IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE, v. DEMETRIUS HALEY, Defendant, and TADARRIUS BEAN, Defendant, and EMMITT MARTIN III, Defendant, and DESMOND MILLS, JR., Defendant, and JUSTIN SMITH, Defendant.	Nos. C2300401, C2300402, C2300403, C2300404, C2300405

MEDIA COALITION MOTION TO INTERVENE AND FOR AN ORDER SETTING AN EXPEDITED HEARING, GRANTING PUBLIC ACCESS TO VERBAL GAG ORDER RECORDING, REDUCING VERBAL GAG ORDER TO WRITING, AND VACATING GAG ORDERS

By this Motion, a coalition of Tennessee and national news organizations and reporters—namely, the Associated Press, The Daily Memphian, Memphis Publishing Co. d/b/a the *Commercial Appeal*, MLK50: Justice Through Journalism, Marc Perrusquia, The New York Times Company, WREG-TV, Cable News Network,

Inc., and WATN-TV/WLMT-TV (collectively "the Media Coalition")—by and through undersigned counsel, respectfully move to intervene in the above-captioned cases for the limited purpose of seeking an order (1) setting an expedited hearing on this Motion;[1] (2) granting public access to the recording of the Court's hearing, presumably on January 26, 2023 at which, the Media Coalition is informed and believes, a gag order was issued orally from the bench; (3) reducing any such verbal gag order to writing; and (4) vacating that verbal gag order and (5) vacating the gag order on the City of Memphis (the "City") entered by the Court on March 8, 2023 (attached as Exhibit A).

INTRODUCTION

Defendants have been indicted for second degree murder, aggravated assault, aggravated kidnapping, official misconduct, and official oppression for their part in the death of Tyre Nichols.[2] Body camera footage released to the public by the Memphis Police Department on January 27, 2023 shows Defendants kicking and

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[1] Because counsel for the Media Coalition is located in the Nashville area, the Media Coalition respectfully requests that any hearing in this case be scheduled at least two days before it is set to be heard.

[2] Lawrencia Grose and Autumn Scott, *Former Memphis officers charged in Tyre Nichols' death,* WREG News Channel 3, Jan. 26, 2023, https://wreg.com/news/local/tyre-nichols/five-officers-involved-in-tyre-nichols-death-booked-into-jail/.

striking Mr. Nichols repeatedly, as Mr. Nichols pleads for them to stop.[3] On February 17, 2023, each of the five Defendants pled not guilty.[4]

Journalists, including Jonathan Mattise of the Associated Press, Jessica Jaglois for The New York Times, Jessica Gertler from WREG-TV, and Marc Perrusquia, among others, have since submitted public records requests seeking the personnel file of Defendant Demetrius Haley from Shelby County, which had previously employed Defendant Haley as a correctional officer.[5] Exhibits B-E.[6] The Shelby County Public Records Counsel, Angela Locklear, denied those requests. In one instance, Ms. Locklear initially denied the request "pursuant to a Criminal Court Order" and stated that "the records sought as to Demetrius Haley are not subject to release at this time." Ex. B; *see also* Ex. C (Ms. Locklear responded to reporter Jessica Jaglois that "the records sought are not subject to release at this time"). When Ms. Locklear was asked for a copy of the order, she replied that it was "a verbal order from the bench by Judge Jones," Ex. B-C, and "[t]o our knowledge the court has not entered it into writing," Ex. C. Because that gag order has not

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3 David Rogers and Stuart Rucker, *Tyre Nichols videos show what happened in fatal Memphis traffic stop*, WREG, Jan. 28, 2023, https://wreg.com/news/local/tyre-nichols/tyre-nichols-video-released-by-memphis-police/.

4 Adrian Sainz and Jonathan Mattise, *5 Memphis officers plead not guilty in death of Tyre Nichols*, AP News (Feb. 17, 2023), https://apnews.com/article/tyre-nichols-memphis-police-officers-court-7119ce117dffafc90728caf3fc264533.

