IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. TRAVIS MCMICHAEL GREG MCMICHAEL WILLIAM R. BRYAN	Case No. CR 2000433

EMERGENCY MOTION TO INTERVENE AND TO VACATE ORDER ADDRESSING EXTRA-JUDICIAL STATEMENTS AND BRIEF IN SUPPORT

Non-party Intervenors WXIA-TV d/b/a 11Alive in Atlanta, 13 WMAZ-TV in Macon, and WJXX/WTLV d/b/a First Coast News in Jacksonville, Florida (collectively, the "Tegna News Media Intervenors") respectfully move to intervene in this action for the limited purpose of moving to vacate the Order Addressing Extra-Judicial Statements (the "Gag Order") entered by this Court on October 11, 2021. Because the Gag Order improperly restricts the Tegna News Media Intervenors' constitutionally-protected rights to gather news for public dissemination, the Media Intervenors respectfully request that this Motion be addressed on an emergency basis. In support of this Motion, the Tegna News Media Intervenors respectfully state as follows:

I. INTRODUCTION

The Tegna News Media Intervenors recognize that the Court has important and competing duties both to ensure the parties' right to a fair trial and to preserve the public's and the media's right of access to criminal proceedings. But "gag orders" are "presumptively unconstitutional" and may only be used as a last resort **when there are no other less restrictive means that the Court may employ to mitigate the potential effects of pre-trial publicity**. *WXIA-TV v. State*, 303 Ga. 428, 434 (2018). The Tegna News Media Intervenors respectfully submit that the Gag

Order entered in this case fails to meet the well-established requirements for judicially-imposed restrictions on extrajudicial statements, violates the media's constitutionally-protected rights to gather and report the news, and, thus, is an impermissible prior restraint for at least three reasons.

First, the Gag Order contains no specific findings of fact showing how any of the prohibited extrajudicial statements "will" have a "substantial likelihood" of materially prejudicing the parties' right to a fair trial and, in fact, none of the extrajudicial statements cited in the Gag Order supports such a finding. Second, the Gag Order neither considers less restrictive means than a gag order for mitigating any potential prejudice from extrajudicial statements nor explains why those less restrictive means would be insufficient to protect the parties' right to a fair trial. Third, the Gag Order contravenes Rule 3.6 of the Georgia Rules of Professional Conduct and is unconstitutionally overbroad.

Any one of those deficiencies is fatal to the Gag Order. Because they are all present here, the Tegna News Media Intervenors respectfully submit that the Gag Order should be vacated.

II. STATEMENT OF GOOD CAUSE FOR EMERGENCY RELIEF

The Tegna News Media Intervenors are broadcast news stations who have been reporting on the murder of Ahmaud Arbery and the related criminal proceedings, including this case. There is tremendous public interest in Mr. Arbery's death and the judicial proceedings against those charged with wrongdoing in connection with his killing. Indeed, Mr. Arbery's murder and the related criminal proceedings have been the frequent subject of print and broadcast news stories both state-wide and nationally since Mr. Arbery was killed.

As with any news story, time is of the essence. The restraints that the Gag Order places on counsel's right to free speech prevents complete and timely reporting to the public on the criminal proceedings related to Mr. Arbery's death, and is a continuing and irreparable injury to the Tegna News Media Intervenors' constitutional rights to gather news for public dissemination. Indeed,

the law is clear that any infringement on the media's First Amendment rights constitutes an intolerable and irreparable constitutional injury that should be remedied immediately. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (holding that where there is a restraint on the media's ability to report the news, "each passing day may constitute a separate and cognizable infringement of the First Amendment"); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").[1]

Because the Gag Order implicates the Tegna News Media Intervenors' right to access and disseminate news of substantial public interest, there is good cause for the Court to review this Motion on an emergency basis. The Tegna News Media Intervenors therefore respectfully request that the Court hear their Motion at its earliest possible opportunity.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. The Tegna News Media Intervenors' Motion to Intervene Should Be Granted.

