No. 18-___

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 of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the public's qualified First Amendment right of access defined by this Court in a series of cases culminating in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), apply to the substantive motion papers, hearing transcripts and court orders filed in a capital murder prosecution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of the two parties to the proceeding in the Colorado Supreme Court. The criminal defendant in the underlying state court action, Sir Mario Owens, was recognized by the Colorado Supreme Court as a real party in interest who was authorized to file pleadings in that Court.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that Petitioner *The Colorado Independent* is a nonprofit corporation, incorporated under the laws of the State of Colorado, and does not issue any stock. (No publicly held corporation owns 10% or more of *The Colorado Independent*.)

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DECISIONS BELOW

The opinion the Colorado Supreme Court entered on June 11, 2018 is reported as *In re People v. Owens*, 420 P.3d 257 (Colo. 2018) and is included in the Appendix ("App.") hereto. The trial court's ruling, entered January 12, 2018, is not reported, but is included in the Appendix. App. 7a-9a.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 11, 2018. A petition for rehearing was timely filed on June 21, 2018, and denied by Order dated July 2, 2018. App. 14a. This Petition for Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

PRELIMINARY STATEMENT

> Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.
>
> —*Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J. concurring in part and dissenting in part) (citation omitted)

This case presents an important foundational question about the public's constitutional right to information concerning the operation of the criminal justice system. *The Colorado Independent* asserted a qualified right under the First Amendment to access sealed motion papers, a hearing transcript and an order relating to a capital murder defendant's effort to disqualify his prosecutor for misconduct and conflicts of interest. Contrary to every federal appellate court and every state court of last resort that has decided the issue, the Colorado Supreme Court categorically rejected the existence of a presumptive constitutional right of access to the sealed records.

The holding of the Colorado Supreme Court should be reviewed and promptly reversed because it is so clearly and dangerously wrong. Left undisturbed, it will erode access to important information about crimes prosecuted in Colorado state court and undermine confidence in the judiciary.

In a series of cases culminating in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), this Court defined a qualified First Amendment right of public access to judicial

proceedings where (a) the type of proceeding traditionally has been open to the public and (b) openness advances the proceeding's objectives. A judicial proceeding subject to this right, the Court further held, can be closed only where closure is essential to avoid a substantial probability of harm to some overriding interest and no effective alternative exists. In articulating this standard, this Court twice held that the First Amendment access right attaches to the transcripts of proceedings that are themselves subject to that qualified right.

Over the following decades, eleven federal courts of appeal have held that the qualified constitutional access right applies to other types of judicial records beyond transcripts of court proceedings. No federal appellate court has denied the existence of a First Amendment-based right to inspect motion papers, transcripts or orders in a criminal case. Yet, the Colorado Supreme Court has now held just that.

The Colorado Court issued this singularly contradictory holding in a capital murder case of significant public concern, in which the trial judge sealed a murder defendant's motion to disqualify the prosecutor, conducted a closed hearing on that motion, sealed the hearing transcript, and denied the defendant's motion in a sealed ruling. The trial court stated only that "countervailing considerations" justified secrecy.

The Colorado Supreme Court rejected a First Amendment right to any of the records without employing the two-part "experience and logic" test this Court formulated nearly 40 years ago to identify where the access right exists, and without addressing this Court's holdings that the qualified access right applies to hearing transcripts in a criminal prosecution. It affirmed the trial court's denial of access to

motion papers, a transcript and a court order without any factual finding of a compelling need for secrecy and with no explanation why a more narrow sealing order would not suffice.

The rejection of a qualified First Amendment access right to these judicial records should be reviewed and promptly reversed because it conflicts with the rulings of this Court and the unanimous view of other state and federal appellate courts that the access right applies to these types of judicial records. The Colorado Court's ruling deserves review for the further reason that the access right it rejects plays a fundamental role in the successful functioning of the judicial system. If permitted to stand, the Colorado Court's categorical rejection of a First Amendment right to access any and all judicial records will impede the proper functioning of that state's criminal justice system, restrict the public's ability to monitor the courts, and undermine public confidence in the judiciary.

STATEMENT OF THE CASE

A. A Convicted Capital Murder Defendant Moves to Disqualify His Prosecutor and All Records and Proceedings Are Entirely Sealed

Sir Mario Owens was convicted and sentenced to death in 2008 for killing a witness scheduled to appear in another murder case. At his trial there was no definitive physical evidence, no confession, and no eyewitness. Prosecutors built their case almost entirely on the testimony of informant witnesses.

During the course of his post-conviction review proceedings in the trial court, one of the prosecutors disclosed a set of secret "witness protection files" that had never been provided to the defense. App. 9a, 16a-

18a. When the district attorney was ordered to turn the files over, they revealed undisclosed payments and other favors to the informant and cooperating witnesses. One was given a district attorney's office car, others were given gift cards for local businesses and one received cash to purchase Christmas presents. A main witness was threatened with being charged for the murders himself if he would not testify against Owens. App. 9a, 16a-18a.

Owens' prosecution raised concern at the time of his trial in 2007 because of the unusual secrecy imposed—a string of court orders sealed much of the court record. All parties remained gagged even from speaking about the sealed court filings until 2013, and practically all of the voluminous case file remains sealed to this day, including the case docket. App. 23a. The post-trial revelations about the district attorney's conduct, specifically the withholding of potentially exculpatory evidence, attracted renewed public interest because it was consistent with a pattern of similar misconduct in other cases by the same office.[1]

On October 6, 2016, Owens filed a motion to disqualify the 18th Judicial District Attorney's office and to appoint a special prosecutor (the "Motion to Disqualify"). He filed that motion under seal as required by the trial court's order, which itself is suppressed from public inspection. App. 8a. Owens also submitted

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[1] *See, e.g.*, *People v. Bueno*, 409 P.3d 320, 327 (Colo. 2018) (affirming trial court's granting motion for new trial based on prosecutorial misconduct in violation of *Brady v. Maryland*, in case prosecuted by same District Attorney's office, and finding record support for the trial court's finding "that the prosecution had 'made the conscious decision this [exculpatory] information was not to be included in discovery' and had 'segregated [the evidence] from the balance of the [prosecution's] working file'").

under seal a motion to unseal and make public his Motion to Disqualify. App. 8a. The district attorney filed sealed oppositions to both motions. App. 8a. Neither the two motions by the defendant nor the two responses filed by the district attorney appear on the court's docket.

On December 12, 2016, district court held a closed hearing on Owens' sealed motions, which resulted in the creation of a sealed transcript. App. 8a. The district court then denied both the Motion to Disqualify and Owens' unsealing motion in orders that were themselves sealed. App. 8a. Accordingly, all records relating to Owens' motions, the transcript of the closed hearing, and the district court's rulings on the motion, were entirely hidden from the public (collectively, the "Sealed Records").

Months later, on September 14, 2017, the district court issued a 1,343-page post-conviction order that found the district attorney had engaged in multiple actions constituting prosecutorial misconduct, including deliberately withholding or suppressing exculpatory evidence. App. 9a, 16a-18a. The district court nonetheless found that the withheld or suppressed exculpatory evidence would not have had an impact on the outcome of the trial. App. 16a-18a.

B. *The Colorado Independent* Moves to Unseal and the District Attorney Denies that Any First Amendment Access Right Exists

On November 7, 2017, *The Colorado Independent* moved to unseal the Sealed Records (the "Motion to Unseal"). The newspaper asserted a qualified First Amendment right of public access to the Sealed Records and urged that the records could not remain

sealed without satisfying the constitutional test laid down in *Press-Enterprise II*. App. 19a. Under this test, the newspaper urged, the records could remain sealed or information redacted from them only if the court found that a compelling interest required continued sealing and there was no alternative to restricting access that would adequately protect that interest. App. 21a-22a.

Owens did not oppose unsealing; the district attorney objected to any unsealing whatsoever. Admitting that many courts "from other jurisdictions" apply the *Press-Enterprise II* test in deciding whether a judicial record may properly be kept from the public, the district attorney argued that no First Amendment access right should apply to the Sealed Records and urged the court to deny the unsealing motion simply by balancing "the interests of the public and the protection of individuals who are parties." Then, instead of explaining how this balance should be struck in its public filing, the district attorney filed his opposition to disclosure of the Sealed Records under seal, and moved to suppress that sealed filing from *The Colorado Independent* and its counsel.

In reply, *The Colorado Independent* demonstrated why the constitutional access right could not simply be ignored, and noted the district attorney's failure to present record evidence sufficient to overcome the public's qualified First Amendment right to inspect the Sealed Records.

C. The District Court Keeps the Records Largely Secret Without Making Any Factual Findings or Stating Any Legal Standard

On January 12, 2018, the district court issued two orders: one deciding the Motion to Unseal (the "Access Order") and another deciding the district attorney's motion to suppress his submissions from *The Colorado Independent* (the "Suppression Order"). Both orders largely retained the secrecy surrounding Owens' effort to disqualify the District Attorney's office.

The Access Order unsealed only a small portion of Owens' initial Motion to Disqualify and nothing else. Specifically, it unsealed those specific allegations of prosecutorial misconduct made in Owens' motion that had previously been disclosed in the court's post-conviction order. App. 9a. The district court refused to unseal any aspect of Owens' legal arguments, his allegations of a disqualifying conflict of interest, his separate motion to unseal, the district attorney's responses to Owens' two motions, the transcript of the closed hearing, or the court's orders deciding the motions. App. 9a.

In maintaining this secrecy, the court recognized *The Colorado Independent*'s "legitimate interest in investigating the underlying facts and claims of alleged government misconduct," but then found this interest outweighed by some entirely unspecified "countervailing considerations." App. 9a. The Access Order never articulates the legal standard applied in concluding that the public can be kept from knowing Owens' arguments about why prosecutorial misconduct and alleged conflicts of interest warranted the district attorney's removal, the prosecution's rejoinder, and the court's reasons for rejecting Owens' positions. The

Access Order cites no case law to support its refusal to apply the *Press-Enterprise II* standards that had been advocated by *The Colorado Independent*; it never even mentions the First Amendment.

The Suppression Order separately granted the district attorney's request that *The Colorado Independent* be denied the right to see the response the district attorney had filed to the newspaper's motion to unseal, ordering that that court filing in response to the *Colorado Independent*'s motion would be "only available to the prosecution and Owen's post-conviction counsel." App. 11a. The Suppression Order, too, contained no discussion of the underlying facts, identified no governing standard, and cited no legal authority to justify the continued sealing and suppression. App. 10a-11a.

D. On Review, the Colorado Supreme Court Holds that the First Amendment Access Right Does Not Apply to Judicial Records

On January 29, 2018, *The Colorado Independent* petitioned the Colorado Supreme Court for immediate discretionary review. It asserted that (1) the Sealed Records are subject to a qualified First Amendment access right under *Press-Enterprise II*; (2) the district court was thus required to determine whether the district attorney had demonstrated a compelling reason to overcome the qualified right; and (3) if so, the district court was required to provide on the record findings to support that determination.

On February 8, 2018, the Colorado Supreme Court directed the district court to respond to the petition. App. 12a-13a. Its response advanced the blanket claim that "the First Amendment does not create a right for the media to inspect criminal court records."

On June 11, 2018, the Colorado Supreme Court issued a five-page opinion summarily holding that the public enjoys a constitutional right only to attend judicial proceedings, but that there is no qualified First Amendment right to inspect any of the Sealed Records. App. 5a-6a. Citing inapposite Tenth Circuit opinions from 1985 and 1994 addressing the common law access right—but not rejecting a First Amendment right, *see United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997)—the Colorado Supreme Court concluded that it was not *bound* to recognize a First Amendment right of access to any judicial records: "We find no support in the United States Supreme Court jurisprudence for Petitioner's contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern." App. 5a. Without further explanation, the Colorado Court "decline[d]" to recognize a First Amendment right of access to the Sealed Records "in the absence of any indication from the nation's highest court" that such access "is a constitutionally guaranteed right belonging to the public at large." App. 6a.

The Colorado Independent petitioned for rehearing, noting the Colorado Court's mistaken reliance on Tenth Circuit authority that did not decide whether the First Amendment access right applies to judicial records. The rehearing petition also pointed out that this Court has twice held that a transcript of a closed criminal proceeding subject to the First Amendment access right cannot be sealed indefinitely without satisfying the same constitutional standard that governs closure of the underlying proceeding. App. 64a. The rehearing petition cited published decisions from eleven United States Courts of Appeals that expressly recognize a qualified First Amendment right

to inspect judicial records in various contexts. App. 65a-67a.

The Colorado Supreme Court summarily denied rehearing on July 2, 2018. App. 14a.

