Amendment defamation analysis, and that a broadcast dealing with alleged  
27 official corruption in connection with an after-hours club did not amount to an  
28 invasion of plaintiff police officer’s privacy, in light of Supreme Court First

1 Amendment precedent, because the broadcast dealt with the officer's public activity  
2 as a police officer; "A police officer's on-the-job activities are matters of legitimate  
3 public interest, not private facts. A publication dealing with those activities thus  
4 cannot be the basis for an invasion of privacy action." (citing *Cox, supra*); *Hardge-*  
5 *Harris v. Pleban*, 741 F. Supp. 764, 776 (E.D. Mo. 1990) (holding that if a matter  
6 involves the activities of police or other public bodies, the matter is of public  
7 interest for purposes of determining whether the tort of false light invasion of  
8 privacy will lie). *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that  
9 when public employees make statements pursuant to their official duties, the  
10 employees are not speaking as citizens for First Amendment purposes, and the  
11 Constitution does not insulate their communications from employer discipline.").

12 Indeed, it is clear that the privacy interests of the *motorist*, in his words at a  
13 traffic stop, are so minimal that he may be recorded by the officer without offense  
14 to the Fourth Amendment. *See, a fortiori, U. S. v. Caceres*, 440 U.S. 741, 750-751  
15 (1979) (holding the Fourth Amendment did not bar the IRS from surreptitiously  
16 recording an individual's conversation with an IRS agent wearing a hidden  
17 transmitter). It is hard to fathom how the officer, who unlike the motorist, is not  
18 even speaking about something that concerns him personally, can have a greater  
19 privacy interest.

20 The Supreme Court's reasoning in support of its holding in *Caceres* is  
21 particularly instructive here. The Court adopted that of Justice White's plurality  
22 opinion in *United States v. White*, 401 U.S. 745 (1971), in which he explained why  
23 a suspect had no Fourth Amendment right not to be surreptitiously recorded by a  
24 police informant:

25 Concededly a police agent who conceals his police  
26 connections may write down for official use his  
27 conversations with a defendant and testify concerning  
28 them, without a warrant authorizing his encounters with  
the defendant and without otherwise violating the latter's  
Fourth Amendment rights. . . . If the conduct and  
revelations of an agent operating without electronic

1 equipment do not invade the defendant's constitutionally  
2 justifiable expectations of privacy, neither does a  
3 simultaneous recording of the same conversations made  
4 by the agent or by others from transmissions received  
5 from the agent to whom the defendant is talking and  
6 whose trustworthiness the defendant necessarily risks.

7 *Caceres, supra* (quoting *White*, 401 U.S. at 751) (internal citations omitted).

8 Likewise, at a traffic stop, the police officer has no privacy interest that  
9 would bar the motorist from repeating or writing down anything he says, and he  
10 takes the risk that the motorist will do just that. (So, too, Mr. Vera would have no  
11 claim under § 632 had defendants simply publicized the entire contents of their  
12 conversation with him, based on notes or memory, in a large newspaper ad.) By the  
13 Court's logic, it follows that the officer does not have a privacy interest in  
14 preventing the motorist from merely making an audio recording of his words.  
15 Indeed, it is hard to see *any* interest the state has in preventing the recording of an  
16 officer's words by a motorist stopped by that officer except that of making it easier  
17 for the officer later to lie about or otherwise conceal what either party said. But  
18 quite obviously, making it easier for police officers to lie or suppress the truth in  
19 such circumstances is not a legitimate state interest. *Compare, e.g., White*, 401  
20 U.S. at 753 (plurality op.) ("An electronic recording will many times produce a  
21 more reliable rendition of what a defendant has said than will the unaided memory  
22 of a police agent. . . . Considerations like these obviously do not favor the  
23 defendant, but we are not prepared to hold that a defendant who has no  
24 constitutional right to exclude the informer's unaided testimony nevertheless has a  
25 Fourth Amendment privilege against a more accurate version of the events in  
26 question."), *quoted in Caceres*, 440 U.S. at 751 n.13.

