IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,
***Plaintiff*,**

v. **CAUSE NO. 22-cv-286-EFP**

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC., *et al.*
Defendants.

MOTION FOR LEAVE TO INTERVENE OF THE NORTHEAST MISSISSIPPI DAILY JOURNAL, THE MISSISSIPPI FREE PRESS, AND MISSISSIPPI TODAY, AND SUPPORTING MEMORANDUM OF LAW

The Northeast Mississippi Daily Journal,[1] the Mississippi Free Press, and Mississippi Today (collectively "Mississippi News Organizations") hereby move for an order under Mississippi Rule of Civil Procedure 24 to intervene in this case for the limited purpose of opposing former Mississippi Governor Phil Bryant's request for a protective order sealing from public view any records he must produce in response to a subpoena from Defendant Mississippi Community Education Center (MCEC) for records relating to a USM volleyball facility that was built while Governor Bryant was in office using millions of dollars in welfare funds from the Temporary Assistance to Needy Families (TANF) welfare program.

[1] The Northeast Mississippi Daily Journal is published by, and is also known as, Journal, Inc.

INTRODUCTION AND FACTUAL BACKGROUND[2]

Since their founding, the Mississippi News Organizations have served Mississippians' crucial right to access information about their public systems of government.[3] From coverage of the growing healthcare accessibility crisis[4] and government operations in Mississippi[5] to the water crisis in the state capitol,[6] these organizations are at the forefront of reporting Mississippi news and the everyday challenges facing Mississippians.

This mission extends to the scandal at issue in this case, on which each of the organizations has extensively reported.[7] As indicated by their coverage, this lawsuit is of serious public import. But as even former Governor Bryant's own evidence submitted in this case makes clear, Doc. 140 at 9-10, Exs. 3-7, numerous communications among former Governor Bryant and others, including certain Defendants about the misuse of the TANF program[8] funds, were not previously known to the news media or the public. Some of those communications have now been uncovered.[9] The subpoena at issue in this case seeks additional records and communications that may facilitate the public's understanding of how the state misspent millions of dollars of public funds meant for

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[2] The relevant procedural history is set forth in Defendant Mississippi Community Education Center's Motion to Compel. Doc. 131.

[3] N.E. MISS. DAILY JOURNAL, About Us, www.djournal.com/site/about.html (last visited Mar. 14, 2023); MISS. FREE PRESS, About Mississippi Free Press, www.mississippifreepress.org/about (last visited Mar. 14, 2023); MISS. TODAY, About Us, mississippitoday.org/about-us/ (last visited Mar. 14, 2023);.

[4] *See, e.g.*, MISS. FREE PRESS, www.mississippifreepress.org/tag/abortion (last visited Mar. 14, 2023) (select "abortion" in top banner); MISS. TODAY, Mississippi Healthcare Crisis, mississippitoday.org/mississippi-health-crisis/ (last accessed Mar. 14, 2023).

[5] N.E. MISS. DAILY JOURNAL, State Government, www.djournal.com/news/state-news/ (last visited Mar. 14, 2023); MISS. FREE PRESS, www.mississippifreepress.org (last visited Mar. 14, 2023) (select "2022 elections" in top banner).

[6] Emily Wagster Pettus, *Black Mississippi capital distrusts plans by white officials*, N.E. MISS. DAILY JOURNAL (Feb. 26, 2023), www.djournal.com/news/state-news/black-mississippi-capital-distrusts-plans-by-white-officials/article_3c8f2568-9ba4-53ae-84ac-055d116243c1.html; MISS. FREE PRESS, "ackson Water Crisis Coverage, www.mississippifreepress.org/jackson-water-crisis-investigation (last visited Mar. 14, 2023); MISS. TODAY, Jackson Water Crisis, mississippitoday.org/jackson-water-crisis/ (last visited Mar. 23, 2023).

[7] Ashton Pittman & William Pittman, *Texts: Gov. Reeves Talked To Brett Favre About Using State Funds For Volleyball Facilities*, MISS. FREE PRESS (DEC. 8, 2022), https://www.mississippifreepress.org/29628/texts-gov-reeves-talked-to-brett-favre-about-using-state-funds-for-volleyball-facilities.

[8] "TANF" is also known as the welfare program.

[9] Anna Wolfe, *Favre secure welfare funding for USM volleyball stadium, texts reveal*, MISS. TODAY (Sept. 13, 2022), mississippitoday.org/2022/09/13/phil-bryant-brett-favre-welfare/.

needy Mississippi families. Although these records relate to one of the largest governmental abuses in this state's recent memory,[10] Bryant seeks to keep them hidden from the public through his effort to persuade this Court to issue a protective order.