5 *See* Travis Loller and Adrian Sainz, *1st officer in Nichols arrest accused of brutality at prison*, AP News, Feb. 10, 2023, https://apnews.com/article/tyre-nichols-memphis-6fc0f442de01ca2c801b8fb67719c48c.

6 These exhibits are the email correspondence between identified reporters and the Shelby County Public Records Counsel, Angela Locklear, along with the reporters' public records requests.

been reduced to writing, the Media Coalition cannot ascertain either the grounds for the order or its scope. Undersigned counsel has tried to contact Ms. Locklear, one of the Assistant District Attorneys assigned to this case, and counsel for Defendant Haley to inquire about the verbal gag order. To date, only the attorney for Defendant Haley has responded, and only to state that he could not comment.

On March 8, 2023, the Court entered a second gag order, this one on the City. Ex. A. The March 8 gag order prohibits the City from releasing "videos, audio, reports, and personnel files of City of Memphis employees related to this indictment and investigation (to include administrative hearings, records and related files ... until such time as the State and the Defendants have reviewed this information." *Id.* The March 8 gag order also states that "[t]he release of this information shall be subject to further orders of this Court and, in the public interest, will be ordered as soon as practicable." *Id.* The March 8 gag order is in response to statements by the City on March 7, 2023 that it intended to release additional video, audio, and records related to the City's administrative investigation into Mr. Nichols death.[7] Defs.' Mot. for Protective Order at 1.

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[7] Julia Baker, *Additional Nichols video to be released Wednesday, internal investigation complete*, The Daily Memphian, March 7, 2023, https://dailymemphian.com/article/34649/ (discussing intended release); Lucas Finton, *Release of additional Tyre Nichols footage, audio, documents to be placed on hold after court order*, Commercial Appeal, March 8, 2023, https://www.commercialappeal.com/story/news/2023/03/08/tyre-nichols-additional-footage-release-on-hold-court-order/69985890007/ (discussing the Court's March 8 gag order).

Any gag order precluding access to public records pertaining to Defendants is not only unwarranted, but also anathema to the First Amendment's protections for newsgathering and publication, particularly in the context of criminal proceedings. For centuries, public access to judicial proceedings has been "an indispensable attribute" of the criminal trial, for good reasons. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). As the Supreme Court has recognized, secrecy breeds "distrust" of the judiciary and undermines its ability to adjudicate matters fairly and effectively. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). And "[p]ublic awareness and criticism have even greater importance where, as here, they concern allegations of police corruption." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1036 (1991). The role of the press, in particular, in fostering public knowledge and understanding of criminal matters is well established. Indeed, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard*, 384 U.S. at 350.

Access to the verbal gag order and vacatur of both gag orders in this case is critical to protecting the First Amendment rights not only of case participants and third parties, but also of the press, who seek to gather news and report on these proceedings and related matters. Without access to the recording of the hearing at which the verbal gag order was entered, it is unclear to whom that order applies, what it prohibits, and what facts and law were asserted to support it. Moreover, under Tennessee law, any such gag order must be reduced to writing. Finally,

vacatur of both gag orders is necessary because the facts and circumstances here are patently insufficient to support such an extreme measure.

Accordingly, and for the reasons herein, this Court should expeditiously grant the Media Intervenors' motion to intervene and enter an order that (1) provides press and public access to the recording of the hearing at which the Court entered the verbal gag order, (2) reduces the verbal gag order to writing, and (3) vacates the gag orders.

ARGUMENT

I. The Media Coalition has standing to intervene.

Under Tennessee law, members of the public, including members of the media, have the right to intervene to oppose gag orders. *State v. Montgomery*, 929 S.W.2d 409, 411 (Tenn. Crim. App. 1996) (affirming intervention by media in criminal case to challenge gag order on the press); *see also State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) (holding that "[i]nterested members of the public and the media may intervene and be heard in opposition to [a closure] motion"). Similarly, members of the public, including members of the media, have a right to intervene to assert their right to access judicial records and proceedings under the common law and First Amendment. *Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996).