The right of the news media to intervene in legal actions where, as here, a court order impedes the media's ability to gather and report the news is well established. *See WXIA-TV v. State*, 303 Ga. 428, 432 (2018) (holding television stations had standing to intervene and challenge a gag order that burdened their newsgathering rights, noting "the federal courts have held in a number of cases that a news organization may have standing to challenge a restraint upon the speech of another when that restraint impairs its own ability to effectively engage in news

[1] Numerous other courts have similarly recognized that even short delays in public access implicate constitutional concerns and violate the public's and the press's First Amendment rights. *See, e.g.*, *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (delaying access "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access … is denied, whatever provision is made for later public disclosure"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access, even for "as little as a day . . . delays access to news, and delay burdens the First Amendment").

gathering"); *see also Davis v. East Baton Rouge Parish School Bd.*, 78 F.3d 920, 926 (5th Cir. 1996) (media has standing to challenge gag order that "severely impede[s] the news agencies' ability to discover newsworthy information from potential speakers," even though media is not a party); *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 606-608 (2d Cir. 1988) (media had standing to challenge gag order because it implicated "media's First Amendment right to publish").

As the Georgia Supreme Court recently noted, "the freedom of speech implies a right to receive information and ideas," and "the First Amendment offers some protection to news gathering by journalists." *WXIA-TV*, 303 Ga. at 432 (internal citations omitted). Indeed, "without some protection for seeking out the news, freedom of the press could be eviscerated," *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), and "[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it." *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975). Thus, "notwithstanding that [a gag order] does not restrain [the media] directly," news organizations have both a constitutional right to gather and report the news and standing to intervene in actions that impair that right. *WXIA-TV*, 303 Ga. at 432.

Because the Gag Order improperly limits the Tegna News Media Intervenors' rights to gather and publish newsworthy information from willing speakers, the Tegna News Media Intervenors have standing to intervene in this case, and their Motion to Intervene should be granted.

B. <u>The Gag Order Is an Unconstitutional Prior Restraint that Should Be Vacated.</u>

The U.S. Supreme Court has recognized that a "prior restraint" includes all "judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur," *Alexander v. U.S.*, 509 U.S. 544, 550 (1993), and has repeatedly and unequivocally held that court orders prohibiting speech are prior restraints. *See, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-559 (1976); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-419 (1971). The Georgia Supreme Court has agreed. *See WXIA-TV*, 303 Ga. at 434 n.7 ("A statement

directed against participants in a judicial proceeding that forbids them, under pain of contempt, from making statements that they would otherwise be free to make certainly *is* a prior restraint.") (citation omitted, emphasis in original). In case there was any doubt, the Georgia Supreme Court made clear that "a gag order is, by definition, a prior restraint." *Id.*

Although the Gag Order "is not directed at the media," Gag Order at p. 6, neither the U.S. Supreme Court nor the Georgia Supreme Court has ever recognized a distinction between prior restraints on speech that are directed at the media as opposed to those directed at members of the general public. To the contrary, the U.S. Supreme Court has rejected a distinction between First Amendment rights of the press and "members of the public generally," s*ee Pell v. Procunier*, 417 U.S. 817, 834-835 (1974), and the Georgia Supreme Court and numerous other courts have held that a gag order limiting speech of non-media parties and individuals constitutes a "prior restraint." *See WXIA-TV*, 303 Ga. at 434 n.7 (disapproving *Atlanta Journal-Constitution v. State*, 266 Ga. App. 168 (2004) "to the extent it suggests" that "a gag order directed only to litigants, their lawyers, and witnesses 'cannot be classified as a prior restraint because it is not directed at the media'"); *see also U.S. v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993) (vacating gag order prohibiting counsel from publicly discussing a criminal case as an impermissible prior restraint, stating "[a]n order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech"); *U.S. v. Ford*, 830 F.2d 596, 598 (6th Cir. 1987) (vacating order prohibiting parties and their attorneys from making extrajudicial statements as an impermissible prior restraint, finding "no legitimate reason[] for a lower threshold for individuals . . . seeking to express themselves outside of court than for the press").

