SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	
v.	Case No. 2017-CF2-001356
	Judge Lynn Leibovitz
ELIZABETH LAGESSE TROY NEVES WILLIAM BOGIN MAKENNA CLARK TRACI DUNLAP JARED FARLEY MICHAEL LOADENTHAL ROSA RONCALES,	
Defendants.	

[PROPOSED] MEMORANDUM OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND [TK] MEDIA ORGANIZATIONS AS *AMICI CURIAE*

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, [tk list others]. A supplemental statement of identity and interest of *amici* is included below as Appendix A.

Amici file this brief in support of Defendants' Opposition to Government's Motion for a Protective Order Regarding Materials Produced During Discovery and Motion to Vacate the Protective Order Imposed. As representatives and members of the media, *amici* have a strong interest in safeguarding the ability of the public and the press to access court documents in criminal cases. *Amici* or the journalists on whose behalf *amici* advocate regularly report on criminal trials and the events that lead to arrests and criminal charges. Accordingly, *amici* frequently rely on court records that shed light on newsworthy events to report on matters of public concern. Broad protective orders that prohibit public disclosure of discovery materials in criminal cases without a sufficient showing of good cause, such as the protective order entered in this case, hinder journalists' ability to gather facts and report the news.

INTRODUCTION AND SUMMARY OF ARGUMENT

The protective order entered in this case restricts public dissemination of virtually all discovery materials in a criminal prosecution that is the subject of widespread public discussion and concern without a good cause basis for doing so. *Amici* agree with Defendants that the protective order currently in place should be vacated and that the government's request for a protective order should be denied. *Amici* write to emphasize a few points.

First, this case, which stems from protests of the presidential inauguration held on January 20, 2017 (the "Inauguration Day protests"), is of national interest and importance. The American public has a powerful interest in obtaining information to understand the events of the Inauguration Day protests, including the actions of protesters and the response of law

enforcement. The Court must consider this interest in determining whether the government has demonstrated "good cause" for the protective order.

Second, the government's broad claim that a protective order is necessary to avoid juror taint is insufficient to show good cause for the protective order. Not only is this claim too vague to satisfy the test of good cause under Superior Court Rule of Criminal Procedure 16, the government ignores the traditional tools used by courts to filter out jury bias, namely a thorough *voir dire*.

Finally, the government's concern over privacy for police officers also cannot demonstrate good cause to support the sweeping protective order entered in this case. The government fails to identify with the requisite specificity what personal information about officers might be revealed without a protective order. Additionally, the government's argument is undermined by the fact that officers have little, if any, privacy interest in information documenting their performance of their official duties.

The protective order sought by the government and imposed by this Court restricts the ability of reporters and news organizations—both in Washington, D.C., and around the country—to keep the public informed about political protests and law enforcement responses to such demonstrations. Because it is not supported by good cause, it should be vacated and the government's motion denied.

ARGUMENT

I. The public has a strong interest in learning about the Inauguration Day protests, which the Court must consider in determining whether the government has demonstrated good cause for the protective order.

Going back at least as far as the Sons of Liberty's 1773 demonstration in defiance of the Tea Act in Boston, protests have been the subject of great public attention and news coverage.

Even after the Inauguration, conflicts between protesters, counter-protesters, and police are more than ever the subject of national discussion. As such, information furthering understanding of such conflicts is of great public interest. *See, e.g.*, Wesley Lowery & Christina Pazzanese, *Boston 'Free Speech' Rally Ends Early Amid Flood of Counterprotesters; 27 People Arrested*, Wash. Post, Aug. 19, 2017, https://perma.cc/4VSZ-XFPF (describing the interplay between protesters, counter-protesters, and police officers during a rally in Boston); Robert Faturechi, *Can Police Prevent the Next Charlottesville*, ProPublica, Aug. 18, 2017, https://perma.cc/5NY7-VDGX (describing protest in Charlottesville, lessons learned by local police, and crowd control methods that could be used by police at future demonstrations). Video footage, photographs, and other documentation of protests are the source materials that allow news media organizations to report about protests, which in some instances have involved violence and even the loss of life, and inform this important public debate. *See, e.g.*, Patrick Wilson, *Some Virginia State Police Troopers Concealed Their Uniform Name Strips at Confederate Rally, Leading to Questions*, Richmond Times-Dispatch, Sept. 20, 2017, https://perma.cc/P92U-KF6A; Doug Moore, *As Arrests Are Made, Protesters Question the Tactics Used by St. Louis Police*, St. Louis Post-Dispatch, Sept. 19, 2017, https://perma.cc/8MG5-3VZ2.