27 In short, California has no legitimate interest in banning citizens from  
28 making audio recordings of what public officials say to them in the course of many  
of their duties, and certainly no interest that outweighs the First Amendment  
interests citizens have in making such recordings. Because of the breadth of the

1 chilling effect of § 632 in this area alone, its ban on the recording of “confidential  
 2 communications” is unconstitutionally overbroad. *Compare Ashcroft v. Free*  
 3 *Speech Coalition*, 535 U.S. 234, 245-251 (2002) (holding provisions of the Child  
 4 Pornography Prevention Act of 1996 overbroad because they harshly penalized the  
 5 possession or distribution of non-obscene “virtual child pornography” or of graphic  
 6 visual depictions, in non-obscene works and through the use of non-minor  
 7 performers, of apparent minors engaging in sexual activity).

8 **II. SECTION 632 UNCONSTITUTIONALLY CRIMINALIZES THE**  
 9 **RECORDING OF INTIMATE FAMILY MOMENTS, AND ALSO**  
 10 **A POPULAR FORM OF TELEVISION ENTERTAINMENT.**

11 Another class of First Amendment-protected activity criminalized in § 632 is  
 12 the innocent use of video technology by individuals, within their families or  
 13 otherwise, in their private lives. For example, a husband who, seeking to preserve a  
 14 spontaneous and unselfconscious family moment, surreptitiously turns a video  
 15 recording device on while his wife reads a bedtime story to their small child has  
 16 violated § 632 because his wife, by hypothesis, has a reasonable expectation that  
 17 her words are not being recorded. No doubt many people also wish to videotape  
 18 relatives or friends in “private” contexts, without gaining prior consent, whether in  
 19 the pursuit of sentiment or just harmless fun. Even if the videographer  
 20 subsequently seeks consent, and would destroy the footage if it were not obtained,  
 21 thereby ruling out any violation of privacy, it does not matter as far as § 632 is  
 22 concerned; the taping without prior consent still would be a criminal act. *Ribas v.*  
 23 *Clark*, 38 Cal.3d 355, 365, 696 P.2d 637, 212 Cal. Rptr. 143, 149 (Cal. 1985)  
 24 (“[T]he right to [] an award [of statutory damages for a violation of § 632] accrues  
 25 at the moment of the violation”); *Marich v. MGM/UA Telecommunications, Inc.*,  
 26 113 Cal. App. 4<sup>th</sup> 415, 425, 7 Cal. Rptr. 3d 60, 67 (Cal. App. 2 Dist. 2003) (“Penal  
 27 Code section 632 is violated the moment a confidential communication is recorded  
 28 without consent, regardless of whether it is subsequently disclosed.”). Yet such  
 uses of videotape technology are protected in the First Amendment. *See, e.g.*,

1 *Commonwealth v. Oakes*, 518 N.E.2d at 605 (“Surely, the First Amendment  
 2 protects [a parent who takes a frontal view picture of his or her naked one-year old  
 3 running on a beach]”). It is unjustifiable for the state to penalize First Amendment-  
 4 protected expression in families or other intimate associations, when by doing so it  
 5 does not protect the privacy interests of anyone.

6 Similarly, § 632 is unconstitutionally overbroad because it penalizes the  
 7 creation of much comedy entertainment in the genre made famous by *Candid*  
 8 *Camera* (and continued in its modern incarnations, such as *Punk’d*). Provided the  
 9 unwitting participants in episodes of such shows have a reasonable expectation that  
 10 their words are not being overheard or recorded, as has been the case in some  
 11 instances,<sup>3</sup> for the episodes to be produced today in California would be a crime  
 12 under § 632 – even if the shows had a policy of seeking consent from all  
 13 participants later and destroying footage if it was not obtained, thus fully protecting  
 14 the privacy of all concerned.

