JOSHUA KOLTUN (State Bar No. 173040)
joshua@koltunattorney.com
101 California Street
Suite 2450, No. 500
San Francisco, California 94111
Telephone: (415) 680-3410
Facsimile: (866) 462-5959

CELESTE PHILLIPS (State Bar No. 100066)
cphillips@lskslaw.com
SETH D. BERLIN (Of Counsel)
sberlin@lskslaw.com
CHRISTOPHER P. BEALL (Of Counsel)
cbeall@lskslaw.com
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 508-1100
Facsimile: (202) 861-9888

Attorneys for Non-Parties NAACP and NAACP Richmond Branch President Ken Nelson

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAMES JENKINS, SHAWN PICKETT, CLEVELAND BROWN, AND ARNOLD THREETS,

Plaintiffs,

v.

CITY OF RICHMOND, a California Governmental Entity; and DOES 1 through 50, inclusive,

Defendant.

CASE NO. C 08-03401 MHP

LIMITED SPECIAL APPEARANCE BY NON-PARTIES NAACP AND NAACP RICHMOND BRANCH PRESIDENT KEN NELSON TO OPPOSE INJUNCTION AND DEFENDANT'S APPLICATION TO HOLD MR. NELSON IN CONTEMPT

Date: March 25, 2010
Time: 4:00 pm
Judge: Hon. Marilyn Hall Patel
Dept: Courtroom 15
Special Master: Catherine Yanni

Documents filed herewith:

1. Declaration of Ken Nelson
2. Declaration of Joshua Koltun

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Non-parties NAACP and Ken Nelson, the President of the NAACP's Richmond Branch, specially appear for the limited purposes of (a) opposing the injunction entered as to them orally at this Court's February 26, 2010 hearing and any such injunction to be memorialized in a future written order; (b) opposing defendant's application for an order holding Nelson in contempt; and (c) challenging the jurisdiction of the court to enter such relief against either of them.[1] Without waiving and expressly preserving the aforementioned jurisdictional issue, they respectfully submit the following memorandum of points and authorities and state as follows:

PRELIMINARY STATEMENT

Concerned about attempts by the parties and their counsel to "try this case in the court of public opinion," this Court announced orders at its January 21, 2010 and February 26, 2010 hearings imposing a number of limitations in connection with future attempts to do so. Because the NAACP and Nelson were not provided with notice of those hearings (and Nelson was not served with, nor otherwise given notice of, the City's application for an order to hold him in contempt), their undersigned counsel did not have the opportunity to participate in those hearings or submit papers in advance of them. The NAACP and Nelson very much appreciate the Court's willingness to hear from them, albeit belatedly, in this memorandum.

We respectfully submit that the Court has received misinformation about Nelson's and the NAACP's connections to this case and to the plaintiffs' counsel, leading the Court to include Nelson – and potentially the NAACP by extension – in a broad injunction that, even assuming it

[1] It appears that at the February 26, 2010 hearing, the City's request for sanctions, including contempt, was denied in light of the injunctive relief the Court issued that day. *See, e.g.*, Hr'g Tr. 25:4-9, Feb. 26, 2010 ("Tr. I") (attached as Ex. 1 to the Declaration of Joshua Koltun ("Koltun Decl.")) (stating "I don't want to . . . really spend any more time on this" and confirming that "the March 22nd motion for sanctions regarding the DVD" is "off calendar as being dealt with by the Court," to the extent "it was ever on the calendar"); 67:21 – 68:1 (at the conclusion of the hearing, the City's counsel asked "[i]s the Court going to issue any sort of sanctions?" and Mr. Dolan responded that, in light of the injunction under Rule 65(d), "I think we're done with that, aren't we, your Honor?" to which the Court responded "Yes, we are done with that."). Nevertheless, because Nelson was neither served with the application seeking contempt against him nor provided with an opportunity to address that issue, and because the City may seek to renew its request that he be held in contempt, Nelson expressly opposes herein any such finding against him.

could properly be applied to parties and their counsel, could not constitutionally be applied to non-parties. The First Amendment rights of the NAACP – and Nelson as its Branch President – to exercise their freedoms of speech, publication, petition, association and assembly are well established, including in numerous Supreme Court decisions in which the NAACP was itself the party invoking those freedoms. Those rights include the prohibition against prior restraints or gag orders on the speech of citizens and political advocacy groups like the NAACP, especially when those citizens are not parties to the underlying court proceeding. This constitutional restriction against prior restraints even encompasses restraints on the disclosure of information that was allegedly provided by someone else in violation of a statute or court order. Indeed, in the *Pentagon Papers* case, the Supreme Court famously declined to enjoin the publication of information claimed to be injurious to national security even though the information had been "purloined" by Daniel Ellsberg. A subsequent and unbroken line of Supreme Court authorities similarly makes clear that a person also cannot be punished after the fact for disseminating such information. This Court recognized as much when it concluded that, despite the potential for much more widespread dissemination of the DVD, the Court could not order KRON-4 and KPIX-5 to return the DVD or to enjoin them from broadcasting its contents.[2] Finally, the Court has ordered ancillary relief relating to its prior restraint, including ordering Nelson, and by extension the NAACP, to disclose the identities of those people to whom they lawfully provided or showed the DVD. This contravenes equally well established Supreme Court authority recognizing the NAACP's and its members' First Amendment right of associational privacy and freedom from government intrusion into its communications or associations.

Despite these settled First Amendment principles, the Court appears to have been persuaded to include Nelson in its injunction through a series of factual assertions that, taken together, created

[2] *See* Tr. I 11:23 – 13:2 (Koltun Decl., Ex. 1) (If the stations do not return the DVD, "there isn't anything I can do about it. I can't order them to turn it over."); *id.* 21:19-21 ("I don't think I have jurisdiction to order [the stations] to turn them over. . . . If they don't want to cooperate, that's it."); *id.* 23:1-2 ("I can't restrain the newspapers, but I can certainly restrain you from talking to the press.").

the misimpression that Nelson and the NAACP are operating at the behest of the plaintiffs and their counsel, and could therefore be bound under Federal Rule of Civil Procedure 65(d). In particular, the City has contended variously that (a) plaintiffs' counsel had represented to the Court that Nelson is assisting plaintiffs in this case, (b) the Court had previously *held* that Nelson is functioning as a paralegal who is assisting plaintiffs in this litigation, and, (c) because Mr. Dolan represented Nelson at his deposition in this case as a courtesy to the NAACP, Nelson is a current client of the Dolan law firm bound by the Court's order at the January 21, 2010 hearing. As set forth below, each of these assertions is demonstrably incorrect, and there is therefore no factual or legal basis to include the NAACP and/or Nelson in the injunction. Similarly, because Nelson had no knowledge of the protective order or the Court's order on January 21, 2010, because he is not a current client of Mr. Dolan's who could reasonably have been understood to be subject to the January 21st order, and because he immediately ceased dissemination of the DVD upon learning of the Court's February 26th order, he cannot, particularly in light of the substantial constitutional limitations at play, properly be held in contempt.

