

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**SUPREME COURT DOCKET NO. 50482-2023**

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

Petitioners,

vs.

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

Respondents.

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**PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION**

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For Petitioners

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

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

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

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

Although there is no history of extrajudicial statements that could prejudice Mr. Kohberger’s right to a fair trial, his attorney and the prosecutor stipulated to a gag order “prohibiting attorneys, investigators, and law enforcement personnel from making any extrajudicial statement, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the Court in this case.” Declaration of Wendy J. Olson (“Olson Decl.”), Ex. A. The parties submitted no evidence that Mr. Kohberger would be prejudiced absent the requested order. The stipulation merely said: “As this Court is aware, this case involves matters that have received a great deal of publicity.” *Id.* That same day and without a hearing, the District Court issued the requested order. Olson Decl., Ex. B. The District Court did not make any factual findings in its order. *Id.*

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

The gag order has restrained Petitioners’ rights to gather and publish information about this newsworthy matter. For example:

- A victim’s family wants to speak with the press about Mr. Kohberger’s prosecution, but they feel bound by the gag order. Olson Decl., Ex. D.
- A Washington agency has requested declaratory relief to determine whether, consistent with the gag order, it can produce 911 tapes in response to public records requests. Olson Decl., Ex. E.
- Major Christopher Paris of the Pennsylvania State Police told reporter Chris Ingalls that he could not answer whether police had launched any review of unsolved cases that could be linked to Mr. Kohberger because of the gag order.

- Moscow Mayor Art Bettge told reporter Erica Zucco that the city attorney advised he could not answer questions about the overall community healing in Moscow because of the gag order.
- Journalist Taylor Mirfendereski’s public records requests were denied by the Latah County’s Sheriff’s Office, Moscow Police Department, Pullman Police Department, and Washington State Police Department because of the gag order.
- The Moscow Police Department issued a press release that: “Due to this court order, the Moscow Police Department will no longer be communicating with the public or the media regarding this case.” Olson Decl., Ex. F.
- Gary Jenkins, Chief of Police at Washington State University, and Matt Young, Communication Coordinator for the City of Pullman, told reporter Morgan Romero that they could not answer whether Mr. Kohberger applied for a graduate assistant research position with the Pullman Police Department because of the gag order.
- The Moscow Police Department refused to advise a reporter from the Idaho Statesman how many cellphone towers are in the area near where the murders occurred, the size of Mr. Kohberger’s cell, the size of the Moscow jail, and the nature of Mr. Kohberger’s meals because of the gag order.

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

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

DATED: February 6, 2023

STOEL RIVES LLP

/s/ Wendy J. Olson

Wendy J. Olson

Cory M. Carone

*Attorneys for Petitioners*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6<sup>th</sup> day of February 2023, I served a true and correct copy of the within and foregoing **PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION** upon the following named parties by the method indicated below, and addressed to the following:

Second Judicial District of the State of Idaho,    \_\_\_ Hand Delivered  
County of Latah                                            \_\_\_ Mailed Postage Prepaid  
Attn: Roland Gammill                                   \_\_\_ Via Facsimile  
Trial Court Administrator                            X  U.S. Mail  
Latah County Courthouse                            X  Via email  
P.O. Box 896                                                X  Via iCourt efile & serve at:  
Lewiston, ID 83501                                                 *TCA2@co.nezperce.id.us*

Hon. Megan E. Marshall                                   \_\_\_ Hand Delivered  
Latah County Courthouse                           \_\_\_ Mailed Postage Prepaid  
P.O. Box 8068                                             \_\_\_ Via Facsimile  
Moscow, ID 83843                                        X  U.S. Mail  
                                                                         \_\_\_ Via email  
                                                                         \_\_\_ Via iCourt efile & serve at:

/s/ Wendy J. Olson  
Wendy J. Olson