The public in Mississippi has an interest in these records and what they may disclose about the scandal and who is, or is not, responsible for it. It is this interest that the Mississippi News Organizations seek to vindicate by intervening in this case. Courts have long recognized the right of news media to intervene to protect against the concealment of records and proceedings. *See generally Gannett River States Pub. Co. v. Hand*, 571 So. 2d 941, 944 (Miss. 1990) ("[I]t is well settled that representatives of the news media have the standing to contest a court order restricting public access to legal proceedings." (citation and internal quotation marks omitted)); *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001) ("This court has held that a news agency has a legal interest in challenging a confidentiality order . . ."); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) ("[T]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their. exclusion.'" (citation omitted)). Here, too, intervention should be granted so the media and the public have an opportunity to be heard.

ARGUMENT

M.R.C.P. 24 allows a non-party to intervene in an ongoing case in two ways: intervention as of right and permissive intervention. M.R.C.P. 24(a)-(b). A court shall grant intervention as of right when a non-party shows: (1) a timely request; (2) an interest in the subject matter of the action; (3) a practical impairment of their ability to protect that interest if the action is determined in their absence; and (4) an inadequate representation of their interest by existing parties. *Id.* at 24(a)(2); *see also Hood ex rel. State Tobacco Litig.*, 958 So. 2d 790, 805 (Miss. 2007). A court

[10] *See, e.g.*, Doc. 148 (MCEC's reply ISO Mot. to Compel) at 10, n.35 (citing Ex. 8, a WLBT news article with video re: the State Auditor characterizing the scandal as one of the largest public embezzlement cases in state history).

may grant permissive intervention if a non-party makes a "timely" motion to intervene based on a "claim or defense" that shares a "question of law or fact in common" with the main action. M.R.C.P. 24(b). Under either analysis, the would-be intervenor "should receive the benefit of the doubt." *Kinney v. S. Miss. Plan. & Dev. Dist., Inc.*, 202 So. 3d 187, 196 (Miss. 2016) (citing *Guar. Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 385 (Miss. 1987)).[11] Here, the putative intervenors meet both standards.

I. The Mississippi News Organizations Satisfy the Standard for Intervention as of Right Under M.R.C.P. 24(a): Their Timely Request is to Protect a Well-Established Interest That is Inadequately Represented By Existing Parties, and Denying Intervention Will Practically Disadvantage Them.

The Mississippi News Organizations satisfy all requirements for intervention as of right.

A. Mississippi News Organizations' Motion is Timely.

An application for intervention as of right must be "timely." M.R.C.P. 24(a). Courts consider four factors when determining the timeliness of a motion to intervene:

> (1) the length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances mitigating either for or against a determination that application is timely.

M.R.C.P. 24 Adv. Comm. Notes (citation omitted); *see also Stallworth v. Monsanto Co.*, 558 F.2d 257, 26466 (5th Cir. 1977)).[12] These factors are not a test; a court should determine

[11] Note that the "likelihood of success on the merits of the claim in intervention is not a factor which should be considered in determining whether [the motion] is timely or should otherwise be granted. . . ." *Guar. Nat'l Ins. Co.* at 382.

[12] Because the language in M.R.C.P. 24 is "virtually identical" to its Rule 24 counterpart in the Federal Rules of Civil Procedure ("F.R.C.P."), "federal judicial decisions offer guidance." *Hood*, 958 So. 2d at 803 & n.13; *id.* at at 806 & n.16 (providing that M.R.C.P. 24 and F.R.C.P. 24 both "use virtually the same language to describe the requirements for intervention of right and permissive intervention" and "require the same intervention procedure," thus making , it "useful . . . to look to the federal judiciary for guidance in construing [state court] rules" and "appropriate to look at federal law interpreting the federal rules," (quoting *Owens v. Thomae*, 759 So. 2d 1117, 1121 n. 2 (Miss. 1999) &

timeliness "from all the circumstances." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (quoting *Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1209 (5th Cir. 1985)). "A motion to intervene may still be timely even if all the factors do not weigh in favor of a finding of timeliness." *State Farm Fire & Cas. Co. v. Hood*, 266 F.R.D. 135, 139 (2010) (citations omitted).

