IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM FOUNDATION *d/b/a* NONDOC MEDIA *and* WILLIAM W. SAVAGE III,

Plaintiffs

v.

STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA,

Defendant.

Case No. CV-2021-1770

Judge Lori Walkley

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR IN-CAMERA REVIEW

Defendant, State of Oklahoma, ex rel. Board of Regents of the University of Oklahoma (the "University") respectfully submits this Response (the "Response") to Plaintiffs, the Sustainable Journalism Foundation d/b/a NonDoc Media and William W. Savage III, Motion for In Camera Review (the "Motion"), requesting the Court deny the request. In support of this Response, the University states:

SUMMARY

An in-camera review is unnecessary as the Court previously adjudicated the issue of privilege without the need for the procedure and Plaintiffs failed to make the request until after (1) the issue was already adjudicated by the Court, and (2) their Response to the Motion for Summary Judgment deadline set by Your Honor's order had passed. While that is sufficient reason enough to deny the Motion, Plaintiffs have also failed to provide an adequate factual basis to support in-camera review, and assuming *arguendo* Plaintiffs can meet that threshold, they have failed to demonstrate the record is insufficient to adjudicate these issues without in-camera review, and additional concerns related to (1) due process for non-parties, (2) issue preclusion and judicial

estoppel, and (3) evidentiary preclusion, preclude the in-camera review regardless.

For these reasons, the Motion should be denied.

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW FOR IN-CAMERA REQUEST BY PARTY CHALLENGING THE ASSERTED PRIVILEGES.

The Oklahoma Supreme Court generally favors in-camera review to determine the validity of claimed privilege. That authority, however, is discretionary: "The court **may** conduct an in-camera review of the documents for which the privilege or other protection from discovery is claimed." Okla. Stat. tit. 12, § 3237 (emphasis added); *Swiney v. Villanueva*, 2021 OK CIV APP 37, ¶ 14 ("A long-standing rule of statutory construction is that 'may' generally denote permissive or discretional, while "shall" is ordinarily interpreted as a command or mandate") (citing *Independent School District #52 v. Hofmeister*, 2020 OK 56, ¶35).

To that point, Plaintiffs concede that in-camera review does not occur by right but must be justified by the record before the Court. *See Plaintiffs' Motion* at 3. But Oklahoma case law is not well-developed concerning the factors a trial court considers for a party requesting for in-camera review to challenge the privileges asserted, demonstrated by the fact the Motion heavily relies on federal authorities. The case law is further lacking in Oklahoma as it relates to cases where the trial court already adjudicated the issue of privilege with the same parties, in the same litigation. Consequently, this Court should look to decisions from the United States Supreme Court concerning the denial of in-camera reviews made by the party challenging the asserted privilege. *See YWCA of Oklahoma City v. Melson*, 1997 OK 81, n. 41 (Noting Oklahoma models the federal discovery rules).

For example, in *U.S. v. Zolin*, the United States Supreme Court discussed when a trial court should exercise its discretion to deny an in-camera review requested by a party challenging the

attorney-client privilege based on the crime-fraud exemption to privilege. There, the party asserting the privilege freely acknowledged that an in-camera review would "establish the fact that the tapes involved attorney-client communications, had they been unable to muster independent evidence to serve that purpose." 491 U.S. 554, 569 (1989). But the Supreme Court noted that the process of "in camera review of the allegedly privileged documents has not been without reservation." *Id.* at 570. Rather, an in-camera review is clearly an "intrusion upon the confidentiality of the attorney-client relationship." *Id.* at 572. (internal citation omitted). For that reason, depending upon facts and circumstances of the case, "examination of the evidence, even by the judge alone, in chambers might in some cases jeopardize the security which the privilege is meant to protect." *Id.* at 570 (internal citation omitted).

There, the party challenging the privilege and requesting the in-camera review was required to make a "factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal . . . [the] exception applies." *Id.* at 572. Alternatively stated by the Court: "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *Id.* at 571.

Once that factual showing is made, then the Court considers undertaking the in-camera review "in light of the facts and circumstances of the particular case," such as:

1. The volume of materials requested for review,
2. The relative importance to the case of the alleged privileged information,
3. The likelihood the review will establish a waiver or exception asserted, and,
4. If non-privileged evidence is available to demonstrate the privilege applies without in-camera review.