The Gag Order entered here directly and preemptively forbids the parties' counsel from making certain statements about this case to the media that they would otherwise be entitled to

make. The Gag Order is unquestionably a prior restraint on those individuals' First Amendment rights. *See Alexander*, 509 U.S. at 550; *WXIA-TV*, 303 Ga. at 434 n.7. By preventing counsel from speaking to the media about the subject matters described in the Gag Order, the Gag Order also constitutes a prior restraint on the Tegna News Media Intervenors' constitutionally-protected right to gather and report the news. *See WXIA-TV*, 303 Ga. at 432-433; *see also CBS, Inc.*, 522 F.2d at 237-239 (holding gag order prohibiting parties, relatives, friends, and associates from discussing case "with members of the news media or the public" was "a prior direct restraint upon freedom of expression" and unconstitutionally impaired First Amendment rights of the media, even though the media was "not made a specific target of" the gag order and was "not directly enjoined from discussing the case").

Both the U.S. Supreme Court and Georgia Supreme Court have recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" and, thus, are "presumptively unconstitutional." *Nebraska Press Ass'n*, 427 U.S. at 558-559; *WXIA-TV*, 303 Ga. at 434. That is particularly true when it comes to reporting news about current events. *See Nebraska Press Ass'n*, 427 U.S. at 558-559 ("The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."). Accordingly, "the proponent of a prior restraint bears a heavy burden of showing justification for the imposition of such a restraint." *WXIA-TV*, 303 Ga. at 434.

To justify the entry of a gag order, there must be a "clear showing" that: (a) extrajudicial statements "will interfere with the rights of the parties to a fair trial"; and (b) there are no alternative measures "having a lesser impact on First Amendment freedoms" that "would be likely to mitigate the effects" of such extrajudicial statements. *Nebraska Press Ass'n*, 427 U.S. at 563; *CBS Inc.*, 522 F.2d at 238, 241. Even if those requirements are met, the gag order must be "narrowly

tailored" and no broader than necessary to protect the parties' right to a fair trial. *WXIA-TV*, 303 Ga. at 435. The Gag Order does not satisfy any of these requirements. It is therefore an unconstitutional prior restraint that should be vacated.

1. There Was Not a Clear Showing that Extrajudicial Statements Will Materially Prejudice the Parties' Right to a Fair Trial.

A prior restraint cannot be imposed unless there is a "clear and present danger" or "serious and imminent threat" to the parties' right to a fair trial. *Ford*, 830 F.2d at 600; *CBS, Inc.*, 522 F.2d at 238, 241. The threat "must be specific, not general," and must be "much more than a possibility or a 'reasonable likelihood' in the future." *Ford*, 830 F.2d at 600. Indeed, there must be "substantial evidence to justify the conclusion that a clear and imminent danger to the fair administration of justice exist[s] because of publicity." *CBS, Inc.*, 522 F.2d at 240.

In addition, Georgia law is clear that a trial court may not prohibit or restrict extrajudicial statements to the media unless the court first "make[s] specific findings of fact based on evidence of record regarding the possible impact of extrajudicial statements upon the forthcoming trial." *Atlanta Journal-Constitution*, 266 Ga. App. at 169. Neither "assumptions and speculation" nor "conclusory" assertions that publicity "might hamper a defendant's right to a fair trial" are sufficient to overcome the protections of the First Amendment. *Id.*; *Rockdale Citizen Pub. Co. v. State*, 266 Ga. 579, 580 (1996) (reversing a closure order, holding "[a]ssumptions and speculation can never justify the infringement on First Amendment rights which the closure of criminal proceedings creates"). Instead, the court must have clear and convincing proof -- *i.e.*, "concrete, tangible evidence that can be made part of and attached to the record" -- that extrajudicial statements to the media "*will* have a *substantial* likelihood of materially prejudicing the trial." *Atlanta Journal-Constitution*, 266 Ga. App. at 169 (emphasis in original); *Rockdale Citizen Pub. Co.*, 266 Ga. at 580.

