

1 DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE (State Bar No. 141930)
2 thomasburke@dwt.com
505 Montgomery Street, Suite 800
3 San Francisco, CA 94111-6533
Telephone: (415) 276-6500
4 Fax: (415) 276-6599

5 DAVIS WRIGHT TREMAINE LLP
DAN LAIDMAN (State Bar No. 274482)
6 danlaidman@dwt.com
DIANA PALACIOS (State Bar No. 290923)
7 dianapalacios@dwt.com
865 South Figueroa Street, 24th Floor
8 Los Angeles, California 90017-2566
Telephone: (213) 633-6800
9 Fax: (213) 633-6899

10 Attorneys for Defendant
11 Joseph Teixeira

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 CITY OF INGLEWOOD, a public entity,) Case No. **2:15-cv-01815-MWF-MRW**
15 Plaintiff,)
16 vs.) Assigned to the Hon. Michael Fitzgerald
17 JOSEPH TEIXEIRA and Does 1-10,) **DEFENDANT’S NOTICE OF**
18 Defendants.) **MOTION AND MOTION TO**
19) **DISMISS PLAINTIFF’S**
20) **COMPLAINT; SUPPORTING**
21) **MEMORANDUM OF POINTS AND**
22) **AUTHORITIES**
23) **[Fed. R. Civ. P. 12(b)(6)]**
24) Hearing Date: June 22, 2015
25) Time: 10:00 a.m.
26) Courtroom: 1600
27) [Notice of Motion and Motion to Strike
28) (Rule 12(f)); Request For Judicial
Notice; Declaration Of Joseph Teixeira
With Exhibit B; Declaration Of Dan
Laidman; Notice of Lodging of DVDs
With Exhibits A, C-F; Notice Of Manual
Filing; and [Proposed] Order Filed
Concurrently]
) Action Filed: March 12, 2015

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 22, 2015, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable Michael W. Fitzgerald of
4 the United States District Court for the Central District of California, in Courtroom
5 1600 of the Spring Street Courthouse, located at 312 N. Spring Street, Los Angeles,
6 California 90012, defendant Joseph Teixeira will and hereby does move this Court,
7 pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing the City
8 of Inglewood's (the "City") Complaint with prejudice.

9 This Motion is made on the following grounds:

10 1. This action arises from alleged infringement of the City's purported
11 copyrights in its video recordings of several of its City Council meetings, but the City
12 is precluded by California law from securing copyright protection in these public
13 records. See Memorandum Section III.A, infra.

14 2. Even assuming that the City could secure a copyright in its video
15 recordings of City Council meetings, Mr. Teixeira's allegedly infringing videos are
16 highly transformative political commentaries that are protected by the fair use
17 doctrine as a matter of law. See Memorandum Section III.B, infra.

18 For each of these reasons, the City's Complaint suffers from fatal legal
19 deficiencies that cannot be cured by amendment. See Memorandum Section IV,
20 infra. Therefore, the Complaint should be dismissed in its entirety, with prejudice.

21 This Motion is based on this Notice Of Motion, the attached Memorandum Of
22 Points And Authorities, the concurrently-filed Declaration of Joseph Teixeira with
23 Exhibit B; Declaration of Dan Laidman; Request For Judicial Notice; Notice Of
24 Lodging of DVDs with Exhibits A, C-F; Notice of Manual Filing; and all other
25 matters of which this Court may take judicial notice, the pleadings, files, and records
26 in this action, and on such other argument as may be heard by this Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This Motion is made following the conference of counsel that occurred on April 9, 2015, pursuant to Local Rule 7-3. See Laidman Decl. ¶ 4.¹

DATED: April 16, 2015

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN
DIANA PALACIOS

By: /s/ Dan Laidman
Dan Laidman

Attorneys for Defendant Joseph Teixeira

¹ In addition to this meet-and-confer session, Mr. Teixeira’s counsel sent a detailed letter to the City’s counsel prior to the initiation of this action explaining why the City’s threatened claim was meritless, and why Mr. Teixeira would likely be entitled to recover his attorneys’ fees and costs should he prevail in litigation. Id. ¶ 3. The City did not respond to this correspondence, and instead proceeded with this lawsuit. Id. Because Mr. Teixeira’s defense against the City’s claim furthers the purpose of the Copyright Act, if the Court grants this Motion he will file a separate motion to recover his attorneys’ fees and costs pursuant to 17 U.S.C. § 505.

TABLE OF CONTENTS

1		<u>Page</u>
2		
3	I. SUMMARY OF ARGUMENT	1
4	II. FACTUAL BACKGROUND	3
5	A. The City Of Inglewood’s Complaint	3
6	B. The City Of Inglewood’s Recordings Of Its City Council	
7	Meetings.	4
8	C. Mr. Teixeira’s Political Commentary Videos.	5
9	III. PLAINTIFF’S COPYRIGHT CLAIM FAILS AS A MATTER OF	
10	LAW	8
11	A. The City Has No Copyright Interest In Its Public Meeting Videos.	9
12	1. The City Cannot Copyright Its Public Meeting	
13	Videos Because California Law Does Not	
14	Specifically Authorize Such Protection.	10
15	2. The City’s Assertion Of Copyright In Its Public	
16	Meeting Videos Is Incompatible With Well-	
17	Established State Law And Public Policy.....	12
18	B. Mr. Teixeira’s Use Of Clips From City Council Meetings In His	
19	Political Commentaries Is Independently Protected By The Fair	
20	Use Doctrine.....	15
21	1. Fair Use Is Applied Expansively Where, As Here, A	
22	Claim Implicates Constitutionally Protected Political	
23	Speech.	15
24	2. Fair Use May Be Decided On A Motion To Dismiss.	16
25	3. Each Statutory Factor Strongly Favors Fair Use.	17
26	a. The Purpose And Character Of The Use	18
27	b. The Nature Of The Allegedly Copyrighted Works	21
28	c. The Amount And Substantiality Used.....	21
	d. The Effect On The Market.....	23
	IV. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE	25
	V. CONCLUSION.....	25

TABLE OF AUTHORITIES

		<u>Page</u>
1		
2		
3		
4	Cases	
5	<u>Banks v. Manchester,</u>	
6	128 U.S. 244 (1888).....	14
7	<u>Batzel v. Smith,</u>	
8	333 F.3d 1018 (9th Cir. 2003)	1
9	<u>Bell Atlantic Corp. v. Twombly,</u>	
10	550 U.S. 544 (2007).....	8
11	<u>Bouchat v. Baltimore Ravens Ltd. Partnership,</u>	
12	737 F.3d 932 (4th Cir. 2013)	15
13	<u>Brownmark Films, LLC v. Comedy Partners,</u>	
14	682 F.3d 687 (7th Cir. 2012)	17
15	<u>Bruns v. E-Commerce Exchange, Inc.,</u>	
16	51 Cal. 4th 717 (2011)	12
17	<u>Building Officials & Code Adm. v. Code Technology, Inc.,</u>	
18	628 F.2d 730 (1st Cir. 1980).....	9, 14
19	<u>Burnett v. Twentieth Century Fox Film Corp.,</u>	
20	491 F. Supp. 2d 962, 966 (C.D. Cal. 2007).....	9, 16, 25
21	<u>Campbell v. Acuff-Rose Music, Inc.,</u>	
22	510 U.S. 569 (1994).....	2, 18, 21, 22
23	<u>Caner v. Autry,</u>	
24	16 F. Supp. 3d 689, 710 (W.D. Va. 2014).....	19
25	<u>Cariou v. Prince,</u>	
26	714 F.3d 694 (2d Cir. 2013).....	17
27	<u>CBS, Inc. v. Block,</u>	
28	42 Cal. 3d 646 (1986)	14
	<u>Consumers Union of United States, Inc. v. General Signal Corp.,</u>	
	724 F.2d 1044 (2d Cir. 1983).....	18

