

1 Iustina G. Mignea (SBN 283836)
MIGNEA LAW
2 5758 Geary Blvd. #441
San Francisco, CA 94121
3 iustina@mignealaw.com
(510) 460-3643 (Phone)
4 (510) 451-4443 (Fax)

5 Attorney for Petitioner, Secure Justice

6 **SUPERIOR COURT OF CALIFORNIA**
7 **IN AND FOR THE COUNTY OF ALAMEDA**

9 SECURE JUSTICE,

10 Petitioner,

11 v.

12 CITY OF BERKELEY

13 Respondent.

Case No.:

**VERIFIED COMPLAINT AND
PETITION FOR WRIT OF MANDATE
(CCP §1085), DECLARATORY RELIEF
(CCP §1060) AND INJUNCTIVE
RELIEF (CCP §§525 et seq.)**

1 **INTRODUCTION**

- 2 1. On March 13, 2018, the City of Berkeley (“Berkeley”) enacted Ordinance 7,592-N.S., and
3 subsequently amended the ordinance on July 27, 2019.¹ This Acquisition and Use of
4 Surveillance Technology Ordinance was chaptered in the Berkeley Municipal Code (“B.M.C.”)
5 at 2.99 et seq. (“the Ordinance”). A true and correct copy of the Ordinance is attached to this
6 complaint as **Exhibit A** and incorporated fully herein by reference. The Ordinance is in full
7 force and effect.
- 8 2. Petitioner seeks a declaratory judgment that Respondent violated the Ordinance by doing the
9 following – the administration installed and is using surveillance technology without first going
10 through the vetting framework established by the Ordinance twice – for the “San Pablo Park
11 Cameras” installation, and the “Transfer Station Cameras” installation. In addition, Petitioner
12 seeks a writ of mandate requiring the City to provide the required impact analysis (Acquisition
13 Report) and proposed use policy for both projects, and a temporary injunction to enjoin their use
14 until City Council approval is possibly obtained, after proper vetting via the Ordinance.
15 Petitioner has no plain, speedy, or adequate legal remedy at law.
- 16 3. The Ordinance requires that a) prior to acquiring surveillance technology, b) prior to using
17 surveillance technology without City Council approval, or c) prior to entering into an agreement
18 with a non-City entity to acquire or use surveillance technology, that staff must first present an
19 acquisition report and proposed use policy for vetting – allowing for meaningful public input
20 and notice and city council deliberation as to appropriate and inappropriate uses, and the
21 establishment of guardrails to protect our civil liberties.
- 22 4. Prior to exercising the private right of action, the Ordinance provides for a “right to cure” which
23 allows Respondent up to ninety (90) days to cure an alleged violation. Petitioner submitted the

24 _____
25 ¹ At the time the contracts at issue were executed, the Ordinance did not prohibit the acquisition and use of facial
recognition – but such technology was required to be vetted before possible acquisition and use.

1 required notices on July 16, 2019 (San Pablo Cameras) and August 1, 2019 (Transfer Station
2 Cameras), and no corrective action has been taken to cure the violations.

3 5. Berkeley has significant problems with racial profiling, infringement upon First Amendment
4 protected activity, and use of surveillance technology specifically.

5 6. In 2017-2018, as then-President Donald Trump escalated his white supremacist agenda, the City
6 of Berkeley became a focal point for far-right white supremacist groups like the Proud Boys to
7 come to Berkeley and protest. Counter-protestors also showed up, and as the two sides clashed,
8 the Berkeley Police Department specifically targeted anti-fascist protestors by arresting and
9 “doxxing” them – a practice of publicly revealing personal information such as names, photos,
10 address, and so on that causes the subject to become a target of online and in-person hate speech
11 and hate crimes. The Appeal reported that of all the photos published by Berkeley Police, none
12 were white supremacists, only anti-fascist counter protestors, and the photos were published
13 prior to any charges being filed. The Appeal could not find examples of other police
14 departments doing the same behavior². This chilling effect caused protestors to have to spend
15 time in jail awaiting release, forcing them to expend thousands of dollars to defend themselves,
16 only to have all charges dismissed. The doxxed anti-fascist counter-protestors were either never
17 charged, or they had all charges dismissed in Court – demonstrating that they were not a true
18 public safety threat and rather were being targeted for their ideology, a clear First Amendment
19 violation. Several of these individuals and their attorneys were threatened by white supremacists
20 with physical violence and were subject to online harassment.

