

BY FAX

UCI Intellectual Property, Arts, and Technology Clinic
Susan Seager (State Bar No. 204824)
sseager1.clinic@law.uci.edu
Jack Lerner (State Bar No. 220661)
jlerner@law.uci.edu
Cassie Douth, Certified Law Student (Certification No. 46674)
cdouth.clinic@law.uci.edu
Shanxi Feng, Certified Law Student (Certification No. 46675)
shanxi.feng@law.uci.edu
Emily Asgari, Certified Law Student (Certification No. 46673)
ejasgari.clinic@law.uci.edu

401 East Peltason, Suite 1000
Irvine, CA 92697-8000
Telephone: (949) 824-5447
Fax: (949) 824-2747

Attorneys for Non-Party Journalist
ANTHONY ESPOSITO

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**SUPERIOR COURT
METROPOLITAN DIVISION**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

LETICIA PEREZ,

Defendant.

Case No. BM922667A
Assigned to the Hon. Charles R. Brehmer

**EX PARTE APPLICATION OF NON-
PARTY JOURNALIST ANTHONY
ESPOSITO TO CLARIFY OR VACATE
PROTECTIVE ORDER AGAINST
PUBLICITY; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF ANTHONY
ESPOSITO WITH EXHIBITS A-B;
DECLARATION OF SUSAN SEAGER
WITH EXHIBITS C-H.**

[Proposed Order Concurrently Submitted]

Hearing Date: February 8, 2019
Time: 1:30 p.m.
Department: 17

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1 The August Gag Order has imposed an unconstitutional prior restraint on Mr. Esposito's
2 First Amendment right to report about this case. This *ex parte* Application is the most expeditious
3 means by which Mr. Esposito could ask this Court to clarify or amend the August Gag Order to
4 make clear it does not apply to him, or to vacate it entirely.

5 Counsel for Mr. Esposito has given notice of this *ex parte* Application to both the
6 prosecution and the defense. (Seager Decl. ¶ 8.) Counsel for both parties do not oppose Mr.
7 Esposito's request to clarify or amend the August Gag Order to make clear it does not apply to
8 Mr. Esposito, but they oppose vacating the August Gag Order in its entirety, and plan to appear
9 for the *ex parte* hearing. (Seager Decl. ¶ 8.)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT**

3 For the past six months, Anthony Esposito, a non-party Bakersfield news publisher, has
4 been unconstitutionally gagged by prosecutors and this Court from publishing news about the
5 high-profile political-corruption prosecution of County Supervisor Leticia Perez.

6 Mr. Esposito's government-mandated silence began on July 23, 2018, when Deputy
7 District Attorney Christopher E. Dominguez mailed Mr. Esposito a copy of this Court's Protective
8 Order Against Publicity dated July 20, 2018 ("July Gag Order"). The prosecutor instructed Mr.
9 Esposito that "[t]he order requires you not to make any statements in any fashion for public
10 dissemination concerning this case." On November 5, 2018, Mr. Esposito again believed he was
11 gagged from publishing news about this case when then-District Attorney Lisa S. Green informed
12 Mr. Esposito that he was "named in the investigative reports" for this case and sent him a copy of
13 this Court's superseding Amended Order Against Publicity dated August 30, 2018 ("August Gag
14 Order"), which bans any "witness contained in investigation reports" from making any "new
15 public statement" about the case. Mr. Esposito has not published any stories about this case since
16 July 23, 2018, based on these statements by prosecutors and the language of the two court gag
17 orders.

18 The prosecution and defense now promise that they will not call Mr. Esposito as a witness
19 or complain if he resumes reporting on the case. But those promises don't change the broad,
20 unconstitutional language of the August Gag Order, which Mr. Esposito believes blocks him from
21 making any "public statements" about the case because Ms. Green told him he is "named in the
22 investigative reports."

23 The August Gag Order is an unconstitutional prior restraint against Mr. Esposito that must
24 be immediately clarified, amended, or vacated. The United States Supreme Court and California
25 courts have struck down gag orders that also banned press coverage of criminal trials as
26 unconstitutional prior restraints. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)
27 (striking down an unconstitutional prior restraint court order barring press from reporting about
28 defendant's confession in murder trial, rejecting defendant's contention that publishing prejudicial

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1 information would violate Sixth Amendment right to fair trial); *Sun Co. of San Bernardino v.*
2 *Superior Court of San Bernardino Cty.*, 29 Cal. App. 3d 815 (1973) (striking down a gag order
3 against press in criminal trial as unconstitutional prior restraint); *Freedom Commc'n, Inc.*, 167 Cal.
4 App. 4th at 154 (same).

5 The party seeking a prior restraint must prove that: (1) the speech sought to be restrained
6 poses a clear and present danger to a protected competing interest; (2) the order is narrowly
7 tailored to protect that interest; and (3) no less restrictive alternatives are available. *Freedom*
8 *Commc'n, Inc.*, 167 Cal. App. 4th at 154; *accord Hurvitz v. Hoefflin*, 84 Cal. App.4th 1232, 1242
9 (2000).

10 Neither the defense nor the prosecution has satisfied this test, which if satisfied would
11 allow for such an order of the “most extraordinary remedy” that may be used “only in
12 ‘exceptional cases.’” *Freedom Commc'n, Inc.*, 167 Cal. App. 4th at 153. “In balancing the
13 constitutional right to a fair trial against the rights of a free press, it should be emphasized that
14 sufficient legal safeguards presently exist to assure the defendant of a fair trial--e.g., change of
15 venue, *voir dire* examination and challenge of prospective jurors, jury sequestration, mistrial, new
16 trial, appeal and habeas corpus.” *Sun Co. of San Bernardino*, 29 Cal. App. 3d at 831. In addition
17 to being an unconstitutional prior restraint, the order is unconstitutionally vague and overbroad
18 because it does not specify which persons are covered by it and lacks a finite termination date.

19 Because the August Gag Order is unconstitutional as applied to Mr. Esposito, he requests
20 this Court to immediately amend the August Gag Order to state that it shall not apply to Mr.
21 Esposito, subject to change only upon notice to Mr. Esposito and providing Mr. Esposito an
22 opportunity to respond to any such change. In the alternative, Mr. Esposito requests the Court to
23 immediately vacate the August Gag Order.

24 II. FACTUAL AND PROCEDURAL HISTORY

25 Mr. Esposito is the publisher and owner of two Bakersfield news websites on Facebook,
26 *The Valley Voice* and *Kern Cast*. (Esposito Decl. ¶ 2.) He is a Latino and has reported on an
27 assortment of issues in the Bakersfield area that impact Latinos. (Esposito Decl. ¶ 2.) During
28 2018, he published several news articles and videos about the criminal misdemeanor charges

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1 brought against County Supervisor Leticia Perez, the only Latino on the board. (Esposito Decl. ¶
2 2.) On July 23, 2018, Mr. Esposito received a letter from Deputy District Attorney Dominguez.
3 (Esposito Decl. ¶ 4, Ex. A.) The prosecutor instructed Mr. Esposito that the Court had issued a
4 gag order on July 20, 2018 and “[t]he order requires you not to make any statements in any
5 fashion for public dissemination concerning this case” because Mr. Esposito had “been identified
6 as a person who provided information to investigators” and was a potential trial witness.
7 (Esposito Decl. ¶ 4, Ex. A.) Mr. Dominguez told Mr. Esposito he could be found in contempt of
8 court if he violated the order. (Esposito Decl. ¶ 4, Ex. A.) Mr. Dominguez included in his letter a
9 copy of the Court’s July Gag Order. (Esposito Decl. ¶ 5, Ex. B.)

10 In fact, Mr. Esposito had not spoken to any investigators during the investigation of
11 *People v. Perez*, but he stopped publishing articles about this case because of the prosecutor’s
12 instruction. (Esposito Decl. ¶¶ 6, 8.)

13 On November 1, 2018, counsel for Mr. Esposito sent a letter to then-District Attorney Lisa
14 S. Green, requesting that her office rescind the July 23, 2018 letter to Mr. Esposito because he had
15 not spoken to any investigators, nor had he been contacted to testify as a witness. (Seager Decl. ¶
16 3, Ex. C.) On November 5, 2018, Ms. Green responded to Mr. Esposito’s letter, confirming what
17 Mr. Esposito already knew: he “was not in fact interviewed by [prosecution] investigators”
18 although she added that he was “named in the investigative reports” and his “name was referenced
19 by others interviewed during the investigation.” (Seager Decl. ¶ 4, Ex. D.) Ms. Green also
20 confirmed that prosecutors have no intention of calling Mr. Esposito as a trial witness and they
21 would not seek sanctions if he resumed reporting about the case. (Seager Decl. ¶ 5, Ex. D.)

22 On November 13, 2018, counsel for Mr. Esposito sent a similar letter to the defense
23 counsel, H.A. Sala, asking him to clarify that he did not intend to call Mr. Esposito as a defense
24 witness. (Seager Decl. ¶ 6, Ex. F.) On November 25, 2018, Mr. Sala replied via email,
25 confirming that he did not intend to call Mr. Esposito as a defense witness or seek sanctions if Mr.
26 Esposito were to make public statements about the case. (Seager Decl. ¶ 7, Ex. G.)

27 To this day, Mr. Esposito still has not published any articles about this case. (Esposito
28 Decl. ¶ 13.) Mr. Esposito does not feel reassured by the promises by the prosecution and the

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1 defense not to call him as a witness or seek punishment if he resumes publishing stories about the
2 case because the Court’s August Gag Order contains broad language that prohibits “public
3 statements” about the case by any “witness contained in investigation reports,” and Ms. Green
4 informed Mr. Esposito that he was “named in the investigative reports.” (Esposito Decl. ¶ 12.)
5 Mr. Esposito is concerned that this Court could interpret the August Gag Order to cover him.
6 (Esposito Decl. ¶ 12.)

