IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 5

DARRELL CALDWELL, *Petitioner*, v. Superior Court of the County of Los Angeles, *Respondent.* People of the State of California, *Real Party in Interest*	B308100 Los Angeles County Superior Court Case No. BA464579-02 The Hon. Laura L. Walton

APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, LOS ANGELES TIMES COMMUNICATIONS LLC, AND FIRST AMENDMENT COALITION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 5:

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press (the "Reporters Committee"), Los Angeles Times Communications LLC, and First Amendment Coalition (collectively, "Amici") respectfully requests leave to file the attached amici curiae brief in support of Petitioner Darrell Caldwell ("Petitioner") in the above-captioned matter.

Amici are filing their brief today – before Petitioner files his Reply brief – to urge this Court to decide the constitutionality of the March 6, 2020 gag order ("Gag Order") at issue even if the trial court seeks to vacate the gag order. Amici are informed that after Petitioner filed his Petition for Writ of Mandate in this

Court on October 14, 2020, the People stated during a Oct. 19, 2020 hearing in the trial court that they would like to withdraw their request for the Gg Order and that the trial court could vacate the Gag Order. Amici support the lifting of the Gag Order, but Amici do not believe that this would render Petitioner's writ petition moot and urge this Court to decide the constitutionality of the Gag Order bcause it presents important constitutional issues and is likely to reoccur. *See In re Willon*, (1996) 47 Cal.App.4th 1080, 1088 n.2, 55 Cal. Rptr. 2d 245 ("Even if the trial court were to withdraw its decision to punish petitioners, this case would not be moot, since it presents important public issues that are 'capable of repetition, yet evading review.'") (citations omitted); *Bursey v. United States*, 466 F.2d 1059, 1088-89 (9th Cir. 1972) (when a court is asked to decide "federal constitutional questions affecting fundamental personal liberties," "[a]djudication of those issues should not be thwarted by resort to narrow interpretations of the doctrines of mootness and justiciability."). No party or counsel for any party

in the pending appeal, other than counsel for Amici, authored the attached Amici brief in whole or in part, and Amici received no compensation or monetary contribution from any party or counsel for a party intended to fund the preparation or submission of the brief.

INTEREST OF THE AMICI CURIAE

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Los Angeles Times Communications LLC is the largest daily newspaper in California. The Times' popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation. Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

First Amendment Coalition ("FAC") is a nonprofit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic

affairs. Founded in 1988, FAC's activities include free legal consultations on First Amendment issues, educational programs, legislative oversight of bills in California affecting access to government and free speech, and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary citizens.

Amici have a unique interest in ensuring that courts take care not to impinge on First Amendment rights of parties and attorneys and thereby impede public understanding of court proceedings. Journalists frequently gather information from parties to litigation and their attorneys to keep the public informed about legal cases that are matters of public concern and the workings of the judicial system. Court orders that prohibit parties and attorneys from speaking publicly about their cases inhibit this reporting. Amici submit the attached brief to inform the Court about the impact of gag orders on newsgathering and

to provide the Court with the history of how California courts have assessed gag orders. The discussion and arguments in the attached Amici brief will not be presented by the parties.

Dated: Oct. 20, 2020 /s/ Susan E. Seager

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amicus Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC. Amici curiae certify that there are no other interested entities or persons that must be listed in this certificate under California Rule of Court 8.208(e).

Dated: Oct. 20, 2020

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INTRODUCTION

Prosecutors sought a gag order to silence Petitioner and his counsel after they criticized the controversial trials of Petitioner, a rapper, in the press and on social media. In response, the trial court entered a sweeping gag order on March 6, 2020. The order prohibited Petitioner, his counsel, and the government from commenting "on anything regarding this case until after verdicts are reached." (Petitioner's Exhibits ("PE"), Vol. 1, Ex. 4, p. 65.) At a subsequent hearing, the court ordered Petitioner not to post about his case on social media and to remove certain statements from his social media accounts, such as "I have been in jail for 26 months for something I didn't do" and "Can someone please tell Oprah about my case." (PE, Vol. 1, Ex. 9, pp. 134, 132.) On July 24, 2020, the trial court reaffirmed the gag order, instructing Petitioner "not to discuss the any facts about the case, including his innocence, the attorneys, the judge, witnesses, and the investigating officers with anyone that is not his defense counsel." (PE, Vol. 1, Ex. 10, p. 179.)

