No. 18-404

In The Supreme Court of the United States

THE COLORADO INDEPENDENT,

Petitioner,

v.

DISTRICT COURT FOR THE EIGHTEENTH JUDICIAL DISTRICT OF COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Colorado

BRIEF OF SCHOLARS OF LAW AND JOURNALISM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are American scholars of law and journalism whose work is focused on the history and law of the freedom of speech and freedom of the press, particularly as those rights relate to the promotion of government transparency and accountability. Amici all teach about, and conduct or supervise research on, topics relating to those covered in this brief and have devoted significant attention to studying the First Amendment. Amici submit this brief to call the Court's attention to the long Anglo-American legal tradition of providing the public with presumptive, but qualified, access to records, transcripts, and orders in criminal justice proceedings, which are inherently matters of public concern. In addition, amici submit this brief to show the importance of public access to court records to promote the structural values of the First Amendment and to facilitate academic research, which some of them were able to conduct only because of their ability to access judicial records. A complete list of amici appears in the Appendix.

[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were notified of amici's intent to file this brief at least 10 days prior to its filing and have consented to the filing of this brief.

BACKGROUND AND SUMMARY OF THE ARGUMENT

This case presents an ideal vehicle for this Court to articulate the precise nature and scope of the First Amendment qualified right of public access to criminal court proceedings as applied to motion papers, hearing transcripts, and judicial orders in such proceedings. The answer to that question should be clear based on a long historical tradition of presumptive public access to such records as well as the reasoning of this Court's decisions protecting a parallel right of access to criminal justice proceedings. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)[2] (collectively, "the *Press-Enterprise* cases").

The *Press-Enterprise* cases established a qualified First Amendment right for the public to have presumptive access to criminal justice proceedings where those types of proceedings have historically been open to the public (the "experience" factor) and where public access plays "a significant positive role in the functioning" of such process (the "logic" factor). *Press-Enterprise II*, 478 U.S. at 8. Noting that there are sometimes valid reasons to preclude such access, this Court stressed that the right of access is not absolute. Rather, such

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[2] Although *Richmond Newspapers* was a plurality decision, a majority of this Court has since embraced its principles.

proceedings can be closed if there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id*. at 9 (internal quotations omitted). While the *Press-Enterprise* cases delineated a clear test for judicial access, these cases are not groundbreaking in the sense that they carved out newly minted rights. Rather, they constitutionalized a longstanding right that can be traced back through hundreds of years of English common law.

As amici show, the history reflects that access has not been limited to criminal justice proceedings, but also has extended to a presumptive access to judicial records. This Court recognized as such when it acknowledged the existence of a common law right of access to such records in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). That common law privilege is not as protective of access as the right under the First Amendment, which requires the government to justify denial of access based on a compelling interest and the restriction to be narrowly tailored. *Press-Enterprise I*, 464 U.S. at 509 ("[P]resumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.").

The pleadings, transcript, and court order sought by the newspaper in this case concerned a proceeding of serious and profound interest to the public – the adjudication of a post-conviction motion to disqualify the prosecutor in a high-profile capital case because of misconduct. Indeed, the district court in this case concluded that misconduct occurred, although it ultimately found that conduct to be harmless error not affecting the underlying adjudication. Petition for a Writ of Certiorari, *The Colorado Independent v. District Court for the Eighteenth Judicial District of Colorado*, No. 18-404 ("Petition"), Appendix A at 9a, 16a-18a. No less than access to the proceedings themselves, a qualified right of access to the related documents serves values at the core of the First Amendment. Exposure of the legal arguments and evidentiary offerings on both sides of this dispute surely fall within the category of information that would promote understanding of the criminal justice process, further the prosecutors' accountability, and ensure legitimacy in the eyes of the public.

It is axiomatic to the right of access that "broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient to warrant . . . closure or sealing." Stephen E. Arthur & Robert S. Hunter, § 8:41 *Public's right to access court records*, FEDERAL TRIAL HANDBOOK CIVIL (4th ed.). Yet, the Colorado Supreme Court's decision in this case rejected outright the newspaper's request for access to these documents without requiring the demonstration of any valid reason, much less a compelling one, for shielding

them from public scrutiny. Its decision conflicts with both the long historical tradition of presumptive access to judicial documents in criminal proceedings and the overwhelming weight of authority from lower federal and state courts applying the *Press-Enterprise* cases.

