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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

CASE NO. 50482-2023

THE ASSOCIATED PRESS, et al.,

Petitioners,

v.

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

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION

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I. NATURE OF CASE

This is a petition for a writ of mandamus or prohibition brought by a coalition of media companies. Petitioners request that this Court exercise its original jurisdiction and vacate the Amended Nondissemination Order entered by the Honorable Megan E. Marshall on January 18, 2023 in *State v. Kohberger*, Case No. CR29-22-2805 in Latah County in the Second Judicial District. Petitioners are not restrained by the court's order which is directed solely to the trial participants. The parties stipulated to a nondissemination order in the case to protect the Defendant's fundamental right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution. The nondissemination order does not violate the First Amendment rights of the petitioners. The Court should deny the petition.

II. STATEMENT OF CASE

On December 30, 2022 Bryan C. Kohberger was arrested and charged for allegedly murdering four students at the University of Idaho. The case is in the pretrial phase and set for a preliminary hearing on June 26, 2023. The case has generated a firestorm of publicity, nationally and internationally.

In light of the extraordinary media coverage, the prosecutor and Mr. Kohberger's counsel agreed that a nondissemination order was necessary to minimize the effects of prejudicial pretrial publicity. Four days later, they filed a stipulation with a proposed order with the court "to protect against adversely affecting the integrity of the case to be presented at trial". See Declaration of Wendy J. Olson ("Olson Decl."), Ex. A.

The court entered the stipulated nondissemination order which held that the parties to the action, including investigators, law enforcement personnel, attorneys, and agents of the prosecuting attorney or defense attorney, were prohibited from making extrajudicial statements,

written or oral, concerning the case other than a quotation from or reference to, without comment, the public records of the case. See Olson Decl., Ex. B. The order specifically prohibited any statement which a reasonable person would expect to be disseminated by means of public communication that relates to the following five categories:

1. Evidence regarding the occurrences or transactions involved in this case;
2. The character, credibility, or criminal record of a party;
3. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such tests or examinations;
4. Any opinion as to the merits of the case or the claims or defense of a party;
5. Any other matter reasonably likely to interfere with a fair trial of this case, such as but not limited to, the existence or contents of any confession, admission, or statement given by the Defendant, the possibility of a plea of guilty to the charged offense or a lesser offense, or any opinion as to the Defendant's guilt or innocence.

On January 13th, the court held a meeting in chambers via Zoom with the prosecutor, defense counsel, other attorneys for the witnesses, and the judge's clerk.[1] The purpose of the call was to speak to the attorneys associated with the case and review the court's recent nondissemination order which prohibited them from speaking with the media, in response to what the court was seeing and hearing from various media sources. The chambers meeting was not on the record. However, the prosecutor and defense counsel summarized the meeting in a joint memorandum that the parties stipulated to and filed under seal for the purpose of documenting the substance of the conference.[2] It appears that not all attorneys were complying

[1] Mr. Shanon Gray, counsel for the Goncalves family of victim, Kaylee Goncalves, recounts his recollection of this chambers conference in his "Memorandum in Support of Motion for Appeal and/or Clarification of Amended Nondissemination Order". Olson Decl., Ex. D. Under the ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 8-1.2., "Definitions", a "lawyer participating in a criminal matter" includes "(ii) any lawyer who is representing or who has represented a witness or likely witness in connection with the criminal matter."

[2] The prosecutor and defense counsel have since filed a stipulation with the court to lift the seal on a redacted version of their joint stipulated memorandum which the court has granted. The

with the court's nondissemination order and the court wanted to review its terms and Rule 3.6 of the Idaho Rules of Professional Conduct with them. The court reminded all the attorneys not to engage in any conduct that would interfere with a fair trial and emphasized that the court wanted to make its expectations clear regarding their ethical duties. The court explicitly stated that the order did not preclude witnesses from speaking to the media.