1	<u>County of Santa Clara v. Superior Court,</u>	
2	170 Cal. App. 4th 1301 (2009)	passim
3	<u>Daly v. Viacom, Inc.,</u>	
4	238 F. Supp. 2d 1118 (N.D. Cal. 2002)	9
5	<u>Dhillon v. Does 1-10,</u>	
6	2014 WL 722592 (N.D. Cal. Feb. 25, 2014)	18, 19
7	<u>Eldred v. Ashcroft,</u>	
8	537 U.S. 186 (2003)	15
9	<u>Fisher v. Dees,</u>	
10	794 F.2d 432 (9th Cir. 1986)	1, 24, 25
11	<u>Golan v. Holder,</u>	
12	132 S. Ct. 873 (2012)	15
13	<u>Harper & Row Publishers, Inc. v. Nation Enterprises,</u>	
14	471 U.S. 539 (1985)	21
15	<u>Hilton v. Hallmark Cards,</u>	
16	599 F.3d 894 (9th Cir. 2010)	1
17	<u>Hustler Magazine Inc. v. Moral Majority Inc.,</u>	
18	796 F.2d 1148 (9th Cir. 1986)	2, 16, 18, 21
19	<u>In re Syntex Corp. Sec. Litig.,</u>	
20	95 F.3d 922 (9th Cir. 1996)	8
21	<u>International Longshoremen’s & Warehousemen’s Union v. L.A. Export</u>	
22	<u>Terminal, Inc.,</u>	
23	69 Cal. App. 4th 287 (1999)	14
24	<u>Kienitz v. Sconnie Nation LLC,</u>	
25	965 F. Supp. 2d 1042 (W.D. Wis. 2013)	19, 24
26	<u>Knievel v. ESPN,</u>	
27	393 F.3d 1068, 1076-77 (9th Cir. 2005)	8
28	<u>Leadsinger, Inc. v. BMG Music Publ’g,</u>	
	512 F.3d 522 (9th Cir. 2008)	16
	<u>Leibovitz v. Paramount Pictures Corp.,</u>	
	137 F.3d 109 (2d Cir. 1998)	22

1 Mattel Inc. v. Walking Mt. Prods.,
 2 353 F.3d 792 (9th Cir. 2003) 19

3 Maxtone-Graham v. Burtchaell,
 4 803 F.2d 1253 (2d Cir. 1986)..... 19

5 Microdecisions, Inc. v. Skinner,
 6 889 So.2d 871 (2004)..... 9, 11

7 Mills v. Alabama,
 8 384 U.S. 214 (1966)..... 16

9 National Rifle Ass’n of America v. Handgun Control Federation of
 10 Ohio,
 11 15 F.3d 559 (6th Cir. 1994) 19

12 New Era Publications International, ApS v. Henry Holt & Co.,
 13 695 F. Supp. 1493 (S.D.N.Y. 1988) 13

14 New York Times Co. v. Sullivan,
 15 376 U.S. 254 (1964)..... 1

16 Norse v. Henry Holt and Co.,
 17 847 F. Supp. 142 (N.D. Cal. 1994) 18

18 North County Parents Org. v. Dep’t of Education,
 19 23 Cal. App. 4th 144 (1994) 13

20 Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical
 21 Reform,
 22 868 F. Supp. 2d 962 (C.D. Cal. 2012) 3, 20, 21, 24

23 Righthaven v. Realty One Group,
 24 2010 WL 4115413 (D. Nev. Oct. 19, 2010) 17

25 Rogers v. Koons,
 26 960 F.2d 301 (2d Cir. 1992)..... 22

27 Savage v. Council on American-Islamic Relations,
 28 2008 U.S. Dist. LEXIS 60545; 87 U.S.P.Q.2D 1730 (N.D. Cal. 2008)..... passim

Sedgwick Claims Management Servs. v. Delsman,
 2009 U.S. Dist. LEXIS 61825 (N.D. Cal. July 17, 2009)..... 17, 19, 25

1	<u>Seltzer v. Green Day, Inc.</u> ,	
2	725 F.3d 1170 (9th Cir. 2013)	24
3	<u>Sierra Club v. Superior Court</u> ,	
4	57 Cal. 4th 157 (2013)	13, 14
5	<u>Snyder v. Phelps</u> ,	
6	131 S. Ct. 1207 (2011)	1
7	<u>Sony Corp. v. Universal City Studios, Inc.</u> ,	
8	464 U.S. 417 (1984)	15
9	<u>Steckman v. Hart Brewing</u> ,	
10	143 F.3d 1293 (9th Cir. 1998)	25
11	<u>Swatch Group Management Services Ltd. v. Bloomberg L.P.</u> ,	
12	756 F.3d 73 (2d Cir. 2014)	21, 22
13	<u>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</u> ,	
14	551 U.S. 308 (2007)	8
15	<u>United States v. Vidal</u> ,	
16	504 F.3d 1072 (9th Cir. 2007) (en banc)	12
17	<u>Wheaton v. Peters</u> ,	
18	33 U.S. (8 Pet.) 591 (1834)	14
19	<u>Wojnarowicz v. American Family Association</u> ,	
20	745 F. Supp. 130 (S.D.N.Y. 1990)	15, 16, 19
21	<u>Wright v. Warner Books</u> ,	
22	953 F. 2d 731 (2d Cir. 1991)	18
23	<u>Zella v. E.W. Scripps</u> ,	
24	529 F. Supp. 2d 1124 (C.D. Cal. 2007)	8
25	Statutes	
26	17 U.S.C.	
27	§ 105	9
28	§ 107	2, 15
	§ 107(1)-(4)	17
	Cal. Code Civ. Proc. § 425.16	1

1	Cal. Gov’t Code	
2	§ 6253(b)	3, 11, 13, 24
3	§ 6254.9	10
4	§ 6257.5	11
5	§ 54950	14
6	§ 54953.5(b)	3, 13
7	Cal. Education Code §§ 1044, 35170, 72207	11
8	Cal. Health & Safety Code	
9	§ 13159.8	12
10	§ 25201.11	11
11	§ 130251.15	12
12	Colo. Rev. Stat. § 24–72–203(4)	11
13	Nevada Rev. Stat. § 239.010(1)	11
14	South Dakota Codified Laws § 1–27–1	11
15	Utah Code § 63G–2–201(10)(b)	11
16	Rules	
17	Federal Rules of Civil Procedure	
18	12(b)(6)	8, 9, 16, 17
19	12(c)	16
20	Constitutional Provisions	
21	Cal. Const. Article 1	
22	§ 3	14
23	§ 3(b)(1)-(2)	14
24	§ 3, subd. (b)	10
25	Other Authorities	
26	1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.14	
27	(2014)	9
28	4 William F. Patry, Patry on Copyright § 4:81 (2015)	9

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Joseph Teixeira is an Inglewood resident who makes videos commenting on local politics. His videos are sharply critical of the public statements and conduct of Inglewood’s Mayor at City Council meetings. The videos feature short clips from the official recordings of these public proceedings, heavily modified with original text and narration which consists of Mr. Teixeira responding to the Mayor’s remarks and criticizing his political positions. Mr. Teixeira’s “speech concerning public affairs is more than self-expression; it is the essence of self-government,” and it “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

In an unprecedented act of censorship, the City of Inglewood is suing its own citizen for using footage from City Council meetings in his videos commenting on public affairs. The City’s aim is clearly to silence Mr. Teixeira, and to punish him for his harsh criticism of the Mayor. But his speech is constitutionally protected, and fully consistent with our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Through this action, the City is transparently attempting to circumvent these constitutional protections – as well as California’s anti-SLAPP statute² – by turning to copyright as a vehicle to silence Mr. Teixeira’s political speech. But “Copyright law is not designed to stifle critics.” Fisher v. Dees, 794 F.2d 432, 437 (9th Cir.

² The anti-SLAPP statute (C.C.P. § 425.16) provides a means for the early dismissal of claims targeting free speech and petitioning activities that “are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.” Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003). The City’s retaliatory claim falls squarely within the scope of the law, but Inglewood is exploiting a loophole in which the statute does not apply to federal claims brought in federal court. See Hilton v. Hallmark Cards, 599 F.3d 894, 901 (9th Cir. 2010).

1 1986). The City’s ill-fitting attempt to misuse copyright law to suppress the views of
2 a political opponent is entirely meritless for several independent reasons.

3 First, this action is premised on Inglewood’s claim to hold copyrights in its
4 video recordings of City Council meetings, see Cmpl. ¶¶ 14, 19, Cmpl. Ex A; Exs.
5 A-F, but the City is precluded by California law from copyrighting these public
6 records. Section III.A. State law determines if state and local government agencies
7 can secure copyrights in their works, and California’s broad mandate of unrestricted
8 disclosure of public records “overrides a governmental agency’s ability to claim a
9 copyright in its work,” unless state law expressly authorizes such protection. County
10 of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301, 1335 (2009). No state law
11 authorizes Inglewood to copyright its City Council meeting videos. Section III.A.1.
12 To the contrary, its attempt to use copyright to limit public access to these public
13 records is plainly incompatible with state law and public policy. Section III.A.2.

14 Second, the City’s claim is independently barred because Mr. Teixeira’s
15 videos criticizing government officials on issues of public concern are quintessential
16 examples of fair use. See 17 U.S.C. § 107. The doctrine is at its most expansive
17 here, as the City’s claim targets a citizen’s use of public records to criticize his
18 government, which is core First Amendment speech. Section III.B.1. As Mr.
19 Teixeira’s videos are incorporated by reference into the pleadings, and it is obvious
20 from reviewing these works that fair use applies as a matter of law, the issue of fair
21 use is properly decided on a motion to dismiss. Section III.B.2.

