THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____

SANDRA SUSAN MERRITT, Petitioner, vs. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, DEPT. 22 Respondent; PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Case No.: _____ **IMMEDIATE STAY REQUESTED:** **Preliminary Hearing: September 3 through 17, 2019, excepting September 6 and 9.** Superior Court of California, County of San Francisco Case Nos.: 17006621 Dept. No.: 23 Judge: Christopher C. Hite Tel. No.: (415) 551-0323 Superior Court of California, County of San Francisco, Dept. 22 Writ No. 1065 Judge: Samuel K. Feng Tel. No.: (415) 551-0322

REQUEST FOR STAY; VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM; AND APPENDIX OF EXHIBITS

From the Orders of the Superior Court of California, County of San Francisco, Dept. 22
Case No. 17006621, Writ No. 1065
The Honorable Samuel K. Feng, Supervising Judge
Tel.: (415) 551-0322

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REQUEST FOR STAY

Due to the February 14, 2019 Order described in the Allegations of Section V herein, the Superior Court of San Francisco ("**SCSF**") (the Honorable Christopher C. Hite, presiding) will require Petitioner Sandra Susan Merritt (hereinafter, "Merritt") to proceed to a preliminary hearing beginning September 3 through 17, 2019, excepting September 6 and 9. Respondent erred when it summarily denied Merritt's Writ Petition No. 1065, in which Merritt sought relief from SCSF's February 14, 2019 Order ("**PX Order**"). The PX Order improperly: Grants intervention to non-parties; considers inadmissible evidence to seal exhibits that have long been public; and arbitrarily avoids applying Penal Code Section 868.7[1] to partially close the preliminary hearing. Thus, to preserve her fundamental rights, Merritt respectfully requests a stay of any preliminary hearing proceedings while this Court considers the fundamental rights raised within this Writ Petition.

[1] Unless otherwise noted, all statutory references are to Penal Code sections.

PETITION

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT:

Petitioner, SANDRA SUSAN MERRITT ("Merritt"), petitions this Court for a Writ of Mandate, Prohibition, or other appropriate relief ("**Writ Petition**"), and for a stay of proceedings, directed to Respondent Court, and by this Writ Petition represents that:

I

Petitioner, Real Party in Interest, and Intervenors

Merritt is a Defendant in a felony action now pending in the Superior Court of San Francisco entitled *The People of the State of California v. David Robert Daleiden and Sandra Susan Merritt,* No. 17006621. The People of the State of California, represented by the Attorney General, are named in this petition as the Real Party in Interest.

"**Intervenors**" are **four** of the fourteen alleged victims[2] in the Amended Criminal Complaint, each designated anonymously as "Doe," as well as three corporate entities **not** named as alleged victims in the Amended Criminal Complaint, as follows:

- **Doe Nos. 7, 9, 10, and 11** (collectively, "Does," who are identified in *sealed* **Exhibit 7**, Vol. 1, Exh-601 to 608 (alleged victims' declarations);[3]

[2] No counsel appeared or sought intervention for the remaining **ten** alleged victims: **Does 1-6, 8, and 12-14**.

[3] All Exhibits referenced herein are contained in the **Appendix of Exhibits**, (Volumes 1-4), which is attached hereto and incorporated herein, the pages of which are consecutively numbered as "Exh-[p. #]."

- **Planned Parenthood Federation of America** ("**PPFA**");
- **Planned Parenthood Pasadena and San Gabriel Valley, Inc**. ("**PPPSGV**"); and
- **Planned Parenthood of Northern California** ("**PPNC**"). (Hereinafter, collectively, "**PP Entities**.")

PP Entities initiated and are embroiled in civil litigation against Merritt and her co-defendant, David Daleiden ("Daleiden"), in *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress* ("***PPFA v. CMP***"), No. 3:16-cv-00236-WHO (N.D. Cal.). Several Does have publicly testified in *PPFA v. CMP* as well as in *Nat'l Abortion Fed'n v. Ctr. for Med. Progress* (***"NAF v. CMP"***), No. 3:15-cv-03522-WHO (N.D. Cal.).

Three civil suits (*NAF v. CMP*, *PPFA v. CMP*, and *Jane and John Does 1-10 v. Univ. of Wash.* ("***Does v. Univ. of Wash.***"), 2:16-cv-01212-JLR (Wash. Super. Ct.)) and the criminal prosecution against Merritt and Daleiden share similar underlying facts, each involving varying parties and claims. Of the civil cases, Merritt is **only** a party to *PPFA v. CMP*, while Daleiden is a party in all three.

II

Respondent

Respondent Department 22 of the Superior Court of California, San Francisco ("**Respondent**"), summarily denied Merritt's original Writ Petition No. 1065 (**Exhibit 27**, Vol. 4, Exh-1322 (Writ Petition No. 1065)) on April 19, 2019 (**Exhibit 28**, Vol. 4, Exh-1400 (4-19-19 Order (summary denial))), and the Superior Court of California, County of San Francisco, is now, and at all other times mentioned in this Writ Petition has been exercising judicial functions in connection with the proceeding described in Section I.

III

Venue is Proper

All the proceedings about which this Writ Petition is concerned have occurred within the territorial jurisdiction of Respondent, and of the Court of Appeal of the State of California, First Appellate District.

IV

No Prior Petitions

Merritt previously filed her Writ Petition (No. 1065) in Respondent court pursuant to the Local Rules of the San Francisco Superior Court ("LRSF"), LRSF 16.13(B), which requires "Petitions for writs of mandate or prohibition in felony cases filed before indictment or information," to be filed with the "Criminal Supervising Judge in Department 22," of the Superior Court, which Respondent summarily denied.

No other petition for writ of mandate or prohibition has been made by or on behalf of Merritt in this Court relating to the Attorney General's *Preliminary Hearing Brief and Request for Offer of Relevant Proof and Rulings* (**Exhibit 2**, Vol. 1, Exh-44 (hereinafter "**PX Brief**")), his related *Motion to Seal Certain Exhibits* (**Exhibit 11**, Vol. 3, Exh-898 ("**Motion to Seal**")), the Intervenors' intervention papers (*see infra* Pet. § V), and the SCSF's PX Order (the Honorable Christopher C. Hite, presiding)), thereon.[4] (**Exhibit 1**, Vol. 1, Exh-19 (PX Order).)

V

Statement of Grounds for Relief

The SCSF abused its discretion in committing several errors in its PX Order to Merritt's severe prejudice. Likewise, Respondent abused its discretion when it summarily denied Merritt's Writ Petition No. 1065, (**Exhibit 28**, Vol. 4, Exh-1400), thereby affirming the PX Order. Thus, where Merritt herein references SCSF's errors, she likewise refers to Respondent's errors.

This Writ Petition involves, *inter alia*, a question of **first impression** concerning SCSF's legal error in construing Article 1, Section 28 of the California Constitution ("**Marsy's Law**") to permit unprecedented intervention of alleged victims, and non-victim PP Entities, to intervene in a criminal prosecution. SCSF's (and Respondent's) errors are particularly

[4] The application of the California Rules of Court ("**CRC**"), Rules 2.550 and 2.551 ("**Sealing Rules**") to some issues arising out of the PX Order in this Writ Petition are materially different and distinguishable from those issues concerning the Sealing Rules raised in Merritt's previous Writ Petition No. A156808 (which this Court summarily denied on April 15, 2019).

grievous because they allow private parties with proverbial axes to grind to unconstitutionally prosecute Merritt. The intervention brings to fruition Merritt's concerns raised in her prior *Motion to Recuse the Attorney General for Conflict of Interest and to Dismiss Criminal Complaint for Selective Prosecution*. (**Exhibit 22**, Vol. 4, Exh-1263 ("**Recusal/Dismissal Motions**").)[5] Although SCSF purports to have granted something less than traditional intervention, (**Exhibit 1**, Vol. 1, Exh-38, 39 (PX Order) (19 n.4, 20:4-13), SCSF, in fact, **considered the Intervenors' arguments on the merits**.

SCSF's PX Order also prejudices Merritt's constitutional and statutory rights to a **public** preliminary hearing. SCSF disregarded well-settled legal principles to seal video exhibits that have long been in the public domain. Moreover, the PX Order is internally inconsistent. Although SCSF properly applied Section 868.7 to deny the Attorney General's Motion to close access to the same videos during the preliminary hearing, (Exhibit 1, Vol. 1, Exh-33, 34 (PX Order, 14:8-15:21)), SCSF arbitrarily disregarded Section 868.7, and instead misapplied irrelevant statutes (Sections 293.5 and 1054.7), to grant anonymity to the alleged victims during the preliminary hearing, notwithstanding the strong presumption of openness attaching to preliminary hearings under constitutional and statutory protections.

SCSF also erred in relying on motion practice documents and ***preliminary*** orders taken from **civil cases** to which Merritt was either **not a**

[5] Merritt's Recusal/Dismissal Motions sought to recuse or dismiss the Attorney General for his disqualifying, conflicting interests that concern officers and employees of the now intervening PP Entities, which are employers of the alleged victims in this case.

party or otherwise involved, thereby violating Merritt's fundamental due process rights. Furthermore, SCSF abused its discretion in relying on declarations woefully deficient under both the Sealing Rules and Section 868.7.

As demonstrated herein and in the Memorandum in Support of Writ Petition, attached hereto and incorporated by reference herein, SCSF's and Respondent's errors constitute abuses of discretion that severely prejudice Merritt, which this Court should remedy to preserve Merritt's fundamental rights to due process and a fair, public preliminary hearing, as well as the proper administration of justice.

A. Statement of Procedural Facts.

Merritt's research as an investigative journalist lead her to discover that abortion providers were altering abortion procedures to increase their ability to harvest intact fetal organs for sale. Abortion providers, Merritt found, were willing to perform "partial birth abortions" or other techniques in which they killed and dissected live fetuses **outside their mothers**. Thus, Merritt began working undercover, gathering information for the Center for Medical Progress' ("**CMP**") Human Capital Campaign, necessarily involving conversations with abortion providers related to the harvest and sale of aborted body parts. Undercover, Merritt attended abortion conferences as an exhibitor, and she met publicly with Planned Parenthood representatives to discuss the purchase of fetal tissue specimens from Planned Parenthood. (**Exhibit 22**, Vol. 4, Exh-1268, 1269 (*Recusal/Dismissal Motions*, 3-4).) Fourteen of those representatives are alleged victims, who were each anonymously designated as "Doe" in the

Amended Criminal Complaint, which charges Merritt and her co-defendant, David Daleiden, with violating Penal Code Section 632(a)). (**Exhibit 24**, Vol. 4, Exh-1303 (Amended Criminal Complaint).)