FACTUAL BACKGROUND

A. The NAACP and Mr. Nelson

The NAACP is one of the oldest and largest civil rights organizations in the United States, and has consistently advocated to end racial discrimination for over 100 years. The NAACP has local branches throughout the United States, including as is relevant here, a branch in Richmond, California. Ken Nelson is currently the President of the Richmond Branch, a position he held from 1996 to 2000 and again from 2006 to the present. *See* Dep. of K. Nelson ("Nelson Dep.") 29:18-21, 35:3 – 36:1, Mar. 23, 2009 (attached as Koltun Decl., Ex. 2).[3]

Consistent with the NAACP's national mission, Nelson, as the Richmond Branch President, focuses on a full-time, volunteer basis on a number of issues that are important to the NAACP. *See, e.g.*, Nelson Dep. 29:8-17, 37:5-10, 103:7 – 104:6, 106:2-7 (describing various issues he has

[3] As discussed in greater detail *infra*, the City took the deposition of Nelson in this action on March 23, 2009.

addressed as NAACP Branch President, including "the gun-free school zone"; a high homicide rate, in which "80 [or] 90 percent of [the victims] are African-American," and "the crimes were going unsolved"; "diversity training"; "education" issues; and "employment issues"). Among his many responsibilities, Nelson also conducts initial interviews of people who ask the NAACP for legal representation. This occurred here when certain of plaintiffs in this action sought representation by the NAACP. *See, e.g.*, *Id.* 96:19 – 97:11.[4]

Not surprisingly, starting long before this action commenced, the NAACP has worked on issues of discrimination by the Richmond Police Department, both internally with respect to its employees and externally with respect to the substantial African American population of Richmond. The NAACP has continued to follow this lawsuit's progress as it obviously has an institutional interest in allegations that the Police Department engaged both in extensive racial discrimination against African American police officers and in retaliation against them for asserting their claims. As Nelson expressly confirmed to the City's counsel at his deposition, however, in pursuing issues of racial discrimination within the Richmond Police Department, he was not doing the bidding of plaintiffs or their counsel.[5] Indeed, Nelson confirmed that the NAACP's involvement in that issue extended much more broadly than the issues raised in this case, that he receives information and requests for assistance from many quarters (including in meetings with the

[4] As it receives far more requests for such representation than it can handle, the NAACP did not undertake to represent the plaintiffs in this action, including because they already had engaged experienced counsel. As such, the NAACP's legal department does not represent the plaintiffs.

[5] *See, e.g.*, Nelson Dep. 45:7 – 18 ("Q: Did Mr. Dolan ask you to write this letter [to the Richmond Police Department] raising issues related to allegations racial discrimination? A: Oh, no. Q: Did any of the plaintiffs in this action . . . ask you to write this letter? No."); *id.* 78:2 – 78:18 (regarding NAACP's Public Records Act request to Richmond Police Department, "Q: Did Mr. Dolan write this letter for you? A: No. Q: Were [the document categories] given to you by Mr. Dolan? A: No . . . Q: Who created these 12 categories of documents that are on here? A: Actually, it was a culmination of myself, Lawyers Committee for Civil Rights and Darnel Turner [an NAACP Executive Board member].").

Police Chief and other City officials), and that he and the NAACP are advancing an agenda which, while in certain respects overlapping with plaintiffs' claims, is decidedly their own.[6]

B. The Subpoena *Duces Tecum* to Mr. Nelson

Although Nelson is not a percipient witness to the allegations of discrimination at issue in this action, he was, in his role as NAACP Branch President, served with a subpoena *duces tecum* in this action for testimony and documents. Nelson Dep. 15:3-8. He testified on March 23, 2009 and was represented at that deposition by plaintiffs' counsel, Chris Dolan, as a courtesy to the NAACP (and to avoid its needing to send an in-house lawyer from the NAACP's national headquarters in Baltimore, Maryland). At the deposition, Mr. Dolan asserted various objections and privileges, including for example (a) NAACP members' rights to associational privacy and (b) the attorney-client privilege protecting citizens' requests for legal representation by the NAACP.[7] In response to the subpoena to Nelson, he and the NAACP also produced 1,423 pages of the Branch's documents at his deposition. *Id.* 15:3-17:5. The City thereafter moved to compel Nelson to submit to further questioning and challenged the objections interposed on his and the NAACP's behalf. On June 1, 2009, this Court denied that motion. Hr'g Tr. 23:23 – 25:9, June 1, 2009 ("Tr. III") (attached as Koltun Decl., Ex. 3). Immediately thereafter, an attorney in Mr. Dolan's office

---

[6] *See, e.g.*, Nelson Dep. 48:9-15 ("Q: Did you talk to anyone besides the plaintiffs in this action before you wrote this letter about the issues [in the Richmond Police Department]? A: Yes. . . . Quite a few."); *id.* 49:11 – 50:7 (asking about information in letter about new requirements for transferring to the Investigation Services Bureau, "Q: So you heard about it from other people besides the plaintiffs? A: Yes."); *id.* 50:8-21 (testifying that "Richmond officers" other than the plaintiffs asked the NAACP and Nelson "to conduct an investigation"); *id.* 102:3 – 103:12 ("I have learned quite a bit of information from different sources" including from "a lot of meetings with . . . the chief or the city manager or other city officials, because we were extremely active on several different issues.").

[7] For example, in response to question inquiring about specific individuals (other than plaintiffs) who had complained to the NAACP about racial discrimination in the police department, Mr. Dolan stated, "So I'm going to ask to step out of the room with [Nelson] for a moment just to discuss how the NAACP would like to proceed with that, and then we'll go forward." Nelson Dep. 47:2-48:1 Upon returning, Mr. Dolan interposed an objection on the NAACP's behalf asserting its "rights of [freedom of]assembly and rights of association" because Nelson had explained that "people come to him wishing to remain anonymous, and that they get fearful of retaliation if their names are disclosed" and this "would impact the ability of the NAACP to function." *Id.*

informed Nelson that the discovery matter was over, and he and the NAACP understood any representation by Mr. Dolan to be concluded. Decl. of K. Nelson ("Nelson Decl.") ¶ 2.[8]

C. Mr. Nelson's Receipt and Dissemination of, and Comments on the DVD.

In early January, plaintiff Arnold Threets voluntarily provided Nelson with a copy of the DVD. Nelson Decl. ¶ 4; Decl. of Arnold Threets . ¶ 2-3 (attached as Koltun Decl., Ex. 4). Nelson did not request it, did not participate in making it, and did not know what was on it until he viewed it. Nelson Decl. ¶ 4. Nelson understood the DVD to contain information of significant public concern for the community, including because it rebutted numerous public statements by the City and its police chief about the allegations in this case and, more generally, allegations of racism within the police department. *Id.* He therefore distributed copies of the DVD – together with his and the NAACP's views concerning the police department's treatment of African Americans – to other citizens, including NAACP officers and members, as well as federal state and local public officials. *Id.*.

