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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

APR 11 2005

GARY M. BLAIR, Executive Officer

By *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

8 SUPERIOR COURT, STATE OF CALIFORNIA
9 FOR THE COUNTY OF SANTA BARBARA

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 vs.

14 MICHAEL JOE JACKSON,

15 Defendant.

Case No.: 1133603

**ACCESS PROPONENTS' NOTICE OF
MOTION AND MOTION REQUESTING
CLARIFICATION OF MEDIA DECORUM
ORDER; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF
PETER SHAPLEN**

16 Date: ~~April 25, 2005~~ TBA
17 Time: Not set
18 Place: Department SM-8,
Judge Rodney S. Melville

[VIA FACSIMILE]


19 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that at 8:30 a.m. on ~~April 25, 2005~~, or as soon before that time as
21 the matter may be heard before the above-entitled Court, located at 312-C East Cook Street, Santa
22 Maria, California 93456-5369, NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network
23 L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; The Associated Press; *Los Angeles Times*; The
24 New York Times Company; and *USA Today* (collectively, the "Access Proponents") will, and hereby
25 do, move this Court to clarify the scope of its Decorum Order Regarding Santa Maria Court
26 Complex. This Motion is made pursuant to the First Amendment of the United States Constitution
27 and Article I, section 2 of the California Constitution.
28

1 This Motion is based upon this Notice, the attached Memorandum of Points and Authorities;
2 the attached Declaration of Peter Shaplen; all pleadings, records and papers on file herein; all matters
3 of which the Court may properly take judicial notice; and upon such further argument and evidence
4 as may be presented at the hearing on this Motion.

5 DATED: April 11, 2005

6 GIBSON, DUNN & CRUTCHER LLP
7 Theodore J. Boutros, Jr.
8 Michael H. Dore

9 By: 
10 Theodore J. Boutros, Jr.

11 Attorneys for NBC Universal, Inc.; CBS Broadcasting
12 Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News
13 Network LP, LLLP; The Associated Press; *Los Angeles*
14 *Times*; The New York Times Company; and *USA Today*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I
3 INTRODUCTION

4 There is a strong tradition in this country of journalists moving freely around public fora like
5 the areas surrounding courthouses and talking with fellow citizens to gather news about the criminal
6 justice system and report it to the public. To ensure protection of this tradition, the Access
7 Proponents, a group of news organizations,¹ respectfully move this Court pursuant to the
8 First Amendment to the United States Constitution and Article I, section 2 of the California
9 Constitution to clarify the scope of its Decorum Order Regarding Santa Maria Court Complex
10 ("Media Decorum Order" or "Order"), which is being applied to the Access Proponents in an
11 arbitrary and unjustified manner to infringe on basic free speech rights. The Media Decorum Order,
12 filed on March 26, 2004, imposes various limitations on journalists "[i]n the interests of justice, for
13 the safety of individuals attending the proceedings of the [Jackson] case, and to preserve the dignity
14 of the court and the integrity of the proceedings." Order at 1, ¶ 3. But the Order is being applied in
15 an overbroad, unpredictable, and arbitrary manner that is not necessary to serve these interests and at
16 the same time seriously infringes on free speech rights.

17 For example, members of the Santa Barbara County Sheriff's Department have invoked the
18 Media Decorum Order's provision that "Interviews and/or press conference shall be conducted in
19 designated areas only" to threaten journalists who have merely said "Hello, how's he doing?"
20 [about an ill member of defense counsel] or in several cases said nothing at all. Declaration of Peter
21 Shaplen ("Shaplen Decl."), ¶¶ 3 -5. Similarly, journalists' mere interview requests and casual
22 conversations with potential sources and fellow citizens, fundamental aspects of free speech and
23 press and association, have been effectively barred by deputies purporting to enforce the Decorum
24 Order. Neither the dignity of the proceedings nor public safety demand any such restrictions on

25
26 ¹ NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News
27 Network LP, LLLP; The Associated Press; Los Angeles Times; The New York Times Company,
28 and USA Today.

1 general civility and newsgathering, and the plain meaning of "interview" renders such an overbroad
2 interpretation patently unreasonable. The First Amendment and Article I, section 2 of the California
3 Constitution will not tolerate this approach, which threatens contempt and/or a fine for quintessential
4 protected speech, and the Court could not have intended it.

