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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA
SANTA BARBARA DIVISION

IN RE @UCSBLIBERATEDZONE and @SAYGENOCIDEUCSB, META PLATFORMS, INC., and UNIVERSITY OF CALIFORNIA SANTA BARBARA POLICE DEPARTMENT, Real Parties in Interest	Case No.: 24CR07427 **BRIEF OF AMICI CURIAE ACLU OF NORTHERN CALIFORNIA AND ACLU OF SOUTHERN CALIFORNIA IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT** DATE: October 14, 2024 TIME: 8:30am DEPT: SB12, Judge Carrozzo

TO: JOHN T. SAVRNOCH, DISTRICT ATTORNEY OF THE COUNTY OF SANTA BARBARA; META PLATFORMS, INC.; JENNIFER MILLER, ATTORNEY FOR UCSB POLICE; AND THE CLERK OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA:

NOTICE IS HEREBY GIVEN that on October 14, 2024, Amici Curiae ACLU of Northern California and ACLU of Southern California will request that the court consider this of brief *amici curiae* in support of the motion to quash the search warrant issued on September 11, 2024 for records relating to the Instagram accounts "@ucsbliberatedzone" and "@saygencodieucsb."

DATED: October 10, 2024

Respectfully submitted,

/s/ Jacob A. Snow
ACLU of Northern California

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I. INTRODUCTION

On September 11, 2024, this court issued a search warrant that would force Meta Platforms, Inc. ("Meta") to hand over detailed records associated with two Instagram accounts—@ucsbliberatedzone and @saygenocideucsb—to the police. While the warrant purports to investigate allegations relating to a June 2024 building occupation, its lack of particularity casts a broad net over a wide range of political activism and protected speech. The accounts targeted by this warrant have called for the University of California, Santa Barbara ("UCSB") to support Palestine, encouraged other students to participate in protests, and monitored police action on campus in response to those protests. The warrant purports to authorize the search of a vast array of information from both accounts, including photos and videos (even archived and deleted ones), private messages, people's interactions with content (e.g., "likes" and reaction emojis), precise location information, and other technical records that would reveal the electronic devices used and the account users' locations. These records have scant (and often zero) connection to the alleged crimes under investigation. If revealed to the police, they would threaten the privacy, free speech, and free expression rights of vast numbers of people who learn, live, work, and speak out on the UCSB campus.

Sweeping and overbroad warrants, such as this one, imperil speech, expression, and privacy rights essential to robust and uninhibited public debate. The social media accounts at issue—like so many others discussing the ongoing war in Gaza—are full of strong, and sometimes brazen, disagreement. When the government demands extensive records associated with those accounts, it ensnares the protected speech of both people who support the pro-Palestine message of the accounts and those who oppose it. Such demands also send a clear message: the government is watching and will surveil anyone who interacts online with a political activist. The chilling effect of that surveillance, as the California Supreme Court wrote in *White v. Davis*, "risks infringement of constitutionally protected privacy of speech." 13 Cal. 3d 757, 768 (1975). And those risks are especially acute in the context of public higher education, given that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 769 (quoting *Shelton v. Tucker*, 364 U.S.

479, 487 (1960)).

The warrant at issue sweeps far broader than permitted by the Fourth Amendment to the United States Constitution, the safeguards for privacy and free expression guaranteed by the California Constitution, and the statutory protections of the California Electronic Communications Privacy Act ("CalECPA"). Specifically, the warrant would compel Meta to compile and hand over to law enforcement a potentially extensive record of the First Amendment-protected speech and associations of members of the UCSB community and others who have followed or care about the recent protests. The warrant and supporting declaration offer no connection between these records, the people they relate to, and the alleged criminal activity. For these reasons, the Court should grant the motion to quash.

