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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

IN RE: PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION.

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.; COURT TV MEDIA, INC.; 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,

and

BRYAN C. KOHBERGER and STATE OF IDAHO, LATAH COUNTY PROSECUTOR,

Intervenor-Respondents.

PETITIONERS' CONSOLIDATED REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Criminal justice is not supposed to happen behind closed doors. Sunlight is thought to be the best disinfectant, not "grotesquely twisted." Freedom of speech is the default; we do not assume media coverage is bad or prejudicial. There are of course exceptions. At times the right to a fair trial outweighs the right to free speech. But those exceptions are exceptions in name only unless procedures are implemented and followed to check overzealous requests for secrecy. Courts are supposed to guarantee that those procedures are followed. Just as courts review the propriety of an agreed-upon protective order or sealed filing, they should also check the legality of a requested gag order.

Procedure is precisely what is missing here. The District Court[1] did not announce a legal standard, find any facts, or perform any legal analysis. Petitioners do not doubt that the District Court had good intentions, but it merely rubber-stamped the stipulated request for a gag order when it issued the original gag order without a hearing, without making factual findings, and without any legal analysis just over an hour after the stipulation was submitted. And without any notice to the public,[2] the District Court then held a secret, in-chambers meeting to discuss the amended gag order. After the amended gag order was issued, Mr. Kohberger and the Latah County Prosecutor filed a sealed memorandum documenting their recollection of the meeting.

Again, no procedures were followed. The District Court published nothing on the docket indicating that a memorandum related to the amended gag order had been filed under seal or explaining why sealing was necessary. If procedures had been followed—that is, if the District

[1] Petitioners recognize that a Magistrate Judge issued the order challenged here, but the Magistrate Judge still operates within the Latah County District Court. Mr. Kohberger takes exception to this characterization, but Petitioners will continue to refer to the District Court for consistency.

[2] The docket in the underlying criminal matter appears to be inaccessible on iCourts, so Petitioners' understanding of the docket is limited to what is posted on the "cases of interest" page on the Court's website.

Court had applied the legal standard for sealing documents—much of the memorandum would have been public because there were no countervailing privacy interests. Acknowledging there were no such interests, Mr. Kohberger and the Latah County Prosecutor now agree that only limited information in the memorandum needed to be redacted. Yet Petitioners and the public were unnecessarily deprived access to a court record and information related to a matter of public interest for over a month. That deprivation of rights presumably would have lasted even longer had Petitioners not brought this challenge to the amended gag order.

This Court should make clear that the lack of procedure and the corresponding trampling of constitutional rights must stop. The Court should vacate or nullify the amended gag order because the District Court failed to apply a legal standard, consider any facts, or perform any legal analysis. The Court should also hold that in the future, before prohibiting speech, trial courts must make factual findings and perform legal analysis to ensure that the prohibited speech is sufficiently likely to cause material prejudice and that other, less offensive measures are unavailable to prevent or remedy that prejudice.

A. Petitioners have standing to assert their First Amendment rights.

Respondents[3] argue that Petitioners lack standing, citing *Radio and Television News Association of Southern California v. U.S. District Court for Central District of California*, 781 F.2d 1443 (9th Cir. 1986), in support. Neither Mr. Kohberger nor the Latah County Prosecutor makes the same argument, and for good reason. *Radio and Television News* stands for the opposite proposition. There, the Ninth Circuit held that the media had "demonstrated a sufficient stake in this controversy to establish standing to raise freedom of the press concerns under the first

[3] By Respondents, Petitioners refer to the Second Judicial District of the State of Idaho, County of Latah and the Honorable Megan E. Marshall. Petitioners will refer to Intervenor-Respondent Bryan C. Kohberger as Mr. Kohberger and Intervenor-Respondent State of Idaho, Latah County Prosecutor as the Latah County Prosecutor.

amendment." *Id.* at 1445. In support, the Ninth Circuit held that because a gag order "impairs the media's ability to gather news by effectively denying the media access to trial counsel, a concrete interest is affected." *Id.*