22 It is readily apparent that Mr. Teixeira uses the City Council meeting video
23 clips in a highly transformative manner – modifying the original footage with his
24 own on-screen text and narration and juxtaposing the clips with other materials – to
25 criticize Inglewood politicians for their conduct and statements at these public
26 meetings. Section III.B.3. Copyright law encourages such transformative use. See
27 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). See also Hustler
28 Magazine Inc. v. Moral Majority Inc., 796 F.2d 1148, 1153 (9th Cir. 1986) (fair use

1 protects “political comment”); Northland Family Planning Clinic, Inc. v. Center for
 2 Bio-Ethical Reform, 868 F. Supp. 2d 962, 970-79 (C.D. Cal. 2012) (analogous
 3 political commentary videos protected by fair use).

4 Moreover, California law requires Inglewood to make its public meeting
 5 videos available for viewing free of charge, and precludes it from charging more than
 6 the “direct costs of duplication” for copies. Cal. Gov’t Code §§ 6253(b), 54953.5(b).
 7 Thus there can be no commercial market for the City’s meeting videos as a matter of
 8 law, and even if there could be, Mr. Teixeira’s sharply critical videos – with titles
 9 like “Inglewood Mayor James Butts Lies, Hiding Dangerous Traffic Problems At
 10 The Forum” – scarcely serve as a market substitute for the City’s unvarnished gavel-
 11 to-gavel recordings of its Council meetings. Section III.B.3. The City also could
 12 hold no more than a “thin” copyright at best in its Council meeting videos, and Mr.
 13 Teixeira has used no more footage than is reasonably necessary in light of his
 14 obvious purpose of political critique. Id. Consequently, all of the statutory factors
 15 unambiguously favor a finding of fair use in Mr. Teixeira’s favor.

16 Because the City has failed to state a claim for each of these reasons, and any
 17 amendment would be futile in light of the fundamental legal deficiencies, Mr.
 18 Teixeira respectfully requests that the Court dismiss the Complaint with prejudice.

19 II. FACTUAL BACKGROUND

20 A. The City Of Inglewood’s Complaint.

21 The City of Inglewood “is a municipality incorporated under the laws of the
 22 State of California.” Cmpl. ¶ 9. Mr. Teixeira is an individual residing in the City of
 23 Inglewood. Id. ¶ 11. He is actively engaged in public affairs, regularly attends and
 24 speaks at City Council meetings, submits public records requests for information
 25 about local government, and creates documentary-style videos about Inglewood
 26 politics and municipal issues, which he posts to a YouTube page under the name,
 27 “Dehol Truth.” Cmpl. ¶¶ 11, 19; Declaration of Joseph Teixeira at ¶¶ 2-10; Exs. A-
 28 F. The City alleges that Mr. Teixeira has infringed its copyrights by posting to

1 YouTube six videos, which use portions of the City’s recordings of five Inglewood
 2 City Council meetings, publicly held on the following dates: 7/20/2010, 5/22/2012,
 3 4/11/2013, 4/23/2013, and 2/22/2014. Cmpl’t. ¶¶ 2, 19. The City alleges that it has
 4 submitted applications for copyright registrations in its video recordings of two of
 5 these Council meetings, 5/22/2012 and 4/23/2013. Id. ¶¶ 14, 19, Cmpl’t. Ex. A. The
 6 City does not allege that it has registered or attempted to register copyrights in its
 7 video recordings of the Council meetings of 7/20/2010, 4/11/2013, or 2/11/2014. Id.³

8 **B. The City Of Inglewood’s Recordings Of Its City Council Meetings.**

9 The underlying “works” that form the basis of this action are Inglewood’s
 10 video recordings of several of its City Council meetings. See Cmpl’t. ¶¶ 2, 19, Ex. A.

11 • 7/20/2010 City Council Meeting: The City’s recording of this Council
 12 meeting is four hours, 40 minutes, 55 seconds long. See Teixeira Decl. ¶ 5, Ex. C. It
 13 opens with approximately one minute, 20 seconds of photographs from community
 14 events, and ends with various photographs being displayed for approximately two
 15 minutes, none of which is included in any of Mr. Teixeira’s videos. Id.; Exs. A-1-A-
 16 6. The rest of the video is an unadorned recording of the meeting. See Ex. C.

17 • 5/22/2012 City Council Meeting: The City’s recording of this meeting is
 18 three hours, four minutes, 32 seconds long. See Teixeira Decl. ¶ 6, Ex. D. It opens
 19 with approximately three minutes, 30 seconds of photographs from community
 20 events, none of which is included in any of Mr. Teixeira’s videos. Id.; Exs. A-1-A-6.
 21 The rest of the video is an unadorned recording of the meeting. See Ex. D.

22 • 4/23/2013 City Council Meeting: The City’s recording of this Council
 23 meeting is two hours, 42 minutes, 27 seconds long. See Laidman Decl. ¶ 2, Ex. F. It
 24 opens with a photograph from an event that is on-screen for approximately seven
 25 seconds, and ends with various photographs being displayed for approximately one
 26

27 ³ The City’s pursuit of this action despite its failure to properly register the
 28 purportedly copyrighted works underscores the true nature of this litigation, which is
 aimed at suppressing political speech. See Concurrently Filed Motion to Strike.

1 minute, 30 seconds, none of which is included in any of Mr. Teixeira's videos. Id.;
 2 Exs. A-1-A-6. The rest of the video is an unadorned recording of the meeting. Ex. F.

3 • 2/11/2014 City Council Meeting: The City's recording of this Council
 4 meeting is two hours, 37 minutes, 57 seconds long. See Teixeira Decl. ¶ 7, Ex. E. It
 5 opens with a photograph from an event that is on-screen for approximately five
 6 seconds, and ends with various photographs being displayed for approximately one
 7 minute, 30 seconds, none of which is included in any of Mr. Teixeira's videos. Id.;
 8 Exs. A-1-A-6. The rest of the video is an unadorned recording of the meeting. Ex. E.

9 **C. Mr. Teixeira's Political Commentary Videos.**

10 The Complaint identifies six allegedly infringing videos. Cmpl. ¶ 19. As
 11 detailed below, each is a documentary-style commentary on public affairs that uses
 12 heavily modified clips from recordings of Council meetings to support Mr. Teixeira's
 13 criticism of Inglewood's Mayor's comments and conduct at the public meetings.

14 • **Video One:** <https://www.youtube.com/watch?v=UyCqRiZXRH8>

15 Video One is titled "James Butts Accuses The City Clerk Of Election Fraud,"
 16 or "James T. Butts Jr. Accuses City Clerk Yvonne Horton of Election Fraud!"
 17 Teixeira Decl. ¶ 3(a); Exs. A-1 (video); B-1 (screenshot). The 14 minute, 56 second-
 18 long video criticizes the conduct of Mr. Butts, then a mayoral candidate, at the
 19 7/20/2010 meeting, at which the body considered a report from the City Clerk about
 20 whether Mr. Butts should be removed from the ballot because of questions about his
 21 residency. Ex. A-1. Video One uses clips of Mr. Butts' own public comments at the
 22 meeting to evaluate and criticize the remarks that he made about the City Clerk and
 23 her investigation, and to illustrate Mr. Butts' alleged violations of City Council rules
 24 at the meeting, as described in original text and voiceover narration superimposed
 25 onto the short meeting clips that are interspersed throughout the video. Id.

26 • **Video Two:** <https://www.youtube.com/watch?v=ZruE0a1UF8g>

27 Video Two is titled "James T. Butts Jr. Misleads the Public About His Voter
 28 Registration." Teixeira Decl. ¶ 3(b); Ex. A-2 (video); B-2 (screenshot). The 14-

1 minute, 53-second video follows up on the issues presented in Video One, asking,
2 “So, were James Butts’ allegations against the City Clerk’s Office fair and accurate
3 or even relevant? Let’s look at each one.” Id. at 02:12-02:19. The video examines
4 each of Mayor Butts’ allegations in detail, using short clips from his comments at the
5 7/20/2010 meeting juxtaposed with original text and narration and images of other
6 public records to evaluate his claims. Id. at 02:20-14:18. It concludes with harsh
7 criticism of Mr. Butts’ conduct and fitness to serve as mayor. Id. at 14:19-14:49.

