

1 James R. Wheaton, State Bar No. 115230
David A. Greene, State Bar No. 160107
2 Geoffrey W. King, State Bar No. 267438
FIRST AMENDMENT PROJECT
3 1736 Franklin Street, 9th Floor
Oakland, CA 94612
4 Telephone: (510) 208-7744
Facsimile: (510) 208-4562

5 Attorneys for Movant
6 DAVID MORSE

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

10 IN RE SEARCH WARRANT ISSUED
11 DECEMBER 12, 2009

Warrant No. 2009-2775

12 **REPLY MEMORANDUM IN SUPPORT OF**
13 **DAVID MORSE'S MOTION TO QUASH**
SEARCH WARRANT AND RETURN
14 **PROPERTY**

15 DATE: June 18, 2010
TIME: 2:00 PM
DEPT: 115

16 Hon. Yolanda Northridge
17

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1 **REPLY IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT**

2 **I. THE SEARCH WARRANT WAS ILLEGAL PURSUANT TO PENAL CODE**
3 **SECTION 1524(g); SECTION 1524(g) PROVIDES UNCONDITIONAL IMMUNITY**
4 **FROM SEARCH WARRANTS SEEKING JOURNALISTIC WORK PRODUCT**

5 The University of California (“UC”) does not contend that the objects sought by the search
6 warrant, namely David Morse’s unpublished photographs, are not the type of “items” subject to the
7 protection of Penal Code section 1524(g). Rather they claim only that section 1524(g) does not apply
8 when the journalist against whom the search warrant is directed has observed or committed a crime.¹

9 However, section 1524(g) contains no such exception. And even if it did, there is no evidence
10 that the UC police believed Morse to have committed a crime. UC’s contentions must be rejected
11 and the search warrant quashed.

12 **A. SECTION 1524(g) BY ITS PLAIN LANGUAGE PROVIDES AN**
13 **UNCONDITIONAL IMMUNITY**

14 As detailed in Morse’s opening papers, California Penal Code section 1524(g)² prohibits the
15 issuance of a search warrant for *any* items covered by California Evidence Code section 1070,³ the
16 journalist “shield law,” including any unpublished photographs that are obtained during the process
17 of “gathering, receiving or processing” information for communication to the public.

18 Neither Penal Code section 1524(g), nor Evidence Code section 1070, require that the

19 ¹UC notes that it “does not concede that Morse qualifies for the protections of California
20 Evidence Code Section 1070(a)” but states that this Court need not decide that question.
21 (*University of California’s Opposition to Morse’s Motion to Quash Search warrant and for*
22 *Return of Property (“UC Opp.”) at 2 n1*) Section 1524(g) incorporates the definition of “items”
23 covered from Evidence Code section 1070. Penal Code § 1524(g). Thus, as set forth in Morse’s
24 opening papers, the Court will need to determine whether or not Morse is a “publisher, editor,
25 reporter or other person connected with or employed upon a newspaper, magazine, or other
26 periodical publication, or by a press association or wire service.” Evid. Code § 1070. UC makes
27 presents no argument or evidence that Morse does not so qualify.

28 ²Contrary to UC’s contention, (*UC Opp. at 3-5*) this Motion to Quash is not based on any
qualified testimonial privilege derived from the First Amendment. Rather it is based solely on the
statutory prohibition against search warrants in Penal Code section 1524(g).

³Contrary to UC’s contention, (*UC Opp. at 5-6*) Morse is not seeking relief directly under
Evidence Code section 1070. Rather this motion to quash is based solely on Penal Code section
1524(g). Section 1524(g) incorporates the definition of covered “items” from Evidence Code
section 1070, but not any of the substantive provisions particularly the immunity from contempt.

1 photographs be confidential or obtained under a promise of confidentiality. Penal Code § 1524(g);
2 New York Times Co. v. Superior Court, 51 Cal. 3d 453, 461 (1990).

3 Section 1524(g) by its express terms is unconditional: “No search warrant shall issue.” Penal
4 Code § 1524(g). This unconditional prohibition stands in sharp contrast to similar provisions that
5 offer persons in privileged situations only conditional protection.