II. INTERESTS OF AMICI

Amici are state affiliates of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution, state constitutions, and our nation and state's civil rights laws. The ACLU and its affiliates share a longstanding commitment to defending and promoting privacy and freedom of speech. The ACLU of Northern California ("ACLU NorCal") has a Technology and Civil Liberties Program, founded in 2004, which works specifically on legal and policy issues at the intersection of new technology and privacy, free speech, and other civil liberties and civil rights. ACLU NorCal and the ACLU of Southern California ("ACLU SoCal') have frequently appeared before both state and federal courts in cases related to privacy and free speech, including exercise of those rights online.

Amici are dedicated to ensuring that everyone in California has strong privacy rights against government interference, representing the plaintiffs in *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994), and *Sheehan v. San Francisco 49ers, Ltd.,* 45 Cal. 4th 992 (2009). ACLU NorCal frequently participates in cases addressing privacy rights and free speech in the modern digital age. *See In re Ricardo P.*, 7 Cal.5th 1113 (2019) (amicus participating at argument); *Riley v. California*, 573 U.S. 373 (2014) (amicus); *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (amicus); *hey, inc. v. Twitter, Inc.*, No. 23-15911 (9th Cir. 2024) (amicus). Amici are

also dedicated to ensuring that all people are free to express themselves without government interference, and work to protect free speech and due process rights through litigation and other advocacy. *See Rosebrock v. Beiter*, No. CV1001878SJOSSX, 2015 WL 13709619 (C.D. Cal. Aug. 13, 2015) (counsel for plaintiff); *Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal. 4th 446 (2010) (counsel for plaintiff).

III. ARGUMENT

A. Government Intrusions into Social Media Related to Campus Protests Pose Grave Threats to First Amendment Rights.

The ability to safely use social media to learn, speak, connect, and get involved in social causes is a necessary element of democracy in the United States today. In 2024, nearly half of adults in the United States (47%) report using Meta-owned Instagram.[1] And a nationwide survey in 2023 showed that 46% of people who use social media have taken part in an online group related to a cause, encouraged others to take action, looked up information on protests or rallies happening in their area, or changed their profile picture or used hashtags related to a political or social issue.[2] Young people and people of color are even more likely to use social media for these important purposes.[3] It is no accident, therefore, that modern activism—on issues ranging from racial justice[4] to gun violence[5] to abortion rights[6]—happens both online and offline. Social media is used for political organizing and activism because it "allow[s] us to see a reality that has been entirely visible to some people and invisible to others."[7]

The law accordingly recognizes social media as a critical forum for speech and activism.

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[1] Jeffrey Gottfried, Pew Research Center, *Americans' Social Media Use* (2024), https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/.
[2] Samuel Bestvater et al., Pew Research Center, *#BlackLivesMatter Turns 10* § 2 (2023), https://www.pewresearch.org/internet/2023/06/29/americans-views-of-and-experiences-with-activism-on-social-media/.
[3] *Id.*
[4] Samuel Bestvater et al., Pew Research Center, *#BlackLivesMatter Turns 10* (2023), https://www.pewresearch.org/internet/2023/06/29/blacklivesmatter-turns-10/.
[5] Maggie Jones, *The March for Our Lives Activists Showed Us How to Find Meaning in Tragedy*, Smithsonian Mag., Dec. 2018, https://www.smithsonianmag.com/innovation/march-for-our-lives-student-activists-showed-meaning-tragedy-180970717/.
[6] Janay Kingsberry, *Gen Z is influencing the abortion debate — from TikTok*, Wash. Post, June 28, 2022, https://www.washingtonpost.com/nation/interactive/2022/gen-z-tiktok-abortion-debate/.
[7] Shira Ovide, *How Social Media Has Changed Civil Rights Protests*, N.Y. Times, June 18, 2020, https://www.nytimes.com/2020/06/18/technology/social-media-protests.html.

As the Supreme Court has written, the "vast democratic forums of the Internet," and "social media in particular," are among the "most important places . . . for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). Access to social media is necessary for "speaking and listening in the modern public square, and otherwise exploring vast realms of human thought and knowledge." *Id.* at 107.

