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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 50482-2023

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Petitioners,

vs.

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

Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION

For Petitioners

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

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I. STATEMENT OF THE CASE

In December 2022, Bryan C. Kohberger was arrested and charged for allegedly murdering four students at the University of Idaho. His prosecution is pending in Latah County in *State of Idaho v. Bryan C. Kohberger*, case no. CR29-22-2805.

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 his attorney and the prosecuting attorney 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.

On the same day as the stipulation, the District Court issued the gag order. Olson Decl., Ex. B. The District Court made no factual findings in support of the gag order, nor could it as the parties presented no evidence and the District Court did not hold a hearing.

Fifteen days later, the District Court *sua sponte* issued an amended gag order (what it called the "Amended Nondissemination Order"). Olson Decl., Ex. C. The District Court noted in the amended gag order that: "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*. The District Court made

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

no factual findings in support of that conclusion—which of course it could not as, again, the parties presented no evidence, and the District Court did not hold a hearing.

With no explanation, the District Court expanded the scope of the gag order beyond what the parties had requested. The amended 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.*

Petitioners are a coalition of media companies that but for the amended gag order would publish more information about the murders at the University of Idaho and Mr. Kohberger's prosecution. Each Petitioner is aware that either it or another media company within the coalition have been affected by the gag order as follows:

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

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

Petitioners bring this petition for a preemptory writ of mandamus, or for a writ of prohibition, to vacate or nullify the amended gag order.

II. STATEMENT OF THE ISSUES

Whether a court violates the free speech provisions of the United States Constitution and the Idaho Constitution by issuing a gag order without finding that (1) the prohibited speech will

prejudice a criminal defendant's right to a fair trial and (2) any prejudice caused by the prohibited speech cannot be prevented or cured through less restrictive means.

III. ARGUMENT

A. The Court should exercise its original jurisdiction.

The Court may exercise original jurisdiction to issue writs of mandamus and writs of prohibition. Idaho Const. art. V, § 9. The Court typically exercises its original jurisdiction "in matters where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature." *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021) (internal quotation marks and citation omitted).

As explained below, the amended gag order violates the First Amendment of the United States Constitution and Article 1, Section 9 of the Idaho Constitution. Those are constitutional violations of an urgent nature. "[A]ny First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers). "Even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." *Cap. Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983).

B. A writ of mandamus, or a writ of prohibition, is a proper remedy.

A writ of mandamus (also called a writ of mandate) "is an order issued by the court to any inferior court" that "compels the performance of an act which a party has a duty to perform as a result of an office, trust or station." I.R.C.P. 74(a)(1); *see also* Idaho Code § 7-302. "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." Idaho Code § 7-303.

A writ of prohibition "is an order that arrests the proceedings of any court . . . when such proceedings are without or in excess of the jurisdiction of the court." I.R.C.P. 74(a)(2); *see also*

Idaho Code § 7-401. "The term 'jurisdiction' has a specific meaning in the context of a writ of prohibition." *Re Petition for Writ of Prohibition*, 168 Idaho 909, 919, 489 P.3d 820, 830 (2021) (citation omitted). It "includes power or authority conferred by law." *Id.* (internal quotation marks and citation omitted). In this context, "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." *Id.* As "the counterpart of the writ of mandate," Idaho Code § 7-401, the writ of prohibition may also be issued "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." Idaho Code § 7-402.

As previewed above and explained further below, the amended gag order violates the free speech provisions of the United States Constitution and the Idaho Constitution. When it issued the amended gag order, the District Court violated its duty to perform in accordance with the law and exercised power exceeding its jurisdiction. Accordingly, either a writ of mandamus or a writ of prohibition is appropriate. A writ of prohibition is also appropriate because the District Court exceeded its personal jurisdiction by issuing an order affecting individuals, such as Washington's state agencies, the Pennsylvania State Police, and some of the victims' family members, that are not parties before the District Court and may be domiciled outside the State of Idaho.

There is not a plain, speedy, and adequate remedy in the ordinary course of law. Without holding a hearing, the District Court issued the original gag order the same day that the parties submitted their stipulation. Petitioners did not have an opportunity to lodge a written or oral objection. The District Court then *sua sponte* and again without a hearing issued the amended gag order. Again, Petitioners did not have an opportunity to lodge a written or oral objection.

