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18 **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20 **THE PEOPLE OF THE STATE OF CALIFORNIA**

21 **Plaintiff,**

22 **vs.**

23 **DAVID ROBERT DALEIDEN and**
24 **SANDRA SUSAN MERRITT,**
25 **Defendants.**

Case No.: 17006621

NOTICE OF DEMURRER; DEFENDANT MERRITT'S DEMURRER TO FELONY COMPLAINT; AND MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: June 8, 2017
Time: 9:00 a.m.
Dept.: 11
Judge: Sharon Reardon

26 **TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO THEIR ATTORNEYS OF**
27 **RECORD:**

28 NOTICE IS HEREBY GIVEN that on June 8, 2017 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 11 of the above-captioned Court, located at 850 Bryant Street, San Francisco, CA 94102, Defendant Sandra Susan Merritt will move this Court for an order sustaining her Demurrer to the Complaint.

1 Ms. Merritt files her Demurrer based on this Notice, and the attached Memorandum of Points and
2 Authorities. In support of her Demurrer, Ms. Merritt further relies upon the files and records in this case
3 (including but not limited to the exhibits filed in conjunction with Defendant Daleiden's Demurrer and
4 his Request for Judicial Notice, as stated in note 11, *infra*), such argument as may be presented at the
5 hearing on this matter, and such other matters of which the Court may take judicial notice.

6 Respectfully submitted
7 DEFENDANT SANDRA SUSAN MERRITT,
8 By Counsel.

9 DATED: May 26, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Criminal Complaint (hereinafter, "Complaint") filed in this matter is vague and ambiguous,
4 and as such, it violates Defendant Merritt's statutory rights found in Penal Code sections 1004,¹
5 subsections (2), (3), and (5),² as well as her constitutional rights of due process of law and against double
6 jeopardy, under both United States Constitution (the Fifth³ and Fourteenth⁴ Amendments) and the
7 California Constitution (Article I, sections 7⁵ and 15⁶). The Complaint further violates her federal
8 constitutional rights of notice under the Sixth Amendment.⁷

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14 ¹ Section 1004 provides:

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

- 15 1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense
16 charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;
17 2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in
18 case of an indictment or information;
19 3. That more than one offense is charged, except as provided in Section 954;
20 4. That the facts stated do not constitute a public offense;
21 5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged,
22 or other legal bar to the prosecution.

23 ² All further statutory references are to the Penal Code unless otherwise indicated.

24 ³ The Fifth Amendment provides, in relevant part, "No person shall . . . be subject for the same offence to be twice put in
25 jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,
26 liberty, or property, without due process of law . . ." U.S. Const. amend. V.

27 ⁴ The Fourteenth Amendment provides, in relevant party, "nor shall any State deprive any person of life, liberty, or property,
28 without due process of law . . ." U.S. Const. amend. XIV, § 1.

⁵ Article I, sec. 7 provides, in pertinent part, "A person may not be deprived of life, liberty, or property without due process of
law or denied equal protection of the laws; . . ." Cal. Const. art. I, § 7(a).

⁶ Article I, sec. 15 provides, in pertinent part that, "The defendant in a criminal cause has the right . . . to be confronted with
the witnesses against the defendant. . . Persons may not twice be put in jeopardy for the same offense, . . . or be deprived of
life, liberty, or property without due process of law." Cal. Const. art. I, § 15.

⁷ The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be
informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . ." U.S. Const. amend.
VI.

1 The Complaint fails to substantially conform to the requirements of Sections 950,⁸ 952,⁹ and
2 954.¹⁰ Section 950 requires the Complaint to contain “a statement of the public offense,” but the vagueness
3 of each count fails to provide sufficient facts to identify the particular conduct that gave rise to a violation
4 of Section 632. Similarly, Section 952 requires, at a minimum, that the Complaint provide “sufficient
5 words to give the accused notice of the offense of which [s]he is accused.” *Id.* The nature of the specific
6 videos involved in this case prevent reasonable understanding of what the Complaint charges as
7 criminal.¹¹ In this case, the bare words of Section 632 fall short of the constitutional and statutory process
8 due—sufficient notice of the charges to prepare a defense. Ms. Merritt cannot defend herself in this
9 Demurrer, let alone the matter as a whole, without resort to the videos, as similarly argued in the Demurrer

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13 ⁸ Section 950 provides that, “[t]he accusatory pleading must contain: 1. The title of the action, specifying the name of the court
14 to which the same is presented, and the names of the parties; 2. A statement of the public offense or offenses charged therein.”
Id.

15 ⁹ Section 952 provides as follows:

16 In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement
17 that the accused has committed some public offense therein specified. Such statement may be made in
18 ordinary and concise language without any technical averments or any allegations of matter not essential to
be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a
public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In
charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.