The Gag Order in this case does not identify any specific, serious, or imminent threat to the parties' right to a fair trial. Instead, the Gag Order generally refers to the "extensive media coverage and publicity" that this case "has and will receive," observes that counsel for both the State and the Defendants have made numerous statements to the media, and notes that "it is likely there will continue to be inquiries made by media representatives and that comments made by the attorneys are likely to be widely disseminated." (Gag Order at pp. 1-2, 4-5.) The Tegna News Media Intervenors do not dispute any of those conclusions, but it is well settled that the mere existence of extrajudicial statements or media reports, without more, does not authorize entry of a gag order. "After all, pretrial publicity—***even pervasive, adverse publicity***—does not inevitably lead to an unfair trial, and in the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to the right to trial by an impartial jury." *WXIA-TV*, 303 Ga. at 439 (citations and punctuation omitted, emphasis added).

Moreover, like the gag order that was vacated in *Atlanta Journal-Constitution*, the Gag Order in this case contains no specific findings of fact, based on evidence of record (or otherwise), showing that any of the prohibited extrajudicial statements "will" have a "substantial likelihood" of materially prejudicing the parties' right to a fair trial. Indeed, the Court did not hold a hearing or receive testimony before entering the Gag Order, and the record is devoid of any evidence -- much less "clear and convincing proof" -- that the extrajudicial statements prohibited by the Gag Order, if not restrained, will materially prejudice the parties' right to a fair trial. *Rockdale Citizen Pub. Co.*, 266 Ga. at 580. It is difficult to imagine how the State could conceivably carry such a high burden of proof, on a constitutionally-disfavored remedy, without the Court first holding a hearing at which such "clear and convincing proof" of likely prejudice could be properly and thoroughly vetted.

The ***only*** evidence submitted in support of the State's request for a gag order was a single newspaper article in which defense counsel said that the Court's evidentiary ruling was "baffling" and that the jury "will be denied the truth." (Gag Order at p. 2.) The Gag Order never identifies **the impact** that any of the extrajudicial statements quoted in that article or elsewhere in the media may have on any potential juror, nor does it explain how any of those statements has prejudiced or could prejudice the parties' right to a fair trial. Instead, the Gag Order summarily concludes that two statements made by defense counsel "are highly prejudicial" and that "without some restraint on the attorneys, there is a substantial likelihood that the Defendants may be denied a fair trial." (Gag Order at pp. 4-5.) Those conclusory assertions are insufficient to support a prior restrain on First Amendment freedoms. *See Atlanta Journal-Constitution*, 266 Ga. App. at 169; *see also Press-Enterp. Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 15 (1986) ("The 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]."); *In re Atlanta Journal-Constitution*, 271 Ga. 436, 438 (1999) (reversing sealing order, holding that in discharging its duty to make factual findings supporting the sealing of court records, "it is not sufficient for the trial court to . . . simply state" that the applicable standard has been met).

The Tegna News Media Intervenors recognize that the Court may find counsel's statements to the media disheartening and that those statements have caused the Court "grave concern," Gag Order at p. 5, but that does not mean they are actually, or even substantially, likely to prejudice the parties' right to a fair trial. For better or worse, the pretrial publicity and extrajudicial statements referenced in the Gag Order are nothing new or unusual; they are garden-variety news coverage and commentary on court rulings that accompany virtually every criminal proceeding of significant public interest. And, in fact, none of those extrajudicial statements supports the Court's

conclusion that there is a substantial likelihood that the Defendants will be denied a fair trial in the absence of a gag order.