The March 6, 2020 gag order (the "Gag Order") remains in place as Petitioner faces a trial on gang conspiracy and weapon charges after being acquitted of death penalty murder charges. Both trials have attracted attention because Los Angeles prosecutors are using the controversial tactic of charging Petitioner, a Black rapper known as Drakeo the Ruler, with serious crimes based largely on his rap lyrics.

Amici write to explain the impact of the Gag Order and similar gag orders on newsgathering. Amici also explain the history of how California courts have assessed gag orders. This history demonstrates that the Gag Order is unconstitutional and must be vacated.

SUMMARY OF ARGUMENT

The Gag Order places broad, unconstitutional restrictions on the speech of Petitioner, his counsel, and the government. They have impeded – and will continue to impede – the ability of journalists to report on Petitioner's criminal prosecution. Petitioner's trial is a matter of public interest. Los Angeles

District Attorney Jackie Lacey, who is in a tight campaign for re-election, has been prosecuting Petitioner, a rapper known as Drakeo the Ruler, based largely on his rap lyrics. This controversial strategy is being used by prosecutors across the nation and has been condemned by some critics as racist. (*See, e.g.*, Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, The New Yorker (Sept. 20, 2019) <https://www.newyorker.com/culture/culture-desk/the-controversial-use-f-rap-lyrics-as-evidence> [as of Oct. 9, 2020].)

Although the Gag Order does not purport to gag the press, their impact is not limited to the trial participants. The First Amendment rights of the press and public are also implicated, because the Gag Order inhibits newsgathering and deprive the public of information about Petitioner's criminal prosecution. Before the March 6, 2020 gag order went into effect, Petitioner, his attorney, and the prosecution spoke to reporters about the controversial aspects of the case – the use of rap lyrics to show that Petitioner allegedly committed murder and a gang

conspiracy charge carrying a life sentence. (PE, Vol. 6, Ex. 19, pp. 1106-1184).). After the March 6, 2020 gag order, the court ordered Petitioner to remove numerous tweets on his Twitter account about the case. (PE, Vol. 1, Ex. 9, p. 107-176.)

The court below failed to apply the legal standard adopted by this Court for imposing gag orders on trial participants. Courts have distinguished between gag orders that prohibit trial participants from speaking publicly about a judicial proceedings and those that prohibit non-party members of press from reporting on a judicial proceeding. (*See, e.g.*, *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1074 (hereinafter *Gentile*)); *Freedom Communications, Inc. v Superior Court (2008)* 167 Cal.App.4th 150 (hereinafter *Freedom Communications*); *Sun Company of San Bernardino* (1973) 29 Cal. App. 3d 815, 824–25 (hereinafter *Sun Company of San Bernardino).*) Nevertheless, this Court applies strict scrutiny and a stringent three-part test for determining the constitutionality of gag orders on trial participants. (*Hurvitz v. Hoefflin* (2000) 84 Cal. App. 4th 1232,

1241 (hereinafter *Hurvitz*) (citing *Levine v. District Court* (9th Cir. 1985) 764 F.2d 590, 595 (hereinafter *Levine*).) And it has twice vacated gag orders in civil cases. (*See id.* at p. 1241–42 (vacating gag order against trial participants); *Steiner v. Superior Court* (2013) 220 Cal. App. 4th 1479, 1482 (hereinafter *Steiner*) (vacating gag order against trial attorney).)

Here, the prosecution failed to establish that its fair trial rights are threatened in any way by public access to information about Petitioner's criminal case, let alone to the extent required to justify the extreme remedy imposed by the trial court. In addition, the Gag Order is, on its face, unconstitutionally overbroad, applying to any statements by Petitioner and his counsel about "any facts" regarding his case.

For all of these reasons, amici urge this Court to issue a writ of mandamus directing the trial court to immediately vacate the Gag Order.