In so doing, he was not aware of the protective order entered in the state court action concerning the report of Ray Marshall. *Id.*¶ 4. Nor was he present for or aware of this Court's January 21, 2010 order interpreting the protective order to apply to at least portions of the DVD, entering the protective order as an order in this case, and enjoining further dissemination of the DVD. *Id.* ¶ 5.[9] Nor was he present for or aware of this Court's February 26, 2010 order, having

---

[8] Shortly before Nelson's deposition in this case, he was also subpoenaed in the companion state case. Judge Flinn quashed the subpoena because it was "very broad" and because the information it sought interfered with the plaintiffs' and the NAACP's various rights. Hr'g Tr. 18:11-14, Feb. 25, 2009 (attached as Koltun Decl., Ex. 5). Although Mr. Dolan moved to quash that subpoena on behalf of *plaintiffs*, he indicated in passing to the Court that he also represented the NAACP and Nelson in connection with that subpoena. In any event, any such representation ended once the NAACP and Nelson were no longer subject to subpoenas in either case – or at the latest on June 1, 2009.

[9] *See, e.g.*, Hr'g Tr. 19:2-9, Jan. 21, 2010 ("Tr. II") (attached as Koltun Decl., Ex. 6) ("I'm making it clear now, in case it's not clear to you already, that anything related to the Marshall report, whether it is his gleaning of the facts, his reporting of the facts – and obviously his recommendations and conclusions, but all of that is subject to the protective order. If that wasn't clear from what the state court protective order is, it is [now] the protective order here."); *see also id.* 18:12-18 (directing Special Master to work with the parties to "revise that confidentiality

not been served with the application for a contempt order or any of the City's other requests for relief. *Id.* In that regard, as he was no longer a client of the Dolan law firm, he was not informed of the January 21st order by Mr. Dolan or his colleagues; indeed, at the February 26th hearing, this Court directed Ms. Yanni to contact Nelson after Mr. Dolan advised the Court that he no longer had any client relationship. Tr. I 18:11-16 (Koltun Decl., Ex. 1). Nelson first learned about this Court's orders on or about March 9, 2010 and, while he wishes to challenge those orders as applied to him for the reasons set forth herein, has complied with those orders and has not disseminated the DVD since that time. Nelson Decl. ¶ 5. Nelson has done so even though the full contents of the DVD have been available on YouTube since at least February 24, Nelson Decl. ¶ 6, in addition to the significant coverage given this case and the contents of the DVD in news reports previously aired on the KRON-4 and KPIX-5 television stations. *See* note 2, *supra*.

D. The City's Contentions in Requesting This Court to Enjoin Mr. Nelson, and by Extension the NAACP, and to Hold Mr. Nelson in Contempt.

Despite the foregoing, the City now contends that Nelson has violated the Protective Order and/or the Court's January 21st Order by disseminating copies of the DVD and that he is so closely connected to the plaintiffs that he can properly be (a) enjoined from disseminating the DVD, (b) required to return it, (c) required to disclose the identities of individuals to whom he may have provided or shown the DVD and the efforts he has taken to retrieve any copies he distributed, and (d) enjoined from future comment on this case. *See, e.g.*, Koltun Decl., Ex. 7 (City's proposed injunction enjoining various persons, including Nelson, "from discussing any issue raised in the DVD or any trial or litigation issue with any third party, including the media, until either trial is concluded or this injunction is dissolved"). The City has relied on three factual contentions to advance those arguments, and each is demonstrably incorrect.

First, the City contends that, when the Court directed Mr. Dolan at the January 21st hearing to retrieve the DVDs from his "clients," Tr. I 10:2-15:20, the Court meant to include Nelson and the NAACP (and presumably any other client of Mr. Dolan's firm) not just his current clients who

---

agreement so that it's clear that that is a part of the protective order"); *id.* 19:12-13 (reiterating instruction to "help them draft a protective order").

are parties in this case. Mr. Dolan provided only limited representation to Nelson during his deposition as a courtesy to the NAACP, and Mr. Dolan expressly asserted objections on behalf of the NAACP. When that deposition (and the motion to compel further testimony) concluded, Mr. Dolan was no longer counsel for the NAACP or Nelson. *See* Nelson Decl. ¶ 2.[10] In any event, Mr. Dolan cannot reasonably be expected to exercise control over a national civil rights organization, with its own in-house legal department, or the president of one of its branches based solely on his having volunteered previously to represent one witness at a deposition. *See* Tr. II 22:7-12 (Koltun Decl., Ex. 6) (order directed to Mr. Dolan and "persons under your control"). Indeed, while there was no conflict of interest in representing both Nelson and the plaintiffs in connection with the deposition in March 2009, Mr. Dolan could certainly not do so in connection with the issues surrounding the DVD in January 2010 because, as discussed below, the plaintiffs, as parties, are situated entirely differently than non-parties like Nelson and the NAACP. The Court recognized as much when it cautioned Mr. Dolan on this very point at the February hearing. *See* Tr. I 7:10-14 (Koltun Decl., Ex. 1) ("[y]ou have to keep in mind your obligations in this case as well as your clients and any potential conflict that there might be respect to your representation in this case vis-à-vis Nelson or the NAACP. Particularly vis-à-vis Mr. Nelson.").

Second, counsel for the City twice submitted a declaration under oath asserting that, in connection with the June 1, 2009 hearing on the City's motion to compel further testimony from Nelson, "***Plaintiff's counsel Dolan*** represent[ed] to the Court that Mr. Nelson is ***assisting plaintiffs in this case***." Dkt. #149 at 9, ¶ 3; Dkt. #155 at 8, ¶ 3 (emphasis added). In fact, Mr. Dolan said no such thing. Rather, it was *Mr. Spellberg*, the City's counsel, who represented to the Court at the June 1 hearing that the "the plaintiffs have . . . approach[ed] Mr. Nelson and asked him to help

[10] *See also, e.g.*, Tr. I at 7:3:5 (Koltun Decl., Ex. 1) (Mr. Dolan: "I've never provided [Nelson] other legal representation beyond the scope of his deposition and the work that's been done in this case previously."); *id.* 7:17("I don't represent Mr. Nelson currently"); *id.* 18:11-16 ("Mr. Dolan: Would you issue an order for Mr. Nelson's appearance? And I'll make every effort to get it to him, but I don't otherwise currently have an attorney-client relationship with him, your Honor, such that I can't compel him to be here. The Court: You provide his address to Ms. Yanni and we'll be sure that he gets it.").

them with their lawsuit," such as "submitt[ing] a Freedom of Information Act request to the City of Richmond to obtain documents relative to the lawsuit," and therefore "it's clear he's working as an agent or some sort of a relationship with the plaintiffs, advancing the lawsuit." Tr. III 23:24 – 24:6 (Koltun Decl., Ex. 3).[11] In actual fact, Nelson has not served as plaintiffs' agent at any time during this action. Nelson Decl. ¶ 3.