CMP published video reports of the investigations on its website, on YouTube, and on Facebook. (**Exhibit 22**, Vol. 4, Exh-1269 (Recusal/Dismissal Motions, 4).) The reports were highly successful and immediately drew appropriate public outrage and moral indignation at Planned Parenthood's practices, as well as swift legal action. At least two entities in California were successfully prosecuted, forced to pay almost $8 million in penalties, and shuttered permanently in connection with their unlawful baby parts transactions. Several states and the federal government moved to defund Planned Parenthood to varying degrees. The United States Congress conducted an investigation and referred Planned Parenthood to law enforcement agencies for criminal prosecution in connection with its illegal profiteering from aborted baby body parts. However, instead of indicting and prosecuting Planned Parenthood for its documented criminal conduct, the California Attorney General brought this unprecedented criminal action against the newsgatherers–the first such action of its kind.

In this context, Merritt previously filed her Recusal/Dismissal Motions and her Petitions for Writ concerning the merits of those motions with this Court.[6] Thereafter, the Attorney General sought to limit Merritt's

[6] Concerning the status of the Petitions for Writ regarding the Recusal/Dismissal Motions, this Court previously denied that Petition for Writ No. 156592 on April 12, 2019. Although the California Supreme Court granted a stay of all proceedings in Merritt's case to consider Merritt's Petition for Review No. S255319 (from this Court's denial) on April 19, 2019 (**Exhibit 29**, Vol. 4, Exh-1403), the Supreme Court summarily denied

defense capabilities at the preliminary hearing, joined at the last minute by four Does, together with non-victims NAF and PP Entities, all of which filed a proverbial mountain of motions seeking intervention on the merits. The following facts in are relevant to this Petition:

1. In preparation for the preliminary hearing (originally docketed on **October 5, 2018** and scheduled for February 19 to March 1, 2019 (**Exhibit 26**, Vol. 4, Exh-1320 (10-5-18 Tr. 40:24-28)), the Attorney General filed his PX Brief, on **December 21, 2018**, seeking, *inter alia*, evidentiary rulings in advance of the preliminary hearing, to partially close the hearing, and to seal certain evidence presented therein, (**Exhibit 2**, Vol. 1, Exh-44).

2. SCSF set January 28, 2019 as the hearing date for argument on the PX Brief.

3. Merritt timely lodged her *Opposition to the Attorney General's Preliminary Hearing Requests*. (**Exhibit 3**, Vol. 1, Exh-57 ("Merritt Opp.").) Daleiden likewise lodged his *Opposition to Preliminary Hearing Brief*. (**Exhibit 4**, Vol. 1, Exh-75 ("Daleiden First Opp.").)

4. On January 22, 2019, **four court days** before the January 28 hearing (**one month after** the Attorney General filed his PX Brief), NAF (through counsel, Derek Foran) sent a letter to SCSF, asking that SCSF consider NAF's interests in its civil suit, *NAF v. CMP*, by submitting, *inter alia*, a preliminary injunction order and a contempt order entered against Daleiden. (*See* **Exhibit 11**, Vol. 3, Exh-898, Exh-995 (NAF letter), (NAF letter later formally adopted and submitted as Exhibit 6 to Declaration

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the Petition for Review on May 15, 2019, and lifted the stay (**Exhibit 30**, Vol. 4, Exh-1405).

of Robert Morgester in the Motion to Seal)).) Merritt's counsel promptly objected. (**Exhibit 5**, Vol. 1, Exh-565 to 574 (January 22-24, 2019 SCSF/Counsel Emails).)

5. On January 24, 2019, SCSF issued tentative rulings by email. (*Id.* at Exh-570.) In response, also on January 24, the Attorney General through DAG Jauron requested by email that SCSF reconsider one of its tentative rulings, mistakenly asserting that NAF's counsel (Mr. Foran) also represented nine of the Does listed in the Amended Criminal Complaint ("Does 1-9"). She also raised **new** argument on NAF's behalf under Cal. Const. article 1, Section 28 ("**Marsy's Law**"), and promised a "Reply" by January 25, even though the time to reply would expire that day, January 24. (*Id*. at Exh-568, 569.)

6. On January 24, in response, Merritt's counsel promptly emailed SCSF, lodging strong objections to the trial by ambush: The Attorney General was now advocating for NAF's improper injection into this criminal case, and raising new arguments in a late Reply, **one court day** before the hearing. (*Id*. at Exh-566, 567.)

7. On January 25, 2019, the Attorney General filed his *Reply to Defendants' Opposition to Preliminary Hearing Brief* ("AG Reply"). (**Exhibit 9**, Vol. 3, Exh-878.)

8. Also, late afternoon on January 25, 2019, PP Entities and Does served via email an **incomplete** set of their motions on Daleiden's counsel (who forwarded them to Merritt's counsel). The motions had previously been **publicly filed** with SCSF on January 23, 2019. (*See* ¶ 15, below.) The filings indicated that Mr. Umhofer and Ms. Lee represent the Does, rather than Mr. Foran. Of the fourteen Does listed in the Amended

Complaint, only Does 7, 9, 10, and 11 (and PP Entities) were represented. PP Entities and Does served the following motions on defendants: Motion to Intervene; Motion in Limine (attaching five unredacted declarations for Does 7, 9, 10, and 11, and for Ms. Lee (with exhibits A to N, but missing Ex. M)); and a Request for Judicial Notice (first page only).

9. Counsel for NAF, Does, PP Entities and the parties appeared on January 28, 2019, for the hearing, in which SCSF permitted some argument. (**Exhibit 12**, Vol. 3, Exh-1008 (1-28-19 Transcript ("Tr.").)

10. During that hearing, SAAG Morgester represented he had just filed a **new** Motion to Seal, (**Exhibit 11**, Vol. 3, Exh-898), **that day** and admitted that the Attorney General's PX Brief failed to meet the standard for sealing under CRC, Rules 2.550 and 2.551. (*See* **Exhibit 12**,Vol. 3, Exh-1030, 1031(1-28-19 Tr., 22:23 to 23:1)).

11. The Attorney General's Motion to Seal merely attached, under Mr. Morgester's supporting Declaration, *inter alia,* three of the five Declarations (Does 7, 10, and 11) that Intervenors had attached to their intervention papers. (**Exhibit 11**, Vol. 3, Exh-985 to 993 (Exs. 2 to 4).) Also attached were two attachments taken from NAF's letter. (*Id*. at Exh-913 to 984 (Ex. 1 (*NAF v. CMP* Orders)); *id*. at Exh-995 (Ex. 6 (NAF's Jan. 22, 2019 letter to Judge Hite)).)

12. During the January 28 hearing, Merritt's counsel forcefully argued against intervention and that the Does publicized their own names by filing their intervention papers, including declarations, in **unredacted** form, and numerous other publications (*see* Memorandum ("Mem."), § III(B) for detailed incidents), which SCSF found "troubling," (**Exhibit 12**, Vol. 3, Exh-1020, 1021 (1-28-19 Tr., 12:16 to 13:23)).

13. Also, Mr. Foran admitted to SCSF that he only represented NAF, but not any Doe. (*Id.* at Exh-1068 to 1070 (60:6 to 62:5).)

14. SCSF continued the hearing to February 11, 2019 (*id.* at Exh-1074 (66:18-19)), permitting defendants time to file responsive argument, (*id*. at Exh-1067 (59:20, 21), and allowing Intervenors to lodge an application to seal their prior filings, (*id*. (59:11-23)). SCSF reserved ruling on Intervenors' proposed sealing application for their intervention papers. (*Id*.)

15. On February 1, 2019, Intervenors served *Doe Witnesses' Request to Withdraw Previously Filed Documents* (**Exhibit 15**, Vol. 3, Exh-1150) ("**Motion to Withdraw**"), and re-filed both conditionally sealed and redacted versions of the following intervention papers (versions attached as exhibits are only those filed under SCSF's final sealing orders):

a. *Motion to Intervene*. (**Exhibit 6**, Vol. 1, Exh-575.)

b. *Motion in Limine*. (**Exhibit 7**, Vol. 1, Exh-578.)

   i. *Declaration of Jane Doe I* ("Doe 10") (*id*. at Exh-605).

   ii. *Declaration of Jane Doe II* ("Doe 7") (*id*. at Exh-601).

   iii. *Declaration of Jane Doe III* ("Doe 9") (*id*. at Exh-603).

   iv. *Declaration of Jane Doe IV* ("Doe 11") (*id*. at Exh-607).

   v. *Declaration of Elizabeth J. Lee in Support of Motion in Limine* (and Exhibits A to N) (*id*. at Exh-609).

c. *Request for Judicial Notice in Support of Victim Witnesses' Motion in Limine,* (**Exhibit 8**, Vols. 2-3, Exh-700 to 804, Exh-812 to 871 ("**RJN**")), for five court records from three civil cases:

i. *PPFA v. CMP*: Motions to Compel (Vol. 2, Exh-739 (as Ex. C)).

ii. *NAF v. CMP*: Civil Order of Contempt (7-17-17) (*Id.* at Exh-706 (as Ex. A)); Order Setting Amount of Civil Contempt Sanctions (8-31-17) (*id.* at Exh-731 (as Ex. B)); and Order Granting Motion for Preliminary Injunction (2-5-16) (Vol. 3, Exh-829 (as Ex. E)).

iii. *Jane and John Does 1-10 v. Univ. of Wash.*: Declaration of Retired Planned Parenthood Federation of American Affiliate Security Team Ellen Gertzog (8-3-16) (Vol. 3, Exh-812 (as Ex. D)).

d. Application to Seal, with Declaration of Matthew Donald Umhofer. (**Exhibit 13**, Vol. 3, Exh-1079, 1085.)

16. Intervenors' motions sought relief on the merits, making numerous arguments as if standing in the Attorney General's shoes. They asked SCSF for the following relief for the preliminary hearing, as summarized in the *Motion in Limine,* (**Exhibit 7**, Vol. 1, Exh-579, 580):

a. "**Prohibit the public display** of videos at issue." (*Id*. at ¶ 1 (emphasis added).)

b. "**Strictly limit** defendants' **cross-examination** to the scope of the direct examination." (*Id*. at ¶ 2 (emphasis added).)

c. "**Restrict the cross-examination** to the facts of the case—the events surrounding the recordings, and the witnesses' credibility." (*Id*. at ¶ 3 (emphasis added).)

d. "**Prohibit questions about fetal tissue and abortion procedures**." (*Id*. at ¶ 4 (emphasis added).)

e. "Protect against the disclosure of the victim-witnesses' personal information and any information that could reveal the victim-witnesses' home addresses and other personal identifying information that could jeopardize their safety." (*Id*. at ¶ 5.)

f. "**Prohibit questioning** that intrudes upon the attorney-client privilege or the work product doctrine." (*Id*. at ¶ 6 (emphasis added).)

g. "Permit counsel for the victim-witnesses to **interpose objections during testimony** that touches on **the concerns** raised in this Motion." (*Id*. at ¶ 7 (emphasis added).)

17. On February 6, 2019, Merritt lodged her *Omnibus Opposition to the Attorney General's Motion to Seal Certain Exhibits; "Third Party" Witness' Motions; NAF Letter Brief; and Does' Motion to Withdraw Documents and Application to Seal.* (**Exhibit 14**, Vol. 3, Exh-1087 ("**Merritt Opp. II**").)