Courts outside of Tennessee likewise have routinely held that members of the press may challenge gag orders that impede their constitutionally protected rights to gather and disseminate news. *See, e.g., Davis v. East Baton Rouge Parish School*

Bd., 78 F.3d 920, 927 (5th Cir. 1996) (finding news agencies had standing to challenge a gag order impeding their First Amendment-protected right to gather news); *CBS, Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975) (holding the press has standing to challenge gag orders because "its ability to gather the news concerning the trial is directly impaired or curtailed" and "[t]he protected right to publish the news would be of little value in the absence of sources from whom to obtain it"); *State ex rel. Miami Herald Pub. Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976) ("[T]he news media...has standing to question the validity of a[] [gag] order because its ability to gather news is directly impaired or curtailed."); *Cape Publ, Inc. v. Braden*, 39 S.W. 3d 823, 827 (Ky. 2011) (holding that "a party or an intervenor is entitled to procedural due process when the court seeks to restrict anyone from exercising a constitutionally protected news interest including news gathering" and "[t]he minimum requirements of due process are notice and an opportunity for a hearing").

There is no doubt that the verbal gag order at issue—whatever its full scope may be—is impeding the Media Coalition's ability to gather news because Shelby County has cited the verbal gag order as the basis for denying public records requests for personnel records of one of its former employees, Defendant Haley, which would otherwise be available to the public.[8] The same is true of the March 8

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[8] Police officer personnel files are public records under the Tennessee Public Records Act ("TPRA"), Tenn. Code Ann. § 10-7-503(c)(1) ("[A]ll law enforcement personnel records shall be open for inspection as provided in subsection (a)."). Moreover, "non-investigative public records made in the ordinary course of business, capable of being accessed from their inception by the citizens of Tennessee, do not

gag order; the City had announced that it was planning on publicly releasing materials that appear to be covered by it.[9] In addition, there may be other aspects of the Court's verbal gag order that further impede the Media Coalition's ability to gather news about the former officers accused of Tyre Nichols' murder and related criminal offenses, and their prosecution. Local Rule 6.12 also provides "[a]ny person" standing to seek access to court recordings, and such access here is particularly necessary given that it is only with access to the recording of the hearing at which the Court entered its verbal gag order that the public, including the Media Coalition, can know its scope. As such, the Media Coalition has standing to intervene to seek the relief sought by this Motion.

II. The Court should grant public access to the recording of the entry of the verbal gag order pursuant to Local Rule 6.12.

Local Rule 6.12 provides that "[a]ny person seeking access to court recordings shall file a motion in the division in which the requested record was made setting forth the date or dates requested, the subject matter, and the identity of any witness or witnesses whose testimony is sought." The Media Coalition is unaware of the exact date the verbal gag order was entered, but based on the public docket it appears likely the order was entered on January 26, 2023, which the docket

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become exempt from disclosure because of the initiation of a criminal investigation in which they become relevant." *Scripps Media, Inc. v. Tenn. Dept. of Mental Health & Substance Abuse Servs.*, 614 S.W.3d 700, 702 (Tenn. Ct. App. 2019). In other words, the existence of a criminal prosecution does not vitiate the public nature of Defendant Haley's personnel file, which remains subject to public access under the TPRA.

[9] Baker, *supra*, n.6.

suggests was the only hearing held before several of the public records request denials by Shelby County. Access to the recording of the hearing is necessary because without it neither the public nor the press, including the Media Coalition, can know to whom the verbal gag order applies, and to what it applies.

III. Court orders must be reduced to writing to be valid and effective; verbal orders are not binding.

As described above, a number of journalists have filed public records requests seeking Defendant Haley's personnel files from Shelby County pursuant to the TPRA. Ex. B-E. Shelby County Public Records Counsel, Angela Locklear, denied those requests, claiming, among other things, that the requested records were exempt "pursuant to a Criminal Court Order" and later stating that it was "a verbal order from the bench by Judge Jones," that "[t]o our knowledge the court has not entered it into writing." Ex. B-C.

