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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, v. BRYAN CHRISTOPHER KOHBERGER, Defendant.	Case No. CR29-22-2805 RESPONSE TO ASSOCIATED PRESS' MOTION TO INTERVENE AND MOTION TO VACATE THE AMENDED NONDISSEMINATION ORDER

In Response to the Associated Press' *Motion to Intervene* and *Motion to Vacate the Amended Nondissemination Order* in this case, the State incorporates the argument and legal analysis provided in its *Brief in Opposition to Writ by Intervenor-Respondent State of Idaho/Latah County* before the Idaho Supreme Court in Docket No. 50482-2023. That briefing is attached to this Response and incorporated herein.

With the decision in *In Re Petition for Writ of Mandamus or Writ of Prohibition*, it is now this Court's prerogative to determine the impact of the Amended Nondissemination Order ("Order") on the Associated Press' First Amendment rights, and whether the Order is "vague, overbroad, unduly restrictive, or not narrowly drawn." No. 50482, 2023 WL 3050829 (Idaho Apr. 24, 2023). As outlined

in the attached *Brief*, this Court should follow the reasoning of the Ninth and Second Circuit Courts of Appeal in *Radio and Television News Ass'n of Southern California v. U.S. Dist. Court for Cent. Dist. of California*, 781 F.2d 1143 (9th Cir. 1986) and *In Re Application of Dow Jones & Company, Inc.*, 842 F.2d 603 (2d Cir. 1988). Even though the Order might impact the Associated Press' ability to interview the parties subject to the Order, this incidental impact does not amount to a "prior restraint" on the speech of the Press or rise to the level of strict scrutiny.

Balancing First and Sixth Amendment interests in this case, the Amended Nondissemination Order is not vague, overbroad, or unduly restrictive as it limits only the speech of "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." These parties have special insights and information on the case, and limiting their speech to only those documents which are part of the "official public record of the case" provides a fair balance of First and Sixth Amendment rights. Even if strict scrutiny applies, the Order addresses the "serious and imminent threat" that unrestricted extrajudicial statements pose in a case surrounded by intense publicity, is narrowly drawn to trial participants, attorneys involved in the case, and is the least restrictive alternative. See *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 597-601 (1985).

Regarding the question of whether the order is narrowly drawn, neither voir dire, jury instructions, change of venue or postponement, or sequestration of the jury could "address the threat to judicial integrity posed by prejudicial extrajudicial statements." Id. at 599-601. As articulated in *Levine*, adopting any of the above alternatives would not address the issue of prejudicial pretrial publicity and "would be either ineffective or counterproductive." *Id.* at 600.

The Associated Press continues to argue that specific evidence of a Sixth Amendment infringement must be shown and that the court should only look at the evidence and state of the case at the time the initial Nondissemination Order was entered. These contentions are incorrect. As the Fifth Circuit Court of Appeals explained in *U.S. v. Brown*:

> [T]rial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979); see also *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 809, 66 L.Ed.2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); *424 *United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir.) (per curiam), cert. denied sub nom. *Cable News Network v. Noriega*, 498 U.S. 976, 111 S.Ct. 451, 112 L.Ed.2d 432 (1990). . . The vigilance of trial courts against the prejudicial effects of pretrial publicity also protects the interest of the public and the state in the fair administration of criminal justice.
>
> This duty comports with the constitutional status of all First Amendment freedoms, which are not absolute but must instead be "applied in light of the special characteristics of the [relevant] environment." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Indeed, "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise" in the context of both civil and criminal trials. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 2207–08 n. 18, 81 L.Ed.2d 17 (1984). "[O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Id.* There can be no question that a criminal defendant's right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps. See *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543 (1965) ("We have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs."); *Pennekamp*, 66 S.Ct. at 1047 (Frankfurter, J., concurring) ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries.") . . .
>
> [I]n *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Supreme Court vacated on prior restraint grounds an order prohibiting the press from publishing accounts about certain evidence that would be used in a widely reported murder trial taking place in a small, rural community. See 96 S.Ct. at 2807. In doing so, the Court endorsed *Sheppard* 's proposal that trial courts employ methods short of prior restraints on the press, including the prohibition of extrajudicial comments by trial participants, in order to mitigate the potentially prejudicial effects

> of pretrial publicity. See id. at 2800–01; see also *Foxman*, 939 F.2d at 1514 (11th Cir.1991).