18. On February 8, 2019, **one court day** before the newly set hearing, Intervenors continued in their attempts to argue the merits and **raised new arguments,** in their *Reply in Support of Motion in Limine,* (**Exhibit 16**, Vol. 3, Exh-1153 ("**Intervenors' Reply**")), with another *Request for Judicial Notice in Support of Victim-Witnesses' Reply in Support*

of Motion in Limine ("**RJN-2**").[7] Also, on February 8, 2019, Intervenors served a *Supplemental Declaration of Elizabeth J. Lee* and Exhibit O (Lee Supp. Decl."), together with an *Application to Seal* Lee's Supp. Decl. (**Exhibit 17**, Vol. 3, Exh-1171.)

19. All counsel again appeared on February 11, 2019 to present further argument. (**Exhibit 18**, Vol. 3, Exh-1181 (2-11-19 Tr.).) At the hearing:

a. SCSF allowed the Does to withdraw their publicly filed intervention papers, (*id.* at Exh-1192 (11:12-25), despite defense counsel's strong demonstration that the Does have been proceeding publicly in their civil cases, (*id*.at Exh-1188 to 1192 (7:11 to 11:5));

b. SCSF ruled the Does' names should be redacted from all of Intervenors' intervention papers, including the Request for Judicial Notice (*id*. at Exh-1200 (19:7-26)), which attached five court documents. Some of those documents **contain full names of various Does**, which must be redacted, **even though at least one document is available on legal data bases, such as Westlaw, without any redaction**, *i.e.*, the *NAF v. CMP* order granting a preliminary injunction. SCSF ordered redaction of this **public** information regardless that Merritt's counsel reminded SCSF of legal precedent holding that there is **no justification** for sealing records already available to the public, (*id*. at Exh-1197 (16:13-18)).

c. Merritt joined Daleiden's *Motion to Dismiss or Recuse for Attempted Interference by Derek Foran in the Preliminary Hearing and*

[7] Merritt did not include a copy of this Request for Judicial Notice because SCSF refused to consider it. (**Exhibit 1**, Vol. 1, Exh-42 (23:11-13) (PX Order).)

Answer to the Court's Tentative Ruling, (**Exhibit 10**, Vol. 3, Exh-885 ("**Daleiden Motion Dismiss/Recuse**")). (**Exhibit 18**, Vol. 3, Exh-1208 (2-11-19 Tr., 27:18-23).)

d. SCSF granted Defendants' motion to continue the preliminary hearing and docketed it for April 22 to May 3, 2019. (*Id*. at Exh-1240 (59:11-24).)[8]

20. After the February 11, 2019 hearing, on **February 12, 2019**, Intervenors served a *Notice Supplemental Authority in Support of Motion in Limine*, attaching a **February 8, 2019** Order from *PPFA v. CMP*, "*Order Affirming Discovery Rulings and Overruling Objections*," (**Exhibit 19**, Vol. 3, Exh-1244), again attempting to oppose Merritt's (and Daleiden's) proposed affirmative defenses.

21. Merritt's Counsel promptly lodged strong objections by email with SCSF regarding Intervenors' improper attempts to argue the merits of the prosecution's case, raising issues that the Attorney General had not raised, and improperly foisting civil case decisions on Merritt in her criminal case under the ruse of safety and privacy. (**Exhibit 20**, Vol. 3, Exh-1252 (2-13-19 Email Objections).) SCSF replied simply that no further responsive pleading was needed. (*Id.* (SCSF email response).)

22. SCSF issued its PX Order on February 14, 2019, concerning, *inter alia*, "Preliminary Hearing Rulings," and "Motions to Intervene." (**Exhibit 1**, Vol. 1, Exh-19.) Although SCSF denied NAF

[8] These dates were subsequently removed from the docket after the Supreme Court issued a stay. *See supra* note 6. The preliminary hearing is now docketed for September 3 through 17, 2019, with dark days on September 6th and 9th. (**Exhibit 31**, Vol 4, Exh-1407 (5-30-19 email order).)

intervention on the one hand, (*id*. at Exh-42 (23:15-25)), SCSF still considered NAF's submissions for their truth because they were included in Intervenors' RJN.

23. Merritt timely filed her Writ Petition objecting to ripe portions of the PX Order with Respondent on April 12, 2019, which Respondent summarily denied on April 19, 2019.

B. Statement of Legal Issues.

This Court should grant this Petition to consider whether Respondent abused its discretion in summarily denying Merritt's Writ Petition addressing the following questions:

1. **Question of First Impression:** Whether SCSF abused its discretion by *de facto* cutting from whole cloth a **new right to intervene in a criminal case** under the guise of Marsy's Law, by both alleged victims and **non-victims** having axes to grind, and financial benefits and a leg-up to be gained in concurrent civil litigation.

2. Whether SCSF abused its discretion by blanketly sealing preliminary hearing evidence that has **long been in the public domain**, even **before** the preliminary hearing has occurred, specifically when several of the Does have already proceeded publicly in Intervenors' civil litigation.

3. Under Section 868 and constitutional law requiring preliminary hearings to be public, and Section 868.7 that governs closure, whether SCSF abused its discretion in permitting alleged victims to continue anonymously at the preliminary hearing by using inapplicable standards found in Sections 293.5 and 1054.7.

4. Whether SCSF abused its discretion by supplanting Merritt's criminal due process with reliance on ***preliminary* orders**, other inadmissible hearsay evidence, and another party's motion practice, all borrowed from **civil cases** in which Merritt was either **not a party** or a **non-participant**.

VI

Petitioner Has Exhausted Her Remedies

Merritt has vociferously and repeatedly objected to SCSF's errors described in Section V, above. Likewise, Merritt challenged SCSF's various rulings in her Writ Petition No. 1065, filed with Respondent. As previously stated above in Section II, Respondent summarily denied Merritt's original Writ Petition on April 19, 2019. (**Exhibit 28**, Vol. 4, Exh-1400 (4-19-19 Order.) Without this Court's intervention to correct SCSF's and Respondent's legal errors, Merritt will be forced to litigate at the preliminary hearing under SCSF's prejudicial PX Order.

VII

Petitioner Diligently Filed This Petition

There is no statutory deadline for seeking writ relief in this instance. Merritt diligently filed her original Writ Petition with Respondent within the sixty-day appeal deadline. (CRC, Rule 8.104(a).) Merritt also timely filed this Writ Petition with this Court. *See also Good v. Superior Court,* 158 Cal. App 4th 1494, 1505 n.9 (Ct. App. 2008) (even writ petition filed **after** 60 days will not be denied unless Respondent can show prejudice).

Further, the Real Party in Interest, the People, have not been and will not be prejudiced because the preliminary hearing is docketed for September

3, 2019 through September 17, 2019, excepting September 6th and 9th. Further, SCSF has given defendants an opportunity to seek a bifurcation of the hearing as necessary. (**Exhibit 31**, Vol. 4, Exh-1407).

VIII

Petitioner Has No Adequate Remedy

The February 14, 2019 PX Order is not appealable at this time, because it is not a final judgment of conviction and does not otherwise qualify as an appealable final judgment under Section 1237 ("Appeal by defendant"). Merritt has no plain, speedy, or adequate remedy at law other than the relief sought in this Writ Petition. The right of appeal is wholly inadequate, because Merritt is constitutionally entitled to a **fair, public preliminary hearing**, free from discriminatory bias and conflicting interests inherent in the Intervenors' participation as litigants, as well as NAF's backdoor participation. *See People v. Jackson*, 128 Cal. App. 4th 1009, 1022 (Ct. App. 2005) (quoting *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984)) ("'No right ranks higher than the right of the accused to a fair trial'"). Further, if required to appeal SCSF's Orders only after a final judgment, Merritt would have to shoulder the heavier burden of prejudice, whereas she is not required to show prejudice pretrial. *See People v. Pompa-Ortiz*, 27 Cal. 3d 519, 529 (1980) (citing *People v. Wilson*, 60 Cal. 2d 139 (1963)).

IX

Petitioner's Irreparable Harm Absent Writ Relief

Merritt raises questions of first impression regarding intervention that will cause irreparable harm pre-trial, and likely through trial. SCSF mischaracterized the intervention as limited (**Exhibit 1**, Vol. 1, Exh-38, 39 (PX Order, 19 n.4, 20:4-8)). However, there is no statutory guidance for this newly minted type of intervention by judicial fiat. Intervention by victims (let alone civil litigation adversaries) has been condemned by the California Supreme Court. Intervention by civil litigants who stand to benefit financially and gain a leg-up in their civil litigation, is **unprecedented and prohibited**. Moreover, Merritt's fundamental rights to due process and a public preliminary hearing will be irreparably damaged by SCSF's PX Order, which blanketly seals evidence and grants anonymity for the alleged victims based on inadmissible evidence and critically deficient declarations.

This Writ Petition raises constitutional questions with **statewide** implications, which will broadly affect the Bench, Bar, and the proper administration of justice. The public's interest in this case is great, specifically concerning free speech, investigative journalism, and abortion industry practices. Accordingly, the public must be able to monitor the conduct of the court and the parties, particularly with the Intervenors' participation in this high-profile case that has drawn nationwide attention.

PRAYER

WHEREFORE, Petitioner prays that:

This Court immediately stay all proceedings in case number 17006621 until further order of this Court; and that,

This Court issue an order requiring Respondent to issue an alternative writ of mandate requiring SCSF to deny intervention, to unseal the video evidence offered at the preliminary hearing, and require that alleged victims identify by their real identities, or to show cause before this Court, at a specified time and place, why it has not done so and why a peremptory writ should not issue; and that,

On the return of the alternative writ and hearing on the order to show cause, the Respondent shall issue a peremptory writ of mandate compelling SCSF to deny intervention, unseal the video evidence offered, and require the alleged victims to identify by their real identities in Case No. 17006621; and that,

This Court grant Merritt such other and further relief as may be appropriate and just.

DATED: June 17, 2019

/s/

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VERIFICATION

I am the Petitioner in this action. All facts alleged in the above document, not otherwise supported by citation to the record, exhibits, or other documents are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **June 17, 2019**, at San Jose, California.

/s/

SANDRA SUSAN MERRITT

MEMORANDUM IN SUPPORT OF WRIT PETITION

Petitioner Merritt (hereinafter, "Merritt") incorporates by reference herein all of her allegations and argument in her Verified Writ Petition, and further states as follows.

Argument Summary

Merritt first filed her Writ Petition No. 1065 in Respondent Court, Department 22, raising and seeking relief from several errors constituting an abuse of discretion in the February 14, 2019 pre-trial order ("PX Order") of the Superior Court of San Francisco ("SCSF"), the Honorable Christopher C. Hite, presiding, which Respondent summarily denied.[9] At a minimum, SCSF's and Respondent's errors will severely prejudice Merritt at the preliminary hearing.