The only extrajudicial statements identified in the Gag Order as being "prejudicial" are comments that defense counsel made about information contained in records and proceedings that were (and are) open to the public. All of the information contained in those statements -- including the evidence about the victim's criminal history, the reasons defense counsel believed that evidence was relevant and should have been admitted, and the Court's evidentiary ruling on it -- had already been made public in court filings and proceedings in open court. Thus, that information was (and still is) in the public record and available to any member of the public (including, of course, any potential juror) who wishes to see it, regardless of any statements that defense counsel made or may later make about it.

There is nothing inherently prejudicial about defense counsel repeating or commenting on information that is already contained in the public record. To the contrary, Comment [5B].b to Rule 3.6 explains that extrajudicial statements about "information contained in a public record" -- like those made by defense counsel in this case -- are "more likely than not to have ***no material prejudicial effect*** on a proceeding." GA. R. PROF'L CONDUCT 3.6, Cmt. [5B].b (emphasis added). Moreover, the subjects identified in Comment [5A] to Rule 3.6 as being "more likely than not to have a material prejudicial effect on a proceeding" do not encompass statements "criticizing" court rulings.[2] In short, the statements identified as the basis for the Gag Order do not even implicate

[2] The only subject listed in Comment [5A] that could be remotely implicated by defense counsel's statements is "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial ***and that*** would, ***if disclosed***, create a substantial risk of prejudicing an impartial trial." GA. R. PROF'L CONDUCT 3.6, Cmt. [5A].e (emphasis added). While the Gag Order finds that defense counsel has made statements about evidence that this Court has ruled inadmissible (*i.e.*, the victim's criminal history), that evidence was both already a matter of public record (after all, Mr. Arbery's criminal records are themselves public records) and had

Rule 3.6, much less show, by "clear and convincing evidence," the type of prejudice necessary to justify a prior restraint.

The Gag Order fairly shows that there has been significant news coverage of, and public interest in, this case, but it does not demonstrate "clear and convincing proof" that the parties' right to a fair trial has been put in jeopardy or show that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press Ass'n*, 427 U.S. at 569. Both Georgia and constitutional law demand much more than a conclusory assertion of prejudice to justify an order limiting counsel's and the media's First Amendment rights. *See Nebraska Press Ass'n*, 427 U.S. at 554; *WXIA-TV*, 303 Ga. at 439. The Tegna News Media Intervenors therefore submit that the Gag Order should be vacated.

2. The Gag Order Fails to Consider Less Restrictive Alternatives to a Prior Restraint or Explain Why They Would Be Insufficient to Protect the Parties.

Even if there was any evidence that the parties' right to a fair trial may be prejudiced by counsel's extrajudicial statements, it is firmly established that a prior restraint "cannot be upheld if reasonable alternatives . . . having a lesser impact on First Amendment freedoms" are available. *CBS, Inc.*, 522 F.2d at 238 (citing cases); *see also Nebraska Press Ass'n*, 427 U.S. at 563-565; *WXIA-TV*, 303 Ga. at 435 (recognizing the "general understanding that a prior restraint is only permissible . . . to the extent that no alternatives less restrictive than a prior restraint are reasonably available"). The U.S. Supreme Court has outlined numerous alternative measures that are less

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already been "disclosed" in connection with this specific case in numerous news articles, television news broadcasts, court filings, arguments in open court, and criminal and court records -- all of which are matters open and available to the public -- long before defense counsel made their extrajudicial statements. Thus, that information was already in the public record, it was not "disclosed" by defense counsel through their extrajudicial statements, and those statements did not violate Rule 3.6 or, it follows, provide a basis for the Gag Order.