19 *Id.*

20 ¹⁰ Section 954 provides as follows:

21 An accusatory pleading may charge two or more different offenses connected together in their commission,
22 or different statements of the same offense or two or more different offenses of the same class of crimes or
23 offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same
24 court, the court may order them to be consolidated. The prosecution is not required to elect between the
25 different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any
number of the offenses charged, and each offense of which the defendant is convicted must be stated in the
verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice
and for good cause shown, may in its discretion order that the different offenses or counts set forth in the
accusatory pleading be tried separately or divided into two or more groups and each of said groups tried
separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

26 *Id.*

27 ¹¹ Defendant Daleiden, in his Notice of Demurrer and Demurrer to Felony Complaint, and Memorandum of Points and
28 Authorities, previously filed in the above-captioned matter, provided a YouTube link (at 1, n. 1) and a flash drive, attached
thereto as Exhibit 1, which contained all videos referenced in the Criminal Complaint. Defendant Daleiden also filed a
concurrent Request for Judicial Notice of the videos. Defendant Merritt relies on Defendant Daleiden’s submission of the
YouTube link, the videos, and the Request for Judicial Notice; to avoid duplicative submissions, she incorporates the same
herein.

1 and Memorandum of Points and Authorities of Defendant Daleiden.¹² The videos demonstrate that, due
2 to the number of people and conversations contained therein (as well as the public, non-confidential nature
3 of them), the Complaint deprives Ms. Merritt of reasonable notice of the charges being brought against
4 her. Further, the vagueness and ambiguity of the pleading frustrates Ms. Merritt's ability to assert her
5 rights against double jeopardy in the future, as necessary. Under these facts, simply alleging a date, a
6 statute, and an accuser named "Doe" suffices only to tie Ms. Merritt's proverbial hands.

7 Moreover, it is not clear from the Complaint whether the counts alleged to have occurred on the
8 same date are alleged as occurring in one conversation with multiple persons present, or whether each
9 count is the result of a separate conversation, recorded at a separate place or time. If the Complaint is
10 alleging the former, then the Complaint fails to conform to Section 954.

11 II. ARGUMENT

12 A. STATEMENT OF FACTS

13 In this matter, the Attorney General of the State of California ("Attorney General") filed a fifteen-
14 count, felony Criminal Complaint ("Complaint") on May 3, 2017, against Defendants David Robert
15 Daleiden ("Mr. Daleiden") and Sandra Susan Merritt ("Ms. Merritt"), alleging fourteen violations of
16 California Penal Code section 632, as well as one count of conspiracy under section 182 to violate section
17 632(a). As mentioned (note 11, *supra*), Defendant Daleiden has filed with this Court videos which might
18 be referenced in the Complaint, seeking judicial notice of the same. Those videos are a product of both
19 Mr. Daleiden's and Ms. Merritt's journalistic endeavors to expose unethical and potentially illegal conduct
20 of Planned Parenthood in profiting from body parts of aborted babies. The videos were filmed undercover
21 by Mr. Daleiden and Ms. Merritt between April 6, 2014 and May 22, 2015, **in settings and circumstances**
22 **which were "non-confidential," as admitted by Planned Parenthood itself, under oath.**¹³ The videos
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26 ¹² As explained herein below, an injunction has been ordered by a federal court, in a related civil matter, preventing any
disclosure or use of the videos which are the subject of the Complaint.

27 ¹³ See *Planned Parenthood Funding; Planned Parenthood President Cecile Richards testified before the House Oversight and*
28 *Government Reform Committee*, C-SPAN (Sept. 29, 2015), <https://www.c-span.org/video/?328410-1/planned-parenthood-president-cecile-richards-testimony-taxpayer-funding> (see C-SPAN video at the approx. 1:07:28 second mark).

1 sparked justified national moral outrage, state and federal investigations of Planned Parenthood, and the
2 revocation of state public funds from Planned Parenthood.¹⁴ One district attorney in Houston, Texas,
3 attempted to bring criminal charges against Mr. Daleiden and Ms. Merritt arising from the same conduct
4 alleged in this Complaint, but those charges were also without merit and have been dismissed.¹⁵

5 Counts 1 through 14 of the Complaint are identical, excepting only the dates stated and the mention
6 of *presumably* one identifiable person per count as “Doe [relevant number].” However, the Attorney
7 General fails to specifically identify any person allegedly filmed. Notably, Counts 1 and 2 are alleged to
8 have occurred on **April 6, 2014**; Counts 3 and 4 are alleged to have occurred on **April 7, 2014**; Counts 5
9 through 8 are alleged to have occurred **April 8, 2015**; Counts 10 and 11 are alleged to have occurred on
10 **February 6, 2015**; and Counts 12 through 14 are alleged to have occurred on **May 22, 2015**. Only Count
11 9 is alleged to have occurred on **July 25, 2014**.