8 • **Video Three:** <https://www.youtube.com/watch?v=gUUZdTNe7CA>

9 Video Three is titled “Lying Politicians,” or “James T Butts Jr Alibi or
10 apology.” Teixeira Decl. ¶ 3(c); Ex. A-3 (video); B-3 (screenshot). The three
11 minute, 43-second video opens with on-screen text stating that one can tell when
12 politicians are trying to hide something by their body language, and then shows
13 footage from the 5/22/2012 Council meeting, with the following text superimposed
14 on-screen: “And this was true on May 22, 2012, when Inglewood’s crooked Mayor,
15 James T. Butts Jr., tried to set up an alibi for his repeatedly helping violate State law
16 to hide evidence of serious Police Misconduct.” Ex. A-1 at 00:06-00:32. The video
17 annotates Mayor Butts’ remarks about the City’s response to Mr. Teixeira’s public
18 records request for information about an incident of alleged police misconduct,
19 constantly cutting in with original text commenting on the substance of the Mayor’s
20 speech as well as his body language (per the video’s thesis statement about
21 politicians giving visual tells when trying to hide something). Id. at 00:32-03:13.

22 • **Video Four:** <https://www.youtube.com/watch?v=-5VQZrW7BVY>

23 Video Four is titled “James T. Butts Jr. exploits the Murder of Fredrick Martin
24 for his own political benefit.” Teixeira Decl. ¶ 3(d); Ex. A-4 (video); B-4
25 (screenshot). The 15-minute video contrasts statements Mayor Butts made at a 2012
26 press conference, in which he assured the public that Mr. Martin’s killers would be
27 caught, and appeared to endorse a “series of reward offerings” for that purpose, with
28 the Mayor’s comments at a subsequent Council meeting casting doubt on whether

1 such rewards are effective and whether such crimes are likely to be solved. Ex. A-4.
 2 The meeting clips used in this video are very short and heavily modified, such that no
 3 more than three seconds ever goes by without original on-screen annotation. Id. at
 4 05:59-14:57. Through such observations, Mr. Teixeira accuses Mayor Butts of using
 5 the murder of Mr. Martin to grandstand for his own political gain. Id.

6 • **Video Five:** <https://www.youtube.com/watch?v=MZKTiutCjdI>

7 Video Five is titled “Mayor James Butts Lies About Being a Hypocrite.”
 8 Teixeira Decl. ¶ 3(e); Ex. A-5 (video); B-5 (screenshot). The 11-minute, 38-second
 9 video revisits the controversy regarding Mayor Butts’ residency at the time of his
 10 election that was also addressed in Video One and Video Two, this time focusing on
 11 remarks that the Mayor made about the issue during the 4/23/2013 Council meeting.
 12 Ex. A-5. It presents more than a dozen short clips of the Mayor addressing criticism
 13 about his conduct in connection with the election, and then responds to each of these
 14 points through original narration, images of public records, superimposed text, and
 15 footage of from other official proceedings. Id. It concludes with an image of the
 16 Mayor giving testimony at the 7/20/2010 meeting, with on-screen text and narration
 17 saying, “James Butts...hypocrite.” Id. at 11:33-11:38.

18 • **Video Six:** <https://www.youtube.com/watch?v=a1p3l0OmhGM>

19 Video Six is titled “Inglewood Mayor James Butts Lies, Hiding Dangerous
 20 Traffic Problems At The Forum,” or “Mayor James T Butts Jr Lies, Hiding
 21 Dangerous Traffic Problems After Forum Event!” Teixeira Decl. ¶ 3(f); Ex. A-6
 22 (video); B-6 (screenshot). Most of the 15-minute video consists of original footage
 23 shot by Mr. Teixeira documenting traffic problems near the Forum, a well-known
 24 Inglewood event venue. Ex. A-6. The video juxtaposes footage of drivers making
 25 illegal turns, nearly getting into accidents, and fighting with traffic officers as local
 26 residents complain of major detours, with short clips of Mayor Butts positively
 27 characterizing the traffic situation in his remarks at the 2/11/2014 Council meeting.
 28 Id. In addition to the interspersed footage that is intended to contradict the Mayor’s

1 comments by example, the video also criticizes the Mayor's remarks directly with
 2 on-screen text superimposed over the meeting footage, and narration accusing the
 3 Mayor of lying and trying to hide the traffic problems associated with the Forum. Id.

4 **III. PLAINTIFF'S COPYRIGHT CLAIM FAILS AS A MATTER OF LAW**

5 A motion under Rule 12(b)(6) tests the legal sufficiency of the complaint.
 6 Dismissal is warranted if no relief could be granted under any set of facts that could
 7 be proved consistent with the allegations. See Bell Atlantic Corp. v. Twombly, 550
 8 U.S. 544, 563 (2007). In making this determination, the court is not required to
 9 construe "conclusory allegations of law and unwarranted inferences" in favor of the
 10 nonmoving party. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

11 When ruling on a motion to dismiss, a court may consider materials referred to
 12 in the complaint that form the basis of the claims, but that are not physically attached
 13 to the pleading. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322
 14 (2007) (court deciding Rule 12(b)(6) motion may consider "documents incorporated
 15 into the complaint by reference"). See also Knievel v. ESPN, 393 F.3d 1068, 1076-
 16 77 (9th Cir. 2005) (12(b)(6) motion properly granted by considering web pages
 17 referred to in the complaint and attached to defendant's motion).

18 Under the incorporation-by-reference doctrine, this Court may consider the
 19 content of the allegedly infringing videos and the underlying Council meeting videos,
 20 as they are referred to in the Complaint at Paragraph 19, and their content forms the
 21 basis for the City's claim.⁴ See Zella v. E.W. Scripps, 529 F. Supp. 2d 1124, 1139
 22 (C.D. Cal. 2007) (dismissing copyright infringement claim for failure to state a claim
 23 based on the court's review of episodes of a television show incorporated into the
 24

25 ⁴ A DVD with copies of the allegedly infringing videos is being concurrently
 26 submitted as Exhibit A. See Notice of Lodging of DVDs, Ex. A; Teixeira Decl. ¶ 3.
 27 Screenshots of the YouTube pages displaying these videos, also referenced in the
 28 Complaint at Paragraph 19, are attached to the Teixeira Declaration as Exhibit B.
 DVDs with copies of four of the underlying City Council meeting videos are being
 concurrently submitted as Exhibits C-F. Id. ¶¶ 5-7; Laidman Decl. ¶ 2; Notice of
Lodging. See also Mr. Teixeira's Concurrently Filed Request For Judicial Notice.

1 pleadings by reference); Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp.
 2 2d 962, 966 (C.D. Cal. 2007) (granting Rule 12(b)(6) motion by considering content
 3 of television program referenced in, but not attached to, plaintiff’s complaint for
 4 copyright infringement); see also Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1121-
 5 22 (N.D. Cal. 2002) (considering content of television programs incorporated by
 6 reference into complaint in dismissing claims under Rule 12(b)(6)).

7 As set forth below, Plaintiff’s claim against Mr. Teixeira is legally deficient
 8 and should be dismissed with prejudice for several independent reasons.

9 **A. The City Has No Copyright Interest In Its Public Meeting Videos.**

10 As a threshold matter, Inglewood’s claim fails because its video recordings of
 11 its City Council meetings are not subject to copyright protection under California
 12 law. While the Copyright Act precludes the federal government from copyrighting
 13 its works, it is silent as to the works of state and local government. 17 U.S.C. § 105.
 14 Consequently, “[s]tate law ‘determines whether [a public official] may claim a
 15 copyright in his office’s creations,’” and “[e]ach state may determine whether the
 16 works of its government entities may be copyrighted.” County of Santa Clara v.
 17 Superior Court, 170 Cal. App. 4th 1301, 1331 (2009) (quoting Microdecisions, Inc.
 18 v. Skinner, 889 So.2d 871, 875-76 (2004)). See also Building Officials & Code
 19 Adm. v. Code Technology, Inc., 628 F.2d 730, 735-36 (1st Cir. 1980) (“[w]orks of
 20 state governments are therefore left available for copyright protection by the state or
 21 the individual author, depending on state law and policy, and subject to exceptions
 22 dictated by public policy...”) (emphasis added; quotation omitted).

23 As explained by one copyright treatise, “[s]tates may, of course, refuse to
 24 permit assertion of copyright in state-created works; copyright is never imposed.” 4
 25 William F. Patry, Patry on Copyright § 4:81 (2015). See also 1 Melville B. Nimmer
 26 & David Nimmer, Nimmer on Copyright § 5.14 (2014) (whether works of state and
 27 local government can be copyrighted is determined by “[t]urning to state law itself”).
 28

1 Here, California law precludes the City from asserting copyright protection to restrict
2 the use of its video recordings of City Council meetings.