Id. at 572. As relevant here, the United State Supreme Court summarized:

> We further hold, however, that before a district court may engage in in-camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability. Finally, we hold that the threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

United States v. Zolin, 491 U.S. 554, 574–75 (1989). It is unlikely that the Oklahoma statutory law here coincidentally mirrors the Supreme Court's holding there:

> A. Preliminary questions concerning . . . the existence of a privilege . . . shall be determined by the court, subject to the provisions of subsections B and C of this section.
>
> B. A person claiming a privilege must prove that the conditions prerequisite to the existence of the privilege are more probably true than not. A person claiming an exception to a privilege must prove that the conditions prerequisite to the applicability of the exception are more probably true than not. **If there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court, in making its determination, may review the material outside the presence of any other person.**

Okla. Stat. tit. 12, § 2105 (emphasis added). Taken together, the Court should utilize the process affirmed in *Zolin* to evaluate Plaintiffs' Motion, which should then be denied.

A. *Plaintiffs failed to provide an adequate factual basis adequate to support a good faith belief by a reasonable person that IN-CAMERA review of the materials may reveal disclosure, waiver, or other exemption to the asserted privileges apply.*

This Court has not previously suggested "that it might be necessary for [the University] to divulge the contents of a report in order to sustain a claim of privilege." *People By & Through Dep't of Pub. Works v. Glen Arms Est., Inc.*, 230 Cal. App. 2d 841, n. 1 (Ct. App. 1964). And there is good reason not to. The Court already adjudicated the issue of privilege in the first instance

when it evaluated NonDoc's deposition subpoena issued to James Gallogly. A review of the Jones Day Reports themselves now would not aid the Court because the Reports themselves will not reflect a disclosure occurring after they came into existence.

For that reason, Plaintiffs confuse the purpose and basis of an in-camera review. Notably, Plaintiffs argue that an in-camera review is necessary because the University's Motion for Summary Judgment does not support the privileges asserted. *See Plaintiffs' Motion* at 4. First, the Motion for Summary Judgment speaks for itself, is well-founded, and the University reserves its right to further articulate its arguments in its Reply in Support of its Motion for Summary Judgment. Second, the Court is meant to review the **entire record**, not only the University's Motion, to determine if in-camera review is necessary. *Zolin*, 491 U.S. 554, 572 (1989) ("The court should make that decision in light of the facts and circumstances of the particular case. . . .").

Plaintiffs argue the record is insufficient to prevent an in-camera review, **but it is their burden to provide positive factual basis supporting in-camera review**. For example, Plaintiffs complain that Heidi Long's affidavit filed with the University's Motion for Summary Judgment "has been contradicted in several ways." *See Plaintiffs' Motion* at 5. But that unwarranted impeachment of the University's evidence is not an affirmative showing of potential waiver or other argument related to or justifying review of the Jones Day Reports themselves.

Plaintiffs then contend the University is contradicting itself by resisting James Gallogly's disclosure of privileged information. *See Plaintiffs' Motion* at 6. But the University reminding Gallogly the information in the Jones Day report is privileged and should not be disclosed supports the existence of the privilege in the first instance. In fact, any other response by the University would likely indicate a voluntary waiver. As far as Plaintiffs believe this line of argument assists them, they are mistaken.

Also, while Plaintiffs attempt to sneak in an assertion that the University disclosed privileged information from the Jones Day Reports to U.S. News and World Report, the testimony of the representative speaks for itself and contradicts that conclusion.

Taking the record into consideration, there is no factual basis to support a good faith belief that a reasonable person would believe in-camera review would lead to the discovery of waiver or other exemption to privilege. Plaintiffs ignore that they have supplemented the record since the Motion for Summary Judgment was filed. Now the record includes the deposition transcript of the University's 3230(C)(5) representative depositions as well as the University's produced documents that Plaintiffs believe support overcoming the University's claimed privileges and exemptions.

