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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF ALAMEDA**

11 DOWNEASTDEM, an individual,

12 Petitioner,

13 vs.

14 ROBERT F. KENNEDY, JR.,

15 an individual,

16 Respondent.

17 _____
18 *In the Matter of the Subpoena Issued to*
Kos Media, LLC, in:

19 ROBERT F. KENNEDY, JR.,
Petitioner,

20 v.
21 KOS MEDIA, LLC, d/b/a, DAILY KOS,
Respondent.

22 In the Supreme Court of the State of
New York, County of Westchester
Index No. 65319/2020
23 Hon. Mary H. Smith
Order granting pre-action disclosure,
24 April 16, 2021

25 Appeal pending
26 Nos. 2021-03700 and 2021-04476
(N.Y. App. Div. Dept. 2)

CASE NO. RG21102647

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO QUASH
SUBPOENA SEEKING TO IDENTIFY
ANONYMOUS INTERNET SPEAKER,
PURSUANT TO CODE OF CIVIL
PROCEDURE §§ 1987.1, 1987.2, AND
2029.600;**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONER'S MOTION TO QUASH
SUBPOENA;**

**DECLARATIONS OF PAUL ALAN
LEVY, JOEL SCHALIT, AND MARK
GOLDOWITZ;
[PROPOSED] ORDER**

**[filed in conjunction with Petitioner's
exhibits and proof of service, and
forthcoming pro hac vice motion]**

**ASSIGNED FOR ALL PURPOSES TO:
JUDGE PATRICK MCKINNEY
DEPARTMENT 511**

Hearing Date: November 1, 2021
Hearing Time: 9:30 a.m.
Dept. No. 511
Reservation # 227279

**PETITIONER’S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA
SEEKING TO IDENTIFY ANONYMOUS INTERNET SPEAKER, PURSUANT TO
CODE OF CIVIL PROCEDURE §§ 1987.1, 1987.2, AND 2029.600**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on November 1, 2021, at 9:30 a.m. in Department 511 of the Alameda County Superior Court, at the Hayward Hall of Justice, 24405 Amador Street, Hayward, CA 954544, or at such other time and location as the Court may direct, Petitioner DowneastDem will move the Court to quash the subpoena to Kos Media, issued on June 7, 2021, seeking to compel Kos Media to disclose identifying information, pursuant to Code of Civil Procedure §§ 1987.1, 1987.2, and 2029.600.

This motion is made on the grounds that: (a) the New York court lacked jurisdiction to authorize issuance of the foreign subpoena; (b) references to “neo-Nazis” and the “extreme right” are expressions of opinion protected by the First Amendment; (c) Petitioner’s references to Kennedy’s association with “neo-Nazis” and the “Extreme right” were expressions of opinion based on disclosed fact; (d) Kennedy cannot carry his burden of showing that statements in the blog post were false, and of proving actual malice by clear and convincing evidence; and (e) as the prevailing moving party, Petitioner should be awarded her reasonable attorneys’ fees.

The motion is based on this notice, the attached memorandum of points and authorities, declarations of Paul Alan Levy, Joel Schalit, and Mark Goldowitz, the accompanying exhibits, and upon such further argument or evidence that Petitioner may submit before or at the hearing.

DATED: August 9, 2021

_____/s/ Mark Goldowitz_____

Paul Alan Levy, Public Citizen Litigation Group
Mark Goldowitz, California Anti-SLAPP Project
Attorneys for Petitioner DOWNEASTDEM

1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF PETITIONER’S MOTION TO QUASH SUBPOENA**

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1 **INTRODUCTION**

2 On August 29, 2020, a large crowd in Berlin, Germany protested government restrictions
3 to stem the coronavirus pandemic. As was widely reported by many media outlets, various right-
4 wing factions were present, including neo-Nazi groupings; Reich flags, QAnon signs, and other
5 manifestations of extreme right ideology could easily be seen in photos of the events. Robert F.
6 Kennedy Jr. addressed the crowd. There was widespread press coverage of the protests and of
7 his participation, including the Wall Street Journal, CBS News, and the New York Times. In
8 addition to major media entities, the blogger DowneastDem posted on the activist-oriented news
9 site Daily Kos, describing the involvement of the German right along with Kennedy.

10 Kennedy seeks to discover DowneastDem’s identity, purportedly so that he can sue for
11 defamation. Kennedy has not sued any of the major media outlets that similarly reported on his
12 participation in the protest along with forces of the extreme right. Instead, he filed a “petition
13 for pre-action disclosure” seeking to identify this one blogger, in a New York state court that has
14 no jurisdiction over the blogger or, for that matter, over Daily Kos. He succeeded in obtaining a
15 disclosure order without presenting any evidence that DowneastDem’s speech was wrongful,
16 because no New York appellate court (unlike California and many other states) has yet
17 considered the need for prima facie evidence that speech is wrongful before a court may override
18 the First Amendment right to speak anonymously.

19 In this Court, Kennedy relied on the New York order to obtain a subpoena for information
20 to identify the blogger. But DowneastDem’s blog post consists of truthful statements and
21 opinions that cannot properly be the subject of a defamation action, and the use of the terms
22 “Neo-Nazi” and “extreme right” represents rhetorical hyperbole and/or opinion based on
23 disclosed fact. Moreover, there is no evidence that DowneastDem’s interpretation of the many
24 press reports included false statements, much less false statements published with actual malice,
25 and New York courts would not have personal jurisdiction of a defamation action against the
26 blogger. Accordingly, under well-established California precedent, and pursuant to Code of
27 Civil Procedure sections 1987.1 and 1987.2(c), the Court should quash the subpoena.

1 **STATEMENT OF THE CASE**

2 On August 29, participants in a rally in Berlin, Germany, protested government
3 restrictions imposed to stem the coronavirus pandemic. Extensive press coverage, both in
4 Germany and elsewhere, including the United States, consistently referred to the heavy
5 involvement of extreme rightist groups, including neo-Nazis, in the rally. The press reported
6 flags and slogans manifesting admiration for the former Nazi regime. (Levy Decl.¶¶ 6-8, 11-16
7 and Exh. D-H, L-Q.) The stories (some of which are quoted at length below at pages 13-15, and
8 are attached to the Levy Declaration) reported that the protests had been organized in large part
9 by a variety of right-wing German organizations including Querdenken, the National Democratic
10 Party (NPD), and the Alternative for Germany (AfD). (*Ibid.*)

11 Robert F. Kennedy, Jr., was a headline speaker at the rally. Kennedy has gained wide
12 attention as an opponent of vaccination.¹ The news that Kennedy would speak at the rally caused
13 significant buzz on right-wing social media, as extremists celebrated having such a prominent
14 advocate lending his weight to the protest they were planning. (Levy Decl.¶ 17, and Exh. R,
15 Ross, *Inside the Weird Pro-QAnon German Group Behind RFK Jr. 's Latest Anti-Vaxx Stunt*,
16 *Daily Beast* (Sept. 2, 2021),
17 [https://www.thedailybeast.com/rfk-jrs-atest-anti-vaxx-stunt-backed-by-weird-pro-qanon-german](https://www.thedailybeast.com/rfk-jrs-atest-anti-vaxx-stunt-backed-by-weird-pro-qanon-german-group-querdenken-711)
18 [-group-querdenken-711.](https://www.thedailybeast.com/rfk-jrs-atest-anti-vaxx-stunt-backed-by-weird-pro-qanon-german-group-querdenken-711))

19 Petitioner and movant DowneastDem is a blogger who has posted articles on the Daily
20 Kos since 2003 (<https://www.dailykos.com/user/DowneastDem>), often about German politics.
21 DowneastDem posted a brief blog post about the protests, including a photograph of Kennedy
22 speaking at the rally that appeared in the German newspaper *Der Tagesspiegel*. (The complete
23 post is Exhibit D to the Petitioner's Exhibits.) DowneastDem summarized press reports,
24 commenting on the irony that, at that time, the German restrictions that were being protested had

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26 ¹ Stone, *An Anti-Vaccine Film Targeted To Black Americans Spreads False Information*,
27 National Public Radio (June 8, 2021), [https://www.npr.org/sections/health](https://www.npr.org/sections/health-shots/2021/06/08/1004214189/anti-vaccine-film-targeted-to-black-americans-spreads-false-information)
28 [-shots/2021/06/08/1004214189/anti-vaccine-film-targeted-to-black-americans-spreads-false-information](https://www.npr.org/sections/health-shots/2021/06/08/1004214189/anti-vaccine-film-targeted-to-black-americans-spreads-false-information); Offit, *Correcting Robert F. Kennedy Jr. 's vaccine 'facts'*, STAT (Sept. 22, 2017), <https://www.statnews.com/2017/0922/robert-kennedy-vaccine-safety/>, attached to Petitioner's Exhibits as Exhibit U.