Many other courts have also held that the media has standing in situations like this one, and this Court should too. *E.g.*, *Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988) ("Hence, we hold that the news agencies have standing to appeal Judge Cannella's order restraining speech of the trial participants."); *United States v. Wecht*, 484 F.3d 194, 202–03 (3d Cir. 2007), as amended (July 2, 2007) ("We have previously determined that media outlets have standing to challenge protective orders and confidentiality orders as long as they can demonstrate that the order is an obstacle to their attempt to obtain access."(internal quotation marks and citation omitted)); *United States v. Aldawsari*, 683 F.3d 660, 665 (5th Cir. 2012) ("We agree with Clark that the gag order affected his right to gather news and that he has standing to challenge it.").

If Respondents are trying to subtly recast Petitioners' claim as a third-party claim, they miss the point. Petitioners' own First Amendment rights have been violated. The amended gag order restricts Petitioners' right to publish information related to a matter of public interest, as Petitioners cannot publish information that they cannot gather. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1980) (finding that it is "not crucial" whether the issue is called "a right of access" or "a right to gather information" because without "protection for seeking out the news, freedom of the press could be eviscerated"). The amended gag order also restricts Petitioners' rights to receive speech.

B. Petitioners need not show clear error.

Respondents argue that Petitioners must show not an error of law, but a clear error of law, because *Hepworth Holzer, LLP v. Fourth Judicial District of State*, 169 Idaho 387, 496 P.3d 873 (2021), changed the standard for all mandamus actions challenging a lower court's order. Again,

neither Mr. Kohberger nor the Latah County Prosecutor makes the same argument. And again, for good reason.

To start, *Hepworth Holzer*'s application of the Ninth Circuit's *Bauman* factors does not appear to change anything about this Court's mandamus jurisprudence. When considering special writs, the Court makes a threshold decision about whether it is prudent to exercise its original jurisdiction. If the answer is yes, then the Court makes a merits decision about whether the respondent did something wrong that needs to be remedied.

Bauman factors 1, 2, 4, and 5 all relate to that threshold question of whether the Court should exercise its original jurisdiction. Boiled down, those factors amount to a question of whether a petitioner has no other means to raise an issue that is sufficiently important for this Court to consider. The answer will be yes when: (1) a petitioner raises "a possible constitutional violation of an urgent nature," *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021) (citation omitted), and (2) "there is not a plain, speedy and adequate remedy in the ordinary course of law," Idaho Code § 7-303; Idaho Code § 7-402. It thus seems irrelevant whether the Court applies the *Bauman* factors or applies Idaho Code and cases like *Reclaim Idaho*. The questions and answers will be largely the same.

Once the Court decides to exercise its original jurisdiction, it then needs to decide whether the respondent did something that needs to be remedied. If the respondent acted unlawfully, then the answer should be yes. Admittedly, *Bauman* factor 3 suggests that the respondent needs to act *really* unlawfully; that is, that the challenged order "is clearly erroneous as a matter of law." *Hepworth Holzer*, 169 Idaho at 396, 496 P.3d at 882 (citation omitted). But it is wrong to allow an unlawful order to stand just because it is not *really* unlawful—particularly when the order raises

an important issue that cannot be remedied through other means (which will be the case when the Court is exercising its original jurisdiction).

Hepworth Holzer does not suggest otherwise. While the Court listed the *Bauman* factors, it considered whether and ultimately decided that "[t]he district court erred as a matter of law"—not that it clearly erred as a matter of law. *Id.* at 397, 496 P.3d at 883. The Court should do the same here. If Respondents erred as a matter of law (which they did as described below), then the Court should remedy that error by issuing the requested writ.

If the Court decides that *Hepworth Holzer* and the *Bauman* factors require more, then it should not apply *Hepworth Holzer* here. There, this Court reviewed a lower court's decision to disqualify counsel. That challenge was unusual for a special writ because a "trial court's discretionary powers include the decision to grant or deny a motion to disqualify counsel" and "this Court has traditionally held that writs of mandate and prohibition will not issue to compel the performance of a purely discretionary function." *Id.* at 395, 496 P.3d at 881. The Court thus needed to adopt a standard for the unique task of reviewing a discretionary decision in a mandamus action. As mentioned, the Court opted to adopt a five-factor test (the Ninth Circuit's *Bauman* factors), which the Ninth Circuit still uses to "review disqualification of counsel because the harm of such disqualification cannot be corrected with an ordinary appeal." *Id.* at 396, 496 P.3d at 882.

