Wendy J. Olson, Bar No. 7634
wendy.olson@stoel.com
Cory M. Carone, Bar No. 11422
cory.carone@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702
Telephone: 208.389.9000
Facsimile: 208.389.9040

Attorneys for Intervenors

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, v. BRYAN C. KOHBERGER, Defendant.	Case No. CR29-22-2805 **Declaration of Wendy J. Olson in Support of Motion to Reconsider**
THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); STATES NEWSROOM DBA IDAHO CAPITAL SUN; TEGNA INC./KREM (SPOKANE), KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV—MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., DBA KIVI-TV, A DELAWARE CORPORATION; THE SPOKESMAN-	

REVIEW/COWLES COMPANY; THE NEW YORK TIMES COMPANY; LAWNEWZ, INC.; ABC, INC.; WP COMPANY LLC, DBA THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS; THE MCCLATCHY COMPANY, LLC; and THE SEATTLE TIMES,

Intervenors.

I, Wendy J. Olson, declare and state as follows:

1. I am a partner with the law firm of Stoel Rives LLP, counsel for Intervenors in the above-captioned matter. As such, I have personal knowledge of the facts and statements contained in this declaration. I submit this declaration in support of Intervenors' Motion to Reconsider.

2. Attached hereto as **Exhibit A** is a true and correct copy of a filing in *State of Idaho v. Bryan C. Kohberger*, case no. CR29-22-2805.

3. Attached hereto as **Exhibit B** is a true and correct copy of a filing in *State of Idaho v. Bryan C. Kohberger*, case no. CR29-22-2805.

4. Attached hereto as **Exhibit C** is a true and correct copy of a filing in *In Re: Petition for Writ of Mandamus or Writ of Prohibition*, Supreme Court Docket No. 50482-2023.

5. Attached hereto as **Exhibit D** is a true and correct copy of a filing in *In Re: Petition for Writ of Mandamus or Writ of Prohibition*, Supreme Court Docket No. 50482-2023.

6. Attached hereto as **Exhibit E** is a true and correct copy of a filing in *In Re: Petition for Writ of Mandamus or Writ of Prohibition*, Supreme Court Docket No. 50482-2023.

7. Attached hereto as **Exhibit F** is a true and correct copy of a filing in *State of Idaho v. Bryan C. Kohberger*, case no. CR29-22-2805.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

DATED: May 9, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of May 2023, I served a true and correct copy of the within and foregoing upon the following named parties by the method indicated below, and addressed to the following:

Latah County Prosecutor's Office
William W. Thompson, Jr.
Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow, ID 83843

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
___ Via email
_X_ Via iCourt efile & serve at:
paservice@latahcounty.id.gov

Anne Taylor
Attorney at Law
P.O. Box 9000
Coeur d'Alene, ID 83816

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
_X_ Via email at *ataylor@kcgov.us*
___ Via iCourt efile & serve at:
pdfax@kcgov.us

Jeff Nye
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
_X_ Via email at *jeff.nye@ag.idaho.gov*
___ Via iCourt efile & serve at:

Shanon Gray
2175 N. Mountain View Road
Moscow, ID 83843

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
___ Via email
_X_ Via iCourt efile & serve at:
shanon@graylaw.org

/s/ Wendy J. Olson
Wendy J. Olson

EXHIBIT A

Wendy J. Olson, Bar No. 7634
wendy.olson@stoel.com
Cory M. Carone, Bar No. 11422
cory.carone@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702
Telephone: 208.389.9000
Facsimile: 208.389.9040

Attorneys for Intervenors

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,

Plaintiff,

v.

BRYAN C. KOHBERGER,

Defendant.

Case No. CR29-22-2805

Memorandum in Support of Motion to Vacate the Amended Nondissemination Order

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); STATES NEWSROOM DBA IDAHO CAPITAL SUN; TEGNA INC./KREM (SPOKANE), KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV—MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., DBA KIVI-TV, A DELAWARE

CORPORATION; THE SPOKESMAN-REVIEW/COWLES COMPANY; THE NEW YORK TIMES COMPANY; LAWNEWZ, INC.; ABC, INC.; WP COMPANY LLC, DBA THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS; THE MCCLATCHY COMPANY, LLC; and THE SEATTLE TIMES,

Intervenors.

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I. INTRODUCTION

Last week, the Idaho Supreme Court confirmed that a "vague, overbroad, unduly restrictive, or not narrowly drawn" gag order is "an unconstitutional obstacle to [Intervenors] gathering" information about this case. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at *5 (Idaho Apr. 24, 2023). But on procedural grounds, the Idaho Supreme Court decided that this Court should have a chance, in the first instance, to vacate the amended nondissemination order entered January 18, 2023 (the "Gag Order"). Following the Idaho Supreme Court's guidance, Intervenors now ask this Court to vacate the Gag Order because it is vague, overbroad, unduly restrictive, and not narrowly drawn. The Gag Order expands far beyond Idaho Rule of Professional Conduct 3.6, applying to individuals not governed by those ethical rules and prohibiting any statements about this case, not just those that present a substantial likelihood of materially prejudicing a future trial. What's more, the State and Mr. Kohberger (the "Parties") have submitted no evidence that media coverage presents a sufficient risk of prejudice to Mr. Kohberger's right to a fair trial or that other remedies are insufficient to prevent or remedy any prejudice. The Gag Order, which is based on the Parties' stipulation, rests merely on an assumption that press coverage is bad. The U.S. Constitution and the Idaho Constitution demand more. The Gag Order should thus be vacated.

II. BACKGROUND

In December 2022, Bryan C. Kohberger was arrested and charged for allegedly murdering four students at the University of Idaho. Despite great public interest in the investigation of the murders and now the prosecution of Mr. Kohberger, there have not been any notable leaks or dissemination of extrajudicial information that would prejudice Mr. Kohberger's right to a fair trial. Yet the Parties stipulated to a gag order "prohibiting attorneys, investigators, and law

enforcement personnel from making any extrajudicial statement, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the Court in this case." Declaration of Wendy J. Olson ("Olson Decl."), Ex. A.[1] The Parties offered no evidence in support of their stipulation, simply asserting: "As this Court is aware, this case involves matters that have received a great deal of publicity." *Id.* Their assertion, while not wrong, does not say the publicity has been prejudicial to Mr. Kohberger.

The Court issued the requested gag order just over an hour after the Parties submitted their stipulation. *Id.*, Ex. B. Intervenors do not doubt that the Court had good intentions, but an hour was not enough time to meaningfully consider the constitutional interests at stake. There was no time for the Court to hold a hearing, take any objections, make factual findings, or perform any legal analysis.

Ten days later, the Court held a private meeting with the Parties and an attorney for a victim's family. *Id.*, Ex. C. The Parties drafted a memorandum after the meeting. *Id.* The memorandum is not a court order; it is the Parties' memorialization of what they remember from the meeting. Even though minor redactions would satisfy any privacy concerns, the Parties opted to file the entire memorandum under seal. To the public, it appeared that the meeting never occurred (the Parties later agreed to unseal to memorandum to use it to oppose the Intervenors' petition in the Idaho Supreme Court).

Five days after the private meeting, the Court issued the Gag Order that is at issue in this motion. *Id.*, Ex. D. Because the preceding meeting was held privately, to the public it appeared that the Court issued the Gag Order *sua sponte*. The Court noted in the Gag Order that: "To

[1] The docket cannot be accessed on iCourts, so Intervenors' knowledge of the proceedings is limited to what the Idaho Judicial Branch has posted at https://coi.isc.idaho.gov/.

preserve the right to fair trial some curtailment of the dissemination of information in this case is necessary and authorized under the law." *Id.* The Court made no factual findings in support of that conclusion—which of course it could not as, again, the Parties presented no evidence (if evidence was presented during the private meeting, it was not offered on the record and cannot be relied upon as Intervenors have no means to evaluate, let alone challenge the veracity of, the evidence). *Id.* Nor did the Court hold a hearing or offer any legal analysis, aside from a footnote citing several authorities and offering no explanation of how or why those authorities apply. *Id.*

The Gag Order extends beyond what the Parties requested in their stipulation. The Gag Order applies to: "The attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the Parties to the above-entitled action, including but not limited to investigators, law enforcement personal, and agents for the prosecuting attorney or defense attorney[.]" *Id.*

Intervenors are a coalition of media companies that but for the Gag Order would publish more information about the murders at the University of Idaho and Mr. Kohberger's prosecution. Members of the media coalition have been affected by the Gag Order as follows:

- A victim's family wants to speak with the press about Mr. Kohberger's prosecution, but they feel bound by the Gag Order. *Id.*, Ex. E.
- A Washington agency has requested declaratory relief to determine whether, consistent with the Gag Order, it can produce 9-1-1 tapes in response to public records requests. *Id.*, Ex. F.

- Major Christopher Paris of the Pennsylvania State Police told reporter Chris Ingalls that he could not answer whether police had launched any review of unsolved cases that could be linked to Mr. Kohberger because of the Gag Order.[2] Olson Decl., ¶ 9.
- Moscow Mayor Art Bettge told reporter Erica Zucco that the city attorney advised he could not answer questions about the overall community healing in Moscow because of the Gag Order. *Id.*
- Journalist Taylor Mirfendereski's public records requests were denied by the Latah County's Sheriff's Office, Moscow Police Department, Pullman Police Department, and Washington State Police Department because of the Gag Order. *Id.*
- The Moscow Police Department issued a press release that: "Due to this court order, the Moscow Police Department will no longer be communicating with the public or the media regarding this case." *Id.*, Ex. G.
- Gary Jenkins, Chief of Police at Washington State University, and Matt Young, Communication Coordinator for the City of Pullman, told reporter Morgan Romero that they could not answer whether Mr. Kohberger applied for a graduate assistant research position with the Pullman Police Department because of the Gag Order. Olson Decl., ¶ 9.
- The Moscow Police Department refused to advise a reporter from the Idaho Statesman how many cellphone towers are in the area near where the murders

[2] For the following citations in this paragraph, the source was referring either to the original or amended gag order.

occurred, the size of Mr. Kohberger's cell, the size of the Moscow jail, and the nature of Mr. Kohberger's meals because of the Gag Order. *Id.*

- Law&Crime reporter Angenette Levy was denied access to Kohberger's booking video from the Latah County Sheriff's Office because of the "court's non-dissemination order." *Id.*

Within weeks of the Court issuing the Gag Order, Intervenors petitioned the Idaho Supreme Court to vacate or nullify the Gag Order. The Idaho Supreme Court held that Intervenors have "sufficient standing to challenge the" Gag Order. *In re Petition for Writ of Mandamus or Writ of Prohibition*, 2023 WL 3050829, at *6. In support of that holding, the Idaho Supreme Court "agree[d] that the injury claimed"—a claim that the Gag Order infringes "freedom of the press by restricting [Intervenors'] ability to gather information for publication"—"is recognized under the First Amendment." *Id.* at *5. The Idaho Supreme Court further noted that if the Gag Order "is vague, overbroad, unduly restrictive, or not narrowly drawn, it would be an unconstitutional obstacle to their gathering of such information." *Id.*

But the Idaho Supreme Court declined to vacate the Gag Order, opining that "the proper course is to first seek redress from the magistrate court[.]" *Id.* at *10. Following that instruction, Intervenors now ask this Court to vacate the Gag Order because it vague, overbroad, unduly restrictive, and not narrowly drawn.

III. ARGUMENT

"[J]ustice cannot survive behind walls of silence[.]" *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). For that reason, "[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Id.* at 350. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* The

First Amendment was thus "intended to give to liberty of the press the broadest scope that could be countenanced in an orderly society." *Id.* (cleaned up).

To be sure, an orderly society must also consider a criminal defendant's right to a fair trial. But when balancing that interest, First Amendment protections do not yield until they infringe the Sixth Amendment. There is no presumption that speech is prejudicial to a criminal defendant or that more speech necessarily means a less fair trial. To the contrary, the U.S. Supreme Court's precedent "demonstrate[s] that pretrial publicity[,] even pervasive, adverse publicity[,] does not inevitably lead to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). And even when speech is prejudicial to a criminal defendant, only in "relatively rare" cases does pretrial publicity present "unmanageable threats." *Id.* at 551, 554. Many mitigating measures exist, "includ[ing] change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors." *Application of Dow Jones & Co.*, 842 F.2d 603, 611 (2nd Cir. 1988) (citing *Sheppard*, 384 U.S. 333, and *Neb. Press*, 427 U.S. 539).