1 provided the German public much better protection than American citizens had received. The
2 article was headlined “Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona’
3 Protest,” and included the following sentence: “The protest was organized by right-wing
4 extremist organizations - including the AfD party and various anti-Semitic conspiracy groups as
5 well as the neo-Nazi NPD party.” The article quoted from Kennedy’s speech and provided a
6 hyperlink to the *Der Tagesspiegel* article so that viewers could read that lengthier account. That
7 article, in turn, hyperlinked to other articles, including one about the background of the rally’s
8 organizing, that provided further context. In an English translation, the accompanying image
9 (below) shows the juxtaposition in the *Der Tagesspiegel* article of Kennedy speaking and
10 references to “fascists” and “neo-Nazis” as being present (Levy Decl., ¶ 8, and Exh. H):

11 Bible verses, drum dance and fascists

August 29, 2020, 7:23 pm

12 Tens of thousands demonstrate in Berlin against 13 the Corona measures

14 Vaccination opponents and neo-Nazis, Trump fans and Hare Krishna dancers - people who
otherwise have little in common are demonstrating against the corona policy. VON HANNES HEINE



19 Like many blogging platforms, the Daily Kos allows registered users to post comments.
20 On September 1, 2020, a lawyer for Kennedy posted an open letter to DowneastDem and Daily
21 Kos that took issue both with the headline and with a sentence in the article about who had
22 organized the protest, demanding that the post be taken down. He claimed that Querdenken was
23 the only organizer, and that Querdenken is a “citizens’ movement for freedom, peace and human
24 rights” that “took great pains to assure that extremists from every position were excluded.” He
25 claimed that “[t]hose efforts were successful,” which was said to be evident from “all the
26 footage publicly available on the Children’s Health Defense website, on Mr. Kennedy’s social
27 media, and in the thousands of photos and videos of the event easily viewed on various
28 platforms of the internet.” (Levy Decl., ¶ 21, and Exh. V.)

1 Although Daily Kos reserves the right to remove “fake news” from its site
2 (<https://www.dailykos.com/rules-of-the-road>), it left the demand letter in place, thereby letting
3 Kennedy keep his side of the story on same page as the critical blog post, and allowing readers to
4 consider it. Indeed, the comments following the open letter reproduced in Exhibit V above
5 suggest that a number of readers found it persuasive.

6 On November 30, 2020, claiming that he wants to bring a defamation action against
7 DowneastDem to force the removal of the criticisms because his reputation will suffer unfairly
8 “as long as they remain online,” Kennedy filed a proceeding in the Supreme Court of New York
9 for Westchester County. (Levy Decl., ¶ 2, and Exh. A.) The petition made a variety of factual
10 assertions about the supposed falsity of the blog headline and of the sentence about how the
11 protest had been organized, and advanced allegations both about what Kennedy says occurred in
12 Berlin and about certain issues of German politics. The petition asserted, for example, that there
13 were multiple separate rallies in Berlin on August 29, 2020, spread over an area of two square
14 miles; that right-wing extremists had gathered only at a different location from where Kennedy
15 spoke; and that someone present when he spoke had not seen any Neo-Nazis. Kennedy asserted
16 personal jurisdiction based on the fact that he lives in Westchester County and that the blog post
17 could be read in Westchester County. The petition was verified on personal knowledge, but
18 attested only by Kennedy’s attorney, who did not purport to have been in Berlin for the protests
19 and did not claim to be an expert in German politics who was competent to testify about the
20 political character of the identified German groups. An article posted to the web site of his
21 nonprofit organization about the petition described a “Motion . . . in RFK Jr. Defamation Case.”
22 ([https://childrenshealth](https://childrenshealthdefense.org/defender/motion-)
23 [defense.org/defender/motion-](https://childrenshealthdefense.org/defender/motion-)
24 [filed-daily-kos-rfk-jr-defamation-case/](https://childrenshealthdefense.org/defender/motion-); Levy Decl., ¶ 22, and Exh. W.)

25 On January 19, 2021, Kos Media answered the petition and filed a counterclaim under
26 New York’s anti-SLAPP statute; it also moved for the issuance of a protective order. Kos Media
27 argued that the petition did not state a claim for relief under the defamation laws and that, under
28 New York law, Kennedy should be required to present admissible evidence that the speech was
wrongful before getting discovery to identify the anonymous blogger. The trial court rejected

1 both arguments, holding that disclosure can be compelled when the petitioner “has alleged facts
2 fairly indicating that he or she has some cause of action.” (Levy Decl. ¶ 2, and Exh. B, at 3.)
3 The court acknowledged that there was no admissible evidence on these questions, and indeed
4 that Kos Media had presented “a number of factual issues and legal arguments, which may
5 provide a defense, in whole or in part, in any future litigation.” (*Ibid.*) Nevertheless, the court
6 concluded that lack of evidence did not bar Kennedy from taking discovery to identify the
7 anonymous blogger. Kos Media has appealed from that ruling. (Declaration of Craig Wenner in
8 Support of Kennedy’s Petition to Compel Production, Case No. HG21107215 (“Wenner
9 Decl.”), ¶ 6.)

10 Like many blogging platforms, the Daily Kos allows registered users to post comments.
11 On September 1, 2020, a lawyer for Kennedy posted an open demand letter to DowneastDem
12 and Daily Kos that took issue both with the headline and with a sentence in the article about who
13 had organized the protest, claiming that Querdenken was the only organizer, and that
14 Querdenken is a “citizens’ movement for freedom, peace and human rights” that “took great
15 pains to assure that extremists from every position were excluded.” He claimed that “[t]hose
16 efforts were successful,” which he said was evident from “all the footage publicly available on
17 the Children’s Health Defense website, on Mr. Kennedy’s social media, and in the thousands of
18 photos and videos of the event easily viewed on various platforms of the internet.” (Levy Decl.,
19 ¶ 21, and Exh. V.) The Daily Kos left both the blog post and the demand letter in place; leaving
20 Kennedy’s side of the story on the same page as the critical article, letting readers consider both.

21 On November 30, 2020, claiming that he needs to force the removal of the criticisms
22 because his reputation will suffer unfairly “as long as they remain online.” (Levy Decl., ¶ 2, and
23 Exh. A, ¶ 9.) Kennedy filed a proceeding in the Supreme Court of New York for Westchester
24 County. The petition made factual assertions about the supposed falsity of the blog headline and
25 of a sentence about how the protest had been organized, as well as about certain issues of
26 German politics. The petition asserted, for example, that there were multiple separate rallies in
27 Berlin on August 29, 2020, spread over an area of two square miles, that right-wing extremists
28 had gathered at a different location from where Kennedy spoke, and that someone present when

1 he spoke had not seen any neo-Nazis. Kennedy asserted personal jurisdiction based on the fact
2 that he lives in Westchester County and that the blog post could be read in Westchester County.
3 The petition was attested by Kennedy’s attorney, who did not purport to have been in Berlin for
4 the protests and did not claim to be an expert in German politics who was competent to testify
5 about the political character of the identified German groups.

6 On January 19, 2021, Kos Media answered the petition and filed a counterclaim under
7 New York’s anti-SLAPP statute; it also moved for the issuance of a protective order. Kos Media
8 argued that the petition did not state a claim for relief under the defamation laws and that, under
9 New York law, Kennedy should be required to present admissible evidence that the speech was
10 wrongful before getting discovery to identify the anonymous blogger. The trial court rejected
11 both arguments, holding that disclosure can be compelled when the petitioner “has alleged facts
12 fairly indicating that he or she has some cause of action.” (Levy Decl., ¶ 2, and Exh. B, at 3.)
13 The court acknowledged that there was no admissible evidence on these questions, and indeed
14 that Kos Media had presented “a number of factual issues and legal arguments, which may
15 provide a defense, in whole or in part, in any future litigation.” (*Ibid.*) But the court concluded
16 that lack of evidence did not bar Kennedy from taking discovery to identify the anonymous
17 blogger. Kos Media has appealed from that ruling. (Wenner Decl., ¶ 6.)

18 On June 7, 2021, Kennedy invoked the New York Supreme Court order as a basis for
19 issuing a subpoena in California seeking identifying information for DowneastDem. (Levy
20 Decl., ¶ 3, and Exh. C.) A request by DowneastDem, through counsel, for withdrawal of the
21 subpoena was rejected. (Levy Decl., ¶ 4.)