ARGUMENT

For centuries, openness has been considered an

"indispensable" element of trials. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 597 (hereafter *Richmond Newspapers, Inc.*).) The California Supreme Court has recognized that the First Amendment gives rise to a strong "presumption" in favor of openness of trials that may be abrogated only in unusual circumstances. *(NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1207-08, 1212-13.)

As the Supreme Court has recognized, secrecy breeds "distrust" of the judicial system and its ability to adjudicate matters fairly. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 349 (hereinafter *Sheppard*).) The benefits of an open and transparent legal system, on the other hand, are manifold, both to the parties and the public. Openness gives "assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." (*Richmond Newspapers, Inc.*, supra, 448 U.S. at p. 569.)

The nexus between openness and fairness in criminal

proceedings, in particular, and the role of an unfettered press is well-established. As the Supreme Court has explained:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

(*Sheppard*, supra, 384 U.S. at p. 350.)

The First Amendment also protects newsgathering. (*Branzburg v. Hayes* (1972) 408 U.S. 665, 681 (hereinafter *Branzburg*) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); (*U.S. v. Sherman* (9th Cir. 1978) 581 F.2d 1358, 1361) (recognizing that "newsgathering is an activity protected by the First Amendment"); (*Shulman v. Group W Productions, Inc.* (1988) 18 Cal. 4th 200, 236) (noting that the "constitutional protection of the press does reflect the strong societal interest in effective and

complete reporting of events"); (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal. App. 3d 509, 519) (recognizing that the First Amendment protects "the news gathering component of the freedom of the press," i.e., "the right to seek out information").)

Because journalists frequently seek to gather the news by interviewing attorneys, parties, and witnesses in judicial proceedings, gag orders on trial participants undermine these foundational principles of openness. (*See CBS Inc. v. Young* (6th Cir. 1975) 522 F.2d 234, 238, 239-40 (hereinafter *CBS*).) Gag orders, which are a form of prior restraint, are particularly offensive to the First Amendment, for they restrict not only the rights of those individuals who have been restrained from speaking, but also the rights of the press and public to receive information from willing speakers. 1 Lee Levine, et al., *Newsgathering & The Law* § 8.01 (4th ed. 2013) (gag orders "plainly burden both the newsgathering activities of the press and the freedom of expression of participants in the judicial

process").

I. This Gag Order chills newsgathering, leading to less accurate and complete reporting about this case and depriving the public of information.

When assessing the propriety of a gag order on trial participants, courts should consider not only the free speech interests of those subject to the order, but also the impact on the First Amendment rights of the press and public to gather and receive information about cases pending in the courts. (*See*, *e.g.*, *CBS*, supra, 522 F.2d at p. 236–38 (holding that CBS had standing to challenge an order prohibiting "all parties concerned with [a specific] litigation, whether plaintiffs or defendants, their relatives, close friends, and associates" from speaking "with members of the news media or the public" because the gag order "directly impaired or curtailed" the media's "ability to gather the news" and vacating the gag order).)

As the Supreme Court has long held, "[f]ree speech carries with it some freedom to listen" and receive information about the workings of government. (*Richmond Newspapers, Inc.*, supra,

448 U.S. at p. 576; *Kleindienst v. Mandel* (1972) 408 U.S. 753, 763 ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." (internal quotation marks and citation omitted)).) The Supreme Court has also repeatedly recognized that the First Amendment includes "a 'right to gather information,'" because "'without some protection for seeking out the news, freedom of the press could be eviscerated.'" (*Richmond Newspapers, Inc.*, supra, 448 U.S. at p. 576 (quoting *Branzburg*, supra, 408 U.S. at p. 681).)

These protections empower the press to fulfill its constitutionally recognized duty to inform citizens about matters of public concern such as the trial at issue here. (*Mills v. Alabama* (1966) 384 U.S. 214, 219 ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."); *Minn. Star & Trib. Co. v. Minn. Comm'r of Revenue* (1983) 460 U.S. 575, 585 (noting that an "untrammeled press" is "a vital source of public information" and "an informed

public is the essence of working democracy"); *Roth v. United States* (1957) 354 U.S. 476, 484 (explaining that the media provides the public with information necessary to "assure unfettered interchange of ideas" which enable "political and social changes desired by the people").) The California Supreme Court has reaffirmed the importance of journalists providing information to the public about court proceedings. (*NBC Subsidiary*, supra, 20 Cal. 4th at p. 1212.)