To ensure a proper balance between the First and Sixth Amendments a party requesting a gag order must present evidence that the prohibited speech presents a sufficient risk of prejudice to a fair trial and that none of the other alternative remedies, which do not prohibit speech, are sufficient to prevent or remedy any prejudice. Here, the Parties have fallen well short, as they have submitted no evidence on the record to support the sweeping Gag Order that is in place.

A. The Gag Order violates the First Amendment because it is vague, overbroad, unduly restrictive, and not narrowly drawn.

The Gag Order broadly prohibits any statements "concerning this case." That prohibition is much broader than Idaho Rule of Professional Conduct 3.6, and it is broader than the regulations of speech described by the U.S. Supreme Court in *Sheppard*, *Nebraska Press*, and *Gentile*. There is no evidence that every statement concerning Mr. Kohberger's prosecution poses a substantial

risk to his right to a fair trial, nor is there any evidence that other, less restrictive measures could not prevent or remedy any prejudice. As a result, the Gag Order violates the U.S. Constitution and the Idaho Constitution.

1. The Gag Order far exceeds Idaho Rule of Professional Conduct 3.6.

Footnote 1 of the Gag Order cites Idaho Rule of Professional Conduct 3.6. It is unclear whether that citation is intended to suggest that the Gag Order mirrors Rule 3.6. Even if that were the case, the Parties need to explain why the Idaho State Bar's enforcement of Rule 3.6 is insufficient, such that a court order and the penalty of contempt are necessary. Those more severe penalties present a unique chilling effect that will reduce speech that does not violate Rule 3.6.

In any event, the Gag Order does not mirror Rule 3.6. The Gag Order is far broader: It prohibits more topics of speech and governs a wider range of individuals.

a. The Gag Order broadly prohibits any statements about Mr. Kohberger's prosecution.

Rule 3.6 is carefully crafted to regulate a narrow set of topics that are most likely to be prejudicial. It regulates speech that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." I.R.P.C. 3.6(a). The rule's comment explains that there are "certain subjects that are more likely than not to have a material prejudicial effect on a proceeding," such as the "character, credibility, reputation or criminal record of a party," "the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant," "[t]he performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test," and "[a]ny opinion as to the guilt or innocence of a defendant[.]" *Id.* 3.6 cmt. 5.

By contrast, the Gag Order is not tailored at all. Section 1 of the Gag Order prohibits any "extrajudicial statements (written or oral) concerning this case." Olson Decl., Ex. D. Section 2

offers examples of prohibited speech, but it does not say those examples are exhaustive or limit the general prohibition of any statements "concerning this case." As a result, the Gag Order prohibits all statements about Mr. Kohberger's prosecution—even statements that could *help* him secure a fair trial.

Unsurprisingly then, individuals have said the Gag Order prohibits them from making comments on innocuous topics like how the Moscow community is healing, how many cellphone towers are around where the murder occurred, the size of Mr. Kohberger's cell, the meals Mr. Kohberger receives, and Mr. Kohberger's job applications to the Pullman Police Department. Olson Decl., ¶ 9.

Even without the sweeping prohibition in Section 1, Section 2 of the Gag Order does not precisely mirror Rule 3.6's commentary. For example, Section 2(a) prohibits speech on "[e]vidence regarding the occurrences or transactions involved in the case," which is broader than the commentary's concerns about speech related to "the identity or nature of physical evidence expected to be presented," I.R.P.C. 3.6 cmt. 5. And Section 2(d) prohibits speech about "[a]ny opinions as the merits of the case or the claims or defense of a party," which is broader than the commentary's concerns related to speech about "[a]ny opinion as to the guilt or innocence of a defendant," I.R.P.C. 3.6 cmt. 5 (which is also covered in Section 2(f), suggesting Section 2(d) is intended to regulate something different and broader).

b. The Gag Order prohibits speech from a broad and vague group of individuals.

The Gag Order targets "[t]he attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the Parties to the above-entitled action, including but not limited to investigators, law enforcement personnel, and agents for the prosecuting attorney or defense attorney." Olson

Decl., Ex. D.

To start, that group of individuals is vague. Although the Gag Order expressly identifies certain types of individuals, that list is not exhaustive because of the phrase "including but not limited to." *Id.* As a result, others—like the victims' families and law enforcement outside the State of Idaho—must guess whether they too are subject to the Gag Order. That guessing game renders the Gag Order unconstitutionally vague, and it also exceeds the Court's jurisdiction, as the Court cannot bind individuals who are not before it and who reside outside Idaho.

That group of individuals is also overbroad. In contrast to the Gag Order, Rule 3.6 governs attorneys only, and specifically those attorneys admitted to practice in Idaho. *E.g.*, I.R.P.C. pmbl.; *id.* 8.5. Rule 3.8 demonstrates that limitation. It requires a prosecutor to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" from making statements that the prosecutor could not make under Rule 3.6. *Id.* 3.8(f). That is, Rule 3.8 operates indirectly through the prosecutor; it does not apply directly to an investigator or law enforcement (because they are not lawyers admitted in Idaho). Nor does Rule 3.8 address the defense attorneys, the defense's investigators or agents, or the attorneys or agents for the victims' families. The Gag Order by contrast applies to both the prosecution and the defense, and it directly regulates those who are not subject to the Idaho Rules of Professional Conduct.

2. U.S. Supreme Court precedent counsels in favor of vacating the Gag Order.

The Court cited three U.S. Supreme Court decisions in footnote 1 of the Gag Order: *Sheppard*, *Nebraska Press*, and *Gentile*. While those cases acknowledge the propriety of regulating some speech from lawyers and trial participants, they also explain the findings of prejudice and the narrow tailoring that are required before prohibiting speech. The Parties' stipulation and the Gag Order ignore those principles.

Taking the cases in order, the U.S. Supreme Court first decided *Sheppard v. Maxwell*, 384 U.S. 333 (1966). There, a prisoner challenged his conviction, arguing that he did not receive a fair trial because of publicity before and during his trial. For example:

- "Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings." *Id.* at 353.
- "[T]hree months before trial, Sheppard was examined for more than five hours without counsel," which "was televised live from a high school gymnasium seating hundreds of people." *Id.* at 354.
- During trial, the lower court erected "a press table for reporters inside the bar," where "some 20 reporters" sat "within a few feet of the jury box." The lower court also "assigned almost all of the available seats in the courtroom to the news media." Together, those decisions interfered with the privacy and tranquility of the defendant, the witnesses, and the jury during the trial. *Id.* at 355.

As a result of those and other facts, the Court held that "Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment." *Id.* at 335.

In support of that holding, the Court noted the trial judge's failures to prevent or remedy any prejudice to Sheppard, using remedies such as continuance of trial, sequestration of the jury, and control of the courtroom. Intervenors acknowledge that one potential measure the Court mentioned was: "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* at 361.

But that observation does not compel maintaining the Gag Order. To start, *Sheppard* is a Due Process case—not a First Amendment case. Nobody appeared to argue that the proscription suggested by the Court would violate the First Amendment, so the Court did not decide that issue. *Sheppard* also largely addressed conduct during trial, which for now is not at issue as Mr. Kohberger's trial has not even been set and is likely many months or years away. And to be clear, Intervenors do not seek to conduct an out-of-court examination of Mr. Kohberger or to sit within the bar at Mr. Kohberger's trial.

While those stark legal and factual differences mean *Sheppard* is not controlling, more importantly the Gag Order here is not the hypothetical order that *Sheppard* described. There, the Court contemplated an order limiting speech on "prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Id.* As described above, the Gag Order is much broader. It prohibits any statements "concerning this case," regardless of how likely or unlikely the statement is to be prejudicial (or helpful) to Mr. Kohberger.

The Court next decided *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). The gag order there prohibited statements about "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts strongly implicative of the accused." *Id.* at 545 (internal quotation marks omitted). Even with that narrower scope of prohibitions, the Court held that the gag order was unconstitutional. While drawing that conclusion, the Court explained three principles relevant here.

First, the First Amendment and the Sixth Amendment are entitled to equal protection. As

the Court explained: "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id.* at 561. It is thus not for courts "to rewrite the Constitution by undertaking what [the founders] declined to do." *Id.* Instead, First Amendment rights should yield only when necessary to protect Sixth Amendment rights. There is a "need to protect the accused as fully as possible" and a "need to restrict publication as little as possible." *Id.* at 566.

The second, and related, principle is that courts should consider "other measures" before issuing a gag order. *Id.* The Court endorsed many alternatives, such as "(a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the Burr Case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court;" and (e) "[s]equestration of jurors[.]" *Id.* at 563–64 (footnoted omitted). By considering these alternatives—in other words, by narrowly tailoring the remedy—courts ensure they are issuing gag orders only when necessary. As a result, the First Amendment is infringed only when necessary to protect a Sixth Amendment interest. That approach preserves an equal balance between the two rights, as intended by the founders.

The third principle is that when reviewing the above analysis, a reviewing court must "examine the evidence before the trial judge" and the "precise terms of the restraining order[.]" *Id.* at 562.

Based on these and other principles, *Nebraska Press* held that the gag order there was unconstitutional. The Court observed that "pretrial publicity, even if pervasive and concentrated,

cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Id.* at 565. Given that assumptions are inappropriate in this context, the probability of prejudice was "not demonstrated with the degree of certainty" required. *Id.* at 569. The gag order was also not properly tailored. The trial court there failed to consider alternatives short of a gag order, and the prohibition on "implicative information" was "too vague and too broad to survive the scrutiny" required. *Id.* at 568.

In many ways, *Nebraska Press* counsels in favor of vacating the Gag Order here. The Parties offered no facts for the Court to determine that any statement concerning his case would prejudice Mr. Kohberger. The Parties also offered no explanation of why alternative measures would not suffice. But even if they had, the precise terms of the Gag Order (which prohibits statements "concerning this case") are broader than the *Nebraska Press* gag order (which prohibited statements about "implicative information") that the U.S. Supreme Court held was too broad.

Last, the Court decided *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). There, an attorney challenged disciplinary action taken against him for allegedly violating Nevada's equivalent of Idaho Rule of Professional Conduct 3.6. Like the Idaho rule, the Nevada rule prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1033 (citation omitted). The Court held that the rule was unconstitutional as interpreted and applied in Nevada.

The Court's decision was fractured, but Part II of Chief Justice Rehnquist's opinion garnered a majority and is relevant here. Chief Justice Rehnquist first observed that, by default,

the First Amendment requires a "showing of clear and present danger that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial." *Id.* at 1070–71 (internal quotation marks omitted). That said, the law imposes a less demanding standard for regulating "speech of lawyers representing clients in pending cases" because those lawyers are "participants in the criminal justice system" and thus "the State may demand some adherence to the precepts of that system[.]" *Id.* at 1074. A "substantial likelihood" of material prejudice test satisfies that less demanding standard, as it imposes "only narrow and necessary limitations" on speech. *Id.* at 1075. Put differently, "[t]he restraint on speech is narrowly tailored[.]" *Id.* at 1076.

Under Chief Justice Rehnquist's reasoning, the Gag Order is unconstitutional. The Parties have submitted no evidence of a "clear and present danger" of prejudice for statements made by non-lawyers nor a "substantial likelihood" of material prejudice for statements made by lawyers. And, again, the Gag Order is not at all tailored; it prohibits all statements "concerning this case"—not just those that would cause material prejudice.

In sum, *Sheppard*, *Nebraska Press*, and *Gentile* all counsel in favor of vacating the Gag Order. Those cases only permit prohibitions on speech that are (1) justified by a risk of material prejudice, and (2) narrowly tailored to limit only the speech that is actually prejudicial and cannot be prevented or remedied through other means. The Parties have submitted no evidence of prejudice sufficient to justify a Gag Order (clear and present danger for non-lawyers and substantial risk of material prejudice for lawyers), and even if they had, the Gag Order is not narrowly tailored to surgically proscribe only the speech that is prejudicial and cannot be prevented or remedied through other means.

