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

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.: A157469 **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

PETITIONER MERRITT'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF, AND STAY REQUEST

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

*Nicolai Cocis (CA Bar # 204703)
Law Office of Nicolai Cocis
38975 Sky Canyon Drive, Suite 211
Murrieta, CA 92563
Tel: (951) 695-1400

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Fax: (951) 698-5192
Email: nic@cocislaw.com

Horatio G. Mihet† (FL Bar # 26581)
Liberty Counsel
P.O. Box 540774
Orlando, Florida 32854
Tel: (407) 875-1776
Fax: (407) 875-0770
hmihet@lc.org
† Admitted Pro Hac Vice
Attorneys for Defendant-Petitioner Sandra Susan Merritt

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REPLY MEMORANDUM IN SUPPORT OF WRIT PETITION

Petitioner Merritt ("**Merritt**"), in accordance with California Rule of Court (**CRC**) 8.487, respectfully files her Reply to Intervenors' June 27, 2019 Letter Brief in Preliminary Opposition to Petition for Writ of Mandate and Request for Immediate Stay ("**Opposition**").

INTRODUCTION

Intervenors, by their June 27, 2019 Opposition, continue with the pretense of arguing under the guise of safety, yet their own allegations and argument belie that safety is their motive. Although the four intervening Does[1] who **moved to intervene** below (Exhibit 6, Vol. 1, Exh-575 (Motion to Intervene)) now try to distance themselves from even the classification of an "Intervenor" in their letter brief, the pleadings below (by title and content), and the trial court's ("**SCSF**") classification of them as "Intervening Parties" in its February 14, 2019 Order (**Exhibit 1**, Vol. 1, Exh-19 (**PX Order**)), establishes the true nature of Intervenors' participation. Additionally, despite stating that the Opposition is submitted only on behalf of the four Does (and

[1] Intervenors imply a need to rename themselves by different "Doe" numbers due to a press leak. (Opposition at 1 n.1). As evidenced in Merritt's *Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief and Request for Stay* ("**Petition**"), Counsel for Does **never contacted the Attorney General's Office** prior to filing any motion papers, (Petition at 45 n.12), and Intervenors' counsel admittedly did not know of SCSF's sealing orders (Opposition at 5 n.3). Re-designating them under different numbers here (and below) serves only to confuse the record. There is no order in the record changing the Does' assigned designations. Further, **Intervenors made no request below to change the Does' numbers for any reason**. Moreover, to the extent that Intervenors raise this issue here to imply that Merritt was responsible for a leak is preposterous as there is no allegation, let alone evidence, in the record that Merritt had anything to do with any press leak.

purportedly not including the Planned Parenthood Entities ("**PP Entities**") (*see* Petition at 12-13), the Opposition still argues on behalf of the PP Entities who were granted intervention status generally. (*E.g.*, Opposition at 5, 7-8, 11, 14). SCSF's PX Order makes no distinction between the Does' and the PP Entities' status, referring to them all throughout the PX Order as "Intervening Parties." (**Exhibit 1**, Vol. 1, Exh-21 (describing parties and motion: "the Motion to Intervene on behalf of Third-Party Witnesses **and Planned Parenthood** [hereinafter referred to collectively as "Intervening Parties"] (which includes a Motion in Limine, several declarations, and a Request for Judicial Notice) [hereinafter referred to collectively as "Motion to Intervene"]"); *id*. at Exh-39:18-20; *id*. at Exh-40:4-5, 10-11, 17-22; Exh-41:5-8, 13-15, 20-23; Exh-42:7-14).

Intervenor's Opposition is loaded with innuendo and baseless allegations that Merritt mischaracterized law and fact, but those arguments are hollow, without evidentiary support, and based on either counsel's personal opinions or a complete misreading of Merritt's Petition. Additionally, Intervenors make repeated attempts to conflate Merritt with her co-Defendant, Daleiden, without any evidentiary support in the record. In fact, much of the unsupported assertions and innuendo comprise factual disputes currently being litigated on cross-motions for summary judgment in *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 3:16-cv-00236-WHO (N.D. Cal.) ("***PPFA v. CMP***").

Try as they might to distinguish away California Supreme Court precedent and its progeny that address constitutional and statutory protections for alleged victims, Intervenors' arguments do nothing to defeat controlling law holding that not even alleged victims may intervene in a criminal case without contravening important principles that protect fundamental separation of powers concerns. Victims cannot have standing to

"intervene" in a criminal case to argue the merits of any substantive right granted under Article I, Section 28 of the California Constitution (commonly known as "Marsy's Law"). As even their own cited cases explain, even post-enactment of Marsy's Law, victims **must comply** with procedural and evidentiary rules applicable to parties in criminal cases, and Marsy's Law cannot change that requirement by allowing alleged victims to litigate contested issues through motion papers asking the court to take action on their behalf in a preliminary hearing or trial. Rights under Marsy's Law are necessarily limited to the presentation of victim-impact statements. Anything more contravenes separation of powers principles.

Like their motions filed below, Intervenors' Opposition continues to rely on inadmissible hearsay without addressing Merritt's arguments on this point, and now attempts to add even more inadmissible hearsay, filed two months **after** the PX Order was issued and upon which there has been no hearing set or briefing. The new (inadmissible) "evidence" is not part of the record and for the reasons argued herein, should be categorically excluded from consideration.

In addition, Intervenors' Opposition is undermined by Intervenors' counsel's own admission on January 28, 2019 that three of the represented Does have been voluntarily publicizing their identities: "**For at least two of my clients, that bell has been rung, and rung many times**," and admitting a third Doe's name has been "less **public.**" (emphasis added)). (**Exhibit 12**, Vol. 3, Exh-1065 (1-28-19 Tr., 57:28)). As Merritt previously pointed out, "less public" is, nevertheless, **public**. In an attempt to create a false impression, Intervenors' Opposition consciously fails to mention their counsel's glaring admission.