This Court's review of the Colorado high court's decision is necessary to provide clear guidance to courts facing judicial record requests about the source, nature, and scope of the First Amendment right of access in the numerous circumstances in which the public and media request such materials. At the same time, by hearing this dispute, this Court can carefully calibrate the right of access by articulating the circumstances in which the right may be outweighed by other interests, such as privacy, the right to a fair trial, or the facilitation of ongoing law enforcement investigations. Review is especially critical in this context because the media frequently seek access to records in controversial court cases meaning that the type of dispute at issue in this case is highly likely to routinely recur across the country.

Clarifying the protection of a public right of access also is necessary to ensure and promote citizen participation in government. *Globe Newspaper Co.*, 457 U.S. at 609-10. In the context of the criminal justice process, such participation advances the structural functions of the First Amendment, which are best fulfilled when the public is able to understand that process, keep its watchful gaze on the actors who carry it out to ensure accountability, and position itself to accept that process's legitimacy. Finally, a qualified public right of

access to judicial records also serves broader purposes for those who research and write about law, history and journalism, and rely on such documents as a primary source of data.

ARGUMENT

I. THE COLORADO SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH THE LONGSTANDING PRACTICE IN ANGLO-AMERICAN LEGAL TRADITION, THE PRINCIPLES EMBODIED BY THE *PRESS-ENTERPRISE* CASES, AND THE OVERWHELMING MAJORITY OF LOWER FEDERAL AND STATE COURTS THAT HAVE ADDRESSED THE ISSUE.

It has been over thirty years since this Court held that the First Amendment encompasses a qualified right of access to criminal justice proceedings in *Press-Enterprise II*. In the interim, dozens of lower federal and state courts have applied the same principles to recognize a parallel qualified public right of access to judicial records. Those decisions reflect a longstanding historical practice that closely tracks the traditions on which *Press-Enterprise II* relied. The Colorado Supreme Court's decision to issue a blanket denial of a newspaper's request to review the transcripts of a proceeding relating to the prosecution of a death penalty case conflicts with the historical tradition of access, the First Amendment principles laid out by this Court, and

the decisions of virtually every lower court to have considered the issue.

A. The Colorado Supreme Court's Decision Conflicts with the Longstanding Anglo-American Legal Tradition of Presumptive Public Access to Judicial Proceedings and Records as Well as with this Court's *Press-Enterprise* Cases.

1. This Court first recognized a qualified First Amendment right to public access to criminal judicial proceedings nearly 40 years ago in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980), but such access substantially predates the ratification of our Constitution. *See United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976) (describing the qualified right of access as a precious common law right, that predates the Constitution itself) *rev'd on other grounds*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Throughout history, the value of public access to government documents on matters of public concern has not been gainsaid. JAMES P. SICKINGER, PUBLIC RECORDS AND ARCHIVES IN CLASSICAL ATHENS 1 (P.J. Rhodes & Richard J. A. Talbert eds., 1999) ("A fine thing, my fellow Athenians, a fine thing is the preservation of public records. For records do not change, and they do not shift sides with traitors, but they grant to you, the people, the opportunity to know whenever you want. . . ."); *see also* Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89 (2015).

A qualified right of access to the judiciary dates to before the advent of this country; its foundations can be traced to pre-Norman England, a society that mandated compulsory attendance of jury trials. Sir Frederick Pollock, *English Law Before the Norman Conquest*, *in* 1 SELECT ESSAYS IN AMERICAN LEGAL HISTORY 88, 89-90 (1907). Historians have noted that after the Norman conquest and the eventual shaping of English law under Magna Carta, jury trials, the most salient judicial acts of the time to the people, were open to the general public. *Richmond Newspapers*, 448 U.S. at 565 (citing 2 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 121 (6th ed. 1681)). The eighteenth-century jurist William Blackstone commented:

> This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law.

3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1765-69).

