No. S271276

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAVID ROBERT DALEIDEN et al.,
Petitioners,
v.
SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent;

THE PEOPLE,
Real Party in Interest.

REPLY TO ANSWER TO PETITION FOR REVIEW

First Appellate District, Division One, Case No. A163488;
San Francisco County Superior Court, Case Nos. 2502505, 17006621
Hon. Christopher C. Hite, Judge

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INTRODUCTION

The Attorney General does not dispute that this criminal prosecution of two citizen journalists under Penal Code section 632, subdivision (a), is unprecedented. Nor does the Attorney General deny the importance of the questions presented, as the trial court's decision prevents Defendant-Petitioners from offering testimonial evidence to negate the specific intent element of the alleged crime. And he does not even try to argue against why the trial court's decision will severely prejudice Defendants at trial.

Instead, the Attorney General's answering brief is a study in contradiction and misdirection. Refusing to concede that section 632(a) is a specific intent crime, the Attorney General advances convoluted legal theories found nowhere in this Court's precedents. The Attorney General's shifting positions underscore why this Court's review is critical.

The Attorney General further rejects this Court's decision in *People v. Superior Court of Los Angeles County* (1969) 70 Cal.2d 123 (*Smith*)), which expressly holds that specific intent is an essential element of the crime of recording a confidential communication. And Defendants have a right to raise a defense of mistake of law to a specific intent crime. The Attorney General hardly suggests otherwise. Instead, he presses an argument that, followed to its logical conclusion, would severely prejudice Defendants at trial and sow confusion about the rights and responsibilities of defendants in specific intent crimes. The decision below subjects innocent First Amendment-protected undercover journalism to felony prosecution—this Court should not allow the extraordinarily prejudicial decision below to stand.

ARGUMENT

I. Review is Necessary to Resolve Important Issues Concerning a Defendant's Substantive and Procedural Rights under Penal Code Section 632(a).

The Attorney General attempts to escape this Court's review by simply characterizing this matter an evidentiary dispute. In the Attorney General's view, the trial court's ruling would be "properly addressed" only on a post-conviction appeal. (Ans. 9.) That claim is untenable.

To begin with, the case on which the Attorney General relies, *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, actually justifies immediate writ relief here. In *Omaha Indemnity Co.*, the Court of Appeal outlined the "general criteria" that this Court has used to determine "the propriety of an extraordinary writ." (*Id.* at p. 1273.) Here, Defendants meet at least four of those considerations. *First*, "the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case." (*Id.* at pp. 1273–1274.) The decision directly conflicts with binding case law, including *Smith*. (See 70 Cal.2d at p. 133.) And as a result of the trial court's decision, Defendants have been severely prejudiced: They have lost their right to present critical evidence negating an element of the charged crime.

Second, and relatedly, the trial court's order "deprived [Defendants] of an opportunity to present a substantial portion of" their defense. (*Omaha Indemnity Co.*, *supra*, 209 Cal.App.3d at p. 1273.) This Court has repeatedly affirmed that a criminal defendant "has a constitutional right to present all relevant

evidence of *significant* probative value in [her] favor…." (*People v. Nieves* (2021) 11 Cal.5th 404, citing *People v. Homick* (2012) 55 Cal.4th 816, 865.) Consequently, the trial court's erroneous ruling creates a likelihood of a fundamentally unfair trial, resulting in a miscarriage of justice for Defendants. That likelihood exists here, where a pretrial ruling has effectively precluded evidentiary defenses against an essential element of the charged crime. Without intervention by writ relief, the trial would go forward while omitting significant legal issues.

Third, absent writ relief, Defendants will "suffer harm or prejudice in a manner that cannot be corrected on appeal." (*Omaha Indemnity Co.*, *supra*, 209 Cal.App.3d at p. 1274.) The Attorney General is already subjecting Defendants, the trial court, and California taxpayers to a lengthy trial. But now with the superior court having adopted such a confused interpretation of section 632(a), it would undoubtedly be "a waste of judicial resources to hold a trial." (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367.)