Gag orders like the one at issue here "choke off important sources of information," stifling the flow of information about court cases and impeding the press' right and ability to gather the news. (Levine, *supra*, § 8.01.) Indeed, "[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it." (*CBS*, supra, 522 F.2d at p. 236–38.) Sources enhance accuracy and credibility in reporting, increase transparency and reader trust, and enrich news stories. Without them, the quality and thoroughness of news coverage of court cases suffers, frustrating the public's right of access to the courts.

The record makes clear that the Gag Order here silences willing speakers, including Petitioner and his counsel, who seek to convey information to the public but are barred from doing so. As a result, the Gag Order is hampering—and will continue to hamper—news coverage of this case. The public will continue to be deprived of the perspective of Petitioner and his counsel, who know the most about this case and are in the best position to identify potential legal errors and other problems as soon as they occur.

Thus, while this Gag Order may not halt news coverage of this case entirely—for journalists will continue to try to cover it, despite this order—they could very well lead to less accurate and reliable reporting that has a greater likelihood of misleading the public and possibly potential jurors, thus defeating the order's purpose.

II. Gag orders on trial participants are a type of prior restraint and appropriate only in narrow circumstances not present here.

The U.S. Supreme Court has repeatedly declared that there

is a "heavy presumption" against the "constitutional validity" of prior restraints on expression. (*See Org. for a Better Austin v. Keefe* (1971) 402, U.S. 415, 419 (hereinafter *Org. for a Better Austin*) (citing *Carroll v. Princess Anne* (1968) 398 U.S. 175; *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58); *see also id.* at 418 (citing *Near v. Minnesota* (1931) 283 U.S. 713).)

This Court has held that gag orders on trial participants are presumptively unconstitutional prior restraints. (*See, e.g.*, *Hurvitz*, supra, 84 Cal.App.4th at p. 1235 (holding that a trial court order "barring disclosure of certain information [by any party or attorney to a lawsuit], whether obtained through discovery or otherwise, is an unconstitutional prior restraint").) "Orders which restrict or preclude a citizen from speaking in advance are known as 'prior restraints,' and are disfavored and presumptively invalid." (*Id.* at p. 1241–42 (citing *Org. for a Better Austin*, supra, 402 U.S. at p. 419); *see also Bailey v. Sys. Innovation, Inc.* (3d Cir. 1988) 852 F.2d 93, 96, 98–99 (hereinafter *Bailey*) (describing a court order prohibiting the defendants in a

civil lawsuit from discussing "nearly every aspect of the case" with the press and others as a "prior restraint" and explaining that "[p]rior restraints are the most drastic . . . judicial tool for enforcing the right to a fair trial") (citing *Neb. Press Ass'n*, supra, 427 U.S. at p. 572–73 (Brennan, J., concurring)).) "If any method other than a prior restraint can effectively be employed to further the governmental or private interest threatened here, then the order is invalid." (*Bailey*, supra 852 F.2d at p. 99.)

A preeminent California scholar on the First Amendment concluded more than 20 years ago that "[g]ag orders on lawyers and parties are virtually always unconstitutional[.]" (Erwin Chemerinsky, *Lawyers have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 Loy. L.A. Ent. L. Rev. 311, 330 (1997).) While those who seek to justify gag orders on attorneys and parties to litigation, claim that they are necessary to "preserv[e] the constitutional right to a fair trial[,]" these orders "sacrifice equally important constitutional values, freedom of speech and of the press, without

any indication that such restrictions are necessary." (*Id.* at p. 331.)