REASONS FOR GRANTING THE PETITION

I. THE COLORADO SUPREME COURT'S REJECTION OF ANY FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL RECORDS CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH THE UNIFORM APPLICATION OF THE RIGHT BY FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT

The holding of the Colorado Supreme Court warrants review and reversal because it is contrary to both the rationale and holdings of this Court's decisions applying the qualified First Amendment access right in criminal prosecutions, and because it directly conflicts with the consistent holdings of other state courts of last resort and federal appellate courts recognizing that the qualified First Amendment access right applies to the types of judicial records at issue here. The Colorado Supreme Court wrongly concluded that no binding precedent from this Court required it to recognize a qualified right of access to the Sealed Records and, without explanation, it "decline[d]" to do so.

A. The Colorado Court's Rejection of a Qualified First Amendment Right to Access the Sealed Records Conflicts with This Court's Prior Rulings

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), holds that the First Amendment's express protections of free speech, freedom of the press, and

the right to petition the government carry with them an implied right of public access to certain judicial proceedings, in that case a state court murder trial. Citing an "unbroken, uncontradicted history" of access to Anglo-American criminal trials that predates the Norman Conquest, the Court explained that the tradition of access to criminal proceedings is "no quirk of history," but "an indispensable attribute of an Anglo-American trial." *Id.* at 556-569.

Richmond Newspapers also found support for recognizing a constitutional right of access to criminal trials in the "logic" of open trials. The presence of the public at a trial helps ensure that proper procedures are followed, encourages those with information to come forward and creates incentives for all participants to perform well. *Id*. at 569-70. Public access also discourages perjury, misconduct, and bias that can thrive in secrecy, and in this respect "is an effective restraint on possible abuse of judicial power." *Id*. at 592 (Brennan, J., concurring) (citations omitted). As Chief Justice Burger observed, public access promotes both the fairness of the judicial system and the essential perception of fairness. *Id.* at 572. In short, public access plays a vital role in assuring that the objectives of a criminal trial are achieved.

The recognition of a constitutional access right was hailed at the time as a "watershed" event, *id.* at 582 (Stevens, J, concurring), that affirmed the structural role the First Amendment plays in our democracy. *See, e.g.*, *Public Right of Access to Criminal Trials: Richmond Newspapers, Inc. v. Virginia*, 94 Harv. L. Rev. 149 (1980). In three subsequent cases, the Court developed the *Richmond Newspapers'* analysis for identifying where the access right exists into what it called the twin tests of "experience and logic." *See*

Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 603, 606-07 (1982); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 505-11 (1984) ("*Press-Enterprise I*"); *Press-Enterprise II*, 478 U.S. at 8-15. These same decisions make clear that the First Amendment access right, while not absolute, can be limited only upon the entry of judicial findings that there is a substantial probability that openness will harm an overriding interest and no alternative to closure will protect against that harm.

As widely recognized by the appellate courts, these seminal decisions actually identify the existence of the constitutional access right in two ways. They articulate the "experience and logic" test that considers whether a type of proceeding has traditionally been open to the public and whether public access contributes to the proper functioning of the governmental process at issue. *See Press-Enterprise II*, 478 U.S. at 8; *Press-Enterprise I*, 464 U.S. at 505 *Globe Newspapers*, 457 U.S. at 605; *see also, Richmond Newspapers*, 448 U.S. at 582-84 (Stevens, J. concurring); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 149-50 (1993). And two of these decisions also hold that the First Amendment access right applies to the transcripts of proceedings that are themselves subject to the constitutional access right, without separately considering the "experience and logic" of access to the transcripts.

Thus, in *Press-Enterprise I*, the Court found a constitutional violation in the sealing of the transcript of closed jury selection proceedings without the factual findings required to overcome the First Amendment access right. 464 U.S. at 513. In *Press-Enterprise II*, this Court held that the trial court violated the First Amendment access right by refusing to unseal the

transcript of a closed preliminary hearing. 478 U.S. at 13-14.[2] As discussed below, lower federal and state courts have widely recognized these holdings to extend the First Amendment access right to the judicial records of proceedings that are themselves subject to the constitutional right. *See, e.g., Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983); *In re Wash. Post Co.*, 807 F.2d 380, 390 (4th Cir. 1986); *In re N.Y. Times*, 828 F.2d 110, 114-15 (2d Cir. 1987); *United States v. Ladd*, 218 F.3d 701, 704 (7th Cir. 2000).

The Colorado Court's rejection of any First Amendment right of access to the motion papers, hearing transcript and court order resolving a capital murder defendant's motion to disqualify the prosecutor warrants review because it directly conflicts with this Court's precedent. The Colorado Supreme Court failed to apply either of the tests this Court has articulated for determining the existence of the constitutional access right, even though the Sealed Records at issue satisfy both.

The Sealed Records satisfy the "experience and logic" test because they are the types of records that historically have been open to the public, *e.g. In re NBC*, 828 F.2d 340, 344 (6th Cir. 1987) (motions); *Phx. Newspapers v. U.S. Dist. Ct.*, 156 F.3d 940, 947 (9th Cir. 1998) (post-trial hearing transcripts), and public access to such records improves both the functioning of the judicial process and the perception that justice

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[2] The specific issue before the Court in *Press-Enterprise II* was whether access should be provided to the transcript of a completed judicial hearing. 478 U.S. at 15 (Stevens, J., dissenting). No party or member of the press had objected to the closure during the preliminary hearing. *See Press-Enterprise v. Super. Ct.*, 198 Cal. Rptr. 241, 247 (Cal. Ct. App.1984).

is being done. *Id.*; *see also In re N.Y. Times Co.*, 828 F.2d at 114 ("Access to written documents filed in connection with . . . motions is particularly important . . . where no hearing is held and the court's ruling is based solely upon the motion papers.").

The Sealed Records are also subject to the access right because they are the judicial records of a proceeding that is itself subject to the First Amendment right of access. *See, e.g.*, *CBS v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (Kennedy, J.) (finding "no principled basis" to apply First Amendment access right to pre-trial criminal proceedings but not to post-trial criminal proceedings regarding sentence reduction).

The conclusion of the Colorado Supreme Court that the First Amendment access right has no application to the Sealed Records is particularly troubling given the nature of the allegations of official misconduct in a capital murder case that were debated and rejected in the secret court records. The Colorado Court's rejection of any need for an overriding governmental interest to justify sealing and any need to explain why wholesale sealing was required should be reviewed and reversed because it so directly contradicts prior holdings of this Court.

B. The Colorado Court's Rejection of a Qualified First Amendment Right to Access the Sealed Records Conflicts with Decisions of Every Circuit Court of Appeals and Every State Court of Last Resort to Have Decided the Issue

Soon after this Court first articulated a First Amendment access right, lower courts began applying the "experience and logic" test to find a qualified First Amendment right of access to various types of judicial

records. *E.g.*, *Associated Press*, 705 F.2d at 1145 (finding right of access applies to pre-trial motion papers in criminal prosecution); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (finding right of access to bill of particulars). Following *Press-Enterprise I* and *Press-Enterprise II*, courts also found a right of access to the records of proceedings that were themselves subject to the access right, applying the rationale of those cases. *E.g., CBS*, 765 F.2d at 825 (recognizing First Amendment access right applies "to documents filed in pretrial proceedings"); *In re N.Y. Times Co.*, 834 F.2d 1152, 1153-54 (2d Cir. 1987) (per curium) (suppression motion papers).

In the nearly four decades since *Richmond Newspapers,* no federal appellate or state court of last resort—until now—had held that the First Amendment access right has no application, under any circumstances, to the kinds of judicial records at issue here. To the contrary, state and federal courts alike reached a broad, uniform and stable recognition that the constitutional access right does indeed apply to such judicial records, either because they constitute the record of proceedings that are themselves subject to the access right or because these types of records independently satisfy the "experience and logic" test. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92-93 (2d Cir. 2004) (surveying the "two types of reasoning in arriving at decisions that the public and press should receive First Amendment protection in their attempts to access certain judicial documents").[3]

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[3] *See also, e.g.,* Melissa B. Coffey, Note: *Administrative Inconvenience and the Media's Right to Copy Judicial Records*, 44 B.C. L. Rev. 1263, 1267 (2003) ("Courts have reasoned that access to public records, including judicial records, increases public understanding of, and encourages confidence in, government and

Notably, eleven federal circuits have held that the First Amendment access right applies to various records in a criminal prosecution and none has rejected the existence of a qualified constitutional right to inspect the types of records at issue here. For example:

- First Circuit: *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (right applies to "documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989) (records of closed cases); *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) (bail records).
- Second Circuit: *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (records of plea hearing); *In re N.Y. Times Co.*, 828 F.2d at 114 (suppression motion).
- Third Circuit: *United States v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997) (right records of a criminal proceeding); *United States v. Antar*, 38 F.3d 1348, 1361, (3d Cir. 1994) (hearing transcript); *Smith*, 776 F.2d at 1111–1112 (bill of particulars).
- Fourth Circuit: *In re Associated Press*, 172 F. App'x 1, 3 (4th Cir. 2006) (records filed "in connection with criminal proceedings"); *In re*

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the judicial process.") (footnotes and citations omitted); *see also* David Marburger, *In Defense of Broadcaster Access to Evidentiary Video and Audio Tapes*, 44 Pitt. L. Rev. 647, 651 (1983) ("the right of access to judicial records is based upon the same justifications which support right to open trials") (citing Stuart Wilder, Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records* ("*Wilder*"), 52 Temp. L. Q. 311, 339 (1979)).

Charlotte Observer, 882 F.2d 850, 851 (4th Cir. 1989) (records filed in connection with motion for a change of venue); *In re Wash. Post Co.*, 807 F.2d at 390 ("documents filed in connection with plea and sentencing hearings").

- Fifth Circuit: *United States v. Edwards*, 823 F.2d 111, 113 (5th Cir. 1987) (transcript of midtrial questioning of jurors).
- Sixth Circuit: *United States v. DeJournett*, 817 F.3d 479, 484 (6th Cir. 2016) (plea agreements); *In re NBC*, 828 F.2d 340, 346-47 (6th Cir. 1987) (motion to disqualify judge and alleging a conflict of interest by defense counsel); *In re Storer Commc'ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987) (records pertaining to recusal of judge).
- Seventh Circuit: *Ladd*, 218 F.3d at 704-06 (records disclosing names of unindicted coconspirators whose statements were admitted into evidence); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (documents submitted in connection with a judicial proceeding).
- Eighth Circuit: *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (documents filed in support of search warrant applications).
- Ninth Circuit: *CBS*, 765 F.2d at 825 (documents filed in pretrial proceedings and post-trial sentencing records); *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1095 (9th Cir. 2014) (records related to defendant's continued confinement); *In re Copley Press, Inc.*, 518 F.3d 1022, 1026-30 (9th Cir. 2008) (plea agreement).

- Eleventh Circuit: *United States v. Ignasiak*, 667 F.3d 1217, 1237-39 (11th Cir. 2012) (post-trial pleading revealing impeachment information); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005) (plea colloquies, sentencing memoranda, and downward-departure motions); *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (transcript of post-trial hearing and docket sheets).
- D.C. Circuit: *Wash. Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) (plea agreement).[4]

[4] At least seven circuits have also found a First Amendment right of access to judicial records in civil matters. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (right of access to "documents submitted to the court in connection with a summary judgment motion"); *Pellegrino*, 380 F.3d at 91-92 (courts' dockets); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-75 (3d Cir. 1984) (transcript of preliminary injunction hearing); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988) (exhibits to summary judgment motion); *Doe v. Pub. Citizen*, 749 F.3d 246, 265-66 (4th Cir. 2014) ("the First Amendment secures a right of access . . . to particular judicial records and documents") (citation omitted); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1176-81 (6th Cir. 1983) (documents filed by the FTC in administrative and civil matters); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (documents filed as part of public record in civil matter); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (evidence admitted in open civil trial); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786-88 (9th Cir. 2014) (civil complaint); *Brown v. Advantage Eng'g Inc.*, 960 F.2d 1013, 1015-16 (11th Cir. 1992) (settlement agreement).

The Tenth Circuit has not rejected a constitutional right of access to records of a criminal prosecution, but has yet to decide the issue.[5]

While Circuit Courts have not found that *all* judicial records on file in a criminal case are subject to the qualified First Amendment access right, none has disputed, as does the Colorado Supreme Court, that the "experience and logic" test must be applied to make that determination, either to the type of proceeding or the specific records involved. *See, e.g., Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392-93 (5th Cir. 2014) ("Although neither the Supreme Court nor this court has explicitly held that the experience and logic tests apply to court *records*, other circuits have and none has found that the experience and logic tests do *not* apply.") (footnote and citations omitted); *In re U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 291 (4th Cir. 2013) ("To determine whether the First Amendment provides a right to access § 2703(d) orders . . . we employ the 'experience and logic' test"); *United States v. Kravetz*, 706 F.3d 47, 53 (1st Cir. 2013) ("We base our assessment of whether there is a First Amendment right of public access to Rule 17(c) subpoenas on experience and logic.").