218 F.3d 415, 425-28 (5th Cir. 2000). Thus, the Court has a duty to consider the overall effect of possible prejudicial pretrial publicity, and to balance that effect between the First and Sixth Amendment rights of the parties involved.

The Order in this case is in line with the Court's duties in *Sheppard* and is drawn as required by the U.S. Supreme Court decision in *Nebraska Press Ass'n.* The Order is not vague, overbroad, or unduly restrictive. The Order is a reasonable and viable option for this Court to meet its duties under *Sheppard* and only incidentally impacts the Associated Press' ability to interview trial participants. While others may claim to be bound by the Order, it clearly only restricts the speech of those participants with special information about the case. Thus, this Court should adopt the reasoning of the Ninth Circuit Court of Appeals in *Radio and Television News Ass'n* and *In Re Application of Dow Jones & Company, Inc.,* in holding that the incidental impact of the Order upon the Media's ability to interview trial participants is an adequate balance to the reasonable likelihood posed by prejudicial pretrial publicity.

Respectfully submitted this 6th day of June, 2023.

Bradley Rudley
Chief Civil Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the RESPONSE TO ASSOCIATED PRESS MOTION TO INTERVENE AND MOTION TO VACATE THE AMENDED NONDISSEMINATION ORDER was served on the following in the manner indicated below:

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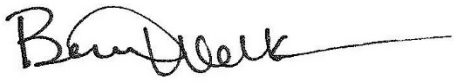

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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 YOUR 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

SUPREME COURT DOCKET NO.

50482-2023

BRIEF IN OPPOSITION TO WRIT BY INTERVENOR-RESPONDENT STATE OF IDAHO/LATAH COUNTY PROSECUTOR

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I.
INTRODUCTION

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260 (1941). The Court need not engage in the "delicate balancing" of these rights where the sole basis of the claimed infringement is access to interviews by the media. See *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974). For the rights of the media to gather information are no greater than those of the general public. *Id.*

This case involves the duty of the Court, counsel for the accused, and the prosecutor to safeguard the rights of the parties to a fair and impartial jury trial. On January 18, 2023, Respondent, Judge Megan E. Marshall, entered an "Amended Nondissemination Order" in the case of *State of Idaho v. Bryan C. Kohberger*, CR29-22-2805 ("underlying criminal case") which orders that:

> 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 references to the official public record of the case.

Declaration of Wendy J. Olson ("Olson Decl."), Ex. C. The "Amended Nondissemination Order" was issued after an in-chambers meeting between the parties and the attorneys for the victim's families. Declaration of Deborah A. Ferguson ("Ferguson Decl."), Ex. A. While many may claim to be bound by the "Amended Nondissemination Order,"[1] the Order specifically limits the

[1] See Petition for a Writ of Mandamus or Writ of Prohibition, pp. 3-4 (citing instances where persons or agencies, who are not a part of this matter, refused to answer an interview question on the basis of the "Amended

speech of "attorneys, for any interested party . . . any attorney representing a witness, victim, or victim's family . . . investigators, law enforcement personal [SIC], and agents for the prosecuting attorney and defense attorney" in line with Rule 3.6 of the Idaho Rules of Professional Conduct.

Following the entry of the "Amended Nondissemination Order," the Petitioners in this case, approximately 30 media companies, filed for the issuance of Writ of Mandamus or Writ of Prohibition to "vacat[e] or nullify[] the amended gag order." This case, however, is not about a restriction on speech of the press, a contempt order, or the closure of a court proceeding,[2] but the safeguarding of the right to a fair trial by an impartial jury and the incidental effects of the "Amended Nondissemination Order" on the Petitioners' ability to interview certain trial participants.