restrictive than a gag order and that can be used to effectively ensure a defendant's right to a fair trial, including: "a change of trial venue to a place less exposed" to the publicity; "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence"; and the "use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Nebraska Press Ass'n*, 427 U.S. at 563-564; *see also R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 580 n.8 (1982) (identifying alternative means that a trial court judge must consider to ameliorate "the impact of prejudicial facts being reported in the media," including "(1) change of venue, (2) postponement of the trial, (3) searching voir dire, (4) clear and emphatic instructions to the jury to consider only evidence presented in open court," and (5) jury sequestration).[3]

Before a trial court may enter an order prohibiting extrajudicial statements -- even if limited only to attorneys of record -- it must not only examine whether those types of less restrictive alternative measures "would be likely to mitigate the effects of unrestrained pretrial publicity," but must also explain *why* those less restrictive alternatives would not be sufficient. *Nebraska Press Ass'n*, 427 U.S. at 563-565. Simply implying or stating in conclusory fashion that alternative

[3] Other courts have held that gag orders on counsel are not appropriate because the rules of professional conduct already provide a less restrictive alternative and "constitutionally tested method of defining the contours of permissible extrajudicial statements by counsel." *Constand v. Cosby,* 229 F.R.D. 472, 481 (E.D. Pa. 2005) (denying request for gag order and reasoning that, despite "intense media scrutiny" and extrajudicial statements, "a gag order stilling counsel's voice outside the courtroom is not the answer"; instead, "[t]imely and fair enforcement of Rule 3.6 . . . will help the Court guard against" any potential prejudice from counsel's extrajudicial statements); *see also State v. Clifford*, No. 02-CR-12-4361, 2012 WL 7849528 (Minn. Dist. Ct. Oct. 3, 2012) (denying State's motion for order preventing extrajudicial statements, noting that "attorneys are already ethically bound to limit extrajudicial statements" through Rule 3.6 of the Minnesota Rules of Professional Conduct, and finding "the rules of professional conduct provide a sufficient less restrictive means of limiting the attorneys' statements to the media while protecting the parties' rights to a fair trial. An additional order, limiting those statements already restricted by the ethical rules would provide no greater protection against prejudicing the jury pool.").

measures are inadequate does not satisfy these requirements. *See id.* at 565 (reversing gag order because, among other reasons, "the Nebraska Supreme Court did no more than imply that [less restrictive alternatives] might not be adequate"); *In re Atlanta Journal-Constitution*, 271 Ga. at 438.

The Gag Order contains no factual findings that less restrictive alternatives to a gag order would be insufficient to protect the parties' right to a fair trial, much less explain why any of those less restrictive alternatives would not be sufficient. In fact, there is nothing in the Gag Order that suggests the Court even considered any alternative, less restrictive measures than a gag order, much less provides the mandatory analysis why such measures cannot cure whatever prejudice the Court believes may exist. For that reason, alone, the Gag Order is unconstitutional and should be vacated. *See, e.g.*, *Nebraska Press Ass'n*, 427 U.S. at 563-565 (reversing gag order where "trial court made no express findings" that "alternative means would not have protected" the defendant's rights and "record [was] lacking in evidence to support such a finding").

The Tegna News Media Intervenors further submit that there is no basis on which the Court could reasonably find that less restrictive alternatives would not be sufficient in this case. The U.S. Supreme Court has recognized that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991), and that less restrictive measures are sufficient to ensure a fair trial in most cases. *Nebraska Press Ass'n*, 427 U.S. at 563-564. Moreover, "[e]mpirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court." *Gentile*, 501 U.S. at 1054-1055. In fact, numerous courts in high profile cases that involved far more reporting on disputed matters of evidence and character than this case -- such as the O.J. Simpson criminal trial, the Casey Anthony

murder trial, the Justin Ross "hot car death" case, and the Andrea Sneiderman/Hemy Neuman murder cases -- did not enter gag orders and instead employed less restrictive, but constitutionally-permitted measures to prevent any potentially negative impact of the extensive pretrial publicity. There is no reason that less restrictive alternatives cannot be equally effective in this case; and, of course, the Gag Order does not hold otherwise.