Merritt's Writ Petition raises issues of **first impression** that govern the reach of Cal. Const., art. I, § 28 ("Marsy's Law"), which must be limited to strictly prohibit alleged victims (and *a fortiori*, non-victims) from usurping prosecutorial functions in criminal matters. SCSF's ruling allowing alleged victims and non-victims to intervene here is not limited to Merritt's preliminary hearing but will constitute law of the case, infecting the entire proceeding. Although SCSF labeled intervention in limited terms, the PX Order *de facto* grants full intervention on the merits, for both alleged victims and non-victims. Thus, the intervention conflicts with controlling law and

[9] The denial is summary because this was a pre-trial writ petition and no response was required of the Respondent. *See Leone v. Medical Bd. of Cal.*, 22 Cal. 4th 660, 669–70 (2000) (citing *Kowis v. Howard*, 3 Cal. 4th 888, 897 (1992)).

constitutes and abuse of discretion. Moreover, permitting intervention by alleged victims and non-victims who are concurrently proceeding against Merritt in civil litigation permits Intervenors to do what the Attorney General is prohibited from doing—prosecuting a criminal case motivated by personal profit and vindictive bias.

Additionally, SCSF's decision to seal video evidence that has been made public and will be made public again at the preliminary hearing thwarts the very purpose of the Sealing Rules. Similarly, SCSF's errors in permitting the alleged victims to proceed anonymously nullifies the standards set forth in Section 868.7 for closure of the preliminary hearing which is presumptively public under Section 868. SCSF's PX Order is particularly pernicious considering the Does' voluntary publication of their own names in conjunction with the underlying facts of this case. As a result, the PX Order cheapens the unique protections afforded to victims when real and imminent danger genuinely exist. Thus, both SCSF's and Respondent's orders constitute abuses of discretion.

I. PETITIONER HAS MET ALL REQUIREMENTS FOR EXTRAORDINARY RELIEF, AND THIS COURT'S REVIEW OF SCSF's and RESPONDENT'S LEGAL ERRORS IS *DE NOVO*.

Code of Civil Procedure Section 1086 requires writs to issue where there is no "plain, speedy, and adequate remedy, in the ordinary course of law." *Id*. Factors for consideration must include: time and expense to proceed with trial; prejudice from delay; the ability to correct possible errors before or during trial; and personal hardships. *See Hogya v. Superior Court*, 75 Cal.

App.3d 122, 128–29 (Ct. App. 1977); *Shuford v. Superior Court*, 11 Cal. 3d 903, 907 (1974). Merritt's Writ Petition has met these requirements.

"Where the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion." *People v. Superior Court (Humberto S.)*, 43 Cal. 4th 737, 742 (2008). Questions of statutory construction are reviewed *de novo*. *See Shorts v. Superior Court*, 24 Cal. App. 5th 709, 719-20 (Dist. Ct. App. 2018) (citing *People v. Prunty*, 62 Cal. 4th 59, 71 (2015); *Rubio v. Superior Court*, 244 Cal. App. 4th 459, 471 (Ct. App. 2016)). Otherwise, the standard is abuse of discretion. *People v. Superior Court* ("*Greer*"), 19 Cal. 3d 255, 269 (1977). However, a writ will lie if discretion can be "**exercised in only one way**.'" *Shorts v. Superior Court*, 24 Cal. App. 5th at 719 (quoting *Babb v. Superior Court*, 3 Cal. 3d 841, 851 (1971)) (emphasis added). Thus, this Court should grant the relief requested in Merritt's Writ Petition to correct Respondent's and SCSF's abuses of discretion in failing to properly apply controlling law or exercise discretion in one way when faced with only one choice, as demonstrated herein.

II. SCSF ABUSED ITS DISCRETION BY ALLOWING *DE FACTO* INTERVENTION.

Respondent's Order ignored Merritt's argument that SCSF, *de facto*, granted intervention by considering and ruling on the Intervenors' arguments and incompetent evidentiary submissions on the merits. Thus, both Respondent's and SCSF's orders constitute abuses of discretion, for the following reasons:

A. Marsy's Law Does Not Confer Standing to Intervene.

SCSF (and Respondent) legally erred, thereby abusing its discretion, by transforming Marsy's Law into a right to **intervene in a criminal case.** Marsy's Law grants only a "right to be heard" at specified junctures listed in Article 1, sec. 28(b)(8) of the California Constitution. That provision merely provides a right for victims,

> To be heard, upon request, at any proceeding, including any delinquency proceeding, involving post-arrest **release decision, plea, sentencing, post-conviction release decision**, or any proceeding in which a right of the victim is at issue.

Id. Noticeably absent from this list is a preliminary hearing and trial. A right "to be heard" cannot be transformed into the right to file motions and submit evidence, particularly on the merits. As Merritt argued below, the catch all portion of this section must be construed in light of the fundamental, constitutional rights granted to a criminal defendant. SCSF's application of Marsy's Law stands in direct conflict with fundamental constitutional principles that **forbid** intervention here.

Both the California Supreme Court and this Court have spoken on this matter before and **after** the Legislature amended Art. 1, section 28 of the California Constitution (the "Victim's Bill of Rights" or "Marsy's Law") in 2008.[10] Prior to the 2008 amendment, the Supreme Court established, in *Dix v. Superior Court*, 53 Cal. 3d 442 (1991), that parties in a criminal prosecution include only the prosecutor and named defendants, to the

[10] Article I, section 28 of the California Constitution was amended by Initiative Measure, Proposition 9, § 4.1, approved on Nov. 4, 2008, and became effective on Nov. 5, 2008.

exclusion of all others. The Court in *Dix* concluded that a victim of a crime, **even one who had been threatened with future harm by the defendant**, *id*. at 451, had "no standing to challenge the application of [Penal Code] section 1170(d) to [the defendant's] sentencing," *id*. at 450. The Court explained its rationale:

> Except as specifically provided by law, a private citizen has no personal legal interest in the outcome of an individual criminal prosecution against another person. Nor may the doctrine of "public interest" standing prevail over the public prosecutor's exclusive discretion in the conduct of criminal cases.
>
> **The parties to a criminal action are the People, in whose sovereign name it is prosecuted, and the person accused** [citations]). The prosecution of criminal offenses on behalf of the People is the **sole responsibility of the public prosecutor**. (Gov. Code, §§ 26500, 26501; see Cal. Const., art. V, § 13.)
>
> The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. ([Citations].) **No private citizen, however personally aggrieved, may institute criminal proceedings independently** ([citations]), **and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused**. ([Citations].) An individual exercise of prosecutorial discretion is presumed to be " 'legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement....' " ([Citations].)
>
> **Exclusive prosecutorial discretion** must also extend to the conduct of a criminal action once commenced. "In conducting a trial a prosecutor is bound only by the general rules of law and professional ethics that bind all counsel." ([Citations].) The prosecutor has the responsibility to decide in the public interest **whether to seek, oppose, accept, or**

> **challenge judicial actions and rulings**. These decisions, too, **go beyond safety and redress for an individual victim**; they involve "the **complex considerations necessary for the effective and efficient administration of law enforcement**." **There is no place in this scheme for intervention by a victim pursuing personal concerns about the case**.

Dix v. Superior Court, 53 Cal. 3d at 451–52 (emphasis added) (internal citations omitted) (fifth alteration in original). The Court continued, explaining that Article 1, Section 28 does not entitle victims open-ended access to **judicial remedies** for enforcing rights thereunder. *Id*. at 452. As the Court held,

> it is obvious that many recent legislative declarations about the "rights" of felony victims have been intended primarily as **moral and philosophical abstractions**…[but they] **do not suggest an intent to alter criminal *practice* fundamentally by giving victims standing to intervene in ongoing criminal cases**.

Id. (italicized emphasis in original). The Court noted only **statutory** exceptions, such as with final disposition and sentencing, referring to "limited categor[ies] of 'victims' rights.'" *Id*. at 453. The Court further recognized that "citizen standing to intervene in criminal prosecutions would have '**ominous'** implications," because "[i]t would **undermine the People's status as exclusive party plaintiff in criminal actions**, interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice." *Id*. at 453-54 (emphasis added).

Both the Supreme Court and this Court have reaffirmed these fundamental principles established in *Dix*. The Supreme Court's very recent decision in *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241 (2017),

approved and reinforced *Dix*. Although deciding a civil standing case, the *Weatherford* Court found it necessary to discuss California's history of common law standing and "its various statutory incarnations." *Id*. at 1247. As the Court explained,

> [n]otwithstanding the arguments for broad "public interest" standing, though, **we have continued to recognize the need for limits in light of the larger statutory and policy context. For instance, in *Dix v. Superior Court* (1991) 53 Cal. 3d 442,** [citation]**, we rejected the petitioner's claim that a private citizen had either a "'beneficial interest'" or public interest standing to challenge a criminal defendant's resentencing.** (*Id*. at p. 451 [citation].) Though the petitioner-victim argued that the prosecutor's decisions in the resentencing proceeding implicated a "'public duty,'" we rejected the invitation to infringe upon a **core aspect of prosecutorial discretion**. (*Id*. at p. 453, [citation].) Even if one might plausibly understand a prosecutor's duties under the law as public, **construing public interest standing to authorize such suits would be at odds with both the executive decision making role of prosecutors, as well as the deference we ordinarily afford them**. (*Id*. at p. 451[citation] ["The prosecutor ordinarily has **sole discretion** to determine whom to charge, what charges to file and pursue, and what punishment to seek"]; *see also Manduley v. Superior Court* (2002) 27 Cal. 4th 537, 552, [citation] ["'The prosecution's authority in this regard is **founded, among other things, on the principle of separation of powers**, and generally is **not subject to supervision by the judicial branch**.'"].)

Weatherford v. City of San Rafael, 2 Cal. 5th at 1248 (emphasis added) (last alteration in original).

This Court, likewise, approvingly relied on *Dix* in 2011. In *Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532 (Ct. App. 2011), the plaintiff appealed dismissal of his taxpayer suit, and this Court affirmed. *Id*. at 1535. In

determining that the statute created **no private right of action** to force a district attorney to investigate and prosecute crimes related to bond funding, this Court characterized *Dix* as "**holding neither a crime victim nor any other member of the public has standing to intervene in a criminal proceeding against another person.**" *Id.* at 1545–46 (bold emphasis added). Moreover, as this Court explained,

> Subjecting district attorneys to suit to compel prosecution would **undermine the impartiality and integrity of the public prosecution function**. (*People v. Eubanks*, [14 Cal. 4th 580, 589–590 (as modified 1997)].) "[T]he district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and **not under the influence or control of an interested individual**." (*Id*. at p. 590, 59 Cal.Rptr.2d 200, 927 P.2d 310.)
>
> A further reason to deny citizens standing to compel prosecution was stated in *Taliaferro v. Locke*, [182 Cal. App. 2d 752, 755–756 (Ct. App. 1960)]: "As concerns the enforcement of the criminal law the office of district attorney is charged with **grave responsibilities** to the public. **These responsibilities demand integrity, zeal and conscientious effort in the administration of justice under the criminal law**. However, both as to investigation and prosecution that effort is subject to the budgetary control of boards of supervisors or other legislative bodies controlling the number of deputies, investigators and other employees. **Nothing could be more demoralizing to that effort or to efficient administration of the criminal law in our system of justice than requiring a district attorney's office to dissipate its effort on personal grievance, fanciful charges and idle prosecution**."