12 Although the Attorney General has filed with the Court an Affidavit of Special Agent Brian
13 Cardwell in support of Arrest Warrant, it vaguely named each alleged victim as “Doe” with a
14 corresponding number.¹⁶ That Affidavit does not alleviate the confusion created by the insufficiency of
15 facts in the Complaint. The dates of several of the violations alleged in the Affidavit **differ from those**
16 **which are alleged in the Complaint**, and thus, the Affidavit only exacerbates the confusion.¹⁷
17 Furthermore, if the Affidavit and Complaint are meant to be part of the same record, they were filed with
18 the Court more than a month apart. Furthermore, the Affidavit is not referenced or incorporated in the
19 Complaint, and thus, is not part of it. *See Lamadrid v. Municipal Court*, 118 Cal. App. 3d 786, 791 (1981).

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22 ¹⁴ See, e.g., Mike DeBois, *House Panel Recommends Cutting Funding for Planned Parenthood, Reigniting Old Debate*, The
23 Washington Post (Jan. 4, 2017), https://www.washingtonpost.com/powerpost/house-panel-recommends-cutting-funding-for-planned-parenthood-reigniting-old-debate/2017/01/04/3755fd78-d2b5-11e6-9cb0-54ab630851e8_story.html?utm_term=.5f11555896f1.

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25 ¹⁵ See, Michael Graczyk, *Last Charges Dropped in Case Over Planned Parenthood Videos*, The Washington Times (July 26, 2016), <http://www.washingtontimes.com/news/2016/jul/26/last-charge-dropped-against-anti-abortion-duo-behi/>.

26 ¹⁶ The Affidavit included a request that each alleged victim’s name be sealed, and Honorable Judge Carol Yaggy granted the
27 request for sealing on March 28, 2017.

28 ¹⁷ The Affidavit, at pages 4-6, alleges that Does 1 through 8 were filmed only on April 6, 2014. There is no allegation in the Affidavit regarding videos being recorded on April 7 or 8, 2014, as in the Complaint. Thus, for Does 3-8, the dates alleged in the Affidavit do not match the dates alleged in the Complaint (in Counts 3-8).

1 Therefore, Ms. Merritt cannot rely on any portion of the Affidavit. Count 15 then alleges a “conspiracy”
2 between Ms. Merritt and Mr. Daleiden to violate Section 632, again listing the accusers as only Does.

3 B. THE COMPLAINT’S ALLEGATIONS FAIL TO COMPLY WITH PENAL CODE SECTIONS
4 950 & 952, VIOLATING FUNDAMENTAL PRINCIPLES OF NOTICE AND DUE PROCESS
5 OF LAW.

6 The Federal Bill of Rights holds inviolate, that “[i]n all criminal prosecutions, the accused shall
7 enjoy the right . . . to be informed of the nature and cause of the accusation. . .” U.S. Const. amend. VI.
8 Additionally, the Fifth Amendment provides, in relevant part, “No person shall . . . be deprived of life,
9 liberty, or property, without due process of law . . .” U.S. Const. amend. V. Further, California’s
10 Constitution mandates due process: “The defendant in a criminal cause . . . may not . . . be deprived of life
11 liberty, or property without due process of law.” Article I, sec. 15.¹⁸

12 California complies with these constitutional strictures by requiring that any accusatory pleading
13 (such as the instant Complaint) must contain “[a] statement of the public offense or offenses charged
14 therein.” § 950(2). Section 952 further requires that each count, in charging an offense, must “contain, and
15 shall be sufficient if it contains in substance, a statement that the accused has committed some public
16 offense therein specified.” *Id.* Although Section 952 does not require “technical averments or any
17 allegations of matter not essential to be proved,” *id.*, California courts have required, at a minimum, that
18 the accusatory pleading provide sufficient notice of the offense to the accused to adequately prepare her
19 defense:

20 The ‘preeminent’ due process principle is that one accused of a crime must be ‘informed
21 of the nature and the cause of the accusation.’ U.S. Const., Amend. VI. Due process of law
22 requires that an accused be advised of the charges against him so that he has a reasonable
opportunity to prepare and present his defense and not be taken by surprise by evidence
offered at his trial.

23 *People v. Jones*, 51 Cal. 3d 294, 317 (1990) (citation omitted).

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26 ¹⁸ The Sixth Amendment’s notice provision, as well as the Fifth Amendment, apply to the states by virtue of the Fourteenth
27 Amendment; the Fourteenth Amendment provides, in relevant part, “nor shall any State deprive any person of life, liberty, or
28 property, without due process of law . . .” U.S. Const. amend. XIV, § 1. Additionally, Article I, section 7(a) of the California
Constitution requires due process: “A person may not be deprived of life, liberty, or property without due process of law or
denied equal protection of the laws; . . .” Cal. Const. art. I, § 7(a). Further, Article I, sec. 24 of the California Constitution
provides that the rights of a defendant, *inter alia*, to the due process of law and not to be placed in jeopardy twice for the same
offense, are to be construed consistently with their federal counterparts. Cal. Const. art. I, § 24.

