

Charles A. Brown ISB 2129
324 Main Street
P.O. Box 1225
Lewiston, Idaho 83501-1225
Telephone: (208) 746-9947
Fax: (208) 746-5886
CharlesABrown@cableone.net

David A. Schulz (*pro hac vice pending*)
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
321 West 44th Street, Suite 510
New York, New York 10036
Telephone: (212) 850-6100
Fax: (212) 850-6299
dschulz@lskslaw.com

Steven D. Zansberg (*pro hac vice pending*)
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1888 Sherman Street, Suite 370
Denver, Colorado 80203
Telephone: (303) 376-2400
Fax: (303) 376-2401
szansberg@lskslaw.com

Attorneys for proposed Intervenor
The Associated Press

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MARLIN RIGGS, individually, and JOSE PINA,)
JOE ROCHA, ANDREW IBARRA, JOSHUA)
KELLY, and RAY BARRIOS, individually and)
on behalf of a class of all other persons)
similarly situated,)
Plaintiffs,)

v.)

PHILLIP VALDEZ, NORMA RODRIGUEZ,)
CHRISTOPHER ROSE, TODD DANFORTH,)
and OFFICER DEAN, individually and in their)
official capacities; BRENT REINKE,)
MARK FUNAIOLE, JANIE DRESSEN,)
NORMAN LANGERAK, MIKE MATTHEWS,)
and BILL YOUNG, in their official capacities;)
and CORRECTIONS CORPORATION OF)
AMERICA, Inc.,)
Defendants.)

Case No. 1:09-cv-00010-S-BLW

MEMORANDUM BRIEF IN SUPPORT
OF MOTION BY *THE ASSOCIATED
PRESS* TO INTERVENE FOR THE
LIMITED PURPOSE OF OPPOSING
DEFENDANTS' MOTION FOR A
RESTRAINING ORDER (Dkt. No. 119)

The Associated Press (“AP”), by and through its undersigned counsel Charles A. Brown, Esq. and Levine Sullivan Koch & Schulz, L.L.P., hereby respectfully submits this memorandum in support of its motion to intervene in this proceeding for the limited purpose of opposing defendants’ motion for a restraining order, and in opposition to the requested restraining order.

PRELIMINARY STATEMENT

This civil case raises issues of profound concern to the general public. The plaintiffs are putative representatives of a class of prisoners at the Idaho Correctional Center, who assert systematic, deliberate, and serious abuses of their rights by the operators of a privately-owned prison facility—abuses that allegedly have placed their personal health and safety at risk. (*See* Am. Compl. [Dkt. No. 16].) The AP understands that these class-action claims for injunctive and declaratory relief will proceed to a bench trial, while a separate claim for compensatory damages by one inmate will proceed to a jury trial. No trial dates have been set in either action, but defendants nonetheless have asked the Court at this time for extraordinary injunctive relief barring plaintiffs, their trial counsel and all witnesses from uttering to the press “*any* extrajudicial statement that *relates to*, concerns, or discusses *the subject matter of this lawsuit*.” (Am. Defs.’ Mot. for Restraining Order & Proposed Order [Dkt. Nos. 119 & 119-1] (emphasis added).) Such a breathtakingly overbroad prior restraint cannot possibly be squared with constitutional limitation on the authority of courts to enjoin the free flow of information about judicial proceedings. The proposed injunction would violate both the constitutional right of trial participants to *speak* freely on matters of public concern, and the right of the press and public to *receive* such information.

As will appear, defendants fall woefully short of meeting their heavy burden to justify the issuance even of a more limited gag order. The First Amendment prohibits even a properly narrow injunction limited to trial counsel, unless its proponent demonstrates a substantial likelihood of material prejudice to a jury proceeding absent such relief, that no adequate alternatives exist, and that the proposed injunction is both narrowly drawn and likely to be effective. All apart from the fatal overbreadth of the relief requested, defendants have failed in multiple respects to satisfy these burdens. The relief requested is patently improper and the motion should be denied.

BACKGROUND

The AP is a not-for-profit mutual news cooperative. The members of AP are more than 1,400 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1846, AP is now the largest newsgathering organization in the world.

This is a class action lawsuit brought by prison inmates against the owners and operators of a private, for profit, prison company. Plaintiffs assert serious violations of their rights, and claim that their health and physical safety are jeopardized by defendants' conduct. Defendants in this civil action now seek a massively broad injunction barring the trial participants—including all witnesses—from speaking to the press about anything “relating” to the issues in this lawsuit.