5 Access Proponents believe that the Court's limitation on where "interviews" may be
6 conducted was intended as a public safety measure to prevent sustained congestion, with camera
7 equipment and microphone wires, in areas of the courthouse that could block reasonable access to the
8 facility. But the broad, elastic, and general meaning that has been imposed on journalists essentially
9 serves as a proxy for barring them from a wide swath of speech. While trial spectators, counsel, and
10 county personnel themselves are permitted to have conversations in this quintessential public forum
11 without fear of official sanction, journalists are being subjected to different rules restricting their
12 speech. Indeed, journalists traditionally gather news through informal conversations that stop far
13 short of anything that could reasonably be viewed as an "interview," yet that kind of speech has been
14 deemed impermissible on an ad hoc and subjective basis by law enforcement officials.

15 Access Proponents, therefore, request that the Court clarify that the Media Decorum Order to
16 ensure that it is not applied in a manner that defeats fundamental speech and press rights guaranteed
17 by the First Amendment and California Constitution. "[I]f arbitrary and discriminatory enforcement
18 is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City*
19 *of Rockford*, 408 U.S. 104, 108-09 (1972).

20 II 21 ARGUMENT

22 The courthouse, and its adjacent public environs, has long been recognized as a classic public
23 forum, and "[i]f government property has by law or tradition been given status as a public forum, a
24 state's right to limit protected expressive activity is sharply circumscribed." *Telemundo of Los*
25 *Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102 (C.D. Cal. 2003) (citing *Capitol Square*
26 *Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995)). Access Proponents recognize and
27 appreciate the significant logistical burdens that this type of case can impose upon the Court and its
28 staff, and that some limited, narrowly tailored, content-neutral "time, place, or manner" guidelines

1 concerning newsgathering in and around the courthouse may be permissible to protect the free flow
2 of pedestrian traffic, orderly proceedings and the like. *See, e.g., Telemundo*, 283 F. Supp. 2d at 1102
3 (“The government may impose reasonable restrictions on the time, place, or manner of protected
4 speech, *provided* the restrictions are content-neutral, that they are narrowly tailored to serve a
5 significant governmental interest, *and that they leave open ample alternative channels for*
6 *communication of the information.*”) (emphasis added) (citing *Ward v. Rock Against Racism*, 491
7 U.S. 781, 791 (1989)). But the restrictions on journalists’ protected speech being imposed by some
8 county officials go well beyond any legitimate governmental interest in maintaining orderly
9 proceedings or protecting significant, compelling interests.

10 Indeed, some county officials’ interpretation of the Media Decorum Order, specifically the
11 term “interview,” is substantially overbroad and unpredictable, and sweeps in protected activity that
12 has no relation to any such interest. *See, e.g., Dorfman v. Melszner*, 430 F.2d 558, 561-62 (7th Cir.
13 1970) (“The achievement of a legitimate governmental object cannot be pursued by means that
14 broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”) (internal
15 quotation and citation omitted). Deputies tightly restrict journalists from even speaking to others
16 unless they are in media “pens” far from the courthouse entrance. Journalists have been threatened
17 with official sanction if they so much as give a “thumbs up” sign outside of designated interview
18 areas or if they walk across the courthouse plaza. Shaplen Decl., ¶ 5. Even a silent glance at trial
19 counsel has drawn a warning from county personnel. *Id.*, ¶ 6 (describing incident in which a
20 journalist, who paused and only looked at one of defense counsel, was warned by a sheriff’s deputy
21 “Don’t even think about it. I know what you are thinking.”). But informal conversations with
22 potential sources are not only a fundamental aspect of the newsgathering process but also integral to
23 free speech rights that belong to every citizen, including journalists. Other members of the public are
24 not barred from engaging in such informal conversations, and the patently overbroad definition of
25 “interview” that is being applied thus prevents speech that is generally innocuous but often also of
26 fundamental importance.

1 The plain meaning of "interview," especially in the context of Paragraph 3—which also
2 applies to "press conferences"—seems clear. Yet county officials have used their wide discretion to
3 interpret the term in a manner that sweeps in all types of speech, even when there is no threat to
4 public safety. These ad hoc, subjective, and patently overbroad determinations are backed up by
5 serious threatened penalties. Simply by trying to do their jobs, journalists risk being held in contempt
6 and/or being subject to a monetary sanction. Order. at 3. Although the Access Proponents initially
7 thought the Order was sufficiently precise, they respectfully suggest that it is now necessary to clarify
8 the plain meaning of "interview" and the basis for the Court's desire to restrict these interviews to
9 specific areas of Court property. To the extent the county officials use the Order as authority for their
10 broad determinations of what is a proscribed "interview," and thus to stifle normal expressive activity
11 around the courthouse, the Order is unconstitutionally vague and ambiguous as it is being applied.

