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Devon Chaffee
Executive Director

August 8, 2018

BY OVERNIGHT MAIL

Maureen F. O'Neil, Clerk
Rockingham Superior Court
PO Box 1258
Kingston, NH 03848-1258

RE: State v. Andersen, No. 218-2018-cr-241

Dear Clerk O'Neil:

In the above referenced action, please find enclosed for filing the Petitioner ACLU-NH's Motion to (i) Intervene, (ii) Vacate the May 23, 2018 "Gag" Order, and (iii) Schedule a Hearing on this Matter for August 22, 2018.

Do not hesitate to contact me if you have any questions.

Very truly yours,

Gilles Bissonnette
Legal Director

cc: William Pate, Esq.
Michael Delaney, Esq.
Rick Lehmann, Esq.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ROBERT ANDERSEN

No. 218-2018-cr-241

PETITIONER ACLU-NH'S MOTION TO (i) INTERVENE, (ii) VACATE THE MAY 23, 2018 "GAG" ORDER, AND (iii) SCHEDULE A HEARING ON THIS MATTER FOR AUGUST 22, 2018

NOW COMES Petitioner the American Civil Liberties Union of New Hampshire ("ACLU-NH") and respectfully petitions this Honorable Court to (i) allow the ACLU-NH to intervene in this matter, (ii) vacate this Court's May 23, 2018 "gag" order, and (iii) schedule this issue for a hearing on August 22, 2018—the date of an already-scheduled dispositional conference and hearing on pending motions in this case. The State objects to this Motion. The Defendant's position on this Motion is not known at this time.

Introduction

This motion concerns the ACLU-NH's investigation into whether the Salem Police Department ("Department") used its immense law enforcement power to intimidate two individuals who are potential witnesses against the State in this criminal case. More specifically, the ACLU-NH is using Chapter 91-A to investigate whether the Department, in violation of the First Amendment, charged Christopher Albano for crimes in retaliation for him speaking to *CBS Boston* about his concern that the Department improperly arrested and used excessive force against a youth hockey coach—Defendant Robert Andersen—on December 2, 2017. Mr. Albano is a witness in this pending criminal case, and the Department charged him with crimes five months

after the December 2, 2017 *Andersen* incident. Mr. Albano's arrest may also have violated his right to record the police—a right that is recognized under the First Amendment as a means of ensuring government accountability. The ACLU-NH is similarly investigating the Department's actions in criminally charging John Chesna, who too is a witness in this case. The Department also charged Mr. Chesna about five months after the December 2, 2017 *Andersen* incident and several weeks after *CBS Boston* informed the public of this case on April 26, 2018.

The Department's decision to charge these two potential witnesses so long after the December 2, 2017 *Andersen* incident is concerning, especially in Mr. Albano's case where the Department's actions came shortly after Mr. Albano criticized the Department in statements to *CBS Boston*. It is, of course, inappropriate for a police department to criminally charge a witness because that witness will present negative testimony in a criminal case or because that witness has spoken out against the police. *See Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Indeed, the ability of people to speak freely to the press without fear of police retaliation is critical to a free press and its valuable role of promoting government accountability. *See Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 233 (2010) ("Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting.") (quoting *Opinion of the Justices*, 117 N.H. 386, 389 (1977)).

In response to Petitioner ACLU-NH's Chapter 91-A request seeking this information, the Department has declined to produce responsive information in light of this Court's May 23, 2018

"gag" order. Thus, the ACLU-NH files this Motion seeking to intervene and asking this Court to vacate the "gag" order.

It is not clear from the information publicly available whether the Department acted inappropriately; this is what the ACLU-NH seeks to investigate. However, what is clear is that the public and the residents of Salem have a right to access basic information to make an assessment for themselves as to how the Department—which is funded by the public—handled this situation. This Motion highlights the critical importance of Chapter 91-A and why this Court must vacate the "gag" order: to shed light on government behavior so the public can hold the government accountable.

The Facts and the Need for the Information Requested

1. On December 2, 2017, the Salem Police Department responded to a call stating that parents were fighting at the Icenter hockey rink where there was a youth hockey game. There was an argument between two parents during the game. According to witnesses, Defendant Robert Andersen—one of the coaches at the game—was standing between the two parents in an attempt to deescalate the situation. Several witnesses say that the Salem police—without announcing themselves, without asking anyone what happened, and without engaging in de-escalation techniques—came through the door, grabbed Mr. Andersen, pushed him to the ground, tased him several times, and put him in handcuffs. The Department ultimately charged Mr. Andersen with simple assault, criminal threatening, and resisting arrest. These charges are pending in this criminal case. The case summary in Mr. Andersen's case is attached as *Exhibit A*.