3. The Court should treat the Gag Order as a prior restraint and apply strict scrutiny.

Consistent with the principles articulated in *Sheppard*, *Nebraska Press*, and *Gentile*, the Court should treat the Gag Order as a prior restraint and vacate it because the Parties' request does not survive strict scrutiny.

The Gag Order is a prior restraint. Speech presupposes a speaker and a recipient. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Without the one there cannot be the other. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[W]e have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated."). So the right to speech "necessarily protects the right to receive" information and ideas. *Va. Citizens*, 425 U.S. at 757 (citation omitted). There is thus a "constitutionally guaranteed right as a member of the press to gather news." *CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

The Gag Order restrains that constitutional right before it can be exercised. Intervenors do not make the news; they report the news. They cannot report what they cannot gather. Here, there are many sources of newsworthy information that but for the amended Gag Order would provide information to Intervenors that Intervenors would then make editorial decisions about whether and when to publish. Intervenors' speech is thus being restrained before they can even speak. That is the definition of prior restraint. *Prior Restraint*, Black's Law Dictionary (11th ed. 2019) ("A governmental restriction on speech or publication before its actual expression.").

If the amended Gag Order is a prior restraint, then it is "subject to strict scrutiny[.]" *Levine v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985).

4. The Court should reject the fiction that gag orders directed at trial participants do not restrain the press.

To avoid the outcome dictated by prior restraint jurisprudence and cases like *Sheppard*, *Nebraska Press*, and *Gentile*, Intervenors anticipate that the Parties will ask the Court to follow the Second and Ninth Circuits in applying the First Amendment differently when the media challenges gag orders directed at sources of information. The Court should reject those decisions because they are not well reasoned and place form over function.

In *Radio and Television News Association of Southern California v. U.S. District Court for the Central District of California*, the Ninth Circuit recognized that the media has a "first amendment right of access or right to gather information[.]" 781 F.2d 1443, 1446 (9th Cir. 1986) (internal quotation marks and citation omitted). But in the Ninth Circuit's view, a court order prohibiting an individual from speaking with the media does not infringe that right to gather information because: "The media never has any guarantee of or 'right' to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment." *Id.* at 1447.

That reasoning is misguided as a court prohibiting a person from speaking to the media is different than an individual deciding not to speak to the media. To start, an interviewee's decision not to speak to the media is generally not a state action. As a result, the First Amendment typically does not govern the interviewee's decision to not answer questions. *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) ("MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion."). By contrast, a gag order issued by a state court, even to enforce the request of a private party, is a state action and thus must comport with the First Amendment. *See Apao v. Bank of N.Y.*, 324 F.3d 1091,

1093 (9th Cir. 2003) ("[W]hat would otherwise be private conduct, i.e., placing a racially restrictive covenant in a deed, can violate the Fourteenth Amendment when state action in the form of a court order is sought to enforce its restrictive provisions.").

The Ninth Circuit's reasoning also ignores the reality of news coverage. There is no reporting without information. The media does not make the news; it reports the news. If a court orders an individual not to provide information to the media, then the media has nothing to report. The media may technically be allowed to ask questions to gather the news, but it has no real expectation of an answer. The law should recognize, or at least assume, that individuals will follow court orders. As a result, a court order regulating an individual's speech to the media also regulates the media. The media has no realistic opportunity to publish the information that the sources of the information are ordered not to provide. Intervenors are not, as *Radio and Television News* suggests, seeking an order compelling anybody to speak with them. Intervenors instead are challenging a state action prohibiting speech and asking for a realistic opportunity to gather and report information on a matter of public interest.

The Second Circuit's decision in *Application of Dow Jones & Co.* is also unpersuasive. The Court's analysis there begins by observing the distinction observed in *Radio and Television News*, which is a flawed for the reasons already described. 842 F.2d at 608. The Second Circuit additionally noted that the parties subject to the gag order there requested the order and urged its affirmance. A party's preference not to speak with the press does not mean a state action adopting that preference is lawful. A party's preference not to speak is typically not a state action, but it becomes a state action when a court issues an order. *See Apao*, 324 F.3d at 1093. And here, not everyone subject to the Gag Order requested it. In fact, one of the victims' families is actively challenging it.

Given the flawed reasoning in *Radio and Television News* and *Dow Jones*, this Court should reject those decisions and adopt the better reasoned decisions in *Young* and *People v. Sledge*, 879 N.W.2d 884 (Mich. Ct. App. 2015). In *Young*, the Sixth Circuit recognized that the media has no realistic opportunity to gather and publish the news when a court forbids sources of information from talking to the media. It wrote: "Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired." 522 F.2d at 239. In *Sledge*, the Michigan Court of Appeals similarly explained: "Although the gag order does not directly prohibit the media from discussing the case, it prohibits the most meaningful sources of information from discussing the case with the media. Therefore, the right of the [media] to obtain information from all potential trial participants is impaired." 879 N.W.2d. at 893 (citation omitted).

Simply put, *Radio and Television News* and *Dow Jones* put form over function. They observe a technical distinction between a gag order naming the media and a gag order naming a third party, but they ignore that, in reality, both orders directly regulate the media. *Richmond Newspapers*, 448 U.S. at 576 ("[W]e have recognized that without some protection for seeking out the news, freedom of the press could be eviscerated."). *Young* and *Sledge* understand that reality. This Court should follow the better reasoning in *Young* and *Sledge* and hold that the Gag Order must be "narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Young*, 522 F.2d at 238.

5. The Court should apply strict scrutiny even if it does not find that the Gag Order is a prior restraint.

Regardless of whether prior restraint jurisprudence applies, the Court's task here is to

balance Intervenors' First Amendment interests with Mr. Kohberger's Sixth Amendment interests. Neither right is superior. As a result, the Court should aim to give both rights the maximum effect possible. It "need[s] to protect the accused as fully as possible," and it "need[s] to restrict publication as little as possible." *Nebraska Press*, 427 U.S. at 566. The only way to satisfy those twin goals is to apply a standard that allows a gag order only when (1) the prohibited speech is almost certain to materially prejudice the criminal defendant, and (2) nothing else can prevent or cure the prejudice.

Anything less risks underenforcing the First Amendment. A less demanding test will be overinclusive, at times restricting protected speech that does not create prejudice or that creates prejudice that can be remedied in other ways. The First Amendment will then be underenforced, as protected speech will be suppressed even if the speech does not infringe the criminal defendant's right to a fair trial. That outcome is intolerable because "any First Amendment infringement that occurs with each passing day is irreparable." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers).

6. The Gag Order fails under strict scrutiny.

A gag order survives strict scrutiny only if: "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Levine*, 764 F.2d at 595 (citations omitted). The Gag Order fails under each prong.

First, there is no evidence that the speech at issue poses a clear and present danger or a serious and imminent threat to Mr. Kohberger's right to a fair trial. The Parties offered no evidence in support of their stipulation, and the Court has not collected any evidence, held any evidentiary hearings, or made any factual determinations.

There is also no indication that the individuals subject to the Gag Order will disseminate

information that will prejudice Mr. Kohberger. Law enforcement released limited information during its investigation and after Mr. Kohberger's arrest, including at the press conference announcing the arrest. As the prosecution moves forwards, the Parties' attorneys must comply with Idaho Rule of Professional Conduct 3.6 and the prosecution must comply with Rule 3.8, even without the Gag Order. The Parties' attorneys' willingness to enter the stipulation suggests they intend to strictly comply with those rules.

In any event, the Gag Order does not target prejudicial speech. It targets *any* speech concerning the case with no consideration of whether the speech would be prejudicial or helpful to Mr. Kohberger.

At bottom, there is not a clear and present danger or a serious and imminent threat that absent the Gag Order, publicity will prejudice Mr. Kohberger's right to a fair trial.

Second, as explained above, the Gag Order is not narrowly drawn. It is directed at a wide and vague group of people, and it governs any statement concerning the case, good or bad for Mr. Kohberger. The Gag Order does not narrowly target speech that could be most prejudicial, but rather wrongly assumes that all speech about the case is prejudicial. As a result, sources of newsworthy information have declined to provide information about topics like how the Moscow community is healing, how many cellphone towers are around where the murder occurred, the size of Mr. Kohberger's cell, the meals Mr. Kohberger receives, and Mr. Kohberger's job applications to the Pullman Police Department because of the Gag Order (or its predecessor). Those topics of speech, while arguably subject to the Gag Order, are unlikely to prejudice Mr. Kohberger. Yet they are suppressed.

Third, the Parties have not explained why other, less restrictive alternatives would not prevent or remedy any prejudice to Mr. Kohberger. For example, prejudicial publicity can be

mitigated by a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors. *Dow Jones*, 842 F.2d at 611 (citing *Sheppard*, 384 U.S. 333, and *Nebraska Press*, 427 U.S. 539). The need to consider less restrictive alternatives here, at this early stage of the case, is particularly acute. No trial has been scheduled (indeed the preliminary hearing is not until June 2023), and given the seriousness of the charges, trial is likely more than a year away. The Parties and the Court have ample time to assess whether unrestrained speech about Mr. Kohberger and the facts and circumstances of the crimes with which he is charged unfairly prejudice his right to a fair trial. And if a danger emergers, there will be plenty of time to remedy it.

7. The Gag Order fails under less exacting scrutiny.

Courts that do not apply strict scrutiny to gag orders like the one here still require some factual findings to support the gag order. In *Dow Jones*, for example, the Second Circuit considered "whether there is a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial" and an exploration of "whether other available remedies would effectively mitigate the prejudicial publicity." 842 F.2d at 610–11. Other courts have required similar findings. *See News-J. Corp. v. Foxman*, 939 F.2d 1499, 1515–16 (11th Cir. 1991) (noting that after "a full hearing" where the press could be heard, the district court found evidence of "the potential inability of impaneling an impartial jury" and "concluded that there was no less restrictive means of safeguarding the defendants' Sixth Amendment rights"); *Radio & Television News Ass'n of S. Cal.*, 781 F.2d at 1447 (considering whether a gag order is reasonable and overrides First Amendment interests); 1 Kevin F. O'Malley et al., Fed. Jury Prac. & Instr. § 2:4, Westlaw (6th ed., updated Feb. 2023) ("A gag order must be no greater than that necessary to protect the interest involved. Hence a gag order may be entered where there is a reasonable or serious threat, less restrictive alternatives are not adequate, and the order would effectively prevent the threatened harm to the defendant's right to

a fair trial.") (footnotes omitted); 75 George L. Blum et al., Am. Jur. 2d Trial § 135, Westlaw (2d ed., updated Feb. 2023) ("[A] court may issue a participant gag order only where the press and general public are given an opportunity to be heard on the question of the issuance of the order, the court describes those reasonable alternatives that the court considered and rejected, the order is narrowly tailored to serve the interest of protecting the defendant's right to a fair trial, and the court has made a specific finding that there was a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity that would occur in the absence of a gag order.").

Again, the Parties here have offered no evidence of any risk of prejudice to Mr. Kohberger or offered any explanation why alternatives to the Gag Order would not suffice. So far, there has been publicity surrounding Mr. Kohberger's prosecution, but no indication that the publicity has been prejudicial. Since the murders occurred, law enforcement and now the attorneys have judiciously shared information with the public. There is no suggestion that anybody now subject to the Gag Order had previously made extrajudicial statements that may have biased the jury pool. In fact, Mr. Kohberger may be less prejudiced if well-informed and responsible individuals share some information, rather than allowing the Gag Order to create a vacuum for mere speculation on the internet.

But even if there were some evidence of prejudicial publicity, there are other ways to ensure Mr. Kohberger has a fair trial. To start, his trial date is not even been set and will presumably occur well in the future. The passing of time reduces the risk of any jury taint. Additionally, when the time for trial arrives, a change in venue, probing voir dire, and clear jury instructions can all ensure Mr. Kohberger has a fair trial.

At bottom, the Gag Order suppresses speech without any justification. That violates the First Amendment no matter the test applied.