Finally, the City twice asserted under oath that, "[a]t pp. 24-25 of the transcript [of the June 1, 2009 hearing], this Court ***holds*** that Mr. Nelson is . . . essentially functioning as a ***paralegal assisting the Plaintiffs*** in litigating this action." Dkt. #149 at 9, ¶ 3; Dkt. #155 at 8, ¶ 3 (emphasis added). In fact, in response to Mr. Spellberg's argument at the June 1, 2009 hearing that Nelson was assisting the plaintiffs, the Court observed, "***If*** he's working with the plaintiffs, it's like trying to take the deposition of a paralegal who's working for them" and "[y]ou can't do that." Tr. III 25:5-7. This is in no way a *holding* that Nelson is *in fact* a paralegal for the Dolan law firm.[12] Moreover, although it is hard to see the relevance of any of the resulting testimony to the issues in this case, the City's counsel queried Nelson at some length about his other employment in addition to serving as President of the Richmond Branch of the NAACP, which notably did not include working as a paralegal or employee of the Dolan law firm.[13] *See also* Tr. I 6:22 – 7:3 (Koltun Decl., Ex. 1) (Mr. Dolan: "He's never worked for me, never received a penny from me."). Given the conditional nature of the court's comment on June 1, 2009, coupled with Nelson's extensive

---

[11] That earlier representation by Mr. Spellberg at the June 1, 2009 hearing is also troubling given that Mr. Spellberg had taken Nelson's deposition two months earlier, at which he testified under oath that the Public Records Act request referenced by Mr. Spellberg was not prepared by or with the participation of the plaintiffs or their counsel, but instead was prepared by Nelson with the help of the Lawyers Committee for Civil Rights and NAACP Executive Board member Darnel Turner. *See* note 5 *supra*.

[12] Indeed, the analogy discussed at the hearing and in the parties' papers was that Nelson was functioning as a paralegal conducting intake *for the NAACP* and its legal department when he spoke with the plaintiffs about their request that the NAACP represent them.

[13] *See* Nelson Dep. 29:22 – 36:4 (describing employment as a project manager for a real estate development company (H&H Builders), as a sales manager for life and health insurance sales for two companies (Primerica Financial Services and United Insurance Company of America), as a security officer and as a member of the "Municipal Advisory Council, . . . an advisory board to the County Board of Supervisors").

testimony about his actual work history, it is difficult to see how the allegation that he is a paralegal for the Dolan law firm could have been made in good faith.

In light of these circumstances, and because, as demonstrated below, there is well-settled precedent under the First Amendment that precludes the Court from enjoining Nelson and by extension the NAACP, the NAACP and Nelson respectfully request that the February 26, 2010 injunction be dissolved as to them and that they be included in no future injunction on this issue. In addition, because Nelson did not knowingly violate a court order – and any such order if intended to apply to him would have been constitutionally infirm in any event – he respectfully requests that the Court deny the City's application for an order holding him in contempt.[14]

ARGUMENT

I. THE FIRST AMENDMENT RIGHTS OF KEN NELSON AND THE NAACP BAR IMPOSITION OF A PRIOR RESTRAINT AGAINST THEIR CONSTITUTIONALLY PROTECTED EXPRESSION.

The Court's February 26, 2010 order from the bench, and any subsequent written order enjoining Nelson, cannot withstand constitutional scrutiny in light of the First Amendment rights of Nelson and the NAACP. The law is clear that there is a heavy – indeed insurmountable in this case – presumption against the constitutionality of gag orders or other prior restraints that enjoin the speech of non-parties about ongoing court proceedings. Moreover, as the cases discussed below make clear, where, as here the DVD indisputably pertains to matter of public concern, the First Amendment also necessarily bars judicial sanction of a non-party's its re-dissemination, even if it was initially disclosed unlawfully.

[14] Nelson and the NAACP believe that, in the present posture of the case – in which the Court has not signed an order and has requested submission of proposed orders – the present opposition is properly framed. In the alternative, they respectfully request that the Court deem this to be a request for leave to move to reconsider the Court's Order(s) under Local Rule 7-9(a); *see Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1103-04 (N.D. Cal. 2003), *amended by* 260 F. Supp. 2d 979 (N.D. Cal. 2003).

A. The NAACP's Activities in Communicating about Racial Discrimination Enjoy Full First Amendment Protection.

In a long and unbroken line of authorities, the U.S. Supreme Court has confirmed that, under the First Amendment, the NAACP and its members are entitled to exercise their right to freedoms of speech, publication, petition, assembly and association in protesting and seeking to remedy racial discrimination. Thus, for example, in *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886, 909-11, 915 (1982), the Court confirmed that speech "'protest[ing] racial discrimination is essential political speech lying at the core of the First Amendment.'" The Court similarly reaffirmed the NAACP's constitutional right of assembly and association, finding that a boycott to protest racial discrimination was protected by the First Amendment. *See Id.*, 485 U.S. at 907-08 (emphasizing that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American" tradition, for "by collective effort individuals can make their views known, when, individually, their voice would be faint or lost") (quotation omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").[15]

In that regard, the Supreme Court has emphasized that the First Amendment protects both "urging a course of action" as well as "giving and acquiring information." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). And, even where speech "will sometimes have unpalatable consequences," it remains protected by the First Amendment precisely because "our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes,

[15] As the Court articulated in *NAACP v. Claiborne Hardware Co.*, quoting Alexis de Tocqueville: "'The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.'" 458 U.S. 886, 933 n.80 (1982) (quoting 1 A. de Tocqueville, *Democracy in America* 203 (P. Bradley ed. 1954)).

J., dissenting)). Simply put, the speech activities of the NAACP and Nelson indisputably are subject to the fullest protections of the First Amendment.

B. The City Cannot Overcome the Heavy Presumption Against Prior Restraints on Constitutionally Protected Expression.

The Supreme Court has long emphasized that a request to enjoin protected expression – *i.e.*, a prior restraint – comes to a court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*). Prior restraints constitute "one of the most extraordinary remedies known to our jurisprudence" and are universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976); *see also Columbia Broad. Sys., Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1177 (9th Cir. 1984) ("the first amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave"). Indeed, some two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of prior restraints on constitutionally protected expression. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). More than eighty years ago the Supreme Court explained that a prior restraint may be imposed only in "exceptional cases," such as the intended publication of the sailing dates of military transports or the number and location of troops in time of war. *Near v. Minnesota ex rel. Olsson*, 283 U.S. 697, 716 (1931) (invalidating gag order against non-parties). This First Amendment principle was reaffirmed in *CBS Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers):

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security . . . or competing constitutional interests . . . are concerned, we have imposed this 'most extraordinary remed[y]' only where the evil that would result . . . is both great and certain and cannot be militated by less intrusive measures.