First, the Petitioners are not entitled to a Writ of Mandamus or Writ of Prohibition because their First Amendment rights have not been infringed by the incidental effects of the "Amended Nondissemination Order." The Petitioners are free to seek interviews from witnesses and observe the court proceedings in the underlying case. This Court should follow the reasoning of the Ninth and Second Circuit Court of Appeals in *Radio and Television News Ass'n of Southern California v. U.S. Dist. Court for Cent. Dist. of California*, 781 F.2d 1143 (9th Cir. 1986) and *In Re Application of Dow Jones & Company, Inc.*, 842 F.2d 603 (2d Cir. 1988).

Even if the Court were to expand the powers of the media to attack lawful orders in criminal cases which bind those parties involved to the Rules of Professional Conduct, the

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Nondissemination Order.")

[2] See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Addressing an order which specifically restricted the press from publishing or broadcasting a confession); *Bridges*, 314 U.S. at 258 (Relating to contempt proceedings and fines by the Court for comments related to pending litigation); and *Press-Enter. Co. v. Superior Court of California*, 478 U.S. 1 (1986) (Holding that there is a qualified First Amendment right to access to criminal hearings).

"Amended Nondissemination Order" meets the dictates of "strict scrutiny" because the Order addresses the "serious and imminent threat" that unrestricted extrajudicial statements pose in a case surrounded by intense publicity, is narrowly drawn to trial participants, and is the least restrictive alternative. See *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 597-601 (1985). Finally, the Court should not create a First Amendment right which has not been recognized - the right to access or interview trial participants. Thus, the Respondent-Intervenor requests that the Court DENY the Petition for a Writ of Mandamus or Writ of Prohibition.

II.
STATEMENT OF THE CASE

As set out by Respondent-Intervenor State of Idaho/Latah County Prosecutor in its February 17, 2023 Memorandum in Support of Petition for Leave to Intervene by State of Idaho, Latah County Prosecutor:

> In criminal case number CR29-22-2805 the defendant, Bryan C. Kohberger, is charged by criminal complaint of the State of Idaho with four counts of murder in the first degree and one count of burglary. The case is still in the pretrial phase and is set for preliminary hearing on June 26, 2023.
>
> This case and investigation have been the subject of great publicity. In light of such publicity, the parties in the underlying criminal case stipulated to the entry of the "Nondissemination Order" on January 3, 2023. Olson Decl., Ex. A. That Order was later Amended on January 18, 2023, to ensure "the balance between protecting the right to fair trial for all parties involved." Olson Decl., Ex. C.

p. 6. Prior to the issuance of the "Amended Nondissemination Order," the attorneys for the parties in the underlying criminal case and attorneys for the victims' families met with Judge Megan E. Marshall via Zoom on January 13, 2023, to discuss the parameters of the Order. Ferguson Decl., Ex. A. Judge Marshall noted that the Order "mirrors Idaho Rules of Professional Conduct Rule 3.6" and that the attorneys in the case should not be "speculating" about what will

happen to the media. *Id.* at p. 1.

On February 14, 2023 the Petitioners in this case filed a Petition for a Writ of Mandamus or a Writ of Prohibition asking that the Supreme Court "vacat[e] or nullify[] the amended gag order." Respondent-Intervenor State of Idaho/Latah County Prosecutor was granted leave to intervene on February 23, 2023, and submits this Brief in Opposition to Writ.

III.
ISSUE PRESENTED

Respondent-Intervenor State of Idaho/Latah County Prosecutor would reframe the issues for the Court as follows:

> Whether Respondent Judge Megan E. Marshall's "Amended Nondissemination Order" adequately balances the Sixth Amendment right to a fair and impartial jury trial, guaranteed by the United States' Constitution, against the effect on the Petitioners' ability to interview the attorneys, investigators, law enforcement personnel, and agents for the prosecution and defense in the underlying criminal case.