Numerous sources confirm that the presumption of an open court, particularly in criminal matters, has a long and celebrated history in the English common law. *See*, *e.g.*, Pierce, *All Courts Shall Be Open*, 37 PITT. LEGAL J. 362, 362 (1883) (expounding on the long-standing right of access), *cited in* Stuart Wilder, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L. Q. 311, 311

n.3 (1979). *See also* SIR MATTHEW HALE, HISTORY OF THE COMMON LAW 163-65 (4th ed. 1779); JEREMY BENTHAM, WORKS OF JEREMY BENTHAM 355 (J. Boring ed., 1838-43); EDWARD JENKS, THE BOOK OF ENGLISH LAW 91 (4th ed. 1936) ("[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial."); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 428-29 (1991) ("Like much of this country's judicial process, the right of public access to court proceedings and records derives from our English common law heritage."). The public criminal trial was often understood as a response to the practices of the English Star Chamber, and other historical examples of adjudicating guilt in secret and without accountability. *In re Oliver*, 333 U.S. 257, 268-69, 273 (1948) (noting "this nation's historic distrust of secret proceedings").

These rights of judicial access crossed the Atlantic Ocean with the colonists who would eventually form this nation. *See*, *e.g.*, *Richmond Newspapers*, 448 U.S. at 567-68. As the eighteenth century closed, this country emerged, invoking a new order with its Constitution and ideals, but preserving the tenets of English common law. Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. LAW REG. 55, 553-54 (1882); *see also* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 197 (2009) ("Like their English counterparts, American courts of the nineteenth century almost never sealed (i.e., concealed) court records.").

With the passage of the Bill of Rights, the principles of this common law right of access were now incorporated into the First Amendment. James Madison, knowing the importance of the public's ability to monitor its government, once explained, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." *Letter from James Madison to W.T. Barry* (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910). *See also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 503 (1st Cir. 1989) (documenting the sources available to the founders that indicated the value they "placed on access to records of secretive criminal proceedings."). Put differently, "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Or indeed, if the requirement of openness is not satisfied, it might be said that there "is no court and all the proceedings are void." *Rex v. Josephson*, 1 W.W.R. 93, 94 (1948) (Can.).

While English common law scholars focus on the right to access judicial *proceedings*, American scholars and courts have noted that the same history includes access to *documents* as well. As Simon Greenleaf, the notable nineteenth-century legal scholar explained:

> [I]t has been admitted, from a very early period, that the inspection and exemplification of the records of the King's courts is the common right of the subject. . . . The exercise of the right does not appear to have been restrained, until the reign of Charles II. . . . But

> in the United States, no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed *repugnant* to the genius of American institutions.

1 SIMON GREENLEAF, A TREATISE ON THE LAWS OF EVIDENCE 571-72 (1888) (emphasis added).

The Third Circuit has made a similar observation, noting that it would be odd "to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed." *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). The right to key documents relating to a proceeding, particularly transcripts, derives from and is a necessary corollary of the right to observe the proceedings. The Colorado Supreme Court's broad rejection of a qualified right to access public records is baldly inconsistent with these historical, common law rights and sets a dangerous precedent.

2. The Colorado Supreme Court's denial of access to the transcripts, pleadings, and order in a proceeding related to the integrity of the prosecution of a capital offense without demanding any specific justification or findings on the record also conflicts with the well-established principles set forth in the *Press-Enterprise* cases. This Court has consistently recognized the historical significance and practical importance of "a constitutional right of access to criminal trials." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596,

603 (1982). Excluding the public from criminal proceedings is impermissible unless there is an "overriding interest" that closure is essential and that such closure is "narrowly tailored" to address that interest. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986). This is tantamount to a "least intrusive means" requirement. The Constitution can demand no less of the government when it comes to access to judicial records.

While this Court has previously recognized a common law right of access to court records, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), lower federal courts have built upon the long history of such presumptive access to locate that right in the First Amendment. *See*, *e.g.*, *Antar*, 38 F.3d at 1361 n.17 ("The right to inspect and copy [judicial records and transcripts] antedates the Constitution.") (alterations in original); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("The common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings.").

The right to review a proceeding retrospectively through transcripts, pleadings, and other documents is presumed to be coextensive with the right to be present at a proceeding. It would betray common sense to conceive of a qualified right of access that privileged contemporaneous observations over the more careful and complete deliberations that can be conducted with the benefit of judicial records. Certainly, therefore, the documents necessary to understand a public proceeding

fall within the qualified right of access. And although this Court has never accepted an absolute right to all judicial records, *Nixon*, 435 U.S. at 598, it must be acknowledged that "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?" *Antar*, 38 F.3d at 1360.