3 **1. The City Cannot Copyright Its Public Meeting Videos Because**
4 **California Law Does Not Specifically Authorize Such Protection.**

5 The Complaint identifies no authority – and Mr. Teixeira is aware of none –
6 that authorizes the City to assert a copyright interest in what it concedes are public
7 records documenting public meetings by its legislative body. The only published
8 authority to address this issue squarely held that California governmental agencies
9 cannot assert copyright protection to restrict the use of such public records unless
10 state law provides “an affirmative grant of authority to obtain and hold copyrights.”
11 County of Santa Clara, 170 Cal. App. 4th at 1333 (original emphasis).

12 In County of Santa Clara, after the trial court ordered the disclosure of a
13 geographic information system (“GIS”) “basemap” under the California Public
14 Records Act (“CPRA”), the County argued that even if disclosure was required, it
15 held a copyright interest that allowed it to restrict the requester’s use of the basemap
16 through a licensing agreement. Id. at 1309. The Court of Appeal rejected this
17 argument and concluded that the County had no express authority for copyrighting
18 the basemap, and thus “unrestricted disclosure [was] required.” Id. at 1335.

19 The court recognized at the outset that a public agency’s assertion of copyright
20 protection restricts the public’s access to government information, and under the state
21 Constitution, “restrictions on disclosure are narrowly construed.” Id. at 1332 (citing
22 Cal. Const., art. I, § 3, subd. (b)). California law does not contain an exception
23 permitting agencies to limit the disclosure or dissemination of public records based
24 on copyright law, and only a single provision of the CPRA addresses copyright at all.
25 Id. at 1332. That provision, Cal. Gov’t Code § 6254.9, “acknowledge[s] copyright
26 protection for software only,” and “recognizes the availability of copyright protection
27
28

1 for software in a proper case,” but “provides no statutory authority for asserting any
 2 other copyright interest.” Id. at 1334 (emphasis added).⁵

3 The court also emphasized two distinctive features of the CPRA: (1) it “does
 4 not allow limitations on access to a public record based upon the purpose for which
 5 the record is being requested”; and (2) agencies are generally limited to charging no
 6 more than the “direct costs of duplication” when providing copies of public records.
 7 Id. at 1335 (citing Cal. Gov’t Code §§ 6253(b); 6257.5). The court favorably cited a
 8 Florida appellate decision which held that a similar provision in Florida’s public
 9 records law “overrides a governmental agency’s ability to claim a copyright in its
 10 work unless the legislature has expressly authorized a public records exemption.” Id.
 11 at 1335 (quoting Microdecisions, 889 So.2d at 876). “The same persuasive reasoning
 12 applies to the interplay between copyright law and California’s public records law,
 13 with the result that unrestricted disclosure is required.” Id. (emphasis added).

14 The court in County of Santa Clara bolstered its reasoning by noting that the
 15 “Legislature knows how to explicitly authorize public bodies to secure copyrights
 16 when it means to do so.” Id. at 1333. It cited examples of California statutes that
 17 expressly authorize certain agencies to secure copyrights in particular enumerated
 18 works, including Education Code §§ 1044, 35170, 72207 (authorizing county boards
 19 of education, school district boards, and community college district boards to secure
 20 copyrights), Health & Safety Code § 25201.11 (authorizing Department of Toxic
 21 Substances Control to secure copyrights in certain works, including “video
 22

23
 24 ⁵ In contrast to California’s public records law, which contains no exception
 25 for copyright, the public records laws of several other states expressly authorize
 26 agencies to obtain and hold copyrights. See, e.g., Colo. Rev. Stat. § 24-72-203(4)
 27 (Colorado “political subdivisions are hereby specifically authorized to obtain and
 28 enforce” copyrights); Nevada Rev. Stat. § 239.010(1) (Nevada public records law
 expressly “does not supersede or in any manner affect the federal laws governing
 copyrights”); South Dakota Codified Laws § 1-27-1 (copies of public records
 available “unless federal copyright law otherwise provides”); Utah Code § 63G-2-
 201(10)(b) (Utah public records law provision specifically reserving “rights or
 protections granted to the governmental entity under federal copyright ... law”).

1 recordings”), and Health & Safety Code § 13159.8 (State Fire Marshal authorized to
2 copyright promotional examinations). Id.⁶

3 That the Legislature has explicitly granted certain state and local agencies the
4 authority to secure copyrights in certain items necessarily leads to the conclusion that
5 the default rule is that California public agencies cannot obtain and hold copyrights
6 without such express authorization. Id.; See also Bruns v. E-Commerce Exchange,
7 Inc., 51 Cal. 4th 717, 727 (2011) (“failure to include a requirement in one statute is
8 significant when the legislative body has included that requirement in other
9 statutes”). If public agencies such as the City of Inglewood could assert copyright
10 protection in their public records absent such authority then all of these statutes
11 would be redundant. See United States v. Vidal, 504 F.3d 1072, 1081 (9th Cir. 2007)
12 (en banc) (“legislative enactments should not be construed to render their provisions
13 mere surplusage”; interpreting California statute accordingly) (quotation omitted).

14 Applying these principles, the court in County of Santa Clara held that because
15 the County could not identify any statute specifically authorizing it to copyright the
16 GIS basemap at issue or to condition its release on a licensing agreement, it “must be
17 disclosed as provided in the CPRA, without any such conditions or limitations.” Id.
18 at 1335-36 (emphasis added). Likewise, here the City of Inglewood has not
19 identified any statute authorizing it to secure a copyright in its City Council meeting
20 videos – because none exists – and therefore California law “overrides [its] ability to
21 claim a copyright in its work,” and “unrestricted disclosure is required.” Id.

22 **2. The City’s Assertion Of Copyright In Its Public Meeting Videos Is**
23 **Incompatible With Well-Established State Law And Public Policy.**

24 Inglewood’s argument for copyright protection is actually far weaker than the
25 one at issue in County of Santa Clara, in which the County sought to copyright GIS
26

27 _____
28 ⁶ See also Health & Safety Code § 130251.15 (California Health and Human
Services Agency authorized to copyright certain documents).

1 basemaps. Here, Inglewood is asserting copyright to block its citizen's use of City
 2 Council meeting videos to comment on governmental affairs. While the Brown Act
 3 and CPRA do not explicitly address the issue of copyright (except as noted above),
 4 they embody a state public policy that strongly favors the broadest possible access to
 5 public records – especially public records like City Council meeting videos that go to
 6 the very heart of democratic self-governance – and they are plainly incompatible
 7 with the City's attempted assertion of copyright protection to limit public access.

8 The City of Inglewood conducts and records its Council meetings pursuant to
 9 the Brown Act, which mandates that “[a]ny audio or video recording of an open and
 10 public meeting made for whatever purpose by or at the direction of the local agency
 11 shall be subject to inspection pursuant to the California Public Records Act.” Cal.
 12 Gov't Code § 54953.5(b). It also requires that members of the public be permitted to
 13 view public meeting videos “without charge on equipment made available by the
 14 local agency.” *Id.* As public meeting videos are public records subject to disclosure
 15 under the CPRA, public agencies such as the City are restricted from charging
 16 members of the public who request copies of these videos more than the “direct costs
 17 of duplication.” Cal. Gov't Code § 6253(b). See also North County Parents Org. v.
 18 Dep't of Education, 23 Cal. App. 4th 144, 147 (1994) (under the CPRA “the cost
 19 chargeable ... for furnishing” copies of public records “is the cost of copying them”;
 20 the Legislature specified “that the sole charge should be that for duplication”).⁷

21 These provisions are core features of a constitutional and statutory scheme that
 22 “maximizes the public's access to information.” Sierra Club v. Superior Court, 57
 23 Cal. 4th 157, 175 (2013). With respect to the CPRA, “[m]aximum disclosure of the

24
 25 ⁷ As the City is barred from making any money from providing copies of these
 26 videos, it has no need for the commercial incentive to engage in creative activity that
 27 copyright law is designed to provide. See New Era Publications International, ApS
 28 v. Henry Holt & Co., 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988) (“[i]t is important to
 recognize that the justification of the copyright law is the protection of the
 commercial interest of the artist/author. It is not to coddle artistic vanity or to protect
 secrecy, but to stimulate creation by protecting its rewards.”) (original emphasis).

1 conduct of governmental operations was to be promoted by the Act.” CBS, Inc. v.
 2 Block, 42 Cal. 3d 646, 651-52 (1986). Meanwhile, the Brown Act was intended “to
 3 facilitate public participation in all phases of local government decisionmaking,” and
 4 must be “construed liberally in favor of openness.” International Longshoremen’s &
 5 Warehousemen’s Union v. L.A. Export Terminal, Inc., 69 Cal. App. 4th 287, 293-94
 6 (1999). The Brown Act opens with a sweeping declaration of the law’s intent:

7 [T]he public commissions, boards and councils and the other public agencies
 8 in this State exist to aid in the conduct of the people’s business ... The people
 9 of this State do not yield their sovereignty to the agencies which serve them ...
 10 The people insist on remaining informed so that they may retain control over
 11 the instruments they have created.