7 **III. THE COURT’S GAG ORDER IS UNCONSTITUTIONAL**

8 **A. Prior Restraints Are Presumptively Unconstitutional and Frequently Vacated**

9 For more than 100 years, courts have struck down court gag orders, known as prior
10 restraints, as violative of the First Amendment. The United States Supreme Court has described a
11 court order barring the press from publishing information about matters of public concern “the
12 essence of censorship.” *Near v. Minnesota*, 283 U.S. 713, 713 (1931). A prior restraint against
13 the press is “the most serious and the least tolerable infringement on First Amendment rights.”
14 *Neb. Press*, 427 U.S. at 559. It is well established that a “heavy presumption” exists against the
15 “constitutional validity” of prior restraints on expression. *Org. for a Better Austin v. Keefe*, 402
16 U.S. 415, 419 (1971).

17 Gag orders are especially suspect when they are used to block reporters from informing
18 the public about criminal proceedings. “[T]he United States Supreme Court has repeatedly
19 recognized the salutary function served by the press in encouraging the fairness of trials and
20 subjecting the administration of justice to the beneficial effects of public scrutiny.” *Neb. Press*
21 *Ass’n*, 427 U.S. 559-60.

22 In *Nebraska Press Association v. Stuart*, the Supreme Court struck down the trial court’s
23 gag order barring the press from reporting about the defendant’s confession before the trial,
24 rejecting the defendant’s contention that the publication of such a damaging information would
25 violate his Sixth Amendment right to a fair trial. 427 U.S. at 556-61. The court agreed that “there
26 was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on
27 the attitudes of those who might be called as jurors.” *Id.* at 568-69. But the court struck down the
28 gag order because the defendant failed to establish that “further publicity, unchecked, would so

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1 distort the views of potential jurors that 12 could not be found who would, under proper
2 instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented
3 in open court.” *Id.* at 569.

4 Similarly, in *CBS v. United States District Court for Central District*, the Ninth Circuit
5 court refused to enjoin CBS from broadcasting surveillance tapes of the defendant, celebrity
6 carmaker John DeLorean, engaging in a drug transaction. 729 F.2d 1174, 1183 (9th Cir. 1984).
7 Despite the highly damaging and prejudicial nature of the tapes and the “enormous, incessant and
8 continually increasing publicity” surrounding the case, the Ninth Circuit held that 12 impartial
9 jurors could readily be found even if the tapes were broadcast before the trial had begun. *Id.*
10 (citing *Nebraska Press* for the proposition that “a prior restraint cannot issue unless it is ‘clear that
11 further publicity, unchecked, would so distort the views of potential jurors that 12 could not be
12 found who would ... fulfill their sworn duty.’”).

13 California courts have overturned prior restraints against journalists covering criminal
14 trials on the grounds that the prior restraints were presumptively unconstitutional and did not meet
15 the heavy burden required to justify a prior restraint. In *Sun Company of San Bernardino v.*
16 *Superior Court of San Bernardino County*, the trial court issued a gag order against several local
17 newspapers at the request of the prosecution in a murder trial. 29 Cal. App. 3d 820-21. The
18 Court of Appeal struck down the gag order, holding that prior restraints against the press violated
19 the First Amendment and should rarely be granted when sought by the prosecution. *Id.* at 831.
20 “[I]n only an insignificant number of cases does the publicity factor affect the prosecution’s right
21 to due process. In those instances, the vast financial resources and manpower available to the
22 Government ... should likewise be kept firmly in mind before the issuance of any order
23 amounting to a direct prior restraint on publication.” *Id.* Only when a party seeking a prior
24 restraint against the press can show “strong proof that the publication sought to be restrained
25 meets the clear-and-present danger standard” should the prior restraint be upheld. *Id.* at 830. The
26 court concluded that the prosecution failed to meet the burden to justify a prior restraint on the
27 press because the prosecutor could not show that its due process right to a fair trial would be
28 harmed by news reports about the confession. *Id.* at 831.

1 In *Freedom Communication, Inc. v. Superior Court of Orange County*, the trial court
2 prohibited a newspaper from reporting on witness trial testimony, citing the danger of other
3 witnesses being influenced by reading news reports of the testimony of fellow witnesses. 167
4 Cal. App. 4th at 154. The Court of Appeal vacated the order, holding that the danger of witnesses
5 being influenced by news stories about trial testimony was not “sufficiently compelling in light of
6 a host of Supreme Court decisions overturning injunctions against publications that posed much
7 graver threats to protected interests.” *Id.* (citing *N.Y. Times Co.*, 403 U.S. at 714 (invalidating
8 prior restraint against publication of “Pentagon Papers,” despite government’s argument that
9 disclosure of information posed “grave and immediate danger” to national security).)

10 Gag orders are commonly found to be an unconstitutional prior restraint because the trial
11 courts failed to use less restrictive means to protect fair trial rights such as *voir dire* to weed out
12 prejudicial biased jurors and admonishing jurors not to read press accounts of the trial. In *Sun*
13 *Company of San Bernardino v. Superior Court of San Bernardino County*, the Court of Appeal
14 concluded that “in balancing the constitutional right to a fair trial against the rights of a free press,
15 it should be emphasized that sufficient legal safeguards presently exist to assure the defendant of a
16 fair trial --e.g., change of venue, *voir dire* examination and challenge of prospective jurors, jury
17 sequestration, mistrial, new trial, appeal and habeas corpus.” 29 Cal. App. 3d at 831. *See also*
18 *Freedom Commc’n, Inc.*, 167 Cal. App. 4th at 154 (“[A]dmonitions ... must be considered a
19 presumptively reasonable alternative’ to restricting First Amendment rights.”).

20 Last year, a Los Angeles Superior Court judge issued – and then quickly reversed – two of
21 its own prior restraints against the *Los Angeles Times* in a criminal case. *See* Maya Lau, *L.A.*
22 *judge reverses order barring journalists from describing appearance of murder defendants*, *L.A.*
23 *Times* (Oct. 13, 2018), [http://www.latimes.com/local/lanow/la-me-ln-wright-descriptor-hearing-](http://www.latimes.com/local/lanow/la-me-ln-wright-descriptor-hearing-20181013-story.html?outputType=amp)
24 [20181013-story.html?outputType=amp](http://www.latimes.com/local/lanow/la-me-ln-wright-descriptor-hearing-20181013-story.html?outputType=amp).

25 In addition to being presumptively unconstitutional under the First Amendment, prior
26 restraints are also disfavored and presumptively unconstitutional under California law. Article I,
27 Section 2 of the California Constitution guarantees that “every person may freely speak, write and
28 publish his or her sentiments on all subjects, being responsible for the abuse of this right” and that

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1 “[a] law may not restrain or abridge liberty of speech or press.” The California Supreme Court
2 has recognized that the California Constitution’s protection for free speech is broader than that
3 provided by the First Amendment because the First Amendment bars government interference
4 with speech and publication, whereas the state constitution gives Californians an affirmative right
5 to speak and publish in addition to providing a restriction on government interference. *See*
6 *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 493 (2000); *Wilson v. Superior Court of L.A.*
7 *Cty.*, 13 Cal.3d 652, 658 (1975).

8 **B. The Gag Order Does Not Satisfy the Stringent Test for Prior Restraints**

9 Prior restraints are unconstitutional unless (1) the speech sought to be restrained poses a
10 clear and present danger to a protected competing interest; (2) the order is narrowly tailored to
11 protect that interest; and (3) no less restrictive alternatives are available. *Freedom Commc’n, Inc.*,
12 167 Cal. App. 4th at 154; *accord Hurvitz*, 84 Cal. App.4th at 1242. A party seeking a prior
13 restraint against the press must also establish that 12 jurors could not be found who would, under
14 proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence
15 presented in open court.” *Neb. Press Ass’n*, 427 U.S. at 569.

16 Before a court issues a prior restraint, it must first consider other alternative actions to
17 protect fair trial rights, including alternatives such as a *voir dire* examination and admonitions to
18 jurors to avoid reading news accounts or talking to others about the trial. *NBC Subsidiary*
19 *(KNBC-TV), Inc. v. Superior Court of L.A. Cty.*, 20 Cal. 4th 1178, 1224 (1999) (holding the
20 “presumption that admonitions and instructions are adequate may be rebutted by the exceptionally
21 prejudicial nature of evidence to be received outside the presence of the jury and the potential
22 intensity of media coverage”). Also, “[a]dmonitions [to the jury] ... must be considered a
23 presumptively reasonable alternative’ to restricting First Amendment rights.” *Freedom Commc’n,*
24 *Inc.*, 167 Cal. App. 4th at 154 (citing *NBC Subsidiary (KNBC-TV), Inc.*, 20 Cal. 4th at 1224).

25 The mere possibility of danger or prejudice to the right to a fair trial is not enough
26 because “the First Amendment right of access cannot be overcome by [a] conclusory assertion;”
27 actual prejudice or danger must exist. *NBC Subsidiary*, 20 Cal. 4th at 1224 (citing *Press-*
28 *Enterprise Co. v. Superior Court of Riverside Cty.*, 478 U.S. 1, 15 (1986)). Gag orders sought by

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1 prosecutors are based on due process rights, not on the Sixth Amendment right to a fair trial, and
2 are disfavored. *See generally Sun Co. of San Bernardino*, 9 Cal. App. 3d at 831.