22 On July 2, 2021, Petitioner presented an ex parte application for a revised briefing
23 schedule for the motion to quash the subpoena. It proposed that Petitioner’s memorandum and
24 moving papers in support of the motion to quash would be due July 23, 2021, with a
25 memorandum a maximum of 20 pages; that Respondent’s memorandum and papers opposition
26 the motion to quash would be due September 7, 2021, with the memorandum a maximum of 20
27 pages; and that Petitioner’s reply memorandum and any supporting papers would be due October
28 15, 2021, with the memorandum a maximum of 15 pages. Kennedy opposed the application.

1 (Goldowitz Decl., below, at p. 36, ¶ 2.)

2 On August 4, 2021, the Court signed without change the (proposed) order accompanying
3 Petitioner’s ex parte application. On August 5, 2021, Department 511 notified counsel for all
4 parties that the application was granted but the proposed order was not signed until recently, that
5 no changes were made to the proposed order, and that it would be processed shortly. (Goldowitz
6 Decl., below, at p. 36, ¶ 3.) Petitioner DowneastDem now moves to quash the subpoena.

7 **ARGUMENT**

8 Under longstanding California precedent, anonymous Internet speakers enjoy a right to
9 speak anonymously online. A party seeking to use court process to compel the identification of
10 an anonymous speaker so that it can serve process on her and thus proceed with litigation against
11 her must ensure that the anonymous speaker has received notice of the threat to her anonymity
12 and must show, both by pleading a valid claim against the allegedly wronged party, and by the
13 presentation of evidence sufficient to establish a prima facie case. Only then does the would-be
14 plaintiff show that the allegedly wronged party has a valid claim against the speaker that creates
15 a sufficiently compelling interest to overcome the speaker’s right, protected by the First
16 Amendment, to speak anonymously. (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154,
17 1163-1164 (*Krinsky*)). Other California courts of appeal have endorsed *Krinsky*. (*ZL*
18 *Technologies v. Does 1-7* (1st Dist. 2017) 13 Cal.App.5th 603, 610; *Digital Music News LLC v.*
19 *Super. Ct.* (2d Dist. 2014) 226 Cal.App.4th 216, 229.)

20 In this case, Kennedy cannot meet his burden under *Krinsky* of showing that he has a
21 legally and factually sound basis for securing Doe’s identifying information, for four reasons:
22 First, the New York court in which he initiated his demand for identifying information did not
23 have personal jurisdiction over either Kos Media or DowneastDem. Hence, that court’s order
24 cannot serve as a proper basis for the subpoena in aid of out-of-state litigation on which this
25 Court’s subpoena is predicated. Second, the allegedly defamatory characterizations on which
26 Kennedy’s proposed claim is predicated—that his speech associated him with German neo-Nazis
27 and forces of extreme right—are rhetorical hyperbole and political name-calling that represents
28 nonactionable opinion protected by the First Amendment. Third, DowneastDem’s blog post

1 summarized media reports, some of which were hyperlinked directly and indirectly from the blog
2 post, and hence represents opinion based on disclosed fact protected by the First Amendment.
3 Fourth, even if the characterizations of the groups with whom Kennedy associated himself via
4 his speech at the Berlin protests are deemed factual, and not opinion, Kennedy has not carried
5 his burden of showing either that the statements are false or that he has any likelihood of
6 showing by clear and convincing evidence that DowneastDem’s alleged misreading of the press
7 reports reflect actual malice.

8 **A. The New York Court Lacked Jurisdiction to Authorize Issuance of the**
9 **Foreign Subpoena.**

10 Under section 2029.350 of the Code of Civil Procedure, the authority of Kennedy’s
11 California counsel to issue the subpoena to Kos Media depends on the existence of a foreign
12 subpoena. Here, the predicate for this Court’s subpoena—the order of the Supreme Court for
13 Westchester County, New York—is invalid because the New York court did not have personal
14 jurisdiction of Kos Media or DowneastDem.

15 Because Kos Media is a California company, New York law makes clear that state courts
16 do not have personal jurisdiction to command it to produce documents. (*Wiseman v. American*
17 *Motors Sales Corp.* (N.Y.App.Div. 1984) 479 N.Y.S.2d 528, 532.) Instead, Kennedy’s petition
18 for pre-action disclosure was predicated on the theory that the Westchester County Supreme
19 Court had personal jurisdiction over the alleged defamer “because [Kennedy] is a resident of
20 Westchester County and because the defamatory statements at issue were published throughout
21 the United States and internationally, including in Westchester County.” (Levy Decl., ¶ 2, and
22 Exh. A, ¶ 4.)

23 However, New York, unlike many other states, has chosen to expressly exclude
24 defamation actions from the tort provisions of its long-arm statute, which allow suits against
25 non-domiciliaries who commit allegedly tortious acts in New York, or acts outside the state but
26 affecting New York. (*See Montgomery v. Minarcin* (N.Y.App.Div. 1999) 693 N.Y.S.2d 293,
27 295–96, citing Civil Practice Law and Rules 302[a][2] and [3].)

28 DowneastDem is a Maine resident, as evidenced both by the pseudonym (“Downeast”

1 refers to the coastal regions of Maine and Canada’s Atlantic Provinces
2 (https://en.wikipedia.org/wiki/Down_East)), and by the content of several blog posts.² (Levy
3 Decl., ¶ 9, and Exh. I.) In a blog post addressing the Petition to Quash, Kennedy’s NGO
4 admitted that DowneastDem is in Maine. (See Levy Decl., ¶ 22, and Exh. W.) A trial court in
5 New York must have jurisdiction of the proposed action in support of which pre-action
6 disclosure is sought. (*Matter of Wallace* (N.Y.App.Div. 1998) 667 N.Y.S.2d 768, 770; *Perez v.*
7 *New York Presbyterian Hosp.*(N.Y.City Civ.Ct. 2006) 811 N.Y.S.2d 914, 916 (“[a]bsent any
8 basis to view the request as related to discovery in a case to be commenced in this forum, the
9 Civil Court lacks the power to issue injunctive relief.”) Yet the fact that DowneastDem resides
10 in Maine was omitted from the New York Petition.

11 Because the New York court lacked jurisdiction, the subpoena to identify Petitioner
12 Downeast Dem, premised on that court’s order, should be quashed.

13 **B. References to “neo-Nazis” and the “Extreme Right” Are Expressions of**
14 **Opinion Protected by the First Amendment.**

15 “Under the First Amendment there is no such thing as a false idea.” (*Gertz v. Robert*
16 *Welch* (1974) 418 U.S. 323, 339, quoted in *John Doe 2 v. Super. Ct.* (2016) 1 Cal.App.5th 1300,
17 1313.) Accordingly, California courts “apply the Constitution carefully distinguishing between
18 statements of opinion and fact, treating the one as constitutionally protected and imposing on the
19 other civil liability for its abuse.” (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596,
20 601.) “The critical determination whether the allegedly defamatory statement constitutes fact or
21 opinion is a question of law.” (*Ibid.*) Commentators and courts “have recognized that online
22 blogs and message boards are places where readers expect to see strongly worded opinion rather
23 than objective facts.” (*Summit Bank v. Rogers* (1st Dist. 2012) 206 Cal.App.4th 669, 696-697;
24 see also *Global Telemedia Intern. Inc. v. John Doe 1* (C.D.Cal. 2001) 132 F.Supp.2d 1261, 1267

25 ² [https://www.dailykos.com/stories/2018/1/12/1732229/-Congresswoman-Chellie-](https://www.dailykos.com/stories/2018/1/12/1732229/-Congresswoman-Chellie-Pingree-D-ME-Granddaughter-of-Norwegian-Immigrant-Blasts-Trump)
26 [Pingree-D-ME-Granddaughter-of-Norwegian-Immigrant-Blasts-Trump](https://www.dailykos.com/stories/2019/9/21/1886936/-Susan-Collins-Owned-by-Manufacturer-of-Assault-Rifles) (mentions being in
27 [Maine](https://www.dailykos.com/stories/2008/7/21/554743/-John-McCain-in-S-Portland-Maine-Today)); [https://www.dailykos.com/stories/2019/9/21/1886936/-Susan-Collins-Owned-](https://www.dailykos.com/stories/2019/9/21/1886936/-Susan-Collins-Owned-by-Manufacturer-of-Assault-Rifles)
28 [by-Manufacturer-of-Assault-Rifles](https://www.dailykos.com/stories/2008/7/21/554743/-John-McCain-in-S-Portland-Maine-Today) (describes Susan Collins as “our” senior Senator);
[https://www.dailykos.com/stories/2008/7/21/554743/-John-McCain-in-S-Portland-Maine -Today](https://www.dailykos.com/stories/2008/7/21/554743/-John-McCain-in-S-Portland-Maine-Today)
(refers to “my South Portland neighborhood”). Kennedy admitted in his New York papers that
he searched DowneastDem’s other blog posts. (Levy Decl., ¶ 2, and Exh. A.)