B. The Gag Orders violates the Idaho Constitution for the same reasons.

Courts have "addressed simultaneously" the First Amendment of the U.S. Constitution and Article I, Section 9 of the Idaho Constitution. *Bingham v. Jefferson Cnty.*, No. 4:15-CV-00245-DCN, 2017 WL 4341842, at *6 n.4 (D. Idaho Sept. 29, 2017). So the Court can find that the Gag Order violates the Idaho Constitution for the same reasons that it violates the U.S. Constitution.

But the Court need not treat Idaho's Constitution in lockstep with the U.S. Constitution. If, for example, the Court is persuaded that under federal law gag orders need not survive strict scrutiny, it should consider whether they must do so under Article I, Section 9 of the Idaho Constitution. Unlike the First Amendment, Article I, Section 9 provides that a person may "publish on all subjects[.]" For criminal trials, all subjects would include both information presented inside the courtroom and information presented outside the courtroom.

As explained above, when balancing the right to speech with the right to a fair trial, the Court's aim should be to recognize each right as much as possible. Only when speech necessarily infringes the right to a fair trial is there a justification for curtailing the speech. And again, strict scrutiny is an exacting standard that ensures speech is curtailed when, and only when, necessary. So even if some federal courts have interpreted the First Amendment to yield short of the outer boundaries of the right to a fair trial by adopting tests that are overinclusive when curtailing speech, this Court should interpret Article I, Section 9 as more broadly protecting all speech that falls short of infringing the right to a fair trial, either because there is not sufficient certainty that the speech will be prejudicial or because other remedies short of restricting speech can prevent or cure the prejudice.

IV. CONCLUSION

Intervenors request that the Court vacate the Gag Order because it violates the U.S. Constitution and the Idaho Constitution.

DATED: May 1, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson
Cory M. Carone

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of May 2023, I served a true and correct copy of the within and foregoing **MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR AMEND THE AMENDED NONDISSEMINATION ORDER** upon the following named parties by the method indicated below, and addressed to the following:

Latah County Prosecutor's Office
William W. Thompson, Jr.
Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow, ID 83843

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
___ Via email
_X_ Via iCourt efile & serve at:
paservice@latahcounty.id.gov

Anne Taylor
Attorney at Law
P.O. Box 9000
Coeur d'Alene, ID 83816

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
_X_ Via email at *ataylor@kcgov.us*
___ Via iCourt efile & serve at:
pdfax@kcgov.us

Jeff Nye
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
_X_ Via email at *jeff.nye@ag.idaho.gov*
___ Via iCourt efile & serve at:

Shanon Gray
2175 N. Mountain View Road
Moscow, ID 83843

___ Hand Delivered
___ Mailed Postage Prepaid
___ Via Facsimile
___ U.S. Mail
___ Via email
_X_ Via iCourt efile & serve at:
shanon@graylaw.org

/s/ Wendy J. Olson
Wendy J. Olson

EXHIBIT B

Electronically Filed
2/14/2023 4:46 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 50482-2023

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC; STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE), KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV—MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN-REVIEW/COWLES COMPANY; COEUR D'ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; COURT TV MEDIA, INC.; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

vs.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents.

PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION

For Petitioners

WENDY J. OLSON, ISB No. 7634
wendy.olson@stoel.com
CORY M. CARONE, ISB No. 11422
cory.carone@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702-7705

Respondents Second Judicial District of the State of Idaho, County of Latah; Honorable Megan E. Marshall, Magistrate Judge.

Petitioners, a coalition of media companies, request that the Court issue a peremptory writ of mandamus, or a peremptory writ of prohibition, ordering Respondents Latah County District Court and the Honorable Megan E. Marshall to vacate the "Amended Nondissemination Order" entered on January 18, 2023 in *State of Idaho v. Bryan C. Kohberger*, case no. CR29-22-2805.

As the Court surely knows, this past November, four students at the University of Idaho were murdered at a home near the campus. The tragedy is a matter of public interest that has garnered attention, and inflicted great sorrow, throughout the University, the State, and the country. For months, law enforcement carefully kept confidential the details of the ongoing investigation. In late December and to the surprise of the public, Bryan C. Kohberger was arrested and charged with the murders. At a press conference announcing the arrest, the authorities declined to provide much information about their investigation, instead deferring to the release of the probable cause affidavit. To this day, the public's knowledge about Mr. Kohberger's prosecution is largely limited to court filings and speculation on the internet.

Although there is no history of extrajudicial statements that could prejudice Mr. Kohberger's right to a fair trial, his attorney and the prosecutor stipulated to a gag order "prohibiting attorneys, investigators, and law enforcement personnel from making any extrajudicial statement, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the Court in this case." Declaration of Wendy J. Olson ("Olson Decl."), Ex. A.[1] The parties submitted no evidence that Mr. Kohberger would be prejudiced absent the requested order. The stipulation merely said: "As this Court is aware, this case involves matters that have received a great deal of publicity." *Id.* That same day and without

[1] Petitioners' knowledge of the proceedings is limited to what the Idaho Judicial Branch has posted at https://coi.isc.idaho.gov/.

a hearing, the District Court issued the requested order. Olson Decl., Ex. B. The District Court did not make any factual findings in its order. *Id.*

Fifteen days later, the District Court, on its own and again without a hearing, issued an amended gag order. Olson Decl., Ex. C. Unlike the original gag order, the amended gag order at least notes: "There is balance between protecting the right to fair trial for all parties involved and the right to free expression as afforded under both the United States and Idaho Constitutions. To preserve the right to fair trial some curtailment of the dissemination of information in this case is necessary and authorized under the law." *Id.* Although the District Court is correct that there is a balance between the right to a fair trial and the right to free speech, the District Court made no factual findings to support its conclusion that a gag order was necessary in this case. In addition, the District Court (again, on its own and without a hearing) expanded the scope of its gag order to include: "The attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the parties to the above-entitled action, including but not limited to investigators, law enforcement personal, and agents for the prosecuting attorney or defense attorney[.]" *Id.*

The gag order has restrained Petitioners' rights to gather and publish information about this newsworthy matter. Each Petitioner is aware that either it or another media company within the coalition have been affected by the gag order as follows:

- A victim's family wants to speak with the press about Mr. Kohberger's prosecution, but they feel bound by the gag order. Olson Decl., Ex. D.
- A Washington agency has requested declaratory relief to determine whether, consistent with the gag order, it can produce 911 tapes in response to public records requests. Olson Decl., Ex. E.

- Major Christopher Paris of the Pennsylvania State Police told reporter Chris Ingalls that he could not answer whether police had launched any review of unsolved cases that could be linked to Mr. Kohberger because of the gag order.
- Moscow Mayor Art Bettge told reporter Erica Zucco that the city attorney advised he could not answer questions about the overall community healing in Moscow because of the gag order.
- Journalist Taylor Mirfendereski's public records requests were denied by the Latah County's Sheriff's Office, Moscow Police Department, Pullman Police Department, and Washington State Police Department because of the gag order.
- The Moscow Police Department issued a press release that: "Due to this court order, the Moscow Police Department will no longer be communicating with the public or the media regarding this case." Olson Decl., Ex. F.
- Gary Jenkins, Chief of Police at Washington State University, and Matt Young, Communication Coordinator for the City of Pullman, told reporter Morgan Romero that they could not answer whether Mr. Kohberger applied for a graduate assistant research position with the Pullman Police Department because of the gag order.
- The Moscow Police Department refused to advise a reporter from the Idaho Statesman how many cellphone towers are in the area near where the murders occurred, the size of Mr. Kohberger's cell, the size of the Moscow jail, and the nature of Mr. Kohberger's meals because of the gag order.
- Law&Crime reporter Angenette Levy was denied access to Kohberger's booking video from the Latah County Sheriff's Office because of the "court's non-dissemination order".

As explained further in the accompanying memorandum, the Court should apply strict scrutiny to the amended gag order. The amended gag order fails under that standard because there is no evidence that pretrial publicity will prejudice Mr. Kohberger's right to a fair trial or that less restrictive methods could not prevent or cure any prejudice. In any event, the amended gag order fails under any standard because the District Court failed to take any evidence, make any factual findings, or consider any alternatives short of a gag order.

As a result, with each passing day, the gag order irreparably harms Petitioners by suppressing their rights under the First Amendment of the United States Constitution and Article I, Section 9 of the Idaho Constitution. This Court should promptly stop any future irreparable harm by vacating or nullifying the amended gag order.

DATED: February 14, 2023

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson
Cory M. Carone

Attorneys for Petitioners

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/14/23

Signature: _____

Name: Brian Barrett

Title: Assoc. Gen. Counsel

Company: The Associated Press

State of New York)
)
County of New York)

This verification was acknowledged before me on February 14, 2023, by Brian Barrett, on behalf of The Associated Press

_____
Notary Public

My commission expires: _____

CLAUDETH HAYLETT
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01HA6181234
Qualified in Kings County
Commission Expires March 22, 2024

Certificate filed in New York County

118415575.1 0205984-00001

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 9, 2023

Signature: John Daniel Shelley

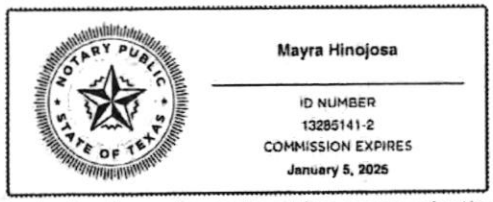
Name: John Daniel Shelley

Title: President and CEO

Company: Radio Television Digital News Association

State of Texas)
)
County of Hidalgo)

This verification was acknowledged before me on February 9, 2023, by John Daniel Shelley, on behalf of Mayra Hinojosa.



Notarized online using audio-video communication

Notary Public

My commission expires: 01/05/2025

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/14/23

Signature: Valerie Koonce

Name: VALERIE KOONCE

Title: GM

Company: Sinclair-Boise

State of Idaho)
)
County of Ada)

Kari Cunningham
20203386
NOTARY PUBLIC
STATE OF IDAHO
MY COMMISSION EXPIRES 09/02/2026

This verification was acknowledged before me on February 14, 2023, by Kari Cunningham on behalf of _____.

Kari Cunningham
Notary Public

My commission expires: 9/2/26

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 10, 2023

Signature: _____

Name: Chadd Cripe

Title: Editor

Company: The McClatchy Company, LLC, dba The Idaho Statesman

State of Idaho)
)
County of Ada)

This verification was acknowledged before me on February 10, 2023, by Chadd Cripe, on behalf of The McClatchy Company, LLC

_____
Notary Public
Residing at Meridian, ID
My commission expires: 4-14-24

DEBRAH SLACK NOTARY PUBLIC Comm. No. 33628 STATE OF IDAHO

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: Feb. 13, 2023

Signature: Christina E Lords

Name: Christina E Lords

Title: Editor

Company: Idaho Capital Sun

State of Idaho)
)
County of Ada)

This verification was acknowledged before me on February 13, 2023, by Leslie Stenitz, on behalf of Christina Lords.

Leslie Stanitz
Commission Number: 20220200
Notary Public
State of Idaho
My Commission Expires: 01/12/2028

Leslie Stan
Notary Public

My commission expires: 01/12/2028

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/13/23

Signature: Lynn Jacobson

Name: Lynn Jacobson

Title: Managing Editor

Company: The Seattle Times

State of Washington)

)

County of King)

This verification was acknowledged before me on February ___, 2023, by _____, on behalf of _____.

_____

Notary Public

My commission expires: _____

118415575.1 0205984-00001

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/9/2023

Signature: 

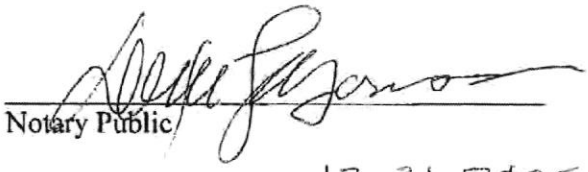
Name: Chris Moeser

Title: Associate General Counsel

Company: TEGNA Inc.

