IN THE UNITED STATES DISTRICT COURT
DISTRICT COURT OF COLORADO

Civil Action No. 02-Z-0473 (BNB)

DENVER JUSTICE AND PEACE COMMITTEE, INC. and
LUIS ESPINOSA-ORGANISTA,

Plaintiffs,

v.

DAVID FARLEY, a detective with the Golden Police Department, in his individual capacity;
JEFF D. KREUTZER, a detective with the Golden Police Department, in his individual capacity;
DAVID J. THOMAS, District Attorney for the First Judicial District, in his official capacity;
MARK PAUTLER, an Assistant District Attorney for the First Judicial District, in his individual capacity; and
ANTHONY ORTIZ, an officer with the Denver Police Department, in his individual capacity,

Defendants.

PLAINTIFF DENVER JUSTICE AND PEACE COMMITTEE, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Denver Justice and Peace Committee, Inc. ("DJPC") respectfully submits this brief in support of its motion for summary judgment in its favor and against defendants David Farley ("Farley"), Jeff D. Kreutzer ("Kreutzer"), Mark Pautler ("Pautler"), and David J. Thomas, in his official capacity as District Attorney for the First Judicial District (the "District Attorney").

INTRODUCTION

DJPC scheduled a rally for December 9, 2000, at the Kohl's department store in Golden Colorado. After the rally was underway, four persons dressed in Santa Claus costumes arrived on the scene, entered the store, spray-painted merchandise, and then fled.

Five days later, as part of its investigation of the vandalism, the Golden Police Department obtained a warrant (the "Warrant"), searched the office of DJPC, and seized hundreds of pages of documents from DJPC's files, including its membership list, various e-mail lists, phone tree lists, and contact lists, and numerous other materials that were not evidence of criminal activity.

Kreutzer obtained the Warrant on the basis of an affidavit (the "Affidavit") that he drafted. Farley, who was Kreutzer's supervisor at the Golden Police Department, and Pautler, the Chief Deputy District Attorney for the First Judicial District, both reviewed and approved the Affidavit. The Affidavit requested, and the Warrant granted, authority to seize all materials meeting any of the following descriptions:

- "Pamphlets, papers, and flyers that are protest related";
- "Posters that are protest related";
- "Videotape and still photographs of persons protesting any organization or business"; and
- "Membership lists for Denver Peace & Justice Committee."

Notwithstanding the Warrant, the seizure of documents and other materials pursuant to any of these four categories violated DJPC's constitutional rights, for which Kreutzer, Farley, and Pautler are liable. In addition, when executing the warrant, Kreutzer further violated DJPC's constitutional rights by seizing additional documents that were not included in the categories listed in the Warrant. The Office of the District Attorney took custody of the seized materials. Although the originals of the illegally-seized materials have now been returned, the District Attorney continues to retain copies of them. DJPC asks for an order that these copies be destroyed or returned to DJPC.

There are no disputes of material fact, and, pursuant to Rule 56(a), DJPC is entitled to judgment as a matter of law against Kreutzer, Farley, Pautler, and the District Attorney.

UNDISPUTED FACTS

A. DJPC's Mission and Long History of Nonviolent Advocacy

DJPC was founded twenty-eight years ago as a religious organization dedicated to the promotion of peace and justice. Deposition of Wendy Hawthorne ("Hawthorne") at 14:11-15:1. (Relevant pages from the transcript of Hawthorne's deposition are attached hereto as Exhibit 1.) In 2000, DJPC's activities included its CAMINOS program, through which DJPC supported a human rights observer in a Mayan community in Guatemala; legislative advocacy; educational events involving peace and justice issues in Latin America; and nonviolent action campaigns. Id. at 15:24-17:13; 18:4-15. DJPC's mission statement as of December 2000 read as follows:

> The Denver Justice and Peace Committee is an interfaith, grass roots organization working for lasting peace and economic justice in Latin America. We promote change through education, solidarity projects, legislative advocacy and non-violent action campaigns. We support those who seek change in institutional structures for the empowerment of all peoples.

See Exhibit 2 attached hereto (pages from the DJPC website printed by the Golden Police Department on December 11, 2000).

B. DJPC Planned Nonviolent Rallies at Kohl's Department Store

In 2000, DJPC participated in two rallies as part of a nationwide effort to draw public attention to the relationship of Kohl's Department Stores with a notorious sweatshop in Nicaragua. Hawthorne depo. at 18:24-19:2; 45:22-46:1. At the first rally, conducted in August, 2000, participants stood outside the Kohl's store, handing out flyers and educating shoppers in a peaceful and nonthreatening manner. See id. at 47:19-25. Kreutzer monitored the event and

confirmed that participants in the DJPC-sponsored event conducted themselves peacefully and lawfully. Deposition of Kreutzer at 40:17-41:7. (Relevant pages from the transcript of Kreutzer's deposition are attached hereto as Exhibit 3.)

DJPC scheduled a second, similar peaceful rally for December 9, 2000. DJPC intended to

> hand out educational information about the sweatshops and Kohl's association with them and to ask people to sign petitions asking Kohl's to either try to influence the sweatshops to change their practices or asking Kohl's to use different manufacturers. . . . [T]here was planned some Christmas caroling.

Hawthorne depo. at 49:1-6. The carols had "changed words related to the situation in Nicaragua." Id. at 49:7-9. In keeping with its pacifist philosophy, DJPC intended that the event be nonviolent. Id. at 45:3-8. David Martin ("Martin"), DJPC's Executive Director at the time, was responsible for organizing DJPC's participation in the protest. Id. at 40:13-17.

The rally was publicized through e-mails and flyers. Id. at 39:17-21; see flyer attached hereto as Exhibit 4. The flyer encouraged individuals concerned about Kohl's purchase of clothing from sweatshops to appear at the rally in holiday garb and to join the group in singing carols and in educating the public about Kohl's policies. See flyer, Exhibit 4.

C. Kreutzer Drafted the Affidavit Seeking Authority to Search DJPC's Office

Five days after the vandalism incident at Kohl's, Kreutzer signed the Affidavit to obtain authority to search DJPC's office. (A copy of the Affidavit is attached hereto as Exhibit 5.) The Affidavit stated that 10-15 protesters had passed out fliers about sweatshop conditions to customers entering and leaving the store. Affidavit, Exhibit 5, at Golden 0002. At approximately 11:35 a.m., four persons dressed as Santa Claus entered the store, moved to the

back, and spray-painted merchandise. The four then ran out of the store and drove off in a small brown car. Before the vehicle left the parking lot, the store's loss prevention officer saw the driver's face and recorded the car's license plate number. Id. at 0002-03.

The Golden Police Department determined that the brown car was registered to one Douglas G. Bohm ("Bohm"), a Denver resident. See id. at 0003. The loss prevention officer at Kohl's "quickly and positively" identified Bohm's photograph from a photo lineup. Id. Police officers learned that Bohm's car was registered to his work address. See id. The police identified Bohm's residence address and learned from one of the owners of the building the times at which Bohm usually parked at such location. See id.

In addition, through a maintenance worker at the building where DJPC leases space, the police learned of a security camera in the hallway outside the suite in which DJPC's offices are located. See id. at 0004. The camera produced a tape with the date and time imprinted. See id. According to the Affidavit, "[o]n 12/09/00 between 10:37 a.m. to 12:42 p.m. the tape show[ed] three persons dressed in Santa Costumes going in and out of" the door to DJPC's office, and also showed Martin talking with them. See id.

The Affidavit requested authority to search the DJPC office for various items, including the following:

- "Pamphlets, papers, and flyers that are protest related";
- "Posters that are protest related";
- "Videotape and still photographs of persons protesting any organization or business"; and
- "Membership lists [for] Denver Peace & Justice Committee."