1 [finding Internet postings “are full of hyperbole, invective, short-hand phrases and language not
2 generally found in fact-based documents, such as corporate press releases or SEC filings”].) The
3 larger context, the fact that the post was placed on Daily Kos, itself a site brimming with highly
4 opinionated writing, further cautions against finding these statements to be fact.

5 DowneastDem’s statements that, in speaking at the Berlin protests, Kennedy “joined neo-
6 Nazis” and participated in a protest “organized by right-wing extremist organizations”
7 constituted protected opinion and hence cannot, consistent with the First Amendment, be the
8 basis for a defamation action, for several reasons. First, name-calling constitutes a form of
9 “classic rhetorical hyperbole which cannot reasonably [be] interpreted as stating actual facts.”
10 (*Seelig v. Infinity Broad. Corp.* (1st Dist. 2002) 97 Cal.App.4th 798, 810.) Thus, it constitutes
11 opinion protected by the First Amendment rather than statements of fact that are provably false
12 and hence capable of having a defamatory meaning. (*Id.* at p. 809; *Overhill Farms v. Lopez*
13 (2010) 190 Cal.App.4th 1248, 1262.) In particular, courts have been unwilling to allow
14 defamation claims to be pursued against defendants for using such terms as “neo-Nazi,”
15 “fascist,” “racist,” “hate group,” “extremist,” “white nationalist,” or “white supremacist.”³ Thus,
16 a blog post contending that Kennedy “joined” neo-Nazis at a protest or appeared at a rally
17 organized by the “extreme right” reflects non-actionable opinion about the context of Kennedy’s
18 speech.

19 Further, because, “in the field of . . . political opinion, . . . what for one man is a weed, for
20 another may be a flower,” political name-calling is not properly the subject of a defamation
21 action. (*Washburn v. Wright, supra*, 261 Cal.App.2d at p. 796.) Indeed, defamatory meaning is

23 ³ See, e.g., *Overhill Farms, supra*, 190 Cal.App.4th. at p. 1275 (“fascist” or “racist”);
24 *Moyer v. Amador Valley J. Union High Sch. Dist.* (1st Dist. 1990) 225 Cal.App.3d 720, 726
25 (“fascist”); *Washburn v. Wright* (1968) 261 Cal.App.2d 789, 796 (“extremist”); *Nelsen v. S.*
26 *Poverty L. Ctr.* (W.D. Mo. July 31, 2019) 2019 WL 12288374, at *5 (“Neo-Nazi” and “racist”);
27 *Grutzmacher v. Chicago Sun-Times* (Ill. Cir. Sept. 28, 1994) 1994 WL 742257, at *3–4, *5
28 (“neo-Nazi”); *Coral Ridge Ministries Media v. Amazon.com* (M.D. Ala. 2019) 406 F.Supp.3d
1258, 1275–78 (“hate group”); *Natl. Rifle Assn. of Am. v. Cuomo* (N.D.N.Y. 2018) 350
F.Supp.3d 94, 133 (“extremist”); *Murray v. HuffingtonPost.com* (S.D. Ohio 2014) 21 F.Supp.3d
879, 885 (“extremist”); *Brimelow v. New York Times Co.* (S.D.N.Y. Dec. 16, 2020) 2020 WL
7405261, at *6 (“white nationalist”); *Jorjani v. New Jersey Inst. of Tech.* (D.N.J. Mar. 12, 2019)
2019 WL 1125594, at *7 (“racist” and “white supremacist”).

1 related to “the mental climate” of the times. (*Ibid.*) Accordingly, a blogger does not defame a
2 legislator who supports voting restrictions by calling her a “racist.” Allowing such controversies
3 to play out in the courts, subject to the threat of punitive damages, instead of in the court of
4 public opinion, threatens grave damage to our democracy. Thus, the law reflects the principle
5 that “[i]ndividuals should be able to express their views about the prejudices of others without
6 the chilling effect of a possible lawsuit in defamation resulting from their words.” (*Rybas v.*
7 *Wapner* (1983) 311 Pa.Super. 50, 55, 457 A.2d 108, 110.)

8 In the New York court, Kennedy relied on cases from another era to support the
9 proposition that calling someone Nazi or an anti-Semite is actionable as libel.⁴ For the most
10 part, his cases held that accusing the plaintiff of having used specific words that were anti-
11 Semitic or otherwise objectionable in character could be deemed defamatory, but that statements
12 calling the plaintiff an “anti-Semite” or “fellow traveler of the radical right” were expressions of
13 opinion that were **not** actionable as defamation. Moreover, many of the cases, especially the
14 ones from the 1940’s, do not address the First Amendment ramifications of the distinction
15 between opinion and fact, which is not surprising considering that the Supreme Court did not
16 hold until 1964 in *New York Times v. Sullivan* (1964) 376 U.S. 254, 283, that the First
17 Amendment constrains libel law, and did not hold until 1974 (*Gertz v. Welch, supra*) and even
18 1990 (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19), that the First Amendment
19 distinguishes between fact and opinion. And, to the extent that some cases in the 1940’s held
20 that it could be defamatory to call someone a Nazi or a Communist, a key distinction is that, at
21 the time, it was a felony to be either one (and close to treasonous in time of war). (*Dennis v.*
22 *United States* (1951) 341 U.S. 494, 495.)

23 Even so, the blog post did not call Kennedy anything. Again, the headline stated, “Anti-
24 Vaxxer RFK Jr. **joins** neo-Nazis in massive Berlin ‘Anti-Corona’ Protest” (emphasis added).
25 That statement cannot, consistent with the First Amendment, be deemed defamatory. Moreover,
26 “when the alleged defamatory statement is contained in a headline, the headline must be read in

27
28 ⁴ See cases cited in Kennedy’s Petition to Compel Kos Media, from 1941, 1942, 1948,
1976, 1986, 1989, 1994, and 1995.

1 conjunction with the entire article, and when so read the conclusion and inferences alleged by
2 plaintiff must be supported.” (*Balzaga v. Fox News Network* (2009) 173 Cal.App.4th 1325,
3 1338.) The context here was supplied by the article itself, which said, truthfully, that the protest
4 had been organized by various right-wing extremist organizations including a neo-Nazi party,
5 known as the AfD, and by the facts, widely reported in the press, that neo-Nazi flags could be
6 seen in photos of his speech, and that there were neo-Nazis present in the crowd.

7 Although Kennedy contends that he was defamed in that the charge of deliberate
8 association with neo-Nazis attributes evil thoughts to him, the statement that he “join[ed]” a
9 protest along with neo-Nazis does not carry any such necessary implication. Dictionaries,
10 including the Free Dictionary, Merriam-Webster, Dictionary.com, and the Random House
11 Unabridged Dictionary, define “join” as having several different meanings, some of which
12 connote mutually intentional association, but many others of which simply refer to being in the
13 same place at the same time, such as the passive “come into contact or union with.” (Levy Decl.,
14 ¶ 10, and Exhs. J and K.) In context, the statement that Kennedy “joins neo-Nazis in massive . .
15 . . protest” is a statement about other participants in the protest, and a characterization of those
16 participants that has no defamatory meaning on which libel litigation can proceed consistent with
17 the First Amendment.

18 **C. Petitioner’s References to Kennedy’s Association with “neo-Nazis” and**
19 **the “Extreme Right” Were Expressions of Opinion Based on Disclosed**
20 **Fact.**

21 The motion to quash should also be denied because DowneastDem’s characterizations
22 were opinions based on disclosed fact, which can be made the basis for liability only if the stated
23 facts are themselves false and defamatory. (*Standing Comm. on Disc. of U.S. Dist. Ct. for Cent.*
24 *Dist. of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1439.) When the facts supporting
25 an opinion are disclosed, “readers are free to accept or reject the author's opinion based on their
26 own independent evaluation of the fact.” (*Overhill Farms, supra*, 190 Cal.App.4th at 1263.)
27 The doctrine of “opinion based on disclosed facts” has particular relevance to online
28 publications that provide a hyperlink to underlying statements on which broad characterizations
are based. (*Nicosia v. De Rooy* (N.D.Cal.1999) 72 F.Supp.2d 1093, 1103; *Ayyadurai v. Floor64*,

1 *Inc.* (D.Mass. 2017) 270 F.Supp.3d 343, 361; *Biro v. Conde Nast* (S.D.N.Y. Sept. 30, 2014)
2 2014 WL 4851901, at *4, *aff'd in part*, (2d Cir. 2015) 807 F.3d 541, and *aff'd* (2d Cir. 2015) 622
3 Fed.Appx. 67; *Adelson v. Harris* (S.D.N.Y. 2013) 973 F.Supp. 2d 467, 485, *aff'd* (2d Cir. 2017)
4 876 F.3d 413.)