15 Indeed, it seems essential to any production of shows of this type that at least  
 16 one party to a recorded conversation have a reasonable expectation that it is not  
 17 being recorded. It might be supposed, however, that their creators could always  
 18 escape liability under § 632 by taking care to shoot them only in locations where it  
 19 was quite clear that no participant would have an objectively reasonable expectation  
 20 that the recorded conversation was not being overheard. Such a restriction, though,  
 21 would seem an unjustifiable interference with artistic freedom. First, for many

22 <sup>3</sup> In one famous “classic” episode of *Candid Camera*, for example, Woody Allen  
 23 poses as a business executive who in his office dictates to an applicant for a  
 24 secretarial position what turns out to be a rather nonsensical love letter. It only  
 25 gradually dawns on the unsuspecting applicant that she is on *Candid Camera* and  
 26 has been recorded surreptitiously.  
 27 <http://www.youtube.com/watch?v=TYpROqeKRMYY>. In an episode of its  
 28 precursor, *Candid Microphone*, Bela Lugosi poses as a vampire-like store owner  
 showing an unsuspecting woman who visits the store his inventory of objects made  
 of human skulls. He says he especially prizes the ones made from the remains of  
 people he knew when alive, and asks her consent to make an artifact out of her skull  
 after she is dead, a request the woman refuses. He then reveals his identity and that  
 their conversation has been recorded secretly for a radio program.  
<http://www.youtube.com/watch?v=MmGTwbOmPX8>.

1 examples of this genre, a relatively private or secluded location, such as by the side  
2 of a country road, or in an office, may be a comedic or dramatic necessity. Second,  
3 it often might not be very easy to ensure the lack of an expectation that a  
4 conversation is not being overheard. A crowded sidewalk or corner of an airport,  
5 for example, could suddenly become deserted in the middle of shooting, and the  
6 filmmakers would either have to cancel the shoot or risk breaking the law.

7       Indeed, what constitutes a reasonable expectation that a conversation is not  
8 being overheard or recorded, and thus whether it is “confidential,” is quite unclear.  
9 For example, if five people are in a room, and two converse while three listen  
10 without speaking (and it is reasonable to expect no one else can overhear), it is far  
11 from apparent whether the conversation is being overheard by three non-“parties”  
12 to it, and thus does not qualify as “confidential,” or whether the three who listen  
13 count as “parties” to the conversation, rendering it “confidential” (at least if any of  
14 the five has a reasonable expectation that it is not being recorded). This vagueness  
15 widens the chill of § 632 still further; in such an environment, the prudent course  
16 for both businesses and individuals is to steer well clear of any recording, however  
17 well-intentioned or harmless to anyone’s privacy, or however amusing, in a  
18 situation where the person recorded might turn out to have such an expectation. As  
19 the Supreme Court explained in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234,  
20 244 (2002), in the course of striking down a federal law aimed at “virtual child  
21 pornography” as overbroad, “few legitimate movie producers or book publishers, or  
22 few other speakers in any capacity, would risk distributing images in or near the  
23 uncertain reach of this law.” Likewise, though the *Candid Camera*-style practical  
24 joke is alive and well, as practiced by individuals (if YouTube is any guide) and  
25 modern incarnations such as *Punk’d*, a person of ordinary intelligence and prudence  
26 would tend to avoid the genre altogether in California, not wishing to tread near the  
27 uncertain and menacing boundaries of § 632.