Fourth, Defendants "lack[] an adequate means, such as a direct appeal, by which to attain relief." *Omaha Indemnity Co.*, *supra*, 209 Cal.App.3d at p. 1274.) The trial court's order granting the Attorney General's Motion to Exclude is not appealable until after a final judgment of conviction and does not otherwise qualify as an appealable final judgment under Penal Code section 1237. (See Pen. Code, § 1237.) In sum, the factors in *Omaha Indemnity Co.* all favor writ relief.

To be sure, "a ruling excluding evidence is not ordinarily subject to review by writ [citation] and typically is reviewed for abuse of discretion on appeal." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634.) But writ review is proper where, as here, the pretrial order excludes all defense evidence on an essential element of the charged crime. (See *id*. at pp. 634–635.) And where, as here, an erroneous ruling will require a retrial following reversal on appeal, writ review is essential to prevent wasting judicial resources. (See *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1183.) In short, a trial court's evidentiary decisions warrant considerable deference, but that does not immunize its decision from writ review when its conclusions of law will severely curtail Defendants' constitutional right to present a complete defense.

II. The Attorney General Obscures the Gravity of the Error Below and Confirms the Need for Review.

A. The Court's review is necessary to affirm that specific intent is an element of section 632(a).

This petition presents two issues worthy of this Court's review. As noted at length in the petition (at pp. 17–25), under this Court's precedent and section 632(a), specific intent is an essential element of the crime of recording a confidential communication. Thus, Defendants should be permitted to present evidence that they had no specific intent to record confidential communications within the meaning of section 632. Defendants should also be permitted to present mistake of law evidence as a defense to section 632(a)'s specific intent element.

The Attorney General devotes much of his brief not to addressing those questions—other than trying to frame this as an evidentiary dispute—but instead to restating his new interpretation of section 632(a). The Attorney General's shifting position is unsurprising: He simply cannot prosecute Defendants under section 632(a) unless the statute is rewritten *post hoc* to be a general intent crime. That is because the Attorney General cannot prove beyond a reasonable doubt that Defendants specifically intended to record confidential communications. For that reason, the evidence and testimony that the Attorney General seeks to exclude confirm that Defendants had no intent whatsoever to record confidential conversations. As a matter of due process and fundamental rights, the jury should be permitted to hear testimony about Defendants' state of mind before, during, and after the hidden camera interviews to decide for itself that Daleiden and Merritt had the requisite *mens rea*.

1. The Attorney General's claim that section 632(a) is a general intent crime has no support in this Court's precedents.

The Attorney General contends (now) that section 632(a) establishes a general intent crime because it requires no proof that a defendant "intended to achieve some consequence beyond the recording," such as "to cause embarrassment or to obtain an advantage." (Ans. 12.) Not so, says this Court. In *Smith*, this Court recognized that "[a]s the definition of a degree of culpability, the word 'intentional' has been the subject of widely differing interpretations, depending on context and apparent legislative intent." (*Smith*, *supra*, 70 Cal. 2d at p. 134.) Far from adopting the

bright line rule now the Attorney General now advances, this Court acknowledged that in some statutes, the term "intentionally" signals specific, not general, intent. The Court then explained that section 632 is precisely such a statute. (See *id*. at pp. 132–34.)

In any event, the Attorney General's reasoning is flat wrong. This Court expressly held that the syntactic use of the term "intentionally" in section 632(a) does, in fact, trigger an additional purpose or further consequence from the mere act of recording:

> [T]he recording of a confidential conversation is intentional if the person using the recording equipment does so *with the purpose or desire of recording a confidential conversation*, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation.

(*Smith*, *supra*, 70 Cal. 2d at p. 134 [emphasis added].) So, the statute does not simply criminalize a defendant's recording of a confidential conversation without the consent of the other party, as the Attorney General presses. (Ans. at 12.) Instead, it plainly requires a further act or purpose: *intentionally* recording a confidential communication. (See *Smith*, *supra*, 70 Cal. 2d at p. 134.) That is why the statute requires specific intent, even though other statutes employing the term "intentionally" in different contexts may require only general intent. (*Id*.)