5 Here, the blog post at issue does not suggest that DowneastDem was in Berlin to observe
6 the protests or Kennedy's speech. And regular readers of the blog would have understood that
7 DowneastDem is a Maine resident who often comments on German political issues based on
8 press reports. The blog post links to an article in *Der Tagesspiegel* (Levy Decl., ¶ 6, and Exh.
9 E), which in turn hyperlinked to an earlier article in the same publication. (Levy Decl., ¶ 7, and
10 Exh. F.) English-speaking readers could read the articles via Google Translate. (See Levy
11 Decl., ¶ 8, and Exhs. G, H.) The articles disclosed the involvement of neo-Nazis and various
12 elements of the extreme right in the August 29 protests, and specifically identified the far-right
13 Alternative for Germany ("AfD") as among the sponsors of the protests. By following these
14 links, readers of the blog post could form their own conclusions about whether DowneastDem
15 had drawn fair conclusions from the press reports about happenings in Berlin. Importantly,
16 Kennedy does not contend that any of the factual assertions in the underlying articles are false.
17 Consequently, Kennedy's proposed defamation claim founders on the doctrine of opinion based
18 on disclosed fact.

19 **D. Kennedy Cannot Carry His Burden of Showing that Statements in the Blog**
20 **Post Were False, and of Proving Actual Malice by Clear and Convincing**
21 **Evidence.**

22 Kennedy's subpoena also fails the *Krinsky* standard for evaluating compelled
23 identification of anonymous online speakers because Kennedy cannot carry his burden of
24 establishing a prima facie case of defamation. As (at the very least) a limited purpose public
25 figure, Kennedy must prove that any statements deemed factual are false (*Carver v. Bonds* (1st
26 Dist. 2005) 135 Cal.App.4th 328, 344) and not even substantially true. (*Id.* at p. 347; *Price v.*
27 *Stossel* (9th Cir. 2010) 620 F.3d 992, 1000.) He must also show by clear and convincing
28 evidence that the false statements were published with actual malice. (*Bose Corp. v. Consumers*
Union of U.S. (1984) 466 U.S. 485, 511 and fn. 30; *St. Amant v. Thompson* (1968) 390 U.S.

1 727, 730.)

2 In seeking an order enabling him to compel Kos Media to disclose, Kennedy introduced
3 no admissible evidence supporting a prima facie case on either falsity or actual malice. His only
4 affidavit was from his counsel, who does not say that he was in Berlin on August 29, 2020.
5 Unless he was, he could not have personal knowledge of what happened there. Kennedy did not,
6 therefore, present a prima facie case on either count.

7 First, the Berlin protests received widespread coverage, and highly credible media sources
8 reported **both** that there was a substantial neo-Nazi presence at the Berlin protests on August 29,
9 **and** that the protests were organized by and attended by, in substantial part, the forces of the
10 extreme right. For example, the *Der Tagesspiegel* stories to which DowneastDem linked
11 featured the subcaption “Vaccination opponents and neo-Nazis, Trump fans and Hare Krishna
12 dancers - people who otherwise have little in common are demonstrating against the corona
13 policy,” and began with this lede: “The redhead with the trimmed beard distributes the ‘German
14 vote’, the party sheet of the right-wing extremist NPD.” (Levy Decl., ¶¶ 6, 8, and Exhs. E, H.)
15 *Der Tagesspiegel* also reported that one of the other speakers at the rally was Attila Hildmann,
16 whom another story identifies as a “self-described ‘ultra-right-winger’” who “believes
17 Chancellor Angela Merkel . . . to be Jewish and a leader of a ‘Zionist regime’ involved with ‘the
18 new axis of evil’ [and] claims that certain Jewish families work to destroy Germany and the
19 ‘German race.’” (Levy Decl., ¶ 16, and Exh. Q.)

- 20 • The New York Times wrote:

21 Some 38,000 protesters from all over the country flocked to the German capital
22 last weekend, the biggest number since the marches started in April. It was an
23 eclectic crowd. There were anti-vaxxers like Robert F. Kennedy Jr., anticapitalists,
24 esoterics, ordinary citizens angry at having to wear face masks — **but also about
25 3,000 members of the far-right scene.**

26 “We have everything from Hare Krishna fans to **Adolf Hitler fans** on the streets,”
27 said Matthias Quent, an expert on far-right extremism and the director of an
28 institute that studies democracy and civil society. “It’s a very disparate crowd but
what unites people is an angry discontent with the establishment. It’s a mix of
populist and egoist outrage.”

The **far-right Alternative for Germany party, or AfD, has tried to exploit the
pandemic in the same way** it used the refugee crisis in 2015, when the
government accepted more than one million migrants into the country, to feed a
narrative of impending crisis and government failure.

1 (Levy Decl., ¶ 11, and Exh. L (emphasis added).)

2 • The CBS News web site carried a photo of Kennedy speaking, with this caption,
3 and text:

4 BERLIN, GERMANY - AUGUST 29: Robert F. Kennedy Jr., nephew of former
5 U.S. President John F. Kennedy, speaks to people from a wide spectrum, including
6 coronavirus skeptics, conspiracy enthusiasts, **right-wing extremists**, religious
conservatives, hippies and others

7 More than 3,000 officers were deployed to help maintain the demonstration after
8 anti-restriction and **far-right supporters took to social media to call on people
to arm themselves and take part in the protest.**

9 **The protest was organized and promoted by far-right groups and outlets,
including the Islamophobic political party Alternative for Germany (AfD) and
10 Compact Magazine, which was removed from Facebook and Instagram on Friday.**
11 Compact has called the demonstration a "freedom movement" and has described
the coronavirus restrictions in the country as part of a "dictatorship."

12 Photos of the protest, which was **organized and promoted by far-right groups
and outlets, show many attendees representing far-right conspiracy theory
13 Qanon.**

14 Kennedy's nephew, Robert F. Kennedy Jr., who is adamantly anti-vaccine and has
15 unfoundedly compared the number of children injured by vaccines as "a
holocaust," spoke at the protest.

16 (Levy Decl., ¶ 12, and Exh. M (emphasis added).)

17 • The *Wall Street Journal* similarly reported, again without mentioning separate
18 rallies:

19 Saturday's protest **drew a broad crowd.** In addition to opponents of coronavirus
20 restrictions and voters generally frustrated with the leadership of Chancellor Angela
21 Merkel, **demonstrators included conspiracy theorists, neo-Nazis and adherents of the
so-called Citizens of the Reich, or Reichsbürger, a loose-knit movement that rejects
22 Germany's government as illegitimate and has been involved in clashes with the
police in recent years.**

23 Robert F. Kennedy Jr., an environmental lawyer and outspoken vaccine critic, **was
also in the crowd.**

24 (Levy Decl., ¶ 13, and Exh. N (emphasis added).)

25 • The report in Indian Express entitled *Germany protests: Who was behind the
26 agitation against pandemic restrictions?* included the following details:

27 According to a Deutsche Welle expert, while the protest drew a large variety of people, **it
28 was the country's fringe groups that largely co-opted it. Attendees from the**

1 **far-right** included those from **the Reichsbürger movement, which believes that the**
2 **modern German state is illegitimate, and maintains that the German Reich, its**
3 **pre-World War II predecessor, continues to exist.**

4 Flags and symbols that dotted the rally were as diverse: **the black-white-red**
5 **“Reichsflagge”**, peace flags, **neo-Nazi insignia** and banners of the US and
6 Sweden— a country that has chosen not to enforce strict lockdowns to deal with the
7 pandemic.

8 The protest **also drew supporters of QAnon**

9 American anti-vaccine campaigner Robert F. Kennedy Jr, the nephew of former
10 President John F. Kennedy and son of presidential aspirant Robert F. Kennedy,
11 **also joined the rally.**

12 (Levy Decl., ¶ 14, and Exh O (emphasis added).)