Tennessee courts have consistently held that failure to enter a written order that explains the court's action and provides adequate notice to affected parties is error. *See, e.g., State v. Rodgers*, 235 S.W.3d 92, 96 (Tenn.2007) (holding that an oral directive did not constitute a valid court order in juvenile proceedings); *In re Addison M*, No. E2014-02489-COA-R3-JV, 2015 WL 6872891 at *7 (Tenn. Ct. App. Nov. 9, 2015) (finding no statutory authority for the substitution of an oral directive for a valid court order); *State v. Conner*, 919 S.W.2d 48, 49 n. 3 (Tenn. Crim. App. 1995) (finding error in the trial court's failure to enter a written order setting forth the reasons for revoking appellant's probation). Indeed, "it is well-settled that a trial court speaks through its written orders—not through oral statements

contained in the transcripts." *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015) (internal quotations omitted); *see also Manor v. Woodroof*, No. M2020-00585-COA-R3-CV, 2021 WL 527477 at *7 (Tenn. Ct. App. Feb. 12, 2021) (holding that oral statements made during a hearing did not affect an extension of a previously entered order of protection).

Any verbal order issued in the instant case that precludes Shelby County from releasing records requested under the TPRA, or otherwise restricts any other third party or case participant from speaking or providing documents to members of the news media, is therefore unenforceable. If the gag order at issue is not reduced to writing, it cannot be binding on those to whom it is directed, including Shelby County. The Media Coalition therefore requests that the gag order be reduced to writing and publicly filed.

IV. The gag orders should be vacated.

Gag orders in criminal cases implicate weighty First Amendment interests and, accordingly, may be imposed only in rare, extraordinary circumstances. *See Neb. Press Ass'n*, 427 U.S. at 558 (holding that restraints on expression related to a criminal trial come with a "heavy presumption" against their constitutional validity and proponents bear a "heavy burden of showing justification for the imposition of such a restraint"); *State v. Carruthers*, 35 S.W.3d 516, 559 (Tenn. 2000) ("[G]ag orders exhibit the characteristics of prior restraints.") (citations omitted). While the exact scope of the verbal gag order is unclear, Shelby County construes it as prohibiting the disclosure of public records concerning Defendant Haley; it is thus

likely to be construed to also apply to the disclosure of records pertaining to the other Defendants, and may be construed to similarly restrict public statements by the Defendants and other participants in this case. The March 8 gag order prohibits the City from releasing public records from its files related to these cases. Different standards apply in analyzing each potential application, but neither standard is met in this case.

A. The gag orders on third parties like the City and Shelby County should be vacated.

The only things the Media Coalition knows for sure at this point is that Shelby County believes it is bound by a verbal gag order issued by this Court that prohibits it from releasing the personnel file of Defendant Haley and that the City is barred from releasing public records it intended to release by the March 8 gag order. Ex. A-E. The verbal gag order may restrict more speech than that and may apply to other third parties. To the extent the gag orders bind non-trial participants, they should be vacated.

While no Tennessee state court has addressed the standard that applies when a member of the news media challenges a gag order on non-trial participants, like Shelby County and the City,[10] the Sixth Circuit did so in *CBS Inc. v. Young*,

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10 The only parties to this case are the State, as represented by the District Attorney General for Shelby County, *Thompson v. Tennessee District Attorney General's Office*, No. 3:18-cv-00502, 2018 WL 6181357 at *2 (M.D. Tenn. Nov. 27, 2018), and Defendants and their counsel. Shelby County is a distinct legal entity from the State. *See, e.g., Spurlock v. Sumner County*, 42 S.W.3d 75, 82 (holding that sheriff is a county official, not a state official); *Morris v. Snodgrass*, 871 S.W.2d 484, 485 (Tenn. Ct. App. 1993) (suit by Shelby County officials against state officials). The same is true of the City. *See, e.g., City of Memphis v. Hargett*, 414

522 F.2d 234 (6th Cir. 1975). The Court's verbal gag order involving Shelby County and any other third parties as well as the March 8 gag order should be evaluated applying the standards set forth in *Young*.