6 For example, Penal Code section 1524(c) sets forth the limitations on search warrants issued
7 for documentary evidence in the possession of lawyers, physicians, psychotherapists and clergy.
8 Penal Code §1524(c). Although section 1524(c) starts with the same baseline as section 1524(g)–
9 “no search warrant shall issue for any documentary evidence . . .”–subsection (c) then limits those
10 protections to documentary evidence sought from only a person “who is not reasonably suspected
11 of engaging or having engaged in criminal activity related to the documentary evidence for which
12 the warrant is requested.” Penal Code § 1524(c). And even for those who are not suspected of
13 criminal activity, a search warrant may still issue in conjunction with a special master procedure.
14 Penal Code § 1524(c)(1)-(3). Despite the subsections’ common origin,⁴ Section 1524(g) contains
15 none of these conditions.

16 The federal Privacy Protection Act, which like sections 1524(c) and 1524(g) was passed in
17 response to the U.S. Supreme Court’s decision in Zurcher v. Stanford Daily, 436 U.S. 547 (1978),
18 similarly contains exceptions when “there is probable cause to believe that the person possessing
19 such materials has committed or is committing the criminal offense to which the materials relate.”
20 42 U.S.C. § 2000aa. Again, the California Legislature included no similar conditions in section
21 1524(g).

22 Thus the California Legislature had the tools available to it had it wanted to imbue section
23 1524(g) with any conditions. But it clearly chose not to.

24 ///

25 ///

27 ⁴Both section 1524(c), passed in 1979, and section 1524(g), passed in 1978, were passed
28 in response to the U.S. Supreme Court’s decision in Zurcher v. Stanford Daily, 436 U.S. 547
(1978). PSC Geothermal Services Co. v. Superior Court, 25 Cal. App. 4th 1697, 1707 (1994).

1 **B. THE ROSATO CASE DID NOT IMPOSE AN UNWRITTEN EXCEPTION**
2 **ON TO SECTION 1524(g)**

3 This Court must reject UC's contention that, despite the statute's plain language, an
4 exception to section 1524(g) nevertheless exists whereby a search warrant may in fact issue if the
5 warrant seeks information about criminal activity in which the newsgatherer participated or
6 observed. (*UC Opp. at 6-7*). UC relies solely on Rosato v. Superior Court, 51 Cal. App. 3d 190, 218
7 (1975), to support the existence of this unwritten exception.

8 Rosato is not applicable to Section 1524(g) for several reasons.

9 First, the court in Rosato was interpreting Evidence Code section 1070. Id. at 216-18 (1975).
10 Indeed, Rosato precedes both Zurcher, decided in 1978, and section 1524(g), enacted in 1978.
11 Although section 1524(g) incorporates the definition of "items covered" from Evidence Code section
12 1070, section 1524(g) does not incorporate any of the substantive provisions of Evidence Code
13 section 1070. See Penal Code § 1524(g). Indeed, although both laws share a common public policy
14 of supporting a free and unhindered press, the substance and focus of the laws is quite different.
15 Section 1524(g) protects *items* from search warrants. Penal Code § 1524(g). Evidence Code section
16 1070 immunizes certain *persons* from contempt of court. Evidence Code § 1070.

17 In fact, no court has ever applied Rosato to section 1524(g).

18 Moreover, Rosato is no longer good law. In 1980, the provisions of Evidence Code section
19 1070 were added by initiative to the California Constitution as article I, section 2(b). Miller v.
20 Superior Court, 21 Cal. 4th 883, 887 (1999). The initiative, which was proposed by the Assembly
21 in 1978, and was thus the same Assembly that passed section 1524(g), was in direct response to, and
22 intended to correct the decision in Rosato and another case. Ian W. Craig, "Delaney v. Superior
23 Court: Balancing the Interests of Criminal Defendants and Newspersons under California's Shield
24 Law," 22 *Pac. L. J.* 1371, 1387 & n.102 (July 1991); Henry Kevane, "The Newsgatherer's
25 Shield—Why Waste Space in the California Constitution?" 15 *SW. U.L. REV.* 527, 539, 545-548,
26 572-573 (1985). (*Second Declaration of Geoffrey King in Support of David Morse's Motion to*
27 *Quash Search Warrant and for Return of Property ("2nd King Decl.") Exhs. D, E*)