B. *In light of the facts and circumstances of this particular case, the Court should exercise its discretion to deny the Motion for In-Camera Review.*

The University does not dispute that an in-camera review would allow the Court to see the Jones Day Reports and all of the identifying information therein; however, given the sensitive nature of the documents and the fact these reports logically concern individuals living in Cleveland County, the University requests the Court carefully consider this decision. Although, the University acknowledges that has not likely been lost on your Honor. The University, however, disputes that there is evidence that would support a good-faith belief by a reasonable person that the University **voluntarily** waived its privileges. Rather, the University intends to show the Court that all of the disclosures described fall into two basic buckets: (1) instances where the University was compelled by statutory or common law to make a limited disclosure, or (2) disclosure to the Oklahoma Bureau of Investigation pursuant to a joint interest agreement. Considering the factors outlined by Zolin, the Court should not order an in-camera review in this case:

1. The volume of materials requested would burden the Court, but the other factors are more important regardless.

The University did not provide the exact number of pages of the Jones Day Reports within its Privilege Log as the volume of the report has never been raised as relevant to the issues before the Court concerning privilege and the University is highly concerned about releasing any information about the Reports. Nonetheless, for purposes of this Motion, the University will inform the Court the Jones Day Reports consist of hundreds of pages. It would assuredly require the Court's time to review the documents, but the Court has likely reviewed larger privileged documents in other cases. Further, due to the University's omission of the Jones Day Reports precise volume from the privilege log, the University encourages the Court to weigh this factor in favor of Plaintiffs.

2. The privileged information within the Jones Day Reports themselves do not have relative importance for resolving this case.

3. It is unlikely a review of the Jones Day Reports will establish or contribute to any argument concerning waiver/disclosure.

4. Non-privileged evidence is available to demonstrate the privilege applies without in-camera review.

Echoing *Zolin*, the United States Supreme Court recently reversed a Ninth Circuit Court of Appeal's opinion and order for in-camera review last year where the factual basis for the in-camera review was available from non-privileged sources:

> The public availability of information concerning Zubaydah's treatment diminishes his need for the discovery he seeks from Mitchell and Jessen, and thus for further judicial probing of the Government's privilege claim.

United States v. Zubaydah, 212 L. Ed. 2d 65, 142 S. Ct. 959, 971 (2022).

II. ADDITIONAL LEGAL ISSUES PREVENT THE IN-CAMERA REVIEW.

A. Due Process Prevents an In-Camera Review in the above-styled case.

As the *Zolin* Court also noted, there are "due process implications of the routine use of in camera proceedings." 491 U.S. at 571 (1989). For example, the seminal cases cited by the United States Supreme Court in *Zolin* are progeny of *In re Taylor* from the Second Circuit Court of Appeals. There, the Court found that an in-camera review would violate a party's due process right when privileged information was "on the verge of disclosure" by depriving stakeholders of an opportunity to be heard concerning the in-camera proceeding. *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) (summarizing *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977)). Like the case before the Court, *Taylor* also concerned purportedly privileged information related to a subsequent grand jury proceeding where the Court was forced to confront the rights of non-parties to an in-camera review. *Id.* at 1189 ("Balanced against this minimal governmental interest are valuable rights of both appellant and Mr. Erlbaum."). There, the Second Circuit explained, in detail, how due process issues may arise for in-camera review:[1]

> In camera proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, *i.e.* notice setting forth the alleged misconduct with particularity and an opportunity for a hearing, *see Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). . . . **Whenever the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings.** *Cf. Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). In-camera examination of

[1] In the event Plaintiffs argue *Taylor* is distinguishable because the Government's Motion for In-Camera review was premature regardless, the 2nd Circuit clarified that was not the case: "We have given consideration to Chief Judge Kaufman's concurring opinion in which he expresses the desirability of deciding this appeal solely on the ground that the Government's motion was premature, and that the discussion of the due process issue, implicit in the in-camera proceeding is, in effect, the rendering of an advisory opinion. In view of the fact that the issues of the propriety of the in-camera proceedings and the right to counsel of one's choice were as much a part of the case as the question of immaturity, and were fully argued by the parties in their briefs and at oral argument, we remain of the view that in the circumstances of this case the parties are entitled to an answer." *In re Taylor*, 567 F.2d 1183, n. 10 (2d Cir. 1977).