Petitioners cannot now intervene below to challenge the amended gag order because Idaho's Criminal Rules do not provide for intervention in any instances. And even if the District

Court looked to I.R.C.P. 24(a) or (b) for guidance, Petitioners cannot move in good faith to intervene because there is no "property or transaction" before the District Court and Petitioners do not have a "claim or defense" in common with the State or Mr. Kohberger. For similar reasons, the Fourth Circuit has observed: "Petitioners appropriately seek mandamus relief, as it is the preferred method for review of orders restricting press activity related to criminal proceedings." *In re The Wall St. J.*, 601 F. App'x 215, 218 (4th Cir. 2015) (internal quotation marks and citation omitted); *see also United States v. Davis*, 902 F. Supp. 98, 101 (E.D. La. 1995) ("In criminal cases, most newspapers have challenged gag orders by seeking mandamus against the court or the judge."); *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975) ("The petitioner, being neither a party to the litigation nor specifically enjoined by the order from discussing the case, . . . would be without remedy should we find that the writ of mandamus could not be invoked.").

C. The amended gag order violates the First Amendment of the United States Constitution.

The amended gag order prohibits protected speech about a newsworthy event. The question is whether that limit on protected speech, which normally would be unlawful, is justified given Mr. Kohberger's right to a fair trial. This Court has not decided which test Idaho courts should apply to answer that question and to balance those competing rights,[2] and the federal courts have taken different views. *Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988) (White, J., dissenting). Some require strict scrutiny, and some require something less.

[2] That said, when considering whether a preliminary hearing should be open to the public, the Court required finding: "first, a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Cowles Pub. Co. v. Magistrate Ct. of the First Jud. Dist. of State, Cnty. of Kootenai*, 118 Idaho 753, 760, 800 P.2d 640, 647 (1990).

The common denominator under any test is that there must be some factual finding by the issuing court that without the gag order there will be (1) prejudicial pretrial publicity (2) that cannot be remedied. The quantum of speech is not a factor. More speech does not mean a less fair trial; the speech at issue must be the kind that could prejudice a jury. And even when publicity may cause prejudice, the answer is not always to suppress the speech. Other remedies like the passing of time, a change in venue, voir dire, jury instructions, and jury sequestration can cleanse any jury taint without offending the right to speech.

The Court should clarify that Idaho courts must apply strict scrutiny to gag orders in criminal cases. But under any standard, the Court should vacate the amended gag order because the District Court failed to make factual findings that (1) the prohibited publicity will prejudice Mr. Kohberger, and (2) less restrictive remedies cannot prevent or cure the prejudice.

1. The Court should apply strict scrutiny to the amended gag order.

The Court should apply strict scrutiny to the amended gag order for two reasons. The first is that the amended gag order is a prior restraint on speech. The second is that applying anything less than strict scrutiny risks suppressing protected speech when it is not necessary to do so.

a. The amended gag order is a prior restraint.

Speech presupposes a speaker and a recipient. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Without the one there cannot be the other. So the right to speech "necessarily protects the right to receive" information and ideas. *Id.* at 757 (citation omitted). There is thus a "constitutionally guaranteed right as a member of the press to gather news." *CBS Inc.*, 522 F.2d at 238.

The amended gag order restrains that constitutional right before it can be exercised. Petitioners 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 Petitioners that Petitioners would then make editorial decisions about whether and when to publish. Petitioners' 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.").

The Court should follow the other cases that have treated gag orders like the one here as a prior restraint. *CBS Inc.*, 522 F.2d 234; *People v. Sledge*, 312 Mich. App. 516, 879 N.W.2d 884 (2015); *see also United States v. Aldawsari*, 683 F.3d 660, 665 (5th Cir. 2012) (implicitly treating a gag order as a prior restraint by applying strict scrutiny); *but see Radio & Television News Ass'n of S. Cal. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 781 F.2d 1443, 1446 (9th Cir. 1986); *Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir. 1988).

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 California*, 764 F.2d 590, 595 (9th Cir. 1985).

b. Strict scrutiny properly balances the right to speech with the right to a fair trial.

"[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 "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 Supreme Court's precedent "demonstrate[s] that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska 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. Many mitigating measures exist, "include[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 at 611 (citing *Sheppard*, 384 U.S. 333, and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539).