28 Lastly, the Rosato exception that UC asserts, if applied to section 1524(g), would swallow

1 the whole of the protection afforded by section 1524(g). As presented by UC, quoting Rosato, 51
2 Cal. App. 3d at 218, section 1524(g) would not prohibit search warrants seeking to uncover any
3 criminal activity the journalist might have merely “observed.” (*UC Opp. at 6*) But a search warrant
4 will only ever be sought in such cases in which a newsgatherer does, at a minimum, “observe” a
5 crime. What other basis would law enforcement have for seeking the warrant?

6 **C. EVEN IF AN EXCEPTION DID APPLY, THE UNCHALLENGED**
7 **EVIDENCE INDICATES THAT THE EXCEPTION DOES NOT APPLY TO**
8 **MORSE**

8 Even if 1524(g) does not apply in the situation in which the newsgatherer is suspected of
9 having committed a crime related to the materials sought by the search warrant, the unchallenged
10 evidence in this case dictates that that exception not apply to Morse.

11 UC presents no evidence that the officers on the scene concluded that Morse had committed
12 any crime. Officer Manchester’s declaration is silent on this point. Instead, she testifies that while
13 many of the protestors ran away when the police car approached, Morse was seen simply “coming
14 down the steps,” and only after the officers had determined that the scene had settled such that it was
15 safe for them to leave their car. (*Declaration of Crista Manchester (“Manchester Decl.”) ¶¶ 5-7*)
16 She acknowledges that Morse identified himself as a member of the press and that he had no
17 weapons in his possession. (*Manchester Decl. ¶ 7*) She testifies that the press pass they obtained
18 from Morse had expired.⁵ (*Manchester Decl. ¶ 8*) But she does not state that either she or Officer
19 Wyckoff, the other officer on the scene, harbored any doubts, or came to any conclusion, that Morse
20 was not in fact on the scene as a journalist.

21 The police report similarly supports the fact the Morse was at the Chancellor’s house as a
22 journalist and not as a protestor. According to the police report, “all of the groups” gathered at the
23 Chancellor’s house “start[ed] to disperse.” (*Declaration of Stephen Rosenbaum (“Rosenbaum*
24

25 ⁵As Morse explains, he does now, and did on the night in question, have a valid *Indybay*
26 press pass. But he had left his current press pass at home and had with him that night only the
27 expired press pass he uses as a back-up. (*Second Declaration of David Morse in Support of*
28 *Motion to Quash Search Warrant and Return Property (“Second Morse Decl.”) ¶¶ 1-2*) The
police did not question Morse as to why he was carrying an expired press pass instead of his
current one. (*Second Morse Decl. ¶¶ 3-5*)

1 Decl. ") Ex. A at p. 7) Morse was not seen "coming down the stairs" until after "most of the crowd
2 had dispersed." (Rosenbaum Decl. Ex. A at p. 7) The police report notes that Morse identified
3 himself as a member of the press and indicated that he had a press pass, and that Morse's press pass,
4 although expired, was ultimately obtained. (Rosenbaum Decl. Ex. A at 7)

5 Both Officer Manchester's Declaration and the police report are consistent with Morse's
6 testimony that while the protestors scattered and ran from the Chancellor's house when the police
7 car arrived, he walked toward the police car and promptly identified himself as a journalist.
8 (Declaration of David Morse in Support of Motion to Quash Search Warrant Return Property
9 ("First Morse Decl. "), filed April 16, 2010, ¶¶ 10, 12)