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[5] The Tenth Circuit *presumptively* applied the "experience and logic" tests to judicial records in *United States v. McVeigh*, 119 F.3d at 812 and *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998), but has not yet resolved whether the constitutional standard must be applied to judicial records in specific contexts. *See, e.g., United States v. Pickard*, 733 F.3d 1297, 1302 n. 4 (10th Cir. 2013) ("[W]e have no occasion here to address whether [appellants] also have a First Amendment right to have the DEA file unsealed").

The Colorado Supreme Court's categorical rejection of a First Amendment right of access to the specific types of judicial records at issue here conflicts directly with Circuit Court holdings. For example, the denial of any First Amendment right to access the trial court's order resolving a substantive motion rejects the settled understanding that "[o]pinions are not the litigants' property. They belong to the public, which underwrites the judicial system that produces them." *PepsiCo v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) (citations omitted). *See also Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("opinions and orders belong in the public domain"); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (refusing to seal a judicial opinion because "decisions of the court are a matter of public record"). As the Fourth Circuit has stressed: "Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Pub. Citizen*, 749 F.3d at 267-68.

Similarly, the refusal to apply the access right to the filed motion papers contradicts long standing Circuit precedent. *E.g., In re NBC*, 828 F.2d at 346-47 (motion to disqualify judge and alleging a conflict of interest by defense counsel); *Ochoa-Vasquez*, 428 F.3d at 1030; *In re N.Y. Times Co.*, 828 F.2d at 114. And the refusal to apply the access right to the transcript of the closed judicial proceeding contravenes this Court's holdings in the two *Press-Enterprise* cases as well as the repeated, consistent rulings of federal appellate courts. *E.g., United States v. Ellis*, 90 F.3d 447, 450 (11th Cir. 1996); *United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982); *Phx. Newspapers*, 156 F.3d at 946; *Valenti*, 987 F.2d at 714; *Antar*, 38 F.3d at 1361.

Courts of last resort in other states have reached the same conclusion that the First Amendment access right applies not only to courtrooms but also to the records of the proceedings occurring there. It is widely recognized among state courts that the same considerations about "the positive role in the functioning of the process" that demands access to judicial proceedings applies to judicial records. *See, e.g., Ex Parte Consol. Publ'g Co.*, 601 So. 2d 423, 433 (Ala. 1992). Put differently, as with access to judicial proceedings,

> access to judicial documents serves to broaden the dissemination of information thereby allowing the general public to guard against malfeasance in our criminal justice system . . . . Because, as a general matter, criminal judicial documents meet the experience and logic test, a First Amendment right of access attaches to such documents.

Cir. Ct. v. Lee Newspapers, 332 P.3d 523, 531 (Wyo. 2014) (citations omitted). *See also, e.g.*, *Grube v. Trader*, 420 P.3d 343, 353 (Haw. 2018) (First Amendment access right applies to the records of court proceedings); *Daily Press, Inc. v. Commonwealth*, 739 S.E.2d 636, 640 (Va. 2013) (same); *Republican Co. v. Appeals Ct.*, 812 N.E.2d 887, 892 n. 8 (Mass. 2004) (same); *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 16 (Ill. 2000) (same);*Wichita Eagle Beacon Co. v. Owens*, 27 P.3d 881, 883 (Kan. 2001) (First Amendment access right applies to criminal case file); *State v. Schaefer*, 599 A.2d 337, 342 (Vt. 1991) (same); *State v. Archuleta*, 857 P.2d 234, 238-39 (Utah 1993) (First Amendment access right applies to search warrants affidavits and probable cause statements); *Cowles Publ'g Co. v. Murphy*, 637 P.2d 966, 969 (Wash. 1981) (same); *State v. Densmore*, 624 A.2d 1138, 1142 (Vt. 1993) (First

Amendment access right applies to sentencing records); *Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1, 7-8 (Fla. 1983) (First Amendment access right applies to suppression hearing transcript).

Petitioner has not discovered any other state court of last resort that has rejected altogether the existence of a constitutional right of access to judicial records of the type at issue here, as has Colorado's Supreme Court.

The Colorado Supreme Court's holding is so plainly contrary to both this Court's relevant decisions and the accepted, widespread and long-standing recognition of the access right among federal and state courts alike that it should be reviewed and promptly reversed by this Court, either summarily or after briefing and argument.[6]

II. THE COLORADO SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT DESERVES TO BE SETTLED BY THIS COURT

The question concerning the scope of the First Amendment access right presented by this Petition has not been, but should be, settled by this Court because the proper application of the access right to

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[6] *See, e.g., Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J. dissenting) (summary reversal "should be reserved for palpably clear cases of constitutional error"); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam) (summary reversal where lower court's decision was "flatly contrary to this Court's controlling precedent"); *Presley v. Georgia*, 558 U.S. 209, 212-16 (2010) (per curiam) (summary reversal of state supreme court's misapplication of this Court's precedents regarding the First Amendment right of public access to judicial proceedings).

judicial records is fundamental to the successful functioning of our criminal judicial system. If permitted to stand, Colorado Supreme Court's rejection of any such First Amendment right will impede the functioning of the justice system, restrict the public's ability to monitor the courts, and undermine public confidence in the judiciary.

The judicial records that remain sealed in this case, without any publicly available justification, raise important issues of public concern. They present a criminal defendant's grounds for seeking the removal of a prosecutor for misconduct—a prosecutor who has been the subject of multiple allegations of serious misconduct by other criminal defendants. *See, supra,* at 4-5. The criminal defendant's motion to disqualify the prosecutor's office also alleged conflicts of interest, *id.*, the nature of which remain completely hidden from public scrutiny. The Sealed Records contain the prosecutor's defense against those unknown allegations and the court's findings, including its stated legal basis for denying the motion. Such secrecy can only undermine public confidence in the murder conviction and capital sentencing of Sir Mario Owens.

But the impact of the legal issue presented by this Petition extends far beyond this case and the specific Sealed Records at issue. The Colorado Supreme Court's ruling creates binding precedent in all future cases in that state that no qualified constitutional right of public access to judicial records exists. Yet this right plays a vital, structural role in the criminal justice system—it promotes the proper functioning of the courts and provides citizens information they need to understand and accept judicial actions. Permitting the Colorado Supreme Court's holding to stand can only corrode the functioning of that state's judicial

system and undermine public acceptance that justice is being done.

This Court has long recognized that judicial openness serves several critical functions. One is to enable the public to "serve as a check on the judicial process," and thereby "enhance[] the quality and safeguard[] the integrity of the factfinding process." *Globe Newspapers, Inc.*, 457 U.S. at 606; *accord Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism"). Another is to preserve "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise II*, 478 U.S. at 9 (internal marks and citation omitted); *Press-Enterprise I*, 464 U.S. at 508 (same). "Secret hearings—though they be scrupulously fair in reality—are suspect by nature." *DePasquale*, 443 U.S. at 429 (Blackmun, J., concurring in part and dissenting in part). These objectives are directly undermined by sealed records and secret orders.

It bears emphasis that the Colorado Court's blanket rejection of a qualified right of access to judicial records encompasses even the court's docket, which is itself now suppressed from public view in the Owens case. But "the ability of the public and press to attend civil and criminal cases" is "merely theoretical" when information provided by the docket is inaccessible. *Pellegrino*, 380 F.3d at 93 (holding that First Amendment right attaches to the docket); *see also Ochoa-Vasquez*, 428 F.3d at 1029-30 ("[P]ublic docket sheets are essential to provide meaningful access to criminal proceedings." (internal marks and citation omitted)); *In re State-Record Co.*, 917 F.2d 124, 128-29 (4th Cir. 1990) (per curiam) (same). The Colorado

Court's holding in this case will apply to all court dockets throughout Colorado. The significance of this fact was recently brought home when it was discovered that more than 6,700 cases on file in state courts in Colorado do not appear in any publicly available database or in courthouse records available to the public. *See* D. Migoya, *Shrouded Justice: Thousands of Colorado Court Cases Hidden From Public View on Judges' Orders*, Denver Post, July 12, 2018 at A-1.

The important objectives of the right of access to judicial proceedings are all undermined by the holding of the Colorado Supreme Court. The public's ability to monitor, understand and check the activities of the criminal justice system would undeniably be curtailed if the access right were relegated to the right to attend the criminal trial, which occurs in less than 5% of all felony cases.[7] Even entirely public proceedings cannot easily be followed or fully comprehended by the press and public without access to the pleadings, motion papers and documentary evidence that are the focus of those proceedings. *See Pokaski*, 868 F.2d at 502 ("without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system.'") (quoting *Associated Press*, 705 F.2d at 1145). As courts have widely recognized:

> [T]he right of access to records may be more important than the right to observe the

[7] *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas") (citations omitted); *see also Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (recognizing "the reality that criminal justice today is for the most part a system of pleas, not a system of trials.").

> judicial process, because it allows examination of documents, pleadings, and transcripts which portray a more complete picture of the official development and resolution of a case.

Willie Nelson Music Co. v. Comm'r, 85 T.C. 914, 919 n.15 (1985) (citing *Wilder*, 52 Temp. L. Q. at 338, and cases cited therein)). Or, as the Second Circuit Court of Appeals put it in reviewing an order sealing court records:

> Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (internal marks and citation omitted); *see also Leavell*, 220 F.3d at 568 ("Judges deliberate in private but issue public decisions after public arguments based on public records.").

Criminal cases in Colorado state courts have not infrequently drawn appropriate national and international press attention, from the short-lived sexual assault prosecution of former NBA basketball star Kobe Bryant to the lengthy prosecution and conviction of James Eagan Holmes for murdering twelve and wounding seventy others in the midnight shooting at a movie theater in Aurora, Colorado. More recently, the trial of Robert Lewis Dear, who has admitted shooting dead three individuals and wounding nine others inside a Planned Parenthood Clinic on "Black Friday" after Thanksgiving, in 2015, has been

continued indefinitely pending further competency evaluations. In these, and all future, cases of national interest, the ability of the public to monitor the criminal justice system will be severely eroded if the Colorado Supreme Court's holding is left undisturbed.

In short, the Colorado Court's rejection of a First Amendment right of access to the writings that serve as the basis for judicial outcomes—legal briefs, documentary evidence, transcripts of proceedings, and decisions—will erode the public's trust in the judicial process. The Colorado Supreme Court's ruling in this case commands attention because, left uncorrected, it will undermine both the ability of the Colorado courts to reach just results and "the appearance of fairness so essential to public confidence in the system."

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests the Court to grant its petition for certiorari review of the ruling of the Colorado Supreme Court that the qualified First Amendment right of access does not apply to motion papers, transcripts or orders in a criminal prosecution.

Respectfully submitted,

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September 28, 2018

APPENDIX

APPENDIX A

Opinions of the Colorado Supreme Court are available to the public and can be accessed through the Judicial Branch's homepage at http://www.courts.state.co.us. Opinions are also posted on the Colorado Bar Association's homepage at http://www.cobar.org.

ADVANCE SHEET HEADNOTE
June 11, 2018

2018 CO 55

No. 18SA19, *In re People v. Sir Mario Owens*, Constitutional Law – Public Access to Court Records.

In this original proceeding, the supreme court considers and rejects a news organization's contention that a trial court erred in refusing to grant public access to certain records maintained under seal in a capital murder case. The supreme court emphasizes that, while presumptive access to judicial proceedings is a right recognized under both the state and federal constitutions, neither the United States Supreme Court nor the Colorado Supreme Court has ever held that records filed with a court are treated the same way. The supreme court thus declines the invitation to hold that unfettered access to criminal justice records is guaranteed by either the First Amendment or Article II, section 10 of the Colorado Constitution.

THE SUPREME COURT OF THE
STATE OF COLORADO
2 East 14th Avenue • Denver, Colorado 80203

2018 CO 55

Supreme Court Case No. 18SA19

In Re Plaintiff:

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant:

SIR MARIO OWENS.

Rule Discharged *en banc*

June 11, 2018

Original Proceeding Pursuant to C.A.R. 21
Arapahoe County District Court Case No. 06CR705
Honorable Christopher Munch, Senior Judge

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Attorneys for Respondent The District Court for the Eighteenth Judicial District of Colorado:

Cynthia H. Coffman, Attorney General
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Denver, Colorado

No appearance on behalf of Plaintiff or Defendant.

JUSTICE HART delivered the Opinion of the Court.

¶1 We accepted jurisdiction in this original proceeding to consider The Colorado Independent's contention that the Arapahoe County District Court erred in refusing to grant public access to certain records maintained under seal in a capital murder case. The Colorado Independent contends that the federal and state constitutions grant a presumptive right of access to documents filed in criminal cases. While presumptive access to judicial *proceedings* is a right recognized under both the state and federal constitutions, neither the United States Supreme Court nor this court has ever held that *records* filed with a court are treated the same way. We decline to conclude here that such unfettered access to criminal justice records is guaranteed by either the First Amendment or Article II, section 10 of the Colorado Constitution.