The underlying suit in *Young* was a civil action regarding the shootings by members of the Ohio National Guard in 1970 of protesters at Kent State University demonstrating against "the invasion of Cambodia by American troops," where four students died and many more were wounded. *Id.* at 236. The gag order that was challenged by the press in that extremely high-profile case was quite broad and barred not just trial participants, but also "their relatives, close friends, and associates ... from discussing in any manner whatsoever these cases with members of the news media or the public." *Id.* The trial judge entered the order after several newspaper stories regarding a memorial service held on the Kent State University campus were brought to his attention, prompting "concern[] over the possibility of publicity which would have an inflammatory effect on the prospective jurors." *Id.* at 240. The Sixth Circuit ultimately found those articles "innocuous" and concluded the order was unconstitutional. *Id.*

As a starting point, the Court in *Young* explained the order should be analyzed as a form of prior restraint, which "bears a heavy presumption against its constitutional validity." *Id.* at 239. To overcome this heavy presumption, "the activity to be restrained must pose a clear and present dangerous threat to a

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S.W.3d 88, 92 (Tenn. 2013) (suit by City of Memphis against state officials and bodies).

protected competing interest" and "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Id.* (citations omitted).

The Sixth Circuit explained in overturning the gag order in *Young* that "[a] more restrictive ban upon freedom of expression in the trial context would be difficult if not impossible to find." *Id.* "We find the order to be an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial." *Id.* at 240. The court concluded that there was "no substantial evidence" to justify the broad gag order on both trial participants and third parties, despite significant publicity that accompanied the case and the trial judge's concerns about its effect on the potential jury pool.

The verbal gag order against third parties, like Shelby County, and the March 8 gag order against the City are unconstitutional under the stringent standard identified in *Young*. Release of Defendant Haley's personnel file from his prior employment simply does not constitute a serious and imminent threat to Defendants' fair trial rights and it is hard to imagine any other restrictions on third party speech that could possibly satisfy this stringent standard. The same is true regarding the release of employment and administrative investigation records related to these cases by the City. Just like in *Young*, the only possible evidence the Media Coalition is aware of that might support a gag order is the significant

publicity about this case, but that is patently insufficient by itself to support gag orders against third parties, like Shelby County and the City. As a result, the gag orders should be vacated.

B. The verbal gag order should be lifted to the extent it restricts trial participants from publicly discussing these cases.

The Tennessee Supreme Court has held that gag orders restricting trial participants from making extrajudicial comments about court proceedings are only permissible if there is a substantial likelihood that the prohibited speech will prejudice the defendant's fair trial rights under the Sixth Amendment. *Carruthers*, 35 S.W.3d at 563. To the extent the verbal gag order in this case applies to trial participants—i.e., prosecutors, the Defendants, and their lawyers—the Court should vacate the order because there is no substantial likelihood that Defendants' fair trial rights will be prejudiced. Even if there was a substantial likelihood of prejudicing Defendants' fair trial rights, the Court should consider reasonable alternatives to a gag order, which are plentiful, and ensure that any order is narrowly tailored to protect First Amendment interests. *U.S. v. Brown*, 218 F.3d 415, 429-31 (5th Cir. 2000); *Carruthers*, 35 S.W.3d at 563-64.

i. There is not a substantial likelihood that Defendants' fair trial rights will be prejudiced absent a gag order applicable to trial participants.

A comparison of the facts of this case with the Tennessee Supreme Court's decision in *Carruthers* demonstrates that the facts of this case are insufficient to support a finding that there is a substantial likelihood of prejudicing Defendants' fair trial rights that is required for the exceptional remedy of a gag order on trial

participants. 35 S.W.3d at 559-564. This conclusion is buttressed by case law regarding prejudice to the fair trial rights of criminal defendants.