3 The parties have not alleged, and will not be able to allege, any facts showing that Mr.
4 Esposito's publications present a clear and present danger to the fair trial rights of any party.
5 Kern County has a population of nearly 1 million. This pool of potential jurors is large enough
6 that neither the prosecution nor the defense can establish that 12 impartial jurors cannot be found.
7 This is not a murder or rape case. It is a misdemeanor case involving a vote by an elected official.
8 The other media organizations in Kern County have not been gagged from reporting about this
9 case. Using *voir dire* to weed out prejudiced juror candidates and admonitions to the seated jury
10 are more than adequate measures to safeguard a fair trial. Here, there is no evidence that the court
11 has considered these alternative actions.

12 Because 12 impartial jurors can be found in a county with a population of nearly 1 million,
13 because no other journalists are gagged from reporting about this case, and because less restrictive
14 alternatives such as *voir dire* and jury admonitions are available, it is clear that the heavy burden
15 to uphold the prior restraint has not been met.

16 **C. Even If Mr. Esposito Were Not a Journalist, the Gag Order Is Unconstitutional**

17 The Gag Order would be unconstitutional as applied to Mr. Esposito even if he were a trial
18 witness and not a journalist – which he unquestionably is.¹

19 California courts have vacated gag orders against parties to litigation and their counsel on
20 the grounds they failed to meet the heavy burden to justify prior restraints. *See Evans v. Evans*,
21 162 Cal. App. 4th 1157, 1167 (2008) (vacated prior restraint prohibiting wife from publishing
22 defamatory and private information about husband in defamation case); *Hurvitz*, 84 Cal. App. 4th
23 at 1241 (vacated prior restraint barring parties, attorneys, agents, employees from naming victims
24

25 ¹ Websites “whose *raison d’etre* [is] dissemination of a particular kind of information to an
26 interested readership” and that “gather[] information by a variety of means Constitute[] the
27 gathering and dissemination of news” and have been recognized as journalistic enterprises
28 protected by California law. *See O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1457 (2006)
(website reporting news and information about Apple products qualified as news website
protected by California reporter shield law).

1 in consolidated cases against plastic surgeons). Just as in cases with prior restraints against
2 journalists, gag orders against trial participants are unconstitutional unless (1) the speech sought
3 to be restrained poses a clear and present danger to a protected competing interest; (2) the order is
4 narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available. *Id.* at
5 1242.

6 This Court has not made any findings based on admissible evidence establishing that Mr.
7 Esposito's publications present a clear and present danger to the fair trial rights of any party. The
8 mere possibility of danger or prejudice to the right to a fair trial is not enough; actual prejudice or
9 danger must exist. *NBC Subsidiary (KNBC-TV), Inc.*, 20 Cal. 4th at 1224 (citing *Press-Enterprise*
10 *Co.*, 478 U.S. at 15). Before a court issues a gag order, it must first consider other alternative
11 actions to protect fair trial rights, including a change of venue, *voir dire* examination, or jury
12 sequestration. *Sun Co. of San Bernardino*, 29 Cal. App. 3d at 831. These legal safeguards can
13 and should be employed before issuing a prior restraint on publication. It is clear the heavy
14 burden to uphold this prior restraint has not been met.

15 **D. The Order is Unconstitutionally Vague and Overbroad.**

16 The unconstitutional vagueness and overbreadth of the August Gag Order is an
17 independent basis for amending or vacating it. California Courts have found that a regulation on
18 speech can both impose an unconstitutional prior restraint on speech and be unconstitutionally
19 vague. *E.g.*, *Smith v. Cty. of L.A.*, 24 Cal. App. 4th 990, 995 (1994) (holding that an ordinance
20 was unconstitutional as being a prior restraint and being vague); *Santa Fe Springs Realty Corp. v.*
21 *City of Westminster*, 906 F. Supp. 1341, 1365 (C.D. Cal. 1995) (finding that an ordinance was
22 both an unconstitutional prior restraint and impermissibly vague).

23 A restraint on speech may be unconstitutionally vague if it “fail[s] to give persons of
24 ordinary intelligence adequate notice of what conduct is proscribed,” or if “it may permit or
25 authorize arbitrary and discriminatory enforcement.” *G.K. Ltd. Travel v. City of Lake Oswego*,
26 436 F.3d 1064, 1084 (9th Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). In
27 addition, “a more stringent vagueness test should apply” where a regulation interferes with the
28 right of free speech. *Village of Hoffman Estates*, 455 U.S. 489, 499 (1982); *Cal. Teachers Ass’n*

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1 v. *Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (noting that “vagueness concerns are more
2 acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more
3 stringent.”).

4 In *Nebraska Press Association v. Stuart*, the trial court’s prior restraint order barred
5 publication of all “[o]ther information strongly implicative of the accused as the perpetrator of the
6 slayings.” 427 U.S. at 568. The Supreme Court found that “this prohibition regarding
7 ‘implicative’ information is too vague and too broad to survive the scrutiny we have given to
8 restraints on First Amendment rights.” *Id.* Here, like the prohibition in *Nebraska Press*
9 *Association*, the August Gag Order is too vague and too broad to survive the stringent vagueness
10 scrutiny. The August Gag Order bans any “witness contained in investigation reports” from
11 making any “new public statement” about the case. However, Mr. Esposito is unsure if he is
12 covered by the order because he has been told by prosecutors he “was named in the investigative
13 reports.”

14 A government restriction on speech is unconstitutionally overbroad when it sweeps so
15 broadly it infringes speech that is entirely protected by the First Amendment. *Erznoznik v.*
16 *Jacksonville*, 422 U.S. 205, 213 (1975). The August Gag Order is overbroad because it lacks a
17 specified termination date. This means that it can be a permanent gag order, which would
18 infringe post-trial speech, which is entirely protected by the First Amendment.

19 The August Gag Order fails to give persons of ordinary intelligence adequate notice of the
20 restraint’s scope and duration. Therefore, the August Gag Order should be vacated by this Court
21 because it is unconstitutionally vague and overbroad.

22 IV. CONCLUSION

23 Mr. Esposito’s speech has been chilled for half a year by incorrect and confusing
24 instructions from the prosecution and two unclear gag orders. Mr. Esposito asks this Court to clear
25 up the confusion by issuing an order stating that Mr. Esposito is not bound by the August Gag
26 Order. But that is not enough to cure the gag order of its unconstitutionality. This Court should
27 vacate the order and use its toolbox of alternatives to ensure a fair trial: remind counsel to obey
28

1 California Rule of Professional Conduct 3.6, use searching *voir dire* to weed out prejudiced
2 potential jurors, and admonish the sitting jury to avoid media accounts of the trial.
3

4 DATED: February 7, 2019

UCI IPAT CLINIC

5
6 SUSAN SEAGER

7 By: Susan S Seager / S.F.

SUSAN SEAGER

8 Attorney for Non-Party Journalist

9 ANTHONY "T.J." ESPOSITO
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UCI IPAT CLINIC

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DECLARATION OF ANTHONY ESPOSITO

I, Anthony Esposito, declare:

1. I am over eighteen years of age. The matters stated below are true of my own personal knowledge, except for those matters stated on information and belief, which I am informed and believe to be true.

2. I live in Bakersfield and I am a Latino publisher and owner of *The Valley Voice/The Central Valley Voice* and *Kern Cast* news websites on Facebook since October 2016. In over fifty postings I and my staff have reported on a variety of issues in the Bakersfield area. Recently, my sites have been reporting about the successful voting rights lawsuit brought by the Mexican-American Legal Defense Fund against the Kern County Board of Supervisors and the two misdemeanor conflict-of-interest charges that Kern County District Attorney Lisa S. Green filed on July 17, 2018 against Kern County Supervisor Leticia Perez. Ms. Perez is the only Latino on the board and according to Ms. Perez's attorneys, she is the only person criminally charged with conflict-of-interest violations in the history of California. I am interested in reporting about the case against Ms. Perez because one of my areas of focus includes issues impacting Latinos in Kern County.

3. On July 17, 2018, I posted an article and video on my website, *The Valley Voice*, reporting that Ms. Green held a press conference to announce she had filed two misdemeanor conflict-of-interest charges against Ms. Perez. My article also reported that immediately after the filing of the charges, Ms. Perez's defense counsel, H.A. Sala, held a press conference in which he gave a "scathing speech" criticizing Ms. Green for bringing the criminal charges against Ms. Perez and saying the unprecedented charges were "discriminatory." We posted a mash-up of several videos with the caption of #UNITY, including videos of the press conferences by Ms. Green, Mr. Sala, and news reports about other issues regarding Latino voters in the county. We received over 44,000 "hits" by viewers on the post. This is a link to that post:

https://m.facebook.com/story.php?story_fbid=907056096147885&id=586891234831041

1 4. On or about July 23, 2018, I received a letter from Deputy District Attorney
2 Christopher E. Dominguez alleging that, “You have been identified as a person who provided
3 information to investigators during the investigation of” the *People v. Perez* case. His letter
4 went on to say that “because you might potentially be called as a witness in this action, you are
5 required to abide by the Protective Order Against Publicity issued on July 20, 2018,” and “the
6 Order requires you not to make any statements in any fashion for public dissemination
7 concerning this case.” A true and correct copy of Mr. Dominguez letter is attached hereto as
8 **Exhibit A.**

9 5. Mr. Dominguez included a copy of this Court’s July 20, 2018 Protective Order
10 Against Publicity (“July Gag Order”) in his letter to me. A true and correct copy is attached
11 hereto as **Exhibit B.** The July Gag Order states that it bars public statements by “any witness in
12 law enforcement reports.”

13 6. I have not spoken to any investigators related to the *People v. Perez* case, nor have I
14 been contacted by anyone stating I might be a witness in the case.

15 7. I am informed and believe that I am mentioned in a written investigative report
16 prepared by Mr. Perez’s defense counsel, H. A. Sala.