21
22
23
24
25 ² <https://theappeal.org/doxxed-by-berkeley-police/>

- 1 7. Berkeley Police have also been guilty of racial profiling for years. Whether compared to the
2 racial demographics of the city, rates of contraband found, individuals placed in handcuffs or
3 actually arrested, a clear bias against Black individuals is apparent across all categories³.
- 4 8. Historically, surveillance has always been used against certain communities more than others,
5 including Black groups like the Black Panthers, and Black leaders like Dr. Martin Luther King,
6 Jr. and Malcolm X.
- 7 9. The Berkeley City Council was aware of these concerns at the time of enactment of the
8 Ordinance, and expressly covered such technologies that are known to have a disparate impact
9 like facial recognition (subsequently completely banned by amendment in 2019), which has a
10 widely known accuracy problem with darker skin tones and different genders – as the
11 algorithms are trained on mostly white male faces, researchers have discovered that Black
12 women were misidentified at a 34% higher error rate than white men⁴.
- 13 10. The foundation of the Ordinance is that prior to releasing powerful and invasive surveillance
14 technology into public spaces, possible appropriate uses be distinguished from possible
15 inappropriate uses. After a thorough public review and meaningful input into policy guardrails
16 sufficient to defend civil liberties, ideally the benefits of the technology would be received
17 without the negative impacts. By completely avoiding the vetting process here with the San
18 Pablo Park Cameras and Transit Station Cameras, the public has been robbed of any input into
19 the policy rule making process, and the City Council was not even given the opportunity to
20 make an informed decision as no acquisition report (impact analysis) had been provided to them
21 prior to use of the technology. No guardrails are in place that would have likely become
22
23

24 ³ <https://www.dailycal.org/2020/07/23/racial-disparities-in-berkeley-police-stop-data-may-indicate-racial-bias/>

25 ⁴ <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>

1 established as a result of public input into the policy making. There are no restrictions on use or
2 third-party data sharing.

3 11. An actual controversy has arisen and now exists between the parties, and Petitioner has
4 exhausted all administrative remedies. Petitioner contends that Respondent has a duty to ensure
5 compliance and to schedule and submit the required impact analysis and use policies as alleged
6 and to obtain City Council approval before taking these actions. Petitioner infers from
7 Respondent's lack of response to the right to cure notices that Respondent contends they have
8 no such duty to perform.

9 JURISDICTION AND VENUE

10 12. This Court has jurisdiction under article VI, section 10 of the California Constitution and
11 California Code of Civil Procedure §§ 410.10, 525 et seq., 1085, and 1060.

12 13. Venue in this court is proper because Petitioner's claims arose in and around the City of
13 Berkeley, and because this is an action against Respondent. Code Civ. Proc. § 394.

14 PARTIES

15 14. Petitioner Secure Justice is and was at all relevant times an IRS registered non-profit
16 organization located in Oakland, Alameda County, and organized under the laws of the State of
17 California, which advocates against state abuse of power, and for reduction in government and
18 corporate over-reach. Petitioner targets change in government contracting and corporate
19 complicity with government policies, including practices that harm immigrants. Petitioner is
20 affected by Berkeley's violation of the Ordinance, as Petitioner's ability to hold Berkeley
21 accountable, like the general public's ability, is impaired.

22 15. Secure Justice is directly affected by Respondent's misconduct. It opens them and their
23 members to unwarranted surveillance and conflicts with their right to privacy. *See* California
24 Constitution, Article I, section 1. Their misconduct interferes with Secure Justice's mission to
25 ensure that the transparency and public participation goals of the oversight framework are being

1 met and that the privacy interests and civil liberties of Berkeley residents and visitors to
2 Berkeley are being protected.