2. Several people videotaped the incident with their cell phones. Mr. Andersen can be heard screaming with four Salem officers pinning him to the floor of the rink lobby. Two of the officers then tased Mr. Andersen. In the video, witnesses yelled "he did nothing wrong," yet the

Salem police officers appeared unwilling to listen to these witnesses' version of events that conflicted with the aggressive actions that they had just undertaken against Mr. Andersen. One officer said in response to witnesses explaining that Mr. Andersen did nothing wrong, "No, I didn't grab the wrong guy. Don't tell me what I did."

3. On April 26, 2018, *CBS Boston* ran a story about this incident. *See* Cheryl Fiandaca, "I-Team: Video Captures Controversial Arrest of Youth Hockey Coach," *CBS Boston*, Apr. 26, 2018, attached as ***Exhibit B***, at http://boston.cbslocal.com/2018/04/26/iteam-salem-youth-hockey-coach-tased-police/. In the story, one witness explained that "I felt like that if you opened your mouth, they were going to arrest you too." *Id.* Witness Christopher Albano was interviewed in the story and stated that "nobody knew what was going on. Nobody knew why this was happening." *Id.* When questioned about the force used by the Salem Police Department against Defendant Andersen, Mr. Albano stated: "[Mr. Andersen] wasn't going anywhere. There [were] four cops on him. And he wasn't fighting back or anything, so there was no reason for that." *Id.*

4. In May 2018—just weeks after the April 26, 2018 *CBS Boston* story aired and five months after the December 2, 2017 incident—the Salem Police Department charged Mr. Albano with disorderly conduct and simple assault in Salem District Court. The allegation is purportedly for touching an officer's hand while the officer was attempting to interfere with Mr. Albano's First Amendment right to record the officers and their interaction with Mr. Andersen. *See Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (holding that there is a First Amendment right to record the police who are performing their duties in public so long as the recording does not interfere with the performance of such duties); *Gericke v. Begin*, 753 F. 3d 1 (1st Cir. 2014) (same). Salem's prosecutor has indicated an intent to seek Class A misdemeanor penalties in Mr. Albano's case. Mr. Albano's criminal case is currently set for trial on August 30, 2018. The case summary for

Mr. Albano's case is attached as ***Exhibit D***. *See State v. Christopher Albano*, No. 473-2018-CR-01360 (Salem District Court, filed on June 1, 2018).

5. Mr. Albano's arrest was further reported by *CBS Boston* on May 23, 2018 where several experts expressed concern that this arrest—which occurred about five months after the incident and soon after Mr. Albano spoke to the press against the Department's actions—constituted retaliation against a witness. *See* Cheryl Fiandaca, "I-Team: Father Arrested After Speaking To WBZ About Arrest of Hockey Coach," *CBS Boston*, May 23, 2018, attached as ***Exhibit C***, at http://boston.cbslocal.com/2018/05/23/father-arrested-salem-police-hockey-coach-arrest-assault-iteam/. Indeed, one expert in the story noted the following: "There are situations where police are assaulted and beaten, so it's a very serious criminal offense. To diminish and trivialize it like this undermines situations where police officers are legitimately assaulted." *Id.*

6. Similarly, in May 2018, after the original April 26, 2018 *CBS Boston* story, the Salem Police Department arrested John Chesna—also a witness in the *Andersen* case—on two charges of disorderly conduct. Salem's prosecutor has indicated an intent to seek Class A misdemeanor penalties in Mr. Chesna's case. Mr. Chesna's criminal case is currently set for trial on August 22, 2018. The case summary for Mr. Chesna's case is attached as ***Exhibit E***. *See State v. John Chesna*, No. 473-2018-CR-01180 (Salem District Court, filed on May 18, 2018).

7. On May 17, 2018, Petitioner ACLU-NH filed a Right-to-Know request with the Salem Police Department. This request is attached as ***Exhibit F***. This request sought, among other things, police reports arising from a simple assault and disorderly conduct allegedly committed by Christopher Albano on December 2, 2017, and the criminal complaint filed against Mr. Albano after this alleged incident, and any internal or external communications concerning Mr. Albano.