Social media also helps students carry forward the rich history of higher learning institutions serving as critical spaces to contest ideas, critique mainstream orthodoxies, and encourage dissenting voices.[8] Higher education, and the robust dialogue that fosters learning, is especially well suited to embody one goal of free speech, which is "to invite dispute." *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949). It is a feature, not a failure, of free speech on campus that "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* The country needs, in other words, people "trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks omitted).

B. Surveillance's Chilling Effects Justify Heightened Particularity Requirements for Warrants That Relate to First Amendment-Protected Speech.

Because government surveillance can chill protected First Amendment activity, warrants to investigate such activity come with heightened particularity requirements. As a baseline, the Constitution prohibits general warrants that would allow the government to "rummage" through someone's personal effects. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The problem of general "exploratory rummaging," *Andresen v. Maryland*, 427 U.S. 463, 480 (1976), intensifies when the rummaging targets information about a person's beliefs, associations, and political activity.

Government actions jeopardizing free speech and free association demand the highest degree of judicial scrutiny. The Supreme Court has "'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with

[8] Richard Fausset, *From Free Speech to Free Palestine: Six Decades of Student Protest*, N.Y. Times, May 4, 2024, https://www.nytimes.com/2024/05/04/us/college-protests-free-speech.html.

others.'" *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). For instance, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), a civil rights organization had been held in contempt for refusing to release a list of its members. The Supreme Court unanimously reversed, explaining that the "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association . . . ." *Id.* at 462. The Court recognized that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* Therefore, any "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460–61; *see also AFLCIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (striking down regulation requiring disclosure of investigatory files concerning political associations because of the "substantial First Amendment interests implicated in releasing political groups' strategic documents and other internal materials.").

Accordingly, the Fourth Amendment standard must be applied with "the most scrupulous exactitude" when material about First Amendment activity is at issue. *Stanford v. State of Texas*, 379 U.S. 476, 485 (1965); *accord Maryland v. Macon*, 472 U.S. 463, 468 (1985); *see also Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961) ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power."). In this case, where the warrant seeks electronic information which also implicates First Amendment protected expression, the Court must exercise this "scrupulous exactitude," lest the "right of the people to be secure … against unreasonable searches and seizures," U.S. Const. amend. IV, lose its force in the contemporary technological world.

C. CalECPA Provides Strong, Clear Digital Privacy Rules for Government, Companies, and the Public.

In addition to the protections provided by the First Amendment, California has an important history of providing more robust privacy protections than federal law. The California

Constitution provides more protection than the Fourth Amendment.[9] The California Constitution guarantees an inalienable right to privacy for all Californians, articulated in The Privacy Amendment to Article I, Section 1, which protects the inalienable privacy rights of "all people." The Privacy Amendment was passed in response to the "modern threat to personal privacy" posed by increased surveillance and then-emerging data collection technology. *White v. Davis*, 13 Cal.3d 757, 774 (1975). CalECPA continues that tradition.

Before CalECPA, however, federal and state statutory law failed to properly safeguard modern electronic communication information in a way that was consistent with the California Constitution, particularly in light of the rapid spread of new information and communication technologies. Before CalECPA, California statutory privacy law in the digital context was similarly "stuck in the digital dark ages"[10] and in need of revision.[11]

CalECPA has warrant particularity requirements that are more specific—and more extensive—than what is afforded under the Fourth Amendment. Warrants must "describe with particularity the information to be seized by specifying, as appropriate and reasonable, the time periods covered, the target individuals or accounts, the applications or services covered, and the types of information sought . . . ."[12] CalECPA includes heightened particularity requirements specifically because online services and electronic devices house vast amounts of personal information, including that of a person's contacts and associates. CalECPA recognizes that, because a warrant permitting the search of a device or online service threatens the privacy of

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[9] *See, e.g., People v. Mayoff*, 42 Cal.3d 1302, 1312–1314 (1986) (reviewing *California v. Ciraolo*, 476 U.S. 207 (1986) and *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) and nevertheless reaffirming precedent holding warrantless aerial surveillance contravenes the California Constitution).