10 UC's statements to the contrary in their opposition papers are purely the speculation of
11 counsel unsupported by the testimony of the officers on the scene. Counsel writes that the UCPD
12 "had a reasonable belief that Morse was not a journalist – because he was using an expired press
13 pass." (UC Opp. at 3) But there is no evidence that the officers held such a belief. Officer
14 Manchester is silent as to any belief she may have held regarding Morse's status as a journalist.
15 (Manchester Decl.) Indeed, the officers' statements at the scene, which are unchallenged, indicated
16 that they simply did not care whether Morse was a journalist.⁶ (First Morse Decl. ¶¶11-14, 16-18)

17 Indeed, when it comes to actually arguing the facts, the most UC can state is that "What
18 precisely Morse was doing on campus the night of the riot is not exactly clear." (UC Opp. at 6) UC
19 reaches that conclusion only because it ignores Morse's sworn declaration that sets forth exactly
20 what he was doing that night—gathering news for publication on *Indybay*. Again, UC has presented
21 no evidence to the contrary, or that anybody on the scene believed otherwise.

22 **D. THE FIRST AMENDMENT PROTECTS THE RIGHT TO OBSERVE AND**
23 **REPORT ON CRIMINAL ACTIVITY**

24 In the absence of any evidence that Morse was himself a rioter, UC attempts to label him as
25 a "participant" by arguing that he or others might use his photographs to "promote the event in the
26 future and advertise what happened." (UC Opp. at 6) In so doing, UC attempts to criminalize the

27
28 ⁶Notably, Officer Wyckoff told Morse that he was treating him the same as he would
treat, and in fact had treated, journalists from a local television station. (First Morse Decl. ¶13)

1 very act of news reporting.

2 The First Amendment protections here are clearly established. Morse's acts of publishing his
3 photographs, even if others may then use them for improper purposes, are fully constitutionally
4 protected; Morse can bear no criminal liability based on the possibility that others may use the
5 photographs for illegal purposes. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) ("The
6 government may not prohibit speech because it increases the chance an unlawful act will be
7 committed 'at some indefinite future time.'"); Bartnicki v. Vopper, 532 U.S. 514, 529-30 (2001)
8 ("[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can
9 be suppressed in order to deter conduct by a non-law-abiding third party.").

10 And even if Morse himself were to use his photographs to publicize future protests, such acts
11 would protected by the First Amendment up until the point the publication amounted to incitement
12 of imminent, lawless activity. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Mere advocacy or
13 advertisement of future action is not incitement. People v. Rubin, 96 Cal. App. 3d 968, 976 (1979).
14 Only advocacy directed at and likely to incite or produce imminent lawless action may be forbidden
15 or proscribed. Brandenburg, 395 U.S. at 447. The fact that a prior protest devolved into an unlawful
16 riot does not give law enforcement the right to act to prevent future protests on the basis that such
17 future protests may too become unlawful. Collins v. Jordan, 110 F.3d 1363, 1371-72 (9th Cir. 1996)
18 (holding that it was clearly established that the First Amendment preserved the right of protestors
19 to demonstrate regarding the Rodney King verdict even though the prior day's protests about the
20 same event involved widespread lawlessness); Service Employee Intern. Union v. City of Los
21 Angeles, 114 F. Supp. 2d 966, 971 (C.D. Cal. 2000) (holding that the government cannot infringe
22 on First Amendment rights on the mere speculation that violence may occur).

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1 **II. ANY DOUBTS THE UC POLICE HAD ABOUT MORSE'S STATUS AS A**
2 **JOURNALIST AT THE CHANCELLOR'S HOUSE SHOULD HAVE BEEN RAISED**
3 **IN THE SEARCH WARRANT AFFIDAVIT**

4 If, as UC asserts, its officers really were "not exactly clear" whether Morse was at the
5 Chancellor's house as a journalist or a protestor, the officers should have indicated their doubts in
6 the search warrant affidavit.

7 However, by leaving out any mention of Morse's claims that he was a journalist, as well as
8 any explanation as to why they discounted his claims, the UC police prevented the reviewing judge
9 from making the determination as to whether section 1524(g) applied.