3 16. Respondent City of Berkeley is and was at all relevant times a political subdivision of the State
4 of California and Alameda County that can be sued in its own name.

5 ***Background***

6 17. On October 16, 2018, the Berkeley City Manager attempted to unlawfully declare “exigent
7 circumstances” were present and therefore allowed the acquisition and use of surveillance
8 technology without City Council approval for the San Pablo Park Cameras. Although true that
9 the ordinance would allow such action if such circumstances were present, there was no
10 exigency.

11 18. The Ordinance defines exigent circumstances as “the City Manager’s good faith belief that an
12 emergency involving imminent danger of death or serious physical injury to any person, or
13 imminent danger of significant property damage, requires use of the Surveillance Technology or
14 the information it provides.” See B.M.C. 2.99.020 #5 Definitions. However, the fact pattern
15 presented was solely based on two shootings that had occurred in the past: August 18 and
16 September 21, 2018, and there were no allegations of retaliatory action or any specific present
17 or future threat. Clearly there was no “imminent” threat, as the City Manager took the time to
18 seek out a vendor, research competitors, schedule an item for City Council approval (completely
19 unnecessary if exigent circumstances were present), and the technology itself was not acquired
20 or installed until the spring of 2019. The City Manager was attempting to avoid the vetting
21 framework and public scrutiny required by the Ordinance.

22 19. There is no mention in the October 2018 report from the City Manager of analytics, remote
23 accessibility, audio recording or any other information that would indicate whether the specific
24 technology to be acquired was covered or exempt under the Ordinance. Strangely, the City
25

1 Manager or one of her staff appeared to recognize that this is covered technology – her report
2 indicates that use beyond 90 days (the exigent circumstances reporting window) will require a
3 return to City Council for the approval part of the Ordinance that she initially avoided. See
4 B.M.C. 2.99.040 2. A true and correct copy of her October 16, 2018, report is attached to the
5 Declaration of Brian Hofer as **Exhibit D**. Use continues today. Internal emails acquired by
6 Secure Justice via public record requests further confirm that administrative staff had drafted a
7 Resolution and were aware that this was covered technology and thus City Council approval
8 was required.

9 *Covered Technology or Exempt*

10 20. The question before this Court is whether or not an exemption applies to these particular
11 surveillance technologies. If they are exempt, petitioner concedes that this claim for relief is
12 moot.

13 21. The ordinance defines surveillance technology, and also expressly exempts certain categories of
14 surveillance technology where the administrative burden is believed to outweigh the potential
15 negative civil liberties, thereby warranting exemption. As is evident, the definition of
16 surveillance technology is broad, and intended to be future proof to address technologies which
17 we may not yet be aware of.

18 22. As defined, "Surveillance Technology" does not include the following devices or hardware,
19 **unless they have been equipped with, or are modified to become or include**, a Surveillance
20 Technology as defined in Section 1 (above) (emphasis added):

21 i. Stationary security cameras affixed to City property or facilities.

22 23. Section 1 defines "Surveillance Technology" as an electronic device, system utilizing an
23 electronic device, or similar technological tool used, designed, or primarily intended to collect
24 **audio**, electronic, visual, **location**, **thermal**, olfactory, **biometric**, or **similar information**

1 **specifically associated with, or capable of being associated with, any individual or group.**

2 Examples of covered Surveillance Technology **include but are not limited to:** cell site
3 simulators (Stingrays); automatic license plate readers; body worn cameras; gunshot detectors
4 (ShotSpotter); **facial recognition software**; thermal imaging systems, except as allowed under
5 Section 1(d); social media analytics software; **gait analysis software**; and **video cameras that**
6 **record audio or video and can remotely transmit or can be remotely accessed.** (emphasis
7 added)