Id. at 1317 (citations omitted).[16]

[16] *See also In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986) ("[I]n its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure

These standards apply not only to gag orders against the media but to any gag order against any citizen other than an attorney in a case.[17] The First Amendment recognizes no basis to distinguish dissemination of the DVD by the media and dissemination by Nelson or the NAACP. As the Supreme Court recently reiterated:

> There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. . . . With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

Citizens United v. FEC, 130 S. Ct. 876, 905-06 (2010).

In this case, the City cannot overcome the heavy presumption against a prior restraint on Nelson and by extension on the NAACP given that the DVD and its contents are now available in the public domain – at television news stations' websites, in newspaper reports, and on the Internet. *See Bank Julius Baer & Co. Ltd. v. WikiLeaks*, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) (dissolving injunction after determining that dissemination of allegedly private information had already occurred on Internet and that "the cat [was] out of the bag," such that injunction would be ineffective and would generate further publicity for the confidential information).[18] Moreover,

---

speech."), *modified on other grounds on reh'g*, 820 F.2d 1354 (1st Cir. 1987). Indeed, prohibiting the exercise of the right of free expression "'is the essence of censorship,' and is allowed only under exceptional circumstances." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (citation omitted). As a result, the expression "must threaten an interest more fundamental than the First Amendment itself" in order to justify a prior restraint. *Id.* at 227.

[17] In *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985), the Court upheld in part a gag order restricting the *parties' attorneys* from discussing the case in public. As the Court of Appeal noted, the Supreme Court had in *Nebraska Press* suggested that it may be "appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of nonparticipants." *Id.* at 595 (citing *Nebraska Press*, 427 U.S. at 601 n.27). In upholding state bar rules applicable to attorneys for publicly discussing a case, the Supreme Court subsequently held that a different standard could be applied to attorneys. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

[18] *See also, e.g., Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) (court may not restrain the disclosure of information that is already in public domain); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 & n.11 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again. . . The genie is out of the bottle. . . . We have not the means to put the genie back."); *Calabrian Co. v. Bangkok Bank Ltd.*, 55 F.R.D. 82 (S.D.N.Y. 1972) ("Once the cat is out of the bag, the ball game is over.").

there has been no showing by the City that the broad panoply of alternative measures traditionally available to protect the fairness of a trial will not be effective in protecting the parties' interests here. *See Nebraska Press Ass'n*, 427 U.S. at 563-64. Indeed, our Court of Appeals has questioned whether, in light of the Supreme Court's pronouncements in *Nebraska Press Ass'n* regarding these alternative measures, there is "reason for courts ***ever*** to conclude that traditional methods are inadequate and that the extraordinary remedy of prohibiting expression is required." *Columbia Broad. Sys., Inc.*, 729 F.2d at 1183 (emphasis added) (overturning gag order against television broadcast of government surveillance tapes from investigation of John DeLorean); *see also Hunt v. Nat'l Broad. Co.*, 872 F.2d 289, 295 (9th Cir. 1989); *Welsh v. San Francisco*, 887 F. Supp. 1293, 1301-02 (N.D. Cal. 1995).

The City offers two bases for overcoming this virtual bar against such prior restraints against a non-party. In addition to alleging that the injunction is proper because the material was subject to a protective order (discussed in Part I.C. *infra*), the City asserts that Nelson's and the NAACP's dissemination of the DVD can be enjoined because it is incomplete and therefore purportedly misleading, such that the City is unable to respond effectively. But the Supreme Court has expressly rejected that very argument: "No prior decisions support the claim that the interest of [a party] in being free from public criticism . . . warrants the use of the injunctive power of a court." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 308-09 (1964) (even allegedly "'false charges' made by the Association or its representatives" would "furnish no basis for the restriction of the right of the petitioner's members to associate"). Indeed, "the Supreme Court has rejected the position that speech must be 'effectively answerable' to be protected by the Constitution." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); s*ee also* Tr. I 15:11-15 ("Mr. Hartinger: They've produced a very, very one sided, edited DVD, which cuts off the Chief in midstream in terms of his explanation about some of these incidents. The Court: Get over it."). Indeed, requests for prior restraints on speech are routinely rejected where a defamation plaintiff contends that speech about him is false or that it omits important additional, contextual facts. A different result would require courts to sit as super-editors over what members of the

press and public could say about a topic without being enjoined on the grounds that the proposed speech is alleged to be incomplete or misleading. That result similarly is required here.[19]

Because the City is unable to overcome the extraordinarily heavy presumption against maintaining a prior restraint against Nelson and the NAACP, the Court should dissolve its earlier order and decline to include them in the written order now before the Court.

C. Any Illegality in the Initial Disclosure of the DVD to Mr. Nelson is Insufficient Under the First Amendment to Support an Injunction Against Mr. Nelson or the NAACP.

The City's final basis for seeking an injunction is its claim that the DVD contains information subject to a protective order. However, in a long line of First Amendment cases, the Supreme Court has made clear that where, as here, a person receives information about a matter of public concern that has been disclosed through the unlawful conduct *of someone else*, the recipient may not be punished for further disseminating that information. For example, in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), a telephone call between two teachers' union officials, discussing possible violence against a school official, was intercepted and recorded in violation of the Wiretap Act. The recording was then provided to a radio station and a citizens group, each of which disseminated portions of the call. *Id.* at 519. In the resulting lawsuit, the Court held that, even with respect to information that the radio host and head of the citizens group had "reason to know" was unlawfully obtained, they could not be sanctioned for its disclosure when the information relates to a matter of public concern. *See id.* at 535 (holding that illegality of how third party acquires information will not "remove the First Amendment shield from criticism of official conduct" because of the Nation's "profound national commitment to the principle that debate on

[19] The City's reliance on *JK Harris & Co. v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003), in its *Ex parte* Application, at 7, is entirely inapposite in light of that court's important, and explicit, distinction that it was being asked to enjoin allegedly false ***commercial*** speech, for which the First Amendment provide lesser protection, rather than the core political speech at issue here. *See id.* at 1130. Moreover, the preliminary injunction in that case did not extend to speech by non parties as is requested here. *See id.* at 1128. Even less applicable is the Ninth Circuit's decision in *L.A. Mem. Coliseum v. NFL*, 634 F.2d 1197 (9th Cir. 1980), which did not involve an injunction against speech at all and in any event struck down the trial court's preliminary injunction barring the then-Los Angeles Rams football team from moving its home games to Anaheim.

public issues should be uninhibited, robust, and wide-open") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (other citations omitted).[20]