8. On May 18, 2018, Petitioner filed a second Right-to-Know request with the Salem Police Department. This request is attached as *Exhibit G*. This request sought police reports arising from criminal activity allegedly committed by John Chesna on December 2, 2017, the criminal complaint filed against Mr. Chesna after this alleged incident, and any internal or external communications concerning Mr. Chesna.

9. On May 24, 2018, the Salem Police Department refused to supply these records based on a May 23, 2018 "gag" order issued in this criminal case. Based on the "gag" order, the Department is also apparently withholding the arrest warrant and supplemental affidavit for arrest warrant filed with the Court in Mr. Albano's case. *See* Albano Case Summary, attached as *Exhibit D*; *see also* July 26, 2018 Affidavit of Robert R. Morin, Jr. (listing withheld documents), attached as *Exhibit J*.

10. This May 23, 2018 "gag" order referenced in Salem's response is attached as *Exhibit I*. The "gag" order issued by this Court in this matter was hand-written in the case's Dispositional Conference Order and states that "In the interim, the parties shall not disclose any information learned from any police report to any outside source/person without permission from the court." The State (not Mr. Andersen) requested the "gag" order (i) just days after the ACLU-NH submitted its Chapter 91-A requests on May 17 and 18, 2018 and (ii) immediately before *CBS Boston* aired a story on May 23, 2018 explaining how the Department arrested Mr. Albano after he spoke to the press. As explained below, this order is unconstitutional.

11. In addition, the Department raised two exemptions under Chapter 91-A in its May 24, 2018 response: (a) the exemption for documents that could reasonably be expected to interfere with enforcement proceedings; and (b) the exemption for documents that would deprive a person

of a right to a fair trial or an impartial adjudication. *See* Salem May 24, 2018 response, attached as *Exhibit H*.

12. Because of the Chapter 91-A exemptions raised by the Department, Petitioner filed a Chapter 91-A lawsuit against the Town of Salem on June 26, 2018. *See ACLU-NH v. Town of Salem*, No. 218-2018-cv-00667 (Rockingham County Superior Court, filed June 26, 2018). The Rockingham County Attorney's Office did not intervene in that Chapter 91-A lawsuit. In response to the Chapter 91-A Petition, the Town of Salem moved to dismiss on July 26, 2018, arguing that the ACLU-NH should have filed "a separate declaratory judgment action against the Court, or intervene[d] in the [*Andersen*] criminal proceedings, so the proper parties are engaged in addressing this Court's order, which arose in [the *Andersen*] criminal action." On August 8, 2018, the ACLU-NH voluntarily dismissed the Chapter 91-A lawsuit, as the ACLU-NH and Town of Salem reached an agreement to resolve the permissibility of the May 23, 2018 "gag" order—including whether the order is necessary to avoid interference with criminal prosecutions and preserve the right to a fair trial—in this criminal case.

13. The public import of the police reports and communications requested by the ACLU-NH concerning the charges against Mr. Albano and Mr. Chesna brought approximately five months after the December 2, 2017 incident is both compelling and obvious. These arrests have potential civil liberties implications and raise questions about the Department's police practices and whether it attempted to use its law enforcement power to intimidate witnesses, including one person who spoke out to the press against the Department.[1] As one police expert told *CBS Boston* in its May 23, 2018 story concerning the Department's arrest of Mr. Albano, "I

[1] Under RSA 641:5, a person is guilty of a class B felony if (i) believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to withhold any testimony, information, document or thing or (ii) he commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant.

have never heard of it before and it is certainly, in my experience that runs to four decades, if it was determined that an arrest was warranted, the arrest should have been carried out in December [2017], not six months after the fact as we are seeing here. This is beyond the pale for what is appropriate and professional police conduct." *See* Cheryl Fiandaca, "I-Team: Father Arrested After Speaking To WBZ About Arrest of Hockey Coach," *CBS Boston*, May 23, 2018, attached as *Exhibit C*, at http://boston.cbslocal.com/2018/05/23/father-arrested-salem-police-hockey-coach-arrest-assault-iteam/. In Mr. Albano's case, the ACLU-NH suspects that the original police reports from December 2017 say little about any alleged assault conducted by Mr. Albano. As explained in the May 23, 2018 *CBS Boston* story, in Salem police officer Sean Wilson's police report describing the December 2, 2017 incident, he makes no mention of being assaulted in his report. *Id.*