Intervenors' constant cry of "limited purpose" is a sham, as evidenced by the relief they sought below and their continued quest to argue the merits

of the State's prosecution in their Opposition. Intervenors' sought to place more limitations than even what the Attorney General thought was legally necessary.

The fact remains that, whether some of SCSF's rulings on Intervenors' motions seem unnecessary (requiring the parties to follow the rules of evidence, for example), SCSF's PX Order sets a dangerous precedent for Merritt, as well as for the Bench and Bar, having statewide implications. A form of "intervention" has been granted to alleged victims **and non-victims**. They are now granted the status of "Intervening Parties." Merritt has been prejudiced by the blanket adoption of inadmissible hearsay and civil court rulings to which she was not a party or participant. Moreover, unlike any case cited by Intervenors in their Opposition, the PP Entities are simultaneously prosecuting civil litigation against Merritt, and the Does, as employees of the PP Entities, are their key witnesses. Both the PP Entities and the Does have much to gain by using a criminal judgment against Merritt for their benefit in their civil suit. Without any statutory guidance (as there is, for example, for victim-restitution), Marsy's Law at most permits alleged victims the right to be heard by presenting a victim impact statement. Marsy's Law affords a right to be heard, and not a right to litigate in criminal prosecutions.

LAW AND ARGUMENT

I. INTERVENORS' OPPOSITION IS FRAUGHT WITH ERROR, INNUENDO, AND IMPROPER SUBMISSIONS.

A. Does' Numerous Innuendos Have No Basis In The Factual Record.

Lacking in evidence, Intervenors improperly interject innuendo against Merritt. As done in the trial court, Intervenors continue to lump Merritt in with the allegations made against her co-defendant, Daleiden. Not only do the empty allegations lack evidentiary foundation in the record, but as this Court previously explained, "'[e]ach defendant stands before the bar of justice as an individual. **Even on a conspiracy charge**[,] defendants do not lose their separateness or identity.'" *In re Humphrey*, 228 19 Cal. App. 5th 1006, 1041 (Ct. App. 2018) (quoting *Stack v. Boyle*, 342 U.S. 1, 9 (1951) (Jackson, J., concurring)) (emphasis added) (alterations in original).[2]

For example, interspersed throughout the Opposition, Intervenors' underhandedly attempt to argue the merits of the case be referring to the videos at issue as **misleading** (Opposition at 9) and **"illegally recorded**" (*id*. 3, 9, 12, 14), and assume conviction when asserting there were "crimes committed" by Merritt. These allegations have nothing to do with victim safety. Moreover, there is no evidence in the record that the videos at issue (*i.e.*, the evidence of Merritt's alleged criminal conduct) were improperly altered or "misleading." On the contrary, in Texas, governmental policies concerning public funding of abortion organizations have been modified

[2] Intervenors misstate the number of counts against Merritt in the Amended Complaint as fifteen counts under Penal Code ("PC") Section 632. (Opposition at 2). The Amended Complaint contains fourteen counts under PC Section 632, and one conspiracy count under PC Section 182(a)(1). (**Exhibit 24**, Vo. 4, Exh-1303).

based upon CMP video footage. *See Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc v. Smith*, 913 F.3d 551 (5th Cir. 2019), *reh'g en banc granted Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 914 F.3d 994 (5th Cir. 2019) (affirming government decision to withhold public funds from Planned Parenthood affiliate on the basis of wrongful conduct exposed by CMP videos). In affirming the governmental policy change, the Fifth Circuit Court of Appeal has expressly and resoundingly rejected the Intervenors' and Planned Parenthood's mantra peddled again here, that the videos at issue were "deceptively edited." *See id.* at 559 n.6 (rejecting Planned Parenthood Gulf Coast's allegation that CMP videos were "deceptively edited" because "the record reflects … a report from a forensic firm concluding that the video was authentic and not deceptively edited. And the plaintiffs did not identify any particular omission or addition in the video footage.").

Additionally, although the authenticity of the videos was initially disputed in *PPFA v. CMP*, Plaintiffs there have abandoned those claims. There, Plaintiffs realized early on that they could never prove **in court** their oft-repeated mantra **outside of court** that the undercover videos were "heavily" or "deceptively" edited, were not true and were tantamount to a "smear." Thus, Plaintiffs in *PPFA v. CMP* (some of whom have intervened in this case) never sued anyone for defamation—not Merritt, not any of the co-defendants, and not any of the countless media outlets that have republished the videos and reported on CMP's findings. In *PPFA v. CMP*, the Plaintiffs have avoided defamation claims like the plague, and they resisted discovery at every turn into the truth of the facts revealed in and published through the videos. (*See PPFA v. CMP*, 3:16-cv-00236-WHO (N.D. Cal. Apr. 9, 2019) (Order Affirming Magistrate Judge Order, dkt. 533,

p. 5 (cautioning Plaintiffs that, by "circumscrib[ing] discovery into … defendants' defenses … Plaintiffs bear the risk" of evidentiary preclusions as to whether or not the videos are accurate).)

Thus, Plaintiffs in the civil case (including some of the intervenors here) forfeited the right and ability to claim legally what they cannot prove factually—that the videos are but a "smear" and not true or accurate. Therefore, it is disingenuous for the Does and the PP Entity Intervenors to assert such innuendo here, already rejected by the courts.