Gag orders sought by prosecutors are particularly suspect. In *Sun Company of San Bernardino*, the court instructed that gag orders sought by prosecutors to protect the prosecution's fair trial rights should rarely be granted. Although that case concerned a gag order against the press, *Sun Company*, supra, 29 Cal.App.3d at p. 817, the court's reasoning is just as applicable in cases in which the prosecution seeks a gag order on trial participants. As the court explained, "in only an insignificant number of cases does the publicity factor affect the prosecution's right to due process." (*Id.* at p. 831.) "In those instances, the vast financial resources and manpower available to the Government . . . should likewise be kept firmly in mind before the issuance of" the gag order. (*Id.*)

III. California courts disfavor gag orders against trial participants.

Courts have distinguished between gag orders that prohibit trial participants from speaking publicly about a judicial

proceedings and those that prohibit non-party members of press from reporting on a judicial proceeding. (*See, e.g.*, *Gentile*, supra, 501 U.S. at p. 1074 ("[T]he speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn v. Stuart* . . . and the cases which preceded it."); *Sun Company of San Bernardino*, supra, 29 Cal.App.3d at p. 824–25.) However, California courts disfavor gag orders against trial participants and subject them to strict scrutiny.

This Court has vacated gag orders against trial participants in two cases, both civil: *Hurvitz,* supra, 84 Cal.App.4th at p. 1241–42 and *Steiner,* supra, 220 Cal.App.4th at p. 1482. Other appellate districts have done the same. (*See Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1219 (same); *In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718 (vacating gag order prohibiting trial participant from publicly disseminating information learned independently from discovery).)

In *Hurvitz*, this Court adopted a three-part test for evaluating the constitutionality of gag orders on trial participants: "Gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available." (*Hurvitz*, supra, 84 Cal.App.4th at p. 1241 (citation omitted).) This Court instructed that a trial court may not simply recite these three factors, but instead "must make express findings showing it's applied this standard and considered and weighed the competing interests." (*Id*.)

This Court adopted this "clear and present danger" test from the Ninth Circuit's decision in *Levine*. (*Levine*, supra, 764 F.2d at p. 595.) That case involved a gag order prohibiting defense attorneys in a high-profile criminal espionage case from making statements to the news media "concerning any aspect of this case that bears upon the merits to be resolved by the jury."

(*Id.* at 593.)

The *Levine* test – and the *Hurvitz* test – are more protective of attorneys' speech than the test applied by the Nevada Supreme Court Rule governing pretrial publicity that the U.S. Supreme Court upheld in *Gentile*, supra, 501 U.S. at p. 1074. In *Gentile*, the Court held that the First Amendment allows restrictions on an attorney's extrajudicial statements if the attorney's speech poses a "substantial likelihood of materially prejudicing" a judicial proceeding. (*Id.* at p. 1075–76.) In contrast, under *Hurvitz*, a court may impose a gag order on an attorney only if the court finds that the attorney's speech poses a "clear and present danger" to a compelling interest such as fair trial rights.

In *Hurvitz*, the trial court issued a gag order that barred multiple parties and attorneys in consolidated cases against a group of plastic surgeons, as well as their agents and employees, from naming the alleged victims of one of the surgeons in to protect the victims' privacy and protect the defendants' fair trial rights. (*Id.* at p. 1241.) This Court held that the gag order on

trial participants was "an unconstitutional prior restraint on speech." (*Id.* at p. 1235.) Applying its three-part test, the Court held that the gag order could not be sustained because "the trial court's ruling relies on . . . speculation" that speech by the trial participants would prejudice the defendants' fair trial rights. (*Id.*)

In *Steiner*, this Court examined the constitutionality of a gag order requiring the plaintiff's lawyer to remove two pages from her website during trial. (*Steiner*, supra, 220 Cal.App.4th at p. 1482.) The defense sought the gag order to remove the portions of the lawyer's website that talked about her previous $1.7-million and $4.3-million jury verdicts against Ford Motor Company while she was trying a similar personal injury case against Volkswagen. (*Id.*)

This Court stated that the three-part test from *Hurvitz* generally applies to gag orders on trial participants: "[G]ag orders on trial participants are subject to strict judicial scrutiny and may not be imposed 'unless (1) the speech sought to be

restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available.'" (*Id.* (quoting *Hurvitz*, 84 Cal.App.4th at p. 1241)).) The Court held that, under either this standard or the less restrictive standard governing commercial speech that the defendants urged the Court to apply, the gag order must be vacated. (*Id.* at p. 1488.) The Court stated that the trial court's order was "an unlawful prior restraint on [the plaintiff's lawyer's] constitutional right to free speech." (*Id.* at p. 1493.)