10 **III. CONCLUSION**

11 For the foregoing reasons, the search warrant issued against David Morse on December 12,
12 2009, must be quashed.

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1 **REPLY IN SUPPORT OF MOTION TO RETURN PROPERTY**

2 **I. THE COURT MUST EXERCISE ITS INHERENT AUTHORITY TO VINDICATE**
3 **THE POLICY UNDERLYING SECTION 1524(g) BY ORDERING THE RETURN OF**
4 **ALL COPIES OF MORSE’S UNPUBLISHED NEWS PHOTOGRAPHS**

5 The right to regain possession of one’s property is a substantial right. Ensoniq Corp v.
6 Superior Court, 65 Cal. App. 4th 1537, 1546 (1998). An officer who seizes and holds property under
7 a search warrant does so on behalf of the court for the sole purpose of that property being used in a
8 judicial proceeding.”Id.; People v. Superior Court, 28 Cal. App. 3d 600, 608 (1972). Thus, as set
9 forth in Morse’s opening papers, the Court has the inherent and statutory authority to order the
10 return of all copies of Morse’s unpublished news photographs “to control and prevent the abuse of
11 its process.” Ensoniq, 65 Cal. App. 4th at 1547. The Court retains this power even when criminal
12 charges no longer lie. People v. Superior Court, 28 Cal. App. 3d at 608.

13 Here the Court must exercise this inherent authority such that the policies section 1524(g)
14 was designed to serve are in fact served.

15 The primary purpose of section 1524(g) is to preserve a journalist’s ability to gather news
16 without being seen as investigative agents of the state.⁷ See Delaney v. Superior Court, 50 Cal. 3d
17 785, 820-21 (1990). See also Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) (recognizing, with
18 respect to subpoenas, the “‘lurking and subtle threat’ to the vitality of a free press if disclosure of
19 non-confidential information ‘becomes routine and casually, if not cavalierly, compelled’”) (citations
20 omitted). But the public benefits as well: promoting a journalist’s ability to gather and disseminate
21 information promotes the free flow of information to the public. See Miller v. Superior Court, 21 cal.
22 4th 883, 898 (1999); Rancho Publications v. Superior Court, 68 Cal. App. 4th 1538, 1542-1543
23 (1999).

24 These goals will not be achieved, however, if the law enforcement entity that obtains
25 newsgathering materials by way of an illegal search warrant is able to retain copies of those
26 materials. Indeed, were a law enforcement entity able to retain copies of the materials it illegally
27 seized, there would be no incentive for it to abide by section 1524(g) at all. The essential purpose

28 ⁷As Morse has previously testified, he is suffering this very injury now. (*Declaration of David Morse In Opposition to UC’s Motion to Continue, filed June 3, 2010, ¶4*)

1 of section 1524(g) will not be realized if anything less than all of the copies of the seized materials
2 are ordered returned.⁸ A journalist injured by a violation of section 1524(g) will continue to suffer
3 the injury as long as law enforcement retains and continues to use copies of his or her journalistic
4 materials.

5 UC does not contest that, should this Court rule that the search warrant was issued illegally,
6 it will need to return Morse's property it seized. Rather, UC argues that the copies are not Morse's
7 property. UC thus urges this Court to rule that it need return only the original digital images it
8 obtained from Morse's photo disks, and that it may retain all other copies. (*UC Opp. at 7*)

9 This argument must be rejected. The UC must not be permitted to benefit from abusing the
10 court's process by obtaining an illegal search warrant, and in so doing, to compound Morse's injury
11 further.

12 **II. ALTERNATIVELY, THIS COURT MUST ORDER THE RETURN OF ALL COPIES**
13 **MADE OF MORSE'S JOURNALISTIC WORK PRODUCT PURSUANT TO PENAL**
14 **CODE SECTION 1538.5(n)**

15 **1. SECTION 1538.5 APPLIES TO "ANY TANGIBLE OR INTANGIBLE**
16 **THING"**

17 Penal Code section 1538.5 provides for a motion for return of "any tangible or intangible"
18 property.⁹ Penal Code § 1538.5(a). Thus, to the extent Morse's photographs, and copies of them,
19 in digital form are "intangible property," they must be returned. UC's contention that it may keep
20 Morse's unpublished news photographs because they do not constitute "tangible property" such as
21 film must be rejected. (*UC Opp. at 7*)¹⁰