State of VIRGINIA)
)
County of FAIRFAX)

This verification was acknowledged before me on February 9, 2023, by CHRIS MOESER, on behalf of TEGNA, INC.



Notary Public

My commission expires: 12.31.2025

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/9/23.

Signature: _____

Name: Nate Sunderland.

Title: Managing Editor.

Company: East Idaho News.com

State of Idaho)
)
County of Bonneville)

RYAN BATEMAN
COMMISSION #55947
NOTARY PUBLIC
STATE OF IDAHO
MY COMM. EXPIRES MARCH 31, 2028

This verification was acknowledged before me on February 9, 2023, by NATE SUNDERLAND, on behalf of EAST IDAHO NEWS.

_____
Notary Public

My commission expires: 3/31/2028

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/9/23

Signature: [signature]

Name: Craig Clohessy

Title: Managing editor

Company: Lewiston Tribune

State of Idaho)
)
County of Nez Perce)

This verification was acknowledged before me on February 9, 2023, by Teresa Mnitcy, on behalf of Nez Perce Co.

[signature]
Notary Public

My commission expires: 1/23/28

TERESA M NITCY
NOTARY
PUBLIC
Comm. No. 41543
STATE OF IDAHO

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 9, 2023

Signature: _____

Name: Keith B Shipman

Title: President : CEO

Company: Washington State Association of Broadcasters

State of Washington)
)
County of Spokane)

This verification was acknowledged before me on February 9th, 2023, by Alison J. Beck, on behalf of Keith B Shipman.

ALISON J BECK
NOTARY PUBLIC #22020030
STATE OF WASHINGTON
COMMISSION EXPIRES
JULY 14, 2026

_____
Notary Public

My commission expires: July 14, 2026

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2-9-2023

Signature: _____

Name: Monte LaOrange

Title: Managing Editor

Company: Post Register

State of Idaho)
)
County of Bonneville)

This verification was acknowledged before me on February 9, 2023, by Monte LaOrange, on behalf of Post Register.

Beth Crossley
Notary Public

My commission expires: 7/28/28

BETH CROSSLEY
68167
NOTARY PUBLIC
STATE OF IDAHO
MY COMMISSION EXPIRES 07/28/28

Verification

I, on behalf of a party beneficially interested therein, hereby verify the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023.

Dated: 2/10/23

Signature: Betsy Russell

Name: Betsy Russell

Title: President

Company: Idaho Press Club

State of Idaho)
)
County of Boundary)

This verification was acknowledged before me on February 10th 2023, by Betsy Russell, on behalf of Idaho Press Club

Katrina Burnham
Notary Public

KATRINA BURNHAM
Notary Public - State of Idaho
Commission Number 20223339
My Commission Expires Jul 12, 2028

My commission expires: 7/12/2028

118415575.1 0205984-00001

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2-10-2023

Signature: Jennifer Swindell

Name: Jennifer Swindell

Title: CEO

Company: Idaho Education News

State of Idaho)
)
County of Ada)

This verification was acknowledged before me on February 10, 2023, by Jennifer Swindell, on behalf of Idaho Education News

Notary Public

My commission expires: 3/31/2024

RANDY SCHRADER NOTARY PUBLIC Comm. 20180573 STATE OF IDAHO

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/9/23

Signature: [signature]

Name: Melissa Luck

Title: News Director

Company: KXLY-TV

State of Washington)
)
County of Spokane)

This verification was acknowledged before me on February 9, 2023, by Emily Mueller, on behalf of Melissa Luck.

EMILY MUELLER
NOTARY PUBLIC
COMMISSION EXPIRES
20104634
1-21-24
STATE OF WASHINGTON

Emily Mueller
Notary Public

My commission expires: 1/21/2024

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 9, 2023

Signature: _____

Name: David M. Giles

Title: SVP, Deputy General Counsel

Company: Scripps Media, Inc., d/b/a KIVI-TV

State of Ohio)
)
County of Hamilton)

This verification was acknowledged before me on February 9, 2023, by David M. Giles, on behalf of Scripps Media, Inc., d/b/a KIVI-TV.

JULIE CORNWELL
Notary Public, State of Ohio
My Commission Expires
February 15, 2027

Julie Cornwell
Notary Public

My commission expires: 2/15/2027

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2-9-2023

Signature: Steve Kiggins

Name: Steve Kiggins

Title: Editor

Company: Times-News

State of Idaho)
)
County of Twin Falls)

This verification was acknowledged before me on February 9, 2023, by Steve Kiggins, on behalf of Times-News.

AMY WIESMORE
COMMISSION NO. 20203230
NOTARY PUBLIC
STATE OF IDAHO
MY COMM. EXPIRES 09/04/2026

Amy Wiesmore
Notary Public

My commission expires: 9-4-26

118415575.1 0205984-00001

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/9/2023

Signature: D Mc

Name: DAVID McCRAW

Title: SR. VICE PRESIDENT & Dep. Gen. Counsel

Company: The New York Times Company

State of New York)
)
County of New York)

This verification was acknowledged before me on February 9, 2023, by DAVID McCRAW, on behalf of The New York Times Co.

Ellen Herb

Notary Public

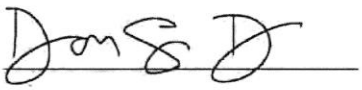
My commission expires: April 2, 2023

ELLEN HERB
Notary Public, State of New York
No. 01HE6163785
Qualified in New York County
Commission Expires April 2, 2023

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/13/2023

Signature: 

Name: Donald L. Day

Title: Founder & Editor

Company: Day365 LLC, d/b/a BoiseDev

State of _____)
)
County of _____)

This verification was acknowledged before me on February ___, 2023, by _____, on behalf of _____.

_____
Notary Public

My commission expires: _____

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 9, 2023

Signature: A. Eis

Name: Andrew Eisbrouch

Title: COO & General Counsel

Company: LawNewz, Inc.

State of New York)
)
County of New York)

This verification was acknowledged before me on February 9, 2023, by Andrew Eisbrouch, on behalf of LawNewz, Inc..

ELIZABETH VULAJ
NOTARY PUBLIC - STATE OF NEW YORK
NO. 02VU6376035
County: NEW YORK
Commission Exp. Date: 06/04/2026

Elizabeth Vulaj
Notary Public

My commission expires: 06/04/2026

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: February 9, 2023

Signature: D M. Giles

Name: David M. Giles

Title: SVP, Deputy General Counsel

Company: Court TV Media, LLC

State of Ohio)
)
County of Hamilton)

This verification was acknowledged before me on February 9, 2023, by David M. Giles, on behalf of Court TV Media, LLC.

JULIE CORNWELL
Notary Public, State of Ohio
My Commission Expires
February 15, 2027

Julie Cornwell
Notary Public

My commission expires: 2/15/2027

Verification

I, on behalf of a party beneficially interested therein, hereby verify the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023.

Dated: 2/14/23

Signature: _____

Name: JOHN W. ZUCKER

Title: Deputy Chief Counsel

Company: ABC Inc.

State of New York)
)
County of New York)

This verification was acknowledged before me on February 14th 2023, by John W. Zucker, on behalf of ABC, Inc.

_____
Notary Public

My commission expires: _____

MARIA M. OCASIO
Notary Public, State of New York
No. 4973183
Qualified in Kings County
Commission Expires October 15, 2026

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/13/23

Signature: _____

Name: Kalea Clark

Title: Deputy General Counsel

Company: WPCompany LLC d/b/a The Washington Post

State of District of Columbia)
)
County of Columbia)

This verification was acknowledged before me on February 13th, 2023, by Kalea Clark, on behalf of The Washington Post

_____
Notary Public

My commission expires: 09.30.26

JACQUELINE MAJDAK NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 09/30/2026

118415575.1 0205984-00001

Verification

I, on behalf of a party beneficially interested therein, hereby verify that I have read the Petition for a Writ of Mandamus or a Writ of Prohibition and the Brief in Support of the Petition in Supreme Court Docket No. 50482-2023 and certify under penalty of perjury pursuant to the law of the State of Idaho that the aforementioned Petition and Brief are true and correct to the best of my knowledge, information, and belief.

Dated: 2/10/2023

Signature: Claire M. Regan

Name: Claire M. Regan

Title: President

Company: Society of Professional Journalists

State of NY)
)
County of Richmond)

This verification was acknowledged before me on February 10, 2023, by Claire M. Regan on behalf of Society of Professional Journalists

ANGELA M. SPECIALE
Notary Public - State of New York
No. 01SP6390180
Qualified in Richmond County
My Commission Expires: 04/08/2023

Notary Public

My commission expires: 04-08-2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of February 2023, I served a true and correct copy of the within and foregoing **PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION** upon the following named parties by the method indicated below, and addressed to the following:

Second Judicial District of the State of Idaho, County of Latah Attn: Roland Gammill Trial Court Administrator Latah County Courthouse P.O. Box 896 Lewiston, ID 83501 *TCA2@co.nezperce.id.us*	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail _X_ Via email ____ Via iCourt efile & serve at:
Jason Slade Spillman Legal Counsel Administrative Office of the Courts Idaho Supreme Court P.O. Box 83720 Boise, ID 83720-0101 *jspillman@idcourts.net*	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail _X_ Via email ___ Via iCourt efile & serve at:

/s/ Wendy J. Olson
Wendy J. Olson

EXHIBIT C

In the Supreme Court of the State of Idaho

In Re: Petition for Writ of Mandamus or Writ of Prohibition.

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC; STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE); KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY TV/4 NEWS NOW AND KAPP/KVEW TV--MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN REVIEW/COWLES COMPANY; COEUR D ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; SCRIPPS MEDIA, INC., a Delaware corporation; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents.

Order Re: Petition for a Writ of Mandamus or a Writ of Prohibition

Supreme Court Docket No. 50482-2023

County of Latah No.
CR29-22-2805

An (Amended) Petition for a Writ of Mandamus or a Writ of Prohibition, Brief in Support of the (Amended) Petition for a Writ of Mandamus or a Writ of Prohibition, and Declaration of Wendy J. Olson in Support of the (Amended) Petition for a Writ of Mandamus or a Writ of Prohibition were filed by counsel for Petitioners on February 14, 2023. Therefore, after due consideration,

This Court Orders the following pursuant to I.A.R. 5(d):

1. The Respondents are ordered to file an answer and a separate response brief, consistent with I.A.R. 32(e), no later than fourteen (14) days from the date of this Order. The response brief shall not exceed 20 pages in length.
2. The Petitioners are ordered to file a reply brief, consistent with I.A.R. 32(e), not to exceed fifteen (15) pages in length, no later than seven (7) days after the Respondents' brief is filed.

IT IS FURTHER ORDERED that the Court may issue a Final Writ based on the record, or after oral argument, which may be scheduled at the discretion of the Court.

Dated February 17th, 2023.

By Order of the Supreme Court

G. Richard Bevan, Chief Justice

ATTEST:

Melanie Gagnepain, Clerk

cc: Counsel of Record

EXHIBIT D

In the Supreme Court of the State of Idaho

In Re: Petition for Writ of Mandamus or Writ of Prohibition.

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC; STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE); KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV--MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN-REVIEW/COWLES COMPANY; COEUR D ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; SCRIPPS MEDIA, INC., a Delaware corporation; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents.

Order Granting Petitions to Intervene

Supreme Court Docket No. 50482-2023

County of Latah No.
CR29-22-2805

1. An Order Re: Petition for a Writ of Mandamus or a Writ of Prohibition was entered by this Court on February 17, 2023, which set the due date for Respondents' answer and response brief, as well as Petitioners' reply brief.

2. A Petition to Intervene as Real Party in Interest and a Memorandum in Support of Petition to Intervene as Real Party in Interest were filed by counsel for proposed Intervenor Bryan C. Kohberger on February 17, 2023, requesting to intervene as a Respondent in this action.

3. A Verified Petition for Leave to Intervene by State of Idaho, Latah County Prosecutor and a Memorandum in Support of Petition for Leave to Intervene by State of Idaho, Latah County Prosecutor were filed by counsel for proposed Intervenor State of Idaho, Latah County Prosecutor on February 17, 2023, requesting to intervene as a Respondent in this action.