In *Carruthers*,

> the following circumstances were considered by the trial court as reasons for issuing the gag order: numerous threats to attorneys, the death of one of the co-defendants, the highly charged emotional climate of the trial (e.g., the courtroom was guarded by S.W.A.T. team members); the gunning down of a deputy jailer in his driveway, which the trial judge thought was related to the case; the fleeing of one witness after reading about the case in the newspapers, and the statements of two witnesses who had already testified that [one of the defendants] threatened to kill them if they talked about the case.

35 S.W.3d at 559-60. In addition, another witness "testified that Carruthers threatened him and made arrangements to have a reporter interview him about recanting his story." *Id.* at 560. Based on these extraordinary facts, the Supreme Court affirmed entry of a gag order prohibiting the defendant and the attorneys in the case from speaking to the press about anything one month before trial in a case that had been pending for two years.[11] *Id.* at 558-60, 564-65. There are no similar facts here to support a finding that there is a substantial likelihood of prejudice to Defendants' fair trial rights.

Case law involving the right to a fair trial reinforces the conclusion that a gag order is not warranted here. Media coverage, even pervasive publicity, is insufficient to support a finding of prejudice to a defendant's fair trial rights. *Neb.*

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11 The Court in *Carruthers* also found that the order was too broad, but affirmed because the Court found that the error was harmless. *Id.* at 560, 565.

Press Ass'n, 427 U.S. at 554 (explaining that "pretrial publicity, even if pervasive, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial"); *State v. Mann*, 959 S.W.2d 503, 532 (Tenn. 1997) ("The mere fact that jurors have been exposed to pre-trial publicity will not warrant a change of venue."); *Whited v. State*, No. M2012-02294-CCA-R3-PC, 2014 WL 1832962 at *12 (Tenn. Crim. App. May 7, 2014) ("Prejudice will not be presumed by a mere showing that there was considerable pretrial publicity.").

Further, the availability of factual information about a case is not prejudicial. *See Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984) (discussing the fact that "purely factual articles" were part of pretrial publicity during voir dire for criminal trial that was found to be constitutional); *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (noting that the pretrial publicity was "largely factual in nature" when rejecting the criminal defendant's claim that the publicity was inflammatory); *Grancorvitz v. Franklin*, 890 F.2d 34, 40 (7th Cir. 1989) (holding the defendant was not denied an impartial jury where the pretrial publicity at issue was "mostly factual" and thus did "not present the same potential for prejudice as publicity which is 'invidious or inflammatory'"); *U.S. v. Faul*, 748 F.2d 1204, 1212 (8th Cir. 1984) (holding that fair trial rights were not violated by denial of change of venue in case with widespread publicity that was "largely factual in nature").

Here, the publicity surrounding Defendants' indictments has been factual in nature, largely consisting of video footage of the incident that resulted in Mr. Nichols' death and written descriptions of those videos; such factual information

does not threaten Defendants' ability to obtain a fair trial. Release of Defendant Haley's personnel file by Shelby County likewise would be factual in nature, detailing Defendant's employment history, and therefore non-prejudicial. Even if the personnel file in question revealed disciplinary action taken against the Defendant or evidence of other problematic behavior, its release would still not amount to unconstitutional prejudice. *See Murphy*, 421 U.S. at 799 (holding that "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged" does not "presumptively deprive[] the defendant of due process"). The same is true of the City's files.

Indeed, even pervasive, negative publicity "does not necessarily produce prejudice," *Skilling v. U.S.*, 561 U.S. 358, 381 (2010) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)), or "inevitably lead to an unfair trial." *Neb. Press Ass'n*, 427 U.S. at 554. One of the reasons is that jurors need not be "totally ignorant of the facts and issues involved" to be impartial. *Mann*, 959 S.W.2d at 531 (quoting *Irvin*, 366 U.S. at 722). As the Tennessee Supreme Court explained in *Mann*,