Furthermore, there is no evidence in the record that Merritt played any part in "releasing" the videos, as argued by Intervenors. (Opposition at 3 ("After Petitioner released the illegally recorded videos in 2015 . . .")). On the contrary, in the civil litigation, the undisputed evidence is that Merritt played no part in the editing or release of the CMP videos. *PPFA v. CMP*, 3:16-cv-00236-WHO (N.D. Cal.) (Declaration of Defendant Sandra Susan Merritt in Support of Her Motion for Summary Judgment, dkt. 599 (May 22, 2019)). Intervenors therefore spout facts not in evidence in an attempt to mislead this Court that these "facts" have been established. Their bereft assertions have nothing to do with the Does' safety, but rather go to the merits of the prosecution in which they seek to intervene.

Likewise, Intervenors baselessly argue that the allegations in Merritt's Petition going directly to her defenses were intended by Merritt to provoke violence (Opposition at 4 (citing Petition at 17 (attacking Merritt's statement that she discovered that abortion providers were willing to perform "partial birth abortions" or other techniques in which they killed and dissected live fetuses outside their mothers))). Merritt's Petition is **verified** and her factual statements constitute facts she intends to prove in her defense. While Intervenors' mantra touts "safety only" throughout their Opposition, they repeatedly revert to arguing disputed issues on the merits that have nothing

to do with safety, or they attempt to invent a new safety issue. Notably, not one of the four Does include in their declarations any averment that allegations in Merritt's pleadings are the source of their safety concerns.

Even more troubling, within the Intervenors' **newly proffered evidence** produced in their Opposition exhibits (Intervenors' Exhibit 10, Vol. II, at 318) (improperly submitted, as discussed below), Intervenors' falsely imply that Merritt or her counsel were involved with third parties who allegedly videotaped an Intervening Doe **at a public gathering held in a public venue (a community center), where the Doe appeared willingly to speak to the public about her involvement in this case**. Without any competent evidence, the Intervenors argue in their Opposition that the third parties involved in videotaping this public discussion are "affiliates" of Merritt's. (Opposition at 4). They then cite to the *Second Supplemental Declaration of Elizabeth J. Lee in Support of Victim-Witnesses' Motion in Limine; Exhibts P-HH, Thereto*. In paragraph 8 of Ms. Lee's Supplemental Declaration she merely states that Merritt's counsel, Mr. Mihet, is "quoted," in the news article reporting on the public taping of the aforementioned Doe (who was speaking at a Jewish Community Center). The news article, attached thereto as Exhibit R, reports Mr. Mihet's comments that do not even mention, let alone admit participation in the aforementioned taping of the community event (Mr. Mihet instead discusses the Attorney General's motives in seeking to seal the Does names and videos (Intervenors' Exhibit 10, Vol II, at 349)), and the article does not indicate when the reporter obtained the quote from Mr. Mihet, or what question was asked to illicit the response. *Id.* Yet both the Opposition and the Supplemental Declaration strongly (and improperly) imply that Merritt was involved in the taping of the Doe at her voluntary public appearance in April 2019. At best, the Opposition and Ms. Lee's Supplemental Declaration are carelessly

misleading. The insinuations are unsupported, beyond tenuous, and wholly improper.

B. The Does' Own Publicity Belies Their Safety Claims.

The Does' alleged concern that Merritt's Petition is a "disguised effort to unseal videos and reveal the victims' identities" or to intimidate the alleged victims, or for fundraising purposes (Opposition at 2) is contrived. As Merritt already noted, she has had the Does' real names and addresses for approximately two years without an iota of evidence that she used their information improperly. (Petition at 60). On the contrary, the Does have, on numerous occasions, publicly and voluntarily associated their own names with the underlying criminal prosecution, (Petition at 51-55 (occasions set forth)), and Intervenors' counsel has admitted that three of the Intervening Does' have themselves rung the publicity bell. (**Exhibit 12**, Vol. 3, Exh-1065 (1-28-19 Tr. 57:28)). Additionally, bare allegations of fundraising alone are not at all relevant to Merritt's fundamental right to a public preliminary hearing (as discussed below).

Moreover, Intervenors' attempt to circumvent the Does' voluntary publication of their own identities is not based in logic. Undisputedly, the Does have publicly associated their names with the same underlying facts of this criminal prosecution in civil cases and elsewhere. (Petition at 51-55). First, Intervenors dismissingly argue that the Does did not choose to be deposed by defendants in the civil cases. Yet Intervenors ignore the declarations that the Does **voluntarily** submitted in the civil cases in support of their employers' suits. (**Exhibit 14**, Vol. 3, Exh-1106, 1125 (Merritt Second Opp., 13, and Ex. A (Doe 10 Declaration)); *id*. at Exh-1132 (Merritt Second Opp., Ex. C)). They argue that there is danger in publicly associating themselves as an alleged victim in this criminal case, but Intervenors

completely fail to explain why voluntarily associating themselves with the same underlying facts of the civil cases does not threaten their safety. Worse, Intervenors fail to demonstrate that their own voluntary publications did not contribute to their alleged safety concerns. The four Does' declarations submitted in this case from January 2019 do not attempt to make such evidenced-based distinction that is logically necessary to their claim for anonymity here, but nowhere else.

Telling of no real need for the Does to continue anonymously, the Does profess to be completely unaware that their names were sealed in the criminal case that began **over two years ago**. (Opposition at 5 n.3) That Intervenors' counsel neither thought to contact the Attorney General before publicly filing their Motion to Intervene (**Exhibit 12**, Vol. 3, Exh-1065 (1-28-19 Tr., 57:28)), nor sought to file their motions conditionally under seal in the first place is telling of their own lack of concern over their safety. Had the Does been genuinely concerned with anonymity, seeking to have their names sealed would not have been an after-thought. Intervenors' very puzzling admissions do not align with their alleged safety concerns. Their admissions demonstrate all the more that their belated concerns are stale or contrived.