Gananian v. Wagstaffe, 199 Cal. App. 4th at 1545–46 (emphasis added) (second alteration in original).

Thus, to permit intervention here for those concurrently embroiled in civil litigation against some of the same defendants equates to allowing Intervenors to do what the Attorney General is expressly forbidden from doing. As explained in *People v. Eubanks*, a prosecutor must give "objective and impartial consideration [to] each individual case," 14 Cal. 4th at 590, and he cannot be "disinterested if he has, or is **under the influence of others who have, an axe to grind against the defendant** …," *id.* (emphasis added). Simply, intervention here would allow the axe grinders to invade the Attorney General's province, thereby unconstitutionally interfering in the separation of powers.

Although SCSF purported to limit the rights of Intervenors to be heard, (**Exhibit 1**, Vol. 1, Exh-38, 39 (PX Order at 19 n.4; 20:10-11)), no such "limited intervention" right exists. As the Court in *Eubanks* , 14 Cal. 4th at 589, explained, a prosecutor's

> functions extend from the investigation of and gathering of evidence relating to criminal offenses ([citations]), through the crucial decisions of whom to charge and what charges to bring, **to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings.**" (*Dix v. Superior Court*, *supra*, 53 Cal. 3d at p. 452, [citation]; *see also People v. Superior Court (Greer)* (1977) 19 Cal. 3d 255, 267, [citation] [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

Id. (emphasis added) (last alteration in original). Intervention **for any purpose** is simply impermissible.

B. SCSF's New Brand of Intervention Vitiates Merritt's Fundamental Rights to Due Process and A Fair, Public Trial.

While SCSF properly acknowledged that *Dix* prohibits intervention and denied "traditional" intervention, (**Exhibit 1**, Vol. 1, Exh-38, 39 (PX Order, 19 n.4; 20:4-15)), in the next breath SCSF arbitrarily invented a new form of "limited" intervention under Marsy's Law (*id*. at Exh-39 (20:10-11), and then ruled on Intervenors' motions seeking relief on the merits, (*id*. at Exh-39 to 42 (20-23)). Puzzlingly, SCSF did so despite holding that no such intervention was even necessary. (*Id*. at Exh-38, 39 (19 n.4, 20:12-15).) SCSF in fact, relied on Intervenors' submissions, taking judicial notice of documents not submitted by the Attorney General, including some NAF documents. (*See infra* Mem., §§ III, IV.)

SCSF considered and then ruled on Intervenors motions seeking to: blanketly shield the public from seeing any evidentiary videos, not limited to specific portions that could raise privacy concerns; and seal all video evidence after the preliminary hearing (the extent to be determined later) (**Exhibit 1**, Vol. 1, Exh-39, 40 (20:17 to 21:2); limit defendant's cross-examination and exclude specific testimonial content (*id*. at Exh-40 (at 21)); exclude attorney-client and work-product privileged information (*id*. at Exh-41 (at 22:11-18)); pose objections at the preliminary hearing (*id*. at Exh-41, 42 (at 22:19 to 23:6)); and take judicial notice of court documents from, *inter alia*, non-victim NAF's and PP Entities' ongoing civil litigation cases *id*. at Exh-42 (at 23:6-14)). The very act of ruling on Intervenors' motions is troubling. Although SCSF ruled in Merritt's favor in some respects, other aspects of these rulings are not only troubling, but violate Merritt's due

process rights and the right to a fair, and public trial. Even this "limited" **access is access to the prosecution's table and provides a substantial shield to any impropriety. Such an improper prosecutorial team cannot be easily monitored by either the court, defendants, or the public.** Furthermore, during the course of a case, **victim safety** concerns are the prosecutor's to manage. *Dix*, 53 Cal. 3d at 451-52. The evidentiary bases allowing intervention shows that SCSF abused its discretion by *de facto* permitting intervention on the merits, impinging upon Merritt's rights to due process, the federal Sixth Amendment, and Article 1, Section 15 of the California Constitution.

C. SCSF Abused Its Discretion by Allowing Non-Victims to Participate in This Proceeding.

The PP Entities do not have standing to litigate in this proceeding. SCSF's own order inconsistently allows the PP Entities to intervene (**Exhibit 1**, Vol. 1, Exh-37, 38 (PX Order, 18:17 to 19:2)), yet (properly) held that NAF could not because NAF does not represent any Doe or witness, nor qualifies as a victim. (*Id*. at Exh-42 (23:15-26).) Like NAF, no PP Entity is named as an alleged victim in the Amended Criminal Complaint. Moreover, PP Entities are **plaintiffs** in **civil** litigation that they are waging against Merritt in *PPFA v. CMP*. Under *Eubanks*, 14 Cal. 4th at 589–90, that stark conflict should have ensured denial of intervention. Beyond the Does' alleged privacy or safety interests (a nullity, *see infra* Mem., §§ III(B)), PP Entities' intervention cannot withstand constitutional scrutiny.

D. SCSF Abused Its Discretion by Considering NAF's and PP Entities' Inadmissible Evidentiary Submissions.

SCSF improperly considered and gave weight to Intervenors' Request for Judicial Notice ("**RJN**"), (**Exhibit 8,** Vol. 2, Exh-700) (*see infra* Mem. §§ III and IV), which includes documents not included by the Attorney General. Even had the Attorney General submitted identical documents, SCSF's consideration was wholly improper and an abuse of discretion because of the documents' nature.

Intervenors sought judicial notice of five court documents (*see supra* Pet. § V(A)(¶15)(c)(i)-(iii)),[11] all five of which SCSF errantly took notice, (**Exhibit 1**, Vol. 1, Exh-42 (PX Order, 23:6-14)). Four of the five are taken from cases in which **Merritt is not a party:** ***NAF v. CMP*** (orders regarding contempt sanctions against Daleiden; and preliminary injunction order); and ***Jane and John Does 1-10 v. Univ. of Wash.*** (a stand-alone declaration of E. Gertzog, who is neither a witness nor an alleged victim in this criminal proceeding). The last document is from ***PPFA v. CMP***, in which Merritt is a defendant. However, it is a motion filed by Daleiden, not Merritt. SCSF also erred in taking judicial notice of U.S. District Court Judge Orrick's "opinions," (**Exhibit 1,** Vol. 1, Exh-42 (PX Order, 23), who presides in *NAF v. CMP* and *PPFA v. CMP*. Although SCSF purported to deny NAF's letter any consideration (*see supra* Pet. § V(A)(2)), SCSF took judicial notice of

[11] The Attorney General referenced and attached, but did not request judicial notice for, some of these documents in the Declaration of Robert Morgester (attaching, *inter alia*, the *NAF v. CMP* preliminary injunction order of 2-5-16). (**Exhibit 11**, Vol. 3, Exh-909 to 1003.)

the documents NAF submitted under Intervenors' RJN, improperly granting backdoor consideration.

All of the above documents cannot be considered here without providing Merritt a full and fair opportunity to litigate the merits contained in them in **this proceeding**[12] in a full evidentiary hearing. SCSF errantly relied upon them for the truth of disputed facts and disputed legal conclusions in this criminal prosecution. Not only do these sources contain multiple hearsay levels, but their consideration here violates Merritt's due process rights:

> [i]t is a well-settled rule that judgments and decrees rendered in civil cases are **inadmissible** in evidence in criminal prosecutions, as proof of **any facts** determined by such judgment or decree. The reasons given to sustain such rule are, generally, that the **parties are different**, and that the **quantum of proof required in the one case is different from that required in the other**.

87 A.L.R. 1258 (originally published 1933) (emphasis added). Even SAAG Morgester readily admitted the documents from the civil cases cannot be considered for their truth. (**Exhibit 12,** Vol. 3, Exh-1038 (1-28-19 Tr., 30:4-11).) They constitute hearsay in the criminal proceeding and are thus, inadmissible. Thus, **above the Attorney General's admission,** SCSF

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[12] Notably, these documents were filed at the last minute, late afternoon, one business day before the first scheduled hearing. (*See* Pet. § V(A)(8), (15)(a)-(d).) Intervenors admit failing to contact the Attorney General's office prior to filing (**Exhibit 12**, Vol. 3, Exh-1066 (1-28-19 Tr., 58:10), and failing to comply with SCSF's prior sealing orders. Likewise, the Attorney General also admitted his failure to comply with CRC 2.551 in his PX Brief, (*Id*. at Exh-1030 (22:23-27) ("we were not compliant")), and attempted to cure it by filing another Motion to Seal **on the day of the hearing**, January 28. *Id.*

abused its discretion and ruled in Intervenors' favor on a merits question, based upon inadmissible evidence.

More than a century ago, in *People v. Lichtenstein*, 22 Cal. App. 592, 614 (Ct. App. 1913) (defendant's request to consider divorce court's findings in criminal appeal denied), the court explained this long-established rule: "[A] conclusion or an opinion of that sort is **never** permissible in the proof of a disputed fact. It possesses **no probative value**." *Id.* (emphasis added). Furthermore, SCSF erred in relying on this hearsay to seal (*see infra* Mem., § III) because CRC, Rule 2.551(b) prohibits hearsay, whereas it requires factual support based upon personal knowledge, *see* Cal. Evid. Code § 702,[13] to justify sealing. SCSF's consideration of these materials has a pernicious and prejudicial effect because it collaterally estops Merritt from litigating the disputed issues of privacy and safety in the criminal proceedings against her. SCSF severely prejudiced Merritt because the threshold requirements for collateral estoppel were not met, and reliance on these materials offends public policy.

Importantly, **finality** is a threshold requirement for collateral estoppel. *See Lucido v. Superior Court*, 51 Cal. 3d 335, 341-43 (1990). Collateral estoppel requires the "identical issue" to have been "actually litigated," in full, in the prior proceeding by the "same parties," and the issue must have

[13] Evid. Code Section 702(a) provides,

> (a) Subject to Section 801, the testimony of a witness concerning a particular matter is **inadmissible unless he has personal knowledge of the matter**. Against the objection of a party, such **personal knowledge must be shown before** the witness may testify concerning the matter.

Id. (emphasis added).

been "finally decided." *Id*. at 341-42. SCSF took judicial notice of a **preliminary** injunction order, which is **not final.** Moreover, Merritt is **not a party** in *NAF v. CMP*, which SCSF even acknowledged (**Exhibit 12**, Vol. 3, Exh-1036 (1-28-19 Tr., 28:15-21.)). Nor did Merritt participate in Daleiden's motion in *PPFA v. CMP*. Thus, SCSF abused its discretion by taking judicial notice of all civil materials.

