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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

DAVID ROBERT DALEIDEN, and SANDRA SUSAN MERRITT,

Defendants.

Case No. 2502505

Hon. William H. Orrick III

DEFENDANT DALEIDEN'S OPPOSITION TO THE ATTORNEY GENERAL'S REQUEST FOR A GAG ORDER

The Attorney General's "Request for Safety Limitation on Public Comments" (identified more accurately in its footer as "Motion for Gag Order") is a betrayal of the public trust. The Motion has no foundation in either law or fact. It is a baseless attack on Defendants—who are already at risk of spending years in prison for their efforts to expose violent felonies—and an attempt to infringe on the public's interest in an open forum,[1] all at the bidding of a powerful political special interest.

The AG previously attempted to close the hearing to the public—and failed. See Dkt. 76. The AG's persistent use of this prosecution to advance a political agenda at the expense of Defendants' constitutional rights, and the public's interest, is inappropriate. The relief the AG seeks is unconstitutional, in several different ways. Not surprisingly, the AG cites no legal authority that supports the extraordinary relief he seeks. The Court must deny the Motion.

I. The relief sought by the Attorney General would violate at least Defendants' First and Sixth Amendment rights.

The Attorney General—who supposedly works for the "People of California" and whose mission is to "ensure justice, safety and liberty for *everyone*," see https://oag.ca.gov/office (emphasis added)—has asked this Court to "limit the statements the parties[2] may make in public in regards to the witness testimony until after the conclusion of the preliminary hearing." Gag Order Mot. at 5. And in case it wasn't clear which "parties" the AG wants to muzzle, he asks the Court to "order *the defendants* to not reference the victims or any matter which may be taken to identify them or their livelihood in any matter." *Id.* (emphasis added).

The United States Supreme Court has admonished courts to be extremely cautious before imposing prior restraints on speech: "[P]rior restraints on speech and publication are the most

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[1] As the AG well knows, Defendants rely on raising public awareness to help raise money to fund their pro bono legal defense. As such, the Motion is an attack not only on constitutional protections for criminal defendants but also the ability of impecunious defendants to defend themselves against the combined forces of the State and well-resourced special interest groups.

[2] Although the motion states only the "parties" would be subject to the gag order, Defendants presume that the AG meant to include their lawyers as well, since a significant part of the Prosecution's complaint is about speech by counsel.

serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart* (1976) 427 U.S. 539, 559. "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss[,] a loss in the immediacy, the impact, of speech. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." *Id*. at 609 (quoting Bickel, The Morality Of Consent (1975) p. 61) (ellipses omitted). See also *Freedom Communications, Inc. v. Superior Court* (2008) 167 Cal.App.4th 150, 153 (vacating superior court's gag order; "Like all gag orders, the trial court's order restricting The Register's ability to report on the upcoming trial is presumptively invalid. . . . A prior restraint is the 'most serious and the least tolerable infringement on First Amendment rights.'") (quoting *Nebraska Press Association*).

Thus, what the AG is asking for would be extraordinary in any case. But it is especially so here, where imposing the restraint requested by the AG would not only infringe the Defendants' First Amendment rights, but it would also violate their rights to a public trial under the Sixth Amendment.

Countering negative publicity about a criminal defendant is not merely a permissible activity for a criminal defense attorney; it is a necessary part of a vigorous defense. See *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030. *Gentile* involved a state bar disciplinary proceeding where Attorney Gentile was sanctioned for a press conference he held to defend his client after the press had pushed out a stream of information, beginning long before his client's indictment, suggesting that his client was guilty. *Id.* at 1064 ("Petitioner's admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case.").

The Supreme Court stated that such a press conference was absolutely within the rights and duties of a criminal defense attorney:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with

> improper motives. **A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried**.