After the chambers conference, the court issued an amended nondissemination order on January 18th. See Olson Decl., Ex. C. The amended order invokes the court's authority to issue a nondissemination order and recognizes the necessary balancing between the right to a fair trial and the right to free expression. The court found that "some curtailment of the dissemination of information in the case is necessary and authorized by law." Specifically, the amended order states in relevant part:

> 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, 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 reference to the official public record of the case.
>
> 2. This order specifically prohibits any statement, which a reasonable person would expect to be disseminated by means of public communication that relates to the following:
>
> a. Evidence regarding the occurrences or transactions involved in the case;
> b. The character, credibility, reputation, or criminal record of a party, victim, or witness, or the identity of a witness, or the expected testimony of a party, victim, or witness;
> c. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test;

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redactions were made to protect the identity of potential witnesses and their attorneys for their safety, pursuant to Idaho Court Administrative Rule 32(i)(2)(D). These filings are attached as Exhibits A and B to the Declaration of Deborah A. Ferguson filed along with this Brief in Opposition to the Petition.

d. Any opinion as to the merits of the case or the claims or defense of a party;
e. Any information a 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;
f. Any information reasonably likely to interfere with a fair trial in this case afforded under the United States and Idaho Constitution, such as the existence or contents of any confession, admission, or statement given by the Defendant, the possibility of a plea of guilt, or any opinion as to the Defendant's guilt or innocence.

The amended nondissemination order ("the nondissemination order" or "the order") provides further guidance from the court and clarifies what attorneys are subject to the order. It contains many of the terms of the original stipulated order (see terms a, d, and f), but also adds language from Comment 5 to Rule 3.6 of the Idaho Rules of Professional Conduct (see terms b, c, and e of the order).

III. STATEMENT OF ISSUE

Defendant Bryan Kohberger and the State of Idaho have the right to a fair and impartial trial under the Idaho Constitution and the United States Constitution. This criminal trial has attracted enormous pretrial publicity in Idaho and across the world. The court's nondissemination order is directed solely at the trial participants and is necessary to preserve the constitutional right to a fair trial. The order is not erroneous, much less is clearly erroneous, as a matter of law.

IV. STANDARD OF LAW

"The writ of mandamus is an extraordinary remedy requiring extraordinary circumstances." *Cover v. Idaho Bd. of Correction*, 167 Idaho 721, 733, 476 P.3d 388, 400 (2020) (citation omitted). The petitioners urge this Court to issue a writ if it determines that the petition "alleges sufficient facts concerning a possible constitutional violation of an urgent nature." Pet. Br. at 4 (citing *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021)).

Respectfully, that is not the correct standard that this Court applies when it reviews a lower court's order in a mandamus action while a matter is still proceeding below.

It is true that this Court has cited that general standard in several cases where the petitioners are seeking a writ of mandamus or prohibition against some official other than a lower court presiding over ongoing litigation. *See, e.g., Reclaim Idaho*, 169 Idaho at 406-07, 497 P.3d at 160-61 (naming the Secretary of State and legislative officials in a mandamus action challenging the constitutionality of statutory limitations on the citizens' initiative process); *see also Regan v. Denney*, 165 Idaho 15,19, 437 P.3d 15, 19 (2019) (naming the Secretary of State as the respondent in a challenge to expanding Medicaid eligibility through the citizen's initiative process); *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513–14, 387 P.3d 761, 766–67 (2015) (seeking a writ against the Secretary of State in a challenge to an untimely gubernatorial veto).

But just two years ago, the Court adopted a more precise test for circumstances like these in *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 396, 496 P.3d 873, 882 (2021). There, the petitioner, a law firm, sought a writ of mandamus from this Court to change a district court's order disqualifying their firm from ongoing litigation in the district court. 169 Idaho at 391, 496 P.3d at 877. The Court looked to the Ninth Circuit's "*Bauman* factors" for the appropriate test to determine whether it should issue a writ against the lower court. 169 Idaho at 396, 496 P.3d at 882 (citing *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977)).