IV.
STANDARD OF REVIEW

As stated in *Idaho v. District Court of Fourth Judicial Dist.*:

> Article 5, section 9 of the Idaho Constitution grants this Court original jurisdiction to issue writs of prohibition. [F]or the writ of prohibition to issue, it is necessary that two contingencies must be shown[:] that the tribunal, corporation, board or person is proceeding without or in excess of the jurisdiction of such tribunal corporation, board, or person, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law A right of appeal is regarded as a plain, speedy and adequate remedy at law in the absence of a showing of exceptional circumstances or of the inadequacy of an appeal to protect existing rights. Prohibition is primarily concerned with jurisdiction and is not available to review errors committed in the exercise of jurisdiction. A writ of prohibition, like a writ of mandate, will not lie to control discretionary acts of courts acting within their jurisdiction.
>
> An applicant bears the burden of showing that the lower court is acting without or in excess of its jurisdiction. Id. Jurisdiction is a question of law over which this

> Court exercises free review.

143 Idaho 695, 698-99 (2006). Additionally:

> The writ of prohibition is a discretionary remedy under Idaho common law, granted only when this Court concludes that the remedy is appropriate.
>
> The term "jurisdiction" has a specific meaning in the context of a writ of prohibition. That is, "when used in reference to a writ of prohibition," the word "jurisdiction" includes "power or authority conferred by law." Thus, in the context of a writ of prohibition, the question of jurisdiction is not merely a question of whether the tribunal had subject matter and personal jurisdiction, but also whether the tribunal had the lawful authority to take the action that it did.

Re: Petition for Writ of Prohibition, 168 Idaho 909, 919 (2021).

V.
ARGUMENT

The Sixth Amendment to the U.S. Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const, amend VI. This is not only a duty of the Court and counsel for the accused, but also of the prosecutor as a public officer. *State v. Spencer*, 74 Idaho 173, 183 (1953). For "uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan J., concurring). In contrast, the "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). "The potential for injury to the integrity of the judicial process is significant in cases involving trial publicity. As the Supreme Court has noted, 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" *Levine*, 764 F.2d at 597 (quoting *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907)).

The "Amended Nondissemination Order" does not suppress or restrain the speech of the press, but simply limits the extrajudicial statements of attorneys, officers, and court personnel in the underlying criminal case to those requirements set forth in Idaho Rules of Professional Conduct 3.6 and 3.8. This Court should adopt the reasoning in *Radio & Television News Ass'n of Southern California v. U.S. Dist. Court for Cent. Dist. of California* and *Application of Dow Jones & Co., Inc.*, in holding that such incidental effect on the Petitioners' ability to interview these personnel does not rise to the level of a First Amendment infringement. 781 F.2d 1443; 842 F.2d 603.

Even if this Court expands the power of the press to challenge trial court orders which only incidentally effect their ability to interview the attorneys in a criminal case, the "Amended Nondissemination Order" meets the dictates of strict scrutiny because the Order addresses the "serious and imminent threat" that unrestricted extrajudicial statements pose in a case surrounded by intense publicity, is narrowly drawn to trial participants, and is the least restrictive alternative. *Levine* 764 F.2d at 590.

Finally, this Court should not expand the First Amendment rights of the press to challenge orders which do not impair their ability to speak or publish under Article I, Section 9 of the Idaho Constitution or other existing rights under the First Amendment to the United States Constitution.

A. The Petitioners have not demonstrated an infringement of their First Amendment rights as the "Amended Nondissemination Order" only effects the ability of specific parties in the underlying criminal case to answer the Petitioners' questions.

In a case surrounded by "intense" publicity and media attention, it is the duty of the Court to "take such steps by rule and regulation that will protect their process from prejudicial outside

interferences." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Where the impact of extrajudicial statements upon a case is so high, the Court should make "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.* at 359. Where a Court enters an order to limit the extrajudicial statements of attorneys and law enforcement in a case, the impact on the media is only "incidental," in that the media may still ask questions, gather information from court proceedings and report such information, but the attorney or officer may decline to answer questions. *Radio & Television News Ass'n*, 781 F.2d at 1447.

