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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

**Supplemental Memorandum in Support
of Motion to Vacate the Amended
Nondissemination Order**

THE ASSOCIATED PRESS; RADIO
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Intervenors.

On May 1, 2023, Intervenors filed a Motion to Intervene and a Motion to Vacate the Amended Nondissemination Order along with supporting memoranda. At a May 22, 2023 Scheduling Conference on those motions, the Court set a motion hearing for June 9, 2023 and ordered that Intervenors could file a supplemental memorandum in support of their pending motions and submit a memorandum on the separate issue of whether cameras should be allowed in the courtroom. Intervenors are contemporaneously filing a separate memorandum on the camera issue. On the Motion to Intervene and the Motion to Vacate, Intervenors stand by the memoranda they filed on May 1, 2023. But they offer three points here to further the colloquy with the Court during the May 22, 2023 Scheduling Conference about the Motion to Vacate.

First, Intervenors respect Mr. Kohberger's right to a fair trial and they do not contend that their First Amendment rights are the only constitutional rights at issue here. Intervenors stand by their prior assertions that when defining the bounds of the First Amendment, "an orderly society must also consider a criminal defendant's right to a fair trial" and that the Court's task when considering a gag order is to "ensure a proper balance between the First and Sixth Amendments." Mem. in Support of Mot. to Vacate the Amended Nondissemination Order, p. 6. Intervenors' argument is that those rights were improperly balanced when a gag order initially was entered and when it was amended in this case. Intervenors agree that their First Amendment rights yield to Mr.

Kohberger’s Sixth Amendment rights, but only when Mr. Kohberger’s Sixth Amendment rights will actually be infringed by Intervenor’s speech. Strict scrutiny analysis teases out where that line lies, and the Amended Nondissemination Order dated January 18, 2023 (“Gag Order”) fails under that test. Intervenor agrees that there has been, and will continue to be, great publicity surrounding this case. But publicity alone is not prejudicial. Any statement concerning this case is not prejudicial; statements can be exculpatory, inculpatory, or irrelevant. The State’s and Mr. Kohberger’s failure to present any evidence of *prejudicial* news coverage, and the Court’s failure to consider alternative measures, means the competing constitutional rights here were improperly balanced and the Gag Order should be vacated. If anything, the Gag Order prejudices Mr. Kohberger by depriving the public of quality information, creating a vacuum for rampant speculation online.

Second, Intervenor has properly cited the Idaho Supreme Court’s decision in *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829 (Idaho Apr. 24, 2023). Two lines from the Idaho Supreme Court’s opinion are particularly relevant to Intervenor’s pending Motion to Vacate:

- “[I]f 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.” *Id.* at *5.
- “[T]he 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.” *Id.* at *6.

Intervenor acknowledges that the Idaho Supreme Court did not decide the merits question of

whether the gag order at issue here is vague, overbroad, unduly restrictive, or not narrowly drawn—that is the task for this Court. But the Idaho Supreme Court did hold that, in the abstract, a gag order that is vague, overbroad, unduly restrictive, or not narrowly drawn “would be an unconstitutional obstacle” and “could improperly infringe on the press’s constitutional right to report on the case.” That is what Intervenor intended to convey in the opening section of their May 1, 2023 memorandum. Intervenor used gag order in the lowercase to reference what the Idaho Supreme Court said about gag orders generally, and Intervenor intentionally did not use the capitalized Gag Order (the defined term for the Amended Nondissemination Order dated January 18, 2023) because the Idaho Supreme Court did not decide whether the Gag Order is vague, overbroad, unduly restrictive, or not narrowly drawn (it is for the reasons provided in Intervenor’s May 1, 2023 memorandum).

Third, the Court should decide the Motion to Vacate based on the factual record that existed when the Gag Order was issued and the new evidence that Intervenor have provided to show the Gag Order’s chilling effect. With their Motion to Vacate, Intervenor submitted a declaration with counsel’s factual understanding of how the Gag Order has affected Intervenor. Submitted with this memorandum are declarations from the reporters themselves. The reporters’ declarations largely confirm counsel’s prior understanding of the facts, but in full candor there are a few corrections: Morgan Romero was not provided information about whether Mr. Kohberger was ever offered a job with the Pullman Police Department (as opposed to whether he was interviewed), and only the Latah County Sheriff’s Office and the Moscow Police Department denied Taylor Mirfendereski’s public records requests because of a gag order in this case (other agencies cited public records exemptions). While the facts that Intervenor rely on only came into existence after a gag order was issued, the State and Mr. Kohberger could have submitted any evidence that in

their view suggests a gag order is necessary when they submitted their request for a gag order to the Court. The State and Mr. Kohberger thus should not be allowed to submit new evidence supporting the Gag Order with their response brief or at the June 9, 2023 motion hearing. When the State and Mr. Kohberger first requested the Gag Order, that was their opportunity to carry their burden to create a record to support their request. Intervenor's Motion to Vacate challenges the validity of the Gag Order based on the record before the Court at the time the order was issued. Six months later, the State and Mr. Kohberger should not be allowed to ambush Intervenor and the Court with evidence, particularly expert evidence, that they could have and should have disclosed and presented much earlier.

Intervenor otherwise urge the Court to vacate the Gag Order for the reasons set forth in their motion and memoranda filed on May 1, 2023, and on the declarations filed contemporaneously herewith.

DATED: June 2, 2023.

STOEL RIVES LLP

/s/ Wendy J. Olson

Wendy J. Olson

Cory M. Carone

Attorneys for Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 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:

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/s/ Wendy J. Olson
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