The constitutional right of access to judicial proceedings "extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings." *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002). A presumptive right to transcripts of proceedings other than the trial, but implicating a criminal conviction, has been acknowledged by this Court for nearly four decades. In *Press-Enterprise I*, a newspaper sought access to the transcripts from a voir dire hearing that had been closed to the public and this Court unanimously held that the closure and refusal to provide transcripts could only be justified through explicit and specific findings about the need for such closure. 464 U.S. 501, 509 (1984). The scope of the right to access judicial records was expounded further in *Press-Enterprise II* when members of the media challenged a municipal court's refusal to release transcripts of a preliminary hearing in a murder case. The journalists appear to have not even attempted to attend the preliminary hearing in question in that case, yet this Court held that the failure to make transcripts available to the

media, absent specific findings on the record justifying the non-disclosure, was a violation of the right of access enshrined in the First Amendment. *Press-Enterprise II*, 478 U.S. at 4-5 (noting that the request for transcripts was made at the conclusion of the hearing, which was closed to the public based on an unopposed motion).

Even when it was more commonplace during the twentieth century for some states to exclude the press and public from certain parts of the criminal case so as to avoid a risk to the fair trial right – a risk that was not present in this case – the ABA's Committee on Fair Trial and Free Press concluded that if the risk of prejudice to a defendant is sufficiently great, then the press and public rights of access are adequately safeguarded by keeping a complete record of the proceedings that is made available to the public after the conclusion of the case. ABA STANDARDS RELATING TO A FAIR TRIAL AND FREE PRESS (1968). The powerful nexus between access to live proceedings and access to transcripts of those proceedings is further reflected by several lower federal courts, which have noted that a transcript can sometimes serve as an adequate substitute for actual attendance at such proceedings. *See*, *e.g.*, *ABC, Inc. v. Stewart*, 360 F.3d 90, 100 (2d Cir. 2004) ("Where, applying the constitutionally mandated balancing test, a court has found that concurrent access must be denied, the provision of a transcript may well be the best available substitute."); *Antar*, 38 F.3d at 1360 n.13 ("where a court . . . finds that closure is necessary and effective to preserve an overriding interest,

so that the right of access may therefore be temporarily limited, later release of a transcript may be the next best means of implementing the right of access.); *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) ("Even where a court properly denies the public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed[,] . . . [a]ccordingly, the district court's denial of the motion to unseal must be supported with a finding that the denial of access is necessary to preserve higher values, and is narrowly tailored to serve that interest.").

The presumption that criminal proceedings will be open and that the essential, related documents, such as transcripts, will be publicly available went entirely unheeded by the Colorado Supreme Court in this case. Because that decision so clearly conflicts with this Court's *Press-Enterprise* cases, certiorari should be granted.

B. The Colorado High Court's Decision is also in Direct Conflict with the Overwhelming Majority of Federal and State Courts, Which Have Consistently Recognized a Qualified First Amendment Right of Public Access to Judicial Records.

1. Review is necessary not only to correct the Colorado Supreme Court's erroneous decision, which categorically refused to recognize even a qualified First Amendment right of access to the requested

judicial documents, but also to resolve a conflict between that decision and the overwhelming weight of authority from lower federal courts and the courts of other state supreme courts. The Colorado high court's cursory rejection of Petitioner's reasonable request for access to documents involving charges of prosecutorial misconduct in a high-profile death penalty case presents a signal opportunity for this Court to clarify the modest extension of its qualified right of access cases to judicial records, transcripts, and filings.

Indeed, nothing could underscore the necessity for this Court's review more clearly than the Colorado Supreme Court's own statement regarding transcripts and pleadings that "we find no support in United States Supreme Court jurisprudence" for the contention that there is a qualified First Amendment right of access to "court records in cases involving matters of public concern." Petition, Appendix A at 5a. As illustrated in the first part of this brief, there is a longstanding historical tradition of qualified access to judicial records in criminal proceedings that closely tracks the access to the proceedings themselves. The Colorado Supreme Court's decision in this case stands as an outlier among courts that have addressed this critical constitutional issue.

A few features of the Colorado Supreme Court's decision are particularly notable in this regard. First, it failed to even directly address the Petitioner's actual request for documents, instead mischaracterizing its claim as a request for "mandatory disclosure," "unfettered access," and "a constitutional right of access to

any and all court records in cases involving a matter of public concern." Petition, Appendix A at 5a-6a. Of course, based on this mistaken description of the breadth of Petitioner's request, the Colorado high court could hardly come to a different conclusion. But such a framing ignores the fact that this Court has carefully calibrated the applicable First Amendment standard for a qualified right of access to criminal proceedings in the *Press-Enterprise* cases.