The Court in *Steiner* held that the trial court should have relied on alternatives to the gag order, such as jury instructions. (*Id.* at p. 1492) ("The first line of defense against juror legal research is to address the issue in jury instructions.") (quotation and citation omitted.) The Court cited recent amendments to Code of Civil Procedure §§ 611, 613, and 1209, which, among other things, required courts to instruct jurors not to use social

media and the Internet to research or disseminate information about cases. (*Id.*) It concluded that "[t]he adoption of these amendments underscores that trial courts are appropriately focusing on tougher admonition rules and contempt consequences, rather than on trying to restrain speech on the Internet." (*Id.* at 1493.) The Court also determined that "the trial court properly admonished the jurors not to Google the attorneys . . . [or] conduct independent research," and that the trial court "did not . . . have authority to impose, as a prophylactic measure, an order requiring [the attorney] to remove pages from her law firm Web site to ensure they would be inaccessible to a disobedient juror." (*Id.*) In short, "the order went too far." (*Id.*)

In another case, the Ninth Circuit vacated a gag order banning the defendants in a trademark infringement case from making comments about the litigation on social media, holding it was an "unconstitutional prior restraints on speech." (*In re Dan Farr Productions* (9th Cir. 2017) 874 F.3d 590, 591, 593) (hereinafter *In re Dan Farr Productions*).) The plaintiffs sought

the gag order to stop the defendants from expressing "their opinions on the merits of this case" on Twitter and Facebook, which sparked responding social media comments from the public. (*Id*. at p. 593.) They argued that the gag order was necessary because jury "venire is being influenced through social media dialogue" by the defendants and their followers. (*Id*. at p. 593.) The trial court issued a gag order barring the defendants from posting any comments on social media platforms about the litigation.

The Ninth Circuit began its analysis by explaining that a gag order on trial participants is permissible only if the unrestrained speech would make it impossible to find twelve unbiased jurors. (*Id*. (citing *Hunt v. Nat'l Broadcasting Co*. (9th Cir. 1989) 872 F.2d 289, 295) (hereinafter *Hunt*).) The court held that the trial court failed to establish that the defendants' social media posts prejudiced the entire jury pool. Plaintiffs presented "no evidence" that a large number of eligible jurors saw tweets about the case posted by the defendants and their followers. *Id*.

at 593–94. The court observed that even if every single one of the defendants' social media followers and other fans were part of the district court's jury pool, the "group would constitute only approximately 8.9 percent of the relevant jury pool, which is insufficient to demonstrate that unbiased jurors could not be found absent the restraining orders." *Id*. (citations omitted).

Based on these facts, the court held that the evidence in the *In Re Dan Farr Productions* case was "insufficient to demonstrate that twelve unbiased jurors could not be found absent the restraining orders" when the jury pool was comprised of 1.75 million registered voters in San Diego and Imperial counties. *Id*. at 594 (citation omitted). The Ninth Circuit instructed that "voir dire, jury instructions, delay, change of venue or jury sequestration" are appropriate alternatives preferable to censorship." *Id*. at 595 (citing *Hunt*, supra, 872 F.2d at p. 295-96; *Nebraska Press*, supra, 427 U.S. at p. 564).

As these decisions demonstrate, courts should avoid gag orders where there is no evidence that social media posts or other

public statements by the trial participants about the case are reaching enough potential jurors to make it impossible to find twelve unbiased jurors. In addition, the correct way to deal with social media posts and other speech by parties and counsel that may influence a jury pool is to use voir dire to weed out jurors who are unduly biased by reading the social media posts or media stories about the case and instruct jurors to avoid social media during voir dire and the trial.