The Ninth Circuit's *Bauman* factors are:

> [W]hether (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules, and (5) the order raises new and important problems, or issues of law of first impression.
>
> *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

Petitioners neither cite *Hepworth Holzer* nor apply the *Bauman* factors to their petition. Yet, the petitioners are essentially asking this Court to reverse the lower court's order in an ongoing and high-profile criminal matter. As in *Hepworth Holzer*, *Bauman* is a much better fit, as it focuses on when it is appropriate for a higher court to step in and reverse a district court through the extraordinary remedy of mandamus.

Even if all the *Bauman* factors are present, the Court need not necessarily issue a writ, because whether to issue a writ is fundamentally a matter of the issuing court's discretion. *Hepworth Holzer*, 169 Idaho at 396, 496 P.3d at 882 (citation omitted). A showing of less than all the factors does not prevent it, but of critical importance is the third factor, which requires "clear error as a matter of law," and that is "a necessary condition for granting a writ of mandamus." *In re Walsh*, 15 F.4th 1005, 1008 (9th Cir. 2021) citing *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011).

Clear error is a highly deferential standard, and a writ of mandamus should not issue "merely because the petitioner has identified legal error." *In re Walsh*, 15 F.4th at 1008 (citation omitted). Since *Bauman* and its progeny, the Ninth Circuit has established a high bar for issuing a writ of mandamus, which requires the reviewing court to have a "firm conviction" that the district court misinterpreted the law or committed a "clear abuse of discretion." *In re Perez*, 749 F.3d 849, 855 (9th Cir. 2014); *see also Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Arizona*, 156 F.3d 940, 952 (9th Cir. 1998) (denying the writ, even though the Ninth Circuit concluded that the district court had erred, given the pressures of a high-profile trial, the delicate situation with which the trial judge was confronted, and confirming the Ninth Circuit's clarifying instructions moving forward).

In short, there should be some play in the joints for district courts of this state to issue orders like this one. There is a cost every time a petitioner seeks mandamus in this Court in terms of time and resources devoted to an ancillary proceeding. This Court should not invite unwarranted petitions, and *Bauman* provides the correct standard to avoid this result.

The lower court made *no* error in issuing its nondissemination order, let alone a clear one. The order was necessary, narrow, and binding only on the attorneys for trial participants and the agents of the prosecuting attorney and defense. The order was not targeted at the media companies who are petitioners here, and they are not bound by it. As such, the order does not violate their First Amendment rights. This Court should not issue a writ.

V. ARGUMENT

A. The nondissemination order does not violate the First Amendment of the United States Constitution.

Petitioners, a coalition of media outlets, argue that the court below exceeded its authority in issuing a limited nondissemination order. This case is still daily front-page news, months after the homicides. The trial participants against whom the order is directed have not objected to the restraining order. Indeed, in a strong display of unanimity on this issue, both the prosecutor and defense counsel explicitly *requested* the nondissemination order to preserve the right of the Defendant and the State to a fair trial under the Sixth Amendment.

Although the nondissemination order is not directed to the petitioners, they object to its indirect impact, alleging that the order's effect constitutes an unlawful prior restraint of their speech. They ask this Court to grant them the extraordinary remedy of a writ of mandamus or prohibition, directing the lower court to vacate its order. The press demands unfettered, immediate, and direct access to all sources of information concerning the case, asserting that anything less violates their rights under the First Amendment.

This is incorrect. The petitioners claim that the lower court's order is a prior restraint on them and that strict scrutiny should apply. Pet. Br. at 7. But, as explained below, the order does nothing to restrain *these petitioners*. Strict scrutiny is therefore inappropriate. The correct standard should instead be "whether 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." *Radio and Television News Ass'n v. U.S. Dis't Court*, 781 F.2d 1443, 1447 (9th Cir. 1986) (citation omitted). The petitioners' argument, in contrast, would sacrifice the Sixth Amendment fundamental right to a fair trial on the altar of the First Amendment, and ignore the commonsense balancing between these rights that the lower court applied.