[10] Nicole Ozer, *California is Winning the Digital Privacy Fight*, Tech Crunch, Nov. 7, 2015, https://techcrunch.com/2015/11/07/california-now-has-the-strongest-digital-privacy-law-in-the-us-heres-why-that-matters/; Kim Zetter, *California Now Has the Nation's Best Digital Privacy Law*, Wired, Oct. 8, 2015, (quoting CA State Senator Mark Leno), https://www.wired.com/2015/10/california-now-nations-best-digital-privacy-law/).

[11] *See* Facebook Letter in Support of SB 178, March 13, 2015 ("People deserve to connect with friends and loved ones knowing that their personal photos and messages are well-protected.") (available at https://www.eff.org/document/facebook-sb-178-support-letter); Google Letter in Support of SB 178, March 12, 2015 ("law enforcement needs a search warrant to enter your house or seize letters from your filing cabinet — the same sorts of protections should apply to electronic data stored with Internet companies.") (available at https://www.eff.org/document/google-sb-178-support-letter).

[12] Cal. Penal Code § 1546.1(d)(1).

both the target and countless others, effectively protecting people's privacy means the *warrant itself* must restrain the government's power to intrude into these digital spaces.

D. The Warrant is Overbroad and Violates the Fourth Amendment and CalECPA.

This warrant impermissibly captures First Amendment speech, associations, and private material that have no relation to the government's purported justification: an investigation of incidents at UCSB Girvetz Hall across a 48-hour period in June 2024. Search Warrant Affidavit, at 4. ("Summary"). Amici offer four examples of overbreadth which intrude into core constitutionally protected speech and render the warrant fatally overbroad.

The content of people's personal and First Amendment protected speech. The warrant seeks "Records of the communications, photo comments, or other data that would constitute electronic communication information by the Target Account to include the contest [sic] of the messages." Search Warrant, Attachment A. The warrant also seeks any "[a]rchived copies" of "photos, videos, chat communication, [and] messages." *Id.* These records include the content of messages between the target accounts and others, potentially exposing the private messages and identities of people engaging in lawful and constitutionally protected associations, speech, protest, and solidarity. And the time period for these materials is not limited to the events at Girvetz Hall; rather, the warrant seeks records going back to the beginning of the accounts. Search Warrant, Attachment A. This warrant violates CalECPA's mandate for reasonable particularly with respect to time periods covered in Cal. Penal Code 1546.1(d)(1). But regardless of its temporal scope, the warrant risks impermissibly exposing to the government a wide array of communications on political events, peaceful protests at UCSB, and other First Amendment protected speech. This demand could reach those who sent a message disagreeing with the perspective of the target accounts, including if that disagreement took a socially inappropriate or shocking form.[13] Strikingly, the warrant could potentially expose attorney-client communications, as one target account posted on Instagram asking that prospective legal counsel message them privately. That measure of overbreadth alone treads far into constitutionally sacrosanct territory, threatening to reveal people's private speech on matters of vital public

[13] Madeline Halpert, *American Jews and Palestinians face fear and hatred*, BBC News, Oct. 23, 2023, https://www.bbc.com/news/world-us-canada-67175483.

concern. This intrusion into the "constitutionally protected free trade in ideas and beliefs" would be especially egregious here, where some of the people who interacted with these accounts were likely "espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555–57 (1963).

A sprawling network of protected associations. The "electronic communication information" sought by the warrant is not limited to messages written by people or photos posted to their accounts. Rather, the warrant extends to a vast matrix of information associated with people's activity on social media, including "any information pertaining to any individual or device participating in the communication . . . ." *See* Cal. Penal Code § 1546(d). The warrant thus reaches not only posted content, but also people's interactions with other content, including when people "Like" or share posts, which posts they click on, and potentially other detailed information about their activity on Instagram.