Affidavit at 0004-05. At the end of the Affidavit, Kreutzer requested that the Affidavit be sealed. Id. at 0005.

Kreutzer also drafted the Warrant. Kreutzer depo. at 115:25-116:2. (A copy of the Warrant is attached hereto as Exhibit 6.) The one-page Warrant did not mention the incident at Kohl's, nor did it describe the nature of the criminal activity under investigation nor the criminal statute the perpetrators were suspected of violating. The Warrant did not incorporate the Affidavit by reference.

D. Kreutzer Omitted Material Facts from the Affidavit

The Affidavit failed to include material facts that the Golden Police Department possessed. It contained no information about DJPC's character as an interfaith organization, its mission, or its more than twenty years of peaceful advocacy, all of which was available in the pages that Golden had downloaded from DJPC's web site. See Exhibit 2. It did not mention the August rally at Kohl's, which proceeded peacefully. It did not mention that advance publicity distributed on the Internet had urged participants to appear in holiday costume, nor that several participants at Kohl's told police they had learned of the rally through the Internet. See Golden Police Department Offense Report ("Police Report") at Golden 0036. (A copy of the Police Report is attached hereto as Exhibit 7.) The Affidavit also failed to make clear that the hallway photos that the security camera had taken outside DJPC's office did not, contrary to the ambiguous language of the Affidavit, depict any persons dressed in Santa Claus costumes *after* the criminal activity at Kohl's. See Kreutzer depo. at 64:21-65:1.

E. Farley and Pautler Approved the Affidavit and Warrant, which a County Court Judge Then Signed

Farley and Pautler reviewed and approved the Affidavit, as well as the text of the Warrant. Kreutzer depo. at 88:3-6, 89:4-13; Farley depo. at 57:11-15; Pautler depo. at 31:8-11, 32:14-17, 32:22-33:1. (Relevant pages from the transcript of Farley's deposition are attached hereto as Exhibit 8. Relevant pages from the transcript of Pautler's deposition are attached hereto as Exhibit 9.) They also approved a separate affidavit seeking a warrant to search Bohm's home and a separate warrant to search Bohm's car. Kreutzer depo. at 114:21-24; 116:14-19. Kreutzer took the three affidavits to the Jefferson County Court, which quickly issued the requested warrants. Id. at 139:25-140:25. As requested, the Court sealed the Affidavit in support of the Warrant. Affidavit at 0005; Kreutzer depo. at 141:6-8, 144:3-13.

F. The Warrant Authorized Seizure of Any Paper Related to Any Protest, Sponsored by Anyone, at Any Time in History, at Any Place in the World, About Any Subject

Kreutzer led the team of Golden police officers who executed the Warrant at DJPC's office on December 14, 2000, and he decided which items would be seized. Kreutzer depo. at 126:14-21; 131:15-25. The broadly-worded Warrant authorized seizure of any paper that was "protest related." It covered any protest, sponsored by anyone, at any time in history, at any place in the world, about any subject. Kreutzer acknowledged that he was looking for information "concerning any protest at all, regardless of the sponsor." Id. at 100:20-23. The Warrant authorized seizure of flyers published by "Citizens Against Cruelty to Kitties." Id. at 100:24-101:2. It also authorized seizure of newspaper articles about protests, id. at 132:17-19, including protests in other parts of the country or other parts of the world, even if DJPC was not a sponsor. Id. at 101:11-18.

The Warrant also authorized seizure of books, and indeed, Kreutzer looked through every book on DJPC's bookshelves. Id. at 160:21-161:2, 206:24-207:14. Kreutzer was authorized to seize, as a protest-related paper, a book about protests organized by Dr. Martin Luther King. Id. at 101:19-23. Kreutzer did not regard books about the American Revolution or the history of protests in the American labor movement as outside the scope of the Warrant. Id. at 133:10-134:5.

Kreutzer and Farley regarded the Warrant as authorizing the seizure of just about any material that contained the word "protest." In Kreutzer's view, even dictionaries were not necessarily excluded. Id. at 134:6-16. As Farley confirmed, the Warrant authorized seizure of any piece of paper containing the word "protesters." Farley depo. at 174:15-17. Indeed, Kreutzer took the position that a document was "protest-related" unless something in the document affirmatively demonstrated that it was not related to protest. Kreutzer depo. at 170:20-22. Even without the word "protest" appearing on a document, Kreutzer deemed the document to be protest-related if it contained Martin's name, e.g., id. at 174:4-10, 193:9-20, or that of Bohm. E.g., id. at 172:19-21, 176:7-10.

Kreutzer construed as similarly broad the Warrant's authority to seize any posters that were "protest-related." Kreutzer was not interested just in posters carried at the Kohl's rally; he also wanted posters related to environmental protests and animal rights protests. Id. at 135:11-14. Kreutzer acknowledged that the Warrant authorized him to seize posters that had nothing to do with DJPC, except for the fact that they might be displayed in the organization's office. Id. at 108:3-109:6. For example, a poster of Dr. Martin Luther King that referred to a march in

Alabama in the 1960s was covered by the Warrant, even though Kreutzer acknowledged it was not a poster for which he was looking in connection with his investigation. Id. at 107:20-108:2.

Kreutzer viewed as equally broad the Warrant's authority to seize photos of "persons protesting any organization or business." Id. at 109:7-110:9. A photo that merely depicted someone holding a sign that said "Denver Justice and Peace Committee" qualified for seizure, Kreutzer said, even when there was no protest and no organization or business targeted. Id. at 195:14-196:20.

G. The Defendants Seized DJPC's 1,000-Name Membership Roster, as well as Additional Phone-Tree Lists, Email Lists, and Other Lists of Names with Contact Information

Pautler acknowledged that he and the Golden Officers did not seek DJPC's membership list because they believed it was evidence of a crime or could be an exhibit in a criminal prosecution. Pautler depo. at 69:16-25. On the contrary, they viewed it as a source of names and addresses of persons the police might want to question. Id.; see Kreutzer depo. at 112:6-10, 14-22.

At the beginning of the search, Kreutzer learned that DJPC's membership list, which contained almost 1,000 names, was stored on DJPC's computer. Kreutzer asked Kareen Erbe ("Erbe"), an employee of DJPC, to print it out, and she did so. Kreutzer depo. at 239:23-240:4; deposition of Erbe at 50:11-20. (Relevant pages from the transcript of Erbe's deposition are attached hereto as Exhibit 10. A copy of the DJPC membership list is filed herewith under seal as Exhibit 11.) Despite having obtained, at the outset of the search, what Kreutzer himself described as the "total accurate list," Kreutzer depo. at 169:6-19, he subsequently seized numerous additional documents containing names, including phone tree lists, email lists, and

other lists. See Return of Inventory, attached hereto as Exhibit 12. He justified these seizures on the ground that the Warrant authorized seizure of "membership lists" of DJPC, in the plural, and that documents containing names might fit that category. See Kreutzer depo. at 167:22-168:15, 169:6-19, 174:17-175:21; 176:2-10; 176:14-177:11; 178:3-179:11; 193:9-20. He justified seizing an issue of DJPC's newsletter, *The Mustard Seed*, on the ground that its listing of staff members and Board members was a "membership list" of DJPC. Id. at 198:12-199:18. Kreutzer also seized a contact list that was clearly labeled as that of an entirely separate organization, the Chiapas Coalition. See id. at 173:19-174:3. As Kreutzer explained:

> Q. You just saw a list of people and you seized it, right?
>
> A. Yes.
>
> Q. And you didn't know whether it was a membership list for DJPC at the time, did you?
>
> A. No.

Id. at 168:10-15.