1. Courts must vigilantly protect the Sixth Amendment right to a fair trial.

The Sixth Amendment guarantees criminal defendants a right to trial by an impartial jury. *Skilling v. United States*, 561 U.S. 358, 377 (2010). It has long been recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 2904 (1979). To safeguard the due process rights of the accused, the Supreme Court has held that trial judges have an *affirmative constitutional duty* to minimize the effects of prejudicial pretrial publicity. *Id.* "And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." *Id*.

The Supreme Court has acknowledged that the stage of the criminal process matters and has recognized a distinction between measures effective in the pretrial phase versus the actual trial. As petitioners have pointed out, once a trial begins, courts have voir dire, jury sequestration, a change in venue and other tools to help ensure a fair trial. Pet. Br. at 7. The Court has noted that the danger of publicity concerning pretrial suppression hearings is

particularly acute, "because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 2905 (1979). That poses special risks of fairness. *Id.* (stating that closure of pretrial proceedings can be necessary to help insure fairness of a trial). Just as publicity concerning the proceedings at a pretrial hearing can influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial, so too can prejudicial pretrial publicity generally. A prerequisite to a fair trial is the ability to select an impartial jury untainted by prejudicial pretrial publicity. The court should do what it can to prevent the spread of prejudicial information throughout the community before the trial.

Where the case is notorious, like this case, the burden on the court is heavy. *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975). The Supreme Court has found that the most practical and recommended procedure to insure against dissemination of prejudicial information is what the lower court did here. It entered "an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial." *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct.1507 (1966). The order at issue is more narrowly focused than the scope of the order suggested by the *Sheppard* Court, and does not extend to the witnesses, only to their attorneys.

2. The nondissemination order is not a prior restraint against the petitioners.

The Court has described a prior restraint as an administrative or judicial order forbidding certain communications when issued in advance of the time the communications are to occur, finding that court orders that actually forbid speech activities are classic examples of prior restraints. *Hall v. State*, 151 Idaho 42, 46, 253 P.3d 716, 720 (2011) citing *Alexander v. United States*, 509 U.S. 544, 550 (1993). The nondissemination order is not addressed to the petitioners.

It imposes no form of restraint on them. The order applies exclusively to the trial participants identified in the court's order and as to only certain categories of statements. Restraints on statements of participants in a criminal trial, although indirectly denying media access to those participants, do not infringe on the freedom of the press under the First Amendment. *Radio and Television News Ass'n v. U.S. Dis't Court*, 781 F.2d 1443, 1444 (9th Cir. 1986).

Radio and Television News is particularly instructive. There the district court issued an order restraining defense counsel from making statements to the media concerning the criminal trial of his client, a former FBI special agent accused of leaking secrets to the Soviets. *Id.* The order was upheld. Six subject matter categories were proscribed by the lower court. *Id.* at 1444, fn. 1. (These subject matter categories are also found in the nondissemination order before this Court.) The media in *Radio and Television News* filed a petition for a writ of mandamus to compel the district court to vacate its order as an unconstitutional prior restraint infringing the freedom of the press. *Id.* The media argued that denial of access to the trial participants constituted an unconstitutional restraint on their ability to gather news. This argument is identical to the argument advanced today.

The Ninth Circuit found the order in *Radio and Television News* significantly different from one denying the media access to a criminal trial or restricting it from publishing the information it obtains. *Id*. at 1446. The court noted it had invalidated as unconstitutional prior restraints on reporting the news and other restraints that barred the media's access to criminal proceedings. But much like the case at hand, that was not the situation in *Radio and Television News*.

> In contrast, the district court's order in this case is not directed toward the press at all. On the contrary, the media is free to attend all the trial proceedings before the district court and to report anything that happens. In fact, the press remains free to direct questions at trial counsel. Trial counsel simply may not be free to

> answer. In sum, the media's right to gather news and disseminate it to the public has not been restrained. *Id.*

In short, "the media's collateral interest in interviewing trial participants is outside the scope of the first amendment." *Id.* at 1447.

