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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

DOE PUBLIUS and DEREK HOSKINS, Plaintiffs, v. DIANE F. BOYER-VINE, in her official capacity as Legislative Counsel of California, Defendant.	CASE NO. 1:16-CV-01152-LJO-SKO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Hearing Date: Feb. 6, 2017 Hearing Time: 8:30 a.m. Judge: Hon. Lawrence J. O'Neill Courtroom: 4 (7th Floor) Complaint Filed: Aug. 5, 2016

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INTRODUCTION

Plaintiffs Doe Publius and Derek Hoskins have moved for a preliminary injunction to enjoin enforcement of a California statute that is allegedly causing them "irreparable harm" by "punishing" and imposing "liability" on them, and by "censoring" constitutionally protected speech connected to political advocacy. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction ("PI Memo") (ECF No. 19-1), at 1, 10-14, 19. Plaintiffs have requested that the Court issue "a preliminary injunction that prevents any further action by the Legislative Counsel of California to suppress or punish Plaintiffs' protected speech," *id.* at 20, by enjoining Defendant Diane Boyer-Vine "from enforcing or applying California Government Code section 6254.21(c) until this Court orders otherwise." [Proposed] Order Granting Plaintiffs' Motion for Preliminary Injunction (ECF No. 19-5).

Section 6254.21(c)[1], however, does not "punish" constitutionally protected speech, and Defendant Boyer-Vine has done nothing to "censor" or "suppress" Plaintiffs' speech. Rather, on behalf of certain California legislators, Defendant Boyer-Vine has merely utilized the procedure set forth in section 6254.21(c)(1) to make a formal written request to the operators of several internet hosting services — including WordPress.com, the hosting service for Plaintiff Doe Publius's blog, and Northeastshooters.com, the internet forum maintained by Plaintiff Hoskins — to remove the legislators' private home addresses and telephone numbers from public display on their web sites. Both WordPress.com and Northeastshooters.com *voluntarily agreed* to do so. But if they had not voluntarily done so, no "irreparable harm" would have befallen them, for not only does section 6254.21(e) expressly provide that internet hosting services "shall not be liable under this section" unless they intend "to abet or cause imminent great bodily harm that is likely to occur . . . to an elected or appointed official," but the only "punishment" that might possibly result from their failure to comply with Defendant's request is that Defendant would then be authorized to "bring an action seeking injunctive or declarative relief in any court of competent jurisdiction." Gov. Code § 6254.21(c)(2).

[1] "Section 6254.21" as used herein refers to California Government Code section 6254.21. For the Court's convenience, the full text of section 6254.21 is attached to the accompanying Declaration of Fredric Woocher ("Woocher Decl.") as Exhibit 1.

In other words, Plaintiff Publius filed this lawsuit against Defendant Boyer-Vine because *WordPress.com* — not Defendant — removed his post listing the legislators' home addresses from the web site it maintains after receiving a request from Defendant to do so. And Plaintiff Hoskins filed this lawsuit against Defendant Boyer-Vine because Defendant's request *reserved the right to file a lawsuit* asking a court to order the removal of the legislators' home addresses from a comment on the Northeastshooters.com forum he hosted. The mere statement of Plaintiffs' claims demonstrates that they have not suffered any cognizable harm from Defendant's actions, much less have they established the likelihood of any future "irreparable injury" that would justify the extraordinary relief they seek in their preliminary injunction motion — the facial invalidation of a duly enacted state statute.

As Defendant demonstrates below, Plaintiffs cannot satisfy any of the four factors that this Court must consider in determining whether to grant a preliminary injunction: Plaintiffs are not likely to succeed on the merits; indeed, there are serious questions whether this Court even has jurisdiction to entertain Plaintiffs' action. Nor, as indicated above, have Plaintiffs established that they will be irreparably harmed in the absence of preliminary relief or that the balance of equities tips in their favor. Finally, the injunction Plaintiffs request is not in the public interest, for it would upend a statute enacted to promote governmental interests of the highest order in our democratic society — protecting police officers, judges, and other government officials and their families from substantial harm or even death, and protecting the public's interest in fair and independent decisionmaking by government officials and employees, uninfluenced by threats, intimidation, and the fear of retribution.

BACKGROUND

A. SECTION 6254.21(C)

Section 6254.21 was added to the California Government Code in 1998 by SB 1386 (Stats. 1998, ch. 429). Section 4 of that bill provided, in language that is identical to what is now found in subdivision (a) of section 6254.21: "(a) No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual."[2] Thus, section 6254.21 was originally directed solely at *state and local*

[2]Subdivision (b) of the newly enacted section 6254.21 defined "elected or appointed official" for purposes of that section to include a list of twelve categories of public officials, which are now

agencies, prohibiting them from publicly disclosing specified officials' home addresses or telephone numbers without their written permission.

Section 6254.21 was amended to address the release of this sensitive information by private individuals and entities occurred in 2002, with the passage of AB 2238 (Stats. 2002, ch. 621). The bill was sponsored by Los Angeles Superior Court Judge James R. Brandlin, chair of the Judges' Security Committee, following the murder two years earlier of a Superior Court Commissioner and his wife at their home and a number of other incidents involving assassination attempts and threats directed to judges and criminal justice personnel based on the availability of their personal information in online records. *See* Woocher Decl., Exh. 2 (The Public Safety Officials' Home Protection Act, AB 2238: Executive Summary). AB 2238 amended section 6254.21 to expressly include "public safety officials" in the list of "elected or appointed officials," and it added subdivision (b), making it a misdemeanor for any person to post the home address or telephone number of any elected or appointed official on the Internet "intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm."[3] As introduced, AB 2238 would also have created a new tort cause of action permitting a public safety official to bring an action for injunctive relief and damages against any person or business who failed to remove the official's home address and telephone number from its records or database upon the official's demand. *See* Woocher Decl., Exh. 3 (AB 2238, as introduced, § 3 [adding Gov. Code § 6254.23 (d) & (f)].) That provision was not retained in the final bill, however, and was instead replaced by an uncodified section creating an advisory task force chaired by the Attorney General, which was to file a report with the Legislature with a plan for how to protect a public safety official's home information. *See id.*, Exh. 4 (AB 2238, as chaptered, § 5).

The Advisory Task Force filed its report in January 2004, *see id.*, Exh. 5 (Public Safety Officials' Home Protection Act Advisory Task Force Report to the Legislature), and its recommendations formed the basis for the enactment the following year of AB 1595 (Stats. 2005, ch. 343), which — among other provisions — amended section 6254.21 to add what is now

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specified in section 6254.21(f)(1)-(12).