After the search, officers of the Golden Police Department called every tenth person on the DJPC membership roster to ask if they had information about the criminal activity at Kohl's. The calls were recorded. See Police Report, Exhibit 7, at Golden 0057-60, 0063; Kreutzer depo. at 237:12-238:24. In addition, the officers contacted each member of DJPC's Board of Directors. The officers called approximately one hundred persons in this fashion. See Police Report at Golden 0062-63, 0072.

H. Although Kreutzer Exercised Discretion and Did Not Seize All the Material that the Warrant Authorized Him to Confiscate, He Also Seized Documents that Were Outside the Warrant's Scope

Although the Warrant's authority cast a broad net, Pautler and Farley expected Kreutzer to narrow the scope of the materials actually seized by exercising on-the-spot discretion. E.g., Farley depo. at 84:4-10; Pautler depo. at 45:7-10. Kreutzer made frequent references to this discretion in his deposition, and he acknowledged that he did not seize all the papers and books that the Warrant ordered him to seize. See, e.g., Kreutzer depo. at 102:11-19, 110:2-9, 131:8-14, 133:10-134:8, 152:2-24, 207:12-21. Nevertheless, Kreutzer also seized additional documents that he was not able to justify as either "protest related" or as "membership lists" of DJPC. See, e.g., id. at 174:25-175:21, 184:20-186:22.

I. Kreutzer Provided an Inventory of the Materials Seized From DJPC

Over a three-and-one-half hour period, the Golden police officers went though every book and every piece of paper in DJPC's office. Id. at 161:1-2, 202:17-203:2. The inventory of the materials seized includes the following, all of which were seized in violation of DJPC's constitutional rights:

- "Copy of Feb 2000 Waubunowin Newsletter - from blue literature rack in North Office (Library)";
- "60 page membership roster for Denver Peace";
- "Mustard Seed Newsletter (Bookcase outside of DJPC office)";
- "Kohl's Sweatshop Company Flier (Bookcase outside of DJPC Office)";
- "Three large envelopes addressed to DJPC (Bookcase outside of DJPC Office)";
- "Award Night Brochure (DJPC Office)";
- "Board of Directors List (DJPC Office small Bookcase)";

- “Six Page Phone Tree List (DJPC Office small Bookcase)”;
- “Membership list”;
- “Phone & email list”;
- “Mustard Seed ‘Pasteup’ - DJPC Office - Desk”;
- “April Events in DC ‘Pasteup’ - DJPC Office - Desk”;
- “Caminos Sponsoring Committee List - DJPC Office - Desk”;
- “24 Page List of Names & Addresses - DJPC Office - Desk”;
- “One E-mail to DJPC (Desk in Office)”;
- “Notes on Yellow Paper (Desk in Office)”;
- “Roll A Dex Card for Dave Martin (Desk in Office)”;
- “Three page membership & youth delegation list (Desk in Office)”;
- “CHIAPAS Coalition calling list (Desk in Office)”;
- “Yellow Folder w/ Numerous Papers (Desk in Office)”;
- “Two Page Phones Email List (Mail Area DJPC)”;
- “Yellow Page w/ Names, PX numbers & Email Addresses (Mail Area - DJPC)”;
- “Five Pages of Kohl’s campaign (Mail Area - DJPC)”;
- “Large white Paper w/Notes (DJPC Mail Area)”;
- “Four Yellow Pages of Notes (DJPC Mail Area)”;
- Two Newspaper articles & photocopy of same (Small Bookcase DJPC office)”;
- “Letter to Board Members (Mail Area DJPC)”;
- “Photocopy of Letter (Mail Area DJPC)”;
- “Two pages of anti-sweat[shop] holiday carols (Table in DJPC Office)”;
- “Kohl’s Flier (Table in DJPC Office)”;

- "Photocopy of Newsletter Page (Table in DJPC Office);
- "Envelope to CEO of Kohl's w/signed fliers inside (Table in DJPC Office)";
- "Folder (Kohl's) w/numerous papers (Mail Area DJPC Office)"; and
- "Nine Pages of 'Call for Action' Brochure (Mail Area DJPC Office)";

See Return of Inventory, Exhibit 12. Before leaving, Kreutzer left a copy of the Warrant and the Return of Inventory at the DJPC office. See Erbe depo. at 46:12-13 (Warrant); Police Report, Exhibit 7, at Golden 0069 (Return of Inventory). DJPC was not provided with a copy of the Affidavit. Kreutzer depo. at 142:16-20.

ARGUMENT

The Affidavit failed to provide sufficient facts to justify the seizure of DJPC's membership list, either under the strict judicial scrutiny required by the First Amendment, Section I.A. below, or the more lenient standard of the Fourth Amendment. See Section I.B. below. In addition, the Warrant failed to comply with the particularity requirement of the Fourth Amendment, see Section II below, in three separate ways. First, as explained in Section II.A., the description of the items to be seized was overbroad on its face. Second, as set forth in Section II.B. below, Kreutzer and Farley failed to use available information to narrow the scope of the Warrant. Third, as argued in Section II.C., the scope of the Warrant exceeded the arguable scope of the probable cause in the Affidavit. Finally, Section III explains that Kreutzer further violated DJPC's Fourth Amendment rights by seizing items not listed in the overly broad Warrant.

I. THE AFFIDAVIT FAILED TO PROVIDE SUFFICIENT FACTS TO JUSTIFY SEIZURE OF "MEMBERSHIP LISTS [FOR] DENVER JUSTICE AND PEACE COMMITTEE."

The First Amendment provides special protection for the privacy of individuals who choose to associate with an organization, like DJPC, that espouses unpopular views critical of government policies. In this case, the facts set forth in the Affidavit failed to meet the legal standard of strict scrutiny that is required to satisfy the concerns of the First Amendment. See Section I.A. below. The Affidavit also failed to meet the more lenient Fourth Amendment standard, which requires probable cause to believe the membership lists are evidence of criminal activity. See Section I.B. below. Accordingly, the seizure of DJPC's membership list was not justified under either the First or the Fourth Amendments.

A. The Seizure of DJPC's Membership List Does Not Survive the Strict Judicial Scrutiny Required by the First Amendment

The substantive First Amendment law that governs this case dates back almost half a century. In NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the Supreme Court recognized that the Constitution requires heightened judicial scrutiny when the government demands the membership list of an organization that espouses controversial views. The Court explained that "[i]nviolability of privacy in group association" is often "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." Id. at 462. Recognizing that "compelled disclosure of affiliation with groups engaged in advocacy" may constitute an "effective . . . restraint on freedom of association," id. at 462, the Court held that Alabama had not shown a sufficiently compelling interest in obtaining the records to justify the chilling effect on the right of association. Id. at 466.

The Supreme Court relied on NAACP v. Alabama several years later in Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963), when it held that a legislative investigating commission could not compel the NAACP to disclose its membership list. The Court explained that when a governmental inquiry "intrudes into the area of constitutionally protected rights of speech, press, association and petition," then the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Id. at 546.

The Supreme Court reaffirmed the need for a heightened standard of judicial review in Buckley v. Valeo, 424 U.S. 1 (1976), in discussing a statute that required disclosure of contributions to political campaigns:

> [S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama, we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.

Id. at 64 (internal citations omitted). The Court also said: "The strict test established by NAACP v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." Id. at 66. See also Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 94 (1982) (holding that government failed under strict scrutiny to justify requiring minor political party to disclose each contributor and each recipient of disbursed campaign funds).