I.

¶2 Defendant Sir Mario Owens was convicted of first-degree murder and sentenced to death in 2008. In 2017, the trial court denied Mr. Owens's motion for post-conviction relief pursuant to Crim. P. 32.2, as well as his related motion to disqualify the District Attorney's Office for the 18th Judicial District and to appoint a special prosecutor. The basis for the motion to disqualify was an allegation that the District Attorney had failed to disclose evidence that would

have been favorable to Mr. Owens's defense. Over Mr. Owens's objection, the trial court issued a protective order, which remains in place today, sealing portions of the post-conviction motions practice.[1]

¶3 In 2017, The Colorado Independent ("Petitioner") filed a motion with the district court, asking the court to unseal the records, arguing that public access to the records was required by the First Amendment, Article II, section 10 of the Colorado Constitution, common law, and the Colorado Criminal Justice Records Act. The district court denied that motion, and Petitioner filed for relief under C.A.R. 21, limiting its request for relief to the argument that presumptive access to judicial records is a constitutional guarantee.

II.

¶4 Relief under C.A.R. 21 is an extraordinary remedy limited in purpose and availability. C.A.R. 21; *People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005). Our exercise of original jurisdiction is discretionary. *Fognani v. Young*, 115 P.3d 1268, 1271 (Colo. 2005). We have previously exercised our original jurisdiction to address public access to court documents. *See*, *e.g.*, *People v. Bryant*, 94 P.3d 624, 625–26 (Colo. 2004); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511, 511–12 (Colo. 1966). Here, we do so once again.

¶5 Because the availability of First Amendment protection presents a legal question, we review such challenges de novo. *See Cotter v. Bd. of Trustees of Univ. of N. Colo.*, 971 P.2d 687, 690 (Colo. App. 1998) (citing *Melton v. City of Oklahoma City*, 879 F.2d 706

[1] Mr. Owens filed a C.A.R. 21 petition with this court in March 2017 seeking to have the protective order vacated. We declined to issue a rule to show cause. *See* Order of Court, *In re People v. Owens*, No. 17SA59 (Colo. Apr. 7, 2017).

(10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir. 1991), and *Kemp v. State Bd. of Agric.*, 803 P.2d 498 (Colo. 1990)). De novo review is also appropriate for alleged violations of Article II, section 10 of the Colorado Constitution. *See Robertson v. Westminster Mall Co.*, 43 P.3d 622, 625 (Colo. App. 2001) (citing *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997)).

¶6 Here, we reject Petitioner's constitutional arguments for mandatory disclosure of the records sealed in this matter.

¶7 We find no support in United States Supreme Court jurisprudence for Petitioner's contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern. Petitioner cites none. The Tenth Circuit has more than once declined to recognize a First Amendment right of access to court records. *See*, *e.g.*, *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("[T]here is no general First Amendment right in the public to access criminal justice records."); *United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985) (distinguishing between the acknowledged right of the public and press to attend trial proceedings and a claimed of right to access court files).

¶8 Moreover, we have never recognized any such constitutional right—whether under the First Amendment or Article II, section 10 of the Colorado Constitution. Petitioner's near-exclusive reliance on this court's opinion in *Wingfield* is misplaced. In *Wingfield*, we analyzed a statutory prohibition against the inspection of court records in pending cases by non-parties. *See* 410 P.2d at 512. We concluded that while no "absolute right to examine" court records

exists, inspection may be permitted "at the discretion of the court." *Id.* at 513. Contrary to Petitioner's assertion, this court did not hold in *Wingfield* that limiting access to court records violates the First Amendment. *See id.* We decline to do so now in the absence of any indication from the nation's high court that access to all criminal justice records is a constitutionally guaranteed right belonging to the public at large.

¶9 We also see no compelling reason to interpret our state constitution as guaranteeing such a sweeping—and previously unrecognized—right of unfettered access to criminal justice records. On the contrary, such a ruling would do violence to the comprehensive open records laws and administrative procedures currently in place—including, but not limited to, the Colorado Criminal Justice Records Act, §§ 24-72-301 to -309, C.R.S. (2017)—that are predicated upon the absence of a constitutionally guaranteed right of access to criminal justice records.

III.

¶10 We affirm the denial of The Colorado Independent's motion to unseal the subject records and, consequently, discharge the rule.

APPENDIX B

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Case Number: 06CR705
Div: SR

PEOPLE OF THE STATE OF COLORADO

vs.

SIR MARIO OWENS

7325 South Potomac Street
Centennial, Colorado 80112

ORDER RE: MOTION TO UNSEAL JUDICIAL RECORDS IN THE COURT FILE

THIS MATTER is before the Court on The Colorado Independent's (Non-Party Movant) Motion to Unseal Judicial Records in the Court File (Motion). Owens joins in the Motion. The prosecution objects.

This Court was divested of jurisdiction on September 21, 2017, when Owens filed his Unitary Notice of Appeal with the Colorado Supreme Court. On October 27, the Non-Party Movant moved for jurisdiction to be partially restored so that this Court could rule on its Motion. On November 6, the Colorado Supreme Court restored partial jurisdiction to this Court for the limited purpose of addressing the Motion. Order of Court – Amended, 08SA402 (Nov. 6, 2017).

The Non-Party Movant seeks access to SOPC-351, SOPC-352, and SOPC353, as well as all motions, responses, replies, exhibits, transcripts, minute orders, and orders of any kind related to Owens's motion seeking the appointment of a special prosecutor. Motion at 3.

Owens filed SOPC-351 under seal. That filing is simply a Notice that SOPC-352 and SOPC-353 were filed under seal. SOPC-351 was unsealed on December 12, 2016. SOPC-351 together with the December 12, 2016, minute order will therefore be provided to the Non-Party Movant.

SOPC-352 is Owens's Sealed Motion to Disqualify the 18th Judicial District Attorney's Office and To Appoint a Special Prosecutor (Motion to Disqualify). Attached to the Motion to Disqualify are Appendices A-O. The prosecution filed a sealed response, and the Court entered a sealed order. SOPC-353 is Owens's Sealed Motion to Unseal SOPC-352 and SOPC-353 (Motion to Unseal). The Court entered a sealed order resolving the Motion to Unseal. The Court held a closed hearing on December 12, 2016, with respect to the Motion to Disqualify and the Motion to Unseal, and a sealed transcript of that proceeding exists. Aside from the filings, orders, and transcript identified herein, there are no exhibits, other filings, other transcripts, or other orders related to Owens's Motion to Disqualify.

In ruling on the Motion to Disqualify, the Court decided whether the individual prosecutors on this case had a disqualifying personal interest in the outcome of the proceedings under *People ex. Rel. N.R.*, 139 P.3d 671 (Colo. 2006), and whether the individual prosecutors and the entire 18th Judicial District Attorney's Office had a disqualifying conflict of interest under Colo. RPC 1.7(a)(2).

This Court recognizes the Non-Party Movant's legitimate interest in investigating the underlying facts and claims of alleged government misconduct and has compared the factual assertions set forth in the Motion to Disqualify to those in Owens's Crim. P. 32.2 petition. The petition's detailed assertions encompass those set forth in the Motion to Disqualify. Because the grounds for disqualification and post-conviction relief are essentially the same, the factual assertions made in the Motion to Disqualify (pages 12-56) shall be unsealed. Two small sections within the factual assertions as well as Appendices A and B do not allege facts upon which disqualification was sought. Those sections have been redacted, and Appendices A and B will not be disclosed. A redacted version of the factual assertions set forth in the Motion to Disqualify has been prepared together with Appendices C-O and will be provided to the Non-Party Movant.

The countervailing considerations are such that publishing portions of the Motion to Disqualify that are merely argument or rhetoric (as opposed to the factual assertions) in support of the Motion to Disqualify and Motion to Unseal is not justified. Likewise, the associated responses, orders, and transcript, will not be disclosed.

SO ORDERED this 12th day of January 2018.

/s/ Christopher J. Munch
Christopher J. Munch
District Court Senior Judge

APPENDIX C

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Case Number: 06CR705
Div: SR

PEOPLE OF THE STATE OF COLORADO

vs.

SIR MARIO OWENS

7325 South Potomac Street
Centennial, Colorado 80112

ORDER RE: PEOPLE'S MOTION TO SEAL/SUPPRESS

THIS MATTER is before the Court on the prosecution's Motion to Seal/Suppress its Statement in Interest (Motion). Owens and The Colorado Independent oppose the Motion.

This Court was divested of jurisdiction on September 21, 2017, when Owens filed his Unitary Notice of Appeal with the Colorado Supreme Court. On October 27, The Colorado Independent moved for jurisdiction to be partially restored so this Court could rule on its Motion to Unseal Judicial Records in the Court File (Motion to Unseal). On November 6, the Colorado Supreme Court restored partial jurisdiction to this Court for the limited purpose of addressing the Motion

to Unseal. Order of Court – Amended, 08SA402 (Nov. 6, 2017).

The Motion is GRANTED and the Statement in Interest shall be suppressed. It is therefore only available to the prosecution and Owens's post-conviction counsel.

SO ORDERED this 12th day of January 2018.

/s/ Christopher J. Munch
Christopher J. Munch
District Court Senior Judge

APPENDIX D

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

[Filed: February 8, 2018]

Supreme Court Case No: 2018SA19

In Re:

Plaintiff:

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant:

SIR MARIO OWENS.

Original Proceeding Pursuant to C.A.R. 21
District Court, Arapahoe County, 06CR705

ORDER AND RULE TO SHOW CAUSE

Upon consideration of the Petition for Rule to Show Cause Pursuant to C.A.R. 21 filed in the above entitled action and matter, and being sufficiently advised in the premises,

IT IS ORDERED that a Rule to Show Cause issue out of this court. Therefore, Respondent, Honorable Christopher J. Munch is directed to answer, in writing, on or before March 12, 2018, why the relief requested in the petition should not be granted.

IT IS FURTHER ORDERED that Petitioner, The Colorado Independent, has 30 days from receipt of the answer within which to reply.

Pursuant to C.A.R. 21(g)(2), all further proceedings are stayed until further order of this court.

BY THE COURT, EN BANC, FEBRUARY 8, 2018.

APPENDIX E

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

[Filed: July 2, 2018]

Supreme Court Case No: 2018SA19

In Re:

Plaintiff:

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant:

SIR MARIO OWENS.

Original Proceeding Pursuant to C.A.R. 21
District Court, Arapahoe County, 06CR705

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 2, 2018.

APPENDIX F

DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO

[Filed: November 7, 2017]

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Case No. 06-CR-705
Division: SR

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Plaintiff:

PEOPLE OF THE STATE OF COLORADO

vs.

Defendant:

SIR MARIO OWENS

and,

Non-Party Movant:

THE COLORADO INDEPENDENT

———

Court Address: 7325 S. Potomac St.
Centennial, CO 80112

———

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MOTION TO UNSEAL JUDICIAL RECORDS
IN THE COURT FILE

Movant The Colorado Independent ("Movant"), by undersigned counsel, respectfully moves this honorable Court to unseal certain of the judicial records contained in the court file, as specified herein.

Counsel for Movant has conferred with counsel for the People and the Defendant. The People oppose the relief requested herein. The Defendant does not oppose the relief requested herein.

INTRODUCTION

Over nine years ago, the Defendant in this action was tried in open court, found guilty of murder, and sentenced to death. In the September 17, 2017 P.C. Order (SO) No. 18 Re: SOPC-163 (the "Post-Conviction Order"), the Court identified numerous instances in which the prosecution failed to disclose or suppressed evidence that would have been favorable to the Defendant.

Specifically, the Post-Conviction Order concludes that the prosecution either withheld from the Defendant or suppressed evidence related to multiple issues, including, but not limited to, the facts that:

- The prosecution had negotiated with a witness's attorney before the arrest of the Defendant (Post-Conviction Order at 150);
- The prosecution promised to give a witness a car and worked with out-of-state authorities to clear warrants so that she could get her license (*id.* at 212-18);
- A witness had provided false testimony to detectives after witnessing an unrelated

shooting, but his probation was not revoked (*id* at 222, 227, 353-54);

- A witness had been involved with a gang and was present at a gang-related shooting (*id.* at 232-33, 355-56);
- A witness was a paid informant (*id.* at 263, 357-58); and
- A witness that had been labeled as a "chronic offender" in 1990 had also assisted the police with two other homicide investigations (*id.* at 265, 359-62).

Ultimately, the Court found that the withheld or suppressed exculpatory evidence would not have had an impact on the outcome of the trial. (*Id* at 371.) Thus, in effect, the Court found that there had been prosecutorial misconduct, but that such misconduct was "harmless error" because it did not sufficiently prejudice the Defendant's right to a fair trial.