Notably, when discussing section 632(a)'s intent element and its secondary purpose requirement, this Court cited *two specific intent cases and employed their language and standard*. (See *Smith*, *supra*, 70 Cal. 2d at p. 134, citing *People v. Fewkes* (1931) 214 Cal. 142, 148, and *People v. Richardson* (1911) 161 Cal.

552, 558–559). This Court had previously recognized both *Fewkes* and *Richardson* as specific intent criminal cases, citing them for the proposition that "[w]henever a particular mental state, such as a specific intent, is by statute made an essential element of a crime, that specific state must be proved like any other fact." (*People v. Wells* (1949) 33 Cal. 2d 330, 350, citing *Fewkes* and *Richardson*.)

Unwilling to let this Court's precedents get in the way of a good strawman, the Attorney General insists that post-*Smith* cases hold that section 632(a) is a general intent crime. For example, the Attorney General relies on *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, to suggest that this Court did not mean what it plainly said in *Smith* and that *Smith* only employs a general intent requirement. (Ans. 12.). That is wrong for three reasons.

First, *Marich* is a *civil* case and had no need or occasion to interpret section 632(a)'s *criminal* scienter requirement. (113 Cal. App. 4th at p. 419.) Thus, the *Marich* court's discussion about section 632(a)'s requirements in criminal prosecutions is mere dicta.[1] *Second*, in purporting to declare that "Smith's definition describes general criminal intent," the *Marich* court—like the Attorney General—merely referenced the way in which other courts have treated the term "intentionally" in various statutes.

[1] The Attorney General notes (Ans. 14) that the federal court in *Planned Parenthood v. Center for Medical Progress* (N.D. Cal. 2019) 402 F.Supp.3d 615, rejected Defendants' specific intent argument. But like *Marich*, Planned Parenthood's suit against Defendants is a civil case and is thus irrelevant as to the criminal scienter requirement. It is also still pending on appeal.

The *Marich* court did not discuss why section 632(a) is different. (*Id.* at pp. 421–22.) *Third*, besides being a civil case, *Marich* is a decision issued by the Second District Court of Appeal, which is inferior to this Court and powerless to overrule this Court's decisions. Only this Court can reverse its pronouncement in *Smith*, and it has not done so. *Smith*, not *Marich*, is precedent.

In contrast with the Attorney General's reliance on *Marich*, several courts—including this Court—have recognized that *Smith* imposed a specific intent requirement. As noted in the petition (at p. 18), this Court affirmed in *Estate of Kramme* (1978) 20 Cal. 3d 567, that a criminal application of section 632 requires a specific intent analysis. (*Id.* at p. 572, fn.5.)

Moreover, two federal district courts have contrasted *Smith*'s specific intent requirement for section 632 with the general intent requirement of Penal Code section 632.7. The latter provision also uses the term "intentionally" in its prohibition of certain cellular phone interceptions but does so in a grammatically different way from section 632, thus leading to a different result.

As one court noted, "the differences between the two statutes' use of the term 'intentionally' underscores the fact that the legislature intended for the state-of-mind requirement to operate differently." (*Montantes v. Inventure Foods* (C.D. Cal., July 2, 2014, No. CV-14-1128-MWF RZX) 2014 WL 3305578, at *8.) The *Montantes* court explained that the term "intentionally" in section 632(a) "syntactically attaches to the entire actus reus phrase: 'intentionally ... eavesdrops upon or records the confidential communication.'" The court contrasted that with section 632.7,

where "liability attaches to a person who 'intercepts or receives and intentionally records' certain communications." (*Ibid.*) The court concluded that unlike section 632(a), "[i]t is only the recording that must be intentional under the plain language of § 632.7." (*Ibid.*)

The federal district court in *McCabe v. Six Continents Hotels, Inc.* (N.D. Cal., Feb. 3, 2014, No. 12-CV-04818 NC) 2014 WL 465750, reached the same conclusion, noting that "[u]nlike § 632.7, the plain language of § 632 requires the intent to eavesdrop upon or record a confidential communication without the consent of all parties." (*Id.* at p. 4., citing *Smith*, *supra*, 70 Cal.2d 123 at p. 133.)