14. The public has a right to records that show how the Department has conducted these arrests. Records such as the ones at issue here are presumptively open to the public, and the issue these records present—namely, whether or not the Department has abused its power to intimidate witnesses—adds significantly to the public's interest in accessing the requested documents. *See Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992) ("The motivations of the *Keene Sentinel*—or any member of the public—are irrelevant to the question of access. We cannot dictate what should and should not interest the public. Were the court to do so we would overstep our judicial authority by substituting our preferences for those of the individual."); *see also, e.g., Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 684 (2011) (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Professional Firefighters of N.H. v. Local*

Government Center, Inc., 159 N.H. 699, 709 (2010) ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.").

Intervention is Appropriate

15. Because the Department is relying on the May 23, 2018 "gag" order in declining to produce to the ACLU-NH responsive documents under Chapter 91-A, the ACLU-NH has a direct and apparent interest in the legality of the "gag" order that permits intervention in this case. The ACLU-NH is seeking to intervene for the purposes of challenging the May 23, 2018 "gag" order only. Petitioner is not seeking to intervene with respect to the merits of the charges brought in this criminal proceeding. Indeed, the New Hampshire Supreme Court has regularly allowed intervention in similar circumstances where third parties have sought access to documents and information related to criminal proceedings to vindicate the public's interest in open government. *See, e.g., Keene Publ'g Corp. v. Keene Dist. Court*, 117 N.H. 959, 960 (1977) (allowing third-party media outlet to challenge trial court's order closing a probable cause hearing in a criminal case concerning seven sex-related charges involving male minors); *Petition of Keene Sentinel*, 136 N.H. at 125 ("The newspaper, *as well as any member of the public* … has standing, without having to be made a party in a case, to request access to court records. The newspaper sought to do so through intervention.") (emphasis added). This Court must similarly permit intervention in this case.

This Court Must Vacate the "Gag" Order

I. The May 23, 2018 "gag" order violates the First Amendment and Part I, Articles 22 and 8 of the New Hampshire Constitution because it bars disclosure of the contents of police reports, court documents, and other public documents to third parties, including to the press and advocacy organizations investigating government accountability.

A. Part I, Article 22 of the New Hampshire Constitution and the First Amendment

16. This Court's May 23, 2018 "gag" order impermissibly acts as a prior restraint in violation of the First Amendment and Part I, Article 22 of the New Hampshire Constitution. Indeed, this "gag" order effectively bars the Town of Salem from complying with its Chapter 91-A obligations to produce important public documents that will shed light on government behavior.

17. A prior restraint is a judicial order or administrative system that restricts speech, rather than merely punishing it after the fact. *See Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 240 (2010) (invalidating a court injunction prohibiting republication of a loan chart, as the petitioner's interests in protecting its privacy and reputation did not justify this extraordinary remedy of imposing a prior restraint). As the New Hampshire Supreme Court has held, "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing speech protected under the First Amendment increases." *Id.* at 241. The danger of a prior restraint is that it has an immediate and irreversible sanction that "freezes" speech at least for the time. For these reasons, any prior restraint on expression comes with a heavy presumption against its constitutional validity. *Id.*

18. Because the May 23, 2018 "gag" order imposed in this case precludes the Town of Salem from discussing or releasing any information from the police reports to any non-parties to this case pursuant to its Chapter 91-A obligations, the order constitutes a prior restraint. Accordingly, the party seeking the prior restraint has a heavy burden of showing that the imposition

of the restraint is justified, as courts can only issue prior restraints in rare and extraordinary circumstances. *See In re Nebraska Press Assn. v. Stewart*, 427 U.S. 539, 558 (1976); *In re N.B.*, 169 N.H. 265, 269 (2016) ("Our case law establishes that the burden is on a party seeking closure or nondisclosure of court records."); *Mortgage Specialists*, 160 N.H. at 241 ("prior restraints may be issued only in rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government"). The State cannot satisfy this burden here.[2]

