

CASE NO. CR29-22-2805  
BY *[Signature]* DEPUTY

Wendy J. Olson, Bar No. 7634  
wendy.olson@stoel.com  
Cory M. Carone, Bar No. 11422  
cory.carone@stoel.com  
STOEL RIVES LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 83702  
Telephone: 208.389.9000  
Facsimile: 208.389.9040

*Attorneys for Intervenors*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,  
  
Plaintiff,  
  
v.  
  
BRYAN C. KOHBERGER,  
  
Defendant.

Case No. CR29-22-2805

**Memorandum in Support of Motion to  
Reconsider Order Dated May 4, 2023**

THE ASSOCIATED PRESS; RADIO  
TELEVISION DIGITAL NEWS  
ASSOCIATION; SINCLAIR MEDIA OF  
BOISE, LLC/KBOI-TV (BOISE); STATES  
NEWSROOM DBA IDAHO CAPITAL SUN;  
TEGNA INC./KREM (SPOKANE), KTVB  
(BOISE) AND KING (SEATTLE);  
EASTIDAHONEWS.COM; THE LEWISTON  
TRIBUNE; WASHINGTON STATE  
ASSOCIATION OF BROADCASTERS;  
IDAHO PRESS CLUB; IDAHO EDUCATION  
NEWS; KXLY-TV/4 NEWS NOW AND  
KAPP/KVEW-TV—MORGAN MURPHY  
MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS  
MEDIA, INC., DBA KIVI-TV, A DELAWARE

CORPORATION; THE SPOKESMAN-REVIEW/COWLES COMPANY; THE NEW YORK TIMES COMPANY; LAWNEWZ, INC.; ABC, INC.; WP COMPANY LLC, DBA THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS; THE MCCLATCHY COMPANY, LLC; and THE SEATTLE TIMES,

Intervenors.

With each passing day, the Amended Nondissemnation Order dated January 18, 2023 (“Gag Order”) causes irreparable harm. At every step, Intervenors have acted quickly to vindicate their constitutional rights and to stop that irreparable harm. The Idaho Supreme Court similarly acted quickly on two motions to intervene and set an expedited briefing schedule. Respectfully, this Court’s decision to hold a Scheduling Conference on May 22, 2023, instead of scheduling Intervenors’ motions for the next available hearing date and following the briefing schedule set in Idaho Rule of Civil Procedure 7(b)(3) and Idaho Criminal Rule 45(c), adds at least 3 weeks of additional irreparable harm while the parties wait for a hearing date and a briefing schedule. To avoid that additional irreparable harm, Intervenors request that the Court reconsider its order dated May 4, 2023 and either (1) stay enforcement of the Gag Order pending a decision on Intervenors’ Motion to Intervene and Motion to Vacate the Amended Nondissemnation Order to avoid any additional irreparable harm while the motions are briefed, or (2) set a hearing on Intervenors’ Motion to Intervene and Motion to Vacate the Amended Nondissemnation Order on the next available date on the Court’s calendar to trigger the briefing schedule in Idaho Rule of Civil Procedure 7(b)(3) and Idaho Criminal Rule 45(c).

For over four months, the Court’s Gag Order has restricted speech related to this matter, without the Court holding a hearing or receiving any evidence. The Gag Order violates the First Amendment of the United States Constitution and Article I, Section 9 of the Idaho Constitution.

Memorandum in Support of Motion to Reconsider Order Dated May 4, 2023 - 2

Declaration of Wendy J. Olson in Support of Motion to Reconsider (“Olson Decl.”), Exhibit A. 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).

Because each passing day inflicts additional irreparable harm, Intervenors have worked quickly to vindicate their rights. Within 19 days of the Court issuing the Gag Order, Intervenors organized a nearly thirty-person coalition, retained counsel, and filed a challenge in the Idaho Supreme Court.

The Idaho Supreme Court recognized the urgency of Intervenors’ challenge. Within 3 days of Intervenors re-filing their challenge to include a verification signed by the coalition members and not counsel, the Idaho Supreme Court ordered briefing on an expedited basis. Olson Decl. Exs. B & C. And when the Latah County Prosecutor and Mr. Kohberger moved to intervene, the Idaho Supreme Court granted their motions without full briefing and without modifying the already-set merits briefing schedule. Olson Decl. Ex. D.

On April 24, 2023, the Idaho Supreme Court held that a “vague, overbroad, unduly restrictive, or not narrowly drawn” gag order “would be an unconstitutional obstacle to” Intervenors. *In re Petition for Writ of Mandamus or Writ of Prohibition*, No. 50482, 2023 WL 3050829, at \*5 (Idaho Apr. 24, 2023). But the Idaho Supreme Court denied Intervenors’ petition because it held that a “plain, *speedy*, and adequate remedy at law exists” if Intervenors were to seek relief from this Court. *Id.* at \*7 (emphasis added).

Following the Idaho Supreme Court's direction, Intervenors took merely 7 days to prepare and file their Motion to Intervene and Motion to Vacate the Amended Nondissemination Order. Olson Decl., Exs. E & F. The next day, Intervenors contacted the Court to schedule the next available hearing date, which would automatically set the briefing schedule for the motions. Idaho Rule of Civil Procedure 7(b)(3); Idaho Criminal Rule 45(c). Instead of providing a hearing date, the Court set a scheduling conference for May 22, 2023. Olson Decl., Ex. G. The Court also vacated the May 25, 2023 hearing date for a related motion filed by a victim's family, which presumably is, or at least was, available on the Court's calendar to hear that motion and Intervenors' motions. *Id.* Intervenors understand that a briefing schedule for their motions will not be set until after the scheduling conference.

Respectfully, waiting 3 weeks from when Intervenors filed their motion to have a conference to then provide additional time for briefing prolongs the irreparable harm inflicted by the Gag Order and contradicts the Idaho Supreme Court's holding that Intervenors could obtain a plain, *speedy*, and adequate remedy by re-filing their challenge with this Court. The Latah County Prosecutor and Mr. Kohberger have already briefed the constitutional issues before the Idaho Supreme Court, and they are thus better situated than the typical litigant to satisfy the briefing schedule set in Idaho Rule of Civil Procedure 7(b)(3) and Idaho Criminal Rule 45(c) by the next available hearing date.

Accordingly, Intervenors request that the Court reconsider its order dated May 4, 2023 and either (1) stay enforcement of the Gag Order pending a decision on Intervenors' Motion to Intervene and Motion to Vacate the Amended Nondissemination Order to avoid any additional irreparable harm while the motions are briefed, or (2) set a hearing on Intervenors' Motion to Intervene and Motion to Vacate the Amended Nondissemination Order on the next available date