Finally, this Court has noted that other provisions in the Invasion of Privacy Act "protect against interception or recording of *any* communication"; but section 632(a), however, protects only confidential communication—that is, "conversations where a party wanted to keep the content secret." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776.)

In short, the Attorney General's contrary argument finds no support in this Court's precedent. After all, this Court was strikingly clear in *Smith*: Recording a confidential conversation is intentional "if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation." (*Smith*, *supra*, 70 Cal.2d at p. 134.) The Attorney General does not even attempt to reconcile his argument with *Smith*.

2. This Court should reject the Attorney General's hybrid-intent theory as an end-around *Smith*.

The Attorney General concedes, as he must, that *Smith* "requires more than the general intent to record a communication." (Ans. 12.) But the Attorney General makes matters worse by fashioning a new type of criminal intent: The People must prove that Defendants had "knowledge of the attendant circumstances" that establish that the communication was confidential under section 632(a). (Ans. 12–13.) The problem with the Attorney General's new "attendant circumstances" *mens rea* is that it has no support in this Court's precedent or that of any court. Moreover, despite announcing his new "knowledge of attendant circumstances" burden of proof, the Attorney General sidesteps what that means, claiming that the People "have no occasion to address what species of knowledge the People must prove." (Ans. 12.) But the Attorney General cannot have it both ways.

Equally unavailing is the Attorney General's reliance *In re Jorge M.* (2000) 23 Cal.4th 866, a firearms regulation case. There, the "reasonably should have known" standard upon which the Attorney General relies was not included in the statute under review but was read into by this Court. (See *id.* at p. 872.) The Court did so because it concluded that a more onerous "actual knowledge" requirement for the characteristics of the firearms that Assault Weapons Control Act ("AWCA") banned "would be inconsistent with the public safety goals of the AWCA." (*Id.* at p. 869.) The Court reasoned that "the AWCA has some of the key

characteristics of a public welfare offense, justifying the inference the Legislature intended guilt to be established by proof of a mental state slightly lower than ordinarily required for criminal liability." (*Id.* at p. 887, fn.11.) In sharp contrast, however, the Court in *Smith* expressly eschewed a lower standard of mental culpability for section 632, partly because it concluded that (unlike the ACWA), "[e]avesdropping is not one of that class of crimes that affects public health, welfare or safety." (*Smith*, *supra*, 70 Cal. 2d at p. 132.)

B. Defendants' state of mind is relevant to the "confidential" communications inquiry because intent is a statutory element.

The trial court erroneously sidestepped the test that focuses, at least in part, on the actors' subjective state of mind—Defendants' specific intent to commit the alleged crime—and instead focused on the objective nature of the "confidential" communications inquiry. Seizing the opportunity, the Attorney General accordingly contends that the Court of Appeal properly denied Defendants' petition because whether a conversation is "confidential" is based on an objective, not subjective, standard. (Ans. 10.) This line of argument from the Attorney General is newfangled and without support in this Court's precedents.

The Attorney General has consistently recognized throughout this entire four-year prosecution that criminal charges under Section 632 require two separate and distinct inquiries: (1) whether a recorded communication is confidential, which is governed by an objective standard; and (2) if a recorded communication is confidential, whether defendants specifically

intended to record the communication knowing that it is confidential, which is governed by a subjective standard. The Attorney General presented this law to both the trial court and the section 995 reviewing court and induced both courts to adopt this reasoning. (See Ex. 4, pp. A056:22–A057:11.)

As trial draws near, the Attorney General has now abandoned that approach. The law, however, has not changed. It is the same now as it was when the Attorney General contended—correctly—that subjectivity is allowed. And it is the same now as when he agreed with trial court's conclusion that section 632(a) requires a showing of specific intent. This Court's unequivocal holding in *Smith*, on which both the trial court and the section 995 reviewing court relied, and on which Defendants have staked their defense—is still precedent. This Court should accordingly reject the Attorney General's shifting litigation argument.