SCSF further failed to consider important public policy concerns when adopting civil orders in a criminal proceeding. *See Lucido v. Superior Court*, 51 Cal. 3d 342-43. Applying collateral estoppel in criminal cases requires consideration of public policy to, *inter alia*, preserve the integrity of the judicial system. *Id* at 343. In *Lucido*, the Court held that the outcome of a probation revocation hearing in the defendant's favor could not bar prosecution for a new crime that gave rise to the revocation hearing. *Id*. at 352. The Court's rationale, in part, required considering "whether … **displacing full determination of factual issues in criminal trials** [] would undermine public confidence in the judicial system." *Id*. at 347. As the Court noted, "probation revocation hearings are not criminal prosecutions and accordingly, should not be given the effect thereof." *Id*. at 343 n.5 (emphasis added). *A fortiori*, **preliminary, civil** findings and orders equally fail. SCSF abused its discretion for altering the criminal preliminary hearing process, and thereby violated Merritt's constitutional rights to a fair and public preliminary hearing (as discussed further, below). Consideration of these materials allows Intervenors, including NAF, to improperly grind their proverbial axes—the polar opposite of the prosecutor's jurisdictional limits described in *People v. Eubanks, supra*.

In addition to the foregoing, SCSF considered the "declarations" for both sealing and closure purposes, (**Exhibit 1**, Vol. 1, Exh-32, 36 (PX Order, 13:20-27; 17:1-7)), as discussed below, which includes the Declaration of Elizabeth J. Lee. That Declaration improperly attached inadmissible documents: a self-serving statistical report **authored by NAF**; nine news articles; and statements made by Daleiden's counsel. (*See* **Exhibit 7**, Vol. 1, Exh-616 to 696 (Exs. A-N).) This information, submitted for its truth, is inadmissible; they are not based upon the declarant's personal knowledge and contain multiple levels of hearsay. Further, the self-serving NAF report required expert qualification by an in-court witness.

Permitting intervention in criminal matters will wreak havoc on the proper administration of justice. SCSF (and Respondent) abused their discretion by welcoming private litigants to invade the exclusive province of the prosecutor. Simply, the 2008 amendments to Article 1, section 28 of California's Constitution cannot alter the foregoing legal principles.

III. SCSF IMPROPERLY SEALED VIDEO EVIDENCE BEFORE THE PRELIMINARY HEARING, WHERE IT WILL BE PUBLICLY PRESENTED.

SCSF abused its discretion by granting the Attorney General's Motion to Seal video evidence that will be presented at the preliminary hearing. (Pet. § V(A)(10).) First, the Motion failed to meet the substantive standards set forth in the Sealing Rules. SCSF relied on **hollow and stale declarations** of the Does, the woefully deficient declaration of attorney Elizabeth J. Lee (attached to the Intervenor's Motion to Intervene), and the preliminary injunction order in *NAF v. CMP*, discussed above. (**Exhibit 1,** Vol. 1, Exh-

36 (PX Order, 17:1-7).) Moreover, much of this information is already public, and all video evidence will become fully public at the preliminary hearing itself. (*Id*. at Exh-34 (15:21-22).) SCSF's reliance on the foregoing materials and the **civil preliminary** injunction order fail for the reasons stated herein, as well as those reasons argued above. (*See supra,* Mem. § II.)

Likewise, Respondent, in its summary denial (**Exhibit 28**, Vol. 4, Exh-1400), erred in relying on *People v. Esquibel*, 166 Cal. App. 4th 539 (Ct. App. 2008). That case is inapt because it involves special facts and circumstances not present here: A child witness (age 7), *id*. at 546, in a case involving "'gang implications.'" *Id*. at 556. Even there, the court issued an admonishment that "trial courts should proceed with extreme caution in this area," when excluding non-disruptive spectators, stating that such exclusion "should never be undertaken without a full evaluation of the necessity for the exclusion." *Id*. at 556.

A. The Sealing Rules Prohibit Sealing Information Already Loosed in the Public Domain.

The Sealing Rules govern sealing the video exhibits. (**Exhibit 1**, Vol. 1, Exh-35 (PX Order, 16:9-10).) CRC, Rule 2.550(c) declares that, "**court records are presumed to be open.**" Under CRC, Rule 2.550(d), SCSF was required to make "express factual findings," considering five factors that impose stringent scrutiny:

> (1) There exists an overriding interest that overcomes the right of public access to the record;
> (2) The overriding interest supports sealing the record;
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

> (4) The proposed sealing is narrowly tailored; and
> (5) No less restrictive means exist to achieve the overriding interest.

Id. Those findings must have been specifically stated in the sealing order. CRC, Rule 2.550(e). Also, CRC, Rule 2.551(b)(1), requires a sealing motion, which "**must** be accompanied by **a memorandum and a declaration** containing **facts** sufficient to justify the sealing." *Id*. (emphasis added).

The presumption of open records is very strong, and thus, the proponent of the sealing motion has an **exceedingly high burden**. This Court, in *Overstock.com, Inc. v. Goldman Sachs Group, Inc*. ("*Overstock.com, Inc*."), 231 Cal. App. 4th 471, 491-92 (Ct. App. 2014), explained the rationale behind the Sealing Rules, noting that the First Amendment of the United States Constitution is implicated by sealing orders. *Id.* at 491. Additionally, article I, section 3, subdivision (b)(2) of the California Constitution applies.[14] Thus, this Court, in *Overstock.com, Inc*., held it was **constrained** to "interpret the sealed records rules [Rules 2.550 and 2.551] **broadly** to further the public's right of access." *Id*. at 495 (emphasis added).

Importantly, the Attorney General must demonstrate that the information **is not already available to the public**. *H.B. Fuller Co. v. Doe* ("*H.B. Fuller Co*."), 151 Cal. App. 4th 879, 894-95 (Ct. App. 2007) "[C]onclusory averments" that information is "'confidential' or 'private' in

[14] California Constitution, art. I, § 3, sub. (b)(2) provides in pertinent part:
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. . . .

some sense," cannot support sealing. *Id.* at 891-92. The movant's burden is **"extraordinary**," and he must demonstrate "that keeping the records in question under seal **will prevent the public from learning anything it does not already know, or cannot find out. <u>It should go without saying that there is no justification for sealing records that contain only facts already known or available to the public</u>**." *Id.* at 898 (emphasis added).

In *Overstock.com, Inc*., this Court held the same, **refusing to seal documents already in the public domain**. As this Court observed, even documents ordinarily subject to sealing should not be sealed when the "data ha[s] **already been loosed into the public domain in another case**." 231 Cal. App. 4th at 505 (citing *Universal Studios, Inc. v. Superior Court Unity Pictures Corp*., 110 Cal. App. 4th 1273, 1286 (Ct. App. 2003)). However, disregarding this precedent, SCSF sealed video evidence that has long been public, even after SCSF correctly ruled the video evidence should be made public at the preliminary hearing, (*see* **Exhibit 1**, Vol. 1, Exh-33, 34 (PX Order at 14:8 to 15:22).)

B. The Does Have Repeatedly Made Their Own Identities Public, And All Intervenors' Declarations Are Woefully Deficient to Warrant Sealing.

Despite SCSF acknowledging that the Does made their own identities public **in this case** when they first filed their motions (**Exhibit 12,** Vol. 3, Exh-1021 (1-28-19 Tr., 13:18-23) (SCSF found public filing "troubling")), SCSF's PX Order failed to give proper weight to the public nature of the Does' identities when it sealed the video evidence. Incredibly, SCSF fully acknowledged that "[i]t is apparent from the record that most if not all of the

Does **are known to the public**. The Does' names and occupations have been revealed in the federal civil case, and through other public outlets." (**Exhibit 1**, Vol. 1, Exh-34 (PX Order, 15:3-6) (emphasis added).) The Does have, in fact, widely publicized their own identities in conjunction with the underlying facts of this case. The most shocking publication occurred, however, when the Does publicly filed their intervention papers on January 23, 2019 without even contacting the Attorney General, later claiming no knowledge of SCSF's sealing orders.[15]

Since the initial release of the videos in question, **more than three years ago**, numerous Does (as well as PP Entities and NAF) have widely publicized their names in association with facts underlying this case. The Declarations of Does 7, 9, 10, and 11 belie any need for privacy and fail to demonstrate any real fear or actual harm. Further, Does 5, 6, 12, 13, and 14 have all spoken publicly about their work, or publicly participated in *PPFA v. CMP*, or in *NAF v. CMP*, filing public declarations in those civil suits, as demonstrated below:

The declarations of Intervenor Does 7, 9, 10, and 11 are woefully deficient. **DOE 10's** Declaration refers only to a generalized time-period, "following the release of the edited videos," (**Exhibit** 7, Vol. 1, Exh-606

[15] Although counsel for Intervenors denied knowledge of the sealing orders in this case, the claim is far from credible. The Does' names were sealed over two years ago, on March 28, 2017, **Exhibit 23**, Vol. 4, Exh-1302 (2017 Order). Further, Intervenors' own motion cites to Daleiden's First Opposition, which referred to alleged victims as "Doe" throughout and discussed SCSF's December 6, 2017 protective order (*See* **Exhibit 14,** Vol. 3, Exh-1110, 1111 (Merritt Second Opposition at 17:16 – 18:13).) Counsel for Intervenors also admitted they failed to contact the Attorney General's office prior to filing. (**Exhibit 12**, Vol. 3, Exh-1066 (1-28-19 Tr., 58:10.)

(D10 Decl., 2:4)), which could refer to a time as early as 2015. The "threats" alleged in paragraph 5 are not only based on inadmissible hearsay, but there is no date. (*Id*. (2:13-15).) Paragraph 6 suggests that armed security is no longer needed. (*Id*. (2:16-17).) **DOE 9's** Declaration refers only to generalized "threats" received in the period when the videos were first released, (*id*. at Exh-604 (D9 Decl. 2:1-2)), and names only one specific threat that occurred "following the release of the videos," (*id.* (2:4)). **DOE 11's** Declaration similarly refers only to generalized threats allegedly received in the period following the videos' initial release but fails to allege that any current threats have been received. (*Id*. at Exh-608 (Dll Decl., 2) Worse than those, **DOE 7's** Declaration **fails** to state she has received **any threats at all**, despite allegedly having her home address posted on a public website. (*Id*. at Exh-601 (D7 Decl. 1:27-28)).

These Does' names and their association with the underlying facts of this case have long been in the public domain after **voluntarily appearing publicly** in ***PPFA v. CMP*** or ***NAF v. CMP***: **DOE 10** filed a public, unredacted declaration in *PPFA v. CMP*. (**Exhibit 14**, Vol. 3, Exh-1106, 1125 (Merritt Second Opp., 13, and Ex. A)). The following Does' names appear in the *NAF v. CMP* Preliminary Injunction Order, 2016 WL454082: **DOE 10** (**Exhibit 11**, Vol. 3, Exh-955, 956, 958, 959 (14:25-28; 15:28; 17:8; 18:14)); **DOE 6** (*id.* Exh-959 (18:16,18)); **DOE 14** (*id.* Exh-948 (7:24) (noted as filing a declaration)); and **DOE 9** (*id.* Exh-954 to 956, 958 to 959 (13:8-28; 14:5-19; 15:28; 17:8; 18:14)). **DOE 9** also filed two public, unredacted declarations in *PPFA v. CMP*. (**Exhibit 14**, Vol. 3, Exh-1132 (Merritt Second Opp. Ex. C).) **DOES 9 and 11** were also both named

publicly in a Sept. 30, 2016 Order in *PPFA v. CMP*, 214 F. Supp. 3d 808 (N.D. Cal. 2016).