[3]If a violation of section 6254.21(b) results in the bodily injury of the official or a family member residing in the home, the crime could be prosecuted as either a misdemeanor or felony.

subsection (c). *See* Woocher Decl., Exh. 6 (AB 1595, as chaptered, § 1). Section 6254.21(c)(1) provided, in terms very similar to its current language, that "[n]o person, business, or association shall publicly post or publicly display on the Internet the home address or telephone number of any elected or appointed official if that official has made a written demand of that person, business, or association to not disclose his or her home address or telephone number." *Id.* A written demand by an elected official must include "a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address," and the request would be effective for four years. *Id.* Subsection (c)(2) permitted an official whose home address or telephone number was made public in violation of subsection (c)(1) to "bring an action seeking injunctive or declarative relief in any court of competent jurisdiction," and to be awarded costs and attorney's fees if successful in that action. *Id.*

AB 1595 also added subsection (e) to section 6254.21, providing that "[a]n interactive computer service or access software provider, as defined in Section 230(f) of Title 47 of the United States Code, shall not be liable under this section unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official." *Id.*[4]

Taken together, these amendments were intended to provide "a reasonable response to the growing concern over the safety of our public officials throughout the state." Woocher Decl., Exh. 7, at 2 (Enrolled Bill Report for AB 1595). Unlike subsection (a) of section 6254.21 relating to the maintenance of *public* records, which placed the burden on the *government agency* not to publicly post the home address or telephone number of any elected or appointed official in the first instance, subsection (c) placed the onus on *the official* to demand from a private individual or business that it not publicly post this personal information, and if the individual or business failed to do so, the official could

[4]In its two other major revisions to section 6254.21 — not at issue here — AB 1595 added subsection (d), prohibiting any person or business from "solicit[ing], sell[ing], or trad[ing] on the Internet the home address or telephone number of an elected or appointed official with the intent to cause imminent great bodily harm to the official or to any person residing at the official's home address." *Id.* An official whose personal information was solicited, sold, or traded in violation of this subsection could bring an action *for damages* in an amount up to three times the actual damages suffered but in no case less than $4,000. *Id.* Second, AB 1595 added federal judges and federal defenders, members of Congress and appointees of the President, and state administrative law judges to the list of covered "elected or appointed officials" in subsection (f)(14)-(16) of section 6254.21. *Id.*

then go to court to seek an injunction or declaration to obtain that relief. In more serious cases — in which a person or business was selling or trading the information on the Internet "with the intent to cause imminent great bodily harm" — the official could not only seek an injunction, but an award of damages, as well. And an internet service provider that merely supplied the conduit for the posting of an official's personal information was expressly provided with immunity from any liability, except in the rare circumstance in which the provider itself intended or threatened "to cause imminent great bodily harm."[5]

Even AB 1595's supporters, however, recognized that it was not a panacea for the intractable problem of how to provide sufficient security to high-profile public officials in an era of mass Internet usage and commerce. *See id.*, Exh. 7, at 5. In particular, both the Legislature and the Governor's office recognized that the bill did not impose strong "penalties" on someone who might ignore a public official's written request not to display their personal information, subjecting them only to a possible court order to take the information off the web site. *Id.*; *see also id.*, Exh. 8, at 6. Nevertheless, AB 1595 received overwhelming support, *see id.*, Exh. 9 (Letter to Governor in Support of AB 1595 from Judicial Council of California) & Exh. 10 (Letter to Governor in Support of AB 1595 from California Judges Association), and it passed the Legislature almost unanimously (*see id.*, Exh. 7, at 7), because it was viewed as "provid[ing] public safety officials with an important tool to assist in protecting their family's privacy and safety." *Id.*, Exh. 9.

A final series of amendments to improve the efficiency of section 6254.21 were adopted in 2009 with the enactment of AB 32 (Stats. 2009, ch. 403). *See* Woocher Decl., Exh. 11 (AB 32, as chaptered, § 1). First, AB 32 specified that a person or business receiving a written demand to remove a public official's home address or telephone number must do so within 48 hours of the request, and must ensure that the information is not reposted on the same web site or any other web site maintained by the recipient. Gov. Code § 6254.21(c)(1)(D)(i). Second, AB 32 added language prohibiting any person or

[5]As noted in the Senate Judiciary Committee's Bill Analysis for AB 1595, this immunity provision was added at the request of Yahoo! and Apple, who explained that they "would immediately suspend or withdraw services to a web site that posts protected information such as the home addresses or telephone numbers of these public officials, were this bill enacted. They also said they routinely do so now, if they are made aware of such violations." Woocher Decl., Exh. 8 (Senate Judiciary Committee Analysis of AB1595, at 8-9.)

business receiving a written demand from transferring the official's personal information to any other person or business. *Id.*, § 6254.21(c)(1)(D)(ii). Third, the bill explicitly authorized an elected or appointed public official to designate the official's employer, a related governmental agency, or a private professional association to act as the official's agent with respect to making a written demand pursuant to the section. *Id.*, § 6254.21(c)(3). Finally, AB 32 provided that a fine not exceeding $1,000 may be imposed for violating an injunction issued by the court ordering the removal of the home address or telephone number of a protected official from the internet. *Id.*, § 6254.21(c)(2).

B. CALIFORNIA LEGISLATORS BEGIN RECEIVING THREATS FOLLOWING "THEREALWRITEWINGER"'S POSTING OF THEIR HOME ADDRESSES AND TELEPHONE NUMBERS

Shortly after Governor Jerry Brown signed several gun-control bills into law, a blogger using the alias "TheRealWriteWinger" (who Plaintiffs allege is the same person who filed this lawsuit under the alias "Doe Publius")[6] posted an entry on July 5, 2016, entitled "Tyrants to be registered with gun owners." Declaration of Doe Publius (ECF No. 19-2), Exh. A. Referencing "the recent anti gun, anti Liberty bills passed by the legisexuals in the State Capitol and signed into law by our senile communist governor," the entry asked, "isn't it about time to register these tyrants with gun owners?" Warning that "[t]hese tyrants are no longer going to be insulated from us" and accusing them of "us[ing] their power we entrusted them with to exercise violence against us if we don't give up our rights and Liberty," TheRealWriteWinger posted the names, home addresses, and home telephone numbers of 40 legislators who voted for those bills, in order to "giv[e] the public the knowledge of who and where these tyrants are in case they wish to use their power for violence again." Answering his own question as to whether