Just as with other protests, the public has an interest in learning about the Inauguration Day protests that took place in Washington, D.C. *See, e.g.*, *Protests Turn Violent Near Inauguration Parade in D.C.*, Fox 5 DC, Jan. 20, 2017, https://perma.cc/X3YC-LQ6X; Phil McCausland, Emmanuelle Saliba, Erik Ortiz, & Corky Siemaszko, *More Than 200 Arrested in D.C. Protests on Inauguration*, NBC News, Jan. 21, 2017, https://perma.cc/88Q2-JJMT. In reporting on the protests, journalists have relied on the same types of materials that are covered by the protective order. For example, in July, a journalist published a news article about the

Inauguration Day protests based at least partly on police video footage. Zoe Tillman, *New Videos of Trump Inauguration Day Protests Show Chaos and Mayhem*, BuzzFeed, Jul. 18, 2017, https://perma.cc/4RAW-P96S (featuring footage highlighting various aspects of the protests and the police response including a clip showing protesters lobbing projectiles at police and another clip showing police spraying a crowd of protesters with what looks like pepper spray). The videos are accompanied by reporting that provides context about the Inauguration Day protests and discussion of what the footage adds to the public's understanding of events. *Id.*

In short, the public has a powerful interest in understanding the Inauguration Day protests, and the news media's ability to report on these events accurately and thoroughly is enhanced by access to videos, photographs, and other materials that document the protests. By limiting dissemination of evidence produced by the government in discovery, which includes videos from police body cameras and other law enforcement sources, videos from nearby businesses, photographs, recordings of police radio communications, and other documents, the protective order inhibits public knowledge about the Inauguration Day protests.

In determining whether good cause exists to justify the protective order in this case, the Court should consider the public's interest in access to the discovery materials. *See* Super. Ct. Crim. R. 16(d)(1) (permitting the Court "for good cause" to enter a protective order denying, restricting, or deferring discovery). Courts in the District of Columbia have not issued any published decisions defining the factors necessary to show good cause under Rule 16. However, D.C. courts construe the good cause standard under Rule 16 consistently with federal courts' interpretations of the same standard under Rule 16 of the Federal Rules of Criminal Procedure and with Rule 26 of the Federal Rules of Civil Procedure. *See Rowland v. United States*, 840 A.2d 664, 678 n.16 (D.C. 2004) ("We construe Rule 16 consistently with the federal rule from

which it is derived."). Federal courts have concluded that "[t]he good cause determination must . . . balance the public's interest in the information against the injuries that disclosure would cause." *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–91 (3d Cir. 1994); *see also SEC v. TheStreet.com*, 273 F.3d 222, 234 (2d Cir. 2001) (affirming district court decision to modify protective order to unseal portions of deposition in a civil case because "the interest of the general public" outweighed the privacy rights at stake). Here, the public interest in information about the Inauguration Day protest is considerable. Accordingly, the Court should weigh this interest against the government's arguments in favor of a protective order barring any dissemination by the parties of government-produced discovery materials in determining whether good cause exists.

II. The government's broad and general assertions are insufficient to demonstrate the good cause required to support the protective order.

The government's motion for a protective order appears to be based on two theories: without such an order there would be a "possibility of juror taint" and without such an order there would be risk that private information about defendants or police officers might become public. Gov't Mot. for a Protective Order Regarding Materials Produced During Discovery at 6, 7 ("Gov't Mot."). These general assertions, however, are insufficient to establish good cause as is required under Rule 16(d).