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Id. (quoting *Irvin*, 366 U.S. at 722-23); *see also State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991) (distinguishing the "presumed prejudice" standard applied in *Rideau*

v. Louisiana, 373 U.S. 72 (1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 33 (1966), which "involved extremely inflammatory publicity and media conduct creating a corruptive carnival atmosphere that deprived the proceedings of 'the solemnity and sobriety' required for due process" and noting that those cases "do not stand for the proposition that juror exposure to information about the crime...is presumably prejudicial"). Here, the mere possibility of potential juror exposure to news reports about Mr. Nichols' death does not support an inference of actual prejudice. Absent a showing by Defendants of substantial likelihood that jurors would be incapable of impartially adjudicating their case, *Patton*, 467 U.S. at 1035, this Court should not deviate from the presumption of impartiality, *Irvin*, 366 U.S. at 723.

Finally, given the size of the jury pool in Shelby County, Tennessee's most populous county,[12] the likelihood of prejudice to Defendants' fair trial rights is, if not non-existent, quite small. *See Skilling*, 561 U.S. at 382 (finding that "[g]iven this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be impaneled is hard to sustain" with a pool of 4.5 million people); *Gentile*, 501 U.S. at 1044 (plurality opinion) (explaining that likelihood of prejudice to fair trial rights was reduced where population of county was over 600,000); *U.S. v. Hofstetter*, No. 3:15-CR-27-TAV-CCS, 2018 WL 813254, at *19 (E.D. Tenn. Feb. 9, 2018) (finding that the population of the Knoxville division was

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12 The U.S. Census Bureau estimates the Shelby County's population as of July 1, 2021 was 924,454. https://www.census.gov/quickfacts/shelbycountytennessee.

"a sufficiently large and diverse population from which to draw twelve to fourteen jurors").

In sum, the case law is clear that a "substantial likelihood of prejudice" to a criminal defendant's fair trial rights sufficient to warrant entry of a gag order is present only in extraordinary and unusual circumstances. Here, the facts do not support such a finding.

ii. Reasonable alternative measures are sufficient to protect Defendants' fair trial rights.

Further, even assuming, *arguendo*, there was some risk to Defendants' fair trial rights, before entering a gag order, a court must consider reasonable alternatives to protect those rights. *Carruthers*, 35 S.W.3d at 563 ("Before a gag order can be entered . . . the case law suggests that a trial court should consider reasonable alternatives that would ensure a fair trial without restricting speech."); *see also Brown*, 218 F.3d at 430 (explaining that when deciding whether to issue a gag order a trial judge should decide "whether other precautionary steps will suffice" to protect defendant's fair trial rights). Reasonable alternatives include "searching questioning of prospective jurors," "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," sequestration of jurors, change of venue, and postponement of the trial, among others. *Neb. Press Ass'n*, 427 U.S. at 563-64 (citing *Sheppard*, 384 U.S. at 357-62).

The Tennessee Supreme Court has explained that "when a crime is highly publicized, the better procedure is to grant the defendant individual, sequestered

voir dire, but it is only where there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated." *State v. Cazes*, 875 S.W.2d 256, 262 (Tenn. 1994); *see also In re Charlotte Observer*, 882 F.2d 850, 855 (4th Cir. 1989) ("Voir dire is of course the preferred safeguard against [the threat of pretrial publicity] to fair trial rights."). It is significant that under the facts of this case, at this point in the proceeding, even the less extreme alternative to a gag order—individual, sequestered voir dire—would likely not even be required because there has been no showing that there is significant prejudicial (rather than factual) material published, as discussed *supra*. *Compare Murphy*, 421 U.S. at 800, n.4 (finding no prejudice where pretrial publicity was "largely factual in nature," rather than inflammatory), *with Sheppard*, 384 U.S. at 356-57 (recounting publicity related to trial as including "charges that [the defendant] had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that [the defendant] was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testimony as to police treatment; and finally, that a woman convict claimed Sheppard to be the father of her illegitimate child"). In fact, "[i]t is significant that voir dire in some of the most widely covered criminal prosecutions has revealed the fact that many prospective jurors do not follow such news closely and that juries can be empaneled without inordinate difficulty." *Appl. of Nat'l Broad. Co.*, 828 F.2d 340, 346 (6th Cir. 1987) (citations omitted). More recently, the Tennessee Court of Criminal Appeals