17 8. I have not made any public statements or published any articles or videos about the
18 *People v. Perez* case since receiving Mr. Dominguez July 23, 2018 letter. I believed that his
19 July 23, 2018 letter instructing me not to make any statements “for public dissemination” about
20 the *Perez* matter meant I could not publish any articles or post any videos about the case.

21 9. I have read the November 5, 2018 letter sent to my attorneys by Ms. Green, which is
22 attached as Exhibit D to the Declaration of Susan Seager. In her letter, Ms. Green stated that
23 “we have confirmed that Mr. Esposito was not in fact interviewed by our investigators.” But
24 Ms. Green added that my “name was referenced by others interviewed during the
25 investigation.” Ms. Green also stated that Deputy District Attorney Chris Dominguez “currently
26 has no intention of calling Mr. Esposito as a witness” and “does not intend to bring any motions
27 concerning Mr. Esposito’s journalistic public statements.”
28

1 10. I have read the August 30, 2018 Amended Protective Order Against Publicity
2 ("August Gag Order"), which Ms. Green sent to my attorneys and is attached as Exhibit E to the
3 Seager Declaration. The August Gag Order states, "[n]o witness contained in investigation
4 reports related to this case ... shall ... [m]ake any new public statement concerning the identity
5 or any current or prospective witness," or "[m]ake any new public statement concerning the
6 nature, source or effect of any evidence introduced or testimony given in any proceeding related
7 to this matter ... absent further Court Order."

8 11. I have read the November 25, 2018 email sent by Mr. Sala to my attorneys, which
9 is attached as Exhibit G to the Seager Declaration. Mr. Sala states in his email that "Mr.
10 Esposito is not a defense witness and I do not have any present intention to call him as a witness
11 at trial" and that Mr. Sala "do[es] not intend to file a motion against Mr. Esposito to enforce the
12 court's protective order."

13 12. I am worried that the August Gag Order bans me from publishing news reports
14 about the *Perez* matter because the order bans any "witness contained in investigation reports"
15 from making any "new public statements" about witnesses, evidence, and testimony in the case.
16 Ms. Green said in her November 5, 2018 letter to my attorneys that my "name was referenced
17 by others interviewed during the investigation," and I am informed and believed that my name
18 is "contained an investigative report" prepared by Mr. Sala.


19 13. Because of my worry that both the July Gag Order and the August Gag Order apply
20 to me, I have not published any articles or posted any videos on my websites about this case
21 since July 23, 2018.

22 14. Even though Ms. Green and Mr. Sala say that they do not intend to call me as a
23 witness or seek court sanctions against me for publishing about this case, I will only feel safe
24 publishing on the *Perez* matter if this Court immediately clarifies or amends the August Gag
25 Order to state that it does not apply to or bar me from publishing articles about the *People v.*
26 *Perez* matter. In the alternative, I request the Court to vacate the August Gag Order in its
27 entirety.
28

15. These two gag orders have for the past six months stopped me from reporting about one of the most important political and criminal cases in Kern County. Since I stopped reporting about the *People v. Perez* case, the amount of people looking at my news websites has dropped from 100,000 views per month to 5,000 to 10,000 views per month. This drop in readership has drastically slowed my momentum in launching and monetizing my online news platforms. I believe that my inability to report on the *People v. Perez* Case has materially contributed to this drop in readership.

16. I am unaware of any other local media outlets being told by prosecutors that they are prohibited from publishing articles about this case because of a court gag order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 4th, 2019, in Bakersfield, California.


Anthony Espinoza

Anthony Esposito

DECLARATION OF SUSAN SEAGER

I, Susan Seager, declare:

1. I am over eighteen years of age. I am an attorney admitted to practice before all the courts of the State of California and before this Court. I am a lecturer at the University of California, Irvine School of Law Intellectual Property, Arts, and Technology Clinic, where I supervise law students in the law clinic that provides pro bono legal services to clients related to First Amendment rights to free speech and a free press. I am one of the attorneys representing non-party journalist Anthony Esposito in this matter. The matters stated below are true of my own personal knowledge, except for those matters stated on information and belief, which I am informed and believe to be true.

2. I have signed and submitted to this Court on February 7th, 2019 the Practical Training of Law Students Program Declarations by Supervising Attorney for the following University of California, Irvine law students working on this case under my supervision: Emily Asgari, Shanxi Feng, and Cassie Doult. The Court clerk confirmed that these have been accepted by the Court on February 7th, 2019.

3. On November 1, 2018, my colleague, Professor Jack Lerner, who is director of our law clinic, sent a letter to Kern County District Attorney Lisa S. Green requesting that her office rescind Deputy District Attorney Chris Dominguez's July 23, 2018 letter to Mr. Esposito. In his July 23 letter, Mr. Dominguez said that this Court's July 20, 2018 Protective Order Against Publicity ("July Gag Order") prohibited Mr. Esposito from making "any statements in any fashion for public dissemination concerning this case" because Mr. Esposito "had been identified as a person who provided information to investigators" and was a potential trial witness. Professor Lerner's letter stated that Mr. Esposito had not spoken to any investigators nor had he been contacted by either side to testify as a witness, and therefore Mr. Esposito should not be covered by the July Gag Order. A true and correct copy of Mr. Lerner's letter to Ms. Green is attached hereto as **Exhibit C**.

1 4. On November 5, 2018, Ms. Green faxed and mailed a response to Professor Lerner,
2 correcting the previous letter by Mr. Dominguez by stating “we have confirmed that Mr.
3 Esposito was not in fact interviewed by our investigators” although his “name was referenced
4 by others interviewed during the investigation.” A true and correct copy of Ms. Green’s letter
5 is attached hereto as **Exhibit D**.

6 5. In her November 5, 2018 letter, Ms. Green also said that the Court had filed a
7 superseding gag order, the August 30, 2018 Amended Protective Order Against Publicity
8 (“August Gag Order”), which she attached to her letter. The August Gag Order banned any
9 “witness contained in investigative reports” from making any “new public statement concerning
10 the existence or possible existence of any document, exhibit, or other evidence,” “the identity of
11 any or any current or prospective witness,” and “the nature, source, or effect of any evidence
12 introduced or testimony given.” Ms. Green stated that the trial prosecutor, Mr. Dominguez, had
13 “no intention” of calling Mr. Esposito as a witness and does not believe Mr. Esposito has any
14 evidence related to the *People v. Perez* case, and that her office would not go to court claiming
15 Mr. Esposito violated the August Gag Order if he spoke or published anything about the *People*
16 *v. Perez* case. A true and correct copy of the August Gag Order is attached hereto as **Exhibit E**.

17 6. On November 13, 2018, I sent a letter to Ms. Perez’s defense counsel, H.A. Sala,
18 asking him to clarify that he did not intend to call Mr. Esposito as a defense witness in trial nor
19 would he file a motion against Mr. Esposito for making public statements or publishing any
20 reports about *People v. Perez*. A true and correct copy of my letter to Mr. Sala is attached as
21 **Exhibit F**.

22 7. On November 25, 2018, Mr. Sala replied via email, confirming that he did not
23 intend to call Mr. Esposito as a defense witness or seek sanctions if Mr. Esposito were to make
24 public statements about the case. A true and correct copy of Mr. Sala’s response is attached
25 hereto as **Exhibit G**.

26 8. At 3:23 p.m. and 3:41 p.m. on February 4th, 2019, I sent emails to Mr. Dominguez
27 and to Mr. Sala, providing notice of Mr. Esposito’s Ex Parte Application, stating that I and
28

1 certified law students under my supervision would appear at the February 8, 2019 hearing at
2 1:30 p.m. that was previously scheduled by the Court in this case, and asked if they would
3 oppose Ms. Esposito's request. Mr. Sala responded to me by email, stating that he does not
4 oppose Mr. Esposito's request to clarify or amend the August Gag Order, but that he opposes
5 vacating the entire August Gag Order. True and correct copies of my email exchanges between
6 myself and Mr. Dominquez and Mr. Sala are attached as **Exhibit H**.

7 9. I spoke with Mr. Dominguez by telephone at approximately 2:12 p.m. on February
8 4th, 2019 and provided notice, and he informed me that he does not oppose Mr. Esposito's
9 request to clarify or amend the August Gag Order, but that he opposes vacating the entire
10 August Gag Order.
11

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct and that this declaration was executed on February ~~7~~th, 2019, in Los
14 Angeles, California.
15


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17 Susan Seager
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EXHIBIT A