In addition to the above public appearances, the full names of **DOES 9, 10 and 11** and CMP video footage publicly appear on the internet (and currently are widely available via YouTube.com), as well as on CMP's website (footage not subject any federal order, yet subject to the motions to seal here). (*See* **Exhibit 14**, Vol. 3, Exh-1105 to 1108 (Merritt Second Opp., 12:23 – 15:5).) **DOES 12, 13, AND 14** also appear on the CMP website footage. (*Id.*) **DOES 9, 10, and 11**, also appear on PlannedParenthood.org in a document labeled, "CMP Analysis." (*See id*.) **DOE 7** gave an interview with and publicly appears in an article on kveller.com. (*See Id.*) **DOE 5** is also named and quoted in that kveller.com article, (*id.*), and gave a public interview about her work in 2017, (**Exhibit 4**, Vol. 1, Exh-87, 88 (Daleiden First Opp. at 12-13). **DOE 12** has also given several interviews to widely known news outlets in 2015, 2016, and 2017. (*Id*. at Exh-88 (13).)[16]

The public nature of the above-mentioned Does' statements and their open participation in *NAF v. CMP* and *PPFA v. CMP*, together with their deficient declarations, belie any necessity to seal the video exhibits.[17] By

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[16] Additionally, Dr. Savita Ginde, a former Planned Parenthood medical officer (Colorado), published her alleged encounter with Daleiden and Merritt in her book, *The Real Cost of Fake News, The Hidden Truth Behind the Planned Parenthood Video Scandal* (released in or about **August 2018**). *See* Dr. Savita Ginde, The Real Cost of Fake News, https://therealcostoffakenews.com/ (last visited Jan. 16, 2019). **The book releases the full names of Does 9 and 10**, and details interactions with Daleiden and Merritt (*see, e.g.*, Chs. 3-4).

[17] Merritt attached a chart that details each Doe's public statements in connection with underlying facts of this case. (**Exhibit 14**, Vol. 3, Exh-1147 (Merritt Second Opp., Ex. F).)

Intervenors' counsel's own admission on January 28, three Does' have been publicizing their identities. (**Exhibit 12**, Vol. 3, Exh-1065 (1-28-19 Tr., 57:28) ("For at least two of my clients, that bell has been rung, and rung many times," and further admitted that a third client's name has been "**less public**" (emphasis added)).) "Less public" is, nevertheless, public.

In sum, these declarations cannot suffice because they ambiguously refer to "threats" in general, or state there is no longer a threat, or do not state that any threat has been received at all. They lack specificity in describing particular incidents, refer generally to time periods when the videos were initially released (**over three years ago**), and fail to provide specific dates. Nor do they, in large part, contain specific details as to the nature of threats.

C. Declarations of Counsel Submitted by Intervenors and the Attorney General Fail for Lack of Personal Knowledge.

To the extent that SCSF relied on any declaration submitted by counsel for the Intervenors or the Attorney General's office, SCSF abused its discretion because the Sealing Rules require personal knowledge of relevant facts. (*See supra* Mem, § II(D).) All three declarations contain nothing more than inadmissible hearsay, conclusory argument, and conjecture. In part, they rely on the civil documents, (*see supra* Mem., § II), and in part rely on the Does' deficient declarations. The declarations of Mr. Morgester **(Exhibit 11**, Vol. 3, Exh-909), Mr. Umhofer **(Exhibit 13**, Vol. 3, Exh-1085), and Ms. Lee **(Exhibit 7**, Vol. 1, Exh-609; **Exhibit 17**, Vol. 3, Exh-1175), all fail for lacking personal knowledge, as is required under CRC, Rule 2.551. (*See supra* Mem., § II(D).) Evidentiary support to rebut the strong presumption

against sealing is **essential** under the Sealing Rules. Even at common law, to inspect and copy judicial records, "'the **strong** presumption' in favor of access [could be] overcome **only 'on the basis of articulable facts** known to the court, **not on the basis of unsupported hypothesis or conjecture.'"** *Valley Broad. Co. v. United States Dist. Ct. for the Dist. of Nev.*, 798 F.2d 1289, 1293 (9th Cir. 1986) (emphasis added). Furthermore, *People v. Watson*, 146 Cal. App. 3d 12 (Ct. App. 1983) holds that the **prosecutor's burden** in avoiding statutory disclosure of a witness' residence at a preliminary hearing under Section 869 "is **not met** by a mere offer of proof that evidence of danger exists; rather it calls for **competent evidence** from which the magistrate can determine the existence of that preliminary fact." *Id*. at 20 (emphasis added). Thus, Counsels' declarations cannot support sealing the video evidence.

Respondent's reliance on *People v. Williams*, 58 Cal. 4th 197, 264 (2013), misses the point. *People v. Williams*, in relevant part, involved a dispute over disclosure of a key witness' address. The witness had been the victim of a violent crime who had relocated more than once after receiving death threats in the event that she testified against the defendants. *Id*. at 260-63. Unlike the proceedings against Merritt, there was no evidence that the witness had voluntarily prosecuted or participated in a civil suit against the defendant using her real name. Further, no similar crime or real or imminent threat exists, as demonstrated herein. Vague generalities can never carry the day to seal information presented as evidence therein, or close a preliminary hearing, (discussed *infra*, Mem., § IV).

D. Unnamed Persons in the Crowd, Absent A Qualifying Affidavit, Fail to Support A Privacy Interest Sufficient to Seal Public Video Evidence.

SCSF also abused its discretion by relying on the privacy interests of unnamed persons inadvertently appearing in videos, who have not filed any declarations in this case. (**Exhibit 1**, Vol. 1, Exh-36 (PX Order, 17:10-13).) That basis has no foundation in the Sealing Rules. That Respondent would bootstrap the privacy interests of unidentified persons flagrantly disregards black letter law. Moreover, SCSF's reliance on "the historical and volatile complexity of the issues surrounding abortion, stem cell research, fetal tissue donation, the attacks on pro-life and pro-choice advocates, and the federal preliminary injunction," (*id*. (17:13-20), errantly considers the civil litigation documents (*see supra* Mem. § II(D)). Absent admissible evidence of a current and real threat of danger, or something more than the Does' contrived need for privacy **only in this criminal matter but nowhere else,** SCSF's justifications directly conflict with the exceedingly strong presumption of open records.

E. SCSF's PX Order Severely Prejudice's Merritt's Right to a Public Preliminary Hearing.

SCSF errantly ignored controlling law when it held that Merritt would not be prejudiced by sealing this evidence. (**Exhibit 1**, Vol. 1, Exh-37 (PX Order, 18:1-10).) SCSF's PX Order prejudicially deprives Merritt of her right to a public and fair hearing:

> [T]he court [in *Press-Enterprise* II] found that access to preliminary hearings "plays a particularly significant positive

> role in the actual functioning of the process" ([478 U.S. at 11]), because the preliminary hearing is "**often the final and most important step in the criminal proceeding**" and in many cases provides "'the **sole occasion** for public observation of the criminal justice system,'" and because **closure frustrates** the "'community therapeutic value' of openness." (*Id*., at pp. 12-13 [106 S. Ct. at p. 2742].)

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1206 (1999) (quoting *Press-Enterprise v. Superior Court* (*Press-Enterprise II*"), 478 U.S. 1, 11-13 (1986)) (emphasis added). Moreover, any argument that a closure can occur because the transcript would be available is no answer (absent meeting the exacting constitutional burdens):

> [A]s observed in *Richmond Newspapers*, [448 U.S. 555 (1980)], "[i]n advancing [the policies discussed in the cases], the availability of a **trial transcript is no substitute for a public presence at the trial itself**. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a **check upon trial officials**, '[r]ecordation ... would be found to operate **rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance**.' [Citations.]" (*Id*., at p. 597, fn. 22, 100 S.Ct. 2814 (conc. opn. of Brennan, J.), brackets and ellipsis in original); . . ..

KNBC-TV, 20 Cal. 4th at 1220 (emphasis added).

The interests involved in this case are wholly different than, for example, justification for sealing a video of a rape that would serve only prurient interests, as recognized in *U.S. v. Criden*, 648 F.2d 814, 825 (3d Cir. 1981). As the court in *Criden* observed, "there is a **vast difference** between republication which would intensify the pain already inflicted on an innocent

victim of a [rape] crime, as in the KSTP case," and that of the defendants in *Criden,* because they were public figures whose conduct "**was already the subject of national publicity and comment**." *Id.* at 825 (emphasis added). Like the public figures in *Criden,* the facts underlying this case—Planned Parenthood's business practices—have been widely publicized for years and have been the subject of congressional hearings, federal and state investigations, and national news. (Pet. § V(A).) As the California Supreme Court noted in *KNBC-TV,* foreclosing public access **cannot** be **justified** "**merely in order to minimize damage to corporate reputation**." *KNBC-TV*, 20 Cal. 4th at 1208 (citing with approval *State v. Cottman Transmission*, 75 Md. App. 6475, 542 A.2d 859 (1988) (unfair trade practice suit) (emphasis added)). Furthermore, there has been no evidence in this case whatsoever that Merritt has used any evidence to gratify private spite or to promote public scandal. Hypothetical **possibilities** upon which SCSF based its decision, (**Exhibit 1,** Vol. 1, Exh-32 (PX Order, 13:25-26), fail under the stringent Sealing Rules. Considering Intervenors own broad publications, in the federal courts and otherwise, to hold that their privacy should be shielded here defies logic, as well as the Sealing Rules which prohibit sealing evidence already in the public domain. SCSF's PX Order abused its discretion by ignoring the vitally important value of Merritt's rights to a public preliminary hearing recognized in *KNBC-TV*, 20 Cal. 4th at 1220. A "transcript is no substitute," *id*., and thus the video footage must be made available to the members of the public unable to attend the hearing that day.

In sum, SCSF abused its discretion because the Sealing Rules prohibit sealing documents already in the public domain. Contrary to the presumption of open records required by the Sealing Rules, SCSF's PX Order creates a

presumption in favor of sealing evidence. SCSF completely sealed the video evidence, only to determine the extent of sealing after the preliminary hearing. (*Id*. at Exh-37 (PX Order, 18:11-15).) Many of the videos sought for closure are not subject to the restraints imposed in the civil matters, and therefore have been widely available in in the public domain since their initial release. For all the foregoing reasons, none of the videos should be sealed, and SCSF's and Respondent's abuses of discretion should be remedied.