Defendants do not dispute that section 632 applies an objective standard to *the definition* of "confidential communications." (Pen. Code, § 632(c).) That being so, the first and threshold inquiry in any case, civil or criminal, is whether the recorded communications were "confidential." And that inquiry applies an objective standard—whether the "circumstances [of the communication] may reasonably indicate that any party to communication desires it to be confined to the parties thereto," excluding those circumstances where "the parties may reasonably expect that the communication may be overheard or recorded." (Pen. Code 632(c).) If this threshold, *definitional* inquiry is answered in the negative, then the cause of action fails, because

the statute only protects objectively "confidential" communications.

But, if the answer to the threshold inquiry is affirmative, and if the application of section 632 is criminal, thereby jeopardizing the accused's fundamental liberty interest, then the fact finder must also engage in a second, equally important inquiry of whether the defendants acted with the requisite intent. This is because scienter is a fundamental requirement for all criminal law violations except for strict liability statutes. (See Pen. Code, § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."); see also *Elonis v. United States* (2015) 575 U.S. 723, 737 ["The 'presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct.'"], quoting *United States v. X–Citement Video* (1994) 513 U.S. 64, 72.) And this Court made clear that section 632 does not impose strict criminal liability because "[e]avesdropping is not one of that class of crimes that affects public health, welfare or safety for which strict liability is most often imposed without any ingredient of intent." (*Smith*, *supra*, 70 Cal. 2d at p. 132.)

Likewise clear is that section 632(a) requires a showing of criminal intent, separate and apart from the definitional inquiry of what constitutes a "confidential" communication. And on that scienter requirement, this Court spoke clearly: "We conclude that a necessary element of the offense … is *an intent to record a confidential communication*." (*Id*. at p. 133.)

Put together, applying a subjective inquiry to the scienter requirement for criminal applications of section 632(a) is fully consistent with the statute's objective criteria for what constitutes "confidential" communications; and it *complements*, rather than *supplants*, that objective criteria. The jury can and must be instructed on both inquiries. Indeed, a contrary application would lead to absurd results: Applying only the objective inquiry would essentially write out *Smith*'s requirement of specific intent and would contravene the United States Supreme Court's prohibition against convicting defendants based solely upon objective, "reasonable person" standards borrowed from civil cases. (See *Elonis v. United States*, *supra*, 575 U.S. 723.)

Again, in the four years before his tactical shift, the Attorney General fully agreed with this reading of section 632 and *Smith*, and with the dual, objective and subjective inquiries mandated under both. This Court should reject the Attorney General's new, unsupported and unprincipled litigation position.

C. The need for review is magnified by the trial court's indiscriminate ruling on the conspiracy charge.

As noted in the petition (at pp. 25–27), the trial court ruled that Defendants may only present evidence supporting their mistake of law defense as it applies to the conspiracy charge. (Ex. 15, p. A282.) Although both section 632(a) and conspiracy are specific intent crimes, the trial court did not address why a defendant could present evidence for a mistake of law defense to one specific intent crime but not to another.

The Attorney General has no response to the trial court's arbitrary ruling. The Attorney General does not respond to this problem because he cannot: As longstanding precedent confirm, a defendant must be permitted to present evidence negating specific intent. (See generally 21 Cal. Jur. 3d Criminal Law § 493 [citing cases].) The Attorney General's refusal to acknowledge—let alone attempt to defend—the trial court's indiscriminate ruling speaks volumes.

