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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff. v. ARMANDO CRUZ, Defendant.	Case No.: BF181682A **BRIEF IN OPPOSITION TO DEFENSE MOTION TO CLOSE PRELIMINARY HEARING AND ALL PRETRIAL HEARINGS** Date: October 22, 2020 Time: 9 a.m. Dept.: 14

On behalf of itself and the public, nonparty public interest organization First Amendment Coalition ("FAC") [1] respectfully submits the following memorandum in opposition to Defendant's motion to close the preliminary hearing and all pretrial hearings.

[1] The First Amendment Coalition ("FAC") is a nonprofit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC's activities include free legal consultations on First Amendment issues, educational programs, legislative oversight of bills in California affecting access to government and free speech, and public advocacy, including extensive litigation and appellate work. FAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California State Constitution, enacted by voters in 2004. FAC's members are news organizations, law firms,

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Before the public and the press can be shut out of a court proceeding—and in particular a preliminary hearing in a criminal case—the First Amendment requires the party advocating secrecy to clear a high hurdle: It must affirmatively show that, absent closure, there is a substantial probability—not just a reasonable likelihood—that a defendant's fair-trial interests will be prejudiced. Press-Enterprise v. Superior Court, 478 U.S. 1, 9 (1986) (Press-Enterprise II). It must do so by offering admissible evidence. See Press-Enterprise v. Superior Court, 464 U.S. 501, 513 (1984) (Press-Enterprise I) (trial court's failure to articulate specific findings rendered closure improper).

Yet in asking the Court for sweeping closures of all pretrial hearings, including the preliminary hearing, Defendant Armando Cruz ("Defendant") fails to show even a reasonable likelihood that his fair-trial rights will be prejudiced, much less a substantial probability. Indeed, Defendant offers no admissible evidence of prejudice whatsoever, instead simply cataloguing press hits as if any media attention were enough to deny the First Amendment right of access. It is not. As the United States and California Supreme Courts have made clear, even an "unusual amount of pretrial publicity" does not automatically compromise a defendant's fair-trial rights, especially where, as here, there is a large and diverse jury pool. See People v. Peterson, No. S132449, 2020 WL 4930269, at *1 (Cal. Aug. 24, 2020) (affirming Scott Peterson's convictions in highly publicized case in county smaller than Kern).

On behalf of itself and on behalf of the public, the First Amendment Coalition ("FAC") seeks to enforce the important constitutional right of access to pretrial criminal proceedings. See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1217-18 (1999) (public and press have standing to challenge any limits on their courtroom access). Respectfully, FAC requests

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libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary citizens.

that the Court deny Defendant's motion to close the preliminary hearing and all pretrial hearings, and that it provide meaningful access[2] to all substantive proceedings in this case.

II. LEGAL ANALYSIS

A. The First Amendment Coalition Has Standing to Challenge the Defense Motion to Close Proceedings.

Courts have long recognized that the public and press have standing to challenge any limits on their courtroom access, and that they must be provided notice and an opportunity to be heard even before such orders are issued. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n. 25 (1982) ("representatives of the press and the general public must be given an opportunity to be heard on the question of their exclusion"); NBC Subsidiary, 20 Cal. 4th 1178, 1217-18 (1999) ("before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that" closure is appropriate under a stringent test); People v. Martinez, 226 Cal. App. 4th 759, 765-68 (2014) (modifying probation condition limiting defendant's First Amendment right of access to the courts); Saunders v. Superior Court, 12 Cal. App. 5th Supp. 1, 9 n.8, (2017) (newspaper had standing to "insert itself" in criminal case demanding the release of seized records based on "the First Amendment, the common law, and the unique position of the press to assert a right of public access to court proceedings.")

"When a motion seeking closure is made in a written filing, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination thereon." NBC Subsidiary, 20 Cal 4th at 1217. Here, while the public docket listed a "motion" on calendar for September 2, 2020, at 8:30 a.m., neither the nature nor the substance of the motion was ascertainable therefrom.

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[2] In light of the ongoing COVID-19 pandemic, FAC requests that the Court allow physical access to the extent possible under public health guidelines, as well as remote access, i.e., audio or video streaming, so that the public may safely exercise its right of access to observe proceedings. See ACLU et al. v. Harber-Pickens et al., Case No. 1:20-cv-00889-DAD-JLT (C.D. Cal., filed June 6, 2020) (lawsuit by ACLU, FAC, and other plaintiffs against Kern County Superior Court under, inter alia, 42 U.S.C. § 1983, seeking "in-person access consistent with social distancing and public health requirements and a viable alternative mechanism for the public to remotely access proceedings that would otherwise be public under the law"). The parties are presently in discussions to resolve the matter, including by way of instituting audio and/or video access to Kern County Superior Court proceedings.

As soon as FAC learned of the effort to close the courtroom, it prepared and filed this brief in opposition.

B. Defendant's Conclusory Assertion That Any Publicity Is Prejudicial Is Insufficient to Overcome the First Amendment Right of Access.