Indeed, *Bartnicki* is the latest in a series of Supreme Court decisions finding it unconstitutional under the First Amendment to sanction a citizen for retransmitting information that was provided by someone else in violation of a statute or court order. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1991) (no liability for publication of identity of rape victim when such information was obtained from a police report released by law enforcement agency in violation of Florida statute); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979) (invalidating West Virginia statute prohibiting publication of identity of juvenile defendant without first obtaining a court order; reiterating that a state cannot restrain a person from reporting information that he did nothing unlawful in obtaining); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law restricting publication of rape victim's name because defendant had obtained information lawfully despite statute's prohibition against its release); *see also Jean v. Mass. State Police*, 492 F.3d 24, 33 (1st Cir. 2007) (affirming First Amendment protection for publication of unlawfully recorded videotape of warrantless residential search that had been provided to community activist who then posted video on the Internet); *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 788-89 (3d Cir. 2005) (no liability for publishing identity of juvenile defendant disclosed in violation of statute).[21]

---

[20] *See Robinson v. York*, 566 F.3d 817, 823 (9th Cir. 2009) (allegations of discrimination in a police force are matters of public concern), *cert. denied*, 130 S. Ct. 1047 (2010); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000) ("Although focused on one employee and not addressed directly to the public, the speech here did concern matters which are relevant to the public's evaluation of its police department."); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 926 (9th Cir. 2004) ("invidious discrimination" inherently is a matter of public concern).

[21] This line of cases is closely related to the well-established body of law that prohibits injunctions against republication of information disclosed in court proceedings. *See, e.g.*, *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311-12 (1977) (striking down injunction barring publication of name and photograph of juvenile who appeared at open pretrial proceeding required to have been closed under state law); *United States v. Quattrone*, 402 F.3d 304, 313 (2d Cir. 2005) (striking down order prohibiting publication of names of jurors); *In re Charlotte Observer*, 921 F.2d 47, 49-50 (4th Cir. 1990) (striking down injunction against dissemination of name of grand jury target); *see also Freedom Commc'ns, Inc. v. Super. Ct.*, 83 Cal. Rptr. 3d 861, 863 (Cal. Ct. App. 2008)

Since there can be no ***after the fact liability*** for disseminating such information, it follows *a fortiori* that no ***prior restraint*** may issue against such dissemination. In *New York Times Co. v. United States*, 403 U.S. at 723-24, the Court rejected the government's request to enjoin publication of the Pentagon Papers despite allegations that the papers had been "purloined" and their publication would result in imminent impairment of the national security. *See also CBS*, 510 U.S. at 1318 ("[N]or is the prior restraint doctrine inapplicable because the videotape was obtained through . . . 'calculated misdeeds.'"). In light of these precedents, even if others released the DVD to Nelson in violation of a court order in the first place, the First Amendment rights of Nelson and the NAACP to speak out on matters of public concern necessarily include the right to re-distribute copies of the DVD, and to speak about its contents. *See Bartnicki*, 532 U.S. at 535. Any injunction intended to bar Nelson or the NAACP from doing so would fundamentally run afoul of the First Amendment.

II. THE COURT'S ORDER REQUIRING MR. NELSON TO RETURN COPIES OF THE DVD, DISCLOSE TO WHOM HE PROVIDED THEM, AND DEMAND THEIR RETURN IS ALSO UNCONSTITUTIONAL.

The injunction further requires Nelson, and by extension the NAACP and its other officials and members, to return all copies of the DVD, identify for the Court and the City all persons to whom Nelson gave copies of the DVD, and to affirmatively demand of those recipients that they too disgorge any copy of the DVD that they received. Tr. I 10:2-15:20 (Koltun Decl., Ex. 1). Insofar as these requirements are ancillary relief in support of the Court's prior restraint on dissemination of the DVD, they must fail for the reasons stated in Part I. (As explained in Part IV *infra*, "mandatory" injunctions requiring affirmative behavior are subject to even stricter scrutiny than "prohibitory" injunctions.) Moreover, these aspects of the order also violate the associational privacy interests of the NAACP and its members, which are protected by the First Amendment, as

---

(striking down injunction on reporting on trial testimony where newspaper was a defendant in the case: "[Supreme Court] case law makes clear that the danger the trial court sought to avert by its prior restraint here – the risk that witnesses in a civil trial might be influenced by reading news reports of the testimony of other witnesses – cannot possibly justify the censorship imposed").

well as their Fourth Amendment rights against unreasonable seizure of First Amendment-protected expressive materials intended to remove them from public circulation.

With respect to the NAACP's associational rights, there can be no dispute that the First Amendment protects the right of the people to associate with like minded individuals and to act through such associations to advance their collective petitions for redress of grievances. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460; *see also* Part I *supra*. The cases likewise make clear that the First Amendment also protects against the unwarranted disclosures of the identities of the members of advocacy organizations such as the NAACP, exposure which is likely to subject the NAACP's members to retaliation or to otherwise discourage persons from participating in the NAACP's work. *See id.* at 462; *accord Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9th Cir. 2010) (reversing trial court's order requiring disclosures of political advocacy group's information on the ground that such disclosures would chill associational and advocacy efforts).

In this regard, disclosure of the identities of the persons to whom Nelson and the NAACP have provided the DVD are hardly compelling when the Court already knows the identity of the party who was Nelson's source for the DVD – Arnold Threets – such that the Court is not trying to identify a "leaker" of information. *Compare, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005). The Court's requirement that the NAACP disclose the downstream recipients of copies of the DVD would dramatically chill the advocacy and internal associational efforts of the NAACP. Nelson Decl. ¶ 6. Such disclosures would expose members and friends of the NAACP to recriminations based solely on their wholly innocent receipt of a DVD that, as explained in Part I *supra*, Nelson disseminated lawfully. *Id.* In addition, the mandate to disclose recipients' identities also would expose the NAACP's petitioning efforts – including its contacts with state legislators, members of Congress, federal law enforcement authorities, and others – all of whom the NAACP attempts to work with on a cooperative and sometimes confidential basis to

advance the goals of the NAACP, making it that much more difficult for the NAACP to do so in the future. *Id.*[22]

IV. THE CITY CANNOT SATISFY ITS BURDEN OF PROVING THAT IT IS ENTITLED TO AN INJUNCTION UNDER THE STANDARDS THAT OTHERWISE GOVERN SUCH AN ORDER.

A. The Court Has No Jurisdiction Under Rule 65(d) to Enjoin Mr. Nelson, and By Extension the NAACP.

This Court determined at the February 26 hearing that it could issue an order binding Nelson under Fed. R. Civ. P. 65(d). That rule provides that an order thereunder "binds only the following who receive actual notice of it by personal service or otherwise (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in

---

[22] The Fourth Amendment expressly singles out "papers" as being protected from seizure by the Government. Where, as here, a court issues a subpoena or other order compelling the production of First Amendment materials, Fourth Amendment concerns are implicated as well. *In re Grand Jury Subpoena*, 829 F.2d 1291, 1295-96 (4th Cir. 1987).