12 Under the current framework, journalists simply have no idea how the standards of Paragraph
13 3 will be used against them because the interpretation varies based on the personal predilections of the
14 officer who is granted basically unfettered and standardless authority to enforce them. See Shaplen
15 Decl., ¶ 2-6; see also *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality) ("It is established
16 that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless
17 that it leaves the public uncertain as to the conduct it prohibits.") (quoting *Giaccio v. Pennsylvania*,
18 382 U.S. 399, 402-03 (1966)); *People v. Castenada*, 23 Cal. 4th 743, 751 (2000) (vagueness may
19 invalidate a law for either of two independent reasons: "First, it may fail to provide the kind of notice
20 that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and
21 even encourage arbitrary and discriminatory enforcement.") (quoting *Morales*, 527 U.S. at 56
22 (plurality)).

23 Especially where First Amendment freedoms are at issue, the dangers posed by vague laws
24 threaten some of our most fundamental principles:

25 It is a basic principle of due process that an enactment is void for vagueness if its
26 prohibitions are not clearly defined. Vague laws offend several important values.
27 First, because we assume that man is free to steer between lawful and unlawful
28 conduct, we insist that laws give the person of ordinary intelligence a reasonable
opportunity to know what is prohibited, so that he may act accordingly. Vague laws
may trap the innocent by not providing fair warning. Second, if arbitrary and

1 discriminatory enforcement is to be prevented, laws must provide explicit standards
2 for those who apply them. A vague law impermissibly delegates basic policy matters
3 to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with
4 the attendant dangers of arbitrary and discriminatory application. Third, but related,
5 where a vague statute 'abut[s] upon sensitive areas of basic First Amendment
6 freedoms,' it "operates to inhibit the exercise of [those] freedoms."

7 *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); see also *Kolender v. Lawson*, 461 U.S.
8 352, 357-58 (1983) (invalidating law that failed to "establish minimal guidelines to govern law
9 enforcement" and conferred upon "policemen, prosecutors, and juries" "a standardless sweep . . . to
10 pursue their personal predilections").

11 Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than
12 if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (quoting
13 *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Here, where journalists are threatened with punishment
14 for contempt if they engage in even casual greetings and basic conversation that characterizes a civil
15 society and are fundamental to newsgathering, the only way to prevent official sanction is to be
16 silent. This chilling effect, arising from the vagueness of the Order as applied, is all the more
17 damaging because members of the press act as "surrogates for the public," *Richmond Newspapers,*
18 *Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (plurality), and are regarded "as the handmaiden of
19 effective judicial administration, especially in the criminal field," *Nebraska Press Ass'n v. Stuart*,
20 427 U.S. 539, 559-60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)); see also
21 *Grayned*, 408 U.S. at 109 (noting that "where a vague statute 'abut[s] upon sensitive areas of basic
22 First Amendment freedoms,' it "operates to inhibit the exercise of [those] freedoms") (alterations in
23 original).

24 The Media Decorum Order thus has led to vagueness problems because individual officers are
25 left to decide on a moment-to-moment basis what constitutes an "interview" and then to issue orders
26 to cease speech based on their own ad hoc decisions. "Because an officer may issue an order only
27 after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will
28 protect the [speaker from] being ordered to disperse. Such an order cannot retroactively give adequate
warning of the boundary between the permissible and the impermissible applications of the law."
Morales, 527 U.S. at 59 (plurality). The Order "does not provide sufficiently specific limits on the

1 enforcement discretion of the police to meet constitutional standards for definiteness and clarity. *Id.*
2 at 64 (plurality) (quotations omitted). In short, it "affords too much discretion to the police and too
3 little notice to citizens who wish to use the public streets." *Id.* Greater clarity therefore is needed to
4 ensure that journalists and county personnel alike will have a better understanding of the limitations
5 on speech and conduct the Court seeks to impose. *See id.* at 56 (plurality) (fair notice principle
6 "provide[s] the kind of notice that will enable ordinary people to understand what conduct [a law]
7 prohibits").