***1. Knowledge of Interest in the Case*.** Requesting to intervene prior to the Court issuing a judgement "favors [a finding of] timeliness." *Edwards*, 78 F.3d at 1001. Here, the Mississippi News Organizations have moved to intervene prior to any court action to address Governor Bryant's request or MCEC's motion to compel. Consequently, Mississippi News Organizations' request for intervention should be considered timely. *See id.* (explaning that filing motions to intervene "prior to entry of judgment favors timeliness, as most of our case law rejecting petitions for intervention as untimely concern motions filed after judgment was entered in the litigation" (citation omitted)); *State Farm*, 266 F.R.D. at 139 (same).

Moreover, Governor Bryant requested a protective order on September 23, 2022—just six months ago. Intervention is often granted to news media after much longer delays, including after entry of judgment.[13] In *State Farm*, for example, leave to intervene to challenge an order sealing documents was granted 15 months after the documents were sealed, with the court recognizing that "delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records." 266 F.R.D. at 143 (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999); s*ee also Hood*, 958 So. 2d at 808 (upholding

Federated Mut. Ins. Co. v. McNeal, 943 So. 2d 658, 662 n. 6 (Miss. 2006)) (citing *Bourn v. Tomlinson Interest, Inc.*, 456 So. 2d 747, 749 (Miss. 1984))); *see also Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1215 (Miss. 2001) (treating federal interpretations of the F.R.C.P. as persuasive authority when interpreting the M.R.C.P.).

[13] *See, e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992) (collecting cases in which the Fifth Circuit has allowed post-judgment intervention in cases).

intervention despite applicants' knowledge for over four years of the order that they sought to have vacated).

2. Prejudice to the Existing Parties. When ruling on intervention as of right, "[t]he prejudice to be considered . . . is that created by the intervenor's delay in seeking to intervene after it has learned of its interest in the action, not prejudice to existing parties if intervention is allowed." *Ceres Gulf*, 957 F.2d at 1203 (finding no prejudice to an existing party who would would incur additional expenses if intervention were granted because the putative intervenor was not dilatory in seeking to intervene); *Ford*, 242 F.3d at 240. In this case, Mississippi News Organizations moved to intervene following Governor Bryant's request for a protective order and prior to any action by the court, procedural or otherwise, to address his request. The Mississippi News Organizations have not been dilatory in seeking to intervene. Moroever, putative intervenors seek "only to litigate the issue of [a] confidentiality order," and not the merits of the underlying case. *Id.* Because existing parties are not prejudiced by any delay, the Mississippi News Organizations' motion should be considered timely.

3. Prejudice to Mississippi News Organizations if Intervention is Denied. The Fifth Circuit has repeatedly found that a news agency has a legal interest in challenging a confidentiality order, and that denying a news agency's request to intervene for the purpose of protecting that interest inflicts legally cognizable harm. *See, e.g., Ford*, 242 F.3d at 240 (providing generally that a news agency has a legal interest in challenging a confidentiality order); *State Farm*, 266 F.R.D. at 142 (finding that denial of intervention to oppose the sealing of records "present[ed] an obstacle to their attempt to obtain access" and therefore "caused injury to a legally protected interest" that was "concrete and particularized" (citations omitted)).

The Mississippi News Organizations seek to intervene in this litigation to oppose former Governor Bryant's request to seal from public view any records—including emails and text messages—that he is required to produce in response to a subpoena from Defendant MCEC, which claims that Governor Bryant directed MCEC to provide TANF money to Brett Favre to fund construction of the volleyball facility.[14] The Mississippi News Organizations wish to review those records as part of their critical reporting on the lawsuit and one of the largest public fraud scandals in this State's history. If they are denied the opportunity to intervene to protect their legally cognizable interest in reporting on these proceedings, they will suffer prejudice and legally cognizable harm. As noted earlier, the documents at issue relate to a matter of great public importance in Mississippi. The former Governor has requested a protective order that would shield these documents from public view, perhaps forever. The media and the public have an interest in these documents and will be greatly prejudiced if their interest is not considered by this Court. Their motion to intervene should be considered timely.

4. Unusual Circumstances. This factor assesses "[t]he existence of unusual circumstances militating either for or against a determination that the application is timely." *Stallworth*, 558 F.2d at 266. For example, under this fourth factor, a tardy putative intervenor could "advance a convincing justification for his tardiness . . . [that] would militate in favor of a finding that his petition was timely." *Id*. Here, the proposed interventors were not tardy: The Mississippi News Organizations filed this pre-judgement motion to intervene before this Court has takien *any* procedural or substantive action to schedule, hear, or consider Governor Bryant's request. Thus,

[14] *See*, e.g., Doc 148 (MCEC's reply ISO Mot. To Compel) at 2-3; *see also* Doc. 140 (Bryant's Opp'n to MCEC's Mot. to Compel) at 12-15 at 56, 65-66.

no unusual circumstances militate against a determination that the Mississipi News Organizations' request is timely.