1 Although the court in *People v. Jones* discussed the availability of additional notice in some cases
2 from a transcript of a subsequent preliminary hearing, *id.*, a defendant is entitled under Sections 1003 and
3 1004 to bring a demurrer prior to a preliminary hearing.¹⁹ A demurrer is particularly warranted in this case
4 for the Attorney General’s failure to state sufficient distinguishing facts and to name the accusers in each
5 count of the Complaint, as well as for the reasons set forth below, pertaining to the Complaint’s failures
6 under Section 954. As explained by the court in *Lamadrid*, 118 Cal. App. 3d at 790, mere compliance
7 with section 952 is not always sufficient: “[W]hile an allegation in the statutory language may be held
8 sufficient (when reviewed on appeal) if the defendant has chosen not to demur . . . a pleading which
9 satisfies section 952 will not invariably, when tested by demurrer, satisfy due process notice
10 requirements . . .” *Id.* (citations omitted). Ms. Merritt cannot possibly enter a plea to the Complaint in its
11 current state. The videos upon which she must presume the Complaint is based contain a plethora of
12 interviews over extended periods of time, such that Ms. Merritt cannot possibly know which particular
13 conversation(s) with which particular person(s) have been identified by the Attorney General as
14 criminal.²⁰ Due process requires that she be apprised of all such necessary information. *Id.* at 790.

15 In *People v. Jordan*, 19 Cal. App. 3d 362 (Ct. App. 1971), the People ran into precisely the same
16 problem—failing to identify the acts and accusers sufficiently, in each count. Like the Complaint in this
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19 ¹⁹ Section 1004 provides that a “defendant may demur to the accusatory pleading at any time prior to the entry of a plea . . .”
20 Cal. Penal Code § 1004 (emphasis added). Under Section 691(c), an accusatory pleading includes “an indictment, an
21 information, an accusation, and a complaint.” Cal. Penal Code § 691(c) (emphasis added). Thus, the Legislature intended that
22 criminal defendants be permitted to demur prior to a preliminary hearing.

23 ²⁰ Special Agent Cardwell declared in his Affidavit in Support of Arrest Warrant that he extracted just over 2300 video files
24 from the digital evidence seized from Mr. Daleiden’s residence. (*Id.* at p. 3). Further, as Mr. Daleiden noted in his Memorandum
25 in support of his Demurrer, the federal court, in its preliminary injunction Order (of which he has already requested that this
26 Court take Judicial Notice pursuant to Evidence Code section 452(d) in his Request for Judicial Notice) observed:

Daleiden and his associates did not limit their recording to presentations or conversations regarding fetal
tissue, but instead turned on their recording devices before entering the meetings each day and only turned
them off at the end of the day. Daleiden Depo. At 121:24-122:22, 124:1-15. In the end, they recorded
approximately 257 hours and 49 minutes at NAF’s 2014 Annual Meeting and 246 hours and 3 minutes at
NAF’s 2015 Annual Meeting. They recorded conversations with attendees at the BioMax Exhibitor booths,
the formal sessions at the Meetings, and interactions with attendees during breaks. Foran PI Decl. ¶ 2 & PI
Ex. 19; Daleiden PI Decl. ¶ 18; Daleiden Depo. at 122:18-123:25; 293:4-25. The interactions with individuals
were recorded in exhibit halls, hallways, and reception areas where Daleiden contends hotel staff were
“regularly” present. Daleiden PI Decl. ¶ 18.

28 *National Abortion Federation, et al. v. Center for Medical Progress, et al.*, No. 15-cv-03522-WHO (ORDER Granting Motion
for Preliminary Injunction, at 8.)

1 case, the indictment in *People v. Jordan* contained ambiguous counts that could not be remedied—even
2 with the help of a transcript. For example, there were multiple charges brought against the defendants in
3 *Jordan* for conduct that occurred during an extended course of activity. Because the facts and persons
4 involved were not sufficiently set forth to dispel confusion, the demurrer was properly sustained. *Id.* at
5 371. The indictment contained five instances (occurring over ten counts) of identical allegations against a
6 same defendant. This type of vague pleading the court condemned. *Id.* at 370 (citing *United States v.*
7 *Panzavecchia*, 421 F.2d 440, 441 (5th Cir. 1970)). In the face of such vague charges, a defendant would
8 be prevented from opposing future charges on grounds that she had already been convicted or acquitted
9 for the same charge. The court enumerated one specific constitutional problem, explaining that a defendant
10 could be convicted by general verdict of an assault against a “police officer” in one count, but acquitted
11 by general verdict of assault on a “police officer” in a separate count. If the conviction were appealed and
12 remanded for a new trial, there would be confusion as to what specific evidence would then be admissible
13 on remand, and what evidence would be barred for the count on which the defendant had been acquitted.
14 *Id.* at 370. These precise problems plague and doom the Complaint against Ms. Merritt. The videos
15 demonstrate numerous acts that took place over an extended period. Yet, Counts 1 through 14 are identical,
16 except for some dates, with the Does distinguished only by generic number. Ms. Merritt cannot possibly
17 know to which specific acts she is required to enter a plea.