Id. at 1043 (Kennedy, J., plurality op.) (emphasis added). This ethical duty is constitutional in nature:

> The Sixth Amendment right to the assistance of counsel, in conjunction with due-process and fair-trial rights, would seem to require attorneys to actively seek to counterbalance a client's negative public image. In high-profile cases, the only way some lawyers can offer clients their Sixth Amendment right to a fair trial is to set the record straight in the media in hopes that accurate reporting will create a neutral litigation environment. In other words, to assure a fair trial, **public advocacy is an essential part of a defense strategy**.

Michael Jay Hartman, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases* (2008) 10 U.Pa.J.Const.L. 867, 879 (quotation marks and ellipses omitted; emphasis added).

Because of critical constitutional values at stake, a court cannot issue a gag order of the kind the AG seeks—i.e., constraining a *defendant*'s speech for the sake of other values. Rather, a court may grant a limited gag order pre-trial when such an order is necessary to protect a *defendant's* rights. See, e.g., California Criminal Procedure (The Rutter Group 2019) § 19:47 ("The trial judge has the authority to issue protective 'gag' orders to manage pretrial and trial publicity in order to assure *the Defendant* of his due process right to a fair trial."); see also *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362-63 (contemplating restraints on publicity in order to protect a defendant's right to a fair trial).

By contrast, courts frown upon enjoining speech for the sake of protecting someone from unwanted public exposure: "[S]paring citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh the guarantees of free speech in our federal and state constitutions." *Hurvitz v. Hoefflin*, (2000) 84 Cal.App.4th 1232, 1244 (emphasis added). See also *Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1225 ("Gag orders are not an appropriate method to protect confidential information from disclosure, no matter how damaging or private that information may be.").

II. In defense of this radical encroachment on Defendants' constitutional rights, the Attorney General cites literally no relevant authority.

Tellingly, the AG cites no legal authority in support of the unprecedented relief he seeks. The AG grasps at straws:

- The AG quotes *People v. Mendoza* out of context (Motion, pp. 2:25 to 3:2). That case applies to a "**threat of force**." There is, and has been, no such threat. Nothing has changed since the Court's February 14, 2019 ruling (Dkt. 76), where the Court ruled that the preliminary hearing will not be closed to the public because neither AG nor Does satisfied the Penal Code § 868.7 closed-proceedings standard.

- The AG's cite to *Joe Z. v Superior Court* is misleading (Motion, pp. 3:4-6). This case, and the cases cited therein, pertain to the defendant's access to discovery materials, i.e., a written confession, for defendant's/counsel's review.

- The AG's cite to CRC 243.1 is inapposite (Motion, p. 4:25). This Rule (renumbered as CRC 2.550 (and 2.551)) applies to sealing documents and court records. It is inapplicable to closing a preliminary hearing.

- The AG's cite to Marsy's Law is inapposite (Motion, p. 3). The AG does not and cannot cite any legal authority for the principle that Marsy's Law somehow supersedes the constitutional limits on gag orders.

- If anything the *NBC Subsidiary* supports Defendants' position, not the AG's (Motion, pp. 4-5). That case involved a request to close trial proceedings to the public. See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1990) 20 Cal.4th 1178, 1180. The California Supreme Court held the trial court must first "provide[] notice to the public on the question of the closure," *id*., a fact the AG conveniently omits. The California Supreme Court held that closure was unjustified there where the trial court failed to make any finding that prejudice to an overriding interest in a fair trial was "*substantially probable* absent closure and temporary sealing." *Id*. at 1222. Nor was its "blanket and sweeping order closing the courtroom during *all* nonjury proceedings . . . narrowly tailored." *Id*. at 1223. Finally, "there were less restrictive means, short of closure, of achieving the overriding interest in a fair trial"—namely, jury instructions to avoid media coverage and to disregard any coverage they did see or hear. *Id*. "We repeatedly have stressed our adherence to the fundamental premise that, as a general matter, *cautionary admonitions and instructions serve to correct and cure myriad improprieties*." *Id*. (emphasis added).

Meanwhile, this Court previously rejected the AG's request to close the hearing under Penal Code § 868.7 and articulated a standard for closing off the evidence from public inspection. See Dkt. 76. As this Court recognized, there is a "strong presumption in favor of open public trials," based on both the state and federal constitutions. See *id.* at 14 (citing U.S. Const. amend. VI; Cal.