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23 ⁸Morse believes that UC has not yet returned to him a copy of each of the photographs
24 that were on his photo disks at they time they were seized from him. (*2nd Morse Decl. ¶7, 2nd*
King Decl. Exhs. A and B)

25 ⁹UC has provided only copies of Morse's photographs, not the original discs seized from
26 him on December 11, 2009. (*2nd Morse Decl ¶9*). Thus, UC remains in possession of both
27 Morse's tangible and intangible property.

28 ¹⁰Moreover, in the context of the secondary evidence rule, California law makes no
distinction between copies of electronic data, such as Morse's digital photographs, and the
document originally seized. Cal. Evid. Code § 255.

1 **2. SECTION 1538.5(n) PROVIDES AN INDEPENDENT VEHICLE FOR THE**
2 **RETURN OF ANY PROPERTY THAT IS PROTECTED BY THE FREE**
3 **SPEECH AND/OR PRESS PROVISIONS OF THE UNITED STATES OR**
4 **CALIFORNIA CONSTITUTION**

5 Penal Code section 1538.5(n) provides another independent basis for a motion for return of
6 property. Section 1538.5(n) specifically allows for a motion to return property “*brought on the*
7 *ground that the property obtained is protected by the free speech and press provisions of the United*
8 *States and California Constitution.*” Morse’s photographs, both the originals and all copies UC has
9 made, are materials so protected. See United States v. Stevens, ___ U.S. ___, ___, 130 S. Ct. 1577,
10 1584 (2010) (affirming that photographs are expression protected by the First Amendment).

11 UC’s assertion that 1538.5(n) does not apply to copies of Morse’s unpublished news
12 photographs “because the University’s possession of the copies of the photographs does not violate
13 the First Amendment,” (*UC Opp. at 7*) must be rejected. The relevant question is whether the
14 photographs themselves are protected by the First Amendment and California’s Liberty of Speech
15 clause. Whether UC may be able to justify some use of the photographs in some hypothetical
16 situations despite these constitutional protections is irrelevant for the purposes of section 1538.5(n).

17 **III. MORSE HAS A PROPRIETARY INTEREST IN CONTROLLING THE**
18 **DISTRIBUTION OF HIS JOURNALISTIC WORK PRODUCT**

19 Moreover, Morse has a proprietary interest in all of the copies that UC made of his
20 photographs. 17 U.S.C. § 113. All copies must thus be included in any order for the return of his
21 property.

22 Morse has a proprietary interest in seeing that his images are not used for any further
23 unauthorized purposes. UC represented to this Court that it would use Morse’s unpublished news
24 photographs in its investigations. Indeed, it already has. Until the Court ordered otherwise on June
25 4, UC had published Morse’s photographs to a “wanted”-style webpage that was accessible to the
26 public on the UCPD website. (*2nd Morse Decl. ¶9*).

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1 **IV. UC'S ARGUMENTS REGARDING EXCLUSION ARE IRRELEVANT AND, EVEN**
2 **IF RELEVANT, ARE WITHOUT MERIT**

3 UC's extended discussion of the exclusionary rule (*UC Opp. at 8-10*) is irrelevant. Morse has
4 not brought a suppression motion.

5 Nevertheless, several of UC's arguments on suppression require some correction.

6 **A. THE UCPD DID NOT ACT IN GOOD FAITH IN OBTAINING THE**
7 **ILLEGAL SEARCH WARRANT**

8 UC will not be able to avail itself of the good faith exception to the exclusionary rule because
9 it did not act in good faith in obtaining the search warrant. The search warrant affidavit completely
10 omitted the fact that Morse was a journalist, or even that he claimed to be a journalist, or even that,
11 as UC now claims, "it was not completely clear" what he was. Instead, the search warrant affidavit
12 intentionally, and misleadingly, groups Morse with the protestors themselves, falsely describing
13 Morse as "running" away from the police, in conflict with both the police report and Officer
14 Manchester's testimony before this Court. (*First King Decl. Exs. B and C; Rosenbaum Decl. Ex. A;*
Manchester Decl. ¶7)¹¹