13 In the New York court, Kennedy’s effort to deny the reality of what happened was based
14 on the proposition that there were several **separate** protests in Berlin on August 29. and that he
15 only spoke at a single event sponsored by a group called “Querdenken 711” which, he said is an
16 entirely peaceful group that avoids any association with the extreme right.

17 In fact, reliable sources portray Querdenken as an organization of the far right in
18 Germany. (Levy Decl., ¶ 17, and Exh. R (reporting that speeches by Querdenken’s founder and
19 leader are replete with dog-whistles to neo-Nazis, and that he has been photographed talking to a
20 neo-Nazi who was among those attacking the Bundestag).) These reports are confirmed by the
21 declaration of Joel Schalit, an Israeli-American journalist based in Berlin who has for many
22 years covered the extreme right in Europe and its impact on Jews. In his expert opinion,
23 Querdenken is:

24 an umbrella of extreme-right politics, in which the varieties of German extremism
25 have found shelter. While it claims closeness to a number of conspiracy theories,
26 Querdenken 711 is less ideological than it is a forum for reconciling German
27 far-right groups, in terms of street politics and protests.

28 (Schalit Decl., below, at p. 33, ¶ 6.) Thus, Kennedy’s admission that Querdenken brought him to
the protest confirms that he cannot establish that the blog post was false, much less written with
reckless disregard or probable falsity.

Similarly, arguing in New York, Kennedy placed reliance on an excerpt from the *Der*
Tagesspiegel article that quoted a single protest attendee, as responding to the question, “Why
spend a sunny Saturday with neo-Nazis?” by saying that **she** had not seen any neo-Nazis.

1 (Wenner Decl., Exh. S, at 11.) But the article also noted the presence of neo-Nazis at the
2 protests, the distribution of the party sheet of the NPD —widely characterized as “a neo-Nazi
3 party” (https://en.wikipedia.org/wiki/National_Democratic_Party_of_Germany.) And a photo
4 caption cited the presence at Kennedy’s speech of “Reichsflagge” (Imperial flags), which are
5 widely displayed by neo-Nazis as a way of evading legal restrictions on the display of overt Nazi
6 symbols (Schalit Decl., ¶ 8), as well as “men [who] identify themselves as . . . opponents of the
7 ‘Jewish republic.’” (See Levy Decl., ¶¶ 6, 8, 23, and Exhs. E, H, X.) In context, the
8 *Tagesspiegel* report was saying that some protesters were in denial of who their bedfellows
9 were.

10 In the New York court, Kennedy was at pains to distinguish the audience to which he was
11 speaking from the gang of thugs who tried to storm the Bundestag, where, he claimed, the neo-
12 Nazis were protesting. (Wenner Decl., Exh. 8, at 19.) But the Indian Express article says that
13 the attack on the Bundestag occurred “[i]n the evening” of August 29, and the Guardian reported
14 that this attack occurred “**following** a protest against the country’s pandemic restrictions” and
15 “**after** a daylong demonstration,” not simultaneously with Kennedy’s speech. (Levy Decl., ¶ 15,
16 and Exh. P (referring to “the group that attempted to break into the parliament building **in the**
17 **wake of Querdenken’s protest**”) (emphasis added).)

18 To win a libel suit, Kennedy must show that DowneastDem’s blog post was not even
19 “substantially true.” “A slight inaccuracy in the details will not prevent a judgment for the
20 defendant, if the inaccuracy does not change the complexion of the affair so as to affect the
21 reader of the article differently.” (*Sipple v. Found. For Nat. Progress* (1999) 71 Cal.App.4th
22 226, 244.) A plaintiff who asks the court to draw fine distinctions between the obnoxious
23 conduct reported in the sources and the obnoxious conduct reported by the alleged defamer (*Colt*
24 *v. Freedom Commun.* (2003) 109 Cal.App.4th 1551, 1558-1559) or to “parse every word . . . to
25 determine truthfulness” (*Summit Bank, supra*, 206 Cal.App.4th at p. 697) will surely fail the test
26 for showing the absence of substantial truth. (See *Wesbrook v. Ulrich* (7th Cir. 2016) 840 F.3d
27 388, 395 (“a statement may be substantially true—and thus privileged—even if some fine
28 splitting of semantic hairs might leave room to argue about its literal truth”).)

1 Kennedy has also admitted, both through his counsel’s demand letter (Levy Decl., ¶ 21,
2 and Exh. V) and in the New York courts (Levy Decl., ¶ 2, and Exh. B, at 3 fn.2) that he is a
3 public figure. As for actual malice, Kennedy admitted in New York that DowneastDem was not
4 in Berlin (Levy Decl., ¶ 2, and Exh. A, ¶ 21), but was only blogging based on press reports.
5 Thus, a showing of actual malice would have to be predicated on proving that the blog post was
6 so far different from what various sources in the mainstream media were saying about the protest
7 that DowneastDem must have known that the blog post was wrong. But because what
8 DowneastDem said—about Kennedy and about the protest where he spoke—is similar to what
9 many sources were saying, Kennedy will not be able to establish actual malice by clear and
10 convincing evidence. Although Kennedy’s lawyer in the New York proceeding swore that the
11 post was made with actual malice, this lawyer had no personal knowledge of DowneastDem’s
12 state of mind—his affirmation was legal argument. And that argument was based on the false
13 propositions that DowneastDem had a single source and that Downeast Dem’s words differed
14 from some details in that one source. The affirmation was also based on the proposition that
15 DowneastDem had in a previous post expressed unfavorable opinions of Kennedy’s anti-
16 vaccination views as “notorious” and as making him the “Kennedy family black sheep.” But
17 these non-actionable opinions are apparently shared by the Kennedy family. (Levy Decl., ¶ 18,
18 and Exh. S.) At best, these are indications of ill will, which is “very different” from actual
19 malice. (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 871.)

20 Accordingly, because the post was not made with actual malice and Kennedy cannot
21 show actual malice, the motion to quash should be granted.

22 **E. Petitioner Should Be Awarded Her Reasonable Attorneys’ Fees.**

23 As the prevailing moving party, Petitioner should be held entitled to recover her
24 reasonable expenses incurred in making the motion, including reasonable attorneys’ fees,
25 pursuant to CCP § 1987.2(c), in an amount that may be established by noticed motion.

26 ////

CONCLUSION

Petitioner’s motion to quash the subpoena should be granted and Petitioner should be awarded her reasonable attorneys’ fees.

DATED: August 9, 2021

/s/ Mark Goldowitz
Paul Alan Levy, Public Citizen Litigation Group
Mark Goldowitz, California Anti-SLAPP Project
Attorneys for Petitioner DOWNEASTDEM
Judicial Officer

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1 streit-um-demonstration-in-berlin-kundgebungen-gegen-corona-politik-duerfen-stattfinden/2613
2 7262.html. A copy of that article is **Exhibit F**.

3 8. I cannot read German, but I was able to read both of them easily by plugging the
4 URL's into Google Translate, which produced the following translations,
5 [https://translate.google.com/
6 translate?sl=de&tl=en&u=https://www.tagesspiegel.de/berlin/bibelsprueche-trommeltanz-und-fa
7 schisten-zehntausende-demonstrieren-in-berlin-gegen-die-corona-massnahmen/26140564.html](https://translate.google.com/translate?sl=de&tl=en&u=https://www.tagesspiegel.de/berlin/bibelsprueche-trommeltanz-und-fa)
8 and
9 [https://translate.google.com/translate?sl=de&tl=en&u=https://www.tagesspiegel.de/berlin/streit-
10 um-demonstration-in-berlin-kundgebungen-gegen-corona-politik-duerfen-stattfinden/26137262.
11 html](https://translate.google.com/translate?sl=de&tl=en&u=https://www.tagesspiegel.de/berlin/streit-um-demonstration-in-berlin-kundgebungen-gegen-corona-politik-duerfen-stattfinden/26137262.html), which are **Exhibits G and H**, respectively.