> evidence by a court will not, for example, suffice to sustain a judgment of conviction where the Government, because of a claim of privilege, has failed to disclose to a defendant information which might be material to his defense. *See Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957); *United States v. Coplon,* 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688 (1952); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *cf. United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). The principal function of the due process clause is to ensure that state power is exercised only pursuant to procedures adequate to vindicate individual rights. *See Wolff v. McDonnell*, supra, 418 U.S. at 558, 94 S.Ct. 2963. As the Supreme Court stated in *Carroll v. Princess Anne*, 393 U.S. 175, 183, 89 S.Ct. 347, 352, 21 L.Ed.2d 325 (1968), "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."

In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977). With this in mind, the Second Circuit found that the party opposing the in-camera review as well as non-party, Mr. Erlbaum, would have their due process rights violated by in camera review:

> These significant pronouncements are made in derogation of basic constitutional rights and without the benefit of the enlightenment which accompanies an adversary proceeding. Under these circumstances, the interests of the appellant and Mr. Erlbaum far outweigh those of the Government and render the in-camera proceedings of the court in this case improper.

In re Taylor, 567 F.2d at 1190.

Here, there is a more particular concern related to the due process claims for release of confidential information related to allegations of sexual misconduct: None of the witnesses have notice of the Motion or, consequently, the ability to be heard to argue against its release or review

by the Court. *In re Taylor* provides the framework for the Court to evaluate due process claims arising from in-camera review, but *Anderson v. Blake* provides the substance of that right.

In *Blake*, Judge Heaton completed an in-depth analysis relating to the expectation of privacy any person generally has in confidential information provided to State entities related to an allegation of sexual misconduct. No. CIV-05-0729-HE, 2005 WL 2210222, at *1 (W.D. Okla. Sept. 12, 2005), *aff'd*, 469 F.3d 910 (10th Cir. 2006). On appeal, the Tenth Circuit summarized the trial court proceeding as:

> Ms. Anderson's claims arise out of the publication of a videotape depicting her alleged rape, which was disclosed to a television reporter and aired on a local news broadcast in Oklahoma City. Aplt. Br. at 2–3. She alleges she was the victim of a rape that occurred while she was unconscious, and that she later discovered a video documenting the rape. *Id.* After discovering the video, she reported the rape to Officer Blake, a detective with the City of Norman Police Department and turned the video over to him. Id. at 3. Ms. Anderson alleged that Officer Blake promised her that the video would remain confidential and would be used only for law enforcement purposes. Aplt.App. at 18 (Compl.¶ 22). Sometime thereafter, Officer Blake disclosed the contents of the video to a reporter named Kimberly Lohman and her cameraman, both of whom work for KOCO–TV, a television station based in Oklahoma City. Aplt. Br. at 3; Aplee. Br. at 11. Ms. Anderson alleges that the officer contacted her by phone and handed the line to Lohman who attempted to interview her about the details of her rape. Aplee. Br. at 11. Later, the television station aired portions of the video in a *913 manner that obscured Ms. Anderson's identity during a news broadcast. Aplt. Br. at 3. Ms. Anderson alleges that there was no law enforcement purpose in defendant's release of the video. Aplee. Br. at 3.

Anderson v. Blake, 469 F.3d 910, 912–13 (10th Cir. 2006). Defendant Blake moved to dismiss the lawsuit pursuant to qualified immunity, as state agents regularly do in 1983 actions. *Id.* But Judge Heaton denied the Motion, and, instead, found that where a person provides private information to a state entity on the promise of confidentiality, there is a Constitutionally protected due process

right in that legitimate expectation of privacy. No. CIV-05-0729-HE, 2005 WL 2210222, at *3 (W.D. Okla. Sept. 12, 2005).

Heaton's legal basis to determine a Constitutional right existed was *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir.1995). There a murder victim's diary was provided to a media outlet:

> The Tenth Circuit held that the plaintiff, the murder victim's spouse, had a constitutional right of privacy in the diary because of its personal nature, and that the plaintiff had a reasonable expectation of its limited use: "To turn a diary over to a limited group for what one perceives to be a limited and proper purpose is quite different than inviting publication of the material." *Id.* at 1388 (finding no compelling interest in the disclosure of the diary).

