IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
	)	**INDICTMENT NO: CR-2000433**
	)	
v.	)	
	)	
TRAVIS MCMICHAEL,	)	
GREG MCMICHAEL,	)	
	)	
Defendants.	)	

Travis and Greg McMichaels' Response to the State's Request for Gag Order

The Court should not grant the State's request for extrajudicial restraint on speech. In support thereof, the defendants show the following:

The death of Ahmaud Arbery has been the subject of overwhelming news and social media coverage since it tragically occurred in February 2020. The sources of information (true and false) for the coverage has been, almost exclusively, legal representatives of the family of Mr. Arbery, the Arbery family members themselves, and commentators in the media with almost no knowledge of the facts of the case. And almost all of the coverage has been slanted in ways consistent with the State's position - that Mr. Arbery, a black man and a man of good character, was simply out for an innocent jog when the defendants, Southern, white men hunted him down and shot him dead – vigilante-style because they were racist. Most shocking, even chief executives of the State of Georgia and the United States, who have sworn to uphold the Rule of Law and the United States Constitution,

have publicly condemned the defendants as guilty, knowing nothing about the case or the law.

A small, representative example of the extrajudicial statements commonly found in news coverage about the case:

Lawyers for the Arbery family:

> "Mr. Arbery had not committed any crime and there was no reason for these men to believe they had the right to stop him with weapons or to use deadly force in the furtherance of their unlawful attempted stop. This is murder."
>
> "The McMichaels acted as judge, jury, and executioner."

Arbery family:

> Ahmaud was "just jogging," "minding his own business."
>
> Ahmaud "committed no crime."
>
> It was a "public lynching."
>
> Ahmaud would never "hurt anyone."

A Cobb County Prosecutor:

> "Clearly, the person [sic] that started this were Greg and Travis McMichael. When they make the choice that they're gonna grab guns and take the law into their own hands that's when this crime starts."
>
> "There's absolutely no legal right to stop a person merely on a hunch or gut feeling, which is exactly what Greg McMichael said he had."
>
> "Any single shot was too much."
>
> "Merely pointing the shot gun was too much. Getting in a pickup truck and chasing Ahmaud Arbery down was too much. This whole case is too much."

Governor Kemp:

> "Mr. Arbery was the victim of a vigilante-style of violence that has no place in our state and some[1] tried to justify the actions of his killers by claiming that they had the protection of an antiquated law that is ripe for abuse."

This collective, concerted, and choreographed reporting by the combination of these individuals and representatives has produced over three thousand articles in the media (print, TV, and internet), many of which cover the before, during, and aftermath of pretrial hearings and the live press conferences that follow. These statements have been played and replayed in media outlets nationally, across the state of Georgia, across northern Florida, and in Glynn County, Georgia. (see attached "Exhibit A").

Additionally, the Arbery family and their lawyers, have not only commented on the case from its inception about facts that will be admitted into evidence at trial, they have also commented about facts that will not be admitted into evidence. For example, the Arbery family members have repeatedly hailed the "good character" of Mr. Arbery: that Mr. Arbery was a great person, that he was harmless and would not hurt others, that he was not a thief or responsible for any thefts in the area, that his intentions of being in the house under construction at 220 Satilla Drive was to study electrical / plumbing design or to get water to satisfy his thirst, and that his being in the Satilla Shores neighborhood was not related to criminal activity, but to run for exercise and health as he did in that area for years. These "facts," though rebuttable, are fed to the media by persons with a personal

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[1] By speaking caustically about "some," the Governor is referring to none other than the constitutionally guaranteed criminal defense attorneys who are seeking to uphold the Constitutions of Georgia and the United States.

and financial interest in the outcome, and are gobbled up and regurgitated by a local and national media hungry for more quotes.

Most recently on the AJC's podcast, The Breakdown, released September 20, 2021, Ahmuad Arbery's mother and father and both of their attorneys spoke about the case. They proclaimed victory for the Court's decision to keep out Mr. Arbery's criminal and violent past and called the McMichaels "murderers" and "killers." One representative even applauded the citizenry for how the "court of public opinion influenced the court of law" – suggesting the Court ruled against the defense due to its allegiance to the state and their "side." Another representative of the Arbery family hailed that there was conclusive proof of corruption between the McMichaels and the local DA's offices, taking the opportunity to begin to influence future criminal matters not before this court.[2]

Neither the Arbery family nor their attorneys have used any qualifying language such as "alleged," "suspected" or "purported," when referring to the McMichaels or their motive / intent for their actions that day. Rather, all of these statements have been offered as the undisputed "truth" of the case.

The extrajudicial comments by those with an interest in the prosecution of this case prejudging the guilt of the accused have saturated every household with a television, computer, or mailbox, thus obliterating the presumption of innocence.