12 9. By clicking on DowneastDem's byline in Exhibit D, I was able to locate her Daily Kos
13 profile at <https://www.dailykos.com/user/DowneastDem> That profile links to all of her blog
14 articles, some of which refer to residency in Maine, including
15 [https://www.dailykos.com/stories/2018/1/12/
16 1732229/-Congresswoman-Chellie-Pingree-D-ME-Grand-daughter-of-Norwegian-Immigrant-
17 Blasts-Trump](https://www.dailykos.com/stories/2018/1/12/1732229/-Congresswoman-Chellie-Pingree-D-ME-Grand-daughter-of-Norwegian-Immigrant-Blasts-Trump) (mentions being in Maine); [https://www. daily
18 kos.com/stories/2019/9/21/1886936/ -Susan-Collins-Owned-by-Manufacturer-of-Assault-Rifles](https://www.dailykos.com/stories/2019/9/21/1886936/-Susan-Collins-Owned-by-Manufacturer-of-Assault-Rifles)
19 (describes Susan Collins as "our" senior Senator);
20 <https://www.dailykos.com/stories/2008/7/21/554743/-John-McCain-in-S-Portland-Maine- Today>
21 (refers to "my South Portland neighborhood"). Copies of those blog posts are in **Exhibit I**.

22 10. **Exhibit J** contains a page from the Random House Unabridged Dictionary, Second
23 Ed. 1993), including the definition of "join." **Exhibit K** is a composite of the web pages from
24 The Free Dictionary (without the translations section), MerriamWebster.com and
25 Dictionary.com, showing definitions of "join."

26 11. **Exhibit L** is a story from the New York Times entitled *Far-Right Germans Try to*
27 *Storm Reichstag as Virus Protests Escalate*, located at [https://www.nytimes.com/2020/
28 08/31/world/europe/reichstag-germany-neonazi-coronavirus.html](https://www.nytimes.com/2020/08/31/world/europe/reichstag-germany-neonazi-coronavirus.html) (behind a paywall), which

1 included the following.

2 Some 38,000 protesters from all over the country flocked to the German capital
3 last weekend, the biggest number since the marches started in April. It was an
4 eclectic crowd. There were anti-vaxxers like Robert F. Kennedy Jr., anticapitalists,
5 esoterics, ordinary citizens angry at having to wear face masks — **but also about**
6 **3,000 members of the far-right scene.**

7 “We have everything from Hare Krishna fans to **Adolf Hitler fans** on the streets,”
8 said Matthias Quent, an expert on far-right extremism and the director of an
9 institute that studies democracy and civil society. **“It’s a very disparate crowd**
10 **but what unites people is an angry discontent with the establishment. It’s a mix of**
11 **populist and egoist outrage.”**

12 The **far-right Alternative for Germany party, or AfD, has tried to exploit the**
13 **pandemic in the same way** it used the refugee crisis in 2015, when the
14 government accepted more than one million migrants into the country, to feed a
15 narrative of impending crisis and government failure.

16 (emphasis added).

17 12. **Exhibit M** is a story from CBS News entitled *Berlin police break up*
18 *"anti-coronavirus" protest after 18,000 gather with no masks or social distancing*, CBS News
19 (Aug. 29, 2020), and located at

20 [https://www.cbsnews.com/news/berlin-police-break-up-anti-coronavirus-protest-](https://www.cbsnews.com/news/berlin-police-break-up-anti-coronavirus-protest-after-18000-gather-with-no-masks-or-social-distancing/)
21 [after-18000-gather-with-no-masks-or-social-distancing/](https://www.cbsnews.com/news/berlin-police-break-up-anti-coronavirus-protest-after-18000-gather-with-no-masks-or-social-distancing/). The story included a photo with the
22 following caption, and the following text:

23 BERLIN, GERMANY - AUGUST 29: Robert F. Kennedy Jr., nephew of former
24 U.S. President John F. Kennedy, speaks to people from a wide spectrum, including
25 coronavirus skeptics, conspiracy enthusiasts, **right-wing extremists**, religious
26 conservatives, hippies and others gathered under the Victory Column in the city
27 center to hear speeches during a protest against coronavirus-related restrictions and
28 government policy on August 29, 2020 in Berlin, Germany. City authorities had
banned the planned protest, citing the flouting of social distancing by participants
in a similar march that drew at least 17,000 people a few weeks ago, but a court
overturned the ban.

* * *

More than 3,000 officers were deployed to help maintain the demonstration after
anti-restriction and **far-right supporters took to social media to call on people**
to arm themselves and take part in the protest.

The protest was organized and promoted by far-right groups and outlets,
including the Islamophobic political party Alternative for Germany (AfD) and
Compact Magazine, which was removed from Facebook and Instagram on Friday.
Compact has called the demonstration a "freedom movement" and has described
the coronavirus restrictions in the country as part of a "dictatorship."

1 Photos of the protest, which was **organized and promoted by far-right groups**
2 **and outlets, show many attendees representing far-right conspiracy theory**
3 **Qanon. . . .**

4 Kennedy’s nephew, Robert F. Kennedy Jr., who is adamantly anti-vaccine and has
5 unfoundedly compared the number of children injured by vaccines as “a
6 holocaust,” spoke at the protest.

7 (emphasis added).

8 13. **Exhibit N** is an article from the Wall Street Journal, entitled *Tens of Thousands*
9 *Converge on Berlin to Denounce Coronavirus Restrictions*, and available online (behind a
10 paywall)
11 [https://www.wsj.com/articles/tens-of-thousands-converge-on-berlin-to-denounce-coronavirus-](https://www.wsj.com/articles/tens-of-thousands-converge-on-berlin-to-denounce-coronavirus-restrictions-11598719108)
12 [restrictions-11598719108](https://www.wsj.com/articles/tens-of-thousands-converge-on-berlin-to-denounce-coronavirus-restrictions-11598719108) (emphasis added), which included the following:

13 Saturday’s protest **drew a broad crowd**. In addition to opponents of coronavirus
14 restrictions and voters generally frustrated with the leadership of Chancellor
15 Angela Merkel, **demonstrators included conspiracy theorists, neo-Nazis and**
16 **adherents of the so-called Citizens of the Reich, or Reichsbürger, a loose-knit**
17 **movement that rejects Germany’s government as illegitimate and has been**
18 **involved in clashes with the police in recent years.**

19 Robert F. Kennedy Jr., an environmental lawyer and outspoken vaccine critic, **was**
20 **also in the crowd.**

21 (emphasis added)

22 14. **Exhibit O** is an article from the Indian Express entitled *Germany protests: Who was*
23 *behind the agitation against pandemic restrictions?* , available online at
24 [https://indianexpress.com/article/explained/explained-who-was-behind-the-protests-against-](https://indianexpress.com/article/explained/explained-who-was-behind-the-protests-against-pandemic-restrictions-in-germany-6578891/)
25 [pandemic- restrictions-in-germany-6578891/](https://indianexpress.com/article/explained/explained-who-was-behind-the-protests-against-pandemic-restrictions-in-germany-6578891/), which included the following details:

26 According to a Deutsche Welle expert, while the protest drew a large variety of
27 people, **it was the country’s fringe groups that largely co-opted it. Attendees**
28 **from the far-right included those from the Reichsbürger movement, which**
29 **believes that the modern German state is illegitimate, and maintains that the**
30 **German Reich, its pre-World War II predecessor, continues to exist.**

31 Some called on Trump and Putin– **both revered by ultra-right groups**– to
32 “liberate” Germany.

33 Flags and symbols that dotted the rally were as diverse: **the black-white-red**
34 **“Reichsflagge”**, peace flags, **neo-Nazi insignia** and banners of the US and
35 Sweden– a country that has chosen not to enforce strict lockdowns to deal with the
36 pandemic.

1 The protest **also drew supporters of Qanon**

2 American anti-vaccine campaigner Robert F. Kennedy Jr, the nephew of former
3 President John F. Kennedy and son of presidential aspirant Robert F. Kennedy,
4 **also joined the rally.**

(emphasis added)

5 15. **Exhibit P** is an article from The Guardian entitled '*Anti-corona' extremists try to*
6 *storm German parliament*, and available online at

7 [https://www.theguardian.com/world/2020/aug/](https://www.theguardian.com/world/2020/aug/29/berlin-braces-for-anti-coronavirus-protest-against-covid-19-restrictions)
8 [29/berlin-braces-for-anti-coronavirus-protest-against-covid-19-restrictions](https://www.theguardian.com/world/2020/aug/29/berlin-braces-for-anti-coronavirus-protest-against-covid-19-restrictions)

9 16. **Exhibit Q** is an English-language article from the German broadcaster Deutsche
10 Welle, entitled *Berlin bans rally by vegan chef and conspiracy theorist Attila Hildmann*, DW,
11 [https://www.dw.com/en/berlin-bans-rally-by-vegan-chef-](https://www.dw.com/en/berlin-bans-rally-by-vegan-chef-and-conspiracy-theorist-attila-hildmann/a-54299794)
12 [and-conspiracy-theorist-attila-hildmann/ a-54299794.](https://www.dw.com/en/berlin-bans-rally-by-vegan-chef-and-conspiracy-theorist-attila-hildmann/a-54299794)