The Colorado Supreme Court also erroneously relied on two Tenth Circuit decisions, seemingly unconstrained and unmoved by the wealth of precedent from other jurisdictions.[3] Having done so, it has created something resembling a circuit split. *See* Petition at 17-19 (cataloguing cases from eleven federal circuits recognizing a qualified First Amendment right of access to judicial records). Amici are not aware of any state supreme court or lower federal court decisions that adopt an approach to judicial records, including transcripts from judicial proceedings pertaining to criminal convictions, that are more restrictive than

[3] The Colorado Supreme Court also mistakenly relied on two Tenth Circuit decisions that it characterized as having "declined to recognize a First Amendment right of access to court records." Petition, Appendix A at 5a. But there is a fundamental difference between *declining to recognize a right* and *never having addressed the question*. Subsequent decisions by the Tenth Circuit, to which the Colorado Supreme Court failed to cite, explicitly confirm that it has never addressed the substantive question in this case – whether there is a qualified right of access to judicial records in criminal proceedings. *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998); *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997).

that offered by the Colorado Supreme Court in this case.

II. THIS COURT SHOULD REVIEW THE COLORADO SUPREME COURT'S DECISION TO CLARIFY THE SOURCE, NATURE, AND SCOPE OF THE QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL DOCUMENTS, WHICH WILL PROMOTE THE STRUCTURAL VALUES OF THE FIRST AMENDMENT BY ASSURING PUBLIC KNOWLEDGE AND CONFIDENCE AS WELL AS FACILITATE LEGAL, HISTORICAL, AND JOURNALISTIC RESEARCH.

1. Another reason supporting certiorari is that this case provides an important opportunity for this Court to offer guidance about the nature and scope of the First Amendment right of access. Lower courts are in apparent agreement that the approach taken by the Colorado Supreme Court is unduly narrow, but there is no consensus as to the precise contours or meaning of the qualified right of access to judicial records. *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 875 (2017) ("[T]he Court's analysis in *Press-Enterprise II* left the lower courts uncertain as to whether the First Amendment right of access recognized in *Richmond Newspapers, Globe Newspaper*, and the *Press-Enterprise* cases extends to judicial records.").

Following the sound reasoning of this Court's qualified right of access decisions, the federal courts of

appeals have almost all extended that right to judicial records, including transcripts, of such proceedings. *See* Petition at 17-19 (listing cases). Although, as this list of cases reflects, these courts have frequently recognized a First Amendment qualified right of access to the records in criminal proceedings, the reach of their protections and their reasons for doing so have not been uniform. Among the eleven other federal circuits that have recognized a qualified right of access to judicial records, the courts have engaged in multiple analytical approaches to defining the nature and scope of that right as well as the degree to which the *Press-Enterprise II* test should apply to judicial records in the same way it is used to determine access to proceedings.

Commentators have identified multiple approaches across the lower courts in their examination of the scope of First Amendment rights for the public to access judicial records. *See* Ardia, 38 CARDOZO L. REV. at 858, 880-81; Raleigh Hannah Levine, *Toward A New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1742-43, 1758-69 (2006). The "contradictory analyses from which the courts pick and choose are troubling not only because they lead to inconsistent and unpredictable results, but also because such inconsistency suggests that the choice is outcome-driven." Levine, 27 CARDOZO L. REV. at 1742. This confusion is perhaps nowhere more apparent than in the Tenth Circuit, the only federal circuit that has not yet applied the *Press-Enterprise* cases to at least some judicial records.

By engaging in careful examination of the First Amendment doctrine as it applies to judicial records, this Court can both clarify the qualified right of access and draw limits on its scope, by permitting narrowly drawn, but specific, exceptions to such access to protect competing rights that might be compromised by the disclosure of such records, such as personal privacy, the right to a fair and impartial jury trial, and potential interference with ongoing law enforcement investigations. These are precisely the types of interests that the Colorado courts refused to even discuss when they categorically rejected the Petitioner's request for access to the judicial records in this case.