Const. art. I, § 15). The AG does not even attempt to meet the high standard the Court recognized for overcoming this strong presumption. Indeed, the AG conspicuously makes no mention of § 868.7; the AG knows he cannot satisfy its closed-proceedings standard.

III. The AG provides no factual basis for infringing Defendants' constitutional rights.

The AG cites the following "facts" as justification for denying Defendants' First, Fifth and Sixth Amendment rights:

(1) Doe 12 "expressed fear and harassment she and her company have suffered immediately after her testimony" last week. Gag Order Mot. at 1.
(2) Lifesite News "quotes one of Daleiden's counsel, discussing, inaccurately, testimony of Doe 12."
(3) "The CMP Twitter account has also been describing testimony by the Does in an almost live feed. In so doing, the CMP Twitter account has essentially identified the Does, if not by name then by title and organization."
(4) "Defendant David Daleiden was scheduled to appear on the Fox News show Tucker Carlson on September 5, 2019 wherein he would have had the opportunity to discuss details of the testimony by Doe 12 and other Does. Fortunately, his appearance was postponed."

Gag Order Mot. at 1-2. For the reasons described below, all of these "facts" are either false or irrelevant. None of them comes close to justifying an unprecedented prior constraint on the speech of a criminal defendant.

The plain insinuation of the AG's motion and Attachment A is that Defendants' "inaccurate" public statements about Doe 12's testimony have exposed her to "fear and harassment" in the form of a road rage incident on the way home from court, see Ex. A at 1-2, a car parked at the end of her driveway "on three occasions last week," *id.* at 2, and negative comments on the Stem Express website. See Gag Order Mot. at 1.

First, as a threshold matter, **neither the motion nor its exhibits point to *any false statement* by Defendants or their counsel**. Although the AG describes quotes in a Lifesite News article from "one of Daleiden's counsel" as somehow "inaccurate," that vague characterization is entirely unsupported by any evidence or argument. Agent Cardwell's assessment of the same article described the title as "false" (again without explanation or proof) but did not allege any false statements on the part of Defendant's counsel. Ex. A at 2.