12 Cal. Gov’t Code § 54950 (emphasis added). Voters enshrined the right of access to
 13 public meetings and records in the state Constitution by approving Proposition 59 in
 14 2004. See Sierra Club, 57 Cal. 4th at 166 (citing Cal. Const. Art. 1, § 3(b)(1)-(2)).⁸

15 Because the California Constitution, Brown Act, and CPRA maximize access
 16 to public records so that citizens can scrutinize the actions of the governmental
 17 agencies that they control, these constitutional and statutory requirements cannot be
 18 reconciled with the City of Inglewood’s unprecedented effort to limit the public’s
 19 access to records of City Council meetings through copyright.⁹

21 ⁸ Tellingly, when the state Constitution was amended to incorporate the right
 22 of access it expressly included exceptions for the right of privacy and the pre-existing
 23 enumerated CPRA exemptions, but not for copyright. See Cal. Const. Art. 1, § 3.

24 ⁹ The City’s attempt to copyright video recordings of the official proceedings
 25 of its legislative body also runs afoul of more than a century of law making clear that
 26 “judicial opinions and statutes are in the public domain and are not subject to
 27 copyright.” Building Officials, 628 F.2d at 734. See also Wheaton v. Peters, 33 U.S.
 28 (8 Pet.) 591 (1834); Banks v. Manchester, 128 U.S. 244 (1888). This line of
 authority recognizes that “citizens are the authors of the law, and therefore its
 owners, regardless of who actually drafts the provisions, because the law derives its
 authority from the consent of the public, expressed through the democratic process.”
Building Officials, 628 F.2d at 734 (quotation omitted). The City Council meeting
 videos at issue here are public records memorializing this “democratic process.” Id.

1 **B. Mr. Teixeira’s Use Of Clips From City Council Meetings In His Political**
 2 **Commentaries Is Independently Protected By The Fair Use Doctrine.**

3 Even assuming for the sake of argument that the City could claim a copyright
 4 interest in its recordings of public meetings, its claim is independently barred by the
 5 fair use doctrine. See 17 U.S.C. § 107 (Copyright Act provides that “the fair use of a
 6 copyrighted work ... for purposes such as criticism, comment, [or] news reporting ...
 7 is not an infringement of copyright”). Fair use balances “the interests of authors ...
 8 in the control and exploitation of their [works] ... on the one hand, and society’s
 9 competing interest in the free flow of ideas, information, and commerce on the other
 10 hand[.]” Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

11 **1. Fair Use Is Applied Expansively Where, As Here, A Claim**
 12 **Implicates Constitutionally Protected Political Speech.**

13 First Amendment protections are “embodied” in the fair use doctrine. Golan v.
 14 Holder, 132 S. Ct. 873, 890 (2012). The ““considerable latitude for scholarship and
 15 comment’ secured by the fair use doctrine protects the core value of free expression
 16 from excessive litigation and undue restriction.” Bouchat v. Baltimore Ravens Ltd.
 17 Partnership, 737 F.3d 932, 944 (4th Cir. 2013) (quoting Eldred v. Ashcroft, 537 U.S.
 18 186, 220 (2003)). The “breadth of fair use varies and where vital First Amendment
 19 concerns are implicated ... that breadth expands and accords greater protection to
 20 what might otherwise constitute an infringement.” Wojnarowicz v. American Family
 21 Association, 745 F. Supp. 130, 147 (S.D.N.Y. 1990).

22 Here, the City’s copyright claim directly targets Mr. Teixeira’s exercise of
 23 political speech that lies at the very heart of the First Amendment. As the Supreme
 24 Court has explained:

25 Whatever differences may exist about interpretations of the First Amendment,
 26 there is practically universal agreement that a major purpose of that
 27 Amendment was to protect the free discussion of governmental affairs. This
 28 of course includes discussions of candidates, structures and forms of

1 government, the manner in which government is operated or should be
 2 operated, and all such matters relating to political processes.

3 Mills v. Alabama, 384 U.S. 214, 218-19 (1966). As the City’s claim targets Mr.
 4 Teixeira’s use of public records of City Council meetings to discuss governmental
 5 affairs and criticize elected officials, “vital First Amendment concerns are
 6 implicated,” requiring the broadest possible application of the fair use doctrine.
 7 Wojnarowicz, 745 F. Supp. at 147.

8 **2. Fair Use May Be Decided On A Motion To Dismiss.**

9 The Ninth Circuit has held that an “assertion of fair use may be considered on
 10 a motion to dismiss,” where it does not require the resolution of any disputed issues
 11 of material fact. Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 530 (9th Cir.
 12 2008).¹⁰ Accordingly, courts routinely dismiss copyright claims at the pleading stage
 13 where, as here, they can find fair use simply by reviewing the allegedly infringing
 14 works, which are incorporated by reference into the complaint. In Burnett, for
 15 example, the court granted a Rule 12(b)(6) motion to dismiss comedienne Carol
 16 Burnett’s copyright claim stemming from a “crude” parody of her Charwoman
 17 character on the television series “Family Guy.” 491 F. Supp. 2d at 971-972. After
 18 reviewing the episode in question, the court determined that the use of Burnett’s
 19 work was a fair use as a matter of law and dismissed her claim. Id. at 972.

20 Similarly, in Savage v. Council on American-Islamic Relations, 2008 U.S.
 21 Dist. LEXIS 60545; 87 U.S.P.Q.2D 1730 (N.D. Cal. 2008), the court held that a
 22 civil-liberties organization’s posting of a segment from the plaintiff’s radio show on
 23 its website in order to criticize his anti-Muslim views and to encourage advertisers to
 24 boycott his program was protected as a fair use, and granted the defendant’s Rule

25
 26 ¹⁰ See also Hustler Magazine Inc. v. Moral Majority Inc., 796 F.2d 1148, 1151
 27 (9th Cir. 1986) (“[i]f there are no genuine issues of material fact, or if, even after
 28 resolving all issues in favor of the opposing party, a reasonable trier of fact can reach
 only one conclusion, a court may conclude as a matter of law whether the challenged
 use qualifies as a fair use of the copyrighted work”).

1 12(c) motion. Id. at *25. See also Sedgwick Claims Management Servs. v.
2 Delsman, 2009 U.S. Dist. LEXIS 61825, at *20-21 (N.D. Cal. July 17, 2009) (finding
3 as matter of law that defendant’s use of two photographs of “WANTED” posters on
4 blog as part of a critical commentary was protected fair use; granting motion to
5 dismiss copyright-infringement claim); Righthaven v. Realty One Group, 2010 WL
6 4115413, *3 (D. Nev. Oct. 19, 2010) (granting defendants’ Rule 12(b)(6) motion to
7 dismiss copyright action based on fair use defense).

8 In Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012),
9 the Seventh Circuit affirmed the dismissal at the pleading stage of a copyright claim
10 based on a finding that it was an “obvious case of fair use.” Id. at 692. Because the
11 allegedly infringing video was incorporated by reference into the pleadings, the court
12 could “decide the merits of the claim without discovery or a trial” simply by viewing
13 the works themselves. Id. See also Cariou v. Prince, 714 F.3d 694, 707 (2d Cir.
14 2013) (explaining that the court in Brownmark “rejected the appellant’s argument
15 that copyright infringement claims cannot be disposed of at the motion-to-dismiss
16 stage”; holding that 25 works of art were “transformative as a matter of law” and
17 protected by fair use based on court’s review of the works themselves). Similarly,
18 this is also an “obvious case of fair use,” which the Court can decide by reviewing
19 the videos, the Complaint, and other materials incorporated by reference therein,
20 without having to resolve any disputed factual issues. Brownmark, 682 F.3d at 692.

21 **3. Each Statutory Factor Strongly Favors Fair Use.**

22 Congress identified four non-exclusive factors to consider in determining
23 whether a particular use of a copyrighted work is a fair use: (1) the purpose and
24 character of the use, including whether such use is of a commercial nature or is for
25 nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the
26 amount and substantiality of the portion used in relation to the copyrighted work as a
27 whole; and (4) the effect of the use upon the potential market for or value of the
28 copyrighted work. 17 U.S.C. § 107(1)-(4). These factors must be considered

1 together, and none may be “treated in isolation.” Campbell, 510 U.S. at 578. As no
 2 single factor is dispositive, “the moving party is not required to prevail on every
 3 factor” to establish fair use, Norse v. Henry Holt and Co., 847 F. Supp. 142, 145
 4 (N.D. Cal. 1994), and “need not ‘shut out’ her opponent on the four factor tally to
 5 prevail.” Wright v. Warner Books, 953 F. 2d 731, 740 (2d Cir. 1991). Here, it is
 6 clear from the videos themselves that each factor strongly favors fair use.