"Liking" the posts of the target accounts is a prime example of the exercise of constitutionally protected rights of expression and association. *See, e.g., Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."); *Bland v. Roberts*, 730 F.3d 368, 385–86 (4th Cir. 2013) (holding that "liking" on Facebook constitutes protected speech). Further, "liking" a post does not even indicate that one literally likes it; it may be no more than a means of saving a record of the post (like a bookmark) or signaling to Instagram that a person wishes for other similar content to appear in their feed, akin to subscribing to a magazine or getting on a particular organization's email list. Still, the consequences of being identified (even pseudonymously) in a government investigation as associated with a political page that the government views as connected to criminal activity may be enough to deter casual "likers" of controversial or dissident political pages in the future. The government's seizure of a list of the people who "liked" a given post would thus risk chilling supporters, opponents, and curious visitors alike. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564

(1969) (recognizing that "the Constitution protects the right to receive information and ideas").

Multiple months of location information history. The search warrant seeks months of location history, for both accounts, going back to when the accounts were created. This location information "provides an intimate window into a person's life, revealing not only [their] particular movements, but through them [their] 'familial, political, professional, religious, and sexual associations.'" *Carpenter v. United States*, 585 U.S. 296, 311 (2018) (citing *United States v. Jones*, 565 U.S. 400, 415 (2012)). Location records, in other words, "hold for many Americans the privacies of life." *Id.* (cleaned up). It is of no relevance to the criminal investigation where, for weeks if not months before and after the events at issue in the warrant, the holders of the targeted accounts sought medical care, spent the night, studied, shopped, or met with friends or family. Sweeping up this location information undermines their fundamental rights to privacy and free association.

Recording of police conduct. The warrant also reaches recording of police that were posted to the social-media accounts and their associated metadata (which goes beyond the content of the images or videos). *See* Search Warrant, Attachment A (covering "Photos and Videos"); Declaration, p.4 (@ucsbliberatedzone "posted multiple videos and photos documenting the police response at Girvetz Hall and the operation on 6/23/2024 that ended the illegal encampment.") As-yet unpublicized recordings of police activity could appear in archived content, deleted content, or private messages.

Recording police activity is protected by the First Amendment. As courts have ruled, "[a]ccess to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" (*Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) [quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)]); *see also Chestnut v. Wallace*, 947 F.3d 1085, 1092 (8th Cir. 2020) [acknowledging the right "to monitor police activities to ensure that their duties are carried out responsibly."]; *Askins v. U.S. Dept. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04 (9th Cir. 2018); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995);

Baca v. Anderson, No. 22-CV-02461-WHO, 2022 WL 7094267, at *6 (N.D. Cal. Oct. 12, 2022) ("In the decades since *Fordyce* came down, district courts in this circuit have continuously recognized a clearly established right to peacefully film police officers carrying out their duties in public.") (collecting cases). For any unpublished footage, the warrant deprives the target accounts of their right to choose when and how to publish the footage. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects decisions on what to print).

In sum, the warrant casts too a wide net, sweeping up protected speech and associational material from across the UCSB community. It intrudes into fundamental constitutional rights to free expression, association, and privacy. And it violates the statutory requirements of CalECPA.

IV. CONCLUSION

For the reasons stated above, the motion to quash should be granted.

Respectfully submitted,

Dated: October 10, 2024

/s/ Jacob A. Snow

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PROOF OF SERVICE

I, Jacob A. Snow, declare:

I am employed in San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is American Civil Liberties Union Foundation of Northern California, 39 Drumm Street, San Francisco, CA 94111. My electronic service address is jsnow@aclunc.org. On October 10, 2024, I served a copy of the following document(s):

1. **BRIEF OF AMICI CURIAE ACLU OF NORTHERN CALIFORNIA AND ACLU OF SOUTHERN CALIFORNIA IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT**

by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Executive Officer/Clerk
Santa Barbara Superior Court
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Santa Barbara County District Attorney Records
sbdarecords@countyofsb.org

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 10, 2024, at San Francisco, California.

JACOB A. SNOW