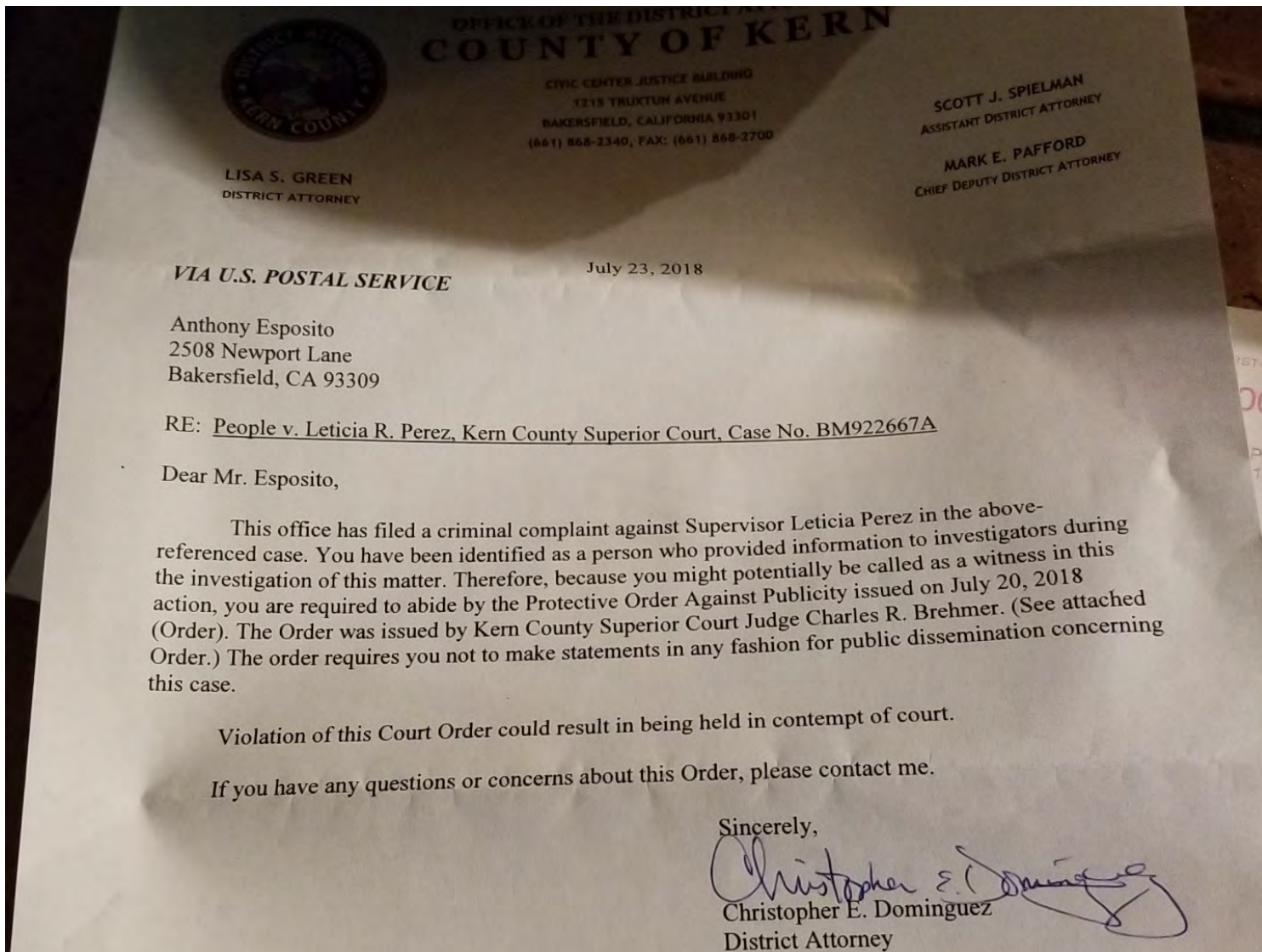


EXHIBIT B

ENDORSED

LISA S. GREEN, District Attorney
County of Kern
Christopher E. Dominguez, 193850
Deputy District Attorney
Civic Center Justice Building
1215 Truxtun Avenue
Bakersfield, CA 93301
Telephone (661) 868-2340

FILED
KERN COUNTY

JUL 20 2018

TERRY McNALLY, CLERK
BY [Signature] DEPUTY

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN
METROPOLITAN DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,)	Case No.: BM922667A
)	
Plaintiff,)	PROTECTIVE ORDER
)	AGAINST PUBLICITY
vs.)	
)	
LETICIA R. PEREZ,)	
)	
Defendant.)	
)	

This matter came on regularly for hearing on July 20, 2018, pursuant to a notice of motion filed herein by the People. Counsel for the defendant and for the People both appeared. Counsel for the People moved in open court for an order concerning publicity.

The Court having read the declaration and the memorandum of points and authorities in support of the motion, having heard the arguments of counsel on the motion, and being fully advised in the premises; IT IS HEREBY ORDERED that:

INCLUDING ANY WITNESS IN LAW ENFORCEMENT AGENCIES
1. No witness or person subpoenaed as a witness, no judicial officer, public employee, law enforcement officer, or attorney connected with this case, or their assistants, office staff,

Page 4 Of 31

EXHIBIT B (1 of 3)

1 investigators, deputies, staff members, or employees under their supervision, make or authorize for
2 public dissemination the making of extrajudicial statements concerning this case, and that no such
3 persons shall release or authorize the release of any documents, exhibits, or other evidence connected
4 with this case.

5 2. No person mentioned above make any statement for public dissemination concerning the
6 existence or possible existence of any document, exhibit, or any other evidence connected with this
7 case.

8 3. No such person express for public dissemination or make any comment concerning the
9 weight or effect of any evidence as tending to establish guilt or innocence.

10 4. No such person make any statement for public dissemination concerning the identity of any
11 prospective witness, or the witness' probable testimony, or the effect thereof.

12 5. No such person make any statement for public dissemination concerning the nature,
13 source, or effect of any evidence obtained as a result of the investigation of this matter.

14 6. No such person make any statement for public dissemination as to the nature, source, or
15 effect of any evidence introduced or testimony given in any proceeding related to this matter.

16 7. This Order is to remain in effect until further order of the Court.

17
18 DATED: _____

*8. ANY LAW ENFORCEMENT REPORTS SHALL NOT BE
FILED WITH THE KERN COUNTY SUPERIOR COURT
NOR DISSEMINATED TO THE PUBLIC WITHOUT A COURT ORDER.*

7/19/18


JUDGE OF THE KERN COUNTY
SUPERIOR COURT

CHARLES R. BREHMER

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I am an employee of the Kern County District Attorney's Office and not a party to the above-
ed action. My business address is Kern County District Attorney's Office, Kern County
opolitan Building, 1415 Truxtun Avenue, Bakersfield, California 93301. On the date listed
, I served via facsimile the attached document, _____, on the
dant, Leticia R. Perez, through the attorney for the defendant listed below:

Executed at Bakersfield, California, on _____

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-3-

EXHIBIT C



Intellectual Property, Arts & Technology Clinic
UC Irvine School of Law

PO Box 5479
Irvine, CA 92616-5479
(949) 824-9660

November 1, 2018

Ms. Lisa S. Green
Kern County District Attorney
Civic Center Justice Building
1215 Truxtun Avenue
Bakersfield, CA 93301

Re: *People v. Perez*, Case No. BM922667A
Anthony Esposito / Protective Order Against Publicity

VIA FEDEX

Dear Ms. Green:

We are counsel for Anthony "T.J." Esposito, the owner, publisher, and reporter of *The Valley Voice* and *Kern Cast*, two local news publications reporting about the Bakersfield area. We are requesting that you rescind your July 23, 2018 letter sent to Mr. Esposito stating that he is covered by the Protective Order Against Publicity ("Gag Order") issued on July 20, 2018 in the above-captioned case. The Gag Order seeks to restrain the free speech of any "witness, including any witness in law enforcement reports or person subpoenaed as a witness, no judicial officer, public employee, law enforcement officer..." Gag Order, 1:23-2:4. We request that you send this letter for arrival by close of business on November 8, 2018. We also ask that you remove Mr. Esposito from any witness lists provided to the Court, the defendant, and anyone else who may have received a witness list.

We request that you rescind the letter directed to Mr. Esposito for two reasons. First, we believe Mr. Esposito was incorrectly identified as a witness; he has not spoken to any investigators. Second, the Gag Order violates Mr. Esposito's First Amendment rights, both as a journalist and as a member of the Bakersfield community. Mr. Esposito has already suffered irreparable harm caused by the deprivation of his constitutional rights to free speech and free press rights for the past fourteen weeks. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

Mr. Esposito Did Not Talk to an Investigator

On July 23, 2018, Mr. Esposito received a letter from you stating that he has spoken to an investigator, is a potential witness in the *People v. Perez*, and therefore is covered by the Gag Order issued by Kern County Superior Court Judge Charles Brehmer on July 20, 2018. We believe that your office is mistaken because Mr. Esposito has not spoken to an investigator, nor do we know of any reason why he would be called as a witness.

Because Mr. Esposito has not spoken to an investigator and presumably will not be a trial witness, we ask that you send a letter to Mr. Esposito making clear that he is not covered by the Gag Order and is not a potential witness in the trial.

The Gag Order Is an Unconstitutional Prior Restraint

Even if Mr. Esposito were a witness, he is also a journalist, and the Gag Order is so broadly worded that it arguably prevents Mr. Esposito and his websites from reporting on and publishing about this case. This order and the accompanying letter are a classic “prior restraint” against the press. For more than 100 years, courts have struck down prior restraints such as this as violative of the First Amendment. The United States Supreme Court has never upheld a prior restraint on the press.

In *Near v. Minnesota*, 283 U.S. 713 (1931), the Supreme Court stated that imposition of prior restraints against publishing is “the essence of censorship.” *Id.* at 713. It is well established that a “heavy presumption” exists against the “constitutional validity” of prior restraints. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Prior restraints against the press may be allowed only in the rarest circumstances, such as to prevent the dissemination of information about troop movements during wartime, *Near*, 283 U.S. at 716, or to “suppress[] information that would set in motion a nuclear holocaust.” *New York Times v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

The Supreme Court has never held that a defendant’s right to a fair trial justifies a prior restraint blocking news reports about the trial. In a case involving a murder trial in a small town in Nebraska, the Supreme Court struck down the trial court’s gag order barring the press from reporting about the defendant’s confession, rejecting the defendant’s contention that such a publication would violate his Sixth Amendment right to a fair trial. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556-561 (1976). The court stated that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Id.* at 559.

Nebraska Press Association is still the law of the land and California courts have repeatedly reaffirmed its First Amendment protection against prior restraints. *See, e.g., Brian W. v. Superior Court*, 574 P.2d 788, 792 (1978) (in bank) (citing *Nebraska Press Ass’n*, 427 U.S. at 559-60) (“[T]he United States Supreme Court has repeatedly recognized the salutary function served by the press in encouraging the fairness of trials and subjecting the administration of justice to the beneficial effects of public scrutiny.”); *see also San Jose Mercury-News v. Mun. Court*, 638 P.2d 655, 664 (1982) (in bank) (citing *Nebraska Press Ass’n* for the proposition that “certain alternate means of preventing prejudice from adverse pretrial publicity, such as gag orders or restraints on publication . . . can involve equal and even greater intrusions on speech and press rights”).