4. A Notice of Non-Opposition to Petitions to Intervene was filed by counsel for Respondents on February 20, 2023.

Therefore, after due consideration,

IT IS ORDERED that the Petition to Intervene as Real party in Interest and the Verified Petition for Leave to Intervene by State of Idaho, Latah County Prosecutor are GRANTED.

IT IS FURTHER ORDERED pursuant to I.A.R. 5(d):

1. Intervenor-Respondents Bryan Kohberger and State of Idaho, Latah County Prosecutor shall file response briefs to the Petition for a Writ of Mandamus or a Writ of Prohibition no later than March 3, 2023. The response briefs shall not exceed 20 pages in length.

2. Petitioners shall file reply briefs within seven (7) days after the filing of the Intervenor-Respondents response briefs. The reply briefs shall not exceed 15 pages in length.

IT IS FURTHER ORDERED that the Court may issue a Final Writ based on the record, or after oral argument, which may be scheduled at the discretion of the Court. If oral argument is scheduled, the extent of intervenors' participation in the argument will be set forth in a future order.

IT IS FURTHER ORDERED that the caption in the above-entitled appeal shall be AMENDED as follows:

In Re: Petition for Writ of Mandamus or Writ of Prohibition.

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC;

STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE); KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY – TV/4 NEWS NOW AND KAPP/KVEW-TV--MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN-REVIEW/COWLES COMPANY; COEUR D ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; SCRIPPS MEDIA, INC., a Delaware corporation; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents,

and

BRYAN C. KOHBERGER and STATE OF IDAHO, LATAH COUNTY PROSECUTOR,

Intervenor-Respondents.

Dated: February 23rd, 2023

By Order of the Supreme Court

G. Richard Bevan, Chief Justice

ATTEST:

Melanie Gagnepain, Clerk

cc: Counsel of Record

EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 50482

In Re: Petition for Writ of Mandamus or Writ of Prohibition.

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC; STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE); KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV--MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN-REVIEW/COWLES COMPANY; COEUR D ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; SCRIPPS MEDIA, INC., a Delaware corporation; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

v.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents,

and

BRYAN C. KOHBERGER and STATE OF IDAHO, LATAH COUNTY PRSECUTOR,

Boise, March 2023 Term

Opinion filed: April 24, 2023

Melanie Gagnepain, Clerk

Intervenor-Respondents.)

The Petition for Writ of Mandamus or Writ of Prohibition is denied.

Stoel Rives, LLP, Boise, for Petitioners.

Ferguson Durham, PLLC, Boise, for Respondents.

Kootenai County Public Defenders Office, Coeur d'Alene, for Intervenor Bryan C. Kohberger.

Latah County Prosecutor, Moscow, for Intervenor Latah County Prosecuting Attorney.

MOELLER, Justice.

A coalition of media companies has petitioned this Court, invoking its original jurisdiction to seek a writ of mandamus or a writ of prohibition to vacate a nondissemination order issued by the magistrate court in the pending criminal action of *State of Idaho v. Bryan C. Kohberger*. This Court expedited the case and ordered briefing from the parties. We have also granted motions to intervene filed by the two parties to this case, the State of Idaho, Latah County Prosecutor ("the State") and the defendant, Bryan C. Kohberger, who were also permitted to file briefs. All of the briefs have been submitted and reviewed by this Court, and we have determined that oral argument is unnecessary to resolve the question before us.

For the reasons explained below, we conclude that neither a writ of mandamus nor a writ of prohibition are appropriate remedies at this time.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 13, 2022, four University of Idaho students were found dead in their apartment in Moscow, Idaho. Bryan C. Kohberger was arrested and charged with the murders of the four students on December 30, 2022. Kohberger's case is pending in Latah County in the Second Judicial District of Idaho, and is currently scheduled for a preliminary hearing on June 26, 2023. *State of Idaho v. Bryan C. Kohberger*, Latah County Case No. CR29-22-2805. The case has drawn widespread publicity, garnering worldwide media attention and much speculation.

Recognizing the high-profile nature of the case and the extensive coverage it has received, along with the need to minimize possible pretrial prejudice, Kohberger's attorneys and the

attorneys for the State stipulated to a nondissemination order.[1] The order was signed by the presiding judge, Magistrate Judge Megan E. Marshall. The original nondissemination order stated in full:

> The Court, by stipulation of the parties, enters its Order as follows:
>
> IT IS HEREBY ORDERED that the parties to the above entitled action, including investigators, law enforcement personnel, attorneys, and agents of the prosecuting attorney or defense attorney, are prohibited from making extrajudicial statements, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the case.
>
> This order specifically prohibits any statement,[ ]which a reasonable person would expect to be disseminated by means of public communication that relates to the following:
>
> 1. Evidence regarding the occurrences or transactions involved in this case;
>
> 2. The character, credibility, or criminal record of a party;
>
> 3. The performance or results of any exminations [sic] or tests or the refusal or failure of a party to submit to such tests or exminations [sic];
>
> 4. Any opinion as to the merits of the case or the claims or defense of a party;
>
> 5. Any other matter reasonably likely to interfere with a fair trial of this case, such as, but not limited to, the existence or contents of any confession, admission, or statement give [sic] by the Defendant, the possibility of a plea of guilt [sic]to the charged offense or a lesser offense, or any opinion as to the Defendant's guilt or innocence.
>
> IT IS FURTHER ORDERED that no person covered by this order shall avoid its proscriptions by actions that indirectly, but deliberately, cause a violation of this order.
>
> IT IS FURTHER ORDERED that this order, and all provisions thereof, shall remain in full force and effect throughout[] these proceedings, until such time as a verdict has been returned, unless modified by this court.

Fifteen days later, following an off-the-record meeting in chambers with Kohberger's attorneys, the prosecutors, and the attorneys for the witnesses and victims' families, the magistrate court entered an amended nondissemination order on January 18, 2023, that expanded the scope of the original order. The amended nondissemination order noted the need to curtail dissemination of "information in this case" and strike "a balance between protecting the right to a fair trial for all parties involved and the right to free expression as afforded under both the United States and Idaho

[1] Such orders, often referred to as "gag orders," prohibit attorneys, parties, and witnesses from publicly talking about a pending case in an effort to prevent pretrial publicity from impairing the parties' right to a fair trial. In this opinion we will use the term "nondissemination order" unless "gag order" is used in the text of a cited decision.

Constitution[s]." Based "upon the stipulation of the parties and with good cause," the magistrate court's amended order contained the following prohibitions:

> IT IS HEREBY ORDERED:
>
> 1. The attorneys for any interested party in this case, including the prosecuting attorney, defense attorney, and any attorney representing a witness, victim, or victim's family, as well as the parties to the above entitled action, including but not limited to investigators, law enforcement personal [sic], and agents for the prosecuting attorney or defense attorney, are prohibited from making extrajudicial statements (written or oral) concerning this case, except, without additional comment, a quotation from or reference to the official public record of the case.
> 2. This order specifically prohibits any statement, which a reasonable person would expect to be disseminated by means of public communication that relates to the following:
>
> a. Evidence regarding the occurrences or transactions involved in the case;
>
> b. The character, credibility, reputation, or criminal record of a party, victim, or witness, or the identity of a witness, or the expected testimony of a party, victim, or witness;
>
> c. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test;
>
> d. Any opinion as to the merits of the case or the claims or defense of a party;
>
> e. Any information a lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;
>
> f. Any information reasonably likely to interfere with a fair trial in this case afforded under the United States and Idaho Constitution, such as the existence or contents of any confession, admission, or statement given by the Defendant, the possibility of a plea of guilt [sic], or any opinion as to the Defendant's guilt or innocence.
>
> IT IS FURTHER ORDERED that no individual covered by this order shall avoid its proscriptions by actions directly or indirectly, but deliberately, that result in violating this order.
>
> IT IS FURTHER ORDERED that this order, and all provisions herein, shall remain in full force and effect throughout the entirety of this case unless otherwise ordered by this court.

Shortly after the amended nondissemination order was issued by the magistrate court, a coalition of media companies[2] directly petitioned this Court, invoking our original jurisdiction and

[2] The coalition includes: the Associated Press; Radio Television Digital News Association; Sinclair Media of Boise, LLC/KBOI-TV (Boise); The McClatchy Company dba The Idaho Statesman; States Newsroom dba Idaho Capital

seeking a writ of mandamus or a writ of prohibition to vacate the magistrate court's amended order. These companies (collectively, "Petitioners") challenge the constitutionality of the nondissemination order and seek an extraordinary writ to protect free speech rights and the media's ability to cover the case under the U.S. and Idaho Constitutions. Notably, Petitioners did not first file an objection with, or seek relief from, the magistrate court before filing their petition against the Respondents in this Court. The petition named Magistrate Judge Marshall and the Second Judicial District of the State of Idaho, Latah County, as Respondents. Kohberger and the State each filed a petition seeking to intervene—both of which we granted. Both Intervenors opposed the petition and argued in support of maintaining the nondissemination order.

Petitioners claim that to date there have been no "notable leaks or dissemination of extrajudicial information that would prejudice Mr. Kohberger's right to a fair trial." In their briefing, they present several situations that suggest the amended nondissemination order is vague or overbroad. As taken from Petitioners' briefing and exhibits, examples of these accounts include:

- A victim's family wanted to speak with the press but feels bound by the nondissemination order.
- The emergency dispatch service that receives the 911 calls for Moscow, Idaho has requested declaratory relief in a Washington suit to determine whether it can disclose 911 tapes in response to public records requests.
- Public records requests have been denied by the Latah County's Sheriff's Office, Moscow Police Department, Pullman Police Department, and Washington State Police Department because of the nondissemination order.
- The Moscow Police Department published a press release stating it would no longer communicate with the public or media about Kohberger's case.
- Moscow's mayor informed the press he could not discuss "the overall community healing" because of the nondissemination order, as advised by the city attorney.

Respondents maintain that there have already been prejudicial disseminations of evidence that implicates both Kohberger and the State's right to a fair trial. They argue that the "nondissemination order speaks for itself" on this matter.

Sun; the Seattle Times; TEGNA, Inc./KREM (Spokane); KTVB (Boise); EastIdahoNews.com; the Lewiston Tribune; Washington State Association of Broadcasters; Adams Publishing Group dba Post Register (Idaho Falls); Idaho Press Club; Idaho Education News; KXLY TV (Spokane); Scripps Media, Inc., dba KIVI-TV (Nampa); Boise State Public Radio; the Times-News (Twin Falls); the Spokesman Review/Cowles Company; Coeur d'Alene Press; the New York Times Company; Day 365, LLC, dba BoiseDev; LawNewz, Inc.; Court TV Media, LLC; ABC, Inc.; WP Company, LLC, dba the Washington Post; and the Society of Professional Journalists.

Additionally, after briefing commenced, Respondents and Intervenors provided this Court with a partially redacted memorandum of the conference the magistrate court held in chambers on January 13, 2023, about five days before issuing the amended nondissemination order. This conference was an off-the-record meeting via Zoom with Judge Marshall, prosecutors, defense counsel, the judge's clerk, and other attorneys for the witnesses and the victims' families in attendance. As explained by Respondents, "[t]he purpose of the call was to speak to the attorneys associated with the case and review the court's recent nondissemination order which prohibited them from speaking with the media, in response to what the court was seeing and hearing from various media sources." They noted that because "not all attorneys were complying with the court's [original] nondissemination order," "the court wanted to review its terms and Rule 3.6 of the Idaho Rules of Professional Conduct with them."

The State and Kohberger prepared a joint-memorandum that summarized the events of this meeting. The magistrate court granted a stipulated motion to file this memorandum under seal. However, after the petition was filed, the State and Kohberger filed a motion to unseal a redacted version[3] of the memorandum, which the magistrate court granted upon "weigh[ing] the interests in privacy and public disclosure." The Respondents have now supplied the redacted version of the memorandum for the record before this Court. The summarized conversations from this meeting largely concerned attorney speech, the rules of professional conduct, the purpose of the original nondissemination order, and the need to protect Kohberger's right to a fair trial. For example:

- Judge Marshall reiterated that "she is not saying that clients cannot talk to the media." She reminded the parties of Idaho Rule of Professional Conduct 3.6 and the lawyers' duties.
- Judge Marshall "clarifie[d] that attorneys are not prohibited from advising their clients, but they are prohibited from speaking to the media."
- There was an allegation of information being leaked from the prosecutor's office.
- There were accusations in the meeting that at least one attorney for a potential witness has been making false statements and/or disseminating the same to the media.