[6]Defendant cannot help but note the irony, if not the hypocrisy, in Publius's insistence that no harm can befall the legislators from his publicly posting their home addresses and telephone numbers on the internet at the same time that he refuses to disclose even his *name* for fear of retribution. More than five months after filing the complaint, Publius has not sought, much less received, the required permission to proceed anonymously. The Federal Rules of Civil Procedure do not provide for anonymous parties, and they are strongly disfavored. *See* Fed. R. Civ. P. 10(a) (complaint must "name all the parties"); Fed. R. Civ. P. 17(a)(1) ("[a]n action must be prosecuted in the name of the real party in interest"); *see also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000) ("[p]laintiffs' use of fictitious names runs afoul of the public's common law right of access to judicial proceedings"). Plaintiffs have ignored proper procedure and have not established the extraordinary circumstances that would justify proceeding anonymously. Before any relief can be granted, Plaintiffs must file an amended complaint in Publius's true name or withdraw his claims.

making this information public might be dangerous, TheRealWriteWinger observed that "it's no more dangerous than, say, these tyrants making it possible for free men and women to have government guns pointed at them while they're hauled away to jail and prosecuted for the crime of exercising their rights and Liberty." Ending on a particularly ominous and threatening note, the post vowed, "the only way for a tyrant to have their name removed from the tyrant registry is to pass laws which repeal the laws that got them added to the list, *or upon the tyrant's death*." *Id*. (emphasis added).

In the days immediately following the publication of TheRealWriteWinger's blog entry, several legislators reported to the Senate Sergeant-at-Arms that they had received threatening phone calls and social media messages apparently occasioned by TheRealWriteWinger's posting of their personal information. At least four Senators received phone calls at their residences from an unidentified male speaker saying, "I know your address and don't you wish you knew who I am?" Woocher Decl., ¶ 2. One of the calls was received by the step-son of a Senator who was alone in the home while the Senator and his wife were away. *Id.* Other legislators received threatening social media messages; one warned: "You have no right to pass laws to take my constitutional rights away. (2nd & 1st amendments) Let alone pass a bill that makes you exempt from the very same laws. I've have [sic] shared your home address in the Internet. The People will be acting on this." *Id*.

C. THE LEGISLATIVE COUNSEL BUREAU REQUESTS THAT LEGISLATORS' HOME ADDRESSES BE REMOVED FROM PUBLIC DISPLAY ON THE INTERNET

In addition to informing local law enforcement agencies about the threats, the information regarding TheRealWriteWinger's blog post was forwarded by the Sergeant-at-Arms to the Legislative Counsel Bureau, which serves as the Legislature's legal counsel, with a request to seek the removal of the legislators' home addresses from the internet pursuant to section 6254.21(c). On July 8, 2016, Deputy Legislative Counsel Kathryn Londenberg emailed a letter to WordPress.com, the entity hosting TheRealWriteWinger's blog, notifying it of TheRealWriteWinger's post and requesting that WordPress.com "remove these home addresses from public display on that Web site, and take steps to ensure that these home addresses are not reposted on that Web site, a subsidiary Web site, or any other Web site maintained or administered by WordPress.com or over which WordPress.com exercises control." Publius Decl., Exh. B. In accordance with section 6254.21(c)(1)(B), Ms. Londenberg's letter

also advised WordPress.com that "[t]he Senators and Assembly Members whose home addresses are listed on this Web site fear that the public display of their addresses on the Internet will subject them to threats and acts of violence at their homes." *Id.* Notably, Legislative Counsel's letter did not request to have TheRealWriteWinger's *entire blog post* taken down, but only to have the legislators' home addresses removed from display. Nevertheless, it appears that WordPress.com responded by disabling and removing the entire post from the internet. *Id.*, ¶ 6.

Ms. Londenberg subsequently learned that another web site, northeastshooters.com, had also posted the legislator's home addresses on its web site in a post by a user with the name "headednorth." Using the "Terms of Service Complaint" button and "Contact Us" form on its web site, Ms. Londenberg sent a similar written demand to northeastshooters.com on July 11, 2016, requesting that it "remove these home addresses from public display on that Web site." Declaration of Derek Hoskins (ECF No. 19-3), ¶ 3 & Exh. B. Ms. Londenberg's letter closed by asking northeastshooters.com to "[p]lease contact me . . . if you have any questions regarding this letter," and stating that "[i]f these home addresses are not removed from this Web site in a timely manner, we reserve the right to file an action seeking injunctive relief, as well as associated court costs and attorney's fees (para. (2), subd. (c), Sec. 6254.21, Gov. C.)." *Id.* Again, although the Legislative Counsel's letter only requested the removal of the legislators' home addresses from public display, Plaintiff Hoskins apparently responded on behalf of northeastshooters.com by "remov[ing] the post from the forum." *Id.*, ¶ 5.

ARGUMENT

In order to obtain a preliminary injunction, Plaintiffs must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, Plaintiffs may demonstrate "serious questions going to the merits" and a balance of hardships that tips *sharply* towards them, as long as they also show that there is a likelihood of irreparable injury and that the inunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Plaintiffs in the present case do not satisfy either formulation.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO SECTION 6254.21(c)

Plaintiffs' principal contention is that section 6254.21(c) violates the First Amendment, both on its face and as applied. Relying upon several cases holding that the state generally may not constitutionally *punish* the publication of truthful information — either criminally or through the imposition of civil damages — Plaintiffs argue that section 6254.21(c) cannot pass the "strict scrutiny" applicable to such statutes. *See* PI Memo, 9-16. But the premise of Plaintiff's argument — that section 6254.21(c) punishes the publication of truthful information — is demonstrably incorrect.

Section 6254.21(c) bears little, if any, resemblance to the statutes at issue in the cases Plaintiffs rely upon. By its terms, section 6254.21(c) imposes no *prior restraint* preventing anyone from speaking or publishing what they want; it does not *punish* anyone for what they have said or printed; it does not threaten anyone with *criminal prosecution* for violating its provisions; indeed, it does not even subject a violator to *civil damages*. Rather, section 6254.21(c) merely permits public officials who fear for their safety and that of their families to opt out of having their home addresses and telephone numbers included in commercial internet databases and to *request* anyone who has publicly posted that information on the internet to remove it. If the recipient refuses to do so, section 6254.21(c) imposes no sanction other than permitting the official to file a lawsuit seeking to have a court issue an injunction ordering the information to be removed from public display. And in that lawsuit, as in any other lawsuit, the defendant may raise any defenses available to it, including defenses invoking the First Amendment or any other constitutional or statutory provision. *Cf. United States v. Bundy*, 3:16-cr-00051, 2016 WL 3156310, at *3, n.3 (D. Or. June 3, 2016) (rejecting constitutional challenge to criminal conspiracy statute (18 U.S.C. § 372) on overbreadth and vagueness grounds, noting that "Defendants may contend at trial that their conduct was protected by the First Amendment and that they, therefore, did not violate § 372").