California courts have also struck down prior restraints in high profile criminal cases. Just last month, a Los Angeles Superior Court judge issued – and then quickly reversed – two prior restraints against the *Los Angeles Times* in a criminal case. Maya Lau, *L.A. judge reverses order barring journalists from describing appearance of murder defendants*, L.A. Times (Oct. 13, 2018), <http://www.latimes.com/local/lanow/la-me-ln-wright-descriptor-hearing-20181013-story.html?outputType=amp>.

In a California Court of Appeal case directly on point, *Sun Company of San Bernardino v. Superior Court*, 29 Cal.App.3d 815 (1973), the trial court issued a gag order against several local newspapers at the request of the prosecution in a murder trial. The Court of Appeal struck down the gag order, holding that prior restraints against the press violated the First Amendment and should rarely be granted when sought by the prosecution. “[I]n only an insignificant number of cases does the publicity factor affect the prosecution’s right to due process,” the court said. “In those instances, the vast financial resources and manpower available to the Government . . . should likewise be kept firmly in mind before the issuance of any order amounting to a direct prior restraint on publication.” *Id.* at 831. Only when a party seeking a prior restraint against the press can show “presentation of strong proof that the publication sought to be restrained meets the clear-and-present danger standard” should the prior restraint be upheld, the court said. *Id.* at 830. The court concluded in that case that the prosecution failed to meet the burden to justify a prior restraint on the press because the prosecutor could not show that its due process right to a fair trial would be harmed by news reports about the confession. *Id.* at 831. *See also Freedom Commc’ns, Inc. v. Superior Court*, 167 Cal. App. 4th 150, 154 (2008) (declaring trial court order prohibiting newspaper from reporting on trial testimony of witnesses an unconstitutional prior restraint because the danger of witnesses being influenced by reading reports of the testimony of other witnesses was not sufficiently compelling, and other, less restrictive means were available to protect fair trial rights).

Prior restraints are also disfavored and presumptively unconstitutional under California law. Article I, Section 2 of the California Constitution guarantees that “every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right” and that “[a] law may not restrain or abridge liberty of speech or press.” The California Supreme Court has recognized that the California Constitution protection for free speech is broader than that provided by the First Amendment. *See Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 493 (2000); *Wilson v. Superior Court*, 13 Cal.3d 652, 658 (1975).

Here, the prosecution could not possibly meet the high standard for justifying a prior restraint against Mr. Esposito, regardless of whether he is a witness. Like the prosecution in *Sun Company*, your office would not be able to present strong proof that any publications made by Mr. Esposito meet the “clear-and-present danger” standard sufficient to justify a prior restraint on the press. Indeed, there are no facts to show that any party’s right to a fair trial would be harmed by Mr. Esposito’s news posts about this case.

Even If Mr. Esposito Were Not a Journalist, The Gag Order Is Unconstitutional

The Gag Order would be unconstitutional as applied to Mr. Esposito even if he were a trial witness and not a journalist.

California courts have routinely overturned prior restraints against non-journalists, including witnesses and parties to the litigation, on the grounds that the prior restraints were presumptively unconstitutional and did not meet the heavy burden required to defeat the presumption. *See Evans v. Evans*, 162 Cal. App.4th 1157, 1167 (2008) (removed prior restraint prohibiting a former wife of a deputy sheriff from publishing false and defamatory information on the Internet); *Hurwitz v. Hoefflin*, 84 Cal. App.4th 1232, 1241(2000) (removed prior restraint issued against patients bringing suit against former physician). Gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available. *Id.* at 1242.

The prosecution has not alleged, and will not be able to allege, any facts showing that Mr. Esposito's publications present a clear and present danger to the fair trial rights of any party. The mere possibility of danger or prejudice to the right to a fair trial is not enough; actual prejudice or danger must exist. *Id.* Before a court issues a gag order, it must first consider other alternative actions to protect fair trial rights, including a change of venue, *voir dire* examination, or jury sequestration. These legal safeguards can and should be employed before issuing a prior restraint on publication. *See Sheppard v. Maxwell* (1966), 384 U.S. 333, 362-363. Here, there is no evidence that the court has considered these alternative actions. It is clear that the heavy burden to uphold this prior restraint has not been met.

Conclusion

Because Mr. Esposito has been incorrectly named as a witness and the Gag Order is an unconstitutional prior restraint, we respectfully ask that you send a new letter to Mr. Esposito making clear that he is not covered by the Gag Order and that he is not a trial witness. We request that you send this letter for arrival by close of business on November 8, 2018. We also ask that you remove Mr. Esposito from any witness lists provided to the Court, the defendant, and anyone else who may have received a witness list.

If you would like to discuss our request, or if any of the assertions we make in this letter do not comport with your understanding of the facts, please let us know as soon as possible. We can be reached at (949) 824-5447, by email at ipatfilmteam@law.uci.edu, or by fax at (949) 824-2747.

Very truly yours,
UCI Intellectual Property, Arts, and Technology Clinic



Michelle Chea, Certified Law Student
Reece Foster, Certified Law Student
Julia Gaffney, Certified Law Student
Ashley Yee, Certified Law Student
Professor Jack Lerner, Esq.
Professor Susan Seager, Esq.

EXHIBIT D



OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF KERN

CIVIC CENTER JUSTICE BUILDING
1215 TRUXTUN AVENUE
BAKERSFIELD, CALIFORNIA 93301
(661) 868-2340, FAX: (661) 868-2700

LISA S. GREEN
DISTRICT ATTORNEY

SCOTT J. SPIELMAN
ASSISTANT DISTRICT ATTORNEY

MARK E. PAFFORD
CHIEF DEPUTY DISTRICT ATTORNEY

November 5, 2018

VIA U.S. MAIL and FAX (949) 824-2747

Jack Lerner
Professor
Intellectual Property, Arts & Technology Clinic
UC Irvine School of Law
PO Box 5479
Irvine, CA 92616-5479

RE: People v. Perez, Case No. BM922667A – Protective Order Against Publicity / Anthony Esposito

Dear Professor Lerner:

I am writing in response to your letter dated November 1, 2018, concerning the above-referenced topic. As an initial matter and for clarification, the original "Gag Order" dated July 20, 2018, was amended on August 30, 2018, by Charles R. Brehmer, Presiding Judge of the Superior Court. (See enclosure, First Amended Protective Order Against Publicity.)

Upon review of the investigative report, we have confirmed that Mr. Esposito was not in fact interviewed by our investigators. His name was referenced by others interviewed during the investigation. At the defendant's and her counsel's insistence, the initial notification letters were sent to all persons who were named in the investigative reports. The prosecutor in this case, Deputy District Attorney Chris Dominguez, currently has no intention of calling Mr. Esposito as a witness and is unaware of material evidence that Mr. Esposito may possess concerning the charges against Supervisor Perez. Mr. Dominguez does not intend to bring any motions concerning Mr. Esposito's journalistic public statements.

We cannot, however, speak for defense counsel. It was at Mr. Sala's insistence the language concerning persons identified in the investigative reports was included in the Gag Order. I have copied Supervisor Perez's counsel, H.A. Sala, on this letter so he is aware of my office's response concerning your request on behalf of Mr. Esposito.

If you wish to discuss this matter further, you may contact Mr. Dominguez directly at 661-868-2317 or Cdominguez@KernDA.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa S. Green", written over the printed name.

Lisa S. Green
District Attorney

cc: H.A. Sala

Enclosure: 1

EXHIBIT E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

ENDORSED
KERN COUNTY

AUG 30 2018

BY TERRY McNALLY, CLERK
DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA)

Plaintiff)

VS)

LETICIA PEREZ)

Defendant)

CASE NO. BM 922667 A

FIRST AMENDED
PROTECTIVE ORDER
AGAINST PUBLICITY

No witness contained in investigation reports related to this case, public employee, law enforcement officer, or attorney of record for a party or subpoenaed witness, or their assistants, office staff, investigators, deputies, or employees under their supervision, shall do the following:

1. Release or authorize the release of any documents, exhibits, or other evidence in this case.
2. Make any new public statement concerning the existence or possible existence of any document, exhibit or other evidence in this case.
3. Make any new public statement concerning the identity or any current or prospective witness or the likelihood of that individual testifying in this case.
4. Make any new public statement concerning the nature, source or effect of any evidence obtained, as a result, of the investigation in this case.
5. Make any new public statement as to the nature, source or effect of any evidence introduced or testimony given in any proceeding related to this matter.
6. Cause to be filed with this Court any law enforcement reports or release to the public any law enforcement reports related to the investigation of this case absent further Court Order.
7. This Order expressly does not prohibit any legal counsel from their representation of clients in any other legal proceedings nor does it effect the litigation privilege.
8. This Order supersedes the initial Order of July 20, 2018.

IT IS SO ORDERED

AUGUST 30, 2018

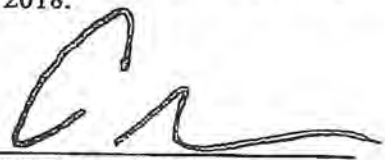

CHARLES R. BREHMER
Judge of the Superior Court

EXHIBIT F



Intellectual Property, Arts & Technology Clinic
UC Irvine School of Law

PO Box 5479
Irvine, CA 92616-5479
Office: (949) 824-9660
Fax: (949) 824-2747

November 13, 2018

VIA FAX (661) 322-6632

Mr. H.A. Sala
641 H Street
Bakersfield, CA 93304

Re: *People v. Perez*, Case No. BM922667A
Anthony Esposito / Protective Order Against Publicity

Dear Mr. Sala,

We are counsel for Anthony "T.J." Esposito. We are Certified Law Students at the UCI Intellectual Property, Arts, and Technology Clinic operating out of the University of California, Irvine School of Law, and are supervised by Professors Susan Seager and Jack Lerner. We are representing Mr. Esposito pro bono to vindicate his First Amendment rights of free press and free speech as the publisher of the online news sites *Valley Voice* and *Kern Cast*.