The only basis for this request is the extensive public attention this case has attracted in the press, due to the serious allegations of wrongdoing in the operation of the prison system in Idaho that are being made. (*See, e.g.*, Am. Defs.' Mot. for Restraining Order at 3-4 [Dkt. No.

119] (asserting that this case has “gained steady and unrelenting attention” by the press.) Defendants object that plaintiffs’ counsel has publicly decried their running of the prison as a “revolting and inexcusable case of mass abuse” (*id.* at 2), and object to an AP report containing “graphic video footage of an inmate-on-inmate assault” at the prison under defendants’ control (*id.* at 3). Defendants “are confident that Court will not be influenced by” these press reports, but nonetheless seek to gag plaintiffs, plaintiffs’ counsel and all witnesses from any comment about this case in order to protect “their right to a fair and impartial jury.” (*Id.*)

Defendants’ request for an extraordinary injunction against speech is insufficient as a matter of law, and the relief requested is prohibited by the First Amendment, as will now be demonstrated.

ARGUMENT

I.

THE ASSOCIATED PRESS SHOULD BE PERMITTED TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING THE PROPOSED GAG ORDER

The AP unquestionably has standing to oppose the defendants’ requested gag order. As the Court of Appeals for this Circuit has instructed, a news organization has standing to be heard in opposition to a gag order because it “impairs the media’s ability to gather news by effectively denying the media access to trial counsel.” *Radio & Television News Ass’n of S. Cal. v. U.S. Dist. Ct.*, 781 F.2d 1443, 1445 (9th Cir. 1986); *see also, e.g., Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 980-81 (9th Cir. 1998) (coalition of news organizations has standing to challenge prison regulation barring witnesses from observing entirety of lethal injection procedure); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (newspaper had standing to challenge court’s order barring press interviews with discharged jurors); *cf. Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 594 (9th Cir. 1985) (although the press were not parties to the

appeal, the court recognized that “[b]y effectively denying the media access to the litigants, the district court’s order raises an issue under the first amendment by impairing the media’s ability to gather news”).¹

There can be no serious dispute that speakers who would be subject to the injunction requested in this case are otherwise willing to speak to the press. The gag order is not sought on consent. Where such a willing speaker exists, “the protection afforded” by the First Amendment “is to the communication, to its source and to its recipients both.” *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (emphasis added).

Members of the press are thus routinely recognized to have standing to intervene to oppose entry of a gag order on a willing speaker, because news agencies, as “potential recipients of speech,” must have the right to “challenge the abridgment of that speech.” *In re Dow Jones & Co.*, 842 F.2d 603, 607-08 (2d Cir. 1988) (recognizing press right to oppose entry of a gag order on trial participants); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996) (allowing press to intervene for purpose of challenging gag order); *see also, Bond v. Utreras*, 585

¹ In addition to asserting its own constitutional rights, the AP has standing to assert the public’s constitutionally protected right to receive information about their government institutions, including the courts. *See, e.g., Globe Newspaper Co. v Super. Ct.*, 457 U.S. 596, 604-05 (1982) (because “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,” the right of public access to information about judicial proceedings “serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”) (internal quotation marks and citations omitted); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070 (1991) (recognizing that ours is “a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, [and t]he way most of them acquire that information is from the media”); *In re Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2d Cir. 1988) (“[T]he First Amendment unwaveringly protects the right to receive information and ideas.”) (collecting cases); *In re Express-News Corp.*, 695 F.2d 807, 809 (5th Cir. 1982) (“Government imposed secrecy denies the free flow of information and ideas not only to the press but also to the public.”); *cf. Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (“An informed public depends on accurate and effective reporting by the news media. . . . *In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive the free flow of information and ideas essential to effective self-government.*”) (emphasis added).

F.3d 1061, 1077 (7th Cir. 2009) (press may challenge gag orders that “interfere with the right to receive information from parties and their attorneys who wish to disseminate it”); *United States v. Wecht*, 484 F.3d 194, 202-03 (3d Cir. 2007) (third parties may challenge gag orders when a willing speaker is being restrained); *United States v. Corbin*, 620 F. Supp. 2d 400, 411 (E.D.N.Y. 2009) (“either the speaker or the media may object” to a restraint on the extra-judicial speech of trial participants); *Brown v. Damiani*, 228 F. Supp. 2d 94, 97 (D. Conn. 2002) (reporter has standing to challenge gag order where a willing speaker is enjoined).² Indeed, “every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.” *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

Accordingly, pursuant to Fed. R. Civ. P. 24, the AP should be granted leave to intervene for the limited purpose of opposing defendants’ motion for a prior restraint on trial participants.