19. There is no basis for the "gag" order. This Court, in issuing the "gag" order, does not appear to have conducted the required analysis or made any necessary factual findings that would justify this prior restraint. For example, in *In re Nebraska Press Assn. v. Stewart*, 427 U.S. 539 (1976), the Supreme Court struck down a gag order preventing the petitioners from publishing or broadcasting confessions, admissions, or "strongly implicative" facts. *Id.* at 541. The Court did so on the basis that the lower court had undergone no analysis of whether there were less restrictive ways of protecting the trial from undue prejudice. *Id.* at 565. The same is true here. There is no indication that this Court, as required, assessed whether alternative, less restrictive, measures could sufficiently mitigate any concerns the State or the Court may have concerning the disclosure of these documents. *See also N.B.*, 169 N.H. at 271-73 (overruling a court order requiring any future cases between the plaintiff and DCYF and CASA to be initially placed under seal as an unconstitutionally overbroad, and thus not narrowly tailored).

[2] Indeed, this burden must be met even if all the litigants agreed to issuance of the "gag" order. For example, in *Petition of Keene Sentinel*, 136 N.H. 121 (1992), the Court overturned a gag order, finding that the lower court that issued it had simply sealed the records "at the request of the parties" without engaging in a balancing analysis. *Id.* at 129-30. Thus, even where the parties agree among themselves to make records confidential, the court must still balance the purported privacy interests against a heavy presumption of constitutional invalidity that comes with a prior restraint on speech. *Id.*

20. The May 23, 2018 "gag" order comprises of a single, broadly worded sentence, and was apparently issued in response to an oral request (without a formal motion) by the State. However, the State cannot possibly meet its burden to justify this prior restraint, as it failed to make *any* factual showing that the order was necessary to ensure Mr. Andersen's right to a fair trial. It does not appear that the State presented any actual evidence demonstrating the need for the order. In its June 25, 2018 Objection to Defendant Andersen's Motion to Amend the Dispositional Conference Order, the State has only justified the order in a one-sentence conclusory statement that "[u]pon information and belief, the purpose of the order was to prevent further prejudice to the defendant and lessen further contamination of future potential jurors in this case." Indeed, given the press criticism that has erupted over how Salem handled Mr. Andersen's arrest, there is an appearance that the State may have requested the "gag" order on May 23, 2018 in an effort to (i) save the Department from further public criticism and (ii) avoid having to produce documents in response to the ACLU-NH's May 17 and 18, 2018 Chapter 91-A requests. Of course, experiencing criticism is not cognizable prejudice justifying the withholding of public records. Any public concern over how Salem handled these arrests only highlights the need for these documents to be immediately produced in their entirety. Typically, it is the defendant—not the government—requesting the "gag" order on the basis that press statements by the litigants will prejudice the accused's right to a trial by an impartial jury. Here, the State apparently requested the order, not the Defendant.

21. As explained in more detail below, there is no basis to assume that Defendant Mr. Anderson's right to a fair trial or impartial jury will be prejudiced by media exposure. Significant media interest neither, by itself, creates prejudice nor demonstrates a likelihood that the persons who are "gagged" by a court order will make prejudicial statements. *See WXIA-TV v. State of Ga.*,

811 S.E.2d 378, 387 (Ga. 2018) ("A reasonable likelihood of prejudice sufficient to justify a gag order cannot simply be inferred from the mere fact that there has been significant media interest in a case. After all, 'pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial,' and '[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the right to trial by an impartial jury].'") (quoting *Nebraska Press Assn.*, 427 U.S. at 554, 551). The publicity surrounding this case is no greater or sensational than an average event of similar newsworthiness. As the Georgia Supreme Court held, such publicity is not sufficient to justify a prior restraint on the speech of attorneys, trial participants, and news organizations. The State must show more than the handful of press reports covering this incident in order to argue that the right to a fair trial is in jeopardy; they must show that the parties and counsel in *this case* are likely to make prejudicial statements or disclosures that will place the fairness of the trial at risk. The State has not made—and cannot make—such a showing. *See id.; see also In re Application of New York Times Co.*, 878 F.2d 67, 68 (2d Cir. 1989) ("Not only has there been no showing that prejudice may result from statements made to the press by counsel, but there has been no showing that statements are likely to be made at all.").

22. For these reasons, the "gag" order violates the First Amendment and Part I, Article 22 of the New Hampshire Constitution. Thus, this Court must vacate the order.