In this case, the Court should adopt the reasoning of the Ninth Circuit Court of Appeals in *Radio & Television News Ass'n.* and *In Re Application of Dow Jones & Co.* because the "Amended Nondissemination Order" only limits the speech of specific parties who would otherwise be subject to the Idaho Rules of Professional Conduct, and the Petitioners' abilities to speak and observe the criminal justice process are not infringed. Further, the "Amended Nondissemination Order" merely adopts the dictates of the Idaho Rules of Professional Conduct and is a proper exercise of the lower court's power.

1. This Court should follow the Ninth and Second Circuit Court of Appeals' reasoning and apply that test to this matter because the "Amended Nondissemination Order" does not infringe on Petitioners' speech, ability to gather information, or constitute a denial of access to the court proceedings.

The reasoning and tests outlined by the Ninth Circuit Court of Appeals in *Radio & Television News Ass'n.* and the Second Circuit Court of Appeals in *In Re Application of Dow Jones & Co., Inc.* properly limit the scope of the Court's review in this case to those matters which are only challenged by the media-Petitioners; whether they have a First Amendment right to interview specific parties.

In the case of *Radio & Television News Ass'n*, the Ninth Circuit Court of Appeals was asked to decide whether an amended restraining order in a criminal case, which barred the attorneys in that case from speaking with the media on matters relating to several subjects, constituted an unconstitutional prior restraint on the First Amendment rights of the press. 781 F.2d at 1444. After examining the U.S. Supreme Court precedent regarding the rights of the press to interview, the Court noted that:

> 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. Ultimately, the Court held "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment. The media's desire to obtain access to certain sources of information, that otherwise might be available, is not a sufficient interest to establish an infringement of freedom of the press in this case." *Id.* at 1447 (internal citations omitted). To assess the incidental effect of the order, the Court adopted the test to assess "[W]hether the restrictions imposed are reasonable and whether the interests of the government override the very limited incidental effects of the order on First Amendment rights. The restrictions imposed also must not serve an illegitimate purpose." *Id.* (internal citations omitted). Restricting extrajudicial statements by the parties was then found to be a reasonable and legitimate interest for safeguarding the right to a fair trial and the integrity of the judicial process. *Id.*

In the case of *In Re Dow Jones & Co., Inc.*, the Second Circuit Court of Appeals was confronted with the similar question of whether a "gag" order on the speech of attorneys and parties in an underlying criminal case constituted a First Amendment infringement on the press'

ability to interview and gather information. 842 F.2d at 605. In adopting the rationales in *Radio & Television News Ass'n,* the Court held that the order did not constitute a "prior restraint" on the speech of the press subject to strict scrutiny, and that "the failure to restrain the trial participants would add 'fuel to an already voracious fire of publicity' and create 'a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial.'" *Id.* at 611 (internal quotations omitted). The Court recognized the "critical" distinction between a challenge by the press to an order that restrains them, versus an order that restrains trial participants that is challenged by the press. *Id.* at 608.

Conversely, the decision by the Sixth Circuit Court of Appeals in *CBS Inc. v. Young* is distinguishable from the case at hand. 522 F.2d 234 (6th Cir. 1975). In that case, the Sixth Circuit granted intervention for all parties in a civil case which were subject to the order. *Id.* at 236. The order limited not only the speech of the parties in that case, but also "their relatives, close friends, and associates." *Id.* As stated in *In Re Dow Jones & Co., Inc.*:

> In *Young*, the court held that "the conclusion is inevitable that [the restraining order] constitutes a prior direct restraint upon freedom of expression." *Id.* at 239. Adopting this view ignores the fact that the defendants here requested the order and urge its affirmance. Thus, we conclude that there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not.

842 F.2d at 609. Additionally, in the case of *Michigan v. Sledge* cited by the Petitioners, the lower court entered a "gag" order *sua sponte,* and there was no indication that the prosecutor or defense counsel wanted such order in place. 879 N.W.2d 884, 896 (Mich. Ct. App. 2015).