The amended nondissemination order that resulted from this meeting was stipulated to by all parties to the case. In response, the media coalition directly petitioned this Court for redress, invoking our original jurisdiction and seeking relief via an extraordinary writ.

II. ANALYSIS

[3] The redactions in the memorandum serve to protect the identities of potential witnesses in Kohberger's upcoming trial.

Petitioners have requested that the Court issue either a writ of mandamus or a writ of prohibition to vacate the amended nondissemination order issued by the magistrate court. They challenge the constitutionality of the amended nondissemination order and argue that it violates the free speech provisions of the federal and state constitutions, especially as they concern the ability of the press to cover matters of public interest. Respondents contend that this Court should deny the petition because the amended nondissemination order applies only to trial participants, adheres to the Idaho Rules of Professional Conduct governing attorneys, is not a prior restraint against Petitioners, and is otherwise constitutionally sound. The State and Respondents also raise a question of whether Petitioners have standing to assert the First Amendment rights of trial participants, while Kohberger argues that an extraordinary writ is an inappropriate remedy where the media had the ability to seek relief before the magistrate court and have not done so.

Before reaching the merits of Petitioners' claims, we must first address the issues of justiciability and jurisdiction to determine (1) whether Petitioners have standing to bring their petition and (2) whether they have properly invoked this Court's original jurisdiction.

A. The Petitioners have standing.

" 'Concepts of justiciability, including standing, identify appropriate or suitable occasions for adjudication by a court.' " *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (quoting *State v. Phillip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 13 187, 194 (2015)). "Standing is a threshold determination by this Court before reaching the merits of the case." *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021). It is an inquiry that "focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Id.* (quoting *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002)). The origin of Idaho's standing rule stems from the United States Supreme Court and the U.S. Constitution because there is no "case or controversy" clause, or an analogous provision, in the Idaho Constitution. *Id.* at 418–19, 497 P.3d at 172–73.

To establish standing, "a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 419, 497 P.3d at 173 (brackets omitted) (quoting *Philip Morris, Inc.*, 158 Idaho at 881, 354 P.3d at 194). To satisfy the first element, an injury-in-fact, a party "must allege or demonstrate an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted).

Petitioners seek a writ of mandamus or of prohibition to compel the magistrate court to vacate a nondissemination order. They claim that the order has violated their First Amendment rights concerning freedom of the press by restricting their ability to gather information for publication. In other words, they argue that the amended nondissemination order "restricts [their] rights to receive speech," which they wish to publish. We agree that the injury claimed here is one that is recognized under the First Amendment.

"The overbreadth doctrine permits litigants to challenge First Amendment restrictions even so far as they also impinge others' First Amendment rights." *In re Murphy-Brown, LLC*, 907 F.3d 788, 799 (4th Cir. 2018) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13 (1973)). Where a trial court's "order impairs the media's ability to gather news by effectively denying the media access to trial counsel, a concrete personal interest is affected." *Radio & Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. of California*, 781 F.2d 1443, 1445 (9th Cir. 1986). Thus, orders that restrict the speech of trial participants can create an injury to the press sufficient for standing to defend free speech. *See id; United States v. Aldawsari*, 683 F.3d 660, 665 (5th Cir. 2012); *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 608 (2d Cir. 1988).

In this context, the record clearly supports Petitioners' claim that, as news organizations, they are potential recipients of speech from the attorneys, witnesses, and parties having knowledge of the case. They maintain that the amended nondissemination order hinders their ability to gather such information. If the Petitioners' allegations are true, they have alleged "an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173 (citations and internal quotation marks omitted). Additionally, if the amended nondissemination order is vague, overbroad, unduly restrictive, or not narrowly drawn, it would be an unconstitutional obstacle to their gathering of such information. *See Radio & Television News*, 781 F.2d at 1445–46; *In re Murphy-Brown*, 907 F.3d at 799–800.

Here, the amended nondissemination order broadly states that those "prohibited" from commenting on the case "*includ[es] but [is] not limited to*" individuals from a list of specified categories. (Emphasis added). The order also restricts such individuals from commenting on anything "concerning this case," aside from items in the "official public record of the case." While the wording of the order appears to apply to both attorneys *and* a broad array of individuals, contrasting statements in the memorandum suggest that the court "is not ordering clients (i.e.,

witnesses) not to talk to the media" and "[the judge] reiterates she is not saying that clients cannot talk to the media."

Based on the record, we conclude that for the purpose of establishing standing, Petitioners have sufficiently alleged an injury in the form of their diminished ability to receive speech and effectively gather news. Further, the media's concern that the order's provisions are vague, overbroad, unduly restrictive, and not narrowly drawn are not merely contrived, and if established, could improperly infringe on the press's constitutional right to report on the case. *See In re Murphy-Brown*, 907 F.3d at 799–800. Therefore, without deciding the merits, we conclude that on its face the petition alleges (1) an injury in fact, (2) a causal link between the injury and the amended order, and (3) a likelihood that if Petitioners prevail, the relief requested would redress the injury claimed. *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173. Therefore, Petitioners have shown sufficient standing to challenge the nondissemination order.

B. Original Jurisdiction

1. The prerequisites for invoking the Idaho Supreme Court's original jurisdiction.

Even if a party has standing, it must still establish that it has properly invoked this Court's jurisdiction. The Idaho Constitution vests this Court with "original jurisdiction" to issue writs of mandamus and prohibition, "and all writs necessary or proper to the complete exercise of its appellate jurisdiction." IDAHO CONST. art. V, § 9. "Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction." I.A.R. 5(a). "This original jurisdiction is limited only by the separation of powers provisions contained in Article II, Section 1 of the Idaho Constitution and this Court's own rules." *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020). *See also Reclaim Idaho*, 169 Idaho at 418, 497 P.3d at 172. Once this Court asserts its jurisdiction, it may issue writs of mandamus or prohibition. *Mead v. Arnell*, 117 Idaho 660, 663–64, 791 P.2d 410, 413–14 (1990). This is a discretionary power of this Court. *See id.*

"The writ of prohibition is not a remedy in the ordinary course of law, but is an extraordinary remedy." *Maxwell v. Terrell*, 37 Idaho 767, 774, 220 P. 411, 413 (1923). *See also Wasden ex rel. State v. Idaho State Bd. of Land Comm'rs*, 150 Idaho 547, 551, 249 P.3d 346, 350 (2010). It is only issued with caution. *Id.* "[A writ of prohibition] may be issued by the supreme court or any district court to an inferior tribunal, or to a corporation, board or person in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." I.C. § 7-

402 (codifying the characteristics of a common law writ). Similarly, a writ of mandamus "is not a writ of right, and this Court's choice to issue a writ is discretionary when compelled by urgent necessity." *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 393, 496 P.3d 873, 879 (2021). Thus, "the existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent the issuance of a writ of mandamus." *Coeur D'Alene Tribe*, 161 Idaho at 523, 387 P.3d at 776. Additionally, the "party seeking the writ of mandamus has the burden of proving the absence of an adequate, plain, or speedy remedy in the ordinary course of law." *Id.*

A writ of prohibition or mandamus can undoubtedly be an appropriate legal avenue where the petition "alleges sufficient facts concerning a possible constitutional violation of an urgent nature." *See, e.g.*, *Reclaim Idaho*, 169 Idaho at 418, 497 P.3d at 172 (quoting *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990)); *Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 55, 57, 982 P.2d 358, 360 (1999). It is equally well recognized that such petitions are an appropriate mechanism across jurisdictions in the United States for the media to challenge overbroad nondissemination orders. *See, e.g.*, *In re Murphy-Brown*, 907 F.3d at 796. However, the core procedural requirement to issue a writ of prohibition remains—the petitioner must prove that no plain, speedy, and adequate remedy at law is available. I.C. § 7-402. Likewise, a writ of mandamus must be "compelled by urgent necessity." *Hepworth Holzer*, 169 Idaho at 393, 496 P.3d at 879.

"It is fundamental that a writ will not function as the equivalent of an appeal or a petition for review." *Rim View Trout Co. v. Idaho Dep't of Water Res.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). Equally important here is our longstanding rule that we will not "usurp" a lower court's role of "deciding new legal issues in the first instance" or from serving as the trier of fact. *See Siercke v. Siercke*, 167 Idaho 709, 716, 476 P.3d 376, 383 (2020); *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 706–07, 52 P.3d 848, 851–52 (2002). In *Clark v. Ada Cnty Bd. of Comm'rs*, we emphasized that an extraordinary writ under our original jurisdiction requires extraordinary circumstances, and that a writ of prohibition will not issue where a plain, speedy, and adequate remedy of law is available:

> "It is a principle of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. And the writ will

> not be allowed to take the place of an appeal. In all cases, therefore, where the party has ample remedy by appeal from the order or judgment of the inferior court, prohibition will not lie, no such pressing necessity appearing in such cases as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right, but resting largely in the sound discretion of the court."

98 Idaho 749, 754, 572 P.2d 501, 506 (1977) (quoting *Sherlock v. Mayor and City of Jacksonville*, 17 Fla. 93 (1879)).

Therefore, before we bypass the role of the trial court and address the merits of Petitioners' claim as an original action, we must decide whether the circumstances of this case are extraordinary and whether no plain, speedy, and adequate remedy of law exists.

2. Petitioners have not properly invoked the original jurisdiction of this Court.

We conclude that Petitioners have not demonstrated the absence of an adequate, plain, or speedy remedy in the ordinary course of law. In fact, the record establishes quite the opposite to be true. Petitioners came to this Court *first* without seeking *any* remedy or clarification from the magistrate court that issued the amended nondissemination order. While Petitioners have alleged that they had "no opportunity to object, review, or otherwise participate in the decision-making process," the record shows that they never formally objected to the amended non-dissemination order or sought clarification from the magistrate court. Moreover, Petitioners have failed to show that seeking redress before the magistrate court would not provide an adequate, plain, or speedy avenue to redress their grievances. Case law and common practice across the trial courts of Idaho, as well as our sister jurisdictions, suggest otherwise.

Petitioners are correct that Idaho's Rules of Criminal Procedure do not provide a specific mechanism for third parties to intervene in a criminal case. Likewise, the Federal Rules of Criminal Procedure do not provide for a motion to intervene in a criminal case brought by the United States. *United States v. Loughner*, 807 F. Supp. 2d 828, 830 (D. Ariz. 2011). However, both state and federal courts often permit the media to intervene in criminal cases on a limited basis—or at least file a motion as interested parties—in the defense of public access and free speech, including in Idaho.

We note that this is a common practice nationwide and trial courts are often called upon to resolve these types of concerns by the media. *See, e.g.*, *Cowles Pub. Co. v. Magistrate Ct. of the First Jud. Dist. of State, Cnty. of Kootenai*, 118 Idaho 753, 755, 800 P.2d 640, 642 (1990) (an Idaho magistrate court permitted a publishing company "to argue its motion seeking public access to the preliminary hearing"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 543 (1976) (media

petitioners successfully filed for leave to intervene in the district court's criminal proceedings of a high-profile murder trial before pursuing mandamus relief from a restraining order before the Nebraska Supreme Court); *N. Jersey Media Grp. Inc v. United States*, 836 F.3d 421, 426–27 (3d Cir. 2016) (media organizations filed a motion to intervene in a criminal case, arguing they had a common law right of public access to a letter they argued was akin to a "bill of particulars"); *In re The Wall St. J.*, 601 F. App'x 215, 217 (4th Cir. 2015) (noting that the district court permitted the media to intervene in a criminal case and thereafter modified its sealing and gag order); *KPNX Broad. v. Superior Ct. In & For Maricopa Cnty.*, 678 P.2d 431, 433–34 (Ariz. 1984) (a broadcasting company successfully intervened in a criminal trial to request the trial court vacate speech restrictions).