B. Part I, Article 8 of the New Hampshire Constitution Concerning Disclosure of Court Documents

23. For similar reasons, the "gag" order violates Part I, Article 8 to the New Hampshire Constitution because the order is being used to withhold court documents, including documents that will ultimately become a part of the record in this criminal case (e.g., the criminal complaint, police reports, bond and orders and condition of bail, arrest warrants and supporting affidavits,

etc.). *See* July 26, 2018 Affidavit of Robert R. Morin, Jr. (listing withheld documents), attached as *Exhibit J*.

24. Under Part I, Article 8 of the New Hampshire Constitution, the government "should be open, accessible, accountable and responsive," and therefore "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." In interpreting Article 8, the New Hampshire Supreme Court has stated the following:

> We hold that under the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records.

See Petition of Keene Sentinel, 136 N.H. at 128; *see also In re N.B.*, 169 N.H. 265, 270-71 (2016) ("[W]e have held that when public access to sealed court documents is sought, 'Part I, Articles 8 and 22 of the State Constitution require: (1) that the party opposing disclosure of the document demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document; and (2) that the court determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved.'") (quoting *Associated Press v. State of N.H.*, 153 N.H. 120, 130 (2005)).

25. Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire then (and now) already had a statute addressing the public's right to access information—Chapter 91-A—the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." Lawrence Friedman, The New Hampshire State Constitution 53 (2d ed. 2015). Article 8 must be read in conjunction with the preceding Article 7, which states, in part, that "'The people of this state have the sole and exclusive right of governing themselves as a

free, sovereign, and independent state.' These sections express the American theory of government that 'the state being sovereign, the people being the state, and all magistrates and public officers being their substitutes and agents' they are accountable to the people." *Opinion of the Justices*, 111 N.H. 175, 177 (1971) (quoting *Attorney General v. Taggart*, 66 N.H. 362, 369 (1890)). Thus, the right to access official proceedings grows out of the need for government accountability. *Associated Press*, 153 N.H. at 124-25; *State v. DeCato*, 156 N.H. 570, 574-75 (2007). It is therefore unsurprising that the right of public access predates both the New Hampshire and United States Constitutions. *See Associated Press*, 153 N.H. at 125. Under Article 8, the public should have the greatest possible access to the actions of all public bodies. Put another way, there is a presumption in favor of disclosure to the public.

26. As explained above and below, there is no compelling reason that would justify preventing public access of the information suppressed under the May 23, 2018 "gag" order. To the contrary, the public interest in disclosure is compelling. Thus, the "gag" order violates Part I, Article 8 of the New Hampshire Constitution and this Court must vacate it.

II. There is no basis to believe that disclosure of the police reports and related communications will interfere with this law enforcement proceeding.

27. Using Chapter 91-A as a guide, police reports and other documents compiled for law enforcement purposes may be withheld if (1) "enforcement proceedings are pending or reasonably anticipated" and (2) *that "disclosure of the requested documents could reasonably be expected to interfere with those proceedings*." *38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. 656, 665 (2012) (emphasis added) (quoting *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 582–83 (2006)). This burden falls squarely on the government entity resisting disclosure. *See Murray*, 154 N.H. 579 ("[i]t is not the petitioner's responsibility to clarify the respondents' vague categorizations").

28. As to the second element, it is clear that the State has not met its burden. "[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 257 (D.D.C. 1982).

29. The July 26, 2018 affidavit of Salem Deputy Chief Robert Morin presents only conclusory and speculative assertions of interference. *See* July 26, 2018 Affidavit of Robert R. Morin, Jr. ¶ 7, attached as ***Exhibit J***. However, courts across the country have uniformly rejected invocation of the "interference" exception based on similar conclusory, speculative assertions without particularized supporting facts. *See, e.g.*, *Jane Does v. King Cty.*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of a shooting and rejecting conclusory assertion of interference with witnesses or law enforcement; holding that proponents of secrecy "were obligated 'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement'") (citation omitted); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (exception "require[s] specific information about the impact of the disclosures" on an enforcement proceeding); *id.* ("[I]t is not sufficient for an agency merely to state that disclosure would" interfere with a proceeding; "it must rather demonstrate how disclosure" would do so); *Grasso v. I.R.S.*, 785 F.2d 70, 77 (3d Cir. 1986) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." (citation omitted)); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (a "categorical indication of anticipated consequences of disclosure is clearly inadequate") (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)); *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (the government must prove release of records would "interfere in a

palpable, particular way"). In the present case, neither the State nor Deputy Chief Morin have put forth any such specific evidence that releasing the police reports and related communications would have any effect on its case against these individuals.