On information and belief, the Defendant (through his post-conviction counsel) filed one or more motions asking the Court to appoint a special prosecutor related to the prosecution's failure to disclose or suppressing of exculpatory evidence. Although the Register of Actions (the "ROA") does not contain sufficient detail to identify this or these motion(s) and related court filings, Movant believes that the motions identified on the ROA as SOPC-351, SOPC-352 and SOPC-353 are related to the Defendant's motion seeking the appointment of a special prosecutor, and that there was also a sealed order or orders denying that or those motion(s) (collectively, along with any related motions, responses, replies, exhibits, transcripts, minute orders, orders or records of any kind, hereinafter the "Prosecutorial Misconduct Records").

All of the Prosecutorial Misconduct Records are currently sealed. Movant now moves the Court to unseal those records.

While the public's right of access to court records is qualified, judicial records may properly be sealed from public view only where express findings have been made and entered that (1) continued sealing is necessary to protect a governmental interest of the highest order, (2) sealing will be effective in protecting that interest, (3) any sealing order is narrowly tailored, and (4) no reasonably available alternatives can adequately protect the compelling state interest.

In a case where the public trial occurred over nine years ago, and there is a 1,500-page public order detailing some of the information sought, it is simply not possible for any party to meet this high burden. Movant respectfully submits that this Court must unseal the Prosecutorial Misconduct Records.

THE INTEREST OF MOVANT

Movant, *The Colorado Independent*, is a not-for profit online journalism organization, engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it to the general public.

Movant appears before this Court on its own behalf—as a member of the public—entitled to the rights afforded it by the U.S. Constitution, the Colorado constitution, all applicable statutes, and the common law. In addition, Movant appears on behalf of the broader public that receives the news and information that *The Colorado Independent* gathers and disseminates. *See*, *e.g.*, *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 573-74 (1980) (the print and electronic media function "as surrogates for the

public"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press "acts as an agent of the public at large").

ARGUMENT

I. Movant Has Standing to Assert the Right of Public Access to Court Records.

The First Amendment to the U.S. Constitution, article II, section 10 of the Colorado constitution, and the common law all protect the right of the people to receive information about the criminal justice system through the news media, and the right of the news media to gather and report that information.

Movant's standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028, 1029-30 (Colo. 1979); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n. 25 (1982); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511, 514 (Colo. 1966); *see also In re NY. Times Co.*, 878 F.2d 67, 67-68 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[1]

The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files and has succeeded in such challenges before both trial courts and the Colorado Supreme Court. *See In re People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); *People v.*

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[1] In addition, the Colorado Rules of Civil Procedure authorize a motion by "any person" to review an order limiting access to a court file. Colo. R. Civ. P. 121(c) § 1-5(4) (2013) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

Holmes, No. 12-CR-1255, Order Regarding Pet's' Mot. to Unseal Affs. Of Probable Cause in Supp. of Arrest and Search Warrants and Req. for Orders for Prod. Of Docs. (C-24) (the "April 2013 Order") (Arapahoe Cnty. Dist. Ct. Apr. 4, 2013) (one of several court orders granting media representatives' petition to unseal court records in Aurora Theater Shooting case) (attached as Exhibit A).

Indeed, this Court has previously granted a prior request, by various members of the press, including *The Colorado Independent*, to unseal certain judicial records *in this case. See* P.C. Order (SO) No. 11 Re: Motion to Unseal at 7 (Mar. 17, 2014) (ordering the unsealing to the Register of Actions and the transcripts of prior hearings conducted in open court, with the sole exception of "the addresses and location information" of witnesses).

II. The Public Is Entitled to the Prosecutorial Misconduct Records Unless There Is Both a Compelling Governmental Interest and No Alternative to a Blanket Seal

The public's right to inspect court records is protected by the First Amendment to the U.S. Constitution. *See*, *e.g.*, *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510-11 (1984) (transcript of closed jury *voir dire); Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (various pretrial documents); *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 89 (D.D.C. 2008) (finding First Amendment and common law right to search warrant materials relating to the 2001 anthrax attacks).

Further, when documents in the court's file involve a matter of public interest or concern, access to such records is also guaranteed by article II, section 10 of the Colorado constitution. *See Wingfield*, 410 P.2d at

513-14; *Office of State Ct. Adm'r v. Background Info. Sys.*, 994 P.2d 420, 428 (Colo. 1999).

Court records in criminal cases are also subject to public access under the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2013); *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, so this Court, not the custodian, must determine whether the sealing order should be lifted. *See* C.R.S. § 24-72-305(1)(b).

The public's right to inspect court documents is also enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . public records and documents"); *In re Nat'l Broad. Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same).

The common law access right "is not some arcane relic of ancient English law," but, rather, "is fundamental to a democratic state." *U.S.* v. *Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *US. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord US. v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1980).

Under the standard adopted by Colorado's Supreme Court, the press and public cannot be denied access to the records of this Court unless such access would both: (1) pose a substantial probability of harm to the

administration of justice or to some equally compelling governmental interest; *and* (2) no alternative exists to adequately protect that interest. *See* ABA CRIMINAL JUSTICE STANDARDS § 8-5.2 (2013) (cited *as* § 8-3.2 (1979) and adopted in *Star Journal Publ'g Corp.*, 591 P.2d at 1030). Moreover, this standard requires "that the trial judge issue a written order setting forth specific factual findings in this regard." *Star Journal Publ'g Corp.*, 591 P.2d at 1030.

The fact that this case is the subject of much media attention and a capital case serves only to increase the burden on any party wishing to shield portions of the court file from public scrutiny. Indeed, in this very courthouse, both judges who have presided over the capital murder case of *People v. Holmes*, No. 12CR1522, have recognized that the First Amendment right of public access applies with full force to the judicial records on file in that case:

> Media Petitioners contend that they and other members of the public have a constitutional right protected by the First Amendment to the information sought which may only be curtailed by the showing of an overriding and compelling state interest. The Court agrees.

Ex. A (April 2013 Order) at 8; *see also* Ex. B *(Holmes*, No. 12CR1522, Order Unsuppressing Ct. File at 1 (Arapahoe Cnty. Dist. Ct. Sept. 21, 2012) (recognizing that "the fundamental nature of First Amendment rights . . . may only be abridged upon a showing of an overriding and compelling state interest" (quoting *Star Journal Publ'g Co.*, 591 P.2d at 1030)).

III. There Is No Proper Basis for Continuing to Seal the Prosecutorial Misconduct Records, and They Must Therefore Be Unsealed Without Delay.

A. The Compelling Interest Standard Cannot Be Met at this Point in the Case.

Because the ROA does not contain detail sufficient to identify the stated *basis* for sealing the Prosecutorial Misconduct Records, Movant can only speculate about the bases for this Court's ruling to seal such records. However, given the posture of this case, it is virtually impossible for any party to sustain the high burden of proving that there is a substantial probability of prejudicing a compelling governmental interest capable of overriding the public's First Amendment rights.

As this Court recognized in its March 17, 2014 P.C. Order (SO) No. 11 Re: Motion to Unseal (the "ROA Order"), the Court had previously "entered various redaction, suppression, and sealing orders" due to concerns related to preserving the Defendant's right to a fair trial and witness protection. (ROA Order at 4-7.) However, because "the factual landscape and procedural posture of this case were markedly different" by March 2014, those concerns either "no longer exist[ed]" or could no longer be addressed by sealing records because the public trial had already been conducted. *(Id.)* In October 2017—over nine years after the public trial—the Court's reasoning in the ROA Order is even more apt.[2]

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[2] Aside from the fact that the public trial occurred nearly a decade ago, the Defendant does not contest unsealing the Prosecutorial Misconduct Records, and there is thus no concern regarding his right to a fair trial.

Further, the Court's extremely thorough Post-Conviction Order discusses in detail some of the facts surrounding the prosecution's failure to disclose or suppression of exculpatory evidence. Thus, much of the information contained in the Prosecutorial Misconduct Records has already been disclosed to the public in open judicial documents, and there is no basis to seal such information. *See U.S. v. Pickard*, 733 F.3d 1297, 1305 (10th Cir. 2013) (holding that information that has "been disclosed in public . . . court proceedings" is not properly subject to sealing); *see also In re Herald Co.*, 734 F.2d 93, 101 (2d. Cir. 1984) (holding that a closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure").

Simply put, at this point in the case, there is no way that a party could satisfy the high burden of showing a substantial probability of harm to a compelling governmental interest that could override the public's First Amendment right.

B. The Release of Prosecutorial Misconduct Records in Redacted Form Is a "Less Restrictive Means" that Must Be Employed as an Alternative to Blanket Sealing.

Any order that removes from the public information posing no harm to "an interest of the highest order" while also sealing discreet, sensitive information does not comport with the constitutionally-imposed standard for closure. *See P.R. v. Dist. Ct.*, 637 P.2d 346, 354 (Colo. 1981) (stating a finding of clear and present danger by itself is not sufficient to warrant sealing, but merely "triggers the next level of inquiry – that is, whether reasonable and *less drastic alternatives are available"* (emphasis added)).

Accordingly, "it is the responsibility of the district court to ensure that sealing documents to which the public has a First Amendment right is no broader than necessary." *US. v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008); *see also Pickard*, 733 F.3d at 1304-05 (reversing trial court's blanket sealing order because "the district court did not consider whether selectively redacting just the still sensitive, and previously undisclosed, information from the [records] . . . would adequately serve the government's interest"); *Kanza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where release of court records poses risk to national security, "[p]ublic release of redacted material is an appropriate response"); *In re NY. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (approving of requirement "to minimize redaction in view of First Amendment considerations"); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 15 (1st Cir. 2002) ("The First Amendment requires consideration of the feasibility of redaction on a document-by-document basis.").[3]

In applying the Colorado Criminal Justice Records Act, the Colorado Supreme Court has instructed that the custodian of records "should redact sparingly" in order "to provide the public with as much information as possible." *In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriffs Dep't*, 196 P.3d 892, 900 n. 3 (Colo. 2008).

Thus, to the extent there is evidence establishing that the disclosure of certain discrete portions of the

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[3] *See also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) (finding that search warrant materials may be released in redacted form to satisfy the public interest in access to such judicial records); *In re N.Y. Times Co.*, 878 F.2d at 67-68 (same); *In re Search Warrants Issued on June 11, 1998*, 710 F. Supp. 701, 705 (D. Minn. 1989) (same).

Prosecutorial Misconduct Records will pose a substantial likelihood of harm to a compelling governmental interest "of the highest order," the proponent of continued sealing must further demonstrate that the entirety of the court records must remain under seal. *See Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986) (holding that trial court had committed constitutional error because it "failed to consider whether *alternatives short of complete closure* would have protected the interests of the accused." (emphasis added)); *Pickard*, 733 F.3d at 1303-05 (once a request is made to unseal court records, the burden shifts to the party seeking to maintain sealing to demonstrate the need for continued sealing and that party must show that "redacting documents instead of completely sealing them would [not] adequately serve [the] government interest to be protected." (citations omitted)).

C. The Prosecutorial Misconduct Records Should Be Unsealed Forthwith.

The public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right of access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (noting that access to court documents "should be immediate and contemporaneous").

Since the public's presumptive right of access attaches as soon as a document is submitted to a court, any delays in access are in effect *denials* of access, even though they may be limited in time. *See*, *e.g.*, *Associated Press*, 705 F.2d at 1147 (even a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint

is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 38 Media L. Rep. (BNA) 1890, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24- to 72-hour delay in access to civil case-initiating documents was "effectively an access denial and is, therefore, unconstitutional").

As the Supreme Court observed in *Neb. Press Ass'n. v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 539, 560-61 (1976).

CONCLUSION

WHEREFORE, for the reasons stated above, Movant respectfully requests that the Court forthwith enter an order unsealing the Prosecutorial Misconduct Records, including, but not limited to, all motions, responses, replies, briefings, minute orders, orders, transcripts, and records of any kind, regardless of whether such records have been specifically identified in this Motion.

Respectfully submitted this 7th day of November 2017, by:

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APPENDIX G

SUPREME COURT,
STATE OF COLORADO

Case No. 2018SA19
Related Case Below: 06-CR-705
(*People v. Sir Mario Owens*) – Arapahoe Cnty. Dist. Ct.

In re: People v. Sir Mario Owens

Petitioner:

The Colorado Independent

Proposed Respondent:

District Court for the Eighteenth Judicial District of Colorado (the Hon. Christopher Munch, Retired Senior Judge, presiding)

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2 East 14th Avenue
Denver, CO 80203

Arapahoe County District Court, Case No. 06CR705
Hon. Christopher Munch, Retired Senior Judge
Hon. Gerald R. Rafferty, Retired Judge

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THE COLORADO INDEPENDENT'S REPLY IN SUPPORT OF PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21, C.A.R. 28, and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

- It contains 5,375 words in those portions subject to the Rule.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21, C.A.R. 28, and C.A.R. 32.