Applying the principles articulated in these cases, the Tenth Circuit has made clear that special considerations and heightened judicial scrutiny are required when law enforcement

agencies seek information about the membership or expressive activities of advocacy groups that espouse controversial or unpopular viewpoints. See Nat'l Commodity & Barter Ass'n v. Archer, 31 F.3d 1521, 1533 (10th Cir. 1994) (denying qualified immunity to government agents sued for executing search warrants authorizing seizure of an organization's membership lists and advocacy literature); Pleasant v. Lovell, 876 F.2d 787, 795 (10th Cir. 1989) (in rejecting qualified immunity defense, reaffirming that clearly established law requires government to demonstrate "overriding and compelling" state interest to justify compelled disclosure of group's members); Grandbouche v. Clancy, 825 F.2d 1463, 1465-67 (10th Cir. 1987) (reversing dismissal of lawsuit and remanding for determination whether First Amendment privilege shields plaintiff from defendant's discovery request for production of mailing list and membership information); In re First Nat'l Bank, Englewood, Colo., 701 F.2d 115, 118-19 (10th Cir. 1983) (government must show "compelling need" to justify a subpoena for documents identifying organization's members); see also Voss v. Bergsgaard, 774 F.2d 402, 405 (10th Cir. 1985) (overbroad search warrant particularly egregious when it implicates rights of speech and association by, *inter alia*, seeking "indicia of membership in or association with" an organization espousing dissident views as well as books expressing the organization's ideology). The Colorado Supreme Court relied on the same line of cases when it held that a search warrant to seize a bookstore's records of its customers' purchases must be justified by a "compelling need for the precise and specific information sought." See Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1058 (Colo. 2002).

Thus, in applying strict judicial scrutiny to government efforts to obtain membership lists, the case law requires not only that the government demonstrate an "overriding and compelling

interest," Pleasant, 876 F.2d at 795, but also that there be a direct and substantial relationship between that interest and the information sought. Id.; see, e.g., Nat'l Commodity & Barter Ass'n, 31 F.3d at 1528.

Although the general interest in investigating crime is a sufficiently weighty government interest, the Affidavit did not demonstrate a direct and substantial relationship between that interest and DJPC's membership list. The Affidavit provided no information about how the membership list could be useful, let alone necessary, to the investigation of the vandalism at Kohl's. While the defendants may have been interested in the names of persons who participated in the Kohl's rally and who may have seen the vandals, the Affidavit expressed no particular interest in that limited group. Instead, after reciting the facts known to the investigators, the Affidavit suddenly moved, without explanation, to a request to seize the entire membership list of DJPC. See Affidavit, Exhibit 5. The investigators thus requested the names of hundreds of persons who had never planned or participated in either of DJPC's leafletting actions at Kohl's. Thus, the Affidavit did not provide facts sufficient under the First Amendment to justify the seizure of DJPC's membership list.

B. The Affidavit Did Not Provide Probable Cause To Justify Seizing DJPC's Membership List

Until 1967, the Supreme Court construed the Fourth Amendment to permit searches only for contraband or for the fruits or instrumentalities of crime. Searches for "mere evidence" were regarded as beyond the government's power. That view changed with Warden v. Hayden, 387 U.S. 294 (1967), in which the Court held that the Fourth Amendment did not categorically bar searches for "mere evidence." Despite this broadening of the range of material that was

subject to search and seizure, the Court explained that a properly-drawn warrant would still provide sufficient protection for privacy:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus – automatically provided in the case of fruits, instrumentalities or contraband – between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.

Id. at 306-07. In this case, however, the Affidavit failed to demonstrate the necessary nexus between the criminal activity at Kohl's and DJPC's membership list.

At a minimum, the nexus must provide probable cause to believe that the items to be seized can be considered evidence in prosecuting the crime under investigation. For example, Federal Rule of Criminal Procedure 41, "which reflects the Fourth Amendment's policy against unreasonable searches and seizures," Zurcher v. Stanford Daily, 436 U.S. 547, 558 (1978), authorizes warrants to search for materials that constitute "evidence of crime." Courts interpreting the Fourth Amendment emphasize that the "evidence" seized pursuant to a search warrant must be evidence of criminal activity. See, e.g., Illinois v. Gates, 462 U.S. 213, 238 (1983) ("evidence of a crime"); United States v. Le, 173 F.3d 1258, 1265 (10th Cir. 1999) ("evidence of criminal activity").

In analyzing the degree of nexus that is required under Hayden's "mere evidence" rule, the Supreme Court relies on the evidentiary rules governing relevance that would apply in formal hearings to prove the crime or violation that is under investigation. For example, in Andresen v. Maryland, 427 U.S. 463, 482-84 (1976), the search warrant authorized investigators to seize

evidence of suspected fraud in connection with a particular piece of real estate. The investigators also seized evidence relating to similar fraud involving a different lot. In concluding that the seizure did not violate the rule of Hayden, the Court reasoned that the proof of fraud required proof of specific intent, and that evidence of similar acts was relevant, under the rules of evidence, to establish intent and absence of mistake. Id. at 482-84. Similarly, in New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court explained that cigarettes found in a student's purse are relevant evidence when the student is accused of smoking and she had denied that she ever smoked cigarettes. Quoting the definition of relevance in Federal Rule of Evidence 401, the Court explained that items could be seized as "mere evidence" if they have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. at 344-45.

These decisions compel the conclusion that DJPC's membership list is not evidence of criminal activity and is not subject to seizure. Indeed, it is difficult to imagine any set of facts that could provide probable cause to believe that DJPC's membership list could constitute evidence of a crime. Even if such a set of facts were conceivable, however, no such facts appear in the Affidavit. Nothing in the Affidavit or in any of the police files suggested that DJPC's membership list could have served as evidence in a prosecution of the persons responsible for the Kohl's vandalism. Nor did the Affidavit provide any information whatsoever about why or how the membership list could or would aid in the prosecution of the Kohl's vandals. The Affidavit provided no information about how the police proposed to use the membership list as an investigative aid, nor any other information that revealed the "police purposes," Hayden, 387

U.S. at 307, that the Hayden decision said would be necessary to evaluate the sufficiency of any arguable nexus.

In his deposition, Kreutzer provided the rationale for seizure that was omitted from the affidavit:

> Q. Why were you seeking Denver Justice and Peace Committee's membership list?
>
> A. Narrow the scope of the volume of people to try to interview to get information to the identities of the Santas.
>
> . . . .
>
> Q. Did you intend to call or have someone call through the membership list of Denver Justice and Peace Committee?
>
> A. It was a source of known people that are connected. When all the links are put together, it's a lead that needed to be followed up.
>
> Q. How did you intend to use that lead?
>
> A. Contact folks and try to figure out who was at the protest.

Kreutzer depo. at 112:6-10, 14-22. Similarly, Pautler clearly acknowledged that the defendants did not seek the membership list for use as evidence. Pautler depo. at 69:16-25.

Even if the rationale for seizing DJPC's membership list had appeared in the Affidavit, and it does not, this Court would be required to reject it. Even if the Fourth Amendment permitted searches for documents on the ground that they might provide this type of mere investigative lead instead of actual evidence of crime, and it does not, Kreutzer still failed to establish a sufficient nexus to justify seizing DJPC's membership list. Neither Kreutzer's deposition testimony nor the Affidavit provides a sufficient nexus between the hundreds and hundreds of names on the membership list and the handful of persons who may have seen the "Santas" on December 9. Nor do they provide probable cause to believe that calling up persons

selected at random from the membership list would produce information that would lead the police to the persons responsible for the vandalism.[1]

[1] The absence of probable cause to seize DJPC's membership list is even more clear in light of the facts that Kreutzer omitted from the Affidavit. See Undisputed Facts, Section D. The omitted facts about DJPC's history and mission demonstrate that the vandalism at Kohl's was strikingly inconsistent with everything that DJPC had stood for and espoused during its two-decade history of nonviolent peace and justice advocacy. Along with the other omitted facts, they further undermine the Golden Police Department's apparent (but erroneous) view that the organization responsible for scheduling the rally must also be responsible for the illegal actions of the Santas. As a result, the omitted facts demolish thoroughly the already-unjustifiable inference that the suspected responsibility of DJPC establishes a sufficient nexus to justify seizing a list of all of the organization's members. See Franks v. Delaware, 438 U.S. 154, 155-56 (1978); Bruning v. Pixler, 949 F.2d 352, 357 (10th Cir. 1991) (defendant violates Fourth Amendment by "knowingly or recklessly omit[ting] from an . . . affidavit information which, if included, would have vitiated probable cause").