II.

DEFENDANTS HAVE NOT ESTABLISHED ANY PROPER BASIS FOR AN EXTRAORDINARY RESTRAINT ON SPEECH

A. The Law Imposes a Heavy Burden on any Party Seeking to Silence Speech on Matters of Public Concern

Judicial restraints on the extrajudicial statements of trial participants implicate fundamental First Amendment rights of the speakers, the press and the general public. Given the

² In *Radio and Television News Association of Southern California v. U.S. District Court*, 781 F.2d 1443, 1445-48 (9th Cir. 1986), the Ninth Circuit held that the media interviewers challenging a gag order had failed to meet the high “clearly erroneous as a matter of law” standard required to warrant the extraordinary remedy of mandamus because their interest in “interviewing trial participants” was outside the scope of the First Amendment. But it did so in the context of a gag order that was unchallenged by both sides, and thus there was no willing speaker.

important constitutional interests at stake, it is well settled that any party seeking to prevent a trial participant from speaking about the case must bear the burden of establishing four things:

1. The speech to be restrained must pose a certain, direct and imminent threat to a fair trial right or other constitutional interest. *See CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (the speech “must pose a clear and present dangerous threat to a protected competing interest”); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam) (speech must pose “a serious and imminent threat to the administration of justice”) (citation omitted).
2. There must be no adequate alternative measures to mitigate the effects of pretrial speech. *United States v. Salameh*, 992 F.2d at 445, 447 (2d Cir. 1993); *In re N.Y. Times Co.*, 878 F.2d 67, 68 (2d Cir. 1989). Among the alternatives that must be considered and found inadequate are the availability of extensive *voir dire*, jury instructions, change of venue, postponement of trial, and sequestration. *Levine*, 764 F.2d at 599-602.
3. The proposed injunction must be narrowly drawn to limit only speech that will materially prejudice the threatened constitutional interest. *E.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075-76 (1991); *Levine*, 764 F.2d at 596-600.
4. The proposed injunction must effectively prevent the demonstrated harm. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976) (to be valid, a prior restraint must “effectively . . . prevent the threatened danger”); *In re Dow Jones & Co.*, 842 F.2d at 611 n.1.

Under these standards, defendants’ request to restrain speech must be subjected to the strictest constitutional scrutiny, and it is presumptively invalid. *See Salameh*, 992 F.2d at 446-47; *United States v. Gotti*, 2004 WL 2757625, at *2 & n.14 (S.D.N.Y. Dec. 3, 2004).

Indeed, these controlling standards should be applied with particularly exacting care in this case, because defendants seek to enjoin speech in a *civil* case. Although gag orders are utilized on occasion to protect the Sixth Amendment rights of a criminal defendant, they are virtually unheard of in the civil context. *See, e.g.*, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 252 (7th Cir. 1975) (“the literature and debate” surrounding gag orders center “on the problem of prejudicial publicity in criminal trials”); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th

Cir. 1979) (noting that the ABA and the Judicial Conference “did not make recommendations concerning civil actions”). As one district court has explained, “civil trials, because of their nature and relatively longer duration, do not as readily justify a restriction on speech as criminal trials.” *Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347, 1359 (S.D. Fla. 2000) (internal quotation marks and citation omitted), *vacated as moot*, 256 F.3d 1251 (11th Cir. 2001); *see also Ruggieri v. Johns-Manville Prods. Corp.*, 503 F. Supp. 1036, 1040 (D.R.I. 1980) (standard for a gag order in a civil case “must necessarily be equal to or higher than that allowed for in criminal proceedings”).