By /s/ Steven D. Zansberg
Steven D. Zansberg, #26634

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INTRODUCTION

In its Response[1] the District Court argues that neither the First Amendment nor the Colorado Constitution provide the public a right of access to *any* judicial record in *any* criminal case. That is incorrect.

Over 50 years ago, this Court refused to apply the literal interpretation of a Colorado statute that, on its face, barred public access to all filed court records. The Court squarely held that the statute's plain meaning "would raise serious questions of *constitutional law involving freedom of the press*" (emphasis added). In effect, this Court disregarded the statutory text in favor of a right, *grounded in the First Amendment*, of public access to court records on file in cases of public interest.

In a similar recent case in which this Court issued an Order and Rule to Show Cause, *In re Dear*, 16SA13 (Colo. Jan. 17, 2016), the Attorney General urged this Court to remand so the District Court could enter a *revised* set of findings, justifying more limited sealing than it had originally ordered, in light of "changed circumstances." That relief was allowed in *Dear*, but the Attorney General's effort to reprise that outcome here is clearly unwarranted. There are no changed circumstances justifying a new set of findings. Instead, District Court's counsel has submitted his *ex parte explanation* for the sealing order—claiming that it is impossible to explain to the public *the reasons* why sealing was purportedly necessary without disclosing the very information that counsel maintains must be kept under seal. That is empty rhetoric. Courts routinely state the nature of the countervailing inter-

[1] Capitalized terms are as defined in the Petition for Rule to Show Cause Pursuant to C.A.R. 21 (the "Petition").

ests (*e.g.*, "disclosure would interfere with an ongoing criminal investigation") without disclosing the information that would do so.

Nor is there any rhyme or reason for the Attorney General's *ipse dixit* that the only information the public is interested in, and presumptively entitled to inspect, is narrowly limited to allegations of prosecutorial misconduct. All allegations in support of disqualification of the People's counsel are of legitimate interest to the public.

Were this Court to condone the District Court's effort to justify secrecy through further secrecy, it would undermine public trust in an institution of government whose claim to legitimacy depends upon that trust. As Chief Justice Burger declared, "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. Va.*, 448 U.S. 555, 572 (1980). This was echoed by Justice Brennan: "*Secrecy of judicial action can only breed . . . distrust of courts* and suspicion concerning the competence and impartiality of judges." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (emphasis added).

This Court should reaffirm its prior *holding* that the First Amendment provides a presumptive right of public access to court records in cases of public interest or concern. The Court should further hold that the Constitutional Standard[2] must be applied when any party seeks to limit that right in a criminal case.

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[2] The "Constitutional Standard" is a defined term. (Pet. at 13-14.)

ARGUMENT

I. Mandamus Is the Appropriate Remedy

The District Court mistakenly asserts that mandamus is not an appropriate remedy to rectify its failure to make any findings, or apply any standard of law, to justify its sealing order. (Resp. at 7-8.) The vast majority of federal courts of appeals and state courts across the nation have held that "mandamus is the proper vehicle for reviewing court orders sealing or redacting court documents in criminal proceedings." *U.S. v. McVeigh,* 119 F.3d 806, 810 (10th Cir. 1997); *see also In re The Wall St. Journal*, 601 F. App'x 215, 218 (4th Cir. 2015) (mandamus is the "preferred" method of review); *CBS v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (same); *In re Globe Newspaper Co.,* 729 F.2d 47, 50 (1st Cir.1984) (same); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 660 (8th Cir.1983) (same).

Moreover, under C.A.R. 21 governing mandamus, this Court has directed courts to unseal judicial records, *People v. Thompson*, 181 P.3d 1143, 1145-48 (Colo. 2008) (applying the CCJRA without reaching the First Amendment), and to enter appropriate findings, applying the Constitutional Standard, prior to closing a preliminary hearing. *In re Sigg*, 13SA21 (Colo. Feb. 21, 2013). So, too, in *Times-Call Publ'g Co. v. Wingfield*, this Court issued mandamus relief directing the District Court to make judicial records available to a non-party newspaper. 410 P.2d 511, 511 (1966) (granting newspaper's petition for "a writ of mandamus requiring defendants . . . to give to plaintiffs . . . access to and right of inspection of all the pleadings and other records contained in the court file"); *see also Star Journal Publ'g v. Cnty. Ct.*, 591 P.2d 1028, 1029-30 (1979) (granting newspaper's

petition under C.A.R. 21, holding, for the first time in Colorado, that a pretrial hearing cannot be closed to the public absent record findings that closure is necessary to protect the defendant's fair trial rights and that no reasonable alternatives to closure are available); *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (same, with respect to a civil contempt hearing, premised on both First Amendment and art. II sec. 10 of Colorado Constitution).

The District Court's argument that the decision to seal judicial records "involves the exercise of judgment" and is therefore not appropriate for mandamus relief (Resp. at 8) misses the mark: While judges exercise judgment in deciding to close court proceedings or seal judicial records, the standards that govern those decisions are imposed by the Constitution, and those decisions are therefore subject to *de novo* review. *See Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010) (even where trial court has "broad discretion," constitutional challenges are reviewed *de novo*).

In short, this Court has the authority to make its Rule to Show Cause absolute to vindicate the public's constitutional right of access to judicial records.

II. The First Amendment Provides the Public a Constitutional Right of Access to Court Records in Cases Involving Matters of Public Concern.

Contrary to the District Court's assertion, this Court, and courts throughout the country, have recognized a First Amendment right of access to court records.

A. This Court Held that the First Amendment Guarantees a Presumptive Right of Access to Judicial Records.

The District Court denies there is any first-amendment right based on two hollow arguments: (1) this Court did not articulate its holding in *Wingfield* with sufficient particularity to apply it beyond that case; and (2) holdings in cases involving access to in-court proceedings should not apply.

1. This Court's Holding in *Wingfield* Necessarily Recognized a First Amendment Right of Access to Judicial Records.

The District Court contends that the right of public access to *any* judicial records—not merely those at issue in this case—arises exclusively from the common law (as modified by the CCJRA) and that the First Amendment is never in play. (Resp. at 15.)

Were the District Court's position correct, there would be no constitutional impediment to a legislative abrogation of the common law right of access that placed *all* documents in a court's file, in *all* cases, unavailable for public inspection. While that prospect of such a jettison of the common law right of access may seem unreal, it is, in fact, the very statute that was construed by this Court in *Wingfield*, as discussed below.

The District Court tries to dodge *Wingfield* by arguing that "[a]t most, *Wingfield* acknowledged that sealing the records in question under the statute would raise questions of constitutional dimension," but that "this Court certainly did not resolve those constitutional questions one way or another." (Resp. at 10.) The District Court's argument skews the doctrine of constitutional avoidance, which is incapable of

application without deciding that a proffered statutory interpretation is unconstitutional.

Under the doctrine of constitutional avoidance, "where two constructions are possible, one constitutional, the other unconstitutional, we must choose that which renders the statute constitutional." *Meyer v. Putnam*, 526 P.2d 139, 134 (Colo. 1974); *People in Interest of C.M.*, 630 P.2d 593, 594 (Colo. 1981) (same).

Thus, the *Wingfield* Court necessarily found that the statute at issue was susceptible to an unconstitutional interpretation—*i.e.*, that denying the newspaper petitioner its right to examine judicial records would violate the First Amendment. *Wingfield*, 410 P.2d at 512-13. Indeed, the Court refused to apply the plain meaning of the statute—"no person [except parties and attorneys] shall have the right to examine pleadings or other documents" filed in court—and in effect struck that plain meaning by holding that a non-party newspaper had such right. *Id.* Either way, the Court necessarily resolved the constitutional issue.

This Court's subsequent jurisprudence makes clear that it did, in fact, perform the necessary constitutional analysis:

> In [*Wingfield*], the publishing company *challenged the constitutionality* of section 30-10-101(1)(a) in part on the grounds that *it violated guarantees of freedom of the press by precluding press access* to court proceedings. We concluded that *the constitutional interpretation* of the statute was that judges and clerks of record are not "prohibited from allowing persons other than parties in interest or their attorneys to examine the pleadings or other papers on file in such courts."

Office of State Ct. Adm'r v. Background Info. Servs., Inc., 994 P.2d 420, 428 (Colo. 1999) (emphasis added). While this Court did go on to particularize the standard for determining whether and when a legislature or judge might limit that right, it is undeniable that the *Wingfield* court *recognized the right* as protected by the First Amendment (and, by ordering access, that it found the record in that case presented no grounds to limit the right). Were there no First Amendment right to inspect judicial records, the *Wingfield* court would have had no unconstitutional interpretation to shun, and would have applied the statute as written and held the newspaper had no right to inspect the court records.

2. This Court's Holdings in Access to Proceedings Cases Are Applicable to the Constitutional Right to Access Judicial Records.

The District Court urges that "access to court proceedings is not governed by the same analytical framework as access to court records" and that the First Amendment right of access does "not extend in the same way to sealed records." (Resp. at 11.) That, too, is incorrect.

Numerous courts have applied "the same analytical framework" in access-to-records cases as they do in access-to-proceedings cases. *See, e.g.*, *McVeigh*, 119 F.3d at 811, *infra* at 11-12 (collecting cases); *In re Washington Post Co.*, 807 F.2d 383, 393 n.9 (4th Cir. 1986) ("[R]equests for the sealing or unsealing of documents must . . . be evaluated under [the] constitutional tests" applicable to hearings).

Applying "the same analytical framework" is particularly important where, as here, the sealed records contain information that the public could not

have learned in an open court proceeding. *See U.S. v. Beckham*, 789 F.2d 401, 414 (6th Cir. 1986). Indeed, this Court has explained why access is necessary in such cases:

> Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.

P.R., 637 P.2d at 353 (citation and quotation omitted).

B. The Overwhelming Majority of Federal and State Courts Have Held that the First Amendment Provides a Right of Access to Court Files.

The District Court erroneously asserts that "[t]he U.S. Supreme Court and other jurisdictions have *rejected* a First Amendment right . . . to access court records" (Resp. at 12) (emphasis added), by (1) citing *Nixon v. Warner Communications*; (2) mischaracterizing the holdings of two Tenth Circuit cases; and (3) string-citing isolated and outdated cases without identifying what these cases purportedly hold.

First, the District Court asserts that the U.S. Supreme Court has *held* that there is no First Amendment right of public access to court records, citing *Nixon v. Warner Communications*, 435 U.S. 589 (1978). (Resp. at 6, 12-13.) However, as the Tenth Circuit Court of Appeals correctly recognized:

> *Of course,* Nixon *did not hold that there is no First Amendment right to access court documents.* Rather, the Court there merely held that, in a situation where there "was no

> question of a truncated flow of information to the public," there was no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally. 435 U.S. at 609–10, 98 S.Ct. at 1317–19. Thus, *that case did not address whether there was a First Amendment right to access to court documents when access to those documents is an important factor in understanding the nature of proceedings themselves and when access to the documents is supported both by experience and logic.*

McVeigh, 119 F.3d at 812 (emphases added). In short, not only does the District Court misstate *Nixon*'s holding, but that case lends no support to its position.

Second, the District Court's assertion that the Tenth Circuit has "confirmed" there is no First Amendment right is equally wrong. (Resp. at 14-15.) The two cited cases—*U.S. v. Hickey* and *Lanphere & Urbaniak v. Colorado*—provide no support because the Tenth Circuit subsequently made clear that neither forecloses a constitutional right to judicial records. *See McVeigh*, 119 F.3d at 812 (explaining that *Hickey* was decided before *Press-Enterprise II* and characterizing *Lanphere* as "suggesting the possibility of using the First Amendment standard in those limited circumstances where experience and logic support public access to judicial documents").

Finally, the District Court's citation to isolated and largely older federal cases does not establish the broad federal precedent the District Court claims. For example, the Fourth Circuit began its analysis "by acknowledging the general proposition that the First

Amendment provides the general public a right of access to criminal trials, *including access to documents submitted* in the course of such trials." *Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000). Moreover, as the Tenth Circuit recognized nearly twenty years ago:

> A number of circuits have concluded that the logic of *Press-Enterprise II* extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed. *See Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir.1991) (plea agreement—vacated order to seal because of inadequate justification and inadequate findings); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (affidavits accompanying search warrants—affirmed order to seal affidavits and revised order to seal docket entries); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement—affirmed order to seal even though district court findings were inadequate because record was sufficient to enable appellate court to conduct a balancing test); *In re NBC, Inc.*, 828 F.2d 340, 343–44 (6th Cir. 1987) (motions concerning recusal of trial judge and defense counsel conflict of interest—remanded for more adequate findings); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (suppression motions and accompanying exhibits—remanded for more adequate findings and for consideration of redacting sensitive material); *cf. Associated Press v. United States District Court*, 705 F.2d 1143, 1144 (9th

> Cir.1983) (pre-*Press-Enterprise II* case holding First Amendment prohibited blanket order sealing *all* documents filed in a high-profile criminal prosecution of John DeLorean, and remanding for document-by-document evaluation).