reaffirmed that "certain precautionary measures will guard against the risk of actual juror prejudice," including "juror questionnaires, individual voir dire, peremptory challenges, and jury instructions." *Davidson v. State*, No. E2019-00541-CCA-R3-PD, 2021 WL 3672797, at *36-42 (Tenn. Crim. App. Aug. 19, 2021) (citing *Skilling*, 561 U.S. at 382-84). Indeed, "[t]he judicial process does not run and hide at those moments when public appraisal of its workings is most intense." *In re Murphy-Brown*, 907 F.3d at 798.

A comparison between the facts here and those in *Carruthers,* again, illustrates why a gag order is not constitutionally permissible. Here, there is only substantial pretrial publicity, nothing more. But in *Carruthers*, there was substantially more than just significant pretrial publicity:

> The trial court found that neither change of venue nor a continuance was practical because the case was several years old and one attempt to try the case had already been made. The court appropriately gave careful attention to voir dire and jury instructions, but determined that these alternatives alone were insufficient.

35 S.W.3d at 564. It has been just a little more than a month since this case began. Trial is likely a long way off. And there have been no written findings that the other tools available to the Court will not suffice to protect the Defendants' fair trial rights. Without such a decision, a gag order cannot be sustained.

The Court has numerous, less extreme tools available to it to protect Defendants' fair trial rights and those tools should be utilized before a gag order should even be considered, let alone entered. Here, alternatives like individual,

sequestered voir dire, careful jury instructions, and even change of venue, among others, should be considered before a gag order is issued. Because it is unlikely at this early stage of the case that such alternatives were considered and rejected, the Court should lift the verbal gag order.

iii. Any gag order on trial participants must be narrowly drawn.

"It is axiomatic that the limitation on First Amendment freedoms must be 'no greater than is essential to the protection of the particular governmental interest involved.'" *Brown*, 218 F.3d at 429 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)); *see also Carruthers*, 35 S.W.3d at 564 ("In determining whether a gag order is appropriate, ... a court must be mindful that '[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). While the Media Coalition is not privy to the exact scope of the verbal gag order, it is very unlikely that it is sufficiently tailored to satisfy constitutional scrutiny.

Even in *Carruthers*, the Tennessee Supreme Court found that the gag order in place on the defendant was too broad where it prohibited "the defendants and their attorneys from making *any* comments to the press about the case." 35 S.W.3d at 564 (emphasis in original). Comparing the gag order at issue to those upheld in other cases, the court concluded that "[th]is gag order is considerably broader than any upheld" in the other cases discussed in *Carruthers*. *Id.* The Tennessee Supreme Court, thus held that "initial gag orders on trial participants should

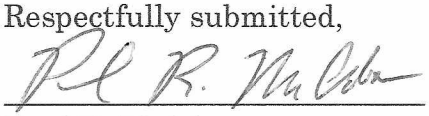
ordinarily ... allow trial participants to make general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record." *Id.* at 565.

As discussed above, the facts do not justify any gag order here, but even if a gag order was warranted it must be narrowly tailored in the manner described in *Carruthers.*

WHEREFORE, the Media Coalition respectfully requests that the Court set an expedited hearing for this Motion, provide them with access to the recording of the entry of the verbal gag order in these cases, reduce the verbal gag order to writing, and lift the Court's gag orders in their entirety.

Dated: March 17, 2023

Respectfully submitted,



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I certify that on this 17th day of March, 2023, I caused a true and correct copy of the foregoing document to be deposited in the United States mail, postage paid, addressed to the following:

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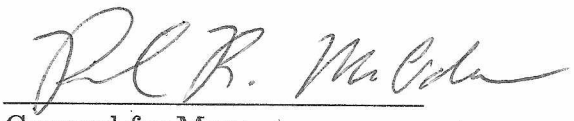

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