If the Court thought the *Bauman* factors should apply to *all* special writs directed at a lower court, it is unclear why the Court waited over 40 years to adopt those factors, especially when it had opportunities to do so in the interim. *E.g.*, *Re Petition for Writ of Prohibition*, 168 Idaho 909, 489 P.3d 820 (2021); *State v. Dist. Ct. of Fourth Jud. Dist.*, 143 Idaho 695, 152 P.3d 566 (2007); *Cowles Publ'g Co. v. Magistrate Ct. of First Jud. Dist. of State, Cnty. of Kootenai*, 118 Idaho 753, 800 P.2d 640 (1990).

It's even less clear why the Court would change a longstanding standard so quietly. Nowhere does *Hepworth Holzer* say it is considering, let alone changing, the standard applied to all special writs targeting a lower court's decision.

Even if the Court were inclined to apply the *Bauman* factors beyond its review of a lower court's disqualification decision, the *Bauman* factors are inappropriate for this case. *Hepworth Holzer* was an abuse of discretion case. But here the Court faces a purely legal issue: the legal standard required to balance the First Amendment and the Sixth Amendment. The subsequent application of that standard may require factfinding, here the District Court found no facts. This Court is thus not reviewing any factual findings.

Hepworth Holzer was also effectively an interlocutory appeal by a losing party. Not so here. Unlike in *Hepworth Holzer*, Petitioners did not have the opportunity to raise a challenge below. The District Court issued its original gag order on the same day that the parties submitted their stipulation (about an hour later according to the timestamps). Petitioners did not have time to learn about the stipulation, let alone submit a written objection, before the original gag order was issued. Nor did the District Court hold a hearing where Petitioners could assert an oral objection.

Before issuing the amended gag order, the District Court held a secret in-chambers meeting. After the District Court issued the amended gag order, the parties (not the District Court) submitted a sealed memorandum documenting the meeting. There was no public notice that the meeting was happening. There was no notice that a memorandum related to the amended gag order had been filed under seal.[4] There was no order explaining why the memorandum needed to be

[4] The case summary on the Court's website says there was a "Stipulation to File Memo Under Seal" filed, but the stipulation itself is not publicly available and nothing in that description suggests it relates to the amended gag order, especially since it was filed two days after the amended gag order.

sealed. Indeed, the stipulation and subsequent order to place the redacted memorandum in the public record occurred only after Petitioners filed this action. From Petitioners' view (and the public's view), the District Court on its own issued the amended gag order without any opportunity to submit a written or oral objection.

Without any sunlight on those proceedings, Petitioners are just now at the starting line. They are asserting their constitutional rights for the first time. Petitioners should not have to start the race from 100 meters back, needing to show more than an error of law. Nor should the District Court be allowed to violate Petitioners' First Amendment rights (which is an error of law), so long as it did not clearly violate those rights. Those rights are too important to leave underenforced for the sake of providing "play in the joints." Respondents' Br., p. 7.

But even if the Court looks for clear error, Petitioners should still win. It is an error under any standard to restrict speech without announcing a legal standard, finding facts, and performing legal analysis.

C. Petitioners have no other available remedies.

Mr. Kohberger argues that Petitioners may not seek a special writ because they "chose not to take part in" the issuance of the amended gag order. Mr. Kohberger's Br., p. 6. Nonsense. Mr. Kohberger is right that there is no indication in the record that Petitioners tried to object to the original gag order or the amended gag order, but he knows that Petitioners had no meaningful opportunity to do so. *Id.* at p. 5. Mr. Kohberger knows, for example, that the District Court issued the original gag order, without a hearing, about an hour after he and the Latah County Prosecutor stipulated to it. Petitioners did not choose anything. They did not have time to learn about the stipulation, let alone retain counsel, evaluate the stipulation, and object.