McVeigh, 119 F.3d at 811; *see also In re New York Times*, 828 F.2d at 114 (same); *State v. Schaefer*, 599 A.2d 337, 342 (Vt. 1991) (same) (citing cases from the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuit Courts of Appeal).

Thus, contrary to the District Court's position, the vast majority of federal and state courts have determined that the First Amendment provides the public with a presumptive right of access to judicial records. And, dispositively here, this Court did so as well, in *Wingfield*, *supra*.

C. The Prosecutorial Misconduct Records Are Precisely the Types of Documents to Which the Constitutional Right of Access Applies.

"Generally, the presumption of access applies to all documents filed with the Court." *Under Seal v. Under Seal*, No. 16-cv-7820(KBF), 2017 WL 343720, at *5 (S.D.N.Y. Aug. 10, 2017) (citation omitted). Plainly, this includes court decisions and documents considered in their making. *Id.*

Indeed, the First Amendment presumptive right of access is particularly important when, as here, court files relate to allegations of prosecutorial misconduct because that right "serves an important function of monitoring prosecutorial or judicial misconduct." *Robinson*, 935 F.2d at 288 (citation omitted). This heightened importance includes the right to access the arguments of counsel as to why the factual allegations

matter (or not) and the court's analysis of the same, as such filings drive the "public discourse on prosecutorial misconduct and whether and what steps should be taken to prevent it." *In re Special Proceedings*, 842 F. Supp. 2d 232, 235 & 244 (D.D.C. 2012) (ordering release of document that would "play a significant role in the public's understanding of criminal trials and safeguard against future prosecutorial misconduct, considerations the courts have consistently found weigh heavily in favor of the right of access") (collecting cases).

Moreover, the right of public access does and should apply to all information put before a judicial decision-maker challenging conduct of *any* participant in judicial proceedings. *See, e.g.*, *U.S. v. Stevens*, No. 08-231(EGS), 2008 WL 8743218, at *7 (D.D.C. Dec. 19, 2008) (ordering release of complaint that "attacks the conduct of police and prosecutor in a highly publicized trial") (quotation and citation omitted); *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (a positive functional role of openness in judicial proceedings is "ensuring that judge and prosecutor carry out their duties responsibly"); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (press coverage of trials "guards against the miscarriage of justice *by subjecting the police, prosecutors, and judicial processes* to extensive public scrutiny and criticism.") (emphasis added); *Richmond Newspapers*, 448 U.S. at604 (Blackmun, J. concurring) ("the public has an intense need and *a deserved right to know* about the administration of justice in general; about the prosecution of local crimes in particular; *about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants*, and all the actors in the judicial arena") (emphasis added).

Here, the so-called Prosecutorial Misconduct Records are exactly the sort of court records covered by the First Amendment right of access. The defendant in a highly publicized capital murder case asked the District Court to remove the District Attorney's Office from the case and to appoint a special prosecutor. The District Attorney's Office convinced the District Court to seal that motion, and argued in secret briefings against its own removal from the case and against unsealing the Defendant's motion. After conducting a secret hearing, the District Court denied the Defendant's two substantive motions, in a secret ruling.

This is precisely how this Court has held judicial officers fail in their duty. *P.R.*, 637 P.2d at 353, *supra* at 9; *accord Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("*Judges deliberate in private but issue public decisions after public arguments based on public records*. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.") (emphasis added).

The District Court's position that the public is entitled to inspect only what it considers to be the Defendant's "allegations of prosecutorial misconduct" (Resp. at 22) is baseless[3] and defies common sense. The public is entitled to know *why* the Defendant argued that prosecutorial misconduct and other factual allegations warranted the District Attorney's removal, *why* the People disagreed, and *why* the District Court ultimately accepted the District Attorney's arguments. Unsealing only a narrow category of factual allegations is "the equivalent of giving a reader only

[3] *See infra* n. 5 (explaining that by negative inference, other "factual allegations" in support of defendant's motion to disqualify remain under seal).

every other chapter of a complicated book, distorting the story and making it impossible for the reader to put in context the information provided. The First Amendment, the public, and our system of justice demand more." *Special Proceedings*, 842 F. Supp. 2d at 235.

D. The District Court's Response Dramatically Demonstrates the Need for this Court to Hold That the Constitutional Standard Applies to the Sealing of Judicial Records in Criminal Cases.

In 2016, this Court issued a rule to show cause in response to a petition by news organizations to unseal affidavits of probable cause related to the "Black Friday" Planned Parenthood Clinic shooter, Robert Lewis Dear. The Attorney General, on behalf of the District Court for the Fourth Judicial District, filed an answer (the "*Dear* Answer") arguing that neither the First Amendment nor the Colorado Constitution provides any right of access to any court file. *See* Ex. A at 11-16, 25-29. This Court ultimately remanded that case based on the Attorney General's representations that changed circumstances rendered it appropriate to release the affidavits of probable cause in redacted form.

The Response filed herein is, in relevant respects, a verbatim copy of the *Dear* Answer. *Compare* Resp. at 9-15 and 16-20 *with* Ex. A at 10-16 and 25-29. However, nothing here could justify remand for "new" findings based on "changed circumstances."

The arguments recycled in the Response show, if anything, that there is confusion in the trial courts as to the precedent of this Court. Precisely for that reason, this Court should clearly hold, as it did in *Star*

Journal with respect to pretrial proceedings, that trial courts must apply the Constitutional Standard when a party seeks to deny the public's presumptive right of access to judicial records in criminal cases.

III. The Colorado Constitution's Stronger Free Speech Rights Require the Application of the Constitutional Standard in This Case.

A. The District Court Cannot Escape the Necessary Import of the Fact That the Colorado Constitution Affords Greater Free Speech Rights.

As the District Court admits, "the Colorado Constitution provides greater free speech rights than the federal constitution" (Resp. at 17). *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). It provides an independent and stronger basis for right of access to judicial documents. *See P.R.*, 637 P.2d at 354 (citing art. II sec. 10 of Colorado Constitution in support of its holding).

B. The CCJRA and CJD Must Be Interpreted in Compliance with the Colorado Constitution.

The District Court's argument that interpreting the CCJRA and CJD 05-01 in compliance with the Colorado Constitution will "undermine" their intent (Resp. at 18-20) ignores basic tenets of statutory interpretation. *See* § 2-4-201(a), C.R.S. (for every statute courts must presume that "[c]ompliance with the constitutions of the state of Colorado and the United States is intended"). Thus, for example, in applying the "contrary to public interest" standard of the CCJRA (applicable under CJD 05-01 in criminal cases), courts must consider all relevant interests, including a defendant's rights under the Sixth

Amendment, third-parties' privacy rights under both state and federal constitutions, and the public's right to inspect such records under both the First Amendment and article II, section 10.

Acknowledging the Colorado Constitution's presumptive right of public access to judicial records in criminal cases, and the accompanying need to apply the Constitutional Standard, does not "guarantee the media unfettered access to inspect confidential court documents" or "inhibit[] [courts] from assuring criminal defendants a fair trial by an impartial jury." (Resp. at 17, 20.) It simply clarifies what standard must be satisfied when a party seeks to deny the public access to criminal court records.

IV. This Court Should Disregard Counsel's *Ex Parte* "Sealed Explanation" (So Filed Without Seeking Leave); In Any Case, It Cannot Cure the District Court's Failure to Apply the Correct Constitutional Standard in the Sealing Order.

A. This Court Should Disregard the Attorney General's Improper Filing

The Attorney General has confirmed to undersigned counsel that the "sealed explanation" was not drafted by the District Court, but, rather, by the Attorney General. In other words, the "sealed explanation" is simply an *ex parte* supplemental brief filed without leave. Such filings are expressly prohibited by the Colorado Code of Professional Conduct,[4] and violate basic tenets of fairness and due process. The *ex parte* supplemental brief should be disregarded and stricken.

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[4] *See* R.P.C. 3.5(a) & 3.5(b).

B. The *Post Hoc* "Sealed Explanation" Cannot Cure the District Court's Error Below.

The *ex parte* supplemental brief was tendered in support of the District Court's claim that it can now, for the first time (through counsel), articulate the "countervailing interests" that purportedly overcome the public's presumptive right to access judicial records. (Resp. at 22.) But such *post hoc* action by proxy cannot cure the District Court's constitutional error below—its failure to make *any findings whatsoever* that continued sealing of judicial records was necessary to protect a compelling governmental interest and that no less restrictive means were available to do so.

In *Star Journal*, this Court made clear that First Amendment right of access cannot be overcome unless "the trial judge issue[s] a written order setting forth *specific factual findings*" that the Constitutional Standard is satisfied. 521 P.2d at 1030 (emphasis added); *see also P.R.*, 637 P.2d at 353 (same). Both of these prior cases expressly relied upon § 8-3.2 of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press, which applies with equal force to documents and exhibits on file in criminal cases. *See* Standard 8-5.2 (renumbered on re-adoption in 2013) ("Public Access to Judicial Proceedings *and Related Documents and Exhibits*") (emphasis added). That standard likewise makes clear that denial of access to such documents requires "*specific* written findings on the record . . ." Standard 8-5.2(b) (emphasis added).

Numerous courts, including this one, have held that a trial court's failure to enter on-the-record findings articulating the need to deny public access calls for *mandamus* relief. *See, e.g.*, *In re Sigg*, 13SA21(Colo. Feb. 21, 2013) (vacating district court's order closing

preliminary hearing because the requisite findings had not been entered); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 13-14 (1986); *Richmond Newspapers,* 448 U.S. at 581 (plurality opinion) (first amendment access right may not be abridged "[a]bsent an overriding interest *articulated in findings*") (emphasis added); *Robinson*, 935 F.2d at 288 (same); *Haller*, 837 F.2d at 87 (same).

Here, the only explanation the District Court provided the public for its denying its right to inspect (1) all portions of the Defendant's Motion to Disqualify (other than an arbitrary *subset* of the factual allegations[5]), (2) the entirety of the People's Response,

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[5] The District Court, and the Attorney General, have represented only that the pages unsealed "contain *all* of Owens' factual allegations of prosecutorial misconduct." (Resp. at 4 (underlining added).) Even if that representation *is* accurate, no representation is made that *all of the factual allegations* in Owen's motion offered as grounds for the requested relief (disqualification of the District Attorney) have been unsealed. Obviously, the grounds for disqualification are not limited to actual "prosecutorial misconduct"—*i.e.*, a conflict of interest is not "prosecutorial misconduct," but nevertheless may support disqualification. *U.S. v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003) (discussing the "several probable bases for disqualification," which include "*either* misconduct in the representation *or* any alleged conflicts of interest") (emphasis added).

The public's interest in accessing substantive motions in criminal cases, and the court's ruling thereon, is by no means limited only to "allegations of prosecutorial misconduct." The right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice"—a goal that cannot be accomplished "without access to testimony *and documents* that are used in the performance of [judicial] functions." *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). This necessarily includes the prosecution's arguments attempting to justify its actions and the

(3) the Defendant's motion to unseal, (4) the People's response, (5) the transcript of a closed hearing, and (6) the Court's ruling on the Defendant's substantive motions, is as follows:

> The countervailing considerations are such that publishing portions of the Motion to Disqualify that are merely argument or rhetoric (as opposed to the factual assertions) in support of the Motion to Disqualify and Motion to Unseal is not justified. Likewise, the associated responses, orders, and transcript will not be disclosed.

Order Denying Access at 3.

Were this Court to approve the above judicial articulation as legally sufficient "specific findings," it would eviscerate the requirement that judges provide the public with a *reasoned explanation* for curtailing its presumptive rights to monitor the conduct of the judicial branch of government.

The District Court argues that it is incapable of "provid[ing] further explanation without disclosing the very information that it had ordered should remain confidential." (Resp. at 21.) This claim that no non-pernicious description of the "countervailing interests" is possible is plainly untenable. For example, the District Court could have easily described the "countervailing interests" (assuming any applied) as:

- A threat to the safety of identified witnesses;
- An invasion of personal privacy of an individual through disclosure of irrelevant, embarrassing and highly personal facts;

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trial court's reasons for not taking any remedial steps. *See supra* at 12-15.

- Interference with another pending or anticipated criminal prosecution or ongoing investigation;
- Identification of undercover law enforcement agents or confidential informants;
- Disclosure of confidential, trade secret, or classified national security information; or
- To protect the interests of minors.

Courts routinely so articulate "countervailing interests" deemed to justify withholding information. Such explanations allow the public to understand the *evidentiary basis for a denial of their constitutional rights* and determine whether to appeal a trial court's sealing order on the merits. *See, e.g.*, *U.S. v. Bakker (In re Charlotte Observer)*, 882 F.2d 850, 853 (4th Cir. 1989) (trial courts must articulate "*specific reasons* and findings *on the record* to facilitate the *de novo* review of such closure [or sealing] orders that is mandated by their constitutional implications"); *U.S. v. Criden*, 675 F.2d 550, 562 (3d Cir. 1982) (same).