The Golden Police suspected Martin. But the omitted facts demonstrate that any criminal involvement on Martin's part was clearly outside his authority as DJPC Director. The potential liability of an organization's officer does not translate into liability of the organization, unless the organization authorized or ratified the illegal activity. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929-31 (1982). This is especially true when the organization is engaged in advocacy protected by the First Amendment. Id. Moreover, even when an organization does have illegal goals, which is not the case here, the First Amendment requires courts to recognize that mere members of the organization do not necessarily know about or share those goals. Id. at 919-20. A reasonable person reviewing the omitted facts could not conclude that DJPC encouraged, authorized, or ratified any illegal activity. Nor could a reasonable person conclude that the organization's membership endorsed or had knowledge of any such activity. On the contrary, the reasonable inference was that the Santas carried out a renegade action, and if Martin aided or encouraged them, then he was acting as a renegade, as well.

Accordingly, the omitted facts make it clear that seizing the entire membership list requires far too great a leap of both faith and logic. Because the illegal activity was so dramatically inconsistent with the DJPC's commitment to nonviolence, the already impermissibly-tenuous link provided by mere membership dissolves into absolutely nothing. Moreover, even if the names of the Santas or of some participants in the Kohl's rally did appear somewhere on the organization's gigantic mailing list, the Affidavit provides no grounds to believe that the detectives could solve the impossible problem of separating the names of the handful who went to Kohl's from the names of the hundreds and hundreds who had no involvement or knowledge whatsoever.

Moreover, any argument that the Affidavit provided sufficient nexus to criminal activity to justify seizing DJPC's entire membership list must be rejected when evaluated in light of the First Amendment values and standards articulated in the cases discussed in Section I.A above, as well as the overriding Fourth Amendment requirement that all search and seizures be reasonable. See Zurcher, 436 U.S. at 559-60 (1978) ("'reasonableness' is the overriding test of compliance with the Fourth Amendment"); id. at 570 n.2 (Powell, J., concurring) ("magnitude of a proposed search . . . and the nature and significance of the materials sought are factors properly considered as bearing on the reasonableness and particularity requirements"); id. at 570 n.3 (magistrate considering search warrant should consider First Amendment values as well as society's interest in enforcing criminal laws); Roaden v. Kentucky, 413 U.S. 496, 504 (1973) ("we examine what is 'unreasonable' in the light of the values of freedom of expression"). Any argument that the Affidavit provided sufficient nexus must also be considered in light of another principle of both the First Amendment and the Due Process Clause: that "guilt by association is a philosophy alien to the traditions of a free society." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982). Accordingly, the facts in the Affidavit did not establish sufficient nexus to justify seizing DJPC's membership list, either under the First or the Fourth Amendment.

II. THE WARRANT VIOLATES THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

To prevent the "general warrants" that helped to spur the American Revolution, the Fourth Amendment requires that a search warrant must "describe the things to be seized with sufficient particularity to prevent a general, exploratory rummaging in a person's belongings." United States v. Carey, 172 F.3d 1268, 1272 (10th Cir. 1999). This particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant

describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985), quoting Stanford v. Texas, 379 U.S. 476, 485-86 (1965). "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." Voss, 774 F.2d at 404.

Warrants that that authorize law enforcement officers to search for documents, as opposed to distinctive physical objects, require greater care in enforcing the particularity requirement, "because of the potential they carry for a very serious intrusion into personal privacy." United States v. Leary, 846 F.2d 592, 603 n.18 (10th Cir. 1988), quoting 2 Wayne R. LaFave, Search and Seizure § 4.6(d), at 249-50 (2d ed. 1987). "Where a business is searched for records, specificity is required to ensure that only the records which evidence crime will be seized and other papers will remain private." Id., quoting United States v. Washington, 797 F.2d 1461, 1472 (9th Cir. 1986).

Because the documents at issue in this case implicate the First Amendment, the requirement of specificity is at its maximum, and the particularity requirement must be enforced with "scrupulous exactitude." The Supreme Court first announced this heightened standard of judicial review in Stanford, where police searched the home of a man who ran a small mail-order business. The warrant authorized seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas." Stanford, 379 U.S. at 486. The Court held that the "indiscriminate sweep" of this description was "constitutionally intolerable,"

because it was the equivalent of a "general warrant" that left too much discretion to the officers conducting the search. As the Court explained:

> [T]he constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. No less a standard could be faithful to First Amendment freedoms.

Id. at 485 (citations omitted); see Zurcher, 436 U.S. at 564 ("Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field"); see also In re Search of Kitty's East, 905 F.2d 1367, 1372-73 (10th Cir. 1990) ("scrupulous exactitude"); Pleasant v. Lovell, 876 F.2d 787, 803 (10th Cir. 1989) (same).

Instead of looking for material relating to the Communist Party, as in Stanford, the Warrant authorized police in this case to seize any paper that is "protest related." The difference between a document that is "protest related" and one that is not is whether the contents of the latter contain certain categories of ideas or viewpoints. Thus, as in Stanford, the basis of the seizure in this case was the ideas expressed in the target documents. Accordingly, the Warrant's authorization to seize any "protest related" document, or photographs or videos depicting persons engaged in "protesting," must be evaluated under the standard of "scrupulous exactitude."

In analyzing whether a warrant satisfies the particularity mandate, the first inquiry is whether the text of the description is overbroad on its face. Because in some cases a broad description is not necessarily invalid, courts will also inquire whether the government included all the detail that was reasonably available. Finally, courts will inquire whether the scope of the

warrant exceeded the scope of the probable cause. In Leary, 846 F.2d at 606, the Tenth Circuit held that the search warrant at issue failed each of these three separate tests of compliance with the particularity requirement. First, the warrant "contains no limitation on the scope of the search." Id. Second, the warrant was "not as particular as the circumstances would allow or require." Id. Third, the warrant "extends far beyond the scope of the supporting affidavit." Id. The Warrant suffers from each of the flaws identified in Leary. This is especially true because the warrant in Leary did not target materials for seizure on the basis of ideas protected by the First Amendment, and, therefore, the Tenth Circuit did not apply the heightened standard of "scrupulous exactitude" that is required here.

A. The Warrant Is Overbroad On Its Face

The Warrant authorized the same kind of indiscriminate rummaging through DJPC's papers that the Supreme Court condemned in Stanford. Indeed, in this case, the "indiscriminate sweep" of the description was even greater than the scope of the warrant to search for Communist-related material that the Court found constitutionally intolerable in Stanford. In this case, the Warrant authorized police to seize any "protest related" document in the office of an organization that had spent more than twenty years protesting and criticizing the effects of United States foreign policy on poor people in Latin America. Indeed, almost any document in the office that related to DJPC's activities and its mission could have been regarded as "protest related." Cf. Leary, 846 F.2d at 602 ("[t]he warrant encompassed virtually every document that one might expect to find in a modern export company's office"). The defendants' understanding of the breadth of the term "protest related," see Undisputed Facts, Section E, confirms the indiscriminate scope of the Warrant's authorization. See Stanford, 379 U.S. at 485 (explaining

that the deficiencies of the warrant are "dramatically underscored by what the officers saw fit to seize under the warrant in this case"); Voss, 774 F.2d at 405 ("the insufficient particularity of the warrants is further illustrated by some of the items actually seized under their terms"). Indeed, Kreutzer took the position that a document was "protest related" unless something in the document affirmatively demonstrated that it was not related to protest. Kreutzer depo. at 170:20-22.