The Second Circuit has also held there is a substantial difference between a restraining order directed against the press and an order directed "solely against trial participants and challenged only by the press" holding this distinction critical to its analysis in *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (1988). The *Dow Jones* court found "a fundamental difference between a gag order challenged by the individual gagged and one restrained 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." *Id*. *But see CBS v. Young*, 522 F.2d 234, 239 (6th Cir.1975) (where the court found a restraining order in a civil suit arising from the aftermath of the Kent State shootings a prior restraint). In *CBS*, the court issued a sweepingly broad order that prevented all parties and their relatives, close friends, and associates from speaking about the case. *CBS* illustrates why the press/trial participant distinction matters. In its rejection of the approach of the Sixth Circuit in *CBS*, the Second Circuit recognized the significance of the fact that the party restrained had requested the nondissemination order, just like here in the Kohberger case.

Orders imposing restrictions on attorneys, parties, and witnesses are entitled to considerably more deference than a prior restraint on the press. *In re T.R.*, 52 Ohio St.3d 6, 21, 556 N.E.2d 439 (1990) (recognizing that orders imposed upon parties and their counsel are "considered a less restrictive alternative to restrictions imposed directly on the media").

Petitioners provide the Court with nine anecdotes to illustrate the impact of the nondissemination order on them.[3] Pet. at 3-4; Pet. Br. at 2-3. A quick review of these one sentence sketches underscores that the Press has not been restrained. The majority of the anecdotes are misplaced: they concern parties not subject to the court's order. [4] Three of the examples relate to public records, the availability of which is not restrained by the order. Two examples relate to individuals to whom the order does not apply: the victims' families and the Mayor of the City of Moscow. Four examples concern the speech of law enforcement who are covered by the nondissemination order. Assuming these illustrations are accurate, the indirect impact of the nondissemination order on the press is not a restraint on their speech.

Restrictions directed against the media such as bans prohibiting the media from publishing information it has gathered are virtually always found to be unconstitutional prior restraints. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). Here, rather than impose a prior restraint on the press, the lower court instead chose a much less draconian alternative, and narrowly focused its nondissemination order on the trial participants. Further still, rather than impose a general "no comment" rule on the participants in the trial, it specificized the particular

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[3] Only three of the nine illustrations cite to any verifiable facts: a pending motion in the district court; a complaint filed by a Washington State agency in Whitman County; and a press release from the Moscow Police Department. See Olson Decl., Exhibits D, E, and F. The other anecdotes are unsubstantiated, unless the Court considers the generalized verifications attached to the Petition sufficient to support these allegations of harm.

[4] The language of the order is unambiguous. The court cannot control how third parties outside the judicial proceeding decide to interpret the order, or whether they attribute to it a sweeping application that is not supported by its language or terms. The real possibility exists that some third parties would prefer not to communicate with the media regarding the criminal case and the nondissemination order gives them their own justification not to do so, which has no bearing on the actual scope of the order directed only to the attorneys for trial participants and the agents of the prosecuting attorney and defense.

subject matter of statements concerning the case they must avoid discussing with the media. This is precisely what the Supreme Court instructs trial courts to do.

In *Sheppard*, the Supreme Court found that rather than restraining the press itself, the court should have considered less restrictive measures, such as "proscribing extrajudicial statements by any lawyer, party, witness or court official." *Id*. at 1521. The Court found that might well have prevented the bedlam that occurred in the trial of that case. The Ninth Circuit has also acknowledged that in notorious criminal cases, the trial judge has a heavy duty and obligation to attempt to protect the right of the defendants to a fair trial, free of adverse publicity. And it believes that "[t]he most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial." *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Likewise, ten years after *Sheppard* in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 564 (1976) the Supreme Court explicitly endorsed imposing a restriction on the communications of trial participants when necessary to avoid excessive or prejudicial pretrial publicity as an alternative to restraining the press.