Indeed, there are unusual circumstances in this case that support a finding of timeliness. This case involves what has been referred to as "the largest public fraud case in the history of the state."[15] Yet former Governor Bryant is seeking to hide records concerning this matter that he sent and received while in office that were public records under state law at the time he created, reviewed, and used them. *See generally, Hood*, 958 So. 2d at 808 (noting the important issues in the case that qualified as unusual circumstances and that supported a finding of timeliness). The Mississippi News Organizations' motion to intervene is timely and satisfies the first condition for intervention as of right under Rule 24(a).

B. Mississippi News Organizations Have an Interest Relating to the Transaction.

To intervene as of right under M.R.C.P. 24(a), the applicant must "claim[] an interest relating to the property or transaction which is the subject of the action." M.R.C.P. 24(a). In determining if an applicant's interest satisfies the standard, the Mississippi Supreme Court has held: "All that is necessary is that [the applicant] establish an interest in the rights that are at issue in the litigation." *Guar. Nat'l Ins. Co.*, 501 So. 2d at 384 (explaining that "[l]egalistic formalism and mechanical jurisprudence simply do not fit the language or philosophy of [M.R.C.P. 24]"); *see also State Farm*, 266 F.R.D. at 142 (finding that a Mississippi media organization seeking to intervene in litigation to unseal a sealed settlemenet agreement "present[ed] an obstacle to their attempt to obtain access," and therefore "caused injury to a legally protected interest" that was "concrete and particularized"(internal quotation marks and citations omitted)).

[15] *See supra* n.10.

The Fifth Circuit has likewise "warned against" too narrowly defining what type of interests satisfy this standard. *Ford*, 242 F.3d at 240; *see also Ceres Gulf*, 957 F.2d at 1203. Critically, the Fifth Circuit "has held that a news agency has a legal interest in challenging a confidentiality order," explaining that, "'members of the news media, although not parties to litigation," have standing to "appeal court closure orders or confidentiality orders . . . . " *Ford*, 242 F.3d at 240 (citation omitted). Furthermore, the court in *Ford* recognized that a news organization seeking to intervene to oppose a confidentiality order need not establish that it would "ultimately obtain access" to the record sought; it was sufficient that the confidentiality order "present[ed] an obstacle to [the applicant's] attempt to obtain" it. *Id.* (citation omitted).

The Mississippi News Organizations are media entities with an interest in accessing the records that Governor Bryant produces in response to MCEC's subpoena. Governor Bryant seeks a protective order that would present an obstacle to obtaining them. Consequently, the Mississippi News Organizations have an interest relating to the underlying action and satisfy the second condition for intervention as of right.

C. Mississippi News Organizations Will Be Practically Disadvantaged if Intervention is Not Allowed.

To intervene as of right, an applicant must show a practical disadvantage if intervention is not allowed. *See* M.R.C.P. 24(a)(2); *Guar. Nat'l Ins. Co.*, 501 So. 2d at 384. "The central purpose of this requisite is to allow intervention by those who might, in a practical sense, be disadvantaged by the disposition of the action"; this prong "is satisfied whenever disposition of the present action would put the would be intervenor at a practical disadvantage in protecting his interest." *Id.*

If Mississippi News Organizations are denied intervention, they will not be able to obtain records produced by the Governor in response to MCEC's subpoena; the applicants have a legally

cognizable interest in reporting on the content of those records, including on what they do or do not reveal about the diversion of public TANF funds to build a volleyball stadium. Therefore, the Mississippi News Organizations will be practically disadvantaged if intervention is not allowed and satisfy the third condition for intervention as of right.

D. Mississippi News Organizations' Interests Are Not Adequately Represented by Existing Parties.

To intervene as of right, an applicant must establish that its interest is "not 'adequately represented by existing parties.'" *Id*. at 381 (quoting M.R.C.P. 24(a)(2)). In *Ford*, the Fifth Circuit found that when existing parties in that case jointly moved for a confidentiality order, they were "advocating a position contrary to the interest" of the putative newspaper intervenor; this alone satisfied this fourth intervention requirement for the newspaper in that case. 242 F.3d at 241. And in *Stallworth*, the court concluded this condition was satisfied because neither of the existing parties "[had] either voiced the appellants' concerns or expressed a desire to." *Stallworth*, 558 F.2d at 268.