Here, although this Court's order preventing further dissemination is not expressly styled as a subpoena, it necessarily implicates those First Amendment concerns. The Court has not only ordered Nelson not only to produce a copy of the DVD for evidentiary purposes, but to turn over any copy in his possession to the Court. Under a long line of authority, the Fourth Amendment prevents the Government from "seizing" First Amendment materials in the absence of probable cause to believe that the speaker had engaged in a crime or other unlawful conduct, and particularly where the order is expressly designed to remove it from circulation and prevent discussion of a matter of public concern. *See Stanford v. Texas*, 379 U.S. 476, 485 (1965) (Fourth Amendment prohibitions must be applied with "scrupulous exactitude" when applied to seizures of expressive works); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979) (there are "special constraints upon . . . seizures of material arguably protected by the First Amendment"); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989) ("The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials" restricts Government's authority to engage in seizures designed to remove a work from circulation) (quoting *Maryland v. Macon*, 472 U.S. 463, 470 (1985), *abrogated by New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986)); *Heller v. United States*, 413 U.S. 483, 492 (1973) ("seizing films to destroy them or to block their distribution is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding"); *Marcus v. Search Warrants*, 367 U.S. 717, 729, 724 (1961) (observing that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression," and holding that a court must examine whether use of seizure power is aimed at suppressing expressive materials).

active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." *Id.*; *see* Tr. I 10:19-25 (Koltun Decl., Ex. 1).[23]

There is no dispute that Nelson is not a party in this action. This Court thus has no jurisdiction over him unless he can be shown to be an "agent" or "servant" of one of the parties, or to be "in active concert or participation" with one of them. The issue is not simply whether Nelson has (as of this date) received "actual notice" of the Court's order, for the fact that Nelson was specifically named by the Court is not enough to bring him within the Court's jurisdiction. *Comedy Club, Inc. v. Improv W. Assocs.*, 514 F.3d 833, 845-46 (9th Cir. 2008), *cert. granted, judgment vacated on other grounds by* 129 S. Ct. 45 (2008); *United Pharmacal Corp. v. United States*, 306 F.2d 515, 517-18 (1st Cir. 1962). Nelson and the NAACP are specially appearing to challenge the injunction, including the jurisdiction of this Court to bind them. *See Heyman v. Kline*, 444 F.2d 65, 67 (2d Cir. 1971) (nonparty specially appeared to successfully challenge jurisdiction of court to issue order binding her).[24]

Although the issue of whether a nonparty is "in active concert" with a party is sometimes referred to under the rubric of "privity," that term has a narrower meaning than it may have in other legal contexts. *Doctor's Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297, 304 (2d Cir. 1999). The fact that nonparties and parties "shared the same interests and the same attorneys" is not a sufficient

---

[23] The Court named Nelson, but also indicated that the order would apply to "other persons of that nature," Tr. I 10:23-25 (Koltun Decl., Ex. 1). Because Nelson acted in his capacity as NAACP's Richmond Branch President, it is uncertain to what extent other members of the NAACP have or may run afoul of the Courts' orders, on the same theory that they are acting "in concert" with Plaintiffs. Of course that very uncertainty is itself a statutory and constitutional infirmity. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1976) (Fed. R. Civ. P. 65 requires that persons be left with no uncertainty as to what they are ordered to do); *In re Berry*, 68 Cal. 2d 137, 151 (1968) (injunction barring "all persons in active concert or participation with" named Defendants from picketing or similar labor activities held to be unconstitutionally vague.). Even if the Court were to clarify, however, that neither the NAACP nor any other member were bound by its orders, the NAACP would challenge the order as impermissibly interfering with its own First Amendment rights because of the restraint on its Branch President.

[24] That Nelson and the NAACP also argue the merits of the injunction and application for contempt herein does not constitute a waiver of their objections to this Court's jurisdiction. *See, e.g.*, Fed. R. Civ. P. 12(b) (a jurisdictional defense is not "waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.").

basis to find that the parties were "in active concert" under Rule 65(d). *Id.* at 304-05. Privity is not established merely "because persons are interested in the same question or in proving the same set of facts, or because the question litigated is one which might affect such other person's liability as a judicial precedent in a subsequent action." *Baltz v. The Fair*, 178 F. Supp. 691, 694 (N.D. Ill. 1959), *aff'd*, 279 F.2d 899 (7th Cir. 1960); *accord Petersen v. Fee Int'l, Ltd.*, 435 F. Supp. 938, 942-943 (W.D. Okla. 1975).

Here, although plaintiff Arnold Threets gave Nelson the DVD, Nelson did not induce Threets to do so nor did he have any agreement with Threets as to what Nelson would do with this information. Nelson Decl. ¶ 4. To the extent that Nelson has distributed the DVD within the community, he did so in pursuit of the NAACP's independent interest in investigating and drawing public attention to issues of racial discrimination. That does not show that Nelson acted "in active concert" with Threets. On these facts, there is no meaningful difference between giving the DVD to an NAACP official and giving the DVD to a television reporter or a newspaper columnist interested in these issues – even if each is given with the hope that the DVD's contents would be disseminated and discussed further. To construe Rule 65(d) so broadly as to sweep those situations into the "active concert" rubric would raise grave constitutional concerns. *See, e.g., Bartnicki*, 532 U.S. at 535; Part I.C. *supra*.

B. The City Has Failed to Make an Adequate Showing Under Fed. R. Civ. P. 65(b) To Obtain Injunctive Relief against Mr. Nelson and the NAACP.

The Court, in issuing its order against Nelson, relied upon its powers under Fed. R. Civ. P. 65. A party seeking a preliminary injunction under that rule must "establish that he is [a] likely to succeed on the merits, [b] that he is likely to suffer irreparable harm in the absence of preliminary relief, [c] that the balance of equities tips in his favor, and [d] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008).[25]

[25] Insofar as the injunction is "preliminary," in the sense that it is expected to remain in effect only until the conclusion of the trial, the foregoing rules would apply. Insofar as the injunction is "permanent," the showing is essentially the same, except that the movant must actually prevail on the merits rather than show a likelihood of success. *Winter v. NRDC, Inc.*, 129

1. The City Has Not Demonstrated a Likelihood of Success on the Merits.

It is unclear what "merits" the City is relying on, if any, in seeking injunctive relief. To the extent that the City contends it is entitled to injunctive relief because it is likely to prevail on the merits of obtaining an order limiting pre-trial publicity, it has not shown any substantial likelihood of any such prejudice from Nelson's dissemination of the DVD (including given the dissemination of the DVD in the media and on the Internet), let alone that that any prejudice could not be easily avoided by this Court's using the traditional tools available to do so, such as vigorous *voir dire* and jury admonitions. *Columbia Broad. Sys.*, 729 F.2d at 1183. To the extent that the City contends it is entitled to injunctive relief because it is likely to prevail on the ultimate merits of the plaintiffs' discrimination and retaliation claims, and it is therefore entitled to an injunction preventing dissemination of and commentary on a DVD that suggests that it had in fact engaged in such unlawful practices, it has not made such a showing. Even had it done so, it would be hard to see how such an argument – *i.e.*, "we will win on the merits so order citizens to stop saying or giving out information suggesting we won't" – would square with the First Amendment. *See* Part I *supra*. Finally, to the extent that the City believes demonstrating a likelihood of success on the merits of its contempt application would somehow entitle it to injunctive relief, it cannot do so either for the reasons discussed in Part V, *infra*.