18 Similarly, in *Jordan*, the indictment was flawed because several of the counts merely named a
19 “peace officer” as a victim, when multiple police officers were present. The court pointed out yet another
20 ambiguity: “Also, it is not clear as to whether the two charges against each defendant (contained in the
21 last four counts) relate to one act which interfered with each officer or to separate acts interfering with the
22 specified officer at different times and places.” *Id.* at 370. The counts in the Complaint accusing Ms.
23 Merritt suffer from a nearly identical flaw—each count only lists a Doe as an alleged victim, but there
24 were numerous people present in the videos such that it is impossible to identify what specific conduct
25 gave rise to the charges, and whether more than one count is permissible. (*See* Section C, *infra*, for further
26 discussion on this critical failure.)

27 Several other California courts have come to similar conclusions regarding notice of the charges.
28 For example, in *Sallas v. Municipal Court*, 86 Cal. App. 3d 737 (Ct. App. 1978), 25 defendants demurred

1 to complaints filed against them alleging the general verbiage in the relevant statute, that they each “did
2 unlawfully and willfully use and was under the influence of a controlled substance.” *Id.* at 740. After the
3 trial court overruled the demurrers, the appellate court (in a consolidated appeal) reversed, holding that,
4 where the controlled substances proscribed by the statute under which the defendants were charged
5 included about 120 drugs or substances, the demurrers should have been sustained. *Id.* at 743. The
6 complaints failed because each defendant,

7 must be prepared to defend against prosecutorial proof that he had used, or had been under
8 the influence of any one of [about 120 possibilities]. Having no information of the precise
9 charge, he would be ill-prepared to establish that he had not shown the symptoms or
10 behavior attending use of the undisclosed controlled substance.

11 *Id.* The court succinctly described a foundational principle at work in cases like these:

12 There is a presumption that the defendant in a criminal case is innocent. An innocent
13 defendant could not determine what offense he was accused of having committed from the
14 information filed in this case.

15 *Id.* (quoting *People v. Clenney*, 165 Cal. App. 2d 241, 253-54 (Ct. App. 1958).

16 Likewise, in *In re Rudolpho A.*, 110 Cal. App. 3d 845 (Ct. App. 1980), the court ruled in favor of
17 the juvenile, where the petition parroted the wording of a trespass statute, but the broad wording of that
18 statute could have applied to “numerous diverse and separate kinds of conduct which are characterized as
19 criminal trespass in respect to school property.” *Id.* at 857. There, the court held that the juvenile’s
20 demurrer should have been sustained. *Id.* An apt analogy can be drawn in the case at bar because of the
21 nature of the videos at issue in this case, where Ms. Merritt would have to guess which of the hundreds of
22 acts and which of the myriads of persons appearing in the video footage gave rise to the charges referenced
23 in the Complaint. (*See* n. 20, *supra.*)

24 Yet another appellate court held that a demurrer should have been sustained to two (of three) counts
25 in an indictment bringing charges for violating the Criminal Syndicalism Act, and for conspiracy. *People*
26 *v. Horiuchi*, 114 Cal. App. 415 (Ct. App. 1931). The indictment accused defendants of unlawfully, *inter*
27 *alia*, organizing the Communist Party and other affiliated organizations for unlawful purposes. *Id.* at 421.
28 Because the People had lumped in one count several organizations that were not necessarily identical, *id.*
at 423, and membership in one subordinate organization did not necessarily constitute membership in the

1 Communist Party, the complaint fell short of constitutional requirements to provide notice of the charges.

2 *Id.* at 423-24. The court explained the serious constitutional error:

3 The severest test of the first count is found in the question whether or not the defendants
4 or either of them could plead **former jeopardy** if either one of them should be charged
5 with the offense of being a member of one of the alleged “affiliated” organizations.

6 *Id.* at 422 (emphasis added). All the organizations could have been subject to the statutory prohibitions,
7 and thus, the indictment failed to provide the necessary “clear and unequivocal” notice. *Id.* at 423. Ms.
8 Merritt faces the same constitutional conundrum. In addition to requiring due process of law, the Fifth
9 Amendment of the federal Constitution provides, in relevant part, “No person shall . . . be subject for the
10 same offence to be twice put in jeopardy of life or limb . . .” U.S. Const. amend. V. The California
11 Constitution provides likewise in Article I, sec. 15, stating in pertinent part, that “Persons may not twice
12 be put in jeopardy for the same offense . . .” Cal. Const. art. I, § 15. As in *Horiuchi*, the Complaint against
13 Ms. Merritt frustrates her ability to assert her rights against double jeopardy when appropriate because it
14 fails to give the requisite “clear and unequivocal” notice. *Id.* at 423.

15 A demurrer is the appropriate remedy to such vague and ambiguous pleading: “It is appropriate,
16 where defendants raise the issue at the pleading stage by demurrer, the election [of the acts upon which
17 the People will rely as to specific counts] be exercised by amendment to the accusatory pleading **rather**
18 **than by some informal specifications which may or may not be effective.**” *People v. Jordan*, 19 Cal.
19 App. 3d at 371 (emphasis added).