Gag orders are particularly disfavored in civil actions because, as here, they often “involve questions of public concern.” *Hirschkop*, 594 F.2d at 373. In such cases, the lawyers involved can “enlighten public debate,” and this debate cannot simply be postponed until after the lawsuit without doing violence to the First Amendment’s vital interest in the “timeliness” of speech—especially given the protracted nature of civil litigation. *Id.*; *see Chicago Council of Lawyers*, 522 F.2d at 258 (civil litigation “often exposes the need for governmental action or correction” that “should not be kept from the public”). “It is inimical to a democratic society to curb the dissemination of such news and certainly unnecessary in light of the many procedures the court can employ, tailored to the unique circumstances at hand.” *Ruggieri*, 503 F. Supp. at 1040; *see also Schiller v. City of N.Y.*, No. 04-cv-7922(KMK)(JCF), 2007 WL 1299260, at *3 (S.D.N.Y. May 4, 2007) (“by encouraging public discussion” of issues raised in civil litigation, the press “serves an important role in maintaining the robust marketplace of ideas so essential to our system of democracy”) (internal quotation marks and citations omitted).

These considerations against restraints on speech in civil lawsuits weigh especially strong in this case, where the plaintiffs have advanced serious allegations of multiple failures by a

private company hired to safeguard the state prisoners entrusted to their custodial care and safekeeping. As the Supreme Court has underscored, “the conditions in this Nation’s prisons are a matter that is both newsworthy and of great public importance.” *Pell v. Procunier*, 417 U.S. 817, 830, 831 n.7 (1974). *See also*, *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 874-75 (9th Cir. 2002) (same); *Jackson v. Bair*, 851 F.2d 714, 720 (4th Cir. 1988) (“The internal security of state prisons and the official policies that bear upon the maintenance of their security are obviously matters of fundamental and rightful public concern.”); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547 (1st Cir. 1971) (“condition of our prisons is an important matter of public policy”).

In the words of Chief Justice Burger:

Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions.

Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978).

B. Defendants Utterly Fail to Justify a Gag Order in this Civil Proceeding

Defendants’ generalized concern with the press coverage this lawsuit has received does not remotely satisfy the strict four point testing governing their motion for a prior restraint. Defendants have not met their burdens in multiple respects, and their request for a gag order should be denied for multiple reasons.

1. Defendants have failed to establish a compelling need for a prior restraint.

Defendants argue that a restraining order is “necessary” to ensure that their fair trial rights are not undermined by pre-trial publicity, but this concern is unsubstantiated. As a threshold matter, defendants’ rationale for a gag order is off-base because this action for injunctive and

declaratory relief will be tried to the court, not a jury. Gag orders have been found constitutionally permissible in a criminal prosecution to protect a pending *jury* proceeding. *E.g.*, *Gentile*, 501 U.S. at 1067, 1067 (disciplinary rule constitutional to the extent it “shield[s] federal juries from prejudicial pretrial publicity); *Bailey v. Sys. Innovations, Inc.*, 852 F.2d 93, 97 (3d Cir. 1988). But these same concerns do not exist where, as here, a case will be decided at a bench trial. Indeed, defendants’ concede that publicity will not “influence[.]” the Court in this case. That should be the end of the matter.

Even if some on-going concern exists for the jury pool given an individual inmate’s pending claim for damages, defendants have not come close to establishing a proper factual basis to support a gag order. In cases that generate a large volume of press coverage, the parties frequently overestimate the degree to which the general public pays attention to, or is influenced by such publicity. *See e.g.*, *Nebraska Press Ass’n*, 427 U.S. at 565 (“pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial”); *see also id.* at 599-600 (difficult to predict “the scope of the audience that would be exposed to the [allegedly prejudicial] information, or the impact . . . the information would have on that audience”) (Brennan, J., concurring).

Experience has shown, time and again, the exaggerated nature of arguments about the impact of press coverage on potential jurors, even in the highest profile cases. As the Ninth Circuit has recognized, “even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage.” *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. (United States v. DeLorean)*, 729 F.2d 1174, 1179 (9th Cir. 1984). The Fourth Circuit Court of Appeals in 1989 cogently summarized nearly two decades of judicial experience with highly

publicized criminal prosecutions following the Supreme Court's ruling in *Sheppard v. Maxwell*, 384 U.S. 333 (1966):

Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which—remarkably in the eyes of many—were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity.

In re Charlotte Observer (United States v. Bakker), 882 F.2d 850, 855-56 (4th Cir. 1989).