7 **a. The Purpose And Character Of The Use**

8 Courts have recognized that “criticism of, and commentary on, [a] plaintiff’s
 9 politics ... is precisely what the Copyright Act envisions as a paradigmatic fair use.”
 10 Dhillon v. Does 1-10, 2014 WL 722592, at *5 (N.D. Cal. Feb. 25, 2014). In Hustler,
 11 after the magazine published a parody ad describing the Rev. Jerry Falwell
 12 committing incest with his mother in an outhouse, Falwell displayed the piece on his
 13 TV show, and the political lobbying group Moral Majority used it as a fundraising
 14 mailer. 796 F.2d 1148 at 1149-50. Hustler sued them for copyright infringement,
 15 but the District Court held that the claim was barred by the fair use doctrine, and the
 16 Ninth Circuit affirmed. Id. at 1149. The court acknowledged that the defendants
 17 used the Hustler piece in its entirety to solicit donations, and the use of the parody ad
 18 on Falwell’s TV show “was also motivated by financial purposes.” Id. at 1152.
 19 Nonetheless, the court held that this factor favored a finding of fair use because the
 20 defendants “also used the copies to rebut the personal attack upon Falwell and make
 21 a political comment about pornography.” Id. at 1153.¹¹

22
 23 ¹¹ If this action proceeds, Mr. Teixeira will show that his political commentary
 24 videos are entirely non-commercial. Nonetheless, for purposes of this Motion, the
 25 Hustler case makes clear that this factor favors fair use even taking as true the City’s
 26 completely baseless assertion that he is somehow using City Council meeting clips to
 27 “generate income.” Cmpl. ¶ 17. See also Campbell, 510 U.S. at 579 (“the more
 28 transformative the new work, the less will be the significance of other factors, like
 commercialism, that may weigh against a finding of fair use”); Consumers Union of
 United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983)
 (“[a]lthough the purpose of [the] use undoubtedly is commercial, this fact alone does
 not defeat a fair use defense. Almost all newspapers, books and magazines are
 published by commercial enterprises that seek a profit.”) (citation omitted).

1 Likewise, in National Rifle Ass'n of America v. Handgun Control Federation
 2 of Ohio, 15 F.3d 559 (6th Cir. 1994), the Sixth Circuit held that fair use protected a
 3 gun control group's use of part of an NRA newsletter in its own publication that
 4 supported legislation that the NRA opposed. Id. at 560. The court reasoned that the
 5 "document was used primarily in exercising [the defendant's] First Amendment
 6 speech rights to comment on public issues and to petition the government regarding
 7 legislation," and the "scope of the fair use doctrine is wider when the use relates to
 8 issues of public concern." Id. at 562. And in Mattel Inc. v. Walking Mt. Prods., 353
 9 F.3d 792, 802 (9th Cir. 2003), the Ninth Circuit held that the first fair use factor
 10 "weighs heavily in favor of" an artist who used the plaintiff's copyrighted Barbie
 11 dolls in photographs that expressed "social criticism" of "Barbie's influence on
 12 gender roles and the position of women in society." Id. at 802.¹²

13 As in these cases, the first factor weighs heavily in favor of fair use here
 14 because Mr. Teixeira is engaged in core First Amendment activity by using portions
 15 of the City Council meeting videos to criticize City officials and comment on matters
 16 of public interest. See Exs. A-1-A-6; Section III.B.1, supra. In particular:

17 • Video One, Video Two, and Video Five concern Mayor Butts' qualifications
 18 for office, focusing on a controversy surrounding his residency at the time of the
 19 2010 mayoral election. See Exs. A-1, A-2, A-5. Each video uses clips from City

20
 21
 22 ¹² See also Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986)
 23 (fair use protected anti-abortion author's use of portions of book "to make the case
 24 against abortion"); Kienitz v. Sconnie Nation LLC, 965 F. Supp. 2d 1042, 1050
 25 (W.D. Wis. 2013) (use of mayor's photo on t-shirt for "political critique"); Caner v.
 26 Autry, 16 F. Supp. 3d 689, 710 (W.D. Va. 2014) (using video "for the transformative
 27 purpose of criticizing Plaintiff"); Dhillon, 2014 WL 722592, at *5 (use of photo on
 28 website "in connection with an article criticizing the plaintiff's political views");
Wojnarowicz, 745 F. Supp. at 147 (use of plaintiff's artwork in a pamphlet designed
 "to stop public funding by the NEA of art works such as plaintiff's"); Sedgwick,
 2009 U.S. Dist. LEXIS 61825, at *15 (use of plaintiff's photographs as "a vehicle for
 publicizing and criticizing [plaintiff's] alleged business practices"); Savage, 2008
 U.S. Dist. LEXIS 60545, at *15-16 (use of audio of plaintiff's radio show "in order
 to criticize and comment on plaintiff's statements and views").

1 Council meetings to criticize Mayor Butts' statements and conduct in connection
2 with this political controversy, including his conduct at these meetings. Id.

3 ● Video Three uses clips from a Council meeting to criticize the City's
4 response to Mr. Teixeira's CPRA request about alleged police misconduct by
5 scrutinizing the Mayor's remarks and conduct at this Council meeting. See Ex. A-3.

6 ● Video Four juxtaposes the Mayor's comments at a press conference about a
7 murder with his later comments on the matter at a City Council meeting in order to
8 accuse the Mayor of exploiting the case for his political benefit. See Ex. A-4.

9 ● Video Six concerns dangerous traffic problems in the neighborhood
10 surrounding the Forum, and it uses brief clips from Council meetings to criticize and
11 evaluate Mayor Butts' position and comments on the traffic issue. See Ex. A-6.

12 Mr. Teixeira's use of the meeting footage is also highly transformative. In all
13 six videos, the clips are heavily modified with his original narration and on-screen
14 text, and juxtaposed with other material to emphasize Mr. Teixeira's political
15 critiques of the Mayor. Exs. A-1-A-6. In this respect, this Court's decision in
16 Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform, 868 F.
17 Supp. 2d 962 (C.D. Cal. 2012), is on point. There, the defendant took verbatim
18 portions of the plaintiff's video, which was aimed at de-stigmatizing abortion, and
19 spliced them together with graphic images and anti-abortion messages, among other
20 alterations. Id. at 966-67. "The new background soundtrack, the visuals, and the
21 juxtaposition of the new video clips with the original creates an entirely different
22 impact on the viewer. Thus, the accused Videos are transformative." Id. at 978.

23 There can be no question from even the briefest review of Mr. Teixeira's
24 critical political documentaries that they similarly transform the City's unadorned
25 Council meeting videos into completely different works with an "entirely different
26 impact on the viewer." Id. As "the goal of copyright ... is generally furthered by the
27 creation of transformative works" such as these, they "lie at the heart of the fair use
28

1 doctrine’s guarantee of breathing space within the confines of copyright.” Campbell,
 2 510 U.S. at 579. Consequently, this factor strongly favors a finding of fair use.

3 **b. The Nature Of The Allegedly Copyrighted Works**

4 The “scope of fair use is greater when ‘informational’ as opposed to more
 5 ‘creative’ works are involved,” Hustler, 796 F.2d at 1153-54, as the “law generally
 6 recognizes a greater need to disseminate factual works than works of fiction or
 7 fantasy.” Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 563
 8 (1985). See also Swatch Group Management Services Ltd. v. Bloomberg L.P., 756
 9 F.3d 73, 89 (2d Cir. 2014) (factor favored fair use where plaintiff’s copyright in a
 10 financial earnings telephone call was “at best thin” as “the call’s sole purpose was to
 11 convey financial information”). Here, the underlying works are the City’s videos of
 12 its City Council meetings, virtually all of which are basic, unadorned presentations of
 13 the official proceedings. Cmplt. ¶ 19; Exs. A, C-F; Section II, supra. As the City’s
 14 copyright in these purely informational works is “at best thin” (assuming it has any
 15 copyright interest at all), this factor favors fair use. Swatch Group, 756 F.3d at 89.

16 **c. The Amount And Substantiality Used**

17 The third factor asks if the use was “reasonable in relation to the purpose of
 18 the copying,” as “the extent of permissible copying varies with the purpose and
 19 character of the use.” Campbell, 510 U.S. at 586-87. As such, it is closely related to
 20 the first factor. Id. Thus in Northland, the court held that this factor favored fair use
 21 even where the defendant used several minutes of plaintiff’s videos “verbatim” in its
 22 own works because it did so to criticize the plaintiff and make a political point. 868
 23 F. Supp. 2d at 980-82. As the court explained, the underlying video was “not easy to
 24 conjure up in a sound byte or a single image,” and “video ... should be afforded
 25 greater leeway in determining whether a defendant borrowed in excess.” Id. at 981.