Petitioners request that the Court adopt a strict scrutiny standard to the court's nondissemination order and treat the ban on the trial participants as *if* it were a prior restraint on the press. A prior restraint standard as set forth in *Nebraska Press Ass'n* is a virtual ban on prior restraint of speech. Were the Court to do so, it would result in the prohibition of *all* restraints on both the press and the trial participants. This in turn would allow the court no flexibility in

responding to pretrial publicity that threatens the right to a fair trial. The Court should steer clear of the imprudent approach advanced by the petitioners.

3. The petitioners' constitutionally protected right to information is no greater than the public's right.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576, 100 S.Ct. 2814 (1980) the Supreme Court affirmed the First Amendment "right of access" or "right to gather information" granted to the media regarding criminal trials. The Court described that right, however, as only a right to sit, listen, watch, and report. The Supreme Court has held that the press has no greater right to information about a trial than the general public. *Nixon v. Warner Communications*, *Inc.*, 435 U.S. 589, 609, 98 S.Ct. 1306 (1978). In short, the media's right to gather information during a criminal trial is the right to attend the trial and report on it. It does not have an "unstrained right to gather information." *The News-J. Corp. v. Foxman*, 939 F.2d 1499, 1512 (11th Cir. 1991). *See also Sioux Falls Argus Leader v. Miller*, 610 N.W.2d 76 (S.D. 2000) (gag order on trial participants did not violate media's First Amendment rights); *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431, 439–42 (1984) (limitations on the media's ability to interview trial participants did not violate the First Amendment). *See also Pell v. Procunier*, 417 U.S. 817, 829–35, 94 S.Ct. 2800 (1974) (freedom of the press was not infringed by government restrictions on interviews with prison inmates, rejecting the media's argument of right of access to the sources of what it regarded as newsworthy information).

The petitioners have no constitutionally protected right to communicate with the trial participants. As aptly noted in *Radio and Television News*, trial counsel are free to refuse interviews by the media, regardless of whether there is a court order prohibiting media contact. When that occurs, the media has no recourse under the First Amendment to compel their speech so that they can gather news. *Id*. 781 F.2d at 1447.

4. The court had no duty to make explicit factually findings or hold a hearing before issuing a nondissemination order.

The court's nondissemination order itself explains that the court was balancing competing constitutional concerns when it issued its order and stated it was necessary to curtail some information in the case. The court cites to the three seminal Supreme Court cases that guide the nondissemination order- *Sheppard, Nebraska Press* and *Gentile.* The court acted well within the bounds of those cases. The court cites to IRPC Rule 3.6 which the Court reviewed carefully and incorporated factors from Comment 5 of the Rule into its order. The court also cites to the ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND PUBLIC DISCLOSURE: (4th ed. 2016) in support of its authority to limit some of the speech of the trial participants.

The court had a discussion in chambers with all counsel representing trial participants to discuss its original order. That discussion was memorialized by the counsel for the prosecution and defense and is in the public record. See Ferguson Decl., Ex. A. The joint memorandum of the prosecution and defense further explains the court's belief that the order was necessary and reveals that the court referenced factual findings to support it. *Id.* For example, the judge noted the high-profile nature of the case, and the fact that the case has garnered national and international attention.

Petitioners take offense that the Court did not hold a hearing for the purpose of providing them an opportunity to object to the nondissemination order. But they are not a party to the case. There is no need to have a hearing on an uncontested matter the parties have stipulated to and then present to the court. While the Supreme Court has held that specific findings must be made in order for a court to close a preliminary hearing to the public under *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 1, 106 S. Ct. 2735, 2737 (1986) there is no similar requirement of specific findings for nondissemination orders.