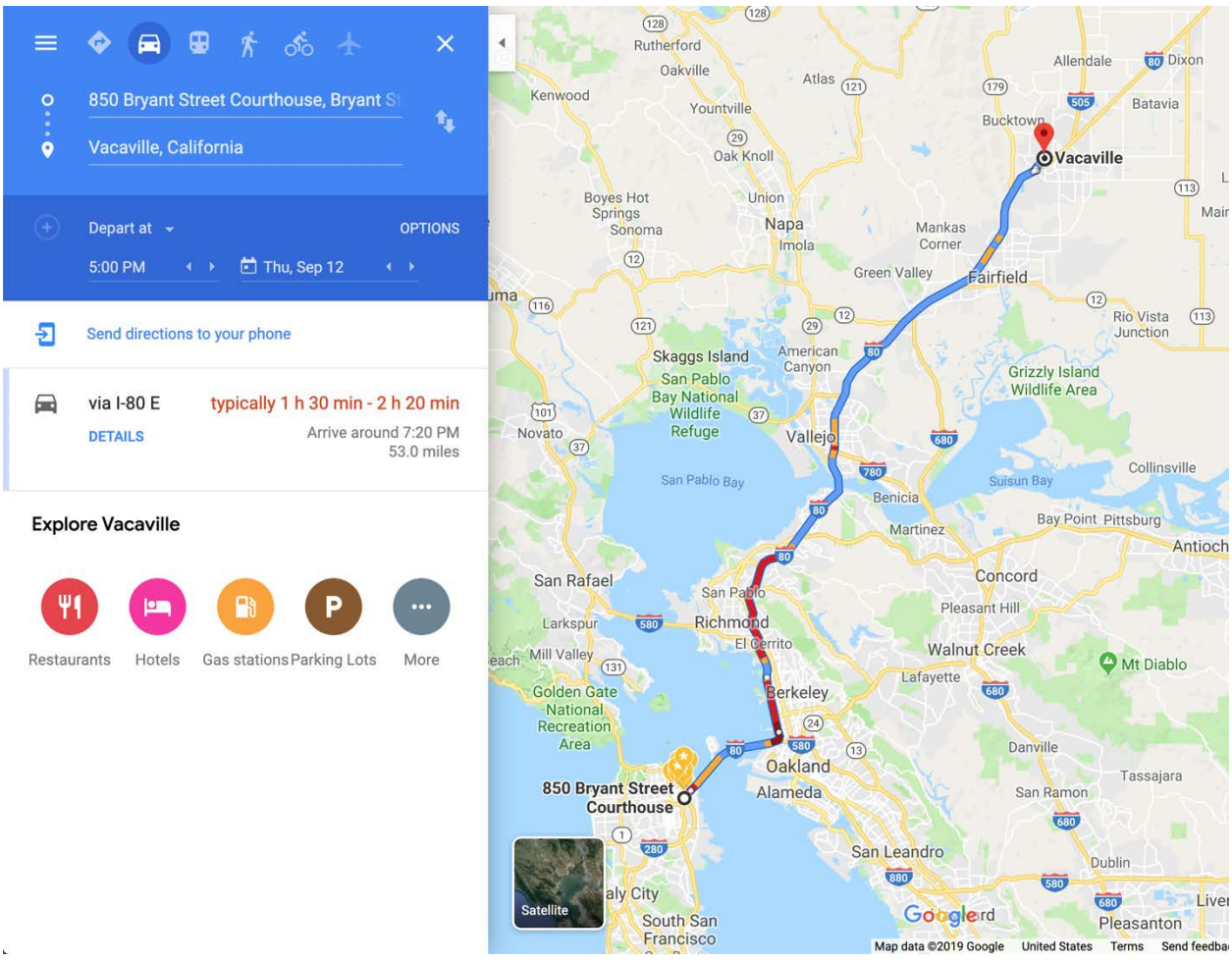
Absent any evidence that Defendants or their counsel have said anything false, the AG's grievance amounts to a complaint that Defendants have spoken publicly about the trial at all. Indeed, the AG objects to the CMP Twitter feed without any suggestion that its contents are false or misleading, and also without arguing why it should be OK for other sites sympathetic to the prosecution (e.g., Rewire.News reporter Helen Christophi (https://twitter.com/helenchristophi)) to cover the proceedings closely but not for Defendants. The AG also cites the mere possibility that Mr. Daleiden might have appeared on a television show as a reason to muzzle Defendants, simply because "he would have had the opportunity to discuss details of the testimony." Gag Order Mot. at 2. Thus, on the AG's account, it is problematic for Defendants to speak *at all*, even truthfully, about the preliminary hearing in their own criminal prosecution. But reporting on a newsworthy event is not harassment.

Second, the AG and Agent Cardwell **do not allege that Defendants or their counsel actually caused any "fear or harassment**." Gag Order Mot. at 1. No one suggests that Defendants or their counsel had anything to do with the alleged road rage incident on Doe 12's drive home from San Francisco, nor with the car that a neighbor saw at the end of her driveway. No one alleges that Defendants or their counsel wrote anything on StemExpress's website. As has been noted many times by now, Defendants have no connection to any group or individual who has threatened *anyone* harm. See *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress* (N.D. Cal., Aug. 23, 2019, No. 16-CV-00236-WHO) 2019 WL 3997494, at *12 ("I agree that" "there is no evidence that any defendant made threats or caused harm to plaintiffs' facilities or staff, or that any defendants directly encouraged or incited others to do so."). Thus, this motion is just the latest instantiation of the "heckler's veto" that the abortion industry has been improperly invoking to silence Defendants throughout this and the two related civil litigations. See *Santa Monica Nativity Scene Comm. v. City of Santa Monica* (9th Cir. 2015) 784 F.3d 1286, 1292–93; *Center. for Bio-Ethical Reform, Inc. v. Los Angeles County. Sheriff Department* (9th Cir. 2008) 533 F.3d 780, 788–90.