15 **B. THE INEVITABLE DISCOVERY DOCTRINE IS INAPPLICABLE**
16 **BECAUSE IF SUBPOENAED, MORSE WILL INVOKE THE SHIELD LAW,**
17 **MAKING THE SUBPOENA UNENFORCEABLE**

18 UC's argument that it should be allowed to keep copies of Morse's unpublished news
19 photographs even if the warrant is quashed because it could inevitably discover them via a *subpoena*
20 *duces tecum* must fail. (*UC Opp. at 8*) If subpoenaed for his unpublished news photographs, Morse
21 will invoke the protections of California Constitution article I, section 2(b), the journalist shield law.
22 (*2nd Morse Decl. ¶11*) The shield law functions as an absolute immunity from contempt of court
23 except in the situation in which a criminal defendant seeks information from a covered journalist.
24 Delaney, 50 Cal. 3d at 805.¹² The shield law remains an absolute immunity when the information

25 ¹¹UCPD should be well aware of the prohibitions on securing a search warrant for
26 journalistic work product, as all of this has occurred while the agency has been in litigation over
27 its alleged seizure of protected materials belonging to the periodical publication *Slingshot*. (*King*
Decl. ¶4, Ex. C at pp. 1-5, 7-18)

28 ¹²In that situation, a multifaceted balancing test is applied. Delaney, 50 Cal. 3d at 807-
17.

1 is sought by the prosecution in a criminal matter. Miller, 21 Cal. 4th at 898. The shield law protects
2 unpublished news photographs made in a public place. New York Times Co. v. Superior Court, 51
3 Cal. 3d at 401.

4 **C. UNDER THE CALIFORNIA CONSTITUTION, THE PRESS RETAINS**
5 **REMEDIES REGARDING THEIR JOURNALISTIC WORK PRODUCT**
6 **THAT ARE UNAVAILABLE TO THE GENERAL PUBLIC**

7 When the California Constitution was amended in 1982 to limit the exclusion of any relevant
8 evidence in criminal proceedings—the so-called “Truth-in-Evidence” rule—that amendment expressly
9 declined to “affect any existing statutory or constitutional right of the press.” Cal. Const. Art. I §
10 28(b)17(f)(2) (as amended by initiative June 8, 1982). Article I section 2(b) predates the Truth-in
11 Evidence Rule. Cal. Const. Art. 1 § 2(b) (as amended by initiative 1980). So does Evidence Code
12 section 1070. Stats.1974 c. 1456, p. 3184, § 2. And so does Penal Code section 1524(g). PSC
13 Geothermal, 25 Cal. App. 4th at 1706. Thus the amended California Constitution ratified and
14 retained the use of strong prophylactic and ameliorative remedies for illegally-seized journalistic
work product, even as it broadened the use of other relevant evidence in criminal proceedings.

15 **V. UC DOES NOT HAVE STANDING TO CHALLENGE THE MOTION FOR**
16 **RETURN OF PROPERTY**

17 As discussed above, an officer who seizes property under a search warrant does so on behalf
18 of the court for use in a judicial proceeding. Ensoniq, 65 Cal. App. 4th at 1546.

19 UC, however, has indicated that it intends to use Morse’s photographs not in judicial
20 proceedings, but rather in its own internal disciplinary proceedings. UC has no authority to retain
21 copies of Morse’s photograph, which it controls on behalf of this Court, for such non-judicial
22 purposes.

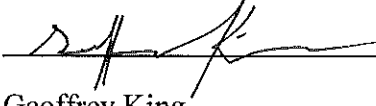
23 **VI. CONCLUSION**

24 For the foregoing reasons, this Court must order the return of all items seized, and all copies
25 made of the items seized, pursuant to its inherent and statutory authority.

26 Dated: June 15, 2010

By:

FIRST AMENDMENT PROJECT


Geoffrey King
Attorneys for Movant David Morse