20 C. THE COMPLAINT’S ALLEGATIONS FAIL TO COMPLY WITH PENAL CODE SECTION
21 954

22 The Complaint further violates Ms. Merritt’s rights of notice and due process by pleading outside
23 the permissible bounds of Section 954: The Complaint (presumably) fails to charge by the permissible
24 prosecutorial units. Because the Complaint is vague and ambiguous, and deprives Ms. Merritt of the
25 constitutionally required notice as argued hereinabove, Ms. Merritt is unable to tell whether the Attorney
26 General has impermissibly included identical conduct in separate counts, where the alleged violations
27 have the same date. If so, such duplicative pleading is constitutionally and statutorily prohibited. There is
28 no provision of Section 954 that would allow the Attorney General to stack charges against Ms. Merritt
in this manner, nor could there be.

1 The Supreme Court of California, in 2014, reviewed and approved *People v. Bailey*, 55 Cal. 2d
2 514 (1961), which held that ““Whether a series of wrongful acts constitutes a single offense or multiple
3 offenses depends upon the facts of each case, and a defendant may properly be convicted upon separate
4 counts charging grand theft from the same person if the evidence shows that the offenses are *separate and*
5 *distinct and were not committed pursuant to one intention, one general impulse, and one plan.*” *People*
6 *v. Whitmer*, 59 Cal. 4th 733, 737 (2014) (quoting *People v. Bailey*, 55 Cal. 2d at 519) (emphasis in original)
7 (citation omitted). As described by the court in *Whitmer*, “In *Bailey*, the defendant committed a single
8 misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than
9 *omitting* to correct the misrepresentation and accepting the payments, the defendant committed no separate
10 and distinct fraudulent acts.” *Whitmer*, 59 Cal. 4th at 740 (emphasis in original).

11 In *People v. Wilson*, 234 Cal. App. 4th 193 (2015), the appellate court considered a similar issue,
12 determining “whether [the] defendant should have been convicted of and punished for two counts of
13 making criminal threats . . . based on a single 15-minute incident during which defendant continuously
14 menaced the victim and (at least) twice threatened to kill the victim and his family.” *Id.* at 196. The court
15 held that the defendant’s conduct constituted a single violation of Section 422 (making criminal threats).
16 *Id.* To determine the proper “unit of prosecution,” the court looked specifically at the text of the statute at
17 issue. *Id.* at 199. ““Answering a unit of prosecution question requires courts to determine when the ‘actus
18 reus prohibited by the statute—the gravamen of the offense—has been committed more than once.’” *Id.*
19 at 199 (quoting *Whitmer* 59 Cal. 4th at 744 (conc. opn of Liu, J.)) (further citation omitted).) Accordingly,
20 the court must also determine legislative intent. *Id.* The court’s analysis must consider the “factual
21 circumstances of the defendant’s criminal conduct,” and “the elements of the crime as defined by the
22 Legislature.” *Id.* at 200.

23 That Ms. Merritt is not able to definitively determine whether each count in the Complaint pertains
24 to the recording of one conversation with multiple persons present (or whether each count represents a
25 separate conversation at separate and distinct times) exacerbates the constitutional defects and demands
26 her demurrer be sustained. Indeed, if Counts 1 and 2, both of which are alleged to have occurred on April
27 6, 2014, are the product of one recording—and thus are not two separate and distinct acts—one of the two
28 counts must be dismissed. The same outcome should occur regarding Counts 3 and 4 (April 7, 2014),

1 Counts 5 through 8 (April 8, 2014), Counts 10 and 11 (Feb. 6, 2015), and Counts 12 through 15 (May 22,
2 2015). The very text of Section 632(a) bears out that **one** recorded conversation, even if multiple persons
3 are present, constitutes only **one** prosecutorial unit:

4 (a) A person who, intentionally and without the **consent of all parties to a confidential**
5 **communication**, uses an electronic amplifying or recording device to eavesdrop upon or
6 record the confidential communication, whether the communication is carried on among
7 the parties in the presence of one another or by means of a telegraph, telephone, or other
8 device, except a radio, shall be punished by a fine not exceeding two thousand five hundred
9 dollars (\$2,500) **per violation**, or imprisonment in a county jail not exceeding one year, or
10 in the state prison, or by both that fine and imprisonment. . . .