28 ///

1 **III. SECTION 632 UNCONSTITUTIONALLY PENALIZES A GENRE**  
 2 **OF EXPOSE NEWSGATHERING.**

3 The First Amendment protects newsgathering as a general matter.  
 4 Guaranteeing more than the right to transmit ideas through words, the First  
 5 Amendment gives some protection, as well, to obtaining information. *Branzburg v.*  
 6 *Hayes*, 408 U.S. 665, 681 (1972) (“Nor is it suggested that news gathering does not  
 7 qualify for First Amendment protection; without some protection for seeking out  
 8 the news, freedom of the press could be eviscerated”); *Daily Herald Co. v. Munro*,  
 9 838 F.2d 380, 384 (9<sup>th</sup> Cir. 1988) (holding the First Amendment protected news  
 10 organizations’ taking exit polls near polling places and explaining that such polling  
 11 is protected newsgathering); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9<sup>th</sup> Cir.  
 12 1971) (“[N]ewsgathering is an integral part of news dissemination”); *Desnick v.*  
 13 *American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1355 (7<sup>th</sup> Cir. 1995)  
 14 (dismissing various tort claims against television network and others arising from  
 15 its engaging in a hidden camera exposé at an eye clinic with journalists posing as  
 16 prospective patients; broadcasters are “entitled to all the [First Amendment]  
 17 safeguards with which the Supreme Court has surrounded liability for defamation.  
 18 And it is entitled to them regardless of the name of the tort . . . and, we add,  
 19 regardless of whether the tort suit is aimed at the content of the broadcast or the  
 20 production of the broadcast.”); *Cuviello v. City of Oakland*, 2007 WL 2349325, \*3  
 21 (N.D. Cal. Aug. 15, 2007) (holding animal rights activists’ efforts to videotape  
 22 activity related to circus animals, which they used to educate the public about the  
 23 circus’s treatment of the animals, was “free speech under the First Amendment”);  
 24 *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (taping truck  
 25 inspections was protected by the First Amendment because plaintiff’s “right to free  
 26 speech encompasses the right to receive information and ideas”); *Lambert v. Polk*  
 27 *County*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (“It is not just news organizations  
 28 . . . who have First Amendment rights to make and display videotapes of events –

1 all of us . . . have that right”). The reason why someone chooses to obtain  
2 information is irrelevant. *Robinson, supra*.

3 Of course, those engaged in gathering information for later distribution are  
4 not permitted to violate “valid” tort or criminal laws in the process, but a tort cause  
5 of action or criminal law is not “valid” unless it properly protects a legitimate state  
6 interest. For example, a law prohibiting someone from taking a photograph of  
7 another without permission (even where circumstances would make it likely that  
8 the subject would deny permission) would be a broad infringement on the right to  
9 gather news or information, with insufficient state interest to balance it. *McNamara*  
10 *v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 904 (Tex. Ct. App. 1991) (holding  
11 First Amendment protected use of photo of high school soccer player with exposed  
12 genitalia; invasion of privacy suit dismissed because “[p]ublication in a newspaper  
13 does not lose its protected character simply because it may embarrass the persons to  
14 whom the publication refers.”).

15 The Ninth Circuit has held that the First Amendment protection of  
16 newsgathering does not immunize the press from the tort of invasion of privacy.  
17 *Dietemann*, 449 F.2d at 249 (holding the First Amendment did not immunize  
18 defendant news organization from liability for invasion of privacy where, for  
19 purposes of publication in a national news magazine, agents of defendant gained  
20 entrance to plaintiff’s home by subterfuge and photographed and recorded him  
21 engaging in an eccentric private hobby of questionable legality). But in many  
22 exposés, no invasion of privacy will occur and no private facts will be revealed.  
23 For example, in *Medical Laboratory Management Consultants v. American*  
24 *Broadcasting Companies, Inc.*, 306 F.3d 806, 813-19 (9<sup>th</sup> Cir. 2002) , the Ninth  
25 Circuit held that secret videotaping of a medical laboratory owner’s conversation  
26 with undercover network representatives for future broadcast about errors in pap  
27 smear testing did not intrude on the owner’s privacy, even though the owner invited  
28 the representatives into his premises only after they told him (untruthfully) that they

1 were thinking of entering the medical testing business and asked for a tour, and  
 2 even though the conversation took place behind closed doors in a conference room  
 3 the owner typically used for private conversation. The court reasoned that the  
 4 owner did not reveal any information about his personal life or affairs, but only  
 5 generally discussed the laboratory's business operations, presenting himself as no  
 6 more than a public face and voice for the laboratory, and concluded that "[t]he  
 7 covert videotaping of a business conversation among strangers in business offices  
 8 does not rise to the level of an exceptional prying into another's private affairs." *Id.*  
 9 at 819. The court also held that "[i]n addition, any offensiveness of the alleged  
 10 intrusion is mitigated by the public interest in the news gathered," explaining that  
 11 "the constitutional protection of the press does reflect the strong societal interest in  
 12 effective and complete reporting of events, an interest that may – as a matter of tort  
 13 law – justify an intrusion that would otherwise be considered offensive." *Id.*  
 14 (quoting *Shulman v. Group W Productions, Inc.*, 18 Cal. 4<sup>th</sup> 200, 236, 955 P. 2d  
 15 469, 493, 74 Cal. Rptr. 2d 843, 867 (Cal. 1998)).

