AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

September 8, 2023

Sent Via Email

Honorable Laura Passaglia
Sonoma Superior Court, Courtroom 10
600 Administration Drive
Santa Rosa, CA 95403

Re: *People v. Hsiung*, *et al.* (2018 Sonoma Superior Court)
Nos. SCR-716272-1, SCR-716272-2, SCR-716272-3

To the Honorable Laura Passaglia:

We write on behalf of the American Civil Liberties Union of Northern California ("ACLU NorCal") in support of Defendants' Motion to Vacate. On September 1, 2023, the Court issued an order prohibiting the parties in the above-named action from speaking to the media. This gag order violates the parties' constitutional right to free speech. We therefore respectfully urge the Court to grant Defendants' Motion to Vacate.

I. Interests of the ACLU NorCal

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan membership organization with approximately 2 million members, dedicated to preserving the guarantees of individual rights and liberties embodied in the United States and California Constitutions. ACLU NorCal is a regional affiliate of the ACLU and has a long history in protecting free speech rights and the public's right to access judicial proceedings. For example, ACLU NorCal has appeared as both direct counsel and *amicus curiae* in several free speech cases. *See, e.g., Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal. 4th 446 (2010); *McDonald v. Lawson*, No. 822CV01805FWSADS, 2022 WL 18145254 (C.D. Cal. Dec. 28, 2022) (amicus); *ACLU of Southern California et al v. Harber-Pickens et al*, No. 120cv00889DADJLT (E.D. Cal 2020).

We are very familiar with the constitutional issues at stake in this matter and we are concerned by what appears to be an unlawful abridgment of certain fundamental rights.

II. The Gag Order is a Prior Restraint on Speech and is Therefore Presumptively Unconstitutional.

Gag orders prohibiting parties from speaking to the press are considered prior restraints on speech and are presumptively invalid. *See Freedom Communications, Inc. v. Superior Court*, 167 Cal. App. 4th 150, 153 (2008) *as modified* (Sept. 29, 2008) (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976)). "Prior restraints are subject to strict scrutiny because of the peculiar dangers presented by such restraints." *Levine v. U.S. Dist. Court for Cent. Dist. of*

California, 764 F.2d 590, 595 (9th Cir. 1985). Accordingly, a gag order may be upheld "only if" it is established that: "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available." *Id.* (internal citations omitted).

III. The Gag Order Fails Strict Scrutiny.

For the following reasons, the gag order fails all three prongs of the strict scrutiny test and therefore should be vacated.

a. No serious or imminent threat to a competing interest has been established.

Here, the Court made no findings on the record as to any serious or imminent threat to a protected competing interest. The Court, the parties and the public all have an interest in the efficient administration of justice. But the parties' fundamental right to free speech does not necessarily endanger this interest. The burden is on the government to show that such a danger exists. In this case, no evidence has been introduced showing how this case could be plagued by the "circus-like environment that surrounds highly publicized trials [and] threatens the integrity of the judicial system." *Levine*, 764 F.2d at 598. The parties have conducted themselves professionally and have not contributed to the type of "intense prejudicial publicity" which could warrant a prior restraint. *See id.*[1] Speculative prejudice is not enough, for "the mere possibility of prejudice to potential jurors does not justify [a] prior restraint." *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1242 (2000) (cleaned up). Without a finding of real possible prejudice, the gag order is not valid.

b. The gag order is not narrowly drawn.

The Court's gag order prohibits the parties and their attorneys from making any statements to the media concerning the ongoing proceedings. Case law makes clear, however, that a court "must determine which types of extrajudicial statements pose a serious and imminent threat . . . [and] then must fashion an order specifying the proscribed types of statements." *Levine*, 764 F.2d at 599. For example, it may be appropriate in a particular case to prohibit statements relating to the character or credibility of a party, to the identity of witnesses, or to the nature of evidence to be presented at trial. *See id.* Even these more limited restraints may be overbroad where they prohibit the restricted party "from commenting on matters that are not substantially likely to have a materially prejudicial effect on [the] proceedings." *Clifford v. Trump*, No. CV1802217SJOFFMX, 2018 WL 5273913, at 5 (C.D. Cal. July 31, 2018). Prohibiting *all* statements to the press thus certainly runs afoul of the constitution. *See Levine*, 764 F.2d at at 598-99 (order is overbroad where it bars trial participants from making any statements to the media concerning any aspect of the case).

[1] Notably, the alleged victims in this case—who are not subject to the Court's gag order—have freely exercised their right to speak with the media, ostensibly without threatening the integrity of the trial. *See Animal Right Extremists: Terrorism or Protest?*, Vice Video (Feb. 9, 2019, https://video.vice.com/en_us/video/animal-rights-extremists-terrorism-vs-protests-dxe/5b107772f1cdb33f9a35cea6. Restricting Defendants' right to speak to the media, but not the rights of others who have a stake in these legal proceedings, presents a far greater risk of improper public influence.

c. Less restrictive alternatives exist.

The Court has other options to protect the interests at stake. The First Amendment need not be pitted against the Sixth. The Defendants' right to a fair trial can be adequately assured through the voir dire process and the application of evidentiary rules. Clear jury instructions will also ensure that selected jurors remain impartial. Indeed, "cautionary admonitions and instructions must be considered a presumptively reasonable alternative—a presumption that can be overcome only in exceptional circumstances." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1224 (1999). These existing safeguards provide adequate and less restrictive alternatives to the Court's order.

IV. Conclusion

"[E]very moment's continuance of [a prior restraint] amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Back, J., concurring). We respectfully urge the court to lift the gag order because it is an unconstitutional restriction on free speech as protected by the United States and California Constitutions.

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