The overbreadth of the Warrant is inescapable in light of the critical and fatal absence of any reference therein to a criminal statute, the specific crime under investigation, or even the general nature of the criminal activity to which the Warrant was directed. See Leary, 846 F.2d at 601; United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) ("We have criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected"). Without any reference to the crime or the criminal activity, it was impossible for the Warrant to fulfill one of the chief purposes of the particularity requirement: to "ensure[ ] that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." Voss, 774 F.2d at 404 (emphasis added). Indeed, even a reference to a specific criminal statute is insufficient when the prohibitions of the statute are too broad and general. See id. at 405 (reference to 18 U.S.C. § 371 did not narrow the warrant sufficiently); Leary, 846 F.2d at 601 ("reference to a broad federal statute is not a sufficient limitation on a search warrant").

The deficiencies of the Warrant, including the failure to refer to any specific criminal statute or criminal activity, cannot be cured by the additional information appearing in the Affidavit. "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." Groh v. Ramirez, 124 S. Ct. 1284, 1289 (2004). In this case, the

Affidavit was sealed. Kreutzer depo. at 143:8-12. It was not attached to the Warrant nor incorporated into it by reference. See Leary, 846 F.2d at 603 & n.20 (both attachment and incorporation are required for an affidavit to cure a warrant's lack of particularity); United States v. Williamson, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993) (same); Groh, 124 S. Ct. at 1290 (most courts of appeals require both attachment and incorporation); cf. United States v. Harris, 903 F.2d 770, 775 (10th Cir. 1990) (rejecting argument that warrant was not limited to evidence of a particular criminal violation, because affidavit referencing crime was incorporated and attached).

In light of the breadth of the Warrant's authorization, the defendants expected Kreutzer to exercise discretion. See Undisputed Facts, Section G. Indeed, Kreutzer testified that he did not seize all the materials that the Warrant authorized him to seize. See Kreutzer depo. at 152:7-24. Kreutzer's testimony confirms that he exercised the very discretion that the particularity clause forbids. See Stanford, 379 U.S. at 485-86 (explaining that the warrant must be specific so that "nothing is left to the discretion of the officer executing the warrant"). As the Tenth Circuit noted:

> Self-restraint on the part of the executing officers does not erase the fact that under the broadly worded warrant appellees were subject to a greater exercise of power than that which may have actually transpired and for which probable cause had been established. The particularity requirement is a check to just this sort of risk.

Leary, 846 F.2d at 604, quoting Application of Lafayette Academy, Inc., 610 F.2d 1, 5 (1st Cir. 1979) (citations omitted). Thus, even when an officer executing an overbroad warrant confiscates only the materials that could have been seized under a proper warrant (which is not the case here), the search nevertheless is judged by the warrant's text. See United States v. Roche, 614 F.2d 6, 8-9 (1st Cir. 1980). This result is required so that a warrant fulfills its

function to "assure[ ] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Groh, 124 S. Ct. at 1292, quoting United States v. Chadwick, 433 U.S. 1, 9 (1977).

The Warrant's authorization to seize membership lists, in the plural, was also overbroad on its face. The meaning of the term "membership list," in the singular, is relatively specific.[2] Indeed, at the beginning of the search, after learning that DJPC's membership list was stored in electronic form, Kreutzer obtained Erbe's cooperation to obtain a print-out of the list of nearly 1,000 persons. Kreutzer depo. at 146:20-7. Erbe even verified for Kreutzer that the document was DJPC's membership list and was up-to-date. Id. Despite having obtained, at the outset of the search, what Kreutzer himself characterized as the "total accurate list," id. at 169:6-19, he subsequently seized numerous additional documents containing lists of names. See Undisputed Facts, Section F. Kreutzer subsequently justified these seizures after the fact on the grounds that they constituted "membership lists," or "could be" membership lists, even when nothing in the documents indicated that the persons whose names appeared in the lists were members of DJPC, or were connected to DJPC in any manner, other than appearing on a paper in DJPC's office. See Kreutzer depo. at 167:22-168:15, 169:6-19, 174:17-175:21; 176:2-10; 176:14-177:11; 178:3-179:11; 193:9-20; see also id. at 198:12-199:18 (justifying seizure of DJPC newsletter as "membership list"). Thus, by authorizing seizure of membership lists, in the plural, the Warrant

[2] Even if the description, by itself, were sufficiently specific, however, the facts presented in the Affidavit did not justify seizing DJPC's membership list under the standards of either the First or the Fourth Amendments. See Section I above.

was overbroad, impermissibly vague, and failed to guide the officers in distinguishing what could be seized.

B. The Government Failed to Use Available Information to Narrow the Scope of the Warrant

"[T]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and 'warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.'" Leary, 846 F.2d at 600, quoting United States v. Fuccillo, 808 F.2d 173, 176 (1st Cir. 1987). The Warrant, like the defective warrant in Leary, failed to meet the particularity requirement because the government failed to include information that would have made the Warrant far more specific and narrow in its scope.

In this case, the Warrant did not mention such readily-accessible information as the nature of the criminal activity under investigation. See United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) ("The government could have made the warrant more particular. Most obviously, the warrant could have specified the suspected criminal conduct."); United States v. Spilotro, 800 F.2d 959, 964 (9th Cir. 1986) ("Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer's exercise of discretion in executing the warrant."). Nor did the Warrant reference a criminal statute or the vandalism at Kohl's. It therefore failed to limit the "protest related" documents to those connected to the rally at Kohl's where the crime took place. As a result, this Warrant, like the defective warrant in Leary, "authorize[s] wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[s] no guidelines to distinguish items used lawfully from those the

government had probable cause to seize." Leary, 846 F.2d at 605, quoting Spilotro, 800 F.2d at 964.

The government also failed to narrow the Warrant by providing a temporal limitation on the documents to be seized. See Leary, 846 F.2d at 605; Kow, 58 F.3d at 427 ("the government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place"). Although the Golden police were investigating a single criminal event that occurred in December 2000, the Warrant authorized seizure of any "protest-related" paper, no matter when the described protest occurred. Thus, documents discussing lunch counter sit-ins in the 1960s or rallies against aid to the Contras in the 1980s were seizable under the Warrant, but were not the least bit relevant to the criminal investigation. Kreutzer testified that, under the language of the Warrant, he was authorized to seize materials on the American Revolution. See Kreutzer depo. at 133:23-134:2; see also id. at 102:6-19 (Kreutzer believed that he had the discretion to seize a "book about the civil rights movement that described protests in which Dr. King had participated"); Farley deposition at 84:4-10 (although Warrant authorized seizure of materials concerning "persons protesting at Woolworth's in the 1950s in the southern U.S.," Farley hoped that Kreutzer would not seize them).

Similarly, the government failed to narrow the Warrant by providing an easily-available geographical limitation on the scope of the documents to be seized. The crime under investigation occurred during a protest in Golden, Colorado. Yet the warrant authorized seizure of any papers that were related to protests anywhere in the world, including Guatemala and South Africa. See Kreutzer depo. at 110:2-6 (South Africa); 184:18-185:1 (seizure of material concerning DJPC activities in Guatemala).