Anderson v. Blake, No. CIV-05-0729-HE, 2005 WL 2210222, at *3 (W.D. Okla. Sept. 12, 2005), aff'd, 469 F.3d 910 (10th Cir. 2006). Judge Heaton specifically noted the right exists, even when the content of the private information is not "particularly controversial [nor] embarrassing." *Id.* (quoting Sheets, 45 F.3d at 1383).

Defendant Blake then appealed the decision, which was affirmed:

> The district court held that Ms. Anderson had a constitutionally protected privacy interest in the contents of the video because of its "personal nature." *Anderson*, 2005 WL 2210222, at *2. This conclusion is well supported by precedent from the Supreme Court and this circuit. In *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court held that the constitutional right to privacy includes an "individual interest in avoiding disclosure of personal matters...." Relying on *Whalen*, we held in *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir.1986), that "[d]ue process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state." Information is protected by the right to privacy when a person has "a legitimate expectation ... that it will remain confidential while in the state's possession." *Id.* We have held, without listing other factors, that this legitimate expectation of privacy depends "'at least in part, upon the intimate or otherwise personal nature of the material which the state possesses.'" *Sheets*, 45 F.3d at 1387 (quoting Mangels, 789 F.2d at 839). Even if personal information is

protected by the right to privacy, the state may still justify its disclosure. Disclosure of such protected information must "advance a compelling state interest which, in addition, must be accomplished in the least intrusive manner." *Mangels*, 789 F.2d at 839 (internal citation omitted). In *Sheets*, we formally articulated the inquiry as a two-part test. When the state discloses information that is alleged to be protected by the right to privacy, we determine first whether the information is protected by the right to privacy, and second, whether the state can demonstrate that it had a compelling interest for disclosure and that it used the least intrusive means of disclosing the information. Sheets, 45 F.3d at 1387.

Ms. Anderson possesses a constitutionally protected privacy interest in the video because it depicts the most private of matters: namely her body being forcibly violated. As the Sixth Circuit noted, "**[p]ublically revealing information regarding [sexuality and choices about sex] exposes an aspect of our lives that we regard as highly personal and private**." *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir.1998). Such a conclusion is also fully justified by precedent in our own circuit. In *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir.1982) (per curiam), we held that the constitutional right of privacy may be violated when guards watch inmates of the opposite sex undressing or showering. Later, in *Eastwood v. Department of Corrections*, 846 F.2d 627, 631 (10th Cir.1988), **we stated more explicitly that the right to privacy is triggered when "an individual is forced to disclose information regarding personal sexual matters."** There, we concluded that a person may have a constitutional privacy interest in refusing to answer questions concerning sexual history posed by an employer. In *Sheets*, the case primarily relied upon by the district court, we held that a husband may have a legitimate expectation of privacy in his wife's diary—which was turned over to the police as part of a criminal investigation—because it contained reflections about the couple's personal relationship. 45 F.3d at 1388.

While there is no case in this circuit addressing whether a video depicting a rape may be within the right to privacy, it is not surprising, given our precedent, that we should reach such a conclusion. If a person has a legitimate expectation of privacy in a diary, in undressing before a guard, or in answering questions concerning sexual history, certainly a person has a reasonable expectation that a video of his or her rape will not be aired to thousands in a public news broadcast.

Blake, 469 F.3d 910, 914–15 (10th Cir. 2006).

Taken together, *Zolin, Taylor,* and *Blake* all stand for the proposition the Court should heavily consider the need for this in-camera review in light of the fact that any witnesses to either Jones Day Report do not have notice of the Motion or an opportunity to be heard against disclosure, even to the Court for in-camera review. It is also noteworthy that this case, *Blake*, and *Sheets* all involved due process violation claims deriving from media outlets request for private information held by the State related to allegations of sexual misconduct. In the Tenth Circuit, it is clearly a deprivation of due process to proceed as requested by Plaintiffs.

CONCLUSION

WHEREFORE, the University respectfully requests the Court deny Plaintiff's Motion for In-Camera Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June 2023, a true and correct copy of the foregoing was hand delivered to:

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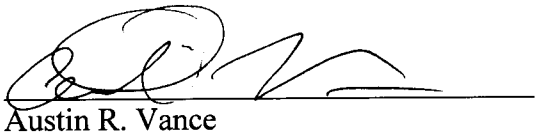

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