Taken together, these principles show that when balancing the right to speech with the right to a fair trial, a court's goal should be to give both rights the maximum effect possible. *See Procunier v. Martinez*, 416 U.S. 396, 409–10 (1974) (explaining that when balancing competing interests in *Tinker* the Supreme Court "undertook a careful analysis of the legitimate requirements of orderly school administration in order to ensure that the students were afforded maximum freedom of speech consistent with those requirements"); *Holland v. Wilson*, 737 F. Supp. 82, 85 (M.D. Ala. 1989) ("These decisions dealing with the balancing of competing constitutional rights are always difficult. However, one person's constitutional rights end where another's begin."). Otherwise, a court accepts regulation of protected speech that does *not* infringe the Sixth Amendment. The First Amendment yields to the Sixth Amendment if, and only if, the protected speech incurably prejudices the criminal defendant.

Strict scrutiny is designed to accomplish the task of giving the First Amendment and the Sixth Amendment the maximum effect possible. It is an exacting standard that is neither overinclusive nor underinclusive. Under strict scrutiny, speech is curtailed only when (1) the speech is almost certain to prejudice the criminal defendant, and (2) nothing else can prevent or

cure the prejudice. 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." *Nebraska Press Ass'n v. Stuart*, 423 U.S. at 1329 (Blackmun, J., in chambers).

The Court should apply strict scrutiny to the amended gag order.

2. The amended gag order fails 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 amended 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 District Court did not collect any evidence, hold any hearings, or make any factual determinations. In any event, 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. That rule says: "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." The parties' willingness to enter the stipulation suggests

they intend to strictly comply with that rule. There is not a clear and present danger or a serious and imminent threat that publicity will prejudice Mr. Kohberger's right to a fair trial.

Second, the amended gag order is not narrowly drawn. It is directed at a wide group of people: "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[.]" Olson Decl., Ex. C. And it covers a wide range of statements: "extrajudicial statements (written or oral) concerning this case, except, without additional comment, quotation from or reference to the official public record of the case." *Id.* The amended gag order also provides specific examples of the types of statements that are prohibited, but that list does not limit the general prohibition on any extrajudicial statements concerning this case. The amended 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 the amended gag order. Those topics of speech, while arguably subject to the amended gag order, are unlikely to prejudice Mr. Kohberger. Yet they are suppressed.

Third, the District Court did not consider a single alternative to the gag order, even though less restrictive alternatives are plainly available. 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. *Application of Dow Jones & Co.*, 842 F.2d at 611 (citing

Sheppard, 384 U.S. 333, and *Nebraska Press Ass'n v. Stuart*, 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), and given the seriousness of the charges, trial is likely more than a year away. The District Court has 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.

3. The amended 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 *Application of Dow Jones & Co.*, 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 Jan. 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.").

Here, the District Court did not take any evidence or a hold a hearing. It made no factual findings that publicity will prejudice Mr. Kohberger, and it did not consider any alternatives short of the gag order. 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 amended 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 amended 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 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 amended gag order suppresses speech without any justification. That violates the First Amendment no matter the test applied.

4. The Court should decide which standard Idaho courts must apply when entering gag orders.

Petitioners recognize that the Court may be inclined not to decide whether to apply strict scrutiny or something less because the amended gag order fails under any test. While that judicious approach is often the wise approach, the circumstances here require more clarity. Even if the Court grants the relief requested here, the District Court may later consider some facts and craft a slightly narrower gag order. Or another court may need to craft a gag order in a different criminal matter. Without clear guidance about which standard to apply, the District Court or another Idaho court may again enter an unlawful gag order. That order will wrongly suppress protected speech, causing irreparable harm from the moment it is entered until it can be challenged. The public should not suffer that irreparable harm.

D. The amended gag order violates Article I, Section 9 of the Idaho Constitution.

Courts have "addressed simultaneously" the First Amendment of the United States 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 amended gag order violates the Idaho Constitution for the same reasons that it violates the United States Constitution.[3]

But the Court need not treat Idaho's Constitution in lockstep with the United States 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

[3] The Court should make that finding, even if technically unnecessary, in case federal law ever changes.

"publish on *all subjects*." (Emphasis added.) For criminal trials, all subjects would include both information presented inside the courtroom and information presented outside the courtroom.[4]

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

Petitioners request that the Court exercise its original jurisdiction to issue a writ of mandamus or a writ of prohibition vacating or nullifying the amended gag order.

DATED: February 14, 2023.

STOEL RIVES LLP

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

Attorneys for Petitioners

[4] That difference distinguishes any federal decisions granting lesser protection to extrajudicial statements because, in those courts' views, the First Amendment primarily protects statements made in the courtroom.

CERTIFICATE OF SERVICE

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

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

/s/ Wendy J. Olson
Wendy J. Olson