Lastly, under the Constitutional Standard, the court must also articulate why no less restrictive alternative means, including the release of redacted records, would be adequate.[6] The District Court's sealing order here made no mention, whatsoever, of redaction, much less *find* that redaction would not adequately protect the "countervailing interests." *See Criden*, 675 F.2d at

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[6] *See In re Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) ("[T]he First Amendment requires consideration of the feasibility of redaction on a document-by-document basis"); *U.S. v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (same); *see also Kasza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where release of court records poses risk to national security, "[p]ublic release of redacted material is an appropriate response").

562 ("In the absence of specific findings, we have no assurance that the district court considered any alternatives to closure."); *Press-Enterprise II*, 478 U.S. at 14 (same); *P.R.*, 637 P.2d at 354 & n.10 (court is required to consider, and to find inadequate, "alternatives to full closure" including "*transcripts and other documents* from which names and other identifying references have been deleted.") (emphasis added).

CONCLUSION

At present, neither the Petitioner, nor the public, has any idea *why* a large swath of judicial records on file in a completed capital murder case are unavailable for public inspection. All the public knows is that one judge is of the view that unexplicated "countervailing considerations" warrant withholding from public inspection legal briefs, a hearing transcript, and the court's ruling. We, the People, are completely in the dark as to what (or even of what *nature*) those purported "countervailing considerations" might be.

The *Colorado Independent* respectfully urges this Court not to lend its imprimatur to this state of affairs. If public trust is to be maintained in the judicial branch, and in the performance of government prosecutors, the wall of secrecy surrounding the Prosecutorial Misconduct Records cannot stand.

For the reasons set forth above and in the Petition, this Court should make its rule absolute.

Respectfully submitted this 18th day of April, 2018, by:

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APPENDIX H

SUPREME COURT,
STATE OF COLORADO

Case No. 18SA19
Rule Discharged
Date: June 11, 2018
En Banc
Delivered by Justice Hart

In re: People v. Sir Mario Owens

Petitioner:
The Colorado Independent

Respondent:
District Court for the Eighteenth Judicial District of Colorado (the Hon. Christopher Munch, Retired Senior Judge, presiding)

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2 East 14th Avenue
Denver, CO 80203

Arapahoe County District Court, Case No. 06CR705
Hon. Christopher Munch, Retired Senior Judge
Hon. Gerald R. Rafferty, Retired Judge

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PETITION FOR REHEARING
PURSUANT TO C.A.R. 21(n)

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all requirements of Rules 21, 28, 32, and 40 of the Colorado Appellate Rules, including all content and formatting requirements set forth in these Rules.

Specifically, the undersigned certifies that this brief complies with C.A.R. 40(b) because it contains 1,879 words in those portions subject to the applicable Rules.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Rules 21, 28, 32, and 40 of the Colorado Appellate Rules.

By /s/ Steven D. Zansberg
Steven D. Zansberg, #26634

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OTHER AUTHORITIES

The Opinion fundamentally misapprehends Petitioner's position concerning the scope of the First Amendment right of public access to court records. In rejecting what it perceived to be Petitioner's argument—that the First Amendment guarantees "absolute" public access to *all* court records, without exception—the Court held that the First Amendment *does not apply at all* to the question whether court records should be released to the public or may be maintained under seal.

This places the Court at odds with all eleven federal Circuit Courts of Appeals that have addressed the issue, each of which has recognized that the First Amendment provides a qualified right of access to court records that serve as the basis for the exercise of judicial authority. This *qualified* right can be overcome, but only by written findings that the presumption in favor of public access has been overcome.

Because the impact of the Court's decision extends far beyond the particular litigation in which it arose, and the decision dramatically departs from the rest of the country in its application of a First Amendment principle that is critical for government transparency, Petitioner respectfully requests that the Court rehear the Petition.

I. THE COURT APPEARS TO HAVE MISAPPREHENDED THE NATURE OF THE RELIEF PETITIONER SOUGHT.

What Petitioner asked the Court to do in this case was simply to apply the uncontroversial, widely recognized First Amendment qualified right of access to four particular records:

1) The Motion to Disqualify the District Attorney and appoint a special prosecutor (SOPC-352);

2) the People's Response;

3) the transcript of the hearing conducted behind closed doors on that motion;[1] and

4) the Order denying that motion.

More specifically, Petitioner asserted that (1) the First Amendment qualified right of access attaches to these four records; (2) the District Court was required to determine whether the government made an adequate showing to overcome that qualified right; and (3) if so, to set forth those findings on the record. *See* Pet'n at 4-5 (requesting an Order to Show Cause why the District Court's sealing orders "should not be immediately vacated and the Prosecutorial Misconduct Records unsuppressed *unless and until the requisite*

[1] *See Press-Enterprise Co. v. Superior Ct.,* 478 U.S. 1, 13-14 (1986) (ordering the unsealing of a transcript of a closed preliminary hearing by applying the First Amendment: "Denying the transcript of a . . . hearing would frustrate what we have characterized as the 'community therapeutic value' of openness"); *Press-Enterprise Co. v. Superior Ct*., 464 U.S. 501, 513 (1984) (the sealing of a transcript of closed *voir dire*, without "consider[ing] alternatives to . . . total suppression of the transcript" violated the First Amendment); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.,* 156 F.3d 940, 946-51 (9th Cir. 1998) (applying First Amendment right of access, finding trial court had improperly sealed a transcript of closed mid-trial hearing, where propriety of the court's courtroom closure order was not at issue: "[T]he district court met neither the procedural nor the substantive prerequisites for sealing the transcript of the . . . hearings. In denying access to the transcript, public confidence was unnecessarily eroded.").

judicial findings have been entered") (emphasis added).

That Petitioner's requested right is not absolute is demonstrated by its application by courts in this state, which have determined (upon entry of the required findings) that certain judicial records subject to that presumptive right should be maintained under seal. *See, e.g.*, *U.S. v. McVeigh*, 119 F.3d 806, 812-15 (10th Cir. 1997) (applying the *Press-Enterprise* standard for court closure and upholding orders sealing records in criminal case); *People v. Holmes*, No. 12CR1522, 2012 WL 4466553, at *4-5 (Arapahoe Cty. Dist. Ct. Aug. 13, 2012) (applying the First Amendment standard and finding that affidavits of probable cause should remain under seal).

The Court described Petitioner's request, however, as one seeking "mandatory disclosure," "unfettered access," and "a constitutional right of access to any and all records in cases involving a matter of public concern." (Op. 4 ¶ 6, 1 ¶ 1, 4 ¶ 7.) The error appears to have arisen as a result of the District Court's misstating the issue in its Response, in which it argued against a right of "unfettered access to inspect confidential court documents." (Resp. at 17.) Petitioner never asserted any such right.

II. THE OPINION PUTS THIS COURT AT ODDS WITH EVERY FEDERAL CIRCUIT COURT OF APPEALS THAT HAS RULED ON THIS ISSUE OF FEDERAL CONSTITUTIONAL LAW.

The Opinion conveys the impression that the constitutional qualified right to inspect judicial records is unprecedented, when, in fact, all eleven of the federal

Circuit Courts of Appeals that have resolved the issue have so held.[2]

- First Circuit: *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002) ("this constitutional right . . . extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings")
- Second Circuit: *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) ("there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion")
- Third Circuit: *U.S. v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997) (holding that the First Amendment right of access encompasses "the records and briefs that are associated with [a criminal] proceeding[]")
- Fourth Circuit: *Doe v. Public Citizen*, 749 F.3d 246, 265-66 (4th Cir. 2014) ("the First Amendment secures a right of access . . . to particular judicial records and documents")
- Fifth Circuit: *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392-93 (5th Cir. 2014) (district court did not err in applying the constitutional standard "to court *records;*"

[2] *See* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 UNIV. ILL. L. REV. 1385, 1403-05 ("[A]ll of the federal circuits that have addressed the issue of access to court records in criminal cases have held that the public has a First Amendment right of access to such records, as have many state supreme courts.") (footnotes omitted).

noting that no circuit court "has found that the experience and logic tests do *not* apply")

- Sixth Circuit: *In re NBC, Inc.*, 828 F.2d 340, 346-47 (6th Cir. 1987) (First Amendment right of access applies to papers filed in connection with a motion to disqualify judge)
- Seventh Circuit: *U.S. v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("this court has held that the first amendment right of access extends to documents submitted in connection with a judicial proceeding")
- Eighth Circuit: *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("the first amendment right of public access does extend to the documents filed in support of search warrant applications")
- Ninth Circuit: *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (Kennedy, J.) (First Amendment right of access "extends to documents filed in pretrial proceedings")
- Eleventh Circuit: *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005) (holding that court's orders sealing court records "do not comply with our First Amendment jurisprudence")
- D.C. Circuit: *Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) ("The first amendment guarantees the press and the public a general right of access to . . . court documents")

The Tenth Circuit has not held to the contrary. While the 1985 and 1994 cases to which the Opinion

cites (Op. 4 ¶ 7) did not find that a constitutional right of access applied to the records at issue in those cases, they did not foreclose the existence of such a right. And, subsequently, the Tenth Circuit has expressly refrained from resolving that question. In one case, it *assumed* that such a right exists, *see McVeigh*, 119 F.3d at 812, and in the other it ordered unsealing under the common law right of access without addressing whether the First Amendment also provides a right. *U.S. v. Pickard*, 733 F.3d 1297, 1302 n.4 (10th Cir. 2013) ("[W]e have no occasion here to address whether [appellants] *also have* a First Amendment right to have the DEA file unsealed") (emphasis added).

III. THE OPINION CANNOT BE RECONCILED WITH *WINGFIELD*.

While it is technically correct that "this court did not hold in *Wingfield* that limiting access to court records violates the First Amendment" (Op. 5 ¶ 8), the Court did hold that the Freedom of the Press clause compelled it to construe the statute as authorizing permissive access. *Times-Call Pub'g Co. v. Wingfield*, 410 P.2d 511, 513 (Colo. 1966) ("A statute should be construed in a manner *to harmonize it with existing constitutional provisions* if it is reasonably possible to do so.") (emphasis added); *see also Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1999) ("Although we must give effect to the statute's plain and ordinary meaning, the intention of the legislature prevails over a literal interpretation of the statute that *would . . . conflict* with the . . . United States Constitution[].") (emphasis added).

Indeed, this Court recognized nearly twenty years ago that, in *Wingfield*, "we concluded that *the constitutional interpretation of the statute* was that it

did not absolutely bar the public from inspecting records on file in courts of law." *Office of State Ct. Adm'r v. Background Info Servs., Inc.*, 994 P.2d 420, 428 (Colo. 1999) (emphasis added).

Thus, in *Wingfield*, this Court necessarily recognized that the First Amendment provides some protection for public access to court records in at least some circumstances. If that were *not* the case, the Court would have had no need to apply a "*constitutional* interpretation of the statute." If this Court now wishes to repudiate its prior decision, it should overrule *Wingfield*. *See Bd. of Cty. Comm'rs of Adams Cty. v. City of Thornton*, 629 P.2d 605, 611 (Colo. 1981).

IV. THE CONSTITUTIONAL RIGHT OF ACCESS DOES NOT REQUIRE STRIKING DOWN THE CCJRA.

The Opinion's concern that recognition of the constitutional right would "do violence to" the statutory scheme adopted by Colorado's General Assembly (Op. 5 ¶ 9) is misplaced.

As noted above, this Court must provide a constitutional interpretation to a statute where reasonable or, if not, strike the statute. *See also* § 2-4-201(a), C.R.S. Trial courts throughout Colorado have recognized the constitutional right without questioning the validity of the CCJRA. For example, in granting a media coalition's petition to unseal the probable cause affidavits on file in the Aurora Theater Shooting case, Judge Carlos Samour recognized that the public's constitutional right is one of the interests that must be considered under the CCJRA:

> In striking the balance required by *Harris*, the Court first analyzes the interests of the

> Media Petitioners and the public. The Court then addresses the parties' objections.
>
> 1. The Interests of Media Petitioners and the Public
>
> Media Petitioners contend that they and other member of the public *have a constitutional right protected by the First Amendment* to the information sought which may only be curtailed by the showing of an overriding and compelling state interest. *The Court agrees*.

People v. Holmes, 12CR1522, 2013 WL 3982191, at *3 (Arapahoe Cty. Dist. Ct. Apr. 4, 2013) (emphasis added) (attached as Appendix A). Thus, Judge Samour and numerous other District Court judges across the state have had no difficulty construing the CCJRA consistently with the constitution.

WHEREFORE, Petitioner respectfully asks the Court to rehear the Petition.

Respectfully submitted this 20th day of June, 2018, by:

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