In this case, the Court should adopt the reasoning and test set out in *Radio & Television News Ass'n* and *In Re Dow Jones & Co., Inc.* The Prosecutor and Defense stipulated to the entry

of the "Nondissemination Order" in the underlying case. Olson Decl., Ex. A. On inquiry about whether the Order applied to the attorney's for the victim's families, the Court held a conference between all persons involved, and found that the Order was: 1) a memorialization of Idaho Rule of Professional Conduct 3.6; 2) in response to what the Court had been "seeing and hearing from various media sources"; and 3) that "comments are harming the ability to impanel a jury." Ferguson Decl., Ex. A at pp. 1-3. Similar to *Radio & Television News Ass'n* and *In Re Dow Jones & Co. Inc.*, the parties in this proceeding before the Court want the "Amended Nondissemination Order" to remain in place. The only person effected by the Order who does not wish for it to remain intact, attorney Shanon Gray, is not a party to this Writ proceeding.

Therefore, this Court should adopt the holdings by the Ninth and Second Circuit Court of Appeals in denying the requested Writs because the "Amended Nondissemination Order" only incidentally effects the Petitioners' ability to interview the primary trial participants in the underlying case.

2. The "Amended Nondissemination Order" is in line with the requirements of the Idaho Rules of Professional Conduct and the power of the Court to limit the speech of attorneys, law enforcement personnel, investigators, and their agents.

Idaho Rule of Professional Conduct (I.R.P.C.) 3.6, regarding "Trial Publicity" requires that:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Comment 5 to I.R.P.C. 3.6 states that:

> There are, on the other hand, certain subjects that are more likely than not to have

> a material prejudicial effect on a proceeding particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) In a criminal case or proceeding that could result in incarceration, 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 or suspect or that person's refusal or failure to make a statement;
>
> (3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) Information that the 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; or
>
> (6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Additionally, the prosecutor is further bound by I.R.P.C. 3.8. These principles are reflected in the "Amended Nondissemination Order" and provide the Court in the underlying criminal case with means to enforce such concepts through a contempt proceeding if a party attorney were to violate these dictates. As the U.S. Supreme Court noted, albeit in dicta in Footnote 27 of *Nebraska Press Ass'n v. Stuart*:

> A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. In *Sheppard v. Maxwell, supra*, we observed that 'the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. . . ' As officers of the court, court personnel and attorneys have a fiduciary

> responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, *see In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. *Cf. New York Times Co. v. United States*, 403 U.S., at 728-730, 91 S.Ct., at 2148-2149 (Stewart, J., joined by White J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.

427 U.S. 539, n. 27 (1976). Thus, the "Amended Nondissemination Order" appropriately limits the speech by attorneys, law enforcement personnel, investigators, and agents involved in the case to only the "official public record of the case."

B. Even if the Court finds that strict scrutiny applies, the "Amended Nondissemination Order" is the least restrictive alternative, narrowly drawn, to address the "clear and present danger" or "serious and imminent threat" that is posed by unmanaged extrajudicial statements.

If this Court expands the rights of the press to assert standing to challenge the "Amended Nondissemination Order" as a prior restraint on their ability to interview the parties subject to the Order, the Order still meets the requirements of strict scrutiny. An order that restricts extrajudicial speech of litigants will survive strict scrutiny 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).

In *Levine*, the underlying criminal case which yielded an amended "gag" order that was the subject of the decision in *Radio & Television News Ass'n*, the attorneys for a defendant charged with espionage sought a writ of mandamus to dissolve an order restraining the speech of the defense attorneys in that case. *Id.* The order at issue specifically stated "that all attorneys in this case, all parties and all their representatives and agents of counsel and the parties shall not

make any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury" and also included "witnesses." *Id.* at 593. In applying strict scrutiny to the restrictions on the speech of the attorneys and witnesses which challenged the order in that case, the Court held that the lower court properly found that "publicity posed a serious and imminent threat to the administration of justice," but that the order was overbroad. *Id.* at 598-99. In recommending how to redraw the order, the Court cited the subjects relating to *ABA Model Rules of Professional Conduct 3.6* (1998); *ABA Standards for Criminal Justice Standard* 8-11 (1982); and *Model Code of Professional Responsibility* DR 7-107 (197), which largely mirror Comment 5 to I.R.P.C. 3.6. *Id.*