A. The government's unsupported claim that dissemination of discovery materials would risk "juror taint" ignores the effectiveness of a thorough *voir dire* in eliminating bias.

The government argues that public dissemination of discovery materials "raises the possibility of juror taint." Gov't Mot. at 6. In connection with this claim, the government notes that certain footage produced in discovery in this case has been posted on the internet "in a manner that is editorialized, arguably inflammatory, and less than complete." *Id*. As an

example, the government points to a video taken on a police body camera and posted to YouTube that shows police cordoning off a group of protesters. *Id.* at 6 n.1. The government states that this video omitted footage from the same body camera of protesters assaulting police officers and charging a police line. *Id.*

It is well-established that mere exposure to information about a case is insufficient to establish a threat of juror bias. The U.S. Supreme Court recognized in *Reynolds v. United States* that the criminal justice system both anticipates and tolerates jurors who have been exposed to pretrial publicity, as it is an inevitable consequence of an informed citizenry. 98 U.S. 145, 155–56 (1878) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."). As the Court affirmed more recently, "Prominence does not necessarily produce prejudice, and juror *impartiality* does not require *ignorance*." *Skilling v. United States*, 561 U.S. 358, 360 (2010).

For pretrial publicity to reach the point of causing serious risk of juror taint, it must be so inflammatory that any juror exposed to it could not be expected to render an impartial verdict. *See id.* at 382–83 (noting that publicity must be "the kind of vivid, unforgettable information" that is "particularly likely to produce prejudice"). Perhaps not surprisingly, then, courts have tended to find pretrial publicity to be sufficiently prejudicial in cases involving particularly heinous crimes that captivated a community and dominated local news coverage, especially when news reports have highlighted a defendant's confession of guilt. *See, e.g.*, *Irvin v. Dowd*, 366 U.S. 717, 720, 725–26 (1961) (coverage of murder case featured multiple articles stating defendant had confessed to six murders); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) ("[I]t

was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged.").

In contrast, courts have held that even widespread, adverse publicity does not so inevitably taint a prospective jury as to make seating an impartial jury impossible. For example, in *Patton v. Yount*, a Luthersburg, Pa., a high-school student was murdered and a man convicted in part based on an improperly obtained confession. 467 U.S. 1025, 1026–27 (1984). The teen's murder and the man's confession were the focus of extensive media coverage throughout a first trial. *Id.* at 1032. At a later retrial, however, the court allowed for "extensive voir dire" before seating a jury. *Id*. at 1027. During the process it was revealed that a sizable majority of jurors "admitted they would carry an opinion into the jury box" and eight of the 14 jurors and alternates seated even "admitted that at some time they had formed an opinion as to Yount's guilt." *Id*. at 1029–30. Nevertheless, the Supreme Court found that "the voir dire testimony and record of publicity do not reveal the kind of 'wave of public passion' that would have made a fair trial unlikely by the jury that was empaneled as a whole." *Id*. at 1040. Similarly, in *Casey v. Moore*, a Wenatchee, Wash., man stood trial for killing his wife. 386 F.3d 896, 901 (9th Cir. 1984). The defendant twice moved for a change of venue, arguing that he could not obtain a fair trial because of intense news coverage and "small-town gossip." *Id.* at 902. Both motions were denied, even after *voir dire* revealed that approximately 40 percent of the jury pool had "formed some opinion about the case." *Id.* The Ninth Circuit affirmed denial of the change-of-venue motions, stating that the defendant "has not demonstrated that prejudice could be presumed or that actual prejudice existed as a result of pretrial publicity . . . ." *Id.* at 921.