In this case, the Mississippi News Organizations' interest is in reporting on the content of any records that Governor Bryant must produce in response to MCEC's subpoena, for the benefit of the public, regardless of whether such reporting would be legally beneficial to any person or entity—whether party or non-party. On the other hand, DHS's interest is in prosecuting its case, and it has been silent regarding Governor Bryant's request. While MCEC weighed in on Governor Bryant's request for a protective order and argues against it, its interest is in avoiding civil liability. Moreover, any of the existing parties could, in furtherance of their interests, enter into private negotiations, arbitration, or provisional or permanent agreements regarding the confidential treatment of all or some of Governor Bryant's subpoenaed records. They do not, and cannot, represent the Mississippi News Organizations' interests in this litigation. The Mississippi News

Organizations' interest is inadequately represented by existing parties, and they satisfy the fourth condition for intervention as of right.

II. Alternatively, Mississippi News Organizations Satisfy the Standard for Permissive Intervention Under M.R.C.P. 24(b).

The Mississippi News Organizations' application also satisfy the standard for permissive intervention. A court must determine if the application was timely; whether the applicant's claim or defense and the main action have a question of law or fact in common; and in its discretion, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *See* Fed.R.Civ.P. 24(b)(2); *see generally Stallworth*, 558 F.2d at 269 ("Determining whether an individual should be permitted to intervene is a two-stage process. First, the [court] must decide whether the applicant's claim or defense and the main action have a question of law or fact in common. If this threshold requirement is met, then the [court] must exercise its discretion in deciding whether intervention should be allowed." (citations omitted)). Here, the Mississippi News Organizations meet these requirements.

A. Whether the application was timely. As with intervention of right, an application for permissive intervention must be "timely," M.R.C.P. 24(b), which the Mississippi News Organizations meet based on their previous arguments regarding timeliness, incorporated here.

B. Whether the applicant's claim or defense has a question of law or fact in common with the main action. In this case, the Mississippi News Organzations claim that former Governor Bryant's request for a protective order should not be granted, which is also question at issue in the main action. Courts have interpreted this factor broadly. In *Stallworth*, for example, the court dispensed with its analysis of this condition in one sentence: "In light of the liberal construction that the 'interest' requirement of section (b)(2) has received, . . . the appellants plainly meet the first test *Id.* at 269-270 (citing *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434,

459 (1940); *In re Estelle*, 516 F.2d at 485 (opinion of Tuttle, J.); *Textile Workers Union of America, CIO v. Allendale Co.*, 226 F.2d 765, 769 (1955); Shapiro, Some Thoughts on Intervention Before Courts Agencies and Arbitrators, 81 Harv.L.Rev. 721, 726 (1958)). Because the news organizations's claim shares a question of law or fact in common with the main action, they satisfy this condition for permissive intervention.

C. Whether, in the court's discretion, intervention should be allowed, and whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. In this case, the original parties are DHS and the individuals and entities which DHS is suing to recoup public funds. None will be harmed if the Mississippi News Organizations' application to intervene is granted. DHS's interest is in prosecuting this case and recouping stolen TANF welfare funds. Defendants' interests are to defend themselves. If the motion is granted, there will be no interference with the Court's orderly processes because the Mississippi News Organizations have filed their application to intervene before the Court has scheduled a hearing on Governor Bryant's request.

These facts are sufficient to establish that the Mississippi News Organizations qualify for permissive intervention. In *McDonald v. E. J. Lavino Corp*., the Fifth Circuit reversed the order of a district court that had denied a worker's compensation carrier's request to intervene post-judgment in a third-party action because the intervention would not have harmed other parties or interfered with the court's orderly processes. 430 F.2d 1065, 1074. The Court explained:

> [T]he record makes it abundantly clear that the district judge studied the issue of intervention with great care and patience. . . . **Our reversal simply means that this court, after studying the entire record in the light of all the relevant considerations, concludes that the reasons militating in favor of granting the motion to intervene substantially outweighed the reasons militating against it.** . . . With little strain on the court's time and no prejudice to the litigants, the controversy can be stilled and justice completely done.

McDonald, (emphasis added); *see also Stallworth*, 558 F.2d at 269-70 (quoting *McDonald*, 430 F.2d at 1074, when advising how the lower court could exercise its discretion when reconsidering the disputed request for permissive intervention).