In evaluating the possible "least restrictive alternatives" outlined in *Nebraska Press Ass'n*, the Court held that neither voir dire, jury instructions, change of venue or postponement, or sequestration of the jury could "address the threat to judicial integrity posed by prejudicial extrajudicial statements" in that case. *Id.* at 599-601. "The various alternatives to a restraining order would be either ineffective or counterproductive. A restraining order on trial participants, however, is a highly effective remedy for excessive trial publicity." *Id.* at 600-01.

This case similarly involves intense, nationwide publicity. This was at the forefront of Respondent, Judge Megan E. Marshall's concerns during the January 13, 2023 meeting when she stated that the case has garnered national and international attention, and that the attorneys should not be speculating to the media. Ferguson Decl., Ex. A at p. 2. The Judge found that "comments are harming the ability to impanel a jury" and issued the "Amended Nondissemination Order" following that meeting. *Id.* at pp. 2-3. Similar to *Levine*, this oral finding meets the requirement for the order to address a "serious and imminent threat to the

administration of justice." The order is narrowly drawn, in that it does not apply to witnesses, and limits speech to the "official public record of the case" and those categories addressed by Comment 5 to I.R.P.C. 3.6. As noted in *Levine*, the possible least restrictive alternatives discussed in *Nebraska Press Ass'n* would run contradictory to the harm addressed by the "Amended Nondissemination Order" and are not possible alternatives to address pretrial publicity. See *Nebraska Press Ass'n*, 427 U.S. at 563-64.

Therefore, even if this Court expands the ability of the Petitioners to challenge orders which only incidentally effect their ability to interview, the "Amended Nondissemination Order" meets the requirements of strict scrutiny.

C The Court should not expand the First Amendment rights of the Petitioners by adopting a "right to access trial participants."

The First Amendment to the U.S. Constitution does not guarantee the press "full access to trial participants." *Radio & Television News Ass'n*, 781 F.2d at 1446. Rather, the rights of the press are limited to "access [of] our criminal courts and criminal justice process" as "the media is granted access to the same information, but nothing more, that is available to the public." See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); and *Pell*, 417 U.S. at 835.

In Idaho, Article I, Section 9 of the Idaho Constitution grants that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Idaho courts have recognized a qualified right of the public to access a preliminary hearing, but do not appear to have addressed the scope of the First Amendment in relation to "gag" orders on trial participants. See *Cowles Publishing Co. v. Magistrate Court of the First Judicial Dist. of State, County of Kootenai*, 118 Idaho 753 (1990) (Finding that there was a qualified First Amendment right of access to preliminary hearings per *Press-Enter. Co. v. Superior Court of*

California decision).

The issue before this Court is whether the incidental effect of the "Amended Nondissemination Order" on the Petitioners' ability to get responses from the attorneys, investigators, law enforcement personnel, and agents of the prosecutor and defense counsel, rises to the level of First Amendment violation. This Court should decide in line with *Radio & Television News Ass'n* holding that the Petitioners do not have standing to challenge any restrictions the Order might have on a third-party and should not create a new right which has not been recognized in Idaho - a right to access trial court participants bound by the Idaho Rules of Professional Conduct.

VI.
CONCLUSION

Petitioners have failed to meet the requirements for the issuance of a Writ of Mandamus or Writ of Prohibition because the minimal and incidental impact of the "Amended Nondissemination Order" on the Petitioners' ability to access and interview the attorneys, investigators, law enforcement, and agents of the prosecutor and criminal defense attorney in the underlying criminal case does not rise to the level of a First Amendment infringement.

The State respectfully presents these requests to the Court.

DATED this 3rd day of March, 2023.

Bradley J. Rudley
Chief Civil Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **BRIEF IN OPPOSITION BY STATE/LATAH COUNTY PROSECUTOR** was served on the following in the manner indicated below:

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DATED this 3rd day of March, 2023.