In essence, then, what the Legislature did in enacting section 6254.21(c) was simply to create a new civil tort in California — a cause of action for "the removal from public display of an official's personal information" — much like it created and specified the conditions for various other statutory

causes of action, including, for example, libel and slander. *See* Cal. Civil Code §§ 44-48.8.[7] As with some libel claims, before instituting an action based upon section 6254.21(c), a public official must first make a written demand to the defendant to remove the personal information from the internet. *Cf.* Civil Code § 48a (requiring plaintiff to make a retraction demand within 20 days of publication in order to recover general and exemplary damages in libel action against news publication). And just as with some libel claims, First Amendment principles may impose outer limits upon the type of conduct that may be held to violate section 6254.21(c). *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). That the First Amendment may in some circumstances be raised as a defense *in an action brought under the authority of section 6254.21(c)*, however, does not invalidate the entire cause of action created by the statute or render the statute itself unconstitutional.

With this understanding of what section 6254.21(c) actually says and how it operates, it is apparent that Plaintiffs' First Amendment challenge, seeking to enjoin Defendant Boyer-Vine from "enforcing or applying" section 6254.21(c), is not likely to succeed on the merits.[8]

A. THIS COURT LIKELY LACKS JURISDICTION TO ENTERTAIN PLAINTIFFS' COMPLAINT

As an initial matter, it is doubtful that this Court even has jurisdiction to entertain Plaintiffs' federal claims in this action, for two separate reasons: Plaintiffs lack standing under Article III of the U.S. Constitution; and they have not adequately stated a claim under 42 U.S.C. § 1983 for the deprivation of any constitutional right under color of state law.

1. Plaintiffs Are Not Likely to Satisfy Article III's "Case or Controversy" Standing Requirements

Under Article III, a federal court only has jurisdiction to hear claims that present an actual "case

[7]One critical difference, of course, is that section 6254.21(c)'s cause of action does not permit the recovery of any monetary damages, only injunctive or declaratory relief.

[8]Indeed, given how the statute operates, it is not entirely clear what Plaintiffs even mean in seeking to enjoin "enforcement or application of California Government Code section 6254.21(c)." First Amended Complaint for Declaratory, Injunctive, or Other Relief (ECF No. 12), at 16, ¶ 4. Do Plaintiffs seek an injunction prohibiting any elected or appointed public official from submitting a written demand to any internet hosting service or provider requesting the removal of their home address or telephone number from public display? Do Plaintiffs seek to prohibit any public official from filing a lawsuit seeking an injunction to have their personal information removed from the internet?

or controversy." *Allen v. Wright*, 468 U.S. 737, 750 (1984). As the Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992), one of the doctrines that has developed to identify those "cases and controversies" that are properly justiciable in the federal courts is standing. "[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely," as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id*. at 561.

Plaintiff Publius cannot satisfy these standing requirements because the injury of which he complains — the removal of his post listing the legislators' home addresses from his blog's web site — was not caused by Defendant but was "the result of the independent action of some third party not before the court" — Wordpress.com. *See* Publius Decl., ¶ 6 ("On or around July 12, WordPress.com (the Internet hosting service for my blog) disabled my post and removed it from the Internet."). Like virtually all internet service providers, Wordpress.com has its own policies governing the content it permits to be posted on the web sites it hosts. Everyone who uses the WordPress.com website agrees to be bound by its Terms of Service. Pursuant to those Terms, operators of blogs must "represent and warrant that [their] Content and conduct do not violate these terms or the User Guidelines." Woocher Decl., Exh. 12, at 2 ("Responsibility of Contributors"). WordPress.com's User Guidelines, in turn, provide that while "WordPress.com strongly believes in freedom of speech, . . . there are a few categories of content and behavior that we don't permit because we consider them harmful to the community." *Id*., Exh. 13. Among those impermissible categories are "directly threatening material" and "posting private information," in which WordPress.com admonishes: "Don't share someone's personal information without their consent." *Id*. The User Guidelines also caution that "these are just guidelines — interpretations are up to us. These guidelines are not exhaustive and are subject to change." *Id.*

It is therefore quite plausible, if not probable, that having been made aware of RealWriteWinger's blog post by Legislative Counsel's letter, WordPress.com decided to remove the entire post — not just the legislators' home addresses — because it violated its own Terms of Service agreement. In any event, Plaintiffs have not presented any evidence from WordPress.com to satisfy their burden to establish that this was not what happened. The present circumstance is thus very similar to *Simon v. East Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), in which several low-income individuals and organizations challenged an IRS policy that they alleged had "encouraged hospitals to deny services to indigents." *Id.* at 42. The Supreme Court concluded that the plaintiffs lacked standing to pursue their federal claim because "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id*. at 42-43. Even under an expansive view of standing, the Court held, "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.[9]

So, too, in the present case, Plaintiff Publius' alleged injury is the result of "the independent action of some third party not before the court" — Wordpress.com — and it is purely speculative whether the removal of his blog post is fairly traceable to the "encouragement" of section 6254.21(c) or

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[9]Likewise, in *Pritikin v. Department of Energy*, 254 F.3d 791 (9th Cir. 2001), the plaintiff, who had suffered damage to her thyroid and endocrine system as a result of exposure to hazardous substances released from the Hanford Nuclear Reservation, sued the Department of Energy ("DOE") to compel it to budget funds for the medical monitoring program that the Agency for Toxic Substances and Disease Registry ("ATSDR") was required to institute at Hanford. The court held that Pritikin did not satisfy the second and third prongs of the constitutional standing requirement because she had not established that her inability to receive medical screening was fairly traceable to DOE's failure to include funding for the Hanford medical monitoring program in its budget, rather than it being "the result of the independent action of some third party not before the court." *Id.* at 797 (quoting *Defenders of Wildlife*, 504 U.S. at 560). "[Plaintiff's] theory omits a necessary step in the causation chain — the independent decision of ATSDR, a third party not before the court, to begin the medical monitoring program." *Id.* For similar reasons, Pritikin did not show "that a decision in her favor 'will produce tangible, meaningful results in the real world' — or in other words — to establish that her claim is redressable." *Id*. at 799 (quoting *Common Cause v. Dept. of Energy*, 702 F.2d 245, 254 (D.C. Cir. 1983). "[B]ecause ATSDR is not a party to this action, there is nothing in the record to indicate what effect, if any, DOE's failure to budget for the program is having on its implementation." *Id*. at 800-01.