IV. The Gag Order does not meet this Court's three-part test.

A. The court cited no factual support for its "clear and present danger" finding.

The Gag Order should be vacated because it cannot meet this Court's stringent three-part test established in *Hurvitz*. Here, the trial court made no specific, factual findings that public statements by Petitioner or his counsel present a "clear and present danger" to any due process rights of the prosecution. (PE, Vol. 6, Ex. 21, pp. 1405-1410.) The mere possibility of danger or prejudice to the right to a fair trial is not enough. The trial

court recited these three factors without "mak[ing] express findings showing it's applied this standard and considered and weighed the competing interests." (*Hurvitz*, supra, 84 Cal.App.4th at p.1241 (citation omitted).) As in *Hurvitz*, this Gag Order "rel[ies] on . . . speculation" that speech by the trial participants would prejudice the prosecution's fair trial rights. (*Id*. at 1235.) There is no evidence or even any indication that the public statements by the Petitioner or his counsel have both reached the jury pool and prejudiced the jury pool of 4 million potential jurors so completely that twelve impartial jurors cannot be found. (PE, Vol. 6, Ex. 21, pp. 1406-1408.)

B. Social media posts about this case should be addressed with voir dire and jury instructions, not gag orders.

The trial court failed to consider less restrictive alternatives other than the Gag Order. The court below did not consider juror admonitions or voir dire as alternatives to the Gag Order. (*Id*., pp. 1409-1410.) And the trial court made no detailed finding that voir dire would be inadequate to weed out biased

jurors during jury selection, or that juror instructions could be inadequate to stop jurors from reading social media and media reports once jury selection is complete. (*Id.*)

There is nothing new about parties and their counsel posting comments about their case on social media or the internet. Recent court decisions by this Court and the Ninth Circuit concerning social media postings and internet websites have concluded that gag orders are not the answer. In *Steiner,* this Court vacated a gag order barring an attorney from posting information about her legal victories on her website, and instructed that "[t]he first line of defense against juror legal research [online] is to address the issue in jury instructions." (*Id.* at p. 1492.) Similarly, in *In re Dan Farr Productions*, the Ninth Circuit vacated a gag order barring trial participants from posting about their case on social media, holding that it violated the First Amendment. (*In re Dan Farr Productions*, supra, 974 F.3d at p. 593. The court focused on the lack of evidence that the social media posts had been seen by potential jurors, noting that

the parties seeking the gag order failed to show that the social media posts made it impossible to find twelve unbiased jurors out of a jury pool of nearly 2 million people. (*Id.* at p. 593-94.) The court instructed that "voir dire, jury instructions, delay, change of venue or jury sequestration are appropriate alternatives preferable to censorship." (*Id.* at p. 595 (citation and quotation omitted).)

As these decisions demonstrate, the correct way to deal with social media posts by parties and counsel is to conduct voir dire and instruct jurors to avoid social media. The court below did not give adequate consideration of voir dire or juror admonitions, nor did it find that Petitioner's social media posts have been so pervasive and prejudicial that twelve unbiased jurors cannot be found among the 4 million registered voters in Los Angeles County.

C. The Gag Order is overbroad.

The Gag Order prohibits Petitioner and his counsel from commenting "about anything regarding this case." (PE, Vol. 1,

Ex. 4, p. 65.) Petitioner and his counsel are gagged from talking about Petitioner's "innocence, the attorneys, the judge, witnesses, and the investigating officers . . . . ." (*Id.*) The order is so broad that it appears to bar the trial participants from talking about the date of the next hearing, the date of the upcoming trial, or even this writ proceeding before this Court.

The breadth of the order has made it difficult to anticipate which statements are permitted and which are not. For example, the trial court ordered the following statements removed from Petitioner's social media accounts because they are "about" his case:

- "Free Drakeo."
- "Can someone please tell Oprah about my case."
- "I've been in jail for 26 months for something I didn't do."
- "Stabbing Lies and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler." (Retweet of a July 11, 2019 article by *The Fader* about Petitioner's 2019

murder trial).

(PE, Vol. 1, Ex. 9, pp. 132, 134, 136).

But the trial court held that the following similar statements by defense counsel and Petitioner, respectively, are permitted and *not* covered by the Gag Order:

- "Prosecutors are increasingly and misleading using rap lyrics as evidence."
- "Free Drakeo" as album promotion.
- "N– might as well work for the DA office the way they don't want me to get out."

(PE, Vol. 1, Ex. 9, pp. 132, 136, 149.)