11 Cal. Penal Code § 632 (emphasis added). The legislature, by referring to the plural—consent of “**all**
12 **parties**”—but in the same paragraph referring to the singular—“confidential communication”—could only
13 have intended one unit of prosecution per recorded conversation, regardless that multiple persons are
14 present. *Id.* (emphasis added). Moreover, because Section 637.2 (which allows civil claims for the same
15 offense) expressly contemplates certain damages **per victim, per violation**, the Legislature’s intent can
16 reasonably be understood as intentionally deciding **not** to provide the People with an avenue to stack
17 counts (by prosecuting per victim rather than per recorded confidential communication):

18 (a) **Any person** who has been injured by *a violation* of this chapter may bring an action
19 against the person who committed the violation for the greater of the following amounts:
20 (1) Five thousand dollars (\$5,000) per violation.
21 (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

22 Cal. Penal Code § 637.2(a) (emphasis added). Considering the textual differences between Sections 632(a)
23 and 637.2(a), the only reasonable conclusion that can and must be drawn is that the legislature knew how
24 to define the unit of prosecution to include or exclude multiple victims per recorded confidential
25 communication under 632(a), and it expressly chose to **exclude** multiple victims.

26 Therefore, pursuant to Section 1004(3), Ms. Merritt demurs to the Complaint in its entirety,
27 whereas it presumably charges the same violations more than once in direct contravention of Section 954,
28 and consequently violates Ms. Merritt’s rights to due process under both federal and California law.

1 D. THE NAF INJUNCTION SEVERELY INTERFERES WITH MS. MERRITT'S PREPARATION
2 OF DEFENSE IN THIS CRIMINAL MATTER, AND THUS, UNDER SECTION 1004(5), THIS
3 DEMURRER SHOULD BE SUSTAINED.

4 As argued above, Ms. Merritt cannot properly proceed with her defense without resort to (and
5 detailed discussion of) the videos that presumably form the basis for the Attorney General's Complaint.
6 The videos contain a plethora of interviews over extended periods of time, such that Ms. Merritt cannot
7 possibly know which particular conversation(s) with which particular person(s) have been identified by
8 the Attorney General as criminal. Ms. Merritt must have a fair opportunity to bring the videos to this
9 Court's attention as early as this demurrer, but she may very well be prevented from doing so because
10 such disclosure by her may be prohibited by the preliminary injunction in the related case, *National*
11 *Abortion Federation, et al. v. Center for Medical Progress, et al.*, No. 15-cv-03522-WHO (N.D. Cal. Feb.
12 6, 2016) (Order Granting Motion for Preliminary Injunction ("NAF Injunction")).²¹ Although Ms. Merritt
13 is not a party to that litigation, she has been specifically named by that NAF Injunction (under her alias in
14 the videos, "Susan Tennenbaum"), and the injunction prohibits, in relevant part, "(1) publishing or
15 otherwise disclosing to any third party any video, audio, photographic, or other recordings taken, or any
16 confidential information learned, at any NAF annual meetings; . . . and (3) publishing or otherwise
17 disclosing to any third party the names or addresses of any NAF members learned at any NAF annual
18 meetings." (NAF Injunction, at 42.)

19 To ensure that Ms. Merritt's rights to present her defense are protected, the videos must be
20 produced, **in their entirety**, by the Attorney General at the preliminary hearing. Ms. Merritt's rights to
21 present her defense are firmly entrenched in constitutional law:

22 In *Washington* itself, the Court stated: "The right to offer the testimony of witnesses, and
23 to compel their attendance, if necessary, is in plain terms the right to present a defense, the
24 right to present the defendant's version of the facts as well as the prosecution's to the jury
25 so it may decide where the truth lies.... [A]n accused has the right to ... present his own
26 witnesses to establish a defense. This right is a fundamental element of due process of law."
27 *Washington*, 388 U.S. at 19, 87 S. Ct. 1920. Since *Washington*, the United States Supreme
28 Court has continually reaffirmed this fundamental right to present a defense. In *Chambers*,
the Court proclaimed: "Few rights are more fundamental than that of an accused to present
witnesses in his own defense[.]" and stated that it was not establishing any new principles

²¹ Mr. Daleiden previously moved this Court to take judicial notice of this order in his Memorandum supporting his Demurrer, at pg. 4, n.5. Ms. Merritt relies on that motion and incorporates the same herein, to avoid duplication.

1 of constitutional law but merely applying established ones to hold that the trial court's
2 rulings deprived the defendant of a fair trial. *Chambers*, 410 U.S. at 302–03, 93 S. Ct. 1038.
3 The Court reemphasized the right's centrality to due process of law in *Taylor v. Illinois*,
4 484 U.S. 400, 409, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988). More recently in *Holmes*, the
5 Court stated: “[S]tate and federal rulemakers have broad latitude under the Constitution to
6 establish rules excluding evidence from criminal trials. This latitude, however, has limits....
7 [T]he Constitution guarantees criminal defendants a meaningful opportunity to present a
8 complete defense. This right is abridged by evidence rules that infring[e] upon a weighty
9 interest of the accused and are ‘arbitrary’ or ‘disproportionate to the purposes they are
10 designed to serve.’” *Holmes*, 547 U.S. at 324–325, 126 S. Ct. 1727 (citations and quotations
11 omitted, second alteration in original). See also *Crane v. Kentucky*, 476 U.S. 683, 690, 106
12 S. Ct. 2142, 90 L.Ed.2d 636 (1986) (holding that “an essential component of procedural
13 fairness is an opportunity to be heard”). The central theme running through each of these
14 Supreme Court cases is the clearly established right that the Constitution guarantees to a
15 criminal defendant to present relevant and material witnesses in his defense. These cases
16 circumscribe the state's ability to infringe that right: a state may limit the defendant's
17 evidence only when that limitation has a nonarbitrary purpose(s) that is (are) proportionate
18 to the corresponding infringement upon the defendant. See, e.g., *Chambers*, 410 U.S. at
19 295, 93 S. Ct. 1038 (“the right to confront and to cross-examine is not absolute.... But its
20 denial or significant diminution calls into question the ultimate ‘integrity of the fact-finding
21 process’ and requires that the competing interest be closely examined.” (citations omitted)).