whether it was the result of WordPress.com's independent determination that the post's threatening tone and disclosure of sensitive personal information violated its Terms of Service. Nor have Plaintiffs established that it is "likely" that Publius's alleged injury will be "redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561. Although Publius has stated that he would re-post the legislators' home addresses and phone numbers but for section 6254.21(c), Plaintiffs have provided no evidence that *WordPress.com*, "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *id.* at 562, would allow him to do so under its Terms of Service. In the absence of such evidence, the court likewise cannot presume that WordPress.com's decisions "have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*

Plaintiff Hoskins has almost the *opposite* problem in attempting to satisfy Article III's standing requirements. He was himself the object of the action challenged here, so there is no issue regarding the causation and redressability prongs of the constitutional standing requirements. The asserted *injury*, however, was not suffered by him, but by "headednorth," who authored the comment that Hoskins removed from the Northeastshooters forum. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* (citations omitted); *accord*, *Lopez v. Merced County*, 1:06-cv-1526, 2008 WL 170696, at *5 (E.D. Cal. Jan.16, 2008) ("a private litigant still must satisfy the standing requirement that he suffered a 'distinct and palpable injury to himself'").[10] Plaintiffs themselves contend that Hoskins' Northeastshooters is an "interactive computer service" that merely provides a forum for its users (i.e., "information content providers") to post information on the site and that, under the law,

[10]Although courts apply a relaxed standing requirement in First Amendment cases, *see, e.g., Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003), they have generally done so with respect to the "actual or imminent injury" requirement, ruling that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief," as long as "there is a credible threat that the challenged provision will be invoked against the plaintiff." *Id.* at 1006 (referring to this as "a 'hold your tongue and challenge now' approach"). At least in the absence of any showing why the other party cannot assert its own rights, a plaintiff who has not himself suffered any injury cannot establish standing based on the asserted denial of *another person's* First Amendment rights.

Northeastshooters cannot be treated "as the publisher or speaker of any information provided by another information content provider." PI Memo, at 18 (quoting 47 U.S.C. § 230(c)(1)). Thus, the only party who can plausibly allege a First Amendment "injury-in-fact" in Hoskins' case is "headednorth," the "information content provider" for the removed post, not Hoskins.

2. Plaintiffs Are Not Likely To Be Able To State a Claim Under § 1983 For Deprivation of a Constitutional Right Under Color of State Law

Plaintiffs' claims suffer from a second fundamental jurisdictional defect — the inability to state a federal claim under § 1983 for the deprivation of a constitutional right under color of state law. The Ninth Circuit's decision in *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001), is controlling in this regard. *Gritchen* involved a challenge to the constitutionality of California Civil Code § 47.5, which allows peace officers to bring an action for defamation against someone who has filed a false complaint against them, knowing that it was false, and was made with spite, hatred, or ill will. Gritchen had filed a complaint against Collier, a police officer who had stopped him for speeding, and Collier sent a letter to Gritchen, threatening to sue him for defamation. After receiving the letter, Gritchen filed a preemptive lawsuit in federal court under 42 U.S.C. § 1983, seeking declaratory and injunctive relief that Civil Code § 47.5 is facially unconstitutional under the First Amendment and the Equal Protection Clause, because it gave special treatment to peace officers, exempting them from the statutory privilege that applied to all other citizen complaints against state employees. The district court agreed and issued an injunction restraining Collier from proceeding with any lawsuit under Civil Code § 47.5.

The Ninth Circuit reversed without reaching the merits of Gritchen's constitutional challenge to Civil Code § 47.5, holding that he could not state a federal claim under § 1983 because Collier's threatened filing of a private lawsuit in state court was not "under color of law" and did not constitute "state action" for purposes of relief under that jurisdictional statute. 254 F.3d at 809. The court of appeals agreed with Collier that "his threat to bring suit was entirely a personal pursuit, unrelated to his official position as a police officer, that is not converted into state action simply because suit is authorized by a state statute." *Id.* at 811. Acknowledging that "the traffic stop, followed by the citizen complaint, and ending with the threats of suits are 'unavoidably tied' to Collier's position as a police officer," *id.* at 813, the court nevertheless concluded that "threatening suit or bringing it" is not "one of

Collier's duties as a police officer," that the decision whether to do so was "not subject to the control of the Department," and that "a decision in his favor would benefit Collier, not the state" — making Collier's action "indistinguishable from the private squabbles that we, and other circuits, have consistently refused to attribute to the state." *Id.*

Nor did the fact that Collier's threatened suit relied upon a *state law* (Civil Code § 47.5) that expressly applied only to *police officers* to undo harm allegedly done to him as a *police officer* convert Collier's private lawsuit into state action. Rather, the court explained, "the statute creates only the right to act; it does not require that such action be taken. [Collier's] exercise of the choice allowed by state law where the initiative comes from (him) and not from the State, does not make (his) actions in doing so 'state action' for the purposes of the Fourteenth Amendment." *Id.* (quoting *Melara v. Kennedy*, 541 F.2d 802, 806 (9th Cir. 1976)). Merely pursuing a remedy afforded by state law does not convert a plaintiff's private action into state action. *Id.* at 814.

The Ninth Circuit's decision in *Gritchen* is *directly on point*. Like Civil Code § 47.5, section 6254.21(c) merely provides a remedy for an elected or appointed public official to pursue a lawsuit in state court seeking injunctive or declaratory relief to remove his or her personal information from display on the internet. The choice whether to pursue this remedy is entirely a private decision, is not one of the public official's duties under the law, and is not subject to the control of the employing agency. Neither the sending of a letter reserving the right to file, nor the actual filing of, such a lawsuit constitutes "state action" for the purposes of § 1983. And because § 1983 is the only basis for federal jurisdiction alleged by Plaintiffs, *see* Complaint, ¶ 10, their action must be dismissed for lack of jurisdiction.[11]

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[11]That the Legislative Counsel Bureau sent the demand letters in this case, or that the Bureau might represent the legislators in any lawsuit they might bring under the authority of section 6254.21(c), does not convert their private decision to pursue such a remedy into "state action." *See Laxalt v. McClatchy*, 622 F. Supp. 737, 747 (D. Nev. 1985) (U.S. Senator's retraction demand and filing of defamation lawsuit were not taken "under color of law" for purposes of *Bivens* action despite his government position and use of his official stationery: "[A]ll actions of a government official are not, simply by virtue of the official's governmental employ, accomplished under the color of federal law."). Instead, the pertinent question under § 1983 is: "[I]s the alleged infringement of federal rights 'fairly attributable to the State?'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (school's private decision to discharge employee funded by state grant did not constitute "state action" despite school's almost complete dependency on public financing); *accord, Blum v. Yaretsky*, 457 U.S. 991 (1982) (actions of nursing home that was heavily regulated and received almost all of its funding from the state were

B. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CHALLENGE

Even if Plaintiffs could overcome the jurisdictional defects discussed above, they are not likely to succeed on the merits of their First Amendment challenge to section 6254.21(c). As noted above, section 6254.21(c) is unlike any of the statutes found to be unconstitutional in the cases cited by Plaintiffs in their preliminary injunction motion, for it does not purport to *criminalize* or even to impose *civil liability* upon anyone's speech. Instead, it merely authorizes public officials to file a lawsuit seeking an *injunction* to have their sensitive personal information removed from further public display on the internet. The lack of any punitive sanction in section 6254.21(c) — the *sine qua non* for a First Amendment violation — alone renders all of Plaintiffs' analysis inapposite.

But this is not the only factor that distinguishes the present case from the circumstances at issue in the cases relied upon by Plaintiffs, and even if one were to accept that the same "strict scrutiny" standard should apply in analyzing the constitutionality of section 6254.21(c), these distinctions warrant a very different balancing of the competing interests involved in such cases and a very different assessment of the appropriateness of the means that California has chosen to balance those interests.

As Plaintiffs note, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) is the Supreme Court's leading decision on how to analyze and resolve "[t]he tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other." *Id.* at 530. In that case, the Court struck down a judgment imposing liability on a newspaper for publishing the name of a rape victim that one of its reporters had obtained from an unredacted police report that had been released by the department, in violation of its policy. Rejecting the newspaper's argument that "truthful publication may never be punished consistent with the First Amendment," *id.* at 532, the Court instead adhered to the standard it had articulated in *Smith v. Daily Mail Publishing Co.* ("*Daily Mail*"), 443 U.S. 97, 103 (1979): "[I]f a newspaper lawfully obtains truthful information about a matter of

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private decisions and not "state action"); *Polk County v. Dodson*, 454 U.S. 312 (1981) (where state did not control the decisions of public defender, her employment with the state was insufficient to make actions "under color of state law" for § 1983). Similarly, here, the private decisions of public officials to pursue the remedy afforded by section 6254.21(c) cannot be attributed to the state itself under § 1983.

public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533.[12]

Applying that standard to the facts before it, the Court found several factors to be determinative: First, the paper had obtained the identifying information directly *from the government itself*. *Id.* at 538.[13] This not only undermined the state's argument that the law was "narrowly tailored," but it "ma[de] it especially likely that, if liability were to be imposed, self-censorship would result." *Id.* at 538. Second, under the Florida law's negligence *per se* standard, liability followed *automatically* from publication, with no individual adjudication or case-by-case findings and no scienter requirement of any kind. *Id.* at 539-40. Third, the law was facially underinclusive, "rais[ing] serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which [the state] invokes." *Id.* at 540-41.

Although Plaintiffs attempt to shoehorn the circumstances of the present case into the *Florida Star* mold, the fit is at best uncomfortable. To begin with, while the Court in *Florida Star* acknowledged that protecting the identity of rape victims furthered "highly significant interests" — indeed, the Court would "not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the *Daily Mail* standard," *id.* at 537 — even Plaintiffs would concede that protecting the safety of law

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[12]It is questionable whether the legislators' home addresses and telephone numbers would even be considered "information about a matter of public significance" under the *Daily Mail* standard. Section 6254.21(c) does not prohibit or infringe in any way upon Plaintiffs' right to discuss, comment on, or to criticize any public official in as "vehement, caustic, and . . . unpleasantly sharp" language, *New York Times,* 376 U.S. at 270, as Plaintiffs may choose to use; it merely bars the public display of an official's private personal information, which generally plays no legitimate part in the "uninhibited, robust, and wide-open" debate on public issues. *Id.* Although Plaintiffs posit a number of hypothetical scenarios in which such information *might be* connected to political advocacy, such as organizing marches on an official's home or verifying the lawfulness of where they live, *see* PI Memo, at 11-12, none of these were why Publius posted the information on his blog, and thus they cannot serve to support his constitutional challenge in this case. *Cf. Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.").

[13]This had occurred in almost all of the cases relied upon by Plaintiffs. *See, e.g., Daily Mail,* 443 U.S. 97*; Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ; *Ostergren v. Cuccinelli*, 615 F.3d 263, 280 (4th Cir. 2010) ("punishing truthful publication of private information will almost never be narrowly tailored to safeguard privacy when the government itself released that information to the press.").

enforcement, judicial, and high-level public officials so that they can perform their valuable government functions without intimidation and fear of retribution is a "state interest of the highest order." *See, e.g., Chaffee v. Roger*, 311 F. Supp. 2d 962, 968-69 (D. Nev. 2004). Moreover, as the court discussed in *Ostergren*, the *nature* of this interest differs from that involved in *Florida Star* and its predecessors, in that the "privacy interest" at issue in those cases was to avoid even a single disclosure that would be embarrassing or compromising, whereas the "privacy interest" in the present case does not hinge upon keeping personal information secret in the first instance but on controlling its dissemination. That a public official's personal information may already be in the public domain therefore does not undermine the state's compelling interest in preventing its further dissemination. 615 F.3d at 281-84.

Plaintiffs are thus incorrect in analogizing the present case to *Florida Star* and its predecessors on the ground that the personal information of public officials is already publicly available.[14] Obtaining information from "public records," and receiving that information directly from the government itself are two very different things, and it is only the latter that *Florida Star* deemed significant to the analysis. Moreover, even if Publius had obtained the legislators' personal information from public records, compiling that information in one place and making it readily available over the internet to anyone who might want to use it to do harm is precisely what section 6254.21(c) seeks to prevent. As the Court explained in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 764 (1989), "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." In any event, Plaintiff Publius acknowledges that he did not obtain the legislators' addresses from public records, but from a

[14]Plaintiffs are also incorrect in asserting that California law *requires* home address information for all voters to be made available. Not only does the statute they cite, Cal. Elec. Code § 2194, explicitly prohibit the use of such information for "[t]he harassment of any voter or voter's household," *id.* § 2194(a)(2)(A), but the Secretary of State's regulations implementing § 2194(a)(3) require that the registration information "shall be used solely for election and governmental purposes," Cal. Code Regs., tit. 2, § 19002, and that once obtained, shall not be made available "under any terms, in any format, or for any purpose, to any person without receiving prior written authorization from the source agency." *Id.* § 19005. Thus, California does indeed have "a general policy of keeping people's home addresses confidential" that Plaintiffs themselves say would constitute "a compelling interest in barring citizens from disclosing public officials' home addresses." PI Memo, at 13.

commercial vendor, zabasearch.com. Publius Decl., ¶ 4.