C. The Scope of the Warrant Far Exceeded the Scope of the Affidavit

The Warrant also failed to meet the particularity requirement because it authorized a search and seizure that extended far beyond the scope of whatever arguable probable cause was presented in the Affidavit. See Leary, 846 F.2d at 605. "An otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." Id., quoting 2 Wayne R. LaFave Search & Seizure § 4.6(a) at 236 (2d ed. 1987).

In Voss, the district court ruled that the search warrant was supported by probable cause but was invalid for failing to comply with the particularity clause. Voss, 774 F.2d at 403. The Tenth Circuit upheld an order for the return of all the seized materials. In explaining the warrant's failure to comply with the particularity clause, the Tenth Circuit noted that the affidavit alleged a scheme of tax fraud, but "[t]he bulk of the warrant was not restricted to evidence relating to tax fraud." Id. at 404. Similarly, in this case, the Affidavit described one particular crime: the vandalism at Kohl's on December 9, 2000. Yet the Warrant authorized seizure of any and all papers that were related in some fashion to "protest," without regard to whether they were associated in any way with the crime described in the Affidavit.

In Voss, the Tenth Circuit noted that the warrant's failure to comply with the particularity clause "is made even more egregious by the fact that the search at issue implicated free speech and associational rights." See id. at 405. As the court noted, the warrant authorized seizure of documents connected to the organization's constitutionally-protected advocacy of "dissident views on the federal tax system" and "a return to currency backed by gold and/or silver." See id. The court explained that "[e]ven if the allegedly fraudulent activity constitutes a large portion, or

even the bulk, of the NCBA's activities, there is no justification for seizing records and documents relating to its legitimate activities." See id. at 406.

This principle of Voss applies with even greater force to the Warrant. At the most, the Affidavit's narrative arguably demonstrated a nexus with documents that may relate in some way to the Kohl's rally. For example, in the category of "flyers that are protest related," the Affidavit arguably established a nexus to flyers that may have advertised or may have been distributed at the Kohl's rally. But the Affidavit certainly did not justify seizing records and documents relating to numerous legitimate advocacy activities that were wholly unrelated to the December 14, 2000 protest. See id. Because the Warrant authorized seizure of any and all papers related in some way to "protest," no matter when or where it occurred or what it was about, the Warrant authorized seizure of documents that exceeded the arguable probable cause established in the Affidavit. The same argument applies to the Warrant's authorization to seize "[v]ideotape and still photographs of persons protesting any organization or business."

The Warrant's authorization to seize "membership lists for Denver Justice & Peace Committee" also exceeded whatever arguable probable cause the Affidavit provided. See Section I.B. above. As explained earlier, the Fourth Amendment authorizes searches for "mere evidence," but the materials seized must nevertheless constitute evidence, and they must have a sufficiently close nexus to the crime under investigation to meet Fourth Amendment standards of reasonableness. In this case, instead of seeking a list of the names of persons who participated in the rally at Kohl's (if such a sign-up sheet existed), the officers sought a list of the entire membership of DJPC, which included the names of almost one thousand persons who had no connection to the Kohl's rally whatsoever. Kreutzer asserted that DJPC's membership lists were

"a lead that needed to be followed up." Kreutzer depo. at 112:22. Investigative leads, however, are not evidence. To the extent that the Warrant authorized a search for items that did not constitute evidence of the crime under investigation, including, but not limited to, DJPC's membership list, the Warrant exceeded the probable cause provided by the Affidavit.

Accordingly, the Warrant violated the requirement of particularity for the same reasons the warrant in Leary was defective. The text of the Warrant failed to limit the search; it was not as particular as the circumstances would have allowed; and it extended far beyond the scope of the supporting affidavit. See Leary, 846 F.2d at 605-06.

III. KREUTZER VIOLATED THE FOURTH AMENDMENT BY SEIZING NUMEROUS ITEMS THAT WERE NEITHER LISTED NOR DESCRIBED IN THE ALREADY OVERBROAD WARRANT

Because the Warrant's description of what could be seized was vague and unconstitutionally overbroad, see Section II.A. above, the text of the Warrant authorized the seizure of numerous items that were irrelevant to the investigation of the vandalism at Kohl's. Indeed, in their depositions, Kreutzer and Farley ably demonstrated the elasticity of the term "protest related" as they strained to justify the seizure of various documents. Despite these efforts, the officers' rationale in some cases simply fails to pass the straight-face test. See, e.g., Kreutzer depo. at 134:6-16 (dictionaries containing word "protest" not necessarily excluded from scope of Warrant); Farley depo. at 174:15-17 (any piece of paper containing word "protesters" was "protest related"); Kreutzer depo. at 174:4-10 (any document with Martin's name was "protest related").

In other instances, Kreutzer acknowledged that the officers seized an item that was not covered by any of the specific authorizations in the Warrant's bullet point list. See, e.g.,

Kreutzer depo. at 169:20-170:22 (describing seizure of handwritten listing of names and contacts on the grounds that it "could possibly provide the identity of the Santas that committed damage" and because Kreutzer had no information that the list was *not* protest related); id. at 174:25-175:21 (officers seized phone tree list because "[i]t's a list of names of persons that might give some identification to the Santas that committed the vandalism," even though Kreutzer did not know whether it was "protest related" or a "membership list" for DJPC); Police Report at Golden 0051 (officers seized **"**anything with the name Douglas Bohm on it").

In one notable example, the officers seized a one-page paste-up of the front page of the summer 2000, edition of DJPC's newsletter, The Mustard Seed. See Kreutzer depo. at 184:8-185:21. (A copy of the seized paste-up is attached hereto as Exhibit 13.) The document contained an article about a DJPC delegation that traveled to Guatemala in February, 2000, along with a photo of nine members of the delegation posing in the Guatemala countryside. Martin appears in the photo. The document also contains an article about a vote in Congress. Nothing in the one-page document says anything about protests, nor does the photograph depict anyone protesting any organization or business. Nevertheless, Kreutzer attempted to claim that the document was "protest related" because

> They're discussing various groups that went down into El Tesoro. It also mentions Kareen Erbe was the base to the Chiapas organization. Also lists DJPC's first youth adult delegation to Guatemala. It just gives some history.

Id. at 184:22-185:1.[3] After admitting that the document says nothing about any protests, Kreutzer asserted that "[i]t's more along the lines of the photograph." Id. at 185:4-6. Although the photograph does not depict persons protesting any organization or business, as required by the Warrant's bullet point list, Kreutzer said that the "the photograph has names identifying the people, which is useful in determining who the Santas possibly could be that did the damage." Id. at 186:20-22. Kreutzer maintained that the group photo with Martin could "show a link of David Martin . . . being associated with someone who might be one of the Santas. We don't know." Id. at 187:2-6.

Thus, the paste-up was not a membership list, nor was it protest-related, nor did it depict anyone protesting an organization or business.[4] Nevertheless, Kreutzer seized it because it showed Martin in association with others. Indeed, Kreutzer justified the seizure of documents on the ground that they contained Martin's name and the names of other unknown persons, any of whom, in Kreutzer's eyes, could be the perpetrators, and would, therefore, in his view,

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[3] Contrary to Kreutzer's testimony, the document says nothing about "El Tesoro," nor does it say that Erbe was connected to "the Chiapas organization." The document states that Erbe is involved in the CAMINOS program, which is a program of DJPC. See Exhibit 13. The Chiapas Coalition is a different organization, unconnected with DJPC, which focuses its activities on Mexico, not on Guatemala. Hawthorne depo. at 113:20-24.