For example, in the prosecution of Attorney General John Mitchell and President Nixon's top aides for their roles in the Watergate conspiracy, the Court of Appeals for the District of Columbia found defendants' pretrial claims that it would be impossible to seat a jury untainted by press coverage to have been flatly refuted during *voir dire*: "Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." *United States v. Haldeman*, 559 F.2d 31, 63 n.37 (D.C. Cir. 1976).

The Second Circuit reached a similar conclusion during the highly publicized prosecution of several members of Congress caught in the federal "Abscam" sting operation, in which FBI agents posed as wealthy Arab businessmen offering bribes for legislative favors. *In re Nat'l Broad. Co.*, 635 F.2d 945 (2d Cir. 1980). Despite the "explosion of publicity in the national and local media" and "contrary to the expectations of [the criminal defendants] . . . , only about one-half of the prospective jurors indicated that they had ever heard of Abscam" and in the large venire called "only eight or ten had 'anything more than a most generalized kind of recollection what it was all about.'" *Id.* at 947-48 (citation omitted); *see also United States v. McVeigh*, 153 F.3d 1166, 1180-81, 1184 n.6 (10th Cir. 1998) (more than one half of potential jurors were

unaware of Timothy McVeigh's purported confession to the Oklahoma City bombing despite ubiquitous press coverage), *overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

The simple fact that the *Idaho Statesman* newspaper and other media outlets have devoted significant press coverage to this lawsuit does not by itself establish that the statements of counsel pose an "imminent threat to the administration of justice." *Levine*, 764 F.2d at 596. *See, e.g., McVeigh*, 153 F.3d at 1180 (finding no denial of fair trial rights despite press accounts appearing one month before trial, that the Oklahoma City bombing suspect had confessed to the crime and was reported to have methodically timed his attack on the federal building "in order to obtain a higher 'body count.'"); *Mu'Min v. Virginia*, 500 U.S. 415, 431-32 (1992) (finding no denial of fair trial rights despite local newspaper's publication of banner headlines "Murderer confesses to killing woman," and "Inmate said to admit to killing," as well as gruesome details of the crime).

In short, defendants fail to demonstrate a substantial likelihood of prejudice to their fair trial rights from publicity concerning this case, and for this reason alone their request for extraordinary injunctive relief should be denied.

2. Myriad alternatives exist to protect the parties' fair trial rights.

Courts in criminal cases attracting far more publicity than the present civil matter have recognized that many alterations exist to safeguard the parties' fair trial rights without restricting free speech rights. These include the use of a controlled and searching *voir dire*, admonishment of the jury, procedures to provide a dignified and restrained trial atmosphere, change of venue, and sequestration of the jury. *See, e.g., Levine*, 764 F.2d at 599-602 (identifying alternatives that must be considered); *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (unlikely

that “questioning of the prospective jurors” and “the use of . . . *clear* instructions . . . will fail to produce an unbiased jury, regardless of the nature of the pretrial documents” that are disclosed).

Time and time again, courts have found that a thorough *voir dire* examination of potential jurors can effectively eliminate from jury service those so affected by exposure to pretrial publicity that they cannot fairly decide issues of guilt or innocence. As three concurring justices in *Nebraska Press Association* explained, even where highly prejudicial information (a confession) is published in advance of a trial, “the Sixth Amendment rights of the accused may still be adequately protected” through the use of *voir dire* probing “fully into the effect of publicity.” 427 U.S. at 601-02 (Brennan, J., concurring); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (finding that “an adequate *voir dire*” is an effective tool to “remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence.”); *In re Charlotte Observer*, 882 F.2d at 856 (“*voir dire* can serve in almost all cases as a reliable protection against juror bias however induced”).

There is simply no reason to believe that this civil action is in a league all its own, such that proper *voir dire* would not be equally effective in this case. The availability of alternatives independently defeats defendants’ request for a prior restraint.

3. The requested relief is not narrowly tailored.

On its face, the Proposed Restraining Order (Dkt. No. 199-1) is unconstitutionally overbroad. It reaches not only the speech of the parties and their lawyers, but of any and all “witnesses” to the underlying facts. And it would preclude any statement to the press that “relates to, concerns or discusses the subject matter of this lawsuit”—reaching far beyond statements that pose “a substantial likelihood of materially prejudicing the fair trial rights of any party” or “the adjudicative proceeding” herein. *See* Rule 3.6(b) of the Idaho Rules of

Professional Conduct (expressly authorizing attorneys to make extrajudicial statements on certain enumerated subjects that will *not* pose a substantial risk of prejudice); *see also Gentile*, 501 U.S. at 1075-76 (finding that that speech by attorneys concerning ongoing litigation is protected by First Amendment, except where statements in a criminal prosecution have a “substantial likelihood of materially prejudicing” the proceeding). Under the terms of the proposed restraining order, parties, counsel and witnesses would be prohibited (under penalty of contempt) even from informing the press of the anticipated length of trial, the order of expected witnesses, or the procedural posture of the case.