In addition, section 6254.21(c) does not "automatically impose liability," but provides for the "case-by-base determination" that the Court found lacking in *Florida Star*. Indeed, the only "liability" that section 6254.21(c) imposes on anyone who violates the statute is the possibility of a lawsuit in which a *court* will decide, in a case-by-case determination, whether an injunction should issue consistent with the First Amendment to require the removal of the official's personal information.[15]

Finally, as the court pointed out in *Ostergren*, the rationale that the Court in *Florida Star* relied on for finding the statute to be underinclusive and not narrowly tailored — that the government could easily have prevented the initial disclosure of the rape victim's identity — does not apply here. *See* 615 F.3d at 284-85. Public officials' home addresses and phone numbers have for the most part made their way into the public domain through actions that occurred during the course of normal commercial transactions, frequently well before an individual even assumed the position or employment that now warrants the protection of that personal information. It would be virtually impossible at this point to scrub all of that information from every corner of the internet. Consequently, as the court observed in *Ostergren*, "[The state] thus faces considerable obstacles in avoiding initial disclosure of sensitive information that *Cox Broadcasting* and *Florida Star* did not have to consider. Such realities plainly must factor into our narrow-tailoring analysis." *Id*. at 285.

In short, section 6254.21(c) is narrowly tailored to further a state interest "of the highest order," and it does so without punishing or imposing liability on any speech. Plaintiffs are unlikely to prevail on their claim that the statute violates the First Amendment, either on its face or as applied to them.

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[15]Plaintiffs suggest that section 6254.21(c)(2)'s mandatory costs and attorney's fees award constitutes the imposition of "automatic liability." PI Memo, at 14. First, of course, no fees are awarded unless the Court has already determined that issuance of an injunction, with the resulting fee award, would not violate the First Amendment. Second, it is well-established that attorney's fee awards under fee-shifting statutes like section 6254.21(c) are considered "costs," not "damages," and are not provided to "punish" the defendant in any way but merely to ensure that the plaintiff will be fully compensated. *See, e.g., Marron v. Superior Court,* 108 Cal. App. 4th 1049, 1065-66 (2003); *Washburn v. City of Berkeley*, 195 Cal. App. 3d 578, 587 (1987). Indeed, under California law, the attorney's fee award belongs to the party's counsel, not to the party. *Flannery v. Prentice*, 26 Cal. 4th 572 (2001).

C. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR COMMERCE CLAUSE CHALLENGE

Plaintiffs are not likely to succeed on their Commerce Clause challenge, either. Relying on a handful of inapposite cases from other circuits and an outdated Supreme Court case, Plaintiffs contend that applying section 6254.21(c) to an out-of-state actor like Hoskins would violate the Commerce Clause by attempting to regulate "commerce that takes place wholly outside of the State's borders." PI Memo, at 16-17 (quoting *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989).) However, *Healy*'s broad articulation of the scope of the extraterritoriality doctrine — to the extent it retains continuing vitality — has been limited by the Supreme Court in subsequent years to the factual context of that case: "price control or price affirmation statutes" that involve "tying the price of . . . in-state products to out-of-state prices." *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (explaining that *Healy* is "not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices"); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) ("In the modern era, the Supreme Court has rarely held that statutes violate the extraterritoriality doctrine."). As the Ninth Circuit explained in *Nat'l Ass'n of Optometrists & Opticians v. Harris*:

> Modern dormant Commerce Clause jurisprudence primarily 'is driven by concern about economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' 'The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.' . . . Given the purposes of the dormant Commerce Clause, it is not surprising that a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce. A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a substantial burden on interstate commerce.

682 F.3d 1144, 1148 (9th Cir. 2012) (citations omitted).

Even under *Healy*, in determining whether a state statute "directly regulates" interstate commerce, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. at 336. The "practical effect" of the statute, in turn, must be evaluated "by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every State adopted similar

legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37. Under this analysis, section 6254.21(c) does not significantly burden interstate commerce. It does not project any "regulatory regime" on Hoskins' operations of his web site, and Plaintiffs have pointed to no laws of New Hampshire or any other state that impose conflicting or incompatible obligations on him. Section 6254.21(c) does not even impose any affirmative obligation on Hoskins, but merely authorizes California public officials to request to have certain specifically identified sensitive personal information removed from a particular post, and requires him to respond to the request by removing that specific information or possibly having to defend his decision not to do so in a subsequent court action. Plaintiffs have not shown how section 6254.21(c) would impose any substantial burden on Hoskins or how it would change his operations one iota. *Cf. Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) (requiring cable network's national website to comply with California statute requiring captioning of online videos for hearing-impaired viewers does not have the practical effect of directly regulating conduct wholly outside of California because CNN could enable a captioning option for California visitors to its site, leave the remainder unchanged, and thereby avoid the potential for extraterritorial application of the state statute).[16]

D. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE UNDER 47 U.S.C. § 230

Plaintiffs' challenge to section 6254.21(c) based on its asserted "inconsistency" with 47 U.S.C. § 230 can readily be dismissed. Plaintiffs contend that because Hoskins is a "provider of an interactive

[16]The state regulations struck down in the lower court cases cited by Plaintiffs, all from the relative infancy of the internet era, imposed significantly greater burdens on the operators of out-of-state web sites than does section 6254.21(c). All involved prohibiting or criminalizing the distribution of pornography or other material harmful to minors and had the "practical effect" of imposing one state's policies and regulatory regimes in that regard on the other states. *See, e.g., American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). As the court in *Pataki* explained, "conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy — perhaps favoring freedom of expression over a more protective stance — to New York's local concerns." *Id.* at 177. Moreover, "the costs associated with Internet users' attempts to comply with the terms of the defenses that the Act provides are excessive. . . . [T]hese costs of compliance, coupled with the threat of serious criminal sanctions for failure to comply, could drive some Internet users off the Internet altogether." *Id.* at 180. There is no realistic danger of anything like that happening in the present case due to section 6254.21(c).

computer service" as defined in that statute, he cannot "be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and he is immunized against "liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). "Section 230 thus bars the state from imposing any liability on Hoskins based on what his users post." PI Memo, at 18.