30. While New Hampshire courts have not provided a precise definition of "interfere" in this Chapter 91-A context, they have given a general sense of the severity of interference they consider sufficient to justify withholding information, stating that "disclosure of information may interfere with enforcement proceedings by '[resulting] in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation.'" *38 Endicott St.*, 163 N.H. at 667 (quoting *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998)). State has not presented any specific evidence as to any of these considerations.

31. The State has not pointed to any specific potential interference, especially where there is no pending criminal investigation in the *Andersen*, *Albano*, or *Chesna* cases. The criminal investigations in these cases are complete and there has been a decision to prosecute. The State also cannot meet this burden of establishing interference where it must acknowledge that the facts and circumstances of these arrests will be adjudicated as part of a public trial that will be open and available to the public and press. In short, it is inappropriate to blanketly view something as "interfering with enforcement proceedings" simply because there is a criminal case pending.

32. If the State's broad interpretation of "interference" is correct, it will justify the issuance of a "gag" order in nearly every criminal case. That view of the law is unsupported. "[M]erely because a piece of paper has wended its way into an investigatory dossier created in anticipation of enforcement action, an agency . . . cannot automatically disdain to disclose it." *Providence Journal Co. v. Pine*, No. C.A. 96-6274, 1998 R.I. Super. LEXIS 86, at *31 (R.I. June

24, 1998) (citation omitted). To find otherwise would create a "blanket exemption for police files" that "would turn on its head [the] basic presumption of openness." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013); *see also Jefferson v. Reno*, 1997 U.S. Dist. LEXIS 3064, *9–11, 1997 WL 135723 (D.D.C. Mar. 14, 1997) (rejecting government's decision to withhold records on grounds that they were "maintained in a case file that pertains to a criminal prosecution" because the government could not "describe[] how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings"; rejecting government's generalized statement that "the release of such information would severely compromise the United States Attorney's Office in its ability to effectively carry out its functions in" the pending criminal actions, and concluding that the government's position "would result in a 'blanket exemption' for all documents contained in pending criminal files"); *Penn. State Police v. Grove*, No. 1646 C.D.2014, 2015 Pa. Commw. Unpub. LEXIS 714, at *4 (Pa. Commw. Ct. Sept. 28, 2015) (ordering release of police dashcam video and holding that "[t]he mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under" open records laws (citation omitted) (alteration in original)).

33. Also troubling is the State's implicit assumption that public access necessarily "interferes with" law enforcement proceedings. To the contrary, the United States Supreme Court has recognized for decades that public access to court proceedings ensures basic fairness and the appearance of fairness in the proceedings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"), fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507–08 (1984) ("*Press-Enterprise I*"), acts as a necessary check on the judiciary, *Richmond Newspapers, Inc. v. Virginia*,

448 U.S. 555, 569 (1980), and allows the public to participate in government, *id.* at 587–88 (Brennan, J., concurring).

III. There is no basis to believe that disclosure of the police reports and related communications will result in the deprivation of the right to a fair trial.

34. The State's contention that disclosure of the police reports would result in deprivation of the right to a fair trial is similarly incorrect. Here, again, the State has made this assertion with conclusory statements that are insufficient to justify the "gag" order.

35. Using Chapter 91-A and the Freedom of Information Act as a guide, the D.C. Circuit Court of Appeals has explained that "to withstand a challenge to the applicability of [the exemption permitting the withholding of documents that would deprive a person of a right to a fair trial or an impartial adjudication], the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Wash. Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). This exemption cannot be met by "merely conclusory statements." *Id.* at 101. Even if a party is faced with litigation, "it [does] not automatically follow that disclosure . . . would deprive [that party] of a fair trial." *Id.* at 102. The State "must show how release of the particular material would have the adverse consequence that [FOIA] seeks to guard against." *Id.* at 101; *see also, e.g.*, *Playboy Enterprises, Inc. v. United States Dep't of Justice*, 516 F. Supp. 233 (D.D.C. 1981) (denying 7(B) exemption because "the degree of publicity that might come about as a result of the disclosure . . . [was] speculative at best"); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174–75 (C.D. Cal 2003) (denying 7(B) exemption, in part, because "defendant has failed to demonstrate that disclosure . . . would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial"); *State News v. Mich. State Univ.*, 735 N.W.2d 649, 660 (Mich. Ct. App.