8 24. Secure Justice executive Director Brian Hofer worked with ordinance sponsors Mayor Arreguin,
9 Council Members Kriss Worthington and Kate Harrison, the Police Review Commission (which
10 initially drafted the ordinance with Mr. Hofer’s help; he was appointed as a public member to
11 the ad hoc group that crafted the language), and many community organizations. During the
12 deliberative process, some administrators and electeds desired to make exempt the old-school
13 cameras already in place on city buildings – cameras that did not contain any analytics such as
14 facial recognition, license plate readers, or gait analysis, were hard wired to local hard drives
15 and not remotely accessible, fixed location and not movable, and not recording audio. Those
16 cameras are what was exempted by the Ordinance. These types of cameras also are less
17 intrusive than the upgraded cameras at issue in this action. It was never the intent to exempt
18 cameras regardless of future upgrades and added features – this would fly in the face of a future
19 proofed definition of “surveillance technology” – and the language in Section 1 above – **“unless**
20 **they have been equipped with, or are modified to become or include...”** Cameras that are
21 remotely accessible may increase public safety due to the ease of access, but they also increase
22 the potential negative privacy and civil liberties impact because a police officer would no longer
23 have to travel to a specific camera hard drive and download the video footage – they can just
24 click a button, apply analytics, and when commingled with the many other data points and

1 databases (both free to members of the public, and those available to law enforcement) easily
2 “identify any individual or group.” As Berkeley has previously demonstrated its practice of
3 targeting anti-fascist counter-protestors, and with a police department guilty of racial profiling,
4 this is a clear First Amendment concern and a potential civil liberties disaster.

5 25. Such technology would *not* be exempt if it “became equipped with...or modified to become”
6 surveillance technology as defined in Section 1 – mobile/movable, remotely accessible, capable
7 of capturing biometric information and audio that could be used to identify an individual or
8 affixed to non-city owned property. See B.M.C. 2.99.020 Definitions.

9 26. It is clear by the other exemptions for cameras that manual devices not capable of being
10 remotely accessed, not capable of remote downloading and viewing, are exempt – those with
11 features allowing such actions are not.

12 27. As revealed by many public record documents in the possession of Petitioner, including the
13 contract documents and staff correspondence, both the San Pablo Park Cameras and Transfer
14 Station Cameras, made by vendor Avigilon, are pan-tilt-zoom (movable), capture audio, and
15 both the cameras and server come preloaded with analytics capable of capturing biometric
16 information such as face detection, gait analysis, and object detection as further explained in the
17 attached declaration of Secure Justice’s Hofer. In addition, the San Pablo Park Cameras were
18 also installed on privately owned utility poles across the street from the park. Thus, these two
19 surveillance technology installations are not exempt from the Ordinance.

20 28. Public record requests submitted to Berkeley have revealed documents confirming that
21 Avigilon’s Control Center (ACC) and H4 cameras come pre-loaded with various analytics, such
22 as “Appearance Search”, which according to Avigilon “is a sophisticated AI search engine for
23 video data that incorporates the characteristics of a person’s face. It sorts through hours of
24 footage with ease to quickly locate...people...even if their clothing change over time...Avigilon

1 Appearance Search technology permits users to initiate a search for a person by selecting certain
2 specific physical descriptions” including hair color, clothing, and gender. The marketing
3 materials are rife with references to analytics that can be used to identify “any individual or
4 group” which meets the definition of surveillance technology in the Ordinance. As further
5 identified in Mr. Hofer’s attached declaration which is fully incorporated here by reference,
6 emails between Avigilon representatives and Berkeley administrative staff frequently discuss
7 the use of artificial intelligence, analytics, and algorithmic data models and data sets – features
8 that allow for the identification of individuals or groups because of the data collected and
9 analytics that could be applied to such data.