13 17. **Exhibit R** contains three articles about the German organization Querdenken,
14 entitled *Anti-lockdown group Querdenken pulls Germans to the far right*, available at
15 <https://www.codastory.com/waronscience/querdenken-movement/>; *Meet Germany's*
16 *'Querdenker' COVID protest movement*,
17 [https://www.dw.com/en/meet-germanys-querdenker-covid-protest- movement/a-57049985](https://www.dw.com/en/meet-germanys-querdenker-covid-protest-movement/a-57049985); and
18 *Inside the Weird Pro-QAnon German Group Behind RFK Jr. 's Latest Anti-Vaxx Stunt*, available
19 at [https://www.thedailybeast.com/rfk-jrs-latest-anti-vaxx-stunt-](https://www.thedailybeast.com/rfk-jrs-latest-anti-vaxx-stunt-backed-by-weird-pro-qanon-german-group-querdenken-711)
20 [backed-by-weird-pro-qanon-german-group-querdenken-711.](https://www.thedailybeast.com/rfk-jrs-latest-anti-vaxx-stunt-backed-by-weird-pro-qanon-german-group-querdenken-711)

21 18. **Exhibit S** is an article from Politico entitled *RFK Jr. Is Our Brother and Uncle: He's*
22 *Tragically Wrong About Vaccines*, available online at
23 [https://www.politico.com/magazine/story/2019/05/08/robert-kennedy-jr- measles-](https://www.politico.com/magazine/story/2019/05/08/robert-kennedy-jr-measles-vaccines-226798)
24 [vaccines-226798\)](https://www.politico.com/magazine/story/2019/05/08/robert-kennedy-jr-measles-vaccines-226798)

25 19. **Exhibit T** is an Associated Press story entitled *RFK Jr. kicked off Instagram for*
26 *vaccine misinformation*, available online at [https://apnews.com/article/rjf-jr-banned-instagram](https://apnews.com/article/rjf-jr-banned-instagram-vaccine-misinfo-d72913572f04ec9b23cec58881bc32d9)
27 [-vaccine-misinfo-d72913572f04ec9b23cec58881bc32d9.](https://apnews.com/article/rjf-jr-banned-instagram-vaccine-misinfo-d72913572f04ec9b23cec58881bc32d9)

28 20. **Exhibit U** contains articles from National Public Radio and STAT about Robert F.

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3 Telephone: (202) 588-7725
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7 Email: mg@casp.net

8 Attorneys for Petitioner DOWNEASTDEM

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ALAMEDA**

12 DOWNEASTDEM, an individual,

13 Petitioner,

14 vs.

15 ROBERT F. KENNEDY, JR.,

16 an individual,

17 Respondent.

CASE NO. RG21102647

**DECLARATION OF JOEL SCHALIT
IN SUPPORT OF PETITIONER'S
MOTION TO QUASH SUBPOENA.**

**Hearing Date: August 16, 2021
Hearing Time: 9:30 am
Dept. No. 511**

18 *In the Matter of the Subpoena Issued to*
19 *Kos Media, LLC, in:*

20 ROBERT F. KENNEDY, JR.,
Petitioner,

v.

21 KOS MEDIA, LLC, d/b/a, DAILY KOS,
Respondent.

22 In the Supreme Court of the State of
New York, County of Westchester
23 Index No. 65319/2020

24 Hon. Mary H. Smith
Order granting pre-action disclosure,
April 16, 2021

25 Appeal pending
26 Nos. 2021-03700 and 2021-04476
27 (N.Y. App. Div. Dept. 2)

1 1. My name is Joel Schalit. I make this affidavit to offer my professional opinions about the
2 nature of the Querdenken 711 movement as it bears on Robert Kennedy’s defamation claim.

3 2. I am an Israeli-American journalist based in Berlin. I was formerly the managing editor
4 of Berkeley’s Tikkun magazine, and I have written such critically acclaimed books as *Jerusalem*
5 *Calling* and *Israel vs Utopia (Akashic)*. For the past twelve years, I have covered far-right
6 extremism in Europe for a variety of platforms including the UK’s Jewish Quarterly, France24 and
7 Israel’s i24News.

8 3. I was the news editor at Brussels’ Euractiv, and, more recently, a political analyst for
9 Beijing’s China Global Television Network. Currently, I heading up my own media organization,
10 *The Battleground*. My team and I have been covering the pressures Germany’s Jewish community
11 faces from both the centre and extreme right, on matters ranging from Israel’s role in German
12 politics to racist violence.

13 4. Starting with Germany’s neofascist opposition party Alternative für Deutschland, under
14 my direction, *The Battleground* has mapped the radicalisation of the country’s far-right, from being
15 an archetypal nationalist party led by what the German press call “pinstripe Nazis” to a more
16 threatening mix of far-right terrorists, conspiracy theorists and QAnon followers.

17 5. Though this evolution may not sound out of place in the United States, in the background
18 of the German version is the Third Reich and continuing frustrations over the collapse of the
19 Communist DDR. Though Nazi-identified nationalism is common throughout today’s Europe,
20 Germans often forget how ruinous it was to their country, in both flesh and blood, their cities and
21 towns, and their culture.

22 6. The Querdenken 711 movement isn’t so much a separate movement within this greater
23 right, but more of an umbrella of extreme-right politics, in which the varieties of German extremism
24 have found shelter. While it claims closeness to a number of conspiracy theories, Querdenken 711
25 is less ideological than it is a forum for reconciling German far-right groups, in terms of street
26 politics and protests.

27 7. Indeed, it would be hard to imagine 2020’s anti-lockdown and so-called hygiene demos,
28 the storming of the Bundestag in August, and the adoption of Jewish yellow stars by anti-vaccination

1 activists, without the Querdenken. Though hippies and some minorities have been featured in these
2 events, the 'movement' is still complicit with white nationalists.

3 8. The fact some Americans have been drawn to these groups is no surprise. Even though
4 they are European events, Querdenken protestors are openly admiring of US nationalist and
5 Evangelical politics. During the 2020 protests, far-right demonstrators often carried banners and
6 signs emblazoned with Trump's image, along with that of Vladimir Putin, and German imperial
7 flags. Those German imperial flags—the "Reichsflagge" mentioned in several news stories,
8 including the Der Tagesspiegel article of August 29—are carried by Neo-Nazis as a coded signal
9 of support for Nazism, evading German laws that forbid the display of overt Nazi symbols.

10 10. Germans who participate in Querdenken circles are aligned with one of these streams.
11 Those who claim they aren't are lower and middle class Germans getting introduced to the far-right,
12 trying to figure out which orientation within it fits them best. Foreign activists addressing the
13 Querdenken, if not politically related, at the very least help support this environment and give it
14 legitimacy.

15 I declare under penalty of perjury, under the laws of the State of
16 California, that the foregoing is true and correct. Executed on
17 June 29, 2021.

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Declaration of Mark Goldowitz

I, Mark Goldowitz, hereby declare:

1. I am local counsel for the Petitioner, DowneastDem.

2. On July 2, 2021, I presented on behalf of Petitioner an ex parte application for a revised briefing schedule for the motion to quash the subpoena. It proposed that Petitioner’s memorandum and moving papers in support of the motion to quash would be due July 23, 2021, with a memorandum a maximum of 20 pages; that Respondent’s memorandum and papers opposition the motion to quash would be due September 7, 2021, with the memorandum a maximum of 20 pages; and that Petitioner’s reply memorandum and any supporting papers would be due October 15, 2021, with the memorandum a maximum of 15 pages. Kennedy opposed the application.

3. On August 4, 2021, the Court signed without change the (proposed) order accompanying Petitioner’s ex parte application. On August 5, 2021, Department 511 notified counsel for all parties that the application was granted but the proposed order was not signed until recently, that no changes were made to the proposed order, and that it would be processed shortly. On August 6, 2021,

Signed under the pains and penalties of perjury, on the 9th day of August, 2021.

_____/s/ Mark Goldowitz_____

[PROPOSED] ORDER

The subpoena issued on June 7, 2021, by California counsel for Respondent Robert F. Kennedy Jr., to Kos Media, compelling it to provide identifying information about Petitioner, DowneastDem, is hereby quashed.

Petitioner DowneastDem, as the prevailing moving party, shall recover her reasonable expenses incurred in making the motion to quash, including reasonable attorney’s fees, pursuant to § 1987.2(c) of the Code of Civil Procedure, in an amount that may be established by noticed motion.

Dated:

Judicial Officer

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