Courts have also found that pretrial publicity is unlikely to taint a jury pool in a place like the District of Columbia, "where the community in which the trial is scheduled is large and inundated with other news . . . ." *United States v. Chapin*, 515 F.2d 1274, 1289 (D.C. Cir. 1975). In *Chapin*, an attorney for the Nixon Administration was convicted of making "false material declarations" to a grand jury investigating so-called "dirty tricks"—ethically dubious political activities aimed at the administration's enemies. *Id.* at 1277. A jury convicted the defendant in April 1974, just two months after publicity of the Watergate break-in and scandal had reached its height, according to the D.C. Circuit. *Id.* at 1289. The defendant appealed, arguing that the district court erred in denying his motion for a change of venue. *Id.* at 1277. The United States Court of Appeals for the District of the Columbia Circuit held, however, that the district court did not err, rejecting the defendant's argument that pretrial publicity was so great that it was unlikely that an unbiased jury could have been empaneled. *Id.* at 1287–89.

Indeed, courts in the District of Columbia have held numerous trials of criminal defendants accused of high-profile crimes subject to extensive press attention. Nevertheless, these courts have effectively assembled impartial juries, as the D.C. Court of Appeals discussed in *United States v. Edwards*:

> The District of Columbia, the capital of the nation, is a major metropolitan center with a surfeit of events commanding media attention. Events occur, are reported, and pass with amazing rapidity. Trials relating to events of national and international news attention have been conducted without undue difficulty in obtaining a jury free from taint caused by such news attention.

430 A.2d 1321, 1346 (D.C. 1981).

Several high-profile cases further illustrate this point. In *Khaalis v. United States* defendants were convicted on charges stemming from their violent seizure of three buildings, including the District Building that housed the offices of the Mayor and City Council. 408 A.2d

313, 319 (D.C. 1979). During the takeover of the District Building, a radio reporter was fatally shot, and then-councilman Marion Barry was shot and injured. *Id.* at 326. Even though a majority of the potential jurors in the case followed news coverage of the seizures on a routine basis, the D.C. Court of Appeals rejected defendants' claim on appeal that this rose to the level of prejudicial publicity that deprived them of their Sixth Amendment rights to a fair trial. *Id.* at 335 (concluding that during its "thorough voir dire" the Court was able to empanel a jury "without unduly exposing the jury array to publicity . . . to the ultimate prejudice of appellants"). Similarly, in *United States v. Haldeman*, "extensive voir dire . . . with its detailed inquiry into the sources and intensity of the veniremen's exposure to Watergate publicity" was sufficient to overcome the contention of Watergate defendants that the jury was prejudiced against them. 559 F.2d 31, 69 (D.C. Cir. 1976).

Here, the government does not argue that pretrial publicity would be more extensive than is typical for a trial of public interest, let alone utterly corrupting. *See generally* Gov't Mot. It also does not suggest that the discovery materials covered under the protective order contain information analogous to a confession that could bias potential jurors with regard to a question of fact in the case. Rather, the government offers as its lone example of potentially prejudicial discovery material a clip posted on YouTube showing police on Inauguration Day corralling protesters that allegedly omits earlier actions of protesters that prompted the police response. Gov't Mot. at 6. Although the government suggests that this video is misleading, it does not explain why it is so inflammatory or so memorable that the public dissemination of it or similar videos would prevent the seating of an impartial jury.

The government also does not explain how dissemination of videos or photographs produced in discovery that show events that took place in public during the Inauguration Day

protests would increase the risk of tainting potential jurors, when there are hundreds of hours of video and innumerable pictures of the day's events that were recorded and made available by journalists and members of the public alike. *See, e.g.*, *Protesters clash with police at inauguration – video*, Guardian, Jan. 20, 2017, http://bit.ly/2k7JYq7; *Protesters and police clash in downtown D.C. on Inauguration Day*, Wash. Post, Jan. 20, 2017, http://wapo.st/2hpfgFB; *See Photos from Anti-Trump Protests on Inauguration Day in Washington, D.C.*, Rolling Stone, Jan. 21, 2017, https://perma.cc/QM8G-9FJF; WTOP Staff, *Photos: Inauguration protests in DC*, WTOP, Jan. 20, 2017, http://bit.ly/2xu5iMk. Indeed, the YouTube video cited by the government itself shows numerous individuals, including some who identify themselves as members of the press, filming or photographing the same events depicted in the video.