II. THE REQUEST FOR JUDICIAL NOTICE AND DECLARATIONS SUBMITTED BY INTERVENORS' COUNSEL CANNOT CURE INADMISSIBLE HEARSAY NOR EXCUSE INTERVENORS' COMPLIANCE WITH REGULAR PROCEDURAL AND EVIDENTIARY RULES.

Intervenors repeatedly cite to and rely on their Request for Judicial Notice, as well as hearsay evidence attached to a declaration by counsel. (*See e.g.*, Opposition at 3-5). Intervenors cite, in part, to a federal case, *Shriner's v. United States*, No. 14-cv-1437 AJB (KSC), 2017 WL 3412299, at *4 (S.D.

Cal. Aug. 8, 2017), to support the sufficiency of Ms. Lee's Declarations, but even the federal rule does not address Merritt's objections. The rule on which Intervenors' rely from *Shriner's* merely authenticates "how" the attorney obtained the exhibits, "how" the exhibits were identified, and their status as true and correct copies. *Id*. at *4 n.4. That is the extent of the authentication. Attaching hearsay to an attorney's declaration cannot transform inadmissible hearsay into admissible evidence, which Intervenors' own cited case, *In re Vicks*, 56 Cal. 4th 274 (2013), clearly explains. *In re Vicks* also clearly demonstrates why SCSF's consideration of the Intervenors' judicially noticed documents constituted an abuse of discretion.

In *In re Vicks*, the California Supreme Court rejected the amicus curiae's (the Public Defender for the Eastern District of California) request for judicial notice (also joined by Vicks). *Id*. at 313-14. The Public Defender and Vicks sought "judicial notice of four volumes of evidence presented in a class action brought on behalf of life prisoners" against the same defendant (the Board of Parole Hearings ("BPH")), in *Gilman v. Brown*, No. S-05-830 LKK/GGH, 2012 WL 3913088 (E.D. Cal. Sept. 7, 2012). *In re Vicks*, 56 Cal. 4th at 313.[3] Thus, the Court in *In re Vicks* had no need to discuss due process concerns, such as those Merritt raised pertaining to *res judicata* or collateral estoppel, against the BPH.[4] The Court did, however, explain that the documents must be competent for the purposes offered:

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[3] As the Court earlier explained, the name of the defendant in Gilman had changed: "The Board of Prison Terms was abolished and replaced by the Board of Parole Hearings, effective July 1, 2005." The Court referred to both the former and the latter as the Board in its opinion. *Id*. at 283 n.5).

[4] Intervenors errantly argue that Merritt cited no authority for her argument against SCSF taking judicial notice improperly (Petition at 13), but Merritt clearly did so, (Petition at 44-48 (raising collateral estoppel, *res judicata* and hearsay challenges under cited authority)).

> "The court may in its discretion take judicial notice of any court record in the United States. [Citation.] This includes any orders, findings of facts and conclusions of law, and judgments within court records. [Citations.] However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, **they may not take judicial notice of the truth of hearsay statements in decisions and court files**."

Id. at 314 (quoting *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th 875, 882 (2001)) (bold emphasis added; italics and alterations in original). The Court went on to explain that the transcripts and exhibits from the class action suit could not be judicially noticed because they "reflect[] only the **beginning of the factfinding process** required to determine the impact of Marsy's Law as applied to prisoners generally." *Id*. This is why Merritt is correct, even with respect to the civil preliminary injunction order. Even the federal court's preliminary injunction order judicially noticed by SCSF cannot qualify under *In re Vicks* because, as Merritt previously argued, it is a preliminary decision, and by definition is not final. (Petition at 46-47); *see also NAF v. CMP*, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016) (summary of preliminary injunction standard, *id.* at *12; Preliminary injunction entered "pending a final judgment," *id.* at *26).

Additionally, Intervenors' cited authority, *People v. Hannon*, 5 Cal. App. 5th 94 (2016), stands for the proposition that regular procedural and evidentiary rules apply to alleged victims under Marsy's Law:

> The plain meaning of the phrase "to be heard" as used in [Cal. Const. Art. 1,] Section 28 does not compel this court to consider the victim's new issues and facts. That is particularly true given that we presume the voters were aware of the well-established rules of appellate procedure when they enacted Marsy's Law.

Id. at 106. Further,

> procedural rules governing appeals may be imposed on parties without violating due process and there is no basis to conclude the conclusion should be otherwise where a victim's interests are at stake.

Id. at 108. Thus, Intervenors' Exhibit 10 that attaches documents submitted to SCSF in April 2019, two months **after** the PX Order was entered on February 14, 2019 (and have not even been briefed by the parties or heard by SCSF yet) are not properly before this Court. This Court should, therefore, disregard them for this reason, in addition to rejecting the attached documents that constitute hearsay and double hearsay, such as the LifeSite news article discussed above.

III. MARSY'S LAW IS NOT AS EXPANSIVE AS INTERVENORS CONTEND.

A. SCSF Abused its Discretion by Granting *De Facto* Intervention.

The facts and procedural history in this case also demonstrate that Intervenors' have been able to intervene ***de facto***, regardless of what SCSF labeled it. That intervention was granted *de facto* affects the analysis as to whether in this case, Intervenors have been given rights that exceed the bounds of both Marsy's Law and proper restraints thereon imposed by the doctrine of separation of powers.