22 *Moses v. Payne*, 555 F.3d 742, 765–66 (9th Cir. 2009) (Gould, J., dissenting) (emphasis added) (alterations
23 in original) (footnote omitted). Thus, the Attorney General must enter all the relevant videos, in full
24 version, into evidence at the preliminary hearing or trial, such that Ms. Merritt can reference them in her
25 defense. The Attorney General has relied upon the videos in the Complaint, and California courts “will
26 not permit the prosecution to produce evidence of a transaction upon which the very charge is based and
27 deny to the defendant the privilege of producing evidence of the same transaction.” *People v. Higgins*, 18
28 Cal. App. 2d 595, 599 (1937). However, the NAF Injunction purports to prohibit the disclosure and use
of the videos, including in this proceeding. Ms. Merritt is understandably apprehensive regarding her
ability exercise her constitutional right to present her defense, considering the prohibitions in the NAF
Injunction.

The videos are also necessary to demonstrate the Complaint's failure to provide the minimum
notice due Ms. Merritt, and to determine whether the Attorney General has improperly double-counted
prosecutorial units in the charges. Moreover, under Section 1054.1, the Attorney General is required to
provide Ms. Merritt with “[a]ll relevant real evidence seized or obtained as a part of the investigation of
the offenses charged,” and “any exculpatory evidence.” Cal. Penal Code § 1054.1(c), (e). The videos fall
under Section 1054.1(c) and (e). For example, the videos plainly show what Planned Parenthood has
already admitted—that the conversations recorded took place in “non-confidential” circumstances,

1 thereby destroying the foundational premise of the Complaint. (*See* n. 13, *supra*). In this case, under the
2 NAF Injunction, the Attorney General presumably cannot provide these videos in open court. It would
3 grossly violate Ms. Merritt’s federal and state due process rights if she is in fact prohibited from disclosing
4 and using them in this Court, in open proceedings. If required to produce them herself, Ms. Merritt could
5 be forced to violate the federal court’s NAF Injunction, thereby subjecting herself to being held in
6 contempt of the federal court. Ms. Merritt must be able to enter an intelligible plea, but she cannot do so
7 without this critical information. If prohibited by NAF Injunction from disclosing the videos herself (and
8 without the Attorney General’s production), Ms. Merritt would be set up to fail. At every stage of the
9 proceeding, including the preliminary hearing, Ms. Merritt is constitutionally entitled to present evidence
10 showing that the Attorney General never had probable cause to prosecute her.

11 Further, without this vital information in full public view in open court proceedings, these
12 proceedings would essentially be closed to the public—yet another violation of Ms. Merritt’s right to due
13 process of law. As argued by Mr. Daleiden, Ms. Merritt is entitled to a public trial, and a public preliminary
14 hearing. *See People v. Pompa-Ortiz*, 27 Cal. 3d 519, 526 (1980) (the right to a public preliminary hearing
15 held to be a **substantial** right which was violated, entitling defendant to have the information set aside).
16 These bedrock rights serve to protect Ms. Merritt against the smallest governmental overreach, and with
17 good reason—this Nation’s founders did not intend that we ever return to the dark days of abusive
18 institutions such as the Star Chamber of medieval England. *See Alvarado v. Superior Court*, 23 Cal. 4th
19 1121, 1137, n.8 (2000). Therefore, pursuant to Section 1004(5), Ms. Merritt demurs to the Complaint in
20 its entirety, whereas it is constitutionally barred as a blatant violation of her rights to due process of law
21 and a public preliminary hearing.

1 For all the foregoing reasons, Ms. Merritt's Demurrer should be sustained.

2 Respectfully submitted

3 DEFENDANT SANDRA SUSAN MERRITT,
4 By Counsel.

5 DATED: May 26, 2017



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CERTIFICATE OF SERVICE

Pursuant to Cal. Code Civ. P. 1013(a), I hereby certify that, on May 26, 2017, I served the forgoing Notice of Demurrer; Demurrer of Sandra Susan Merritt to Criminal Complaint; and Memorandum of Points and Authorities; on the following parties/entities via the following methods:

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[Via Electronic Mail at the email addresses shown above, pursuant to their agreement to receive electronic service].

I further certify that I am over the age of 18 and not a party to this action.

Dated: May 26, 2017

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