IV. SCSF IMPROPERLY CLOSED THE PRELIMINARY HEARING BY CONTINUING THE DOES' ANONYMITY.

SCSF effectively closed the preliminary hearing by allowing the Does to proceed anonymously, thereby abusing its discretion. (*Id.* at Exh-32 (13:3-20).) To do so, SCSF arbitrarily borrowed the relaxed balancing test from Section 293.5 ("reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense," § 293.5(a)), which applies **only** to a unique group: victims of sex-crimes. SCSF glaringly erred in light of its own admission that Section 293.5 is inapplicable here. (*Id.* (13:8-9).) Likewise, SCSF's erred in relying upon Section 1054.7, which is irrelevant here. Section 1054.7 concerns discovery, but the Attorney General provided defendants with the Does' full names and contact information almost two years ago.

Moreover, SCSF errantly relied on its general "inherent power to control its courtroom," (*id.* (13:10-11) but this power is limited: "Whatever inherent authority a judge possesses may not be exercised in a manner that is 'inconsistent with or which contravene[s] a statute.'" *Los Angeles Cty. Dep't of Children and Family Servs. v. Superior Court*, 162 Cal. App. 4th 1408,

1420 (Ct. App. 2008) (citation omitted) (alteration in original). Rather than Section 293.5, Section 868.7 directly applies, explicitly setting the standard to close a preliminary hearing. SCSF's ruling is internally inconsistent. SCSF properly ruled that Section 868.7 requires the video evidence to be played in open court, (**Exhibit 1**, Vol. 1, Exh-33, 34 (PX Order, 14, 15)). Allowing the Does to continue to proceed anonymously in a hearing after ruling (properly) that the video footage must be played publicly does not follow sound logic.

A. Merritt's Right to an Open and Fair Preliminary Hearing Has Been Seriously Prejudiced by SCSF's Ruling.

Merritt's fundamental right to an open, public hearing does not hinge on a simplified balancing test, but rather stringent standards must be applied under federal and California law. *See* U.S. Const. amends. VI (right to speedy and public trial), XIV; Cal. Const. art. I, § 15 (same and due process)[18]; CRC, Rules 2.550-2.551; § 868.7 (state standard more stringent than federal standard). The California Supreme Court concluded in *People v. Pompa-Ortiz*, 27 Cal. 3d at 526, that "the Legislature at all times perceived there was a right to **public preliminary examinations** and drafted [Cal. Penal Code sections 867 and 868] in light of that understanding. . . . We also believe that right was a **substantial right** the denial of which entitled him to have the information set aside pursuant to section 995." *Id*. (emphasis added). Section 868 explicitly commands that Merritt's preliminary hearing "**shall be open and public."** § 868 (emphasis added).

[18] Under Cal. Const. art. I, § 3, the public also has a right to access information "concerning the conduct of the people's business." *Id*.

The United States Supreme Court has also held that the Sixth Amendment right to a public trial extends to preliminary hearings. *Waller v. Georgia*, 467 U.S. 39, 43 (1984). In *Waller*, the Court explained the circumstances that would allow closure "will be **rare**, … the **balance of interests must be struck with special care**," *id*. at 45 (emphasis added), and the same scrutiny as the First Amendment should be applied, *id*. at 46.

> The **presumption of openness** may be overcome only by an overriding interest based on findings that closure is **essential** to preserve higher values and is **narrowly tailored** to serve that interest. The interest is to be **articulated along with findings specific** enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 45 (quoting *Press–Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. at 510) (emphasis added). The basis for such strict scrutiny in criminal proceedings rests on the right of the accused to a fair trial:

> The requirement of a public trial is for the benefit of the accused; **that the public may see** he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....

Waller v. Georgia, 467 U.S. at 46 (internal citation omitted) (footnote omitted) (emphasis added). As the Court further found, "'[t]he knowledge that every criminal trial is subject to contemporaneous review **in the forum of public opinion** is an **effective restraint** on possible abuse of judicial power.'" *Id*. at 46 n.4 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)) (emphasis added). A public hearing also "encourages witnesses to come forward and **discourages perjury**." *Id*. at 46 (emphasis added).

This high-level of scrutiny did not occur here. In addition to ignoring the Does' obvious voluntary publicity of their identities in association with the CMP investigations, SCSF supplanted the process due in this criminal proceeding with documents, motions and preliminary orders from parallel civil proceedings, (*see* Mem., § II(D)). SCSF's ruling turns a blind-eye to the severe lack of necessary evidence. SCSF errantly relied on defendants' knowledge of the Does' names, "the circumstances in this case, the federal preliminary civil injunction orders, the declarations submitted in connection with the [Attorney General's] Motion to Seal, and the declarations submitted in connection with the Motion to Intervene, all of which give rise to the '**possible** danger to safety' of the Does" under Section 1054.7. (**Exhibit 1**, Vol. 1, Exh-32 (PX Order, 13:10-27) (emphasis added).)

B. Application of Section 293.5's and Section 1054.7s Standards are Categorically Improper.

Section 293.5 is wholly irrelevant because it **only** applies to sex crime cases, which is clear to even the most casual reader.[19] Section 293.5 has a very specific purpose and rationale underlying that enactment, as explained in *People v. Ramirez*: "The section is intended to protect the privacy of **victims of sex offenses,**" and "'**[t]here is <u>no other crime</u> in which the victim risks being blamed and in so insidious a way** ....'" *People v. Ramirez*, 55 Cal. App 4th 47, 53 (1997) (citations omitted) (emphasis added). Further,

[19] Section 293.5 is found within Chapter 5.5. ("Sex Offenders") of Title 9 of the Penal Code.

> "rape remains the **most underreported crime** within the criminal justice system" . . . and studies indicate "that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, **if statutorily enforced anonymity were available** or dependable."

Id. (citations omitted) (emphasis added). SCSF's arbitrary choice to apply Section 293.5 instead of Section 868.7 flouts the Legislature's command, and thus, constitutes an abuse of discretion that must be remedied.

Section 868.7 provides, in pertinent part,

> a) Notwithstanding any other provision of law, the magistrate may, upon motion of the prosecutor, close the examination in the manner described in Section 868 during the testimony of a witness:
>
> ***
>
> (2) Whose **life** would be subject to a **substantial risk** in appearing before the general public, and **where no alternative security measures**, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the temporary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat.
>
> (b) In any case where public access to the courtroom is restricted during the examination of a witness pursuant to this section, **a transcript of the testimony of the witness shall be made available to the public as soon as is practicable**.

§ 868.7 (emphasis added). This statutory standard is even **more stringent** than the that found in *Waller v. Georgia*, 467 U.S. at 45, 48, and clearly more stringent than that found in either Sections 293.5 ("reasonably necessary to protect the privacy") or 1054.7 (permitting parties to withhold discovery

based on, *inter alia*, "possible danger"). Section 868.7(a)(2) requires that there be a substantial risk of life to appear in public. It also far exceeds a reasonableness standard, requiring that "**no other alternative security measures**… would be adequate . . .." *Id*. (emphasis added). Even where closure is necessary, the transcript **must** be made available to the public. Absent sex-crime victims, Section 868.7 forbids using the lesser standard in Section 293.5. Likewise, Section 868.7 forbids use of Section 1054.7's "possible danger" standard, requiring instead a showing of a "substantial risk" to life. Thus, SCSF (and Respondent) abused its discretion by borrowing these lower standards.

Likewise, SCSF (and Respondent) abused its discretion when it errantly attempted to distinguish *Alvarado v. Superior Court*, 23 Cal. 4th 1121 (2000), noting that case concerned a trial, rather than a preliminary hearing, and noting that defendants here know the Does' names. (**Exhibit 1**, Vol. 1, Exh-33 (PX Order, 14:1-7).) As the Court in *KNBC-TV* explained, "preliminary hearings '**are sufficiently like a trial**' so as to justify the **same treatment** under the First Amendment." 20 Cal. 4th at 1206 (quoting *Press-Enterprise II*, 478 U.S. at 12.[20] Further, the Court in *Alvarado*, 23 Cal. 4th 1121, rejected the lower court's ability to **permanently** withhold prosecution witness identities "in advance of trial and **without regard to the evidence and circumstances** as they **then** may appear." *Alvarado,* 23 Cal. 4th at 1126 (emphasis added). The Court further noted that trial court would be permitted to reassess whether identities should be disclosed "as [the] case proceed[ed],"

[20] Additionally, in *Alvarado,* the prosecutor proceeded by a grand jury indictment (rather than by complaint and preliminary hearing, as in Merritt's case).

because "[m]uch may have happened in the **considerable time** that has elapsed since the trial court's order, or **may happen between now and the time of trial**, that may affect the necessity for a disclosure order." *Id*. at 1149 n.14 (emphasis added). Thus, the Court contemplated changed circumstances, such as the witnesses' **voluntary disclosure** to defense counsel. *Id*.

Accordingly, in a preliminary hearing which is sufficiently like trial to receive First Amendment protections, SCSF's ruling cannot stand. The evidence must be **current,** not stale or outdated. Declarations must articulate **specific** facts for a court to make specific findings. The Does' Declarations are woefully deficient, as are the three declarations by counsel, as argued above, (*see supra,* Mem. § III). **Very rarely** will there be an exception that can encroach upon the strong presumption of an open and public preliminary hearing. It should go without saying that neither hearsay, stale evidence, generalized fears, nor borrowed factual findings or judgments from civil cases can qualify to override these extraordinary, strong presumptions.

V. CONCLUSION

For all the foregoing reasons, this Court should grant the relief sought in Merritt's Prayer for Relief.

Respectfully submitted

DEFENDANT-PETITIONER
SANDRA SUSAN MERRITT,
By Counsel.

DATED: June 17, 2019

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CERTIFICATION OF COMPLIANCE

I, Nicolai Cocis, certify that, pursuant to California Rules of Court, Rules 8.204(b), 8.204(c)(l) and 8.204(c)(3), the attached petition with memorandum of points and authorities is prepared in 13-point Times New Roman font and contains **13,990 words**, including footnotes, but not including caption, tables, verification, any signature blocks, this certificate, proof of service, or exhibits, and is thus within the 14,000 word limit. The total number of words was calculated through the use of the word count feature of the computer program used to prepare the brief**.**

Dated: June 17, 2019

/s/
Horatio G. Mihet

CERTIFICATE OF SERVICE

Pursuant to Cal. Code Civ. P. § 1013(a) and § 1010.6, I hereby certify that, on **June 17, 2019**, I served the forgoing *Request for Stay; Verified Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief; Memorandum; And Appendix of Exhibits* (Volumes 1 through 4)*;* on the following parties/entities via the following methods:

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The Honorable Samuel K. Feng, Supervising Judge
Superior Court of California, County of San Francisco, Dept. 22
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San Francisco, CA 94103
Tel. No. (415) 551-0322

And

San Francisco Superior Court
Attention: Judge Christopher C. Hite
Department 23, First Floor
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850 Bryant St.
San Francisco, CA 94103

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

Dated: **June 17, 2019**

/s/

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