On Friday November 2, 2018, we sent a letter to Kern County District Attorney Lisa Green, asking her to rescind her July 23, 2018 letter to Mr. Esposito, in which she claimed that he was a witness and covered by the court's July 20, 2018 Protective Order Against Publicity. We apologize for not serving you with our letter last week, but we are attaching the letter here.

As you know, Ms. Green sent us a letter on November 5, 2018 clarifying that Mr. Esposito is not a prosecution witness or potential witness, and prosecutors do not intend to bring any motions concerning Mr. Esposito's journalistic public statements about the case.

In her letter, Ms. Green stated that you insisted that the Protective Order Against Publicity covered people referenced in investigative reports; apparently, Mr. Esposito is referenced by others in an investigative report. Ms. Green also provided us with the new August 30, 2018 Amended Protective Order.

As we did with Ms. Green, we are asking you to clarify that Mr. Esposito is not a witness for the defense, you do not intend to call him as a witness in the trial, and you do not intend to file a motion against him if he makes any public statements or publishes any reports about *People v. Perez* on his websites.

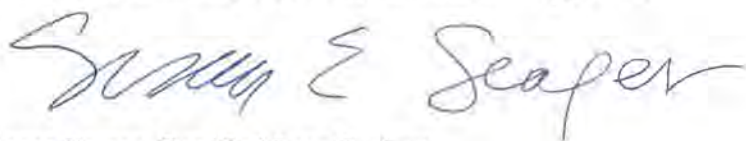
It is likely that we will go to court to ask the court to modify its Protective Order Against Publicity to clarify that Mr. Esposito is not covered by the Order even if he is named in an investigator's report. Please let us know if you would oppose, support, or remain neutral on our request.

We are prepared to argue to the court that even if Mr. Esposito were a witness, the Protective Order Against Publicity is an unconstitutional prior restraint that violates his First Amendment rights as a journalist. Prior restraints against the press may be allowed only in the rarest circumstances, such as to prevent the dissemination of information about troop movements during wartime. *Near v. Minnesota*, 283 U.S. 713, 716 (1931). In a case involving a murder trial in a small town in Nebraska, the Supreme Court struck down the trial court's gag order barring the press from reporting about the defendant's confession, holding that the gag order violated the First Amendment. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-561 (1976). The court stated that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559.

California courts also consistently strike down gag orders, both against journalists and ordinary parties and witnesses. *See Sun Company of San Bernardino v. Superior Court*, 29 Cal.App.3d 815 (1973); *Evans v. Evans*, 162 Cal. App.4th 1157, 1167 (2008).

We look forward to hearing from you.

Very truly yours,
UCI Intellectual Property, Arts, and Technology Clinic



Reece Foster, Certified Law Student
Michelle Chea, Certified Law Student
Julia Gaffney, Certified Law Student
Ashley Yee, Certified Law Student
Professor Jack Lerner
Professor Susan Seager

cc: Ms. Lisa Green (via email)

Xerox Color C70

Transmission Report

G3-ID
Local Name
Company Logo

Date & Time: 11/13/2018 5:51 PM
Page: 1 (Last Page)

The job has been sent.
Original Size: 8.5 x 11"

UNIVERSITY OF CALIFORNIA, IRVINE

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SANTA BARBARA • ANIMATING

Intellectual Property, Arts & Technology Clinic
UC Irvine School of Law

PO Box 5479
Irvine, CA 92616-5479
Office: (949) 824-9660
Fax: (949) 824-2747

November 13, 2018

VIA FAX (661) 322-6632

Mr. H.A. Sala
641 H Street
Bakersfield, CA 93304

Re: *People v. Perez*, Case No. BM922667A
Anthony Esposito / Protective Order Against Publicity

Dear Mr. Sala,

We are counsel for Anthony "T.J." Esposito. We are Certified Law Students at the UCI Intellectual Property, Arts, and Technology Clinic operating out of the University of California, Irvine School of Law, and are supervised by Professors Susan Seager and Jack Lerner. We are representing Mr. Esposito pro bono to vindicate his First Amendment rights of free press and free speech as the publisher of the online news sites *Valley Voice* and *Kern Cast*.

On Friday November 2, 2018, we sent a letter to Kern County District Attorney Lisa Green, asking her to rescind her July 23, 2018 letter to Mr. Esposito, in which she claimed that he was a witness and covered by the court's July 20, 2018 Protective Order Against Publicity. We apologize for not serving you with our letter last week, but we are attaching the letter here.

As you know, Ms. Green sent us a letter on November 5, 2018 clarifying that Mr. Esposito is not a prosecution witness or potential witness, and prosecutors do not intend to bring any motions concerning Mr. Esposito's journalistic public statements about the case.

In her letter, Ms. Green stated that you insisted that the Protective Order Against Publicity covered people referenced in investigative reports; apparently, Mr. Esposito is referenced by others in an investigative report. Ms. Green also provided us with the new August 30, 2018 Amended Protective Order.

COMMUNITY AND ECONOMIC DEVELOPMENT | CRIMINAL JUSTICE | DOMESTIC VIOLENCE | ENVIRONMENTAL
LAW | IMMIGRANT RIGHTS | INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY | INTERNATIONAL JUSTICE

#	Job	Remote Station	Start Date & Time	Duration	Pages	Protocol	Contents	Status
1	2980	6613226632	11-13; 5:50 PM	39 Secs	2/2	Super G3		Completed

EXHIBIT G

RE: Legal letter re Mr. Anthony Esposito and the Gag Order in People v. Perez

HA Sala <hasala@hasala.com>

Tue 11/27/2018 12:46 PM

To: Michelle Chea (clinic) <cheam1.clinic@law.uci.edu>;

Hello Ms. Chea,

A trial date has not been set.

Since you intend to file a motion, notwithstanding my reply to Ms. Seagar on November 25, 2018, I will respond to your request once I have had the opportunity to review the motion.

Best regards,

[website](#) | [vCard](#) | [map](#) | [email](#)

H.A. SALA
ATTORNEY AT LAW



CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

641 H STREET • BAKERSFIELD, CA 93304
TEL: (661) 322-1708 • FAX: (661) 322-6632

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From: Michelle Chea (clinic) <cheam1.clinic@law.uci.edu>
Sent: Tuesday, November 27, 2018 12:05 PM
To: HA Sala <hasala@hasala.com>
Cc: LAW - IPAT Clinic Filmmaker <IPATfilmteam@law.uci.edu>
Subject: Re: Legal letter re Mr. Anthony Esposito and the Gag Order in People v. Perez

Hi Mr. Sala,

We are students from the UCI Intellectual, Property, Arts, and Technology Clinic working under the supervision of Professors Susan Seagar and Jack Lerner.

Thank you for your reply. What is the trial date for this matter? If there is no date, what is your estimate?

We plan to file a motion to ask the court to clarify that Mr. Esposito is not covered by the order or vacate the gag order entirely. Please let us know if you would oppose, support, or remain neutral on our request.

Thank you.

Michelle and Reece

Michelle Chea

UCI Law IPAT Clinic | Certified Law Student

Mobile: (626) 905-3437 | Email: cheam1.clinic@law.uci.edu

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From: Susan Seager (clinic)
Sent: Tuesday, November 27, 2018 8:47 AM
To: LAW - IPAT Clinic Filmmaker
Subject: Fw: Legal letter re Mr. Anthony Esposito and the Gag Order in People v. Perez

Hi Bakersfield Team,

Trying again -- here is the response letter from Mr. Sala.

Page 23 Of 31

EXHIBIT G (2 of 4)

See you soon.

Best,

Susan

From: HA Sala <hasala@hasala.com>
Sent: Sunday, November 25, 2018 1:51 PM
To: Susan Seager (clinic)
Subject: RE: Legal letter re Mr. Anthony Esposito and the Gag Order in People v. Perez

Hello Ms. Seager,

Currently Mr. Esposito is not a defense witness and I do not have any present intention to call him as a witness at trial.

In light of Deputy District Attorney Chris Dominguez' representation reflected in District Attorney Lisa Green's November 5, 2018 correspondence that Mr. Esposito will not be called as a prosecution witness and that Mr. Dominguez is "unaware of material evidence that Mr. Esposito may possess concerning the charges against Supervisor Perez" I do not intend to file a motion against Mr. Esposito to enforce the court's protective order.

Best regards,

[website](#) | [vCard](#) | [map](#) | [email](#)

H.A. SALA
ATTORNEY AT LAW



CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

641 H STREET • BAKERSFIELD, CA 93304
TEL: (661) 322-1708 • FAX: (661) 322-6632

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From: Susan Seager (clinic) <sseager1.clinic@law.uci.edu>
Sent: Tuesday, November 20, 2018 10:27 AM
To: HA Sala <hasala@hasala.com>
Cc: Susan Seager (clinic) <sseager1.clinic@law.uci.edu>; Jack Lerner <jlerner@law.uci.edu>
Subject: Legal letter re Mr. Anthony Esposito and the Gag Order in People v. Perez

Dear Mr. Sala,

Please see the attached letter we sent to you last week regarding the Protective Order against Publicity and our client, Anthony Esposito.

Page 24 Of 31

EXHIBIT G (3 of 4)

Also attached is a copy of a similar letter we sent to District Attorney Lisa Green and a copy of her response to us.