Many courts have found such “gag orders” that broadly preclude public statements *on any topic* to be constitutionally impermissible. *See, e.g., State, ex rel. Nat’l Broad. Co. v. Ct. of C.P.*, 556 N.E.2d 1120, 1124 (Ohio 1990) (citing *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501 (1984)), *overruled in part on other grounds, State v. Schlee*, 882 N.E.2d 41 (Ohio 2008); *Conn. Magazine, a Div. of Arc Commc’ns, Inc. v. Moraghan*, 676 F. Supp. 38, 39, 44 (D. Conn. 1987) (gag order prohibiting “any public statements to any member of the media about [the] trial while it [was] in progress” was unconstitutional because it was not narrowly tailored); *New York Times Co. v. Rothwax*, 533 N.Y.S.2d 73, 74 (N.Y. App. Div. 1988) (if gag order is necessary, it “should have been limited to information or statements which might be likely to impugn the fairness and integrity of the trial”). Among the courts rejecting broad gag orders such as the one requested here are:

Levine v. U.S. Dist. Ct., 764 F.2d 590, 599 (9th Cir. 1985) (granting mandamus and dissolving district court order, on overbreadth grounds, that prohibited counsel from commenting “upon the merits” of the case);

State v. Bassett, 911 P.2d 385, 388 (Wash. 1996) (striking down blanket ban on counsel’s public discussion of criminal case because “the order must be narrowly tailored to proscribe only those extrajudicial statements that threaten the defendants’ right to a fair

trial or the administration of justice” which statements are also prohibited by the state rule of professional conduct applicable to all counsel in the case);

United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (vacating district court order prohibiting trial counsel in prosecution of World Trade Center bombing from discussing “‘anything to do with this case’ or that even ‘may have something to do with the case’”);

In re New York Times Co., 878 F.2d 67 (2d Cir. 1989) (per curiam) (striking down gag order barring counsel in criminal case from speaking to press during trial);

CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (granting mandamus and vacating trial court order restraining all parties in civil litigation from discussing the case);

Bailey v. Sys. Innovation, Inc., 852 F.2d 93 (3d Cir. 1988) (vacating trial judge’s order prohibiting litigants in civil action from discussing facts or legal claims in case).

Defendants’ proposed order is equally over broad and is similarly impermissible. For this reason, too, defendants’ request for an injunction should be rejected.

CONCLUSION

For the reasons stated above, the AP respectfully requests that its Motion to Intervene be granted, and that the Court deny the defendants’ motion for an injunction against speech in all respects.

DATED on this 17th day of February, 2011.

/s/ Charles A. Brown

CHARLES A. BROWN
Charles A. Brown (ISB 2129)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February, 2011, I filed the foregoing with the Clerk of the Court electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Timothy J Bojanowski (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
tbojanowski@jshfirm.com

Lea Candy Cooper (attorney for plaintiffs)
lcooper@acludaho.org

Krista Lynn Howard (attorney for defendants Reinke, Runaiole, Dressen, Langerak, Matthews, & Young)
khoward@idoc.idaho.gov

James D Huegli (attorney for plaintiffs)
jameshuegli@yahoo.com

Kirtlan G Naylor (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
kirt@naylorhales.com

Paul R Panther (attorney for defendant Reinke)
ppanther@idoc.idaho.gov

Stephen L Pevar (attorney for plaintiffs)
Pevaraclu@aol.com

James R. Stoll (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
jrs@naylorhales.com

Daniel Patrick Struck (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
dstruck@jshfirm.com

Tara B Zoellner (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
tzoellner@jshfirm.com

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant in the manner indicated: via first class mail to

Joseph J Popolizio (attorney for defendants Rodriguez, Valdez, Rose, Danforth, Dean & CCOA)
2901 North Central Avenue, Suite 800, Phoenix, AZ 85012

/s/ Charles A. Brown
Charles A. Brown