Importantly here, only **four of a total of fourteen** Does sought intervention, in addition to the PP Entities. While Intervenors now deny that "intervention" was sought and occurred, that was not the position they took before SCSF. As shown previously, SCSF's PX Order refers to them as "Intervening Parties" throughout and the Intervenors filed a "Motion to Intervene" under Marsy's Law catch-all provisions. Through their various motions, Intervenors sought to participate in the preliminary hearing as

litigants with the right to impose objections, move exhibits into evidence, and limit the substantive content of Merritt's defenses (whether governed by procedural rule or by specific category). They sought to do so under the guise of "safety," but their goals (and SCSF's PX Order) go much farther, reaching substantive merits that hamper and prejudice Merritt's right to an open and fair preliminary hearing—a critical stage in the criminal proceedings.

Intervenors sought—and SCSF granted—relief on substantive grounds, apart from any safety concerns alleged by Intervenors. Notably, the **four Intervening Does do not allege** that they are in each video that is subject to SCSF's PX Order. Yet they asked for—and received—blanket sealing of **all videos** based on the inadmissible evidence discussed above. **Intervenors cannot possibly have a safety interest in sealing videos in which they do not appear**. However, the non-victim Intervenors (PP Entities) certainly do have an interest in seeing each and every video sealed—to ensure their success in their civil case and to prevent damage to their reputation where the video footage reveals that they violated federal tissue procurement laws. As such, the Intervenors' interests in this case are not as limited as they pretend.

Further, at least in one aspect, Intervenors were given greater rights than the constitutional and statutory rights belonging to criminal defendants. Intervenors sought and SCSF granted a ruling limiting the extent of Merritt's cross examination "to the facts and circumstances of this case . . .," (**Exhibit 1**, Vol. 1, Exh-40), while SCSF simultaneously granted judicial notice of Intervenors' exhibits, motions and preliminary orders—accepting as true the evidence presented therein—taken from cases and motion practice **not limited to this case.** SCSF abused its discretion by considering against Merritt hearsay evidence and preliminary conclusions from civil cases in which Merritt is not a party or did not participate. Ironically, Intervenors

were given **greater** rights than the accused defendant, who is presumed innocent until proven guilty. Contrary to Intervenors' argument that none of the records accepted by SCSF go to the merits of the case and therefore cannot violate due process—as set forth above, Merritt was improperly estopped from fully litigating the Does' veracity concerning the legitimacy of their safety concerns when SCSF accepted as true the inadmissible evidence and findings taken from other cases in which Merritt had no opportunity to fully litigate the claims. For example, Merritt has not been able to challenge the expert qualifications of the declarant and the assertions made in the declaration (with bias statistics attached thereto) taken from *Jane and John Does 1-10 v. Univ. of Wash.*, 2:16-cv-01212-JLR (Wash. Super. Ct.). This is a clear violation of the principles set forth in *In re Vicks*, 56 Cal. 4th at 313-14, as well as the principles cited in Merritt's Petition.

SCSF ultimately ruled on specific procedural and substantive relief sought by Intervenors, which overshadowed Merritt's constitutional and statutory rights to a fair and public preliminary hearing. As a further example, SCSF ruled on both the AG's motion and the "Intervening Parties'" motion to exclude substantive testimony that goes to Merritt's defenses. That motion was **denied without prejudice**, which contemplates that Intervenors (Does or PP entities) will be able to renew their motions during the preliminary hearing. (**Exhibit 1**, Vol. 1, at Exh-40:17-21). Intervenors' attempt to argue that their request was somehow limited to "inflammatory" testimony (Opposition at 6) is a last-minute attempt to white-wash their motion. There is nothing in the Intervenors' motions or the content of the PX Order that limits their request to "inflammatory testimony." Instead, the PX Order correctly describes the specific content the Intervenors sought to exclude: testimony regarding any donation of fetal tissue, abortion procedures or Planned Parenthood operations.

B. The Right "To Be Heard" Cannot be Equated With Moving the Court for Substantive Relief.

Intervenors' expansive view of Marsy's Law is not warranted under the cases cited in their Opposition. While *In re Vicks* does discuss the due process afforded to victims under Marsy's Law, it does not approve the relief given to Intervenors here. As held by the Court there, while Marsy's Law seeks to ensure that victims are acknowledged and respected, "the scheme **does not authorize** the Board [of Parole Hearings] to base its decisions on victims' **opinions or public outcry**." The documents submitted by Intervenors constitute opinion or reflect one side of the public debate, such as the **editorial** from The Sacramento Bee, which is by definition an opinion piece. (Opposition at 3 (citing Intervenors' Exhibit 3 (Lee Decl. ¶ 9, Ex. H)). To make things worse, the editorial contains quotes, meaning double hearsay. Also, Intervenors' Exhibit D is a Declaration of Ellen Gertzog, and paragraph 8 therein incorporates a NAF statistical report which is loaded with bias. This a document of which SCSF took judicial notice in violation of the principles set forth in *In re Vicks.* Merritt had no opportunity to litigate the facts alleged therein (since she is not a party to the NAF lawsuit), yet SCSF accepted their truth in determining whether to close or partially close the preliminary hearing.

While Intervenors attempt to dismiss and distinguish the important principles in *Dix*, that opinion does not conflict with *In re Vicks*. Contrary to Intervenors' Opposition, *Dix* is directly applicable because, although pre-Marsy's Law, it directly addressed the same principles that undergirded the Victim's Bill of Rights in Article 1, Section 28 of the California Constitution. In *Dix*, the Court held that Article 1, Section 28 (known at that time as "The Victims' Bill of Rights," *id.* at 452, does not entitle victims to **open-ended**

access to judicial remedies for enforcing rights thereunder. *Id*. 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 category[ies] of 'victim 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).