Mr. Kohberger also knows that he participated in a secret, in-chambers meeting to discuss the forthcoming amended gag order. Obviously Petitioners were not invited to that meeting, and

there was no indication on the docket that the meeting was scheduled. Indeed, the public had no indication that the meeting even occurred until after Petitioners filed this action. The parties then filed a sealed memorandum documenting the meeting, but the docket did not provide notice that a sealed document related to the amended gag order had been filed or explain why sealing the memorandum was proper. To Petitioners and the public, it appeared that the District Court issued the amended gag order on its own. Petitioners had no opportunity to object, review, or otherwise participate in the decision-making process.

Those facts raise a host of additional First Amendment and other issues that Petitioners did not raise in their opening brief because they did not know those events had occurred. There are procedures and legal analysis required to hold secret meetings and file secret documents, particularly when those secrets relate to a court order. *See, e.g.*, Idaho Ct. Admin. R. 32(i); *In re Spokesman-Rev.*, No. MC 08-6420-S-EJL et al., 2008 WL 3084252, at *2 (D. Idaho Aug. 5, 2008) ("The Supreme Court has made clear that criminal proceedings and documents may be closed to the public without violating the first amendment only if three substantive requirements are satisfied: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. The court must not base its decision on conclusory assertions alone, but must make specific factual findings." (citation omitted)).

The decision to now unseal a redacted version of the memorandum shows that the parties below are willing to stipulate to unnecessary secrecy. If the redacted memorandum can be made public now, it could have been made public a month ago. The District Court's duty is to apply facts to law to protect against those overzealous requests for secrecy. But the District Court did

not discharge its duty when the memorandum was sealed, just as it did not discharge its duty when it issued the gag order and the amended gag order.

In any event, Mr. Kohberger says even if Petitioners were given no prior opportunities to participate, they could now, two gag orders later, move to intervene below and ask the District Court to revise the amended gag order. He admits that the rules do not allow for such a motion, but he says Petitioners should file that procedurally improper motion anyway because some courts have looked past that procedural issue, even in matters including some of the same media companies that are Petitioners here. Petitioners have different counsel now, and as a result they do not believe it is proper to file a motion that the rules do not allow. Respondents and the Latah County Prosecutor seemingly agree, as they do not argue that a special writ is an improper vehicle to raise the constitutionality of the amended gag order.

Mr. Kohberger also says a writ of prohibition is inappropriate because "Petitioners are not trying to prevent any action in the case below." Mr. Kohberger's Br., p. 7. Not true. Petitioners are trying to prevent the District Court from continuing to enforce the amended gag order because it lacks the power to violate the First Amendment and to regulate conduct by individuals domiciled outside of Idaho.

In sum, a special writ is the proper vehicle for Petitioners' challenge.

D. The amended gag order fails under any standard.

Although Petitioners urge the Court to adopt the standard described below, the Court should grant Petitioners relief under any standard. In both gag orders, the District Court did not announce, let alone apply, a legal standard. It did not find a single fact. It did not consider alternative remedies. It performed no factual or legal analysis.

The unnecessarily sealed memorandum changes nothing. It is not a written order signed by the court or an oral order announced on the record. It is a memorandum written by Mr. Kohberger

and the Latah County Prosecutor with a summation, not a transcription, of what they believe was discussed during the off-the-record meeting. And even looking at the substance of the memorandum, there again is no legal standard articulated or an application of facts to that standard.

The United States Constitution and the Idaho Constitution require more.

E. The Court should clarify that gag orders are appropriate only when (1) the prohibited speech presents a clear and present danger or substantial risk of material prejudice, and (2) that prejudice cannot be prevented or cured through less restrictive means.