These examples illustrate the difficulty of determining which statements are covered by the Gag Order and which are not. The Gag Order is not narrowly tailored and must be vacated. *See Hurvitz*, supra, 84 Cal.App.4th at p. 1241.

V. The constitutionality of the Gag Order will not become moot if the trial court vacates the Gag Order prior to this Court's decision.

Amici urge this Court to decide the constitutionality of the

Gag Order even if the prosecutors state that they want to withdraw their request for a gag order and the trial court states that it would like to vacate the Gag Order before this Court has the opportunity to decide Petitioner's writ petition. Amici are informed that after Petitioner filed his Petition for Writ of Mandate in this Court on October 14, 2020, the People stated during a Oct. 19, 2020 hearing in the trial court that they would like to withdraw their request for the gag order and that the trial court could then vacate the gag order. Amici support the lifting of the gag order, but Amici do not believe that this would render Petitioner's writ petition moot and urge this Court to decide the constitutionality of the Gag Order in any case.

The Gag Order's infringement on important federal rights of free speech and choking off of information to the public about Petitioner's two controversial criminal trials present important public issues that are likely to reoccur. In *In re Willon*, (1996) 47 Cal.App.4th 1080, 1088 n.2, the trial court suggested that the California Supreme Court need not decide the validity of the trial

court's contempt order against reporters that was related to a gag order because the trial had begun, rendering the gag order unnecessary. But the Supreme Court held that determining the validity of the contempt order under the California Constitution and reporter's shield law was an important issue that required review. "Even if the trial court were to withdraw its decision to punish petitioners, this case would not be moot, since it presents important public issues that are 'capable of repetition, yet evading review.'") (citations omitted). Similarly, in *Bursey v. United States*, (9th Cir. 1972), 466 F.2d 1059, 1088-89, the Ninth Circuit issued a decision in a grand jury contempt order against witnesses even though the grand jury term had expired during the pendency of the appeal. *Id.* at 1089. "Postponement of the decisions of the[se] important constitutional issues . . . is not in the interests of the public, the Government, or the witnesses." *Id.* at 1089. When a court is asked to decide "federal constitutional questions affecting fundamental personal liberties," "[a]djudication of those issues should not be thwarted by resort to

narrow interpretations of the doctrines of mootness and justiciability." *Id*. The same is true here. The Gag Order presents important constitutional issues impacting fundamental personal liberties that are capable of repetition and require review.

CONCLUSION

California law permits gag orders on trial participants only if the orders meet stringent requirements. These requirements ensure that gag orders do not infringe on freedom of speech and the public's ability to observe and be informed about important judicial proceedings. By failing to correctly apply the three-part test in *Hurvitz* and by imposing an unconstitutional Gag Order on the trial participants, the court has greatly diminished the ability of the media to report about this important case and curtailed the flow of information to the public.

Because the constitutional requirements for gag orders on trial participants were not met in this case, amici urge this Court to issue a writ of mandamus directing the court below to immediately vacate the Gag Order.

Dated: Oct. 20, 2020 /s/ Susan E. Seager

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks, and this Certificate, consists of 7,256 words in 13-point Century School type as counted by the Microsoft Word word-processing program used to generate the text.

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APPENDIX A

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is UC Irvine School of Law, UCI Law Clinics, P.O. Box 5479, Irvine, CA 92616-5479

On Oct. 20, 2020 , I served true copies of the **APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, LOS ANGELES TIMES COMMUNICATIONS LLC, AND FIRST AMENDMENT COALITION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-PETITIONER and AMICI CURIAE BRIEF OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF DEFENDANT-PETITIONER**

on the interested parties in this action as follows:

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I also electronically served the parties identified above the documents identified above via email on October 20, 2020.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on Oct. 20, 2020, at Irvine, California.

Czarina Ellingson

_____

Czarina Ellingson
Law Clinics Coordinator, UC Irvine School of Law

AS TO SERVICE BY MAIL: I caused the document to be enclosed in a sealed envelope addressed to the persons at the address listed below, and to have it placed in the U.S. Postal Service mailbox with the postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on Oct. 20, 2020, at Irvine, California.

Debi Gloria

_____

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