In re Vicks does not contradict *Dix*, but rather affirms it. The Court, noting its decision in *People v. Ramirez*, 25 Cal. 3d 260, 264 (1979), considered Marsy's Law to properly give a victim the right to have a "**chance to be heard**," thereby meeting "minimum standards of political accountability" but the Court did not stop there. As mentioned above, "the scheme does **not authorize** the Board [of Parole Hearings] to base its decisions on **victims' opinions or public outcry**." *In re Vicks*, 5 Cal. 4th at 310 (emphasis added). SCSF erred by considering all hearsay and other preliminary decisions from cases to which Merritt was not a party, violating her due process rights. Allowing Intervenors to submit such documents here for the truth of the matters asserted therein contravenes the court's decision in *People v. Hannon*, 5 Cal. App. 5th at 108, which held that Marsy's Law did not obviate victims' obligations to comply with reasonable procedural

and evidentiary rules. To hold otherwise grants accusers greater rights than the constitutional protections afforded to the accused.

Additionally, *Dix* explains the province of the prosecutor that cannot be invaded, and this principle has stood the test of time, as affirmed by *Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532 (Ct. App. 2011) and *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241 (2017). The general principles are applicable in any case which purports to grant **intervention** that permits non-parties to participate by **litigating through motions** rather than merely affording an opportunity to be heard as to the victim's perspective in the manner of a "victim impact statement."

Regular motion practice, as occurred in the case at bar, goes well beyond the victim impact statement approved by the court in *People v. Hannon*, 5 Cal. App. 5th 94. In the context of a victim's claim for restitution after Hannon pled no contest to embezzlement, the *Hannon* court explored what it means for victims to "be heard," but the decision is not as broad as Intervenors purport it to be. The right to be heard regarding restitution is guided by statutory parameters that are not present here. *See e.g., id*. at 98-99 (discussing requirements of Penal Code § 1202.4 subd. (f)(3)(g)).[5] Further, the restitution procedure necessarily begins after a determination of guilt, whether by conviction, or by a guilty or no-contest plea. By contrast, unlike Hannon, Merritt has plead **not** guilty, and hence the need for a preliminary hearing.

The court in *Hannon* only recognized the right to be "heard" through a "victim impact statement," and there is therefore no right on appeal for a victim to "raise new legal issues or rely on facts not in the record below." *Id.*

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

at 98. The court regarded victims on appeal as "occupy[ing] a position somewhat analogous to that of an amicus curiae," *id*. at 105, which "assist the court by broadening its perspective on the issues raised by the parties," and "may bear on important legal questions" or offer "an informed perspective different from that of the parties." *Id*. However, there is nothing in *Hannon* that goes beyond submitting such a statement, akin to an *amicus curiae*, and certainly there is nothing allowing victims to file motions and ask the court to **take action** to **exclude evidence and the like**, as has occurred here.[6]

As explained above, the PX Order ruled that the Intervenors' motion to exclude substantive testimony was denied **without prejudice**, which is a welcome mat for Intervenors to make additional motions during the preliminary hearing. **The PX Order goes to Merit's defenses – the**

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[6] Intervenors footnoted their citation to *People v. Brown*, 33 Cal. 4th 892, 899 (2004), for prosecutors' reliance on victims' cooperation and participation. (Opposition at 7 n.4). Not only does this case not speak to the parameters of such participation, the one-liner offered by Intervenors is pure dicta, not addressing Marsy's Law at all but rather expert testimony in the unique context of domestic violence.

Intervenors' next footnoted case, *People v. Parmar*, 86 Cal. App. 4th 781, 805 (Cal. App. 2001) (Opposition at 7 n.4), is similarly inapt because the court there analyzed whether a **government entity's** use of federal funds for a prosecutorial purpose was grounds for recusal of the prosecutors. The government entity was a "joint powers authority of the city and county," *id*. at 799, and the court found relevant that –unlike the case at bar—the government entity is "**neither a private party nor a specific victim of defendants' alleged offenses.**" *Id*. at 796 (emphasis added). Thus, there was "**no showing of the possibility of private-party influence upon the prosecutor**." *Id*. This was a "factor of **obvious significance** in considering the necessity of disqualification." *Id*. (emphasis added). Thus, the "close cooperation" referenced by the court, *id.* at 805, is not a relevant consideration here because the Intervenors are private parties litigating against Merritt in civil prosecution.

Intervenors should not be able to move the court to <u>exclude</u> any evidence. The full **<u>exclusion</u>** of evidence at a preliminary hearing necessarily goes well beyond a victim's alleged safety concerns, because exclusion would bar SCSF from considering Merritt's evidence at all. Exclusion **does not go to a safety concern** unless Intervenors are arguing that their perceived danger stems from the trial court.

IV. INTERVENORS' ATTEMPT TO AVOID CALIFORNIA'S CONTROLLING STANDARDS FOR SEALING EVIDENCE AND CLOSING A PRELIMINARY HEARING IS WITHOUT MERIT.

As the Supreme Court observed in *Waller v. Georgia*, 467 U.S. 39, 43 (1984), strict scrutiny applies to preliminary hearings, not based alone on a right to cross-examine witnesses. It bears repeating that the importance of a **public** preliminary hearing rests on the broader right of the accused to a fair hearing influenced by public accountability:

> 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, 467 U.S. at 46 (internal citation and footnote omitted) (emphasis added). As the Court further held, "'[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).

Intervenors ignore altogether these important purposes elucidated by the High Court, just as they have painstakingly avoided the application of the only relevant standards applicable here for closure of preliminary hearings (whether full or partial)–CRC Rules 2.550 and 2.551 (the "Sealing Rules"). Both standards are more stringent than the general balancing tests selected by both SCSF and Intervenors. But neither SCSF nor Intervenors have a choice in the matter because Section 868.7 mandates use of the statutory standard it provides, as do the Sealing Rules mandate the standards provided therein for sealing any evidence. Preliminary hearing closure warrants a more stringent standard under California law compared with federal law, as Merritt previously discussed. (Petition at 64-65). Likewise, sealing documents is governed by the Sealing Rules' stringent standards. (*Id*. at 57-60).

