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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUAN CARLOS VERA, an individual,

Plaintiff,

v.

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

Defendants.

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

INTRODUCTION

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

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

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

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

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

[1] And in some areas that, alone, perhaps are not "substantial" in scope. For example: one party, A, to a three-party "confidential" conversation records the communications therein of another party, B, with B's consent, and neither records the communications of the remaining party, C, nor obtains C's consent to record 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).

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

ARGUMENT

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

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

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.

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

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

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

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

[2] The *Flanagan* court explicitly rejected an earlier interpretation the Ninth Circuit had applied in *Deteresa v. American Broadcasting Companies, Inc.*, 121 F.3d 460, 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.

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

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

> In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. '[T]he First Amendment goes beyond protection of the press and the self-expression of 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

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

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

More specifically, the Ninth Circuit and other federal courts have held that the First Amendment protects videotaping matters of public interest, including police conduct in public. *See, e.g., Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding that plaintiff arrested for videotaping a demonstration on a public street had a "First Amendment right to film matters of public interest" and was entitled to a trial on his claim that police interference with his doing so, which interference took a physical form and was included on the videotape, violated the First Amendment); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding there is a "First Amendment right, subject to reasonable time, manner and 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

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

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

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

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

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

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

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

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

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning 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

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

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

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

In short, California has no legitimate interest in banning citizens from 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

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

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

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

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

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

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

[3] In one famous "classic" episode of *Candid Camera*, for example, Woody Allen poses as a business executive who in his office dictates to an applicant for a secretarial position what turns out to be a rather nonsensical love letter. It only gradually dawns on the unsuspecting applicant that she is on *Candid Camera* and has been recorded surreptitiously. http://www.youtube.com/watch?v=TYpROqeKRMY. In an episode of its 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.

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

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

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III. SECTION 632 UNCONSTITUTIONALLY PENALIZES A GENRE OF EXPOSÉ NEWSGATHERING.

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

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

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

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

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

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

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[4] *Medical Management Laboratory Consultants* itself distinguished *Dietemann* on the ground that *Dietemann* "involved an intrusion into a plaintiff's private affairs in 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.

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

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

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

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

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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

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