26 Similarly, in Savage, the court held that this factor favored fair use where the
 27 defendants posted on their website a four minute, thirteen-second audio clip from the
 28 plaintiff’s two-hour radio show, along with “a detailed criticism of plaintiff’s anti-

1 Muslim” views. 2008 U.S. Dist. LEXIS 60545, at *3-4. The amount used “was
 2 reasonably necessary to convey the extent of plaintiff’s comments” so that the
 3 defendants could “comment on and rebut” them. Id. at *21. See also Swatch, 756
 4 F.3d at 90 (news service’s use of an entire financial earnings call “was reasonable in
 5 light of its purpose of disseminating important financial information”).¹³

6 As in these authorities, here it is readily apparent from the videos that the
 7 amount of City Council meeting footage used by Mr. Teixeira is “reasonable in
 8 relation to the purpose” of criticizing City officials’ political positions and conduct at
 9 these official proceedings. Campbell, 510 U.S. at 586-87. The videos present brief
 10 clips of the Mayor making statements and taking certain actions at the meetings, and
 11 then directly respond to his remarks and conduct through on-screen text, narration,
 12 and the juxtaposition of other footage and visual and audio materials. See Exs. A-1-
 13 A-6. The videos use a reasonable amount of the footage that is necessary to convey
 14 the substance of the Mayor’s positions and conduct to facilitate Mr. Teixeira’s
 15 response. And in any event, the public meeting footage included in Mr. Teixeira’s
 16 works, and in particular the few “verbatim” clips, are extremely brief in relation to
 17 the City’s full meeting videos that typically lasted hours:

18 • Video One and Video Two are both about 15 minutes. See Section II, supra.
 19 They each use clips from the City’s video of the 7/20/2010 Council meeting, which is
 20 more than four hours and 40 minutes. Id. The longest any meeting clip runs in either
 21 Video One or Video Two without some sort of audio or visual modification is 40
 22 seconds; the next longest is about 15 seconds, and most of the unmodified clips are
 23 10 seconds or less. See Exs. A-1-A-2.

24
 25 ¹³ In the closely analogous context of parody, courts “have consistently held
 26 that a parody entitles its creator under the fair use doctrine to more extensive use of
 27 the copied work than is ordinarily allowed[.]” Rogers v. Koons, 960 F.2d 301, 310
 28 (2d Cir. 1992). See also Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116
 (2d Cir. 1998) (third factor has “little, if any, weight against fair use so long as the
 first and fourth factors favor the parodist ... even though the degree of copying of
 protectable elements was extensive”).

1 • Video Three is three minutes and 43 seconds, and it uses clips from the
2 5/22/2012 meeting video, which lasts more than three hours. See Section II, supra.
3 The longest any meeting video clip runs in Video Three without audio or visual
4 modification is about five seconds. See Ex. A-3.

5 • Video Four is 15 minutes. See Section II, supra. The longest any meeting
6 video clip runs in Video Three without audio or visual modification is about three
7 seconds. Id.; Ex. A-4.¹⁴

8 • Video Five is 11 minutes and 38 seconds, and it uses clips from the video of
9 the 4/23/2013 council meeting, which is more than two hours and 42 minutes long,
10 and the 7/20/2010 meeting, which is more than four hours and 40 minutes. See
11 Section II, supra. The longest any meeting video clip runs in Video Five without
12 audio or visual modification is about one minute and 13 seconds. See Ex. A-5.

13 • Video Six is 15 minutes, and it uses clips from the 2/11/2014 meeting video,
14 which is more than two hours and 37 minutes longer. See Section II, supra. The
15 longest any meeting video clip runs in Video Six without audio or visual
16 modification is about 11 seconds. See Ex. A-6.

17 As Mr. Teixeira's videos use very brief clips from the City's lengthy Council
18 meeting videos, and the amount used is reasonable in light of these transformative
19 works' purpose of political criticism, this factor also favors a finding of fair use.

20 **d. The Effect On The Market**

21 Not only does the fourth factor unequivocally favor fair use, this inquiry
22 exposes the completely baseless nature of this action. First, the City of Inglewood
23 cannot seriously claim any economic harm to the market or potential market for its
24

25 ¹⁴ The City's allegation that Video Four uses clips from a "4/11/2013" Council
26 meeting appears to be in error, and Mr. Teixeira has not yet been able to obtain the
27 City's full video recording of the City Council meeting that apparently does appear in
28 Video Four. See Teixeira Decl. ¶ 9. But regardless of the precise length of the
underlying City Council meeting video, the third factor clearly favors fair use with
respect to Video Four as a matter of law as the clips that it uses are extremely brief
and reasonable in length in light of the highly transformative purpose of the work.

1 City Council meeting videos because there can be no such market as a matter of law.
2 Because the City is legally prohibited from making money from the distribution of
3 these videos, there can be no “market” harmed by Mr. Teixeira’s use. See discussion
4 supra at Section III.A; Cal. Gov’t Code §§ 6253(b), 54953.5(b).

5 Second, Mr. Teixeira’s highly transformative videos, offering harsh political
6 critiques with titles like “Lying Politicians” and “James T. Butts Jr. exploits the
7 Murder of Fredrick Martin for his own political benefit,” are obviously no substitute
8 for the City’s unvarnished recordings of its public meetings. Compare Exs. A-1-A-6,
9 with Exs. C-F. As the Ninth Circuit explained in finding that the parody “When
10 Sonny Sniffs Glue” made fair use of the 1950s standard “When Sunny Gets Blue,”
11 this is “not a case in which commercial substitution is likely” because the “two works
12 do not fulfill the same demand.” Fisher, 794 F.2d at 438. See also Seltzer v. Green
13 Day, Inc., 725 F.3d 1170, 1179 (9th Cir. 2013) (“there is no reasonable argument that
14 conduct of the sort engaged in by [defendant] is a substitute for the primary market
15 for [plaintiff’s] art”); Kienitz, 965 F. Supp. 2d at 1054 (shirts mockingly using
16 mayor’s image “were not a substitute for and did not reduce the demand for”
17 straightforward portrait of the politician; “Anyone seeking a photographic portrait—
18 or even just an accurate representative image—of the mayor would not even consider
19 the garish image of the mayor splashed onto defendants’ ... shirts.”).

20 Third, with no conceivable economic harm, the City is transparently bringing
21 this action because it finds Mr. Teixeira’s criticism offensive. But “[i]t is not
22 relevant that a use may damage the original’s value through criticism.” Northland,
23 868 F. Supp. 2d at 982. “Biting criticism suppresses demand; copyright infringement
24 usurps it,” and therefore for purposes of the fourth factor, “critical impact must be
25 excluded.” Fisher, 794 F.2d at 437-48. See also Savage, 2008 U.S. Dist. LEXIS
26 60545, at *24 (fourth factor “strongly favor[ed]” defendants where “the effect of
27 defendants’ usage is limited to the public criticism and condemnation of the ideas
28 within the original work, not market damage in the economic sense”).

1 Because Mr. Teixeira’s “biting criticism” of City officials’ comments and
2 conduct in the City Council meeting videos is no substitute for the original works,
3 which can have no commercial market as a matter of law, this factor weighs strongly
4 in favor of fair use, as do all of the statutory factors. Fisher, 794 F.2d at 438.

5 **IV. THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE**

6 A claim should be dismissed with prejudice where “any amendment would be
7 an exercise in futility.” Steckman v. Hart Brewing, 143 F.3d 1293, 1298 (9th Cir.
8 1998). This is just such an instance: because the underlying works are not subject to
9 copyright protection as a matter of law, no amendment could cure the legal defects in
10 the City’s Complaint. See Section III.A, supra. And where, as here, it is apparent
11 from reviewing the allegedly infringing works themselves that they are obvious
12 examples of fair use, courts have not hesitated to dismiss copyright claims at the
13 pleading stage without leave to amend. See, e.g., Burnett, 491 F. Supp. 2d at 971-72
14 (granting motion to dismiss without leave to amend because factors “weigh strongly
15 in favor of a finding of fair use” and “plaintiffs could not allege any additional facts
16 which might cure defects in the complaint”); Savage, 2008 U.S. Dist. LEXIS 60545,
17 at *25-26 (same); Sedgwick, 2009 U.S. Dist. LEXIS 61825, at *20-21 (same).

18 **V. CONCLUSION**

19 For all of the foregoing reasons, Mr. Teixeira respectfully requests that this
20 Court dismiss the City’s Complaint in its entirety, with prejudice.

21 DATED: April 16, 2015

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN
DIANA PALACIOS

24 By: /s/ Dan Laidman
25 Dan Laidman

26 Attorneys for Defendant Joseph Teixeira
27
28