The authorities cited by Intervenors are wholly inapt because they are not based on Section 868.7 nor the Sealing Rules. Instead, they rely on **non**-California cases in search of a more liberal standard. For example, Intervenors' analogy to federal trade secret law (Opposition at 9-10, 12), ignores the *Overstock* court's discussion of the Sealing Rules and their First Amendment implications (*see* Petition at 50), and instead resorts to a completely inapplicable, unpublished federal law case pertaining to trade secrets. *United States v. Roberts*, 2010 WL 1010000, *5, *8 (E.D. Tenn. Mar. 17, 2010) (*see* Opposition at 9-10).

Roberts is not only not controlling, but it is inapt for several reasons. Unlike a case involving theft of a trade secret, Merritt can raise an affirmative defense (and has) under Section 633.5 (**Exhibit 1**, Vol. 1, Exh-23). Merritt was investigating crimes, an important aspect of her affirmative defenses. There is no similar defense alleged in *Roberts*. Moreover, Intervenors' argument here is argument that goes to the merits of Amended Complaint counts, rather than any safety issue, for the reasons stated throughout this

Reply and in Merritt's Petition as to the Does' own voluntary publicity. **Intervenors' admission** that the Does have rung the publicity bell "many times" takes this case out of a "trade secret" analogy. Moreover, several videos which are not even subject to the preliminary injunction in *NAF v. CMP*, and which specifically show Does 9 and 10, have been public for several years now and are widely available on YouTube. (Petition at 54; **Exhibit 14,** Vol. 3, Exh-1106 (Merritt Opposition II, at 13:9-12)(Does 9, 10 and 11 appear on CMP website and YouTube)). **Yet the Does incredibly sought to restrict ALL videos (and which were so restricted–even those in which <u>they do not appear</u>, or that are already in the public domain and not subjection to the *NAF v. CMP* preliminary injunction.** Thus, Intervenors' attempt to distinguish *Overstock* fails.

Furthermore, Intervenors ignore that the Court of Appeal in *H.B. Fuller Co. v. Doe* ("*H.B. Fuller Co*."), 151 Cal. App. 4th 879, 891-92 (Ct. App. 2007) held precisely the point that Intervenors are disputing. Under *H.B. Fuller*, the burden to seal (and for continued sealing) is on the movant. "[C]onclusory averments" that information is "'confidential' or 'private' in some sense," cannot support sealing. *Id.* at 891-92. The court in *H.B. Fuller Co*. rejected the request for continued sealing, in part, where the supporting declaration failed to "identify specific facts . . . that [the sealed materials] were confidential in any legally significant sense, or **were not available to the public** . . .." *Id*. at 895 (emphasis added). As the court further explained,

> without a clear enumeration of specific facts alleged to be worthy of the **extraordinary measure** of maintaining our records under seal, there is simply no basis to conclude that unsealing the records will actually infringe any interest of plaintiff's or inflict any harm on it.
>
> Similarly, plaintiff has provided no basis for a conclusion that keeping the records in question under seal **will prevent the**

> **public from learning anything it does not already know, or cannot find out. It should go without saying that there is no justification for sealing records that contain only facts already known or available to the public.**

Id. at 898 (emphasis added).

In addition to the foregoing, Intervenors ignore the unique context of the Intervenors in this case that compounds the problem of allowing intervention in a criminal matter. All intervenors are maintaining a civil suit against Merritt (the PP Entities who are prosecuting it and the Does who are supporting their employers' success by voluntarily submitting declarations on behalf of the Plaintiffs in *PPFA v. CMP*). As argued above, voluntariness is not the test for sealing, but rather the fact of public knowledge and availability is the key.

Intervenors' reliance on *Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589 (1978), is likewise misplaced. *Nixon* concerned a unique circumstance of access to "tapes obtained by subpoena over the opposition of a sitting President." 435 U.S. at 603. Yet Intervenors ignore the Supreme Court's ruling that, having custody of the tapes, the lower court has "a responsibility to exercise an informed discretion as to release of the tapes, with a **sensitive appreciation of the circumstances that led to their production**." *Id.* (emphasis added). As explained below, the case at bar involves no sensitive photos or videos of sex crimes or other prurient interests. This case also involves the Does' own publicity of their names with the underlying facts of this case, as well as their admission to that fact. In any event, *Nixon* was ultimately decided based on the Presidential Recordings Act, giving Congress control over the tapes' release. *Id*.

Likewise, for the same reasons that Section 293.5 does not apply (and that its standards cannot be arbitrarily borrowed,[7] Intervenors' reliance on *United States v. Monarch*, 2015 WL 6655170, *4 (A.F. Ct. Crim App. Oct. 14, 2015) also fails. Intervenors rely on this case for its reference to the "very nature of the charge," concerning surreptitious photographs of the victim's genitalia. (Opposition at 10). As Merritt previously demonstrated, (Petition at 60, 63), sex-crimes are in a class by themselves and "the very nature of the charge," cannot be borrowed here. Citing this unpublished, non-California case adds nothing.

SCSF properly ruled that neither the Attorney General nor Intervenors met the required burden of proof under Section 868.7. (**Exhibit 1**, Vol. 1, Exh-33, 34 (PX Order at 14-15)). Regardless, *People v. Watson*, 146 Cal. App. 3d 12 (Ct. App. 1983) holds that the **prosecutor's burden** (importantly, **not** a third party's burden), "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). Intervenors' cannot rely on their submissions of hearsay evidence and evidence taken from other civil cases and motion practice to which Merritt was not a party or participant.