For example, in *KPNX Broadcasting*, the Supreme Court of Arizona discussed its prior dismissal of a petition for special action to stay or vacate certain orders issued by a trial court that affected the media. 678 P.2d at 433–34. In that case, the petitioners were a news reporter and courtroom sketch artist assigned to cover a high-profile murder trial. *Id.* at 434. The court imposed a nondissemination order on trial participants' speech with the media upon the stipulated request of the prosecution and defense. In response to jurors' fears of retribution and their personal safety, the trial court also orally ordered that all courtroom sketches including the jury had to be reviewed by the court before their presentation on television. *Id.* The reporter from KPNX, along with the First Amendment Coalition, first filed a petition for special action with the Supreme Court of Arizona, seeking to stay or vacate these orders from the trial court. *Id.*

The Supreme Court of Arizona declined jurisdiction and dismissed the petitioners' action for (1) failure to join the real parties in interest, (2) failure to exhaust their remedies in the trial court before seeking relief by special action, and (3) the Coalition's lack of standing. *Id.* Following dismissal, the petitioners along with the media station employing the reporter, KPNX, successfully moved to intervene in the trial court and requested the respondent judge vacate the orders. When the judge refused, a new petition to the Arizona Supreme Court followed—this time with full review of the orders—and, ultimately, the Arizona Supreme Court granted relief in part. *Id.*

Similarly, in *In re Murphy-Brown*, 907 F.3d at 795–96, the U. S. Court of Appeals for the Fourth Circuit reviewed the merits of a petition for a writ of mandamus against a gag order *after* establishing the "extraordinary situation[]" that called for an exercise of its mandamus jurisdiction. The Fourth Circuit was asked to review a "sweeping" gag order issued in a series of highly

publicized nuisance lawsuits filed against the hog industry in North Carolina. *Id.* at 792. While that case dealt with civil matters, the Fourth Circuit's approach to special relief is instructive here, particularly since it applied the same mandamus standard from its review of gag orders issued in criminal proceedings. *Id.* at 796.

The Fourth Circuit determined that the petition for mandamus relief was appropriate where "[t]he trial court had already considered the legal issues surrounding the gag order" and the loss of First Amendment freedoms "unquestionably constitutes irreparable injury." *Id.* While the respondents in *Murphy-Brown* argued that the petitioners should have sought reconsideration before the district court before filing their petition, the Fourth Circuit disagreed. It determined that "[p]arties need not endure repeated and irreparable abridgments of their First Amendment rights simply to afford the district court a second chance." *Id.* The trial court had already considered the legal issues, and a motion for reconsideration "would not have been an 'adequate' means of attaining relief from the gag order." *Id.*

These cases not only demonstrate the relatively common practice of media organizations first seeking relief from the trial courts, but they also show that appellate courts are cautious in exercising original jurisdiction when adequate remedies at law are still available. This latter principle is well illustrated in the *Radio & Television News* case from the Ninth Circuit. In that case, the petitioner—an umbrella organization of journalists—petitioned the U.S. Court of Appeals for the Ninth Circuit for a writ of mandamus "without first intervening in the district court below to challenge the amended restraining order." *Radio & Television News*, 781 F.2d at 1444 n.2. While the Ninth Circuit exercised its mandamus jurisdiction *without* an underlying proceeding at the trial court, it did so only after determining there were "extraordinary circumstances" at hand—including the lack of "other adequate means, such as direct appeal, to attain [] relief" and that there would be "damage[] or prejudice[]" to the petitioner "in a way not correctable on appeal." *Id.* at 1444 n.2 and 1445. This is in line with our case law, which has held "the existence of an adequate remedy in the ordinary course of law, either legal or equitable in nature, will prevent the issuance of a writ of mandamus." *Coeur D'Alene Tribe*, 161 Idaho at 523, 387 P.3d at 776. It is also a bar to issuing a writ of prohibition. *Wasden*, 150 Idaho at 554, 249 P.3d at 353.

Nothing in the briefing or record suggests that a remedy from the magistrate court was pursued by the Petitioners, much less denied. Therefore, we conclude that other remedies were available to Petitioners before seeking this Court's intervention. Additionally, there has been no

showing that extraordinary circumstances justify accepting this case under our original jurisdiction. By failing to pursue a remedy from the magistrate court before pursuing an extraordinary remedy from this Court, Petitioners have forgotten that we are "the court of last resort in Idaho"—not the court of first resort. *State v. Cates*, 117 Idaho 372, 372, 788 P.2d 187, 188 (1990). Only rare and special circumstances warrant an extraordinary remedy and cause us to exercise our original jurisdiction. *See, e.g.*, *Maxwell*, 37 Idaho at 774, 220 P. at 413. We have consistently held that the "party seeking the writ of mandamus has the burden of proving the absence of an adequate, plain, or speedy remedy in the ordinary course of law." *Coeur D'Alene Tribe*, 161 Idaho at 523, 387 P.3d at 776. Petitioners have not met this burden of proof.

Accordingly, if Petitioners want relief or clarification of the amended nondissemination order, the proper course is to first seek redress from the magistrate court which issued the amended order. If the media is still aggrieved after seeking clarification or an amendment to the existing order, then they have the avenue of appeal. *See Cowles Pub. Co.*, 118 Idaho at 755, 800 P.2d at 642 (a petitioner filed for a writ of mandamus with this Court *after* it argued its case before the magistrate court and its motion seeking public access to a preliminary hearing was denied).

Importantly, we caution that our decision in this case should *not* be read to support a widespread right of the press—or anyone else—to routinely intervene in Idaho's criminal proceedings. Our holding here only endorses a limited right, applicable when a trial court's responsibility to balance the Sixth Amendment rights of the accused with the First Amendment interests of the media becomes an issue. While Idaho's "criminal prosecutions are public matters, sought by the State on behalf of its citizen[s]," *State v. Johnson*, 167 Idaho 454, 458, 470 P.3d 1263, 1267 (Ct. App. 2020), Idaho law defines the State and the person charged as the only parties to a criminal action. I.C. § 19-104. Unlike the state and federal rules of civil procedure that often permit the intervention of interested parties to an action, intervention in criminal proceedings is much more circumscribed. As articulated in *United States v. Carmichael*,

> Intervention in criminal cases is generally limited to those instances in which a third party's constitutional or other federal rights are implicated by the resolution of a particular motion, request, or other issue during the course of a criminal case. For example, courts sometimes permit the press to intervene in a criminal case where a decision to close criminal proceedings to the public may affect its First Amendment rights. In addition, third parties are occasionally allowed to intervene in a criminal trial to challenge a request for the production of documents on the ground of privilege, or to protect other rights implicated by a particular proceeding.

342 F. Supp. 2d 1070, 1072 (M.D. Ala. 2004) (citations omitted).

We are also mindful that under the circumstances presented here, granting Petitioners' request would essentially invite the media and others to bring a direct challenge to this Court any time a trial judge issues a nondissemination order or admonishes the attorneys not to discuss the case with the media—without first attempting to resolve the issue before the court issuing the order. While we recognize the high public interest in such matters, and the media's important role in providing the public information, we cannot routinely entertain requests to grant an extraordinary writ where a plain, speedy, and adequate remedy is still available. *See Clark*, 98 Idaho at 754, 572 P.2d at 506.

This Court has long respected the media's role in our constitutional republic, and honored the promises in both the Idaho Constitution and the First Amendment to the U.S. Constitution:

> The underlying rationale of the First Amendment protection of freedom of the press is clear . . . the public must know the truth in order to make value judgments, . . . The only reliable source of that truth is a 'press' . . . which is free to publish that truth without government censorship. We cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.

Caldero v. Tribune Pub. Co., 98 Idaho 288, 298, 562 P.2d 791, 801 (1977). *See also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("[J]ustice cannot survive behind walls of silence" and a responsible press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."). Although we still hold to that view today, we recognize that our trial courts have an increasingly difficult task in balancing the Sixth Amendment rights of a defendant with the First Amendment protections afforded the press. With the advent of the internet and social media, this balancing act has become even more challenging today than it was in the 1960s and 1970s when *Sheppard* and *Caldero* were decided. Although these are well-guarded rights, those seeking to enforce them must still bow to the jurisdictional rules and procedural channels litigants are constrained to follow.

III. CONCLUSION

For the reasons expressed above, we dismiss the petition and deny Petitioners' request for a writ of mandamus or a writ of prohibition. The Respondents, as the prevailing parties, are awarded costs as a matter of course pursuant to Idaho Appellate Rule 40(a).

Chief Justice BEVAN, Justices BRODY, STEGNER and ZAHN **CONCUR.**

EXHIBIT F

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, vs. BRYAN C. KOHBERGER, Defendant.	Case No. CR29-22-2805 ORDER VACATING HEARING AND SETTING SCHEDULING CONFERENCE FOR MOTIONS RE: AMENDED NONDISSEMINATION ORDER

A Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order and a Memorandum in Support of Motion for Appeal and/or Clarification of Amended Nondissemination Order were filed by counsel for the Goncalves family on February 3, 2023.

A Petition for Writ of Mandamus or a Writ of Prohibition was filed with the Idaho Supreme Court (Docket No. 50482-2023) on February 6, 2023, titled *The Associated Press, et al. v. Second Judicial District of the State of Idaho, County of Latah, Honorable Megan E. Marshall, Magistrate Judge*, related to the Amended Nondissemination Order in this case.

A Memorandum of Points and Authorities Relating to Nondissemination Order and Affidavit of Latah County Prosecutor William W. Thompson, Jr. were filed by the State of Idaho on February 8, 2023.

An Objection to Motion to Appeal, Amend and/or Clarify Nondissemination Order was filed by counsel for Mr. Kohberger on February 9, 2023.

On February 27, 2023, the court issued a Notice Regarding Hearing Date on Motion to Appeal, Amend, and/or Clarify Amended Nondissemination Order providing notice that the Goncalves' motion would be set for hearing upon the issuance of the Idaho Supreme Court's decision in *The Associated Press, et al. v. Second Judicial District* (Docket No. 50482-2023).

On April 24, 2023, the Idaho Supreme Court issued an opinion dismissing the Associated Press, et al.'s Petition for Writ of Mandamus or a Writ of Prohibition.

On April 28, 2023, the court issued a Notice of Hearing setting the Goncalves' Motion to Appeal, Amend, and/or Clarify Amended Nondissemination Order for hearing on May 25, 2023.

On May 2, 2023, the Associated Press, et al. filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order.

The Goncalves' motion and the Associated Press, et al.'s motion concern the same subject matter, the Amended Nondissemination Order, and should be set for hearing at the same time for judicial efficiency. Therefore, after due consideration,

IT IS HEREBY ORDERED that the Motion Hearing Re: Goncalves' Motion to Appeal, Amend and/or Clarify Amended Nondissemination Order scheduled for May 25, 2023, is vacated.

IT IS FURTHER ORDERED that a **Scheduling Conference** Re: Goncalves' Motion to Appeal, Amend, and/or Clarify Amended Nondissemination Order and the Associated Press, et al.'s Motion to Intervene and Motion to Vacate the Amended Nondissemination Order will be held on **May 22, 2023 at 10:00 a.m. PST via Zoom**. (See Notice of Remote Hearing.)

IT IS FURTHER ORDERED that any recording or live streaming of the Zoom proceeding is prohibited.

Dated: 5/4/2023

Megan E. Marshall
Magistrate Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that a true and complete copy of the foregoing was served as follows:

William Wofford Thompson	paservice@latahcountyid.gov	[X] By E-mail
Jeffery Nye	jeff.nye@ag.idaho.gov	[X] By E-mail
Ingrid Batey	ingrid.batey@ag.idaho.gov	[X] By E-mail
Anne Taylor	pdfax@kcgov.us	[X] By E-mail
Wendy Olson	wendy.olson@stoel.com	[X] By E-mail
Cory Carone	cory.carone@stoel.com	[X] By E-mail
Shanon Gray	shanon@graylaw.org	[X] By E-mail

JULIE FRY
CLERK OF THE DISTRICT COURT

DATE 5/5/23

By: _____
Deputy Court Clerk