16 As a comparison of *Dietemann* with *Medical Laboratory Management*  
 17 *Consultants* suggests, it seems that a line can and should be drawn between privacy  
 18 and the command of the press clause in a way that properly balances both of these  
 19 vital concerns.<sup>4</sup> That line does not have to be precisely drawn for it to be clear that  
 20 for many kinds of exposés prohibited by § 632, the First Amendment interest  
 21 recognized in *Medical Laboratory Management Consultants* – that in the free flow  
 22 of information important to the public – will outweigh any government interest in  
 23 protecting privacy.

24 ///

25 \_\_\_\_\_  
 26 <sup>4</sup> *Medical Management Laboratory Consultants* itself distinguished *Dietemann* on  
 27 the ground that *Dietemann* "involved an intrusion into a plaintiff's private affairs in  
 28 his home, where it is well-established that privacy interests are most potent. . . . The  
*Dietemann* plaintiff's quack healing of nonexistent ailments, which the defendant-  
 journalists clandestinely recorded, was his private hobby, not a professional  
 business service." *Id.* at 818 n.6.

1 A form of newsgathering particularly deserving of First Amendment  
 2 protection for this reason is much newsgathering that is also “tester” activity,  
 3 analogous to that of housing testers who pose as potential buyers to test compliance  
 4 with fair-housing laws. *See generally Desnick*, 44 F.3d at 1351-55 (7<sup>th</sup> Cir. 1995)  
 5 (dismissing various tort claims arising from television show engaging in a hidden  
 6 camera exposé at an eye clinic with journalists posing as prospective patients, and  
 7 analogizing this kind of journalism to tester activity). Such journalistic enterprise,  
 8 when the subject matter, as it often will be, is one of public concern, may be  
 9 essential to serve core First Amendment values. As James Madison wrote:

10 A popular Government, without popular information, or  
 11 the means of acquiring it, is but a Prologue to a Farce or a  
 12 tragedy; or, perhaps both. Knowledge will forever govern  
 13 ignorance: And a people who mean to be their own  
 14 Governors, must arm themselves with the power which  
 15 knowledge gives.

14 9 Writings of James Madison 103 (G. Hunt ed. 1910), *quoted in Branzburg*, 408  
 15 U. S. at 728 (Stewart, J., dissenting).

16 \* \* \*

17 Today more than ever, technological means unimaginable to the Framers of  
 18 the Constitution have enabled people to engage in new forms of speech, expression  
 19 (artistic, political, and other kinds), and petitioning and press activity. The easy  
 20 ability of people to record sound is part of what speech has become in the twenty-  
 21 first century. Such acts of expression are protected in the First Amendment, *see*,  
 22 *e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 420 (1992) (“[T]he First  
 23 Amendment broadly protects ‘speech’”), unless strong governmental interests  
 24 countervail. Within substantial reaches of § 632, they do not.

25 ///

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

For the foregoing reasons, defendant’s motion pursuant to Rules 12(b)(6) and 12(c) should be granted and the complaint dismissed with prejudice.

Dated: March 15, 2011

Respectfully submitted,  
CENTER FOR INDIVIDUAL RIGHTS

By /s/Christopher J. Hajec  
MICHAEL E. ROSMAN  
CHRISTOPHER J. HAJEC,  
Attorneys for Defendant JAMES O’KEEFE III

Dated: March 15, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

By /s/Eric A. Gressler  
ERIC A. GRESSLER,  
Attorneys for Defendant JAMES O’KEEFE III