Third, **the factual allegations are not credible**. If the Court even entertains the far-fetched suggestion that the alleged traffic incident was related to the testimony of Doe 12, then surely the

Court will recognize that that incident cannot have been caused by *Defendants' speech* about her testimony, *which wasn't published or posted until later*. It would have been caused by the testimony itself. It would be beyond unjust to deprive Defendants of their constitutional freedoms because someone else reacted negatively to Doe 12's *own words* that she *voluntarily* offered in the context of a *public prosecution*.

Moreover, the incident is alleged to have occurred in Vacaville, California. Doe 12 testified until 4:30 p.m. before this Court, last Thursday. The trip to Vacaville is roughly 50 miles, and normally takes between 1 hour 30 minutes and 2 hours 20 minutes.



The chain of logic for the AG's claim is that a person followed Doe 12 out of the courthouse, located Doe 12's car where it was parked, then that person got into their own car which must have been parked nearby, then proceeded to follow Doe 12, in rush hour traffic, for roughly two hours, over 50 miles, and then suddenly made several jerking motions on the interstate toward

Doe 12 while filming Doe 12's car. The more common and reasonable assumption is that Doe 12 cut someone off in traffic on the way home who then became irate and engaged in "road rage."

And by itself, Doe 12's neighbor's report of an unusual car is completely meaningless. There are any number of possible explanations for it, up to and including that the neighbor was mistaken. Without anything connecting it even to this litigation, never mind Defendants' speech, it would be ludicrous to deprive Defendants of constitutional rights on that basis. And the comments on Stem Express's website, though unpleasant, are not threats, nor do they say anything that could cause legitimate concern for Doe 12's safety. (And to the extent that the AG, Agent Cardwell, and Doe 12 are actually concerned about the website comments, then they are free to pursue the commenters themselves; the commenters provided contact information with their comments. See Ex. B to the Motion.)

And finally, **Doe 12 herself is not credible**. The proven contradictions between her testimony in this preliminary hearing and what she stated candidly in other contexts has already proven her willingness to lie to serve her own self-interest.[3] In this fraught context, in which *Doe 12 herself has chosen* to testify, exposing her own conduct to an uncomfortable amount of scrutiny, it is obviously in her self-interest to characterize herself (rather than, say, babies born alive after botched abortions) as a victim, and Defendants (rather than herself) as the aggressor. But there are zero facts to support that narrative, and her word alone is demonstrably unreliable. At the very least, this Court should require Doe 12 to testify under oath and in open court before relying on any of her averments.

IV. The proposed gag order is unconstitutionally vague and overbroad.

Aside from the other constitutional defects discussed above, the relief the AG requests is also unconstitutionally vague and overbroad. The AG seeks an order (1) limiting, to an unspecified

[3] For example, on the witness stand, Doe 12 claimed to selectively remember a conversation with Doe 13 about an NDA from 4 years ago but denies remembering anything else. She claims not to remember anything at all about Planned Parenthood's standard consent form—a form she bragged on video about having memorized. And she claims not to remember anything about the terms of her own company's consent form, then or now.

degree, the parties from making public statements "in regards to the witness testimony" and (2) barring Defendants from referencing anything that is implicative of the "victims" or "any matter which may be taken to identify them or their livelihood." Motion, p. 5. As the United States Supreme Court held in *Nebraska Press Association*, a "prohibition regarding 'implicative' information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights." *Nebraska Press Association* , *supra*, 427 U.S. at 568. For this additional reason, the Court must deny the Motion.

V. Conclusion

Gagging Defendants on the basis of this Motion would radically encroach on their constitutional rights without any legal or factual justification. This Court must deny the AG's motion.

Respectfully submitted: Date: September 11, 2019

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