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III.
CONCLUSION

For the foregoing reasons, this Court should grant Access Proponents' motion and clarify the scope of its Media Decorum Order to ensure that journalists' ability to speak and cover this trial is adequately protected in a manner that comports with the First Amendment and the California Constitution.

DATED: April 11, 2005

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutros, Jr.
Michael H. Dore

By: 
Theodore J. Boutros, Jr.

Attorneys for NBC Universal, Inc.; CBS
Broadcasting Inc.; Fox News Network
L.L.C.; ABC, Inc.; Cable News Network
LP, LLLP; The Associated Press;
Los Angeles Times; The New York Times
Company; and *USA Today*

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DECLARATION OF PETER SHAPLEN

I, PETER SHAPLEN, hereby declare and state that:

I have personal knowledge of all facts herein stated, except where stated on information and belief. If called as a witness, I could and would testify competently to the following:

1. I am Media Pool Coordinator for various media organizations covering the criminal trial of Michael Jackson. In that capacity I act as a liaison between journalists, and their employers, and county and court personnel. In doing so, I facilitate news coverage of these proceedings.
2. As the trial has progressed, I have witnessed or have been informed of the Court's Decorum Order Regarding Santa Maria Court Complex ("Order") being enforced more aggressively to prevent casual conversation involving journalists and otherwise restrict the speech and conduct of journalists trying to gather news related to the court proceedings. Various examples include:
 3. A sheriff's deputy determining that a local reporter's greeting "Hello, how is he doing?" to a Santa Maria fireman was an "interview" under the Court's Decorum Order Regarding Santa Maria Court Complex ("Order"). The reporter was taken aside, warned, and was subsequently rebuked the following day.
 4. A sheriff's deputy determining that a producer waiting outside the courthouse door who wanted to ask spectators if they would agree to an interview off court grounds was in violation of the Court's Order because it was considered to be an interview.
 5. A legal analyst from one network was reprimanded for giving a "thumbs up" sign to his producer as he waited in line to enter the courthouse and warned that any hand signals violated the Decorum Order and were not permitted.
 6. One journalist, who paused and only looked at one of defense counsel as they passed one another in a public area, was warned by a sheriff's deputy "Don't even think

about it. I know what you are thinking," apparently because the deputy thought there might be an "interview."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16 day of April, 2005, at SANTA MATEVA, California.


Peter Shaplen

Declarant

1 **CERTIFICATE OF SERVICE**

2 **BY FAX AND REGULAR MAIL**

3 I, Jess Fernandez, hereby certify as follows:

4 I am employed in the County of Los Angeles, State of California; I am over the age of
5 eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher
6 LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am
7 employed in the office of Michael H. Dore, a member of the bar of this Court, and on April 11, 2005,
8 I served the following:

9 **ACCESS PROPONENTS' NOTICE OF MOTION AND MOTION REQUESTING**
10 **CLARIFICATION OF MEDIA DECORUM ORDER; MEMORANDUM OF POINTS AND**
11 **AUTHORITIES; DECLARATION OF PETER SHAPLEN**

12 on the interested parties in this action, by the following means of service:

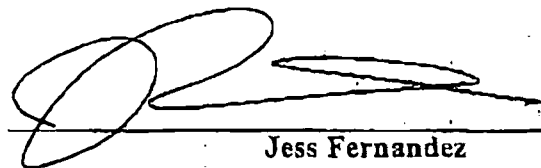
13 **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-
14 mentioned date. I am familiar with the firm's practice of collection and processing
15 correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the
ordinary course of business. I am aware that on motion of party served, service is presumed
invalid if postal cancellation date or postage meter date is more than one day after date of deposit
for mailing in affidavit.

16 Thomas W. Sneddon 17 District Attorney 18 Santa Barbara County 1105 Santa Barbara Street 19 Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
20 Thomas A. Mesereau, Jr. 21 Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor 22 Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
24 Robert Sanger 25 Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C 26 Santa Barbara, CA 93101 27 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

1 **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to be
2 transmitted by facsimile machine, to the parties and numbers indicated below, pursuant to
3 Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported
4 by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record
of the transmission, a copy of which is attached to the original of this declaration.

5 6 7 8 9 10 11 12	Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
13 14 15 16	Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
	Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93101 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

17 I certify under penalty of perjury under the laws of the State of California that the foregoing is
18 true and correct, that the foregoing document(s), and all copies made from same, were printed on
19 recycled paper, and that this Certificate of Service was executed by me on April 11, 2005, at
20 Los Angeles, California.

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Jess Fernandez

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