10 29. In addition, contract documents and emails further discuss the remote viewing capabilities
11 (login credentials were also provided to third parties like the Northern California Regional
12 Intelligence Center, a federal fusion center located in San Francisco), audio recording and
13 licenses were obtained to record audio (at least 24), and as a potential ban on facial recognition
14 technology was being proposed by Council Member Harrison, administrative staff reached out
15 to her office via email requesting an exemption for the San Pablo Park Cameras, further
16 confirmation that an agreement was entered into with a non-city entity to acquire and use
17 analytics capable of identifying an “individual or group.” Avigilon representatives emailed staff
18 to coordinate a response to the facial recognition ban, mentioning that they had just had similar
19 conversations in San Francisco, the first city in the country to ban such technology in May 2019.

20 30. As Secure Justice publicly voiced its concerns, on July 16, 2019, Mayor Arreguin emailed City
21 Manager Williams-Ridley, stating that he was not aware of the analytics components of the San
22 Pablo Park Cameras, demonstrating that the City Council had not been fully informed in
23 October 2018 of the true nature of the camera proposal submitted by the City Manager.

24 CAUSE OF ACTION

**City of Berkeley’s Failure to Obtain City Council Approval
in Violation of Berkeley Municipal Code §2.99.030**

31. Petitioner incorporates by reference the allegations of the above paragraphs as though fully set forth herein.

32. The Ordinance requires that prior to “acquiring new surveillance technology...”, “using new surveillance technology...”, or “entering into an agreement with a non-City entity to acquire...surveillance technology”, the City Manager must obtain City Council approval. See B.M.C. §2.99.030.

33. The City Manager must first provide the proposed use policy to the Police Commission for its review for the San Pablo Park Cameras and Transfer Station Cameras installations. This did not occur.

34. The City Manager must submit an acquisition report for review and obtain City Council approval of a proposed use policy prior to engaging in one of the three categories of action above, for both the San Pablo Park Cameras and Transfer Station Cameras installations. Neither of these occurred.

35. Respondent has failed to comply with the Ordinance as alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests that this Court:

A. Enter a declaratory judgment stating that the City of Berkeley violated the Ordinance because the City Manager failed to first obtain City Council approval, after review of an Acquisition Report and adoption of a Use Policy, prior to acquiring, using, and entering into an agreement with a non-City Entity for the San Pablo Park Cameras and Transfer Stations Cameras installations.

B. Issue a writ of mandate directing the City of Berkeley’s City Manager to schedule and submit the required documents for review and possible adoption for the San Pablo Park

1 Cameras and Transfer Station Cameras installations.

2 C. Enter a temporary injunction restraining the City of Berkeley from using the San
3 Pablo Park Cameras and Transfer Station Cameras surveillance technologies, until such time as they
4 may receive City Council approval.

5 D. Enter an order requiring the City of Berkeley to pay Petitioner's attorneys' fees and
6 costs under Berkeley Municipal Code § 2.99.090, Code of Civil Procedure § 1021.5, and any other
7 applicable statutes.

8 E. Grant Petitioner any further relief the Court deems just and proper.

9

10 Dated: November ____, 2021

Respectfully Submitted,

11

By: _____

12

Iustina G. Mignea

13

Attorney for Petitioner, Secure Justice

14

15

16

17

18

19

20

21

22

23

24

25

1 VERIFICATION

2 I, Brian Hofer, declare:

3 I am Chair of the Board for and Executive Director of, Secure Justice, an Oakland,
4 California non-profit corporation organized and existing under the laws of California. Secure Justice
5 is Petitioner and Plaintiff in the above-entitled action, and I have been authorized to make this
6 verification on its behalf. I have read the foregoing Verified Complaint and Petition for Writ of
7 Mandate, Declaratory and Injunctive Relief and know the contents thereof, except as to those
8 matters which are alleged on information and belief, and as to those matters, I believe them to be
9 true. All facts alleged in the petition are true of my own personal knowledge.

10 I declare under penalty of perjury, under the laws of the State of California, that the
11 foregoing is true and correct, and that this verification was signed on the 30th day of November
12 2021 in Oakland, California.

13 

14
15 _____
16 Brian Hofer, Chair and Executive Director
17 of Petitioner Secure Justice
18
19
20
21
22
23
24
25