2. The City Cannot Show That It Will Suffer Irreparable Harm in the Absence of Preliminary Injunctive Relief.

Here, the City has not made any showing that it will suffer irreparable harm without enjoining Nelson and/or the NAACP, and there is little to no risk that the City will be prejudiced at trial by their actions. It is extraordinarily unlikely in a metropolitan area the size of San Francisco

---

S. Ct. 365, 382 (2008). As discussed above, however, the issue of "success on the merits" is not truly applicable where, as here, the basis for the motion is presumably to prevent prejudice at trial.

Even if the Court's authority is deemed to arise from some source other than Fed. R. Civ. P. 65, however, the foregoing factors must still be met, as they derive from established equitable principles. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (applying four factor test to injunctive powers under the Patent Act). Moreover, insofar as the Court's authority is derived from its inherent powers, such powers must be exercised with "restraint and discretion" as such powers are not subject to direct democratic controls. *See Roadway Express v. Piper*, 447 U.S. 752, 765 (1980).

that most prospective jurors would have seen the DVD or portions thereof. *See* Part I.B., *supra*. Moreover, there is no evidence that the injunction the Court has ordered would provide any relief from such alleged prejudice, given that the DVD has been fully aired in the mainstream media and has been posted on YouTube. Nor has there been any showing by the City that the less-restrictive remedies traditionally available to ensure a fair trial, including vigorous *voir dire*, jury admonitions, and lapse of time, will be ineffective. *See Columbia Broad. Sys.*, 729 F.2d at 1180.

3. The Balance of the Equities Favors Mr. Nelson and the NAACP.

As indicated, the City has made no showing of any substantial harm to it, let alone harm that would in any significant way be affected by an injunction applicable to Nelson and the NAACP. On the other hand, the injunction would impose a substantial hardship on Nelson and the NAACP, neither of whom is a party to this action, by interfering with and burdening their rights to associate (internally and with members of the community), speak out on issues of concern to the community, and to petition the government to obtain redress for the community's concerns. As the Supreme Court repeatedly has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), *overruled on other grounds by Branti v. Finkel*, 445 U.S. 507 (1980) and *abrogated in part on other grounds by FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); see *also Nebraska Press Ass'n*, 427 U.S. at 559 (a "prior restraint . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, a prior restraint 'freezes' it.").

4. The Public Interest Favors Mr. Nelson and the NAACP.

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965) (citing authorities). The "public interest" factor is separate from the "balancing of the equities," and is designed among other things to protect the interests of nonparties. *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974-75 (9th Cir. 2002).

The present case, involving as it does issues of racial discrimination and animosity within a local police department, is of vital concern to all members of that community. It is inevitable that such a case would generate considerable interest and controversy. The public interest in a full and robust airing of issues raised by the allegations of this case, independent of any judicial adjudication – and including more systemic issues of community-wide policy that go beyond the specific claims of these particular plaintiffs – is paramount. "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Id.* (citing authorities). For that reason, in *Bank Julius Baer & Co. Ltd.*, 535 F. Supp. 2d at 985, this Court recently dissolved an injunction after a person purportedly bound by virtue of Fed. R. Civ. P. 65(d) and numerous media and public advocacy *amici* brought to the Court's attention the serious First Amendment issues raised by that injunction.

5. The Mandatory Portions of the Injunction Must Meet Even Stricter Scrutiny.

"There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319-20 (9th Cir. 1994) (citations omitted); *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (an injunction requiring affirmative conduct is "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party"). Here, the Court's Order would not only prohibit certain activities but would mandate affirmative conduct, such as returning copies of the DVD and requiring Nelson to seek the further return of DVDs that have been distributed. These aspects of the injunction cannot meet the more stringent scrutiny required, especially in the absence of any showing that these actions would have any impact whatsoever on any supposed prejudice to the City.

V. THERE IS NO BASIS TO HOLD MR. NELSON IN CONTEMPT.

The City's request that Nelson be held in contempt must fail. As soon as Nelson became aware that he was even potentially subject to any court order he ceased distributing the DVD pending further adjudication of his rights and obligations.

> [A] person should not be held in contempt if his action 'appears to be based on a good faith and reasonable interpretation of the [court's order]. . . . The party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by "clear and convincing evidence," not merely a preponderance of the evidence.

Go-Video v. Motion Picture Ass'n of Am. (In re Dual-Deck Video Cassette Recorder Antitrust Litig.), 10 F.3d 693, 695 (9th Cir. 1993) (citations omitted). The only evidence demonstrates that Nelson was not aware of the Protective Order or the January 21st Order; that he was not served with any of the papers filed by the City, including the Application to hold him in contempt; and that, upon learning of the Court's order, he immediately obeyed it. Nelson respectfully submits that in seeking his "day in court" to address these issues, he has shown the exact opposite of contempt for this Court. *Cf. Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002) (holding persons in contempt where the persons ***failed*** to seek clarification from the court regarding the applicability of its order). Moreover, this case raises substantial First Amendment questions, and holding Nelson in contempt for disseminating a DVD he was lawfully entitled to disseminate would work a manifest injustice. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 293, 301 (4th Cir. 2000) (reversing contempt order against newspaper reporter who published amount of confidential court settlement, which had been contained in a sealed court file, where court clerk had erroneously provided document).

CONCLUSION

At bottom, this is a case where it appears that the Court has received misinformation about the conduct of Nelson, his connection to the plaintiffs and his role, not as their agent, but as the Branch President of the NAACP – which has an interest well beyond this one lawsuit in addressing racial discrimination in the Richmond Police Department. With the benefit of the foregoing clarification of the factual record and discussion of the constitutional limitations on enjoining Nelson and the NAACP – even assuming *arguendo* that Threets violated the Protective Order by giving Nelson the DVD – Nelson and the NAACP respectfully request that the Court dissolve the injunction as to them, refrain from including them in any written version of the injunction, and deny the City's application for a contempt order against Nelson. (Nelson and the NAACP reserve the right to seek such further relief as justice may require.)

DATED: March 22, 2010

Respectfully submitted,

/s/ Joshua Koltun
JOSHUA KOLTUN

Of Counsel:
VICTOR GOODE
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215-3297
Telephone: (410) 580-5789
Facsimile: (410) 358-9350

Attorneys for Non-Parties NAACP and NAACP Richmond Branch President Ken Nelson