Moreover, even when there is a genuine possibility of juror taint, courts should employ thorough *voir dire* to screen out potentially biased jurors and preserve the impartiality of the jury. *See In re Charlotte Observer*, 822 F.2d at 855–56 (observing that "[i]ncreasingly the courts are expressing confidence that voir dire can serve in almost all cases as a reliable protection against juror bias however induced"). As part of the *voir dire* process, courts may also allow litigants to use special questionnaires to filter prospective jurors, *Casey*, 386 F.3d at 902; allow litigants to ask searching and direct questions to jurors about their level of exposure to pretrial publicity and whether they nonetheless can be fair, *Skilling* at 373–74; and increase the number of peremptory challenges available to the parties, *id.* at 373. The government does not even attempt to explain why one or more of these remedies would be insufficient to ensure an impartial jury in this case.

B. The government's invocation of "privacy interests" does not establish good cause for a broad protective order that bars dissemination of all discovery materials.

The government's motion argues that certain discovery materials, including body camera footage of arrest processing and arrest paperwork "contain relevant, but personal information about defendants, and even officers." Gov't Mot. at 7. While courts have held that privacy concerns can provide good cause to support protective orders, a particularized showing is nevertheless required under Rule 16(d) when such an order is challenged. *United States v. Bulger*, 283 F.R.D. 46, 55–56 (D. Mass. 2012) (recognizing that a party seeking continued enforcement of a protective order under Rule 16 must demonstrate cognizable privacy rights with particularity for specific items produced in discovery).

Here, the government suggests that body camera footage and arrest paperwork produced by the government in discovery might contain personal information about officers, without explaining what information may be revealed or the level of privacy interest, if any, an officer may have in that information. To the extent that these materials reveal events that occurred in public or non-undercover officers' names, faces, or badge numbers, which are in full view of members of the public on a daily basis, they are insufficient to justify the protective order. *See Franks v. City of New York*, No. 13-CV-623 JBW VMS, 2013 WL 6002946, at *2 (E.D.N.Y. Nov. 12, 2013) ("Defendant offers no explanation for why the requested photographs are protected by the law enforcement and official information privileges, when the officers are publicly visible during the course of their duties.").

In addition, *amici* agree with Defendants that officers have little, if any, privacy interest in the performance of their official duties. Def. Opp'n at 14–15; *see ACLU v. Alvarez*, 679 F.3d 583, 605–06 (7th Cir. 2012) (recognizing that police officer's privacy interests are not implicated

by recordings of officers performing their duties in public places and speaking at a volume audible to bystanders); *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1320 (11th Cir. 2017) (holding that police chief had no expectation of privacy in meeting between two members of the public and two police officials in chief's office to discuss allegations of police misconduct); *Bacon v. McKeithen*, No. 5:14-cv-37-RS-CJK, 2014 WL 12479640, at *3 (N.D. Ill. Aug. 28, 2014) (stating that "there is little societal expectation of privacy for police officers acting in the line of duty in public places; an expectation of privacy in these circumstances would undercut societal expectations of police accountability"); *Cowles Pub. Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (concluding that "a law enforcement officer's actions while performing his public duties or improper off duty actions in public which bear upon his ability to perform his public office" are not a matter of "personal privacy" in tort law). As the U.S. Supreme Court has recognized, there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). Accordingly, there is no good cause that justifies the protective order prohibiting dissemination of discovery materials that show or relate to officers' performance of their official duties.

CONCLUSION

For the foregoing reasons and those set forth in Defendant's opposition, *amici curiae* respectfully urge this Court to deny the government's request for a protective order and vacate the protective order currently in place.

Respectfully submitted,

/s/ Bruce D. Brown

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CERTIFICATE OF SERVICE

I certify that on XXXXX, 2017 a true and correct copy of this XXXXXX of The Reporters Committee for Freedom of the Press, YYYYYY, and ZZZZZZZZ was served, via electronic mail and the Court's e-filing system, to:

/s/ Bruce D. Brown
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