Because intervention would not cause undue delay in the litigation, and because the original parties in the case will not suffer prejudice if it is granted, the Mississippi News Organizations satisfy these conditions.

The Mississippi News Organizations satisfy the standard for permissive intervention under under M.R.C.P. Rule 24(b).

CONCLUSION

The Mississippi News Organizations should be granted leave to intervene in this case for the limited purpose of opposing former Governor Bryant's request for a protective order. The Mississippi News Organizations satisfy the standard for—and are therefore entitled to—intervention as of right under M.S.R.P. Rule 24(a). Alteratively, they also satisfy the standard for permissive intervention under under M.S.R.P. Rule 24(b). Attached to this motion is the proposed response in opposition to Governor Bryant's request that the Mississippi News Organizations will file if intervention is granted.

Dated: March 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were filed on the MEC system on this 30th day of March, 2023, which electronically served copies on all counsel of record in this litigation.

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IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES,
***Plaintiff*,**

v. **CAUSE NO. 22-cv-286-EFP**

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC., *et al.*
Defendants.

[PROPOSED] RESPONSE OF INTERVENORS NORTHEAST MISSISSIPPI DAILY JOURAL, THE MISSISSIPPI FREE PRESS, AND MISSISSIPPI TODAY IN OPPOSITION TO FORMER GOVERNOR PHIL BRYANT'S REQUEST FOR ENTRY OF A PROTECTIVE ORDER

Intervenors the Northeast Mississippi Daily Journal, the Mississippi Free Press, and Mississippi Today (collectively "Mississippi News Organizations") hereby file this Response in Opposition to Former Governor Phil Bryant's request for entry of a protective order in connection with documents subpoenaed by Defendant Mississippi Community Education Center's (MCEC). In support of their Memorandum, the Mississippi News Organizations state as follows:[1]

INTRODUCTION

Former Governor Phil Bryant ("Bryant") has asked this Court for a protective order that "shields . . . from public consumption" any documents he produces in response to Defendant MCEC's subpoena for records, including communications, concerning the Volleyball Center at the University of Southern Mississippi. Doc. 140 at 57; Doc. 93. Bryant argues that a protective order is necessary to: (1) uphold the suppression order limiting pretrial publicity in a related

[1] The relevant procedural history is set forth in Defendant MCEC's Motion to Compel. Doc. 131.

criminal case; (2) preserve the "chief executive communications privilege" and "deliberative process privilege" that he claims apply to the documents, though neither is recognized in Mississippi; and (3) "preserve the integrity of these proceedings" from a "media frenzy" that he characterizes as "unfounded and unfair." Doc. 140 at 57–58.

As explained below, a protective order is not warranted on these or any other applicable grounds. The subpoena seeks records and communications of a public official about important public business. Those records, and the scandal to which they pertain, were unknown to the public at the time and therefore the news media did not request them under the Mississippi Public Records Act. But they were covered under the Act and pertain to public business. That public business is still public business today. The fact that Bryant is no longer Governor does not give him a license to obtain a protective order from this Court to keep them hidden from public view. To the contrary, granting the blanket confidentiality order that Bryant requests would run directly counter to the purpose of Mississippi's Public Records Act and would undermine fundamental principles of transparency and openness that are inherent in Mississippi law and the United States Constitution.

ARGUMENT

Miss. R. Civ. P. 45(d)(2)(A) provides that "[a] subpoena commanding production or inspection will be subject to the provisions of Rule 26(d)." Under Rule 26(d)(1), a court may enter a protective order "for good cause shown . . . to protect a party or person [from whom discovery is sought] from annoyance, embarrassment, oppression, or undue burden or expense." The Mississippi Supreme Court has repeatedly held that protective orders that do not articulate and hew closely to the standards described by Rule 26 constitute an abuse of the trial court's discretion. *See, e.g., Blossom v. Blossom*, 66 So. 3d 124, 127 (Miss. 2011) (holding that the lower court "erred by granting the protective orders without meeting the requirements set out in Rule 26(d)," and that

"further explanation regarding the issues and requirements set out in the rules" was necessary); *Cole v. Wiggins*, 487 So. 2d 203, 206 (Miss. 1986). The Court has also reversed protective orders that are contrary to state law in favor of disclosure and public access. *See, e.g., Cellular South, Inc. v. BellSouth Telecommuns., LLC*, 214 So. 3d 208, 216 (Miss. 2017) (reversing protective order concealing records that were later made public through amendment to Mississippi's Public Records Act based on the Mississippi legislature's "clear pronouncement [of] the right of the public . . .[to] access[] public documents").