3. The Gag Order Is Unconstitutionally Overbroad.

Because orders placing judicial restraints on extrajudicial statements limit the First Amendment rights of the public and the press, such orders must be "narrowly tailored" to avoid "a clear and present danger or serious and imminent threat to a competing, protected interest." *WXIA-TV*, 303 Ga. at 435; *see also CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) ("[t]he restraint must be narrowly drawn"). A gag order that "contravenes Rule 3.6" of the Georgia Rules of Professional Conduct "is overbroad." *Atlanta Journal-Constitution*, 266 Ga. App. at 170.

As in *Atlanta Journal-Constitution*, the Gag Order in this case states that it "does not prevent the attorneys from commenting on those subjects as outlined in Comment 5(B) under Rule 3.6 of the Georgia Rules of Professional Conduct," but another paragraph of the Gag Order directly contravenes Rule 3.6 by prohibiting counsel from releasing "any out-of-court opinion on, or related to" any "evidence that has been previously ruled inadmissible" or any "evidence that is ruled inadmissible during the trial." (Gag Order at pp. 5-6.) Nothing in Rule 3.6 prohibits counsel from commenting on any evidence that has been ruled inadmissible. To the contrary, Comment [5A] of Rule 3.6 is limited to "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial ***and that would, if disclosed, create a substantial risk of prejudicing an impartial trial***." GA. R. PROF'L CONDUCT 3.6, Cmt. [5A].e (emphasis added). The Gag Order is not limited to statements about inadmissible evidence that would create a substantial risk of prejudicing an impartial trial and does not make any effort to delineate with sufficient clarity

what such evidence is; instead, the Gag Order prohibits counsel from commenting on ***any evidence*** that has been ruled inadmissible. That restriction is overbroad on its face.

The Gag Order also conflicts with Rule 3.6 because it prohibits counsel from releasing any opinion about evidence that has been or may be ruled inadmissible, even if that evidence is contained in a public record. As noted above, Comment [5B].b to Rule 3.6 permits counsel to make extrajudicial statements about "information contained in a public record," and at least some of the evidence this Court has ruled inadmissible and about which counsel is prohibited from commenting under the Gag Order (*i.e.*, information about the victim's criminal history) is already contained in public records, including criminal records that existed before this case was filed and which have already been the subject of substantial pre-trial publicity and media reporting wholly independent of any commentary by defense counsel. Prohibiting counsel from commenting on that publicly-available information contravenes Rule 3.6.

For both of these reasons, the Gag Order is unconstitutionally overbroad and should be vacated. *See Atlanta Journal-Constitution*, 266 Ga. App. at 170.

IV. CONCLUSION

For the foregoing reasons, the Tegna News Media Intervenors respectfully request that the Court grant their Motion to Intervene, schedule a hearing on their Motion to Vacate the Gag Order, and enter an order vacating the Gag Order in its entirety. Because the Gag Order is limiting the Tegna News Media Intervenors' First Amendment rights, including the right to gather news for dissemination to the public, this Motion is time-sensitive and necessary to prevent continuing irreparable harm to the public's and the media's constitutional rights. Accordingly, the Tegna News Media Intervenors respectfully request that the Court expedite its consideration of this Motion and provide the Tegna News Media Intervenors with the opportunity to be heard on the issues presented herein at the earliest practical time.

Respectfully submitted this 14th day of October, 2021.

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Uniform Superior Court Rule 36.4 Caption: **Emergency Motion to Intervene and to Vacate Order Addressing Extra-Judicial Statements and Brief in Support**, *State of Georgia v. Travis McMichael, et al.*, Superior Court of Glynn County, Georgia; Case No. CR 2000433.

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following counsel with a true and correct copy of the above **EMERGENCY MOTION TO INTERVENE AND TO VACATE ORDER ADDRESSING EXTRA-JUDICIAL STATEMENTS AND BRIEF IN SUPPORT** via the Odyssey E-Filing system and via e-mail:

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