The amended 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 in *Sheppard*, *Nebraska Press*, and *Gentile*. To prevail, Respondents must distinguish those cases, and they rely on lower court decisions like *Radio and Television News* and *Dow Jones* to do so. But those cases are not persuasive. They ignore the fundamental difference between an individual deciding not to answer the media's questions and a court ordering an individual not to answer the media's question. Applying the principles announced in *Nebraska Press* and *Gentile*, this Court should follow cases like *Young* and *Sledge* to find the amended gag order unconstitutional because the District Court did not consider, let alone find, that the prohibited speech poses a clear or present danger or substantial risk of material prejudice that cannot be prevented or cured through less restrictive means. Indeed, it is too early in the proceedings to make such a determination.

1. The amended gag order is far broader than Idaho Rule of Professional Conduct 3.6.

Idaho Rule of Professional Conduct 3.6 does not excuse the District Court's failure to find facts, apply those facts to law, and determine the legality of the amended gag order. Rule 3.6 and the amended gag order are not the same. The amended gag order is far broader. The amended gag order prohibits more topics of speech and governs a wider range of individuals. Even if Rule 3.6

and the amended gag order were identical, the District Court would need to explain why Rule 3.6 needed the heightened enforcement of a court order and why the threat of contempt of court was necessary. The District Court made no such findings.

Starting with the topics of speech, 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 describes "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." I.R.P.C. 3.6 cmt. 5.

By contrast, the amended gag order is not tailored at all. It prohibits any "extrajudicial statements (written or oral) concerning this case." Olson Decl., Ex. C. While the amended gag order offers examples of prohibited speech, it does not say those examples are exhaustive or limit the general prohibition of any statements "concerning this case." Indeed, individuals have said the amended 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. Petition, pp. 3–4. Respondents call those facts anecdotes and question their evidentiary legitimacy, but they have been verified under penalty of perjury. Respondents also suggest that the interviewees merely cite to the gag order to gracefully avoid the questions, but the Court should not question without evidence whether the interviewees

(primarily public officers or employees) were being candid, or at the very least the Court should appreciate the amended gag order's chilling effect.

What is more, the examples in the amended gag order do 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." 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" (which is also covered in Section 2(f), suggesting Section 2(d) is intended to regulate something different and broader).

The amended gag order prohibits speech from more individuals than does Rule 3.6. The amended 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." By contrast, Rule 3.6 governs attorneys only, specifically those attorneys admitted to practice in Idaho. *E.g.*, I.R.P.C. pmbl.; I.R.P.C. 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. I.R.C.P. 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 victims' families attorneys or agents. The amended gag order by contrast applies to both the prosecution and the defense, and it directly regulates those that are not subject to the Idaho Rules of Professional Conduct.

2. *Sheppard, Nebraska Press,* and *Gentile* counsel in favor of vacating the amended gag order.

Mr. Kohberger argues that the trilogy of relevant United States Supreme Court cases (*Sheppard*, *Nebraska Press*, and *Gentile*) requires finding that the amended gag order is lawful. But the opposite is true. While those cases acknowledge the propriety of regulating some speech from lawyers and trial participants, they also explain the findings of prejudice and tailoring that are required before prohibiting speech—all of which is missing here. And to the extent any respondent or intervenor argues it exists, it exists only in the memorandum that the District Court did not write and that was kept secret from Petitioners and the public.

Taking the cases in order, the 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 the "Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourth Amendment." *Id.* at 335.

In support of that holding, the Court noted the trial judge's many failures to prevent or remedy any prejudice to Sheppard, such as continuance of trial, sequestration of the jury, and control of the courtroom. Respondents latch on to one potential measure the Court mentioned: "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 upholding the amended 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, Petitioners do not seek to 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 amended gag order 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 amended 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). There, like here, the Court considered the constitutionality of a gag order under the First Amendment. The gag order there did not prohibit any statements concerning the case; it targeted 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 that are 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. The founders were "fully aware of the potential conflicts between" the First and Sixth Amendments, yet they "were unwilling or unable to resolve the issue by assigning to one priority over the other." *Id.* 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. 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 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. What is more, the gag order was not properly tailored. The lower 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 amended gag order. Here, the District Court did not consider *any* facts or apply *any* standard to determine whether the prohibited topics of speech would prejudice Mr. Kohberger. The District Court also did not consider any alternatives. And even it had done either, the precise terms of the amended gag order (which prohibits statements "concerning this case") are broader than the *Nebraska Press* gag order

(which prohibited statements about "implicative information") that the Supreme Court held was too broad.