[2] https://www.ajc.com/news/breakdown/breakdown-ep-11-a-fourth-defendant-is-indicted/TJ775QJYWZALFJHFVRRZADT75A/

Counsel for these defendants have done what is expected of them to attempt to balance the prejudgment of their clients and the offensive erosion of their rights, and to realign the scales of justice to ensure a fair trial. The Constitution, the law, and the Rules of the State Bar expect and allow this.

The state accuses the defense of making improper comments, as if the defense has done so in a complete vacuum. A defendant's right to be presumed innocent and to have a fair and impartial jury are more than mere suggestions. Defense counsel's one statement complained of by the state, when compared to innumerable articles slanted towards the guilt of the McMichaels, hardly endangers the hope for a fair and impartial jury. In fact, such statements, might actually inform the potential jurors that there are actually two sides to this story.

Rule 3.6(c) of the State Bar Handbook of Georgia grants the duty and responsibility to lawyers whose clients have been subjected to substantial undue prejudice to rebalance the scales of justice with statements about the case. The rule states:

> [A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

GA R BAR Rule 4-102, RPC Rule 3.6.

The state is asking for the court to order a "prior restraint[3]" on the lawyers for the defendants and the prosecution. The state's proposed request does not ask the court to

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[3] The term prior restraint is used to describe "administrative and judicial orders forbidding certain communication when issued in advance of the time that

limit any extrajudicial statements by third parties, including the Arbery family or their attorneys.

The state's request for restraint is overbroad in that it asks for:

1. No comment or argument about the facts or evidence;
2. No statements or commentary about judicial proceedings, prior or future; and
3. No comment on court rulings or orders.

First, the statements complained of were consistent with what counsel had said in court, on the record (which was played live for the residents of Glynn County (and the nation) pursuant to several Rule 22 requests).

Second, the state's request for restricted speech is overbroad and would include any comment about any aspect of the case.

Third, the state cannot demonstrate harm or a substantial likelihood of future prejudice.

A prior restraint on speech and publication is "the most serious and the least tolerable infringement on First Amendment rights." *WXIA-TV*, 303 Ga. 428, 434 (*quoting* Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976)). The proponent of a prior restraint bears a "heavy burden of showing justification for the imposition of such a restraint." *Id.* (*quoting* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

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such communications are to occur" even if the restraint is not applied to the media. *WXIA-TV*, 303 Ga. 428, 434 (2018) (*citing* Alexander v. United States, 509 U.S. 544, 550 (1993)).

"Prior restraints are presumptively unconstitutional." New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

The Georgia Supreme Court in *WXIA-TV, supra*, noted that the United States Supreme Court had never passed upon the constitutionality of a gag order that was directed to trial participants. *WXIA-TV*, 303 Ga. at 438. The circuit courts are divided. Some have applied the standard of "substantial likelihood of material prejudice" when there is an attempt to regulate the parties, others have applied a "reasonable likelihood of prejudice" to those third parties who objected to the order as applied to others but not themselves. *Id.* at 438-39.

The court must decide whether the state can overcome the presumption against the restraint. To do so, it must determine "whether the gravity of the 'evil,' discounted by its improbability, justifies invasion of free speech as is necessary to avoid the danger." WXIA-TV v. State, 303 Ga. 428, 435 (2018) (*quoting* Nebraska Press Assn. v. Stuart, 427 U.S. 539, 562). Consider, though: "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2724 (1991) (*quoting* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980)). Public vigilance serves us well, for "[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 … Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.* (*quoting* In re Oliver, 333 U.S. 257, 270-71 (1948)). "[T]he press guards against the miscarriages of justice by subjecting the police, the prosecutors,

and judicial processes to extensive public scrutiny and criticism." *Id.* at 2724-25 (*quoting* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

As a guide post, "the drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test." *Id.* at 2725 (*citing* ADA Annotated Model Rules of Professional Conduct 243 (1984)). Additionally, the "court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (*quoting* Bose Corp. v. Consumers Union of the United States, Inc. 466 U.S. 485, 499 (1958) (*quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964))). Stated another way, and in keeping with the Supreme Court of the United States' analysis in *Gentile*:

> The court is compelled to examine for itself the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

Ultimately, the Court in *Gentile* concluded that the lawyer's statements provided no basis for the conclusion that the speech presented a substantial likelihood of material prejudice. *Id.* at 2726. The Court found that the attorney "sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community." *Id.*

The Court should not issue an order restricting extrajudicial statements. The speech complained of here by the state does not rise to the level of prejudicial speech. The state,

the Arberys, and the biased members of the media who unabashedly support the narrative the state has spread will continue to enjoy unfettered speech, which defense counsel must be able to balance and to respond.

WHEREFORE, the McMichaels ask the court not to issue any restraint on their right to free speech but to simply require that counsel for the defendants and the state follow Georgia Rule 3.6.

This 30th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the within and foregoing Travis and Greg McMichaels' Response to the State's Request for Gag Order upon the parties via the Odyssey E-File System to:

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This 30th day of September, 2021.

Respectfully submitted,

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