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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 **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