As discussed above, it is doubtful that section 6254.21(c) could be construed as imposing "liability" on Hoskins merely by authorizing a court to issue an injunction removing the legislators' home addresses from "headednorth"'s post. But the Court need not reach that issue in the context of the present motion, nor determine whether Hoskins is indeed a "provider of an interactive computer service" as he alleges, because *subdivision (e)* of section 6254.21 — which Plaintiffs curiously fail to mention in their moving papers — provides Hoskins with the *same* immunity from "liability," using the *exact same* definition of "interactive computer service," as does 47 U.S.C. § 230.[17] It is therefore nonsensical for Plaintiffs to assert that section 6254.21, which copies the federal statute, is somehow "inconsistent with" that same statute.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS WEIGH IN DEFENDANT'S FAVOR, NOT PLAINTIFFS'

Plaintiffs devote scant attention to the remaining factors necessary for preliminary injunctive relief. Aside from reiterating the truism that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," PI Memo, at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976), Plaintiffs make no attempt to demonstrate what *the actual harm is* that they are likely to suffer in the present case, or to weigh that harm against the harm to Defendant and

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[17]Section 6254.21(e) provides:

> (e) An interactive computer service or access software provider, *as defined in Section 230(f) of Title 47* of the United States Code, *shall not be liable under this section* unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official. (Emphasis added)

The statute's exception for the extraordinary circumstance in which the interactive computer service itself "threatens to cause imminent great bodily harm to an elected or appointed official" is an example of conduct that would transform a passive website operator into an active content provider, making it equally unprotected from liability under both 47 U.S.C. § 230 and section 6254.21(f).

the public from issuing the broad injunction Plaintiffs request.[18] While a First Amendment claim "certainly raises the specter" of irreparable harm and public interest considerations, proving the likelihood of such a claim is not enough to satisfy the Plaintiffs' burden. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). Rather, "the district court must determine the likelihood that these harms will occur and weigh any harm likely to be suffered by the [defendants] if the injunction is granted against the injury that will likely befall the [plaintiffs] if it is not." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

Here, in the absence of the injunction they request, Plaintiffs and others who may desire to post the home addresses and telephone numbers of judges, police officers, or other public officials in a manner that threatened them or caused them to fear for their safety, *see* section 6254.21(c)(1)(B), would face the prospect of (1) receiving a written demand to remove the information from public display within 48 hours; and (2) being sued by the official(s) for injunctive or declaratory relief. Receiving a written demand letter surely does not constitute "irreparable harm." *See, e.g., Sciortino v. Pepsico, Inc.*, 108 F. Supp. 3d 780, 788 (N.D. Cal. 2015) (Prop 65's notice requirement serves salutary purpose to "reduce private lawsuits by requiring a non-adversarial opportunity . . . to pursue investigation, settlement, and cure"). Likewise, the courts have repeatedly held that the burden and expense of having to defend oneself and one's speech in a lawsuit does not violate or infringe upon the defendant's freedom of speech or "chill" First Amendment rights. *See Jungherr v. San Francisco U.S.D. Bd. of Educ.*, 923 F.2d 743, 744-45 (9th Cir.1991); *Laxalt*, 622 F.Supp. at 751; *see also Calder v. Jones*, 465 U.S. 783, 790 (1984) (potential "chilling effect" on reporters and editors from having to appear and defend against libel action did not justify quashing service of complaint because "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.").

[18]Plaintiffs also erroneously rely upon *Sammartano v. First Judicial Dist. Court.*, 303 F.3d 959 (9th Cir. 2002) for the proposition that it is sufficient to show "the potential for irreparable injury." PI Memo, at 19. In *Winter*, however, the Court overruled this aspect of *Sammartano* and "underscored the requirement that the plaintiff seeking a preliminary injunction 'demonstrate that irreparable injury is *likely* in the absence of an injunction.'" *Herb Read Enterprises, LLC v. Florida Entertainment Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013) (quoting *Winter*, 555 U.S. at 22) (emphasis in original).

Moreover, even if Plaintiffs were able to establish — despite the absence of any cognizable harm that would result from the "enforcement" section 6254.21(c) — that the mere continuing existence of the statute during the pendency of this lawsuit is likely to cause them and others to "self-censor" their posting of public officials' personal information, they have not demonstrated that such harm would be irreparable here. Plaintiffs cite to cases observing that "timing is of the essence in politics" and "[a] delay of even a day or two may be intolerable," PI Memo, at 19, but they have failed to present any actual evidence establishing that waiting a few more months for a final adjudication of the merits of their complaint will significantly interfere with anyone's political speech. Certainly, Plaintiffs themselves are unable to make that showing, since neither of them has proffered any evidence even suggesting that the strength of their supposed "political message" has been irreparably weakened in the six and a half months that have already elapsed since their posts were first removed.

By contrast, the harm would truly be irreparable if some gun-loving madman with an AK-47 were to obtain a list of legislators' home addresses from TheRealWriteWinger's re-posted blog entry and take him up on his suggestion that the only way to remove these "tyrants" from the registry was by "the tyrant's death." In weighing the balance of the equities, this Court cannot discount the very real harm that will be caused to these targeted legislators and their families from having to live everyday with the haunting knowledge that armed and highly motivated adversaries "know where you live" and that the next action you take that displeases one of them could be your last.

Finally, where the impact of an injunction would reach beyond the immediate parties, the court must also consider the public interest. "[When] an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312–13 (1982). In fact, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312.

Plaintiff's requested injunction against enforcement of section 6254.21(c) is likely to have an impact far beyond the immediate parties to this case. Literally thousands of state and local officials throughout California would be affected, many of them front-line law enforcement personnel who for years have been able to rely upon the protection of the statute to request — and undoubtedly in most

cases to voluntarily obtain — the removal of their sensitive personal information from commercial databases, search engines, and other internet web sites. The Court must consider the effect that granting an injunction will have on all of these other individuals and their families. In addition, a district court must give due weight to the serious consideration of the public interest that has already been undertaken by the responsible state officials in Sacramento who overwhelmingly passed section 6254.21(c), convinced of the need for the measure in order to protect the public's interest in fair and independent decisionmaking by government officials and employees, uninfluenced by threats, intimidation, or the fear of retribution. *See Stormans*, 586 F.3d at 1140; *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) ("The public interest may be declared in the form of a statute."). Aside from quoting more boilerplate generalities, *see* PI Memo, at 20, Plaintiffs have offered nothing to counter these considerations and to satisfy their burden of proving that an injunction in the present case is in the public interest. *Stormans*, 586 F.3d at 1139.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Preliminary Injunction should be denied.

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