[4] Additional examples of items seized that were outside the scope of the already-overbroad Warrant include the calling list for the Chiapas Coalition, filed under seal as Exhibit 14; phone tree list, filed under seal as Exhibit 15; a handwritten list of names, telephone numbers, and e-mail addresses, filed under seal as Exhibit 16; a list of DJPC's Board of Directors, filed under seal as Exhibit 17; a list of the Sponsoring Committee for the CAMINOS project, filed under seal as Exhibit 18; and an e-mail from a reporter, attached hereto as Exhibit 19. The other materials illegally seized at DJPC's office on December 14, 2000 are filed herewith as Exhibits 20 through 45. (Exhibits 23-29, 35, 42, 44, and 45 are filed under seal.)

demonstrate a link between Martin and the as-yet-unknown Santas.[5] As Kreutzer testified regarding a phone tree list for an unspecified group:

> Q. If you could turn to Exhibit 97. Could you confirm this was also seized at the office of the Denver Justice and Peace Committee on December 14, 2000?
>
> A. Yes, it was. Six-page phone tree list. Denver Justice and Peace office, in a small bookcase, which I believe was on the west wall.
>
> Q. What was the basis for seizing Exhibit 97?
>
> A. It's not labeled specifically to any organization, and again it's within the administration area. It's a list of names of persons that might give some identification to the Santas that committed the vandalism.
>
> Q. Did you believe it was protest related?
>
> A. Don't know.
>
> Q. Did you believe it was the membership list for Denver Justice and Peace Committee?
>
> A. There are members on here. And why it's there, I don't know.
>
> Q. You didn't know whether or not it was the membership list for the Denver Justice and Peace Committee when you seized it, correct?

[5] The Warrant did not authorize Kreutzer to seize a document simply because it showed Martin or Bohm's association with any and all unnamed and unspecified persons, at any time, in any context. Moreover, such a broad authorization would clearly violate the particularity requirement. In United States v. Washington, 797 F.2d 1461 (9th Cir. 1986), the defendant argued that the search warrant was invalid because it authorized law enforcement authorities to "seize anything that associates Washington with any other person, regardless of any possible link to criminal activity." Id. at 1473. The court agreed, holding that "[a] warrant that permits officers to seize evidence of association between a suspect and any other person is patently overbroad." Id. The court further held that this portion of the warrant was "so facially deficient in particularity that the officers could not have acted in 'objectively reasonable' reliance" on it. Id. at 1474.

A. Correct.

Id. at 174:25-175:21.

Thus, by seizing items that were not included in the categories listed in the already overbroad warrant, Kreutzer violated DJPC's rights under the Fourth Amendment, which forbids "the seizure of one thing under a warrant describing another." Voss, 774 F.2d at 704.

IV. NEITHER KREUTZER, FARLEY, NOR PAUTLER IS ENTITLED TO QUALIFIED IMMUNITY

Kreutzer, Farley, and Pautler have each claimed that they are entitled to summary judgment on grounds of qualified immunity. DJPC is filing herewith separate briefs in response to such motions. DJPC expressly incorporates herein the arguments made in its responses to those three motions.

V. THIS COURT MUST AWARD NOMINAL DAMAGES TO DJPC

For the violation of its constitutional rights, DJPC seeks an award of nominal damages only. Once this Court concludes that summary judgment should be entered in favor of DJPC against Kreutzer, Farley, and Pautler, the requested award of nominal damages is mandatory. See Farrar v. Hobby, 506 U.S. 103, 112 (1992) (noting that Carey v. Piphus, 435 U.S. 247 (1978), held that an award of nominal damages is required when a plaintiff proves a violation of procedural due process); Fassett v. Haeckel, 936 F.2d 118, 121 (2d Cir. 1991) ("a court is required to award nominal damages where the plaintiff proves a deprivation of the Fourth Amendment but not actual damages"); George v. Long Beach, 973 F.2d 706, 708 (9th Cir. 1992) (holding in Fourth Amendment case that "nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights").

VI. DJPC IS ENTITLED TO AN ORDER FOR THE RETURN OR DESTRUCTION OF THE COPIES OF THE ILLEGALLY-SEIZED MATERIALS THAT THE DISTRICT ATTORNEY RETAINS

As DJPC has demonstrated, numerous documents were seized in violation of DJPC's constitutional rights. Because the District Attorney retains copies of the illegally-seized documents, DJPC is suffering an ongoing injury from that violation. See, e.g., Church of Scientology v. United States, 506 U.S. 9, 12-13 (1992). DJPC and its members also face a threat of future injury, especially if DJPC's membership list is disclosed to others. As a remedy, DJPC asks this Court to order the return or destruction of the copies.[6]

DJPC sues under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), which permits suits for prospective relief against a state officer named in his official capacity. See Roe #2 v. Ogden, 253 F.3d 1225, 1233 (10th Cir. 2001). At the time he answered the Fifth Amended Complaint, the District Attorney continued to retain originals, as well as copies, of the documents seized from DJPC's office. Subsequently, "District Attorney Thomas made an exception to his normal records retention practice and returned the original document[s]." See Defendant David Thomas' Motion for Judgment on the Pleadings, or Alternatively, For Summary Judgment, at 5. Thus, the District Attorney, who is the final policymaker for his office, has clearly made an official decision to retain the copies, a decision consistent with the "normal records retention practice" of his office. Id.; see Lopez v. LeMaster, 172 F.3d 756, 763

[6] DJPC summarizes here its argument for relief against the District Attorney and incorporates by reference the arguments raised in its Response to Defendant David Thomas' Motion for Judgment On the Pleadings, filed on July 9, 2004.

(10th Cir. 1999) (when liability under § 1983 turns on proof of a municipal policy, liability can be based on decision of final policymaker).[7]

The ongoing injury from the violation of DJPC's constitutional rights clearly satisfies the equitable requirement of irreparable injury, and the prospect of future injury to First Amendment rights "unquestionably constitutes irreparable injury." See Elrod v. Burns, 427 U.S. 347, 373 (1976); see, e.g., Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) (illegal search); Howard v. United States, 864 F. Supp. 1019, 1028 (D. Colo. 1994) (violation of constitutional right establishes irreparable injury); Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) (violations of Fourth Amendment sufficient to prove irreparable injury and inadequacy of remedy at law for purposes of injunctive relief). This is especially true because the Eleventh Amendment bars an award of damages. See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1543 (10th Cir. 1994) (when the plaintiff sustains injury and the Eleventh Amendment bars an award of damages, the injury is irreparable).

Finally, the requested injunctive relief will not harm the public interest, and the balance of harms clearly favors DJPC. At the end of 2002, the District Attorney notified the Court that the materials seized from DJPC "are no longer needed." District Attorney Defendants' Status Report, at 2-3, filed December 5, 2002. Moreover, courts recognize that injunctions that vindicate constitutional rights, like the requested injunction in this case, serve to advance the public interest. E.g., Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002)

[7] Although DJPC does not agree with the District Attorney that proof of a "policy" is necessary for prospective relief under Ex Parte Young, it is clear that such a policy is nevertheless established in this case.

("upholding constitutional rights surely serves the public interest"). Accordingly, DJPC is entitled to injunctive relief.

Finally, even if this Court were to conclude, contrary to the authorities cited above, that injunctive relief is not appropriate, it should nevertheless award declaratory relief to DJPC. See Advisory Committee Note to 1937 adoption of Fed. R. Civ. P. 57 ("when coercive relief only is sought but is deemed ungrantable, or inappropriate, the court may . . . grant instead a declaration of rights"). Thus, at a very minimum, this Court should issue a judgment declaring that the documents in question were seized in violation of DJPC's constitutional rights.

CONCLUSION

For the foregoing reasons, DJPC is entitled to a judgment against Kreutzer, Farley, and Pautler, pursuant to Rule 56(a), for nominal damages in the amount of one dollar. DJPC is also entitled to a judgment ordering the District Attorney to return or to destroy the copies it retains of any documents seized from DJPC's office.

Respectfully submitted this 31st day of August, 2004.

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