We ask that you respond to our letter by close of business on Monday, November 26.

Very truly yours,
UCI Intellectual Property, Arts, and Technology Clinic

Reece Foster, Certified Law Student
Michelle Chea, Certified Law Student
Julia Gaffney, Certified Law Student
Ashley Yee, Certified Law Student
Professor Jack Lerner
Professor Susan Seager

Professor Susan Seager

UC Irvine School of Law

sseager1.clinic@law.uci.edu

Cell: 310-890-8991

EXHIBIT H

People v. Leticia Perez, Case No. BM922667A – Protective Order Against Publicity / Anthony Esposito

Shanxi Feng (clinic)

Mon 2/4/2019 3:23 PM

Inbox

To: Cdominguez@KernDA.org <Cdominguez@KernDA.org>;

Cc: LAW - IPAT 1A Team <ipatl1team@law.uci.edu>;

Dear Mr. Dominguez,

We are counsel for Anthony Esposito, the owner, publisher, and reporter of The Valley Voice and Kern Cast, two local news publications reporting about the Bakersfield area. We plan to file an *Ex Parte* Application to clarify or vacate the Court's August 30, 2018 Amended Protective Order Against Publicity (the "Order").

Specifically, we plan to request the Court to clarify the Order as follow: "Counsel for the prosecution and defense have stated that they do not plan to call Mr. Esposito as a witness in this case and the prosecution stated that Mr. Esposito has not been interviewed by any prosecution investigator. Therefore, this Order shall not apply to Mr. Esposito, subject to change only upon notice to Mr. Esposito and providing Mr. Esposito an opportunity to respond to any such change." In the alternative, we plan to request the Court to vacate the entire Order because it is an unconstitutional prior restraint and is unconstitutionally broad and vague.

We plan to schedule the hearing on February 8, 2019 at 1:30 pm, in Department 17 of the Kern County Superior Court.

Our certified law student, Shanxi Feng, has notified you the *Ex Parte* Application over the phone on February 4, 2019 at 2:12pm. You responded that (1) you agree that the Order shall not apply to Mr. Esposito, subject to change only upon notice to Mr. Esposito and providing Mr. Esposito an opportunity to respond to any such change; (2) you will oppose to our request to vacate the entire Order; (3) you agree to accept service of the *Ex Parte* Application and related papers by email; and (4) you will attend the hearing.

If any of the assertions we make in this email do not comport with your understanding of the facts, please let us know as soon as possible.

Very truly yours,
UCI Intellectual Property, Arts, and Technology Clinic

Professor Susan Seager, Esq.
Professor Jack Lerner, Esq.
Shanxi Feng, Certified Law Student
Cassie Douth, Certified Law Student

Page 27 Of 31

EXHIBIT H (1 of 5)

Shanxi Feng, Ph.D.

Certified Law Student

University of California, Irvine School of Law

Email: shanxif.clinic@law.uci.edu

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Fw: People v. Leticia Perez, Case No. BM922667A – Protective Order Against Publicity / Anthony Esposito

Shanxi Feng (clinic)

Mon 2/4/2019 4:23 PM

To: Susan Seager (clinic) <sseager1.clinic@law.uci.edu>

Cc: LAW - IPAT 1A Team <ipat1ateam@law.uci.edu>

Dear Professor Seager,

Mr. Sala just replied. His response is basically the same as the DA's office.

Best,
Shanxi

From: HA Sala <hasala@hasala.com>

Sent: Monday, February 4, 2019 4:19 PM

To: Shanxi Feng (clinic)

Subject: RE: People v. Leticia Perez, Case No. BM922667A – Protective Order Against Publicity / Anthony Esposito

Hello counsel,

I will oppose vacating the *entire* order.

I will accept service via email and I will attend the hearing.

[website](#) | [vCard](#) | [map](#) | [email](#)

H.A. SALA
ATTORNEY AT LAW



CERTIFIED SPECIALIST - CRIMINAL LAW
THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

641 H STREET • BAKERSFIELD, CA 93304
TEL: (661) 322-1708 • FAX: (661) 322-6632

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From: Shanxi Feng (clinic) <shanxif.clinic@law.uci.edu>

Sent: Monday, February 4, 2019 3:41 PM

To: HA Sala <hasala@hasala.com>

Page 29 Of 31

EXHIBIT H (3 of 5)

Cc: Susan Seager (clinic) <sseager1.clinic@law.uci.edu>

Subject: People v. Leticia Perez, Case No. BM922667A – Protective Order Against Publicity / Anthony Esposito

Dear Mr. Sala,

We are counsel for Anthony Esposito, the owner, publisher, and reporter of The Valley Voice and Kern Cast, two local news publications reporting about the Bakersfield area. We plan to file an *Ex Parte* Application to clarify or vacate the Court's August 30, 2018 Amended Protective Order Against Publicity (the "Order").

Specifically, we plan to request the Court to clarify the Order as follow: "Counsel for the prosecution and defense have stated that they do not plan to call Mr. Esposito as a witness in this case and the prosecution stated that Mr. Esposito has not been interviewed by any prosecution investigator. Therefore, this Order shall not apply to Mr. Esposito, subject to change only upon notice to Mr. Esposito and providing Mr. Esposito an opportunity to respond to any such change." In the alternative, we plan to request the Court to vacate the entire Order because it is an unconstitutional prior restraint and is unconstitutionally broad and vague.

We plan to schedule the hearing on February 8, 2019 at 1:30 pm, in Department 17 of the Kern County Superior Court.

Our certified law student, Shanxi Feng, called you on February 4, 2019 at 9:31am and left you a message regarding the *Ex Parte* Application. Specifically, we would like to know (1) will you oppose the *Ex Parte* Application? (2) do you agree to accept service of the *Ex Parte* Application and related papers by email? and (3) will you attend the hearing?

We would really appreciate it if you could call or email your response. We can be reached by phone at (626)782-1372, or by email at ipat1ateam@law.uci.edu. We look forward to hearing from you!

Very truly yours,
UCI Intellectual Property, Arts, and Technology Clinic

Professor Susan Seager, Esq.
Professor Jack Lerner, Esq.
Shanxi Feng, Certified Law Student
Cassie Doult, Certified Law Student

Shanxi Feng, Ph.D.
Certified Law Student
University of California, Irvine School of Law
Email: shanxif.clinic@law.uci.edu

Page 30 Of 31

EXHIBIT H (4 of 5)

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The State Bar of California

OFFICE OF ADMISSIONS

180 Howard Street, San Francisco, CA 94105

Tel: 415-538-2300

Email: Admissions@calbar.ca.gov

February 5, 2019

Shanxi Feng
c/o Susan Seager
UC Irvine
401 E Peltason, #1000
Irvine, CA 92697

NOTICE OF STUDENT CERTIFICATION

Certification Number	46675
Effective Date:	2/6/19
Graduation Date:	May/2020
Law School:	UC Irvine

Dear Student:

The State Bar of California's Office of Admissions has reviewed your application and determined that you have met the requirements for certification under the *Rules Governing the Practical Training of Law Students (Rules)*. We are pleased to inform you that you have been certified to engage in the activities set forth in Title 3.4 of the *Rules* under the supervision of **Susan Seager**.

Under Title 3, Rule 3.8 of the Rules Governing the Practical Training of Law Students, your certification will expire on **5/30/2019**, unless terminated earlier. The Practical Training of Law Students Program information is available on the State Bar's website at <http://www.calbar.ca.gov/Admissions/Special-Admissions/Practical-Training-of-Law-Students>. There is a model consent form that your supervising attorney may wish to refer to when preparing a consent form to be presented to client(s) when complying with Title 3, Rule 3.4 of the Rules.

Please email me brandie.burroughs@calbar.ca.gov or call 415/538-2117, if you have any questions.

cc: Supervising Attorney
Dean



The State Bar of California

OFFICE OF ADMISSIONS

180 Howard Street, San Francisco, CA 94105

Tel: 415-538-2300

Email: Admissions@calbar.ca.gov

February 5, 2019

Cassie Doult
c/o Susan Seager
UC Irvine
401 E Peltason, #1000
Irvine, CA 92697

NOTICE OF STUDENT CERTIFICATION

Certification Number	46674
Effective Date:	2/6/19
Graduation Date:	May/2020
Law School:	UC Irvine

Dear Student:

The State Bar of California's Office of Admissions has reviewed your application and determined that you have met the requirements for certification under the *Rules Governing the Practical Training of Law Students (Rules)*. We are pleased to inform you that you have been certified to engage in the activities set forth in Title 3.4 of the *Rules* under the supervision of **Susan Seager**.

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Please email me brandie.burroughs@calbar.ca.gov or call 415/538-2117, if you have any questions.

cc: Supervising Attorney
Dean



The State Bar of California

OFFICE OF ADMISSIONS

180 Howard Street, San Francisco, CA 94105

Tel: 415-538-2300

Email: Admissions@calbar.ca.gov

February 5, 2019

Emily Asgari
c/o Susan Seager
UC Irvine
401 E Peltason, #1000
Irvine, CA 92697

NOTICE OF STUDENT CERTIFICATION

Certification Number	46673
Effective Date:	2/6/19
Graduation Date:	May/2019
Law School:	UC Irvine

Dear Student:

The State Bar of California's Office of Admissions has reviewed your application and determined that you have met the requirements for certification under the *Rules Governing the Practical Training of Law Students (Rules)*. We are pleased to inform you that you have been certified to engage in the activities set forth in Title 3.4 of the *Rules* under the supervision of **Susan Seager**.

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Please email me brandie.burroughs@calbar.ca.gov or call 415/538-2117, if you have any questions.

cc: Supervising Attorney
Dean