Lower federal and state courts urgently require this Court's guidance on these important matters, especially because the nature of judicial proceedings has changed dramatically in the more than thirty years since the *Press-Enterprise* cases were decided. Increasing on-line access makes issues about access to judicial records and filings likely to recur, presenting critical questions about the scope of the qualified right of access to records as balanced against legitimate countervailing concerns. *See generally* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385 (2017).

2. Not only should this Court grant certiorari to clarify the law for the courts, its authority is also critical to advancing the structural purposes of the First Amendment in promoting reasonable government transparency by ensuring access to judicial records by the public, the media, and the scholarly community. As

Justice Brennan once wrote, a critical function of the right of access is ensuring that the "constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982). Moreover, this Court has stressed that public access to the criminal justice judicial process is particularly important where, as here, the proceedings involve the conduct of prosecutors. *See Waller v. Georgia*, 467 U.S. 39, 47 (1984). Continuing uncertainty about the nature and scope of the right of access to criminal justice records directly impedes the public's ability to learn about and understand criminal proceedings, observe and act as a check on abuses in the criminal justice process, and retain faith in the legitimacy of the criminal justice system.

Along similar lines, it has long been recognized that *judicial* integrity is preserved by opening criminal proceedings to public scrutiny and judgment. *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); BENTHAM, *supra*, at 316 (noting that the integrity of the judiciary is safeguarded through open courts). History taught the founders to abhor secret criminal proceedings that sow public doubt over the fairness of the judicial process. For the system's functioning to be understood, it must be open to the public. *See*, *e.g.*, *Oxnard Publ'g Co. v. Superior Court*, 68 Cal. Rptr. 83, 90 (Ct. App. 1968) (recognizing a newspaper's interest in accessing information about criminal proceedings as relevant to "public tranquility, . . . honest government, and . . . effective institutions"). Hon. T. S. Ellis, III, *Sealing, Judicial Transparency and Judicial*

Independence, 53 VILL. L. REV. 939, 940 (2008) ("as the familiar maxim teaches, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'") (quoting *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (Eng.)).

It ought not be surprising, then, that when the stakes are highest, when the crimes the most salacious, as in the case at issue, the public's interest in debating the government's (and defense's) handling of a criminal case will be at their apex. Colorado's high court has turned this principle on its head and reasoned that when the State seeks the death penalty and there is evidence that the prosecution offered financial rewards to its witnesses, the importance of avoiding secrecy and fostering public scrutiny is greatest. The Colorado Supreme Court's refusal to require so much as a valid, much less a compelling, countervailing government interest puts its decision at war with history and this Court's longstanding recognition that "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). "When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case." *Id*. In an analogous context, lower courts have applied this Court's precedents in holding that closed post-trial hearings relating to misconduct implicate the First Amendment, and that the presumed "right of access cannot be overcome by [a] conclusory assertion" of

public interest. *Application of Nat'l Broad. Co.*, 828 F.2d 340, 344-45 (6th Cir. 1987) (relying on the *Press-Enterprise* cases to hold that "there is a qualified right of access to documents and records that pertain to a proceeding in which one or more parties seek to disqualify a judge").

Over the course of the nation's history, access to judicial records and court filings have been at the core of the American media's work to report about the inner workings of our criminal justice system to the public to ensure precisely this type of check on the government. *See Richmond Newspapers*, 448 U.S. at 573 ("[P]eople now acquire [information about judicial proceedings] chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."). Investigative journalists have routinely combed through thousands of pages of court documents, filings, and transcripts to unearth information that would otherwise escape the public's discerning eye. *See* JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 31, 79-80, 95-96, 212 (2005) (recounting the importance of access to judicial records to the work of Chicago Tribune journalist Henry Demarest Lloyd to uncover misconduct by oil tycoons and Philadelphia Inquirer reporters Donald Bartlett and James Steele to expose the influence of politics and racial bias in Philadelphia's criminal justice system).

Finally, as scholars whose work focuses on the right of access, amici are acutely concerned that a qualified right of access be ensured to enable them to

continue their research, which sometimes relies on securing access to documents for empirical and other research objectives. *See*, *e.g.*, David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1850 (2015) (describing the study's methodology, which was dependent on public access to state court records). Indeed, judicial records have long been a fertile original source for legitimate academic inquiry. *See generally* David H. Flaherty, *The Use of Early American Court Records in Historical Research*, 69 LAW LIBR. J. 342 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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