I. A Protective Order Would Contravene the Spirit and Purpose of The Mississippi Public Records Act to Guarantee Public Access to Public Records That Address Public Business.

The Mississippi Public Records Act (the "MPRA" or "Act"), Miss. Code §§ 25–61–1 *et seq*., "focuses on the right of the public to have access [to public records]," and it "expressly makes public records the property of the public." *Cellular S., Inc.*, 214 So. 3d at 215 (citing Miss. Code Ann. § 25–61–5(1)(a). The Act applies to all public bodies in the State. *See* Miss. Code. Ann. § 25–61–2 ("[P]roviding access to public records is a duty of each public body . . ."); Miss. Code. Ann. § 25–61–3 (defining "Public body" to include "any department, bureau, division, council, commission . . . agency and any other entity of the state or a political subdivision thereof, . . . and any other entity created by the Constitution or by law, executive order, ordinance or resolution.").. It applies to records, "regardless of physical form or characteristics,"[2] that are "in use" or which "have[] been used . . . or prepared, possessed, or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or [are] required to be maintained by any public body," unless specifically exempt from disclosure. Miss.

[2] "'Public records' shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics." Miss. Code Ann. § 25–61–3(b).

Code Ann. § 25–61–3(b). Thus, communications made by government officials of public bodies regarding their official duties and responsibilities are public records, including emails and text messages on a public official's personal cell phone. *See, e.g.,* Miss. Ethics Comm'n, Public Records Op. No. R-13-023 (Apr. 11, 2014) ("The fact that text messages reside on the mayor's personal cell phone is not determinative as to whether text messages must be produced…. Any text message used by a city official 'in the conduct, transaction or performance of any business, transaction, work, duty or function of [the city] . . . ' is a public record subject to the Act, regardless of where the record is stored."); *see also generally* Public Records Op. No. R-13-022 (Dec. 6, 2013 (discussing emails).

Records that are subject to public disclosure under the Act, are not generally the proper subject of a protective order. Indeed, in *Cellular South*, the Mississippi Supreme Court held that a trial court committed reversible error when it rejected a petition to revoke a protective order that improperly limited the disclosure of documents that fell within the Act's amended definition of public records. *Cellular South*, 214 So. 3d at 216. As the Court explained in *Cellular South*, the PRA is not "subservient to" a protective order—even when the order has already been granted by the court. *Cellular S., Inc.*, 214 So. 3d at 211. To the contrary, the rights encapsulated in the Act supersede individual interests that may otherwise justify a protective order.

Here, the documents sought from Bryant—including communications during his time in office regarding the expenditure of state funds and the construction of a facility at a state university—fall squarely within the PRA's definition of public records at the time they were created. The PRA must be interpreted broadly "in favor of disclosure," *Mississippi Dep't of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enf't Officers' Ass'n, Inc.*, 740 So. 2d 925, 936 (Miss.1999), and there is no question that these are the type of records the public has a right to see.

Had the news media been aware at the time of the theft of the TANF funds by state officials and by then-Governor Bryant's communications about the use of those funds, these intervenors and others would have requested and been entitled to these records under the PRA. Just as there would have no grounds for Bryant to withhold them from the public then, he should not be able to withhold them from the public now by way of a request to this Court for a protective order.

II. A Protective Order Is Not Needed or Proper Here to Preserve the Integrity of These Proceedings.

Bryant also argues that a protective order is needed to "preserve the integrity of these proceedings." Doc. 140 at 58. But he has it backwards. Far from undermining the integrity of these proceedings, declining to grant Bryant the special protections he requests will uphold the integrity of these proceedings and the spirit of openness and transparency that are exemplified not only by the Mississippi Public Records Act but by the state and federal constitutions. While Bryant is asking this Court to become an agent of secrecy by issuing a protective order to bar the public from viewing these records of public business, the state and federal constitutions highlight the importance of a judicial branch that is transparent and that protects the right of the public to know about the business of government.

Open courts and a free press are among the pillars of our democratic society. As the United States Supreme Court has noted, "the courts of this country recognize a general right to inspect and copy public records and documents." *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597 (1978). Members of the news media, in addition to enjoying their own First Amendment protections, play a critical intermediary role in effectuating the public's right of access. *Assoc. Press v. Bost*, 656 So.2d 113, 117 (Miss. 1995) ("Freedom of the press and speech are fundamental rights guaranteed by the First Amendment. Under the First Amendment, the press and the public are guaranteed a right of access to public trials in order to gather information, and report what they

see and hear." (citing *Richmond Newspapers v. Commonwealth of Va.*, 448 U.S. 555, 575 (1980)). These principles are protected by the First Amendment and also by Article 3, Section 13 ("[t[he freedom of speech and of the press shall be held sacred") and Section 24 ("[a]ll courts shall be open") of the Mississippi Constitution. Given these principles of openness and transparency, the integrity of these proceedings requires that the Court deny the former Governor's request that it ban, on his behalf, the press and the public from seeing these documents about important public business.