That said, *Nebraska Press* is not controlling because the amended gag order does not name the media. *Id.* at 564 n.8. And Petitioners acknowledge that the Court referenced studies suggesting that in "appropriate cases" a court can limit statements from lawyers, the police, and witnesses. *Id.* at 564. But the Court did not hold that those measures were lawful, it merely noted that the studies existed. And the "appropriate cases" referenced would be those that survive the scrutiny that the Court outlined, namely when there is a sufficient risk that the prohibited statements would be prejudicial and there are no other remedies available.

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). 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 amended gag order is unconstitutional. The District Court found neither 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 amended gag order is not at all tailored; it prohibits all statements "concerning this case."

In sum, *Sheppard*, *Nebraska Press*, and *Gentile* all counsel in favor of vacating the amended gag order. Those cases only permit prohibition 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 District Court did not make the factual finding of prejudice necessary to justify a gag order (clear and present danger for non-lawyers and substantial risk of material prejudice for lawyers), and even if it had, the amended gag order is not narrowly tailored to surgically proscribe only the speech is prejudicial and cannot be prevented or remedied through other means. Mr. Kohberger's arguments thus miss the mark, which explains why Respondents opted instead to rely primarily on the lower court decisions that followed.

3. The Court should reject the fiction that gag orders directed at trial participants do not restrain the press.

To avoid the outcome dictated by *Sheppard*, *Nebraska Press*, and *Gentile*, Respondents 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*, the Ninth Circuit recognized that the media has a "first amendment right to access or right to gather information." 781 F.2d at 1446. (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 a private request, is a state action and thus must comport with the First Amendment. *See Apao v. Bank of New York*, 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.").

What is more, the Ninth Circuit's reasoning 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. Petitioners are not, as *Radio and Television News* suggests, seeking an order compelling anybody to speak with them. Petitioners 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. 842 F.2d 603 (2d Cir. 1988). 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. *Id.* 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 amended gag order requested it. In fact, one of the victim's 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 *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975), 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.[5] 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 577 ("[W]e we 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 amended 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.

But even if this Court does not view the amended gag order as a prior restraint because it does not name Petitioners, it should still apply the same standard. Regardless of whether prior restraint jurisprudence applies, the Court's task here is to balance the media's First Amendment interests with Mr. Kohberger's Sixth Amendment interests. Looking back to *Nebraska Press*, neither right is superior. As a result, the Court should aim to give both rights the maximum effect

[5] Even though *Young* was a civil case, that fact does not detract from the Sixth Circuit's persuasive explanation of how a gag order directed at third parties still directly affects the media.

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 adopt 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 and thus not restricting publication as little as possible.

If for any reason the Court feels compelled by federal case law to apply the First Amendment differently than Petitioners have requested, then Petitioners urge the Court to take the principles described above and apply them to Article I, Section 9 of the Idaho Constitution. That provision guarantees the right to publish on "all subjects"—which would include both what happens in the courtroom or on the docket and everything that happens outside the courtroom. The amended gag order runs afoul of that guarantee by treating out-of-court statements differently than in-court statements. And, for the same reasons described about, those restrictions are unjustified and should be found unlawful.

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: March 10, 2023

STOEL RIVES LLP

/s/ Wendy J. Olson
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Cory M. Carone

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of March 2023, I served a true and correct copy of the within and foregoing **PETITIONERS' CONSOLIDATED REPLY IN SUPPORT OF 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:

Deborah A. Ferguson Craig H. Durham Ferguson Durham, PLLC 223 N. 6th St., Ste. 325 Boise, ID 83702 Attorneys for the Second Judicial District of the State of Idaho, Latah County, and the Honorable Megan E. Marshall	___ Hand Delivered ___ Mailed Postage Prepaid ___ Via Facsimile ___ U.S. Mail ___ Via email _X_ Via iCourt efile & serve at: daf@fergusondurham.com chd@fergusondurham.com
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/s/ Wendy J. Olson
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