Other state supreme courts have found that a hearing on a nondissemination order is unnecessary when both the state and defense agree that the order is appropriate in the case. *State v. Grate*, 164 Ohio St. 3d 9, 20, 172 N.E.3d 8, 32 (Ohio 2020). This makes sense.

5. Attorneys in judicial proceedings have lesser First Amendment rights than the public generally.

This Court has found that "[i]t is well established that attorneys acting as advocates in a judicial proceeding do not enjoy the same First Amendment protections as the general public, both due to their membership in a specialized profession and their status as officers of the court." *Hall v. State*, 151 Idaho 42, 47, 253 P.3d 716, 721 (2011) citing *Gentile*, 501 U.S. 1030, 1066, ("Membership in the bar is a privilege burdened with conditions ....").

The nondissemination order is aimed primarily at the attorneys in the case as trial participants who represent the parties to the case, as well as the attorneys for the witnesses and victims. The order extends to others who act in concert with the attorneys involved in the case, such as investigators, law enforcement and other agents of the attorneys and prohibits certain extrajudicial statements.

As the court reminded counsel in the case during its conference to review the details of the order, the attorneys participating in this case are also bound by an ethical code of conduct, separate and apart from its order. Rule 3.6 of the Idaho Rules of Professional Conduct restricts the extrajudicial statements of lawyers who are participating in litigation. Lawyers can be subject to discipline if they disregard this rule and make extrajudicial statements prohibited by Rule 3.6.

The court was well within its authority to order the attorneys participating in the case and those who act in concert with them to refrain from extrajudicial prohibited speech. Further, an attorney's ethical obligations to refrain from making prejudicial comments during a pending case exist regardless of a nondissemination order.

B. The nondissemination order does not violate Idaho's Constitution.

Petitioners are correct that the Court need not treat the Idaho Constitution "in lockstep" with the United States Constitution. Pet. Br. at 14. The constitutions are distinct and are interpreted as such. *Reclaim Idaho v. Denney*, 169 Idaho 406, 443, 497 P.3d 160, 197 (2021) (Idaho's constitution "does not contain the same limitations as the U.S. Constitution, and the state is free to set its own standing requirements." Stenger, J., specially concurring).

However, there is nothing in Article I, Section 9 of the Idaho Constitution which provides a person may "publish on all subjects" that supports the petitioners' claim that they have a constitutional right to communications with trial participants and the court cannot restrict trial participants' extrajudicial communications. The obvious point bears repeating: there is absolutely nothing in the nondissemination order that prohibits petitioners from "publish[ing] on all subjects" they deem fit. Petitioners cite no case law in support of this novel theory under the Idaho Constitution.

C. The petitioners lack standing to assert the First Amendment rights of trial participants.

This Court has historically looked to the Supreme Court for guidance on issues of standing. *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021). The Supreme Court has held that a party has no standing to assert the rights of third parties. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 80 (1978); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The press stands in no special relationship with the trial participants to assert their First Amendment rights. Here, none of the trial participants whose speech has been curtailed under the nondissemination order have joined this action. To the contrary, the primary trial participants, the prosecutor and defense counsel, jointly stipulated to the order on behalf of their respective clients. Just as the Ninth Circuit found in *Radio and Television News*, 781 F.2d at 1448, the

petitioners lack standing to assert the free speech constitutional rights of nonparties in challenging the court's nondissemination order.

VI. CONCLUSION

The court below did not commit clear error when it issued a nondissemination order applicable to the trial participants as requested by the parties to protect the right to a fair and impartial trial under the Sixth Amendment. Free speech and fair trials are two of the most cherished policies of our civilization. *Bridges v. State of Cal*., 314 U.S. 252, 260, 62 S. Ct. 190, 192 (1941). The court below has the difficult task of balancing these fundamental rights and has reasonably done so in issuing the nondissemination order. The press is not restrained by the nondissemination order. Accordingly, the Court should deny petitioners' request for an extraordinary writ.

DATED: March 3, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of March 2023, I served a true and correct copy of RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION upon the following:

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