III. Bryant's Dubious Claims of Executive Privilege Do Not Trump the Public's Interest or Entitle Him to a Protective Order Banning the Public from Seeing These Documents.

Bryant's claims of executive privilege are likewise unavailing. As Bryant himself acknowledges, the pair of purported executive privileges he raises to justify his request for a protective order—the "chief executive communications privilege" and "deliberative process privilege"—have never been recognized by the Mississippi Supreme Court. Doc. 140 at 5 (citing written Objections to the subpoena that Bryant provided to MCEC on August 26, 2022). With no controlling or even persuasive Mississippi case law to anchor it, Bryant's discussion of these privileges appears largely cribbed—sometimes verbatim or switching out single words—from an uncited law review article that references a variety of authorities from other jurisdictions. *Compare id*. at 48–60, *with* Matthew W. Warnock, *Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials*, 35 CAP. U. L. REV. 983, 985–96 (2007).

But tis argument is largely based on a lengthy disposition on the unsettled federal doctrine of presidential privilege that Bryant attempts to refashion into a broad cloak of secrecy for Mississippi governors. Bryant's baseless contentions about exceedingly broad and unrecognized privileges are not nearly enough to overcome the public's interest in access to the public records he seeks to shield. *See, e.g.*, *Cellular South*, 214 So. 3d at 215 ("[T]he statutory framework of the

[Mississippi] Public Records Act belies any contention that the Legislature intended to create [private] rights in favor of the [Mississippi Department of Information Technology Services] or BellSouth.").

Accordingly, Bryant's request for a protective order shrouding the entirety of these communications from disclosure to the public do not meet Rule 26(d)(1)'s requirements. Bryant does not claim, for example, that the subpoena seeks to discover a "trade secret or other confidential research, development, or commercial information," or information that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive." Miss. R. Civ. P. 26(d)(1)(G) and (d)(2). Instead, he pleads his case for secrecy by invoking these two unrecognized and staggeringly expansive privileges, painting a portrait of America's free press that does not reflect its foundational role in our democracy. According to Bryant, these documents should be "shielded [from] the press" because they "sometimes carry biases and unfounded and unfair opinions" and do not always "impartially seek[] the truth." Doc. 140 at 67-68.

Of course, this criticism of the media has always existed, even at the time of the Bill of Rights; yet the First Amendment guarantees the freedom of the press, so people will know about the operations of their government. When Bryant seeks to hide his communications about public business from the press, he is trying to hide them from the public. Contrary to Bryant's contention, it is not the press that "threatens the integrity of this court's proceedings," *id.*; it is his effort to use this Court to prevent the public from learning how millions of dollars were stolen from the state treasury.

Governor Bryant's cynicism regarding our free press is not the sort of "embarrassment" against which Rule 26 is intended to protect—especially when invoked by a former public official

called to address matters of great public import that occurred while at the helm of the State's highest office. Bryant's discomfort with public and media scrutiny of his communications during his time as governor is not a valid ground under Rule 26 to overcome the public's right to see public records about public business.

IV. A Protective Order Is Not Needed or Proper Here to Effectuate the Criminal Court's Suppression Order.

Finally, Bryant's argument that a protective order is somehow necessary to effectuate the suppression order issued in a criminal matter involving some of the same parties and factual underpinnings as this case. *See* Doc. 140 at 6–7, 57. But that order exists on its own terms: it binds those parties that are subject to it (which do not include Bryant); and any request to enforce, expand, or modify that order must be taken up with the judge presiding over the criminal proceedings—not with this Court. Moreover, the concerns that justify a gag order limiting pretrial publicity in a criminal matter—to protect a criminal defendant's constitutional rights—are largely inapplicable into the civil context. Neither logic nor legal authority commands that existence of the criminal gag order in a related case mandates, or even counsels in favor of, a protective order in this case.

CONCLUSION

Based on the foregoing, this Court should deny former Governor Bryant's request that it enter a protective order banning the public from viewing the documents that he will be required to turn over in this case.

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Respectfully submitted,

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