Additionally, Intervenors repeatedly argue that Sections 1054 and 1054.7 apply, but emphatically, this dispute is **not a discovery dispute**

[7] Contrary to Intervenors' argument that SCSF did not apply Section 293.5 (Opposition at 11), SCSF arbitrarily borrowed the standard therein, as Merritt previously demonstrated. (Petition at 60, 63). SCSF's PX Order finds, "the balancing test of Penal Code section 293.5 constructive in considering whether to permit the use of the term Doe during the preliminary hearing. The Court finds the use of the term Doe at the preliminary hearing 'reasonably necessary to protect the privacy of the Does and will not unduly prejudice the prosecution or the defense.' (Cal. Pen. Code§ 293.5.)" (**Exhibit 1**, Vol. 1, Exh-32).

governed by these statutes. Merritt's right to a public hearing does not turn on an ability to obtain information from the alleged victims to learn of their community reputation. As previously noted, Merritt already has this information and no harm has come to the Does at Merritt's hands. There is no evidence in the record of any such incident or threat involving Merritt since she obtained this information **over two years** ago. (Petition at 60).

Instead, the Does' veracity here is being directly challenged based upon their decisions to voluntarily and very publicly discuss their involvement with the underlying facts of this case, and the possibility of perjury on the stand if they proceed anonymously without the need to be as careful to protect their personal and professional reputations in the public eye. Moreover, with their unique position of voluntarily testifying as their employer's witnesses in *PPFA v. CMP*, the need for a public Preliminary Hearing is all the more critical.

Again, this issue is not a discovery issue, but rather a preliminary hearing issue. Section 868.7 applies whether the moving party seeks full or partial closure.[8] Additionally, the Does' own voluntary exposure is critical

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[8] Intervenors' falsely argue that Merritt contended that SCSF blocked public viewing of the videos at the preliminary hearing. (Opposition at 6 (citing Petition at 16)). However, that is not what Merritt asserted. Instead, Merritt argued that,

"**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."

(Petition at 16).

to this analysis. Intervenors feebly argue that their involvement was not voluntary because they were deposed by Defendants in the civil matter. (Opposition at 11). Beyond their voluntarily submitted Declarations (Petition 51-55), critically the Does do not bother to explain why their association with the underlying facts of this case should be treated differently as between the civil and criminal cases. They cite to no stigma whatsoever that could attach to testifying as an alleged victim in a criminal case, as opposed to a civil case involving the same factual allegations.

Finally, Intervenors' argue in favor of SCSF's inherent power to control the courtroom, (Opposition at 11), but have not addressed what Merritt argued in her Petition (*id*. at 60-61): "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). SCSF's application of a statute or rule other than Section 868.7 contravenes statutory commands. Section 868.7 governs because by its very terms, it controls **any degree of closure of a preliminary hearing.**

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: July 12, 2019

/s/

Nicolai Cocis
(CA Bar # 204703)
Law Office of Nicolai Cocis
38975 Sky Canyon Drive, Suite 211
Murrieta, CA 92563
Tel: (951) 695-1400
Fax: (951) 698-5192
Email: nic@cocislaw.com

Horatio G. Mihet*
(FL Bar # 26581)
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Tel: (407) 875-1776
Fax: (407) 875-0770
hmihet@lc.org
* Admitted Pro Hac Vice
Attorneys for Defendant-Petitioner Sandra Susan Merritt

CERTIFICATION OF COMPLIANCE

I, Horatio Mihet, 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 **7,754 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: July 12, 2019

/s/
Horatio G. Mihet

CERTIFICATE OF SERVICE

Pursuant to Cal. Code Civ. P. § 1013(a) and § 1010.6, I hereby certify that, on **July 12, 2019**, I served the forgoing *Petitioner Merritt's Reply in Support of Petition For Writ of Mandate, Prohibition, or Other Appropriate Relief, And Stay Request* on the following parties/entities via the following methods:

Johnette Jauron,
State Bar No. 183714
Deputy Attorney General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Tel: (415) 703-1662
Johnette.Jauron@doj.ca.gov
Attorney for the State of California

Via Electronic Service

Steve Cooley,
State Bar No. 56789
Brentford J. Ferreira,
State Bar No. 113762
Steve Cooley & Associates
5318 E. 2nd Street, #399
Long Beach, CA 90803
Steve.Cooley@stevecooley.com
Tel: (562) 400-8578
Bjferreira47@hotmail.com
Attorneys for Defendant David Daleiden

Via Electronic Service

Matthew Donald Umhofer
Elizabeth J. Lee
SPERTUS, LANDES & UMHOFER, LLP
1990 South Bundy Drive, Suite 705
Los Angeles, California 90025
Matthew@spertuslaw.com
elizabeth@spertuslaw.com
Attorneys for Intervenors
Via Electronic Service

And a **SERVICE/COURTESY COPY** (excluding the exhibits attached thereto) was provided ***Via Fed Ex Overnight Delivery Service*** to**:**

The Honorable Samuel K. Feng, Supervising Judge
Superior Court of California, County of San Francisco, Dept. 22
850 Bryant Street

San Francisco, CA 94103
Tel. No. (415) 551-0322

And

San Francisco Superior Court
Attention: Judge Christopher C. Hite
Department 23, First Floor
Hall of Justice
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: **July 12, 2019**

/s/

Horatio G. Mihet*
(FL Bar # 26581)
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Tel: (407) 875-1776
Fax: (407) 875-0770
hmihet@lc.org
* Admitted Pro Hac Vice
Attorney for Defendant-Petitioner