1. Defendant's Pretrial Proceedings Are Presumed Open.

As a threshold matter, the California Constitution expressly recognizes the public's "right of access to information concerning the conduct of people's business" and requires the narrow construction of any limits thereto. Cal. Const. art. I, § 3(b). Under the common law, pretrial proceedings are presumed open, as the "right of access applies to preliminary hearings as conducted in California." Press-Enterprise II, 478 U.S. at 10. Moreover, the party advocating closure must provide evidence to support its argument that closure is necessary. See Press-Enterprise I, 464 U.S. at 513. The court must base its closure order on "specific, on-the-record findings" of fact. Press-Enterprise II, 478 U.S. at 13-14 (emphasis added). "[T]he court may not base its decision on conclusory assertions alone, but must make specific factual findings." Washington Post Co. v. Soussoudis, 807 F.2d 383, 392-93 & n.9 (4th Cir. 1986). Accord Oregonian Publ. Co. v. District Court, 920 F.2d 1462, 1466 (9th Cir. 1990).

2. The Motion Must Fail Because Defendant Presents No Evidence That, Absent Closure, There Is a Substantial Probability His Fair-Trial Interests Will Be Prejudiced.

Generalized fears of negative publicity are insufficient to overcome the public's right of access, especially in Kern County where there is a relatively large jury pool. In Press-Enterprise II, the United States Supreme Court made clear that "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant [of the right to a fair trial]." 478 U.S. at 15. Instead, the party advocating secrecy must affirmatively show that, absent closure, there is a substantial probability that a defendant's fair-trial interests will be prejudiced. Id. at 6. "Substantial probability" is a high hurdle: it is not sufficient to show simply "a reasonable likelihood" of prejudice. Id.

Here, Defendant comes nowhere near clearing this hurdle. In the present motion, defense counsel vaguely chronicle the media attention this case has received: "television and newspaper

stories...detail[ing] the police investigation and other matters pertaining to this incident"; televised clips that showed Defendant "wearing what was dubbed 'anti-suicide smock'"; "front page coverage" on one local news station's website; and "hundreds" of social media posts. Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Close Preliminary Hearing, All Pretrial Hearings, and for Protective Order ("Def.'s Memo") at 7. Defendant's position, in other words, is that this case is a matter of public concern, so it should be adjudicated in private. Not only is that premise constitutionally infirm, but Defendant's purported evidentiary showing is also problematic: It is 1) disputed by the People,[3] and 2) inadmissible on hearsay and authentication grounds in the first instance. See Cal. Evid. Code §§ 1200, 1400.

The notion that publicity is inherently prejudicial, and thus justifies closing, is contrary to well-established precedent. For example, despite widespread publicity surrounding the criminal cases of Scott Peterson, John DeLorean, Sirhan Sirhan, Charles Manson, and Watergate, courts have repeatedly rejected criminal defendants' allegations that their convictions must be reversed because juries were tainted by prejudicial publicity.[4] Similarly, in Press-Enterprise v. Superior Court, 22 Cal. App. 4th 498, 503 (1994) ("Press-Enterprise III"), in overturning a sealing of just three percent of a grand jury transcript, the court explained that even accepting the trial court's finding that prospective jurors reading newspaper accounts of the grand jury transcripts "are likely

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[3] See Declaration of Bakersfield Police Sergeant Robert Pair in Support of the People's Response to Defendant's Motion to Close Preliminary Hearing, All Pretrial Hearings, and for Protective Order (contradicting allegation in Def.'s Memo that police called this case one of the worst Bakersfield Police have ever seen).

[4] See, e.g., People v. Peterson, No. S132449, 2020 WL 4930269, at *1 (Cal. Aug. 24, 2020) (rejecting Peterson's claim that because of the "unusual amount of pretrial publicity that surrounded the case," he received an unfair trial as to guilt, and thus affirming his convictions for murder); CBS v. United States Dist. Court, 729 F.2d 1174 (9th Cir. 1983) (in DeLorean criminal trial, showing of extensive media coverage was inadequate to establish the requisite level of prejudice); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (court found that despite the reams of newsprint and enormous number of hours of viewing time devoted to coverage of the Watergate affair, publicity had made little impression on most citizens); People v. Sirhan, 7 Cal. 3d 710 (1972) (finding that Robert Kennedy's assassin had been tried by an impartial jury despite numerous newspaper articles and broadcasts reporting he would probably plead guilty); overruled on other grounds, Hawkins v. Superior Court, 22 Cal. 3d 584 (1978); People v. Manson, 61 Cal. App. 3d 102 (1977) (rejecting defendants' prejudicial publicity claims in what was one of the most massively publicized cases in California history).

to remember these reports and may even develop a preconception" concerning defendant's "guilt or innocence," it could not "conclude that release of this material would make it difficult to find 12 jurors capable of acting impartially."