III. Review is Necessary to Affirm That a Defendant May Present Evidence of Mistake to Negate Specific Intent.

The Attorney General contends (Ans. 13) that a defendant's belief that she was recording a nonconfidential conversation is not a defense to a section 632 charge. That is wrong. This Court holds as "a general rule" that "no crime is committed unless there is a union of act and either wrongful intent or criminal negligence." (*People v. King* (2006) 38 Cal.4th 617, 622.) If a crime requires specific intent, "mistake of law may negate that intent." 1 Witkin, Cal. Crim. Law 4th Defenses § 45 (2021). Accordingly, the trial court must allow Defendants to present evidence to the jury: (1) that they harbored a good faith belief the recordings they were undertaking were legal; (2) that they were correct in their interpretation of the legal requirements of section 632(a); and (3) even if Defendants were ultimately wrong as to the law's limits, they nonetheless held a good faith belief they were legally recording their interviews. Such a mistake of law negates the specific intent requirement for criminal violations of section 632. (Cf. *People v. Vineberg* (1981) 125 Cal. App. 3d 127, 137 [noting

that "[i]t has been recognized in California since the turn of the century that ignorance or mistake of law can negate the existence of a specific intent"].)

Similarly, persons who commit an allegedly criminal act "under an ignorance or mistake of fact" are also incapable of committing the crime, because that mistake "disproves any criminal intent." (Pen. Code, § 26.) Here, if Defendants' intent was not to record a confidential communication, then they cannot by definition be guilty of violating section 632(a). If the facts were as Defendants believed (*e.g.*, that all the hidden camera interviews were in public places where others could overhear the conversations), then the commission of the acts would not have violated section 632(a). That is because Defendants would have lacked the specific intent required to commit the crime. Thus, a mistake-of-fact defense also applies to the crime of recording a confidential communication, and must be permitted.

IV. This Court Should Affirm that Specific Intent Is Required for Penal Statutes that Punish Expressive Conduct.

As noted in the petition (at pp. 35–36), the Attorney General's attempt to remove section 632(a)'s *mens rea* element risks "inhibit[ing] constitutionally protected expression." (*Smith v. California* (1959) 361 U.S. 147, 155.) In response, the Attorney General concedes that this Court in *Smith* "rejected the contention that section 632 imposes strict liability on a defendant for recording confidential communications." (Ans. 16 [citing *People v. Superior Court*, *supra*, 70 Cal.2d at p. 132.] He nonetheless presses that Defendants have not established a First Amendment right "to

record nonconsensual confidential conversations with knowledge of the objective circumstances establishing a reasonable expectation of confidentiality." (Ans. 16.) That is beside the point.

The specific intent *mens rea* serves to prevent government actors like the Attorney General from prosecuting undercover journalists based solely on a post hoc assertion of confidentiality by a party to the conversation. The Attorney General, in conflict with *Smith*, seeks to prosecute Defendants under section 632 without having to prove specific intent as a required element. Doing so conflicts with the United States Supreme Court's decision in *Elonis v. United States*, *supra*, 575 U.S. 723, and other decisions protecting a defendant's First Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Review.

Respectfully submitted,

/s/

DATED: November 15, 2021

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504 of the California Rules of Court, the enclosed brief is produced using 13-point Century Schoolbook font and contains 4,194 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

/s/
Nicolai Cocis

Dated: November 15, 2021

PROOF OF SERVICE

I hereby certify that, on November 15, 2021, I served Defendant's **Petition for Review** on the following parties/entities via electronic service:

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A SERVICE COPY will be provided via Fed Ex Overnight Delivery Service to**:**

San Francisco Superior Court
The Honorable Christopher C. Hite
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Hall of Justice, Room 101
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San Francisco, CA 94103

Via Electronic Filing of this Petition:

Charles D. Johnson, Clerk/Executive Officer of the Court of Appeal, First Appellate District

Pursuant to California Rules of Court, Rule 8.500(f)(1) (as revised January 1, 2020), a copy of this Petition for Review has been served upon filing of this Petition electronically.

Courtesy Copy via Electronic Mail Service:

The Honorable Christopher C. Hite
Superior Court of California, County of San Francisco, Department 21
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Electronic Mail Service Only:

Pursuant to Cal. R. Court, R. 8.360(d), a copy of this Petition for Review, with Exhibit A, was electronically mailed to Defendant and Petitioner Sandra Susan Merritt, and Defendant and Petitioner David Robert Daleiden.

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

/s/
Horatio G. Mihet

Dated: November 15, 2021