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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); *Hurvitz 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.

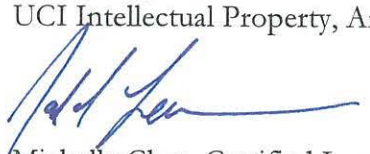
The prosecution has not alleged, and will not be able to allege, any facts showing that Mr. Esposito's publications present a clear and present danger to the fair trial rights of any party. The mere possibility of danger or prejudice to the right to a fair trial is not enough; actual prejudice or danger 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.