2007) ("by failing to find with sufficient particularity that [the party resisting disclosure] specifically justified its claim of exemption, the trial court erred in its determination that [the party] met its statutory burden"), *rev'd in part on other grounds*, 481 Mich. 692, 753 N.W.2d 20 (2008).

36. All criminal prosecutions involve information that is unflattering, potentially prejudicial, and sometimes inflammatory, but "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). Hypothetical prejudice alone has never been sufficient under the First Amendment or the common law to deny the public access to records. If the law were otherwise, no negative information about a criminal defendant would ever be released—a rule that would undoubtedly hurt victims who, like the public, are entitled to information from court proceedings. As the court explained in *State v. Kozma*, No. 92-15914 CF10E, 1994 WL 397438 (Fla. Cir. Ct. Feb. 4, 1994) in which a criminal defendant's confession was unsealed:

> [E]ven massive pretrial publicity about a case is not enough to show a serious and imminent threat to the administration of justice or to the denial of fair trial rights. The fact that the Statement has been determined to be inadmissible does not alter that conclusion. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial.

Id. at *2 (citations omitted).

37. Numerous other courts—including the New Hampshire Supreme Court—have agreed. *See Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992) (denying a political candidate's efforts to prevent a newspaper's access to divorce records on privacy grounds because court records are presumptively accessible to the public and the candidate had not made anything more than a "blanket assertion" of privacy rights); *People v. DeBeer*, 774 N.Y.S.2d 314, 316 (N.Y. Co. Ct. 2004) (finding that defendant was not entitled to have sealed a confession contained in document filed with court); *U.S. ex rel. Callahan v. U.S. Oncology, Inc.*, No. 7:00-CV-00350,

2005 U.S. Dist. LEXIS 31848, at *8 (W.D. Va. Dec. 7, 2005) (finding that "defendants ha[d] not overcome the presumption in favor of public access" by providing "general claims of prejudice"); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (finding that "blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents").

38. Even if the police reports were potentially prejudicial, the proper and least restrictive means of mitigating that prejudice is not by restricting the public's access in which it has a compelling interest; rather, it is through voir dire. *See Keene Publ'g Corp. v. Keene Dist. Court*, 117 N.H. 959, 962–63 (1977) ("Much that has been written about empirical studies of pretrial publicity indicates that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. Appropriate tools are available to the trial court as outlined in the draft ABA standard to exclude jury prejudice."). Courts across the country have repeatedly endorsed voir dire as effective at ensuring a fair and impartial jury and rejected the notion that jurors are "nothing more than malleable and mindless creations of pretrial publicity." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991). As the Fourth Circuit explained:

> The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. *With respect to the potential prejudice of pretrial publicity, . . . [v]oir dire is of course the preferred safeguard against this particular threat to fair trial rights . . . [and] can serve in almost all cases as a reliable protection against juror bias however induced.*

Id. at 329 (internal quotation marks omitted; alterations and second ellipsis in original; emphasis added); *see also, e.g.*, *Press-Enterprise II*, 478 U.S. at 15 ("Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."); *United States v. Martin*, 746 F.2d 964,

973 (3d Cir. 1984) ("Testing by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused a fair trial.") (internal quotation marks omitted); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) ("As a basic principle, voir dire is the normal and preferred method of combating any effects of pretrial publicity.").

Conclusion

WHEREFORE, the American Civil Liberties Union of New Hampshire respectfully prays that this Honorable Court:

A. Allow the Petitioner ACLU-NH to intervene in this matter for the limited purpose of asking this Court to vacate its May 23, 2018 "gag" order;

B. Vacate the May 23, 2018 "gag" order;

C. Schedule this Motion for a hearing on August 22, 2018; and

D. Grant such other and further relief as may be deemed just and equitable.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION

Date: August 8, 2018

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Certificate of Service

I hereby certify that a copy of the foregoing was sent to the following:

- The prosecutor in the *Andersen* matter, William Pate, Esq. (wpate@rcao.net); and
- Defense counsel in the *Andersen* matter, Michael Delaney, Esq. (Michael.Delaney@mclane.com);

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August 8, 2018