The possibility that "publicity might prejudice one directly exposed to it" is not enough to conduct the court's business in secret. Id. at 504 (internal quotations omitted). The publicity must be so extensive—and the jury pool, so limited—that it "threaten[s] to prejudice the entire community so that twelve unbiased jurors cannot be found." Id. Indeed, the California Supreme Court held just last month that even in a case described as "the most publicized in American history"—and in a county smaller than Kern—the parties had more than enough "avowedly impartial jurors to choose from." People v. Peterson, No. S132449, 2020 WL 4930269, at *17 (Cal. Aug. 24, 2020) (finding Scott Peterson's claim that he was denied a fair trial without merit, even where 43 percent of prospective jurors had formed a preliminary opinion that he was guilty). The Court reasoned: "When, as here, there is a 'large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empanelled (sic) is hard to sustain.' " Id.

Here, Kern County is among the state's more sizeable counties—larger and more diverse, in any event, than San Mateo County, where Peterson was tried. Moreover, Defendant offers no evidence that, absent closure of the pretrial proceedings, the entire County will be biased. In fact, despite the "great attention" on the case, Defendant does not cite a single instance of misinformation or inadmissible evidence tainting the jury pool. See generally Def.'s Memo. In any case, the mere possibility that inadmissible evidence might surface during a preliminary hearing, or a suppression hearing for that matter, does not justify the blanket closure of pretrial hearings. See Waller v. Georgia, 467 U.S. 39, 48 (1984) ("Under Press–Enterprise, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."). Indeed, the public interest in suppression hearings is particularly strong; in many cases, such hearings are "the only trial, because the defendants thereafter plead[ ] guilty pursuant to a plea bargain." Id. at 47. Moreover, the rationale that proceedings should be closed to avoid jury tainting is "attenuated" by

instructions "not to discuss the case or read or view press accounts of the matter"—a remedy available to Defendant here as well. Id. at 47 n.6. Because Defendant has not shown there is a substantial probability that, absent closure, his fair-trial rights will be prejudiced, the present motion cannot succeed.

3. Even If There Were a Substantial Probability of Prejudice, the Motion Would Also Fail Because Reasonable Alternatives to Closure Exist.

In addition to a substantial probability of prejudice, Defendant must show that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Press-Enterprise II, 478 U.S. at 14 (citing Press-Enterprise I, 464 U.S. at 510; Richmond Newspapers v. Virginia, 448 U.S. 555, 581 (1980)). Reasonable alternatives include "careful voir dire of the jurors" and "frequent and specific cautionary admonitions and jury instructions"; these measures, "not closure, constitute the accepted, presumptively adequate, and plainly less restrictive means of dealing with the threat of jury contamination." NBC Subsidiary, 20 Cal. at 1221, 1224–25. Under extreme circumstances, courts may also consider a change of venue. See People v. Famalaro, 52 Cal. 4th 1, 21 (2011); Cal. Rule of Ct. 4.151.

Here, voir dire and jury instructions will adequately protect Defendant's fair-trial rights, especially in a county as large and diverse as Kern. In addition, Defendant's principal concern as to pretrial publicity was "the media's spin on commentary by police," which he identified as "the main source of the problem." Def.'s Memo at 11. The Court's protective order directly addresses that concern by prohibiting all discussion of the case. In sum, there is no interest here that has not been or cannot be protected through alternative means.

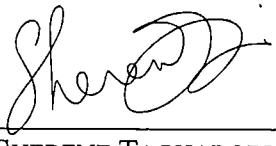
III. CONCLUSION

Defendant's only ground for advocating for the extraordinary remedy of closing all pretrial hearings is that prejudicial evidence might be publicized before trial. This concern, no different than in any other case, has been routinely rejected by courts as a basis to justify closure. The United States Supreme Court has been unequivocal, to be sure: "[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976) (emphasis added).

Because Defendant's submission comes nowhere near demonstrating that this case presents exceptional circumstances—circumstances not present in cases far more publicized than this one, including the trials of O.J. Simpson, the Manson family, and Scott Peterson—his closure request should be denied. For these reasons, FAC respectfully requests that the Court deny Defendant's motion to close the preliminary hearing and all pretrial hearings and instead, allow physical access to the extent possible under COVID-19 public health guidelines as well as alternative access, e.g., audio or video streaming, for the public and press to safely observe proceedings.

DATED: September 25, 2020

FIRST AMENDMENT COALITION

By: 

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PROOF OF SERVICE

I, Sherene Tagharobi, declare:

I am a citizen of the United States, I am over the age of eighteen, and I am not a party to this action.

I served a copy of the attached **BRIEF IN OPPOSITION TO DEFENSE MOTION TO CLOSE PRELIMINARY HEARING AND ALL PRETRIAL HEARINGS** in the case of People v. Armando Cruz, Case. No. **BF181682A** on the Kern County District Attorney and Defendant's counsel by placing a copy of the above-described brief in a sealed postage paid envelope addressed to the following persons, and depositing the envelope with the United States Postal Service:

- Kern County District Attorney's Office
  1215 Truxtun Ave., Basement
  Bakersfield, CA 93301

- Law Office of Tomas Requejo
  Tomas Requejo
  16177 Whittier Blvd.
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Los Angeles, CA on September 25, 2020.

Sherene Tagharobi