No. 18-404

In the Supreme Court of the United States

THE COLORADO INDEPENDENT,
Petitioner,
v.
DISTRICT COURT FOR THE EIGHTEENTH JUDICIAL DISTRICT OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the "experience and logic" test from *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), governing access to judicial proceedings, be extended to state criminal justice records, even though Petitioner did not advance that argument below?

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INTRODUCTION

This case is not about the public's general access to court records. Nor is it about the propriety of the trial court's sealing order in this particular case—an order issued to ensure the safety of witnesses in a criminal case where the defendant was charged with, and ultimately convicted of, murdering a witness set to testify in another trial. Instead, this case is about a small subset of sealed documents that the Colorado state courts have repeatedly concluded have no bearing on Mr. Owens' claims of prosecutorial misconduct or any other substantive issue connected with his trial, appeal, or post-conviction proceeding. The Colorado Supreme Court confirmed as much when it reviewed the sealed records *in camera* and affirmed the denial of Petitioner's unsealing motion. As below, the sealed records have been submitted to this Court *in camera*, so that this Court can confirm the records' irrelevance to Mr. Owens' arguments related to the merits of his prosecution.

In any event, Petitioner failed to preserve below its argument to extend *Press-Enterprise II* to criminal justice records, it identifies no genuine conflict of authority, and even if this Court were inclined to expand the "experience and logic" test to the situation presented here, this case is riddled with vehicle problems. The Petition for Writ of Certiorari should therefore be denied.

COUNTERSTATEMENT

1. Sir Mario Owens was convicted in 2008 and sentenced to death for murdering a witness who was expected to testify in another homicide case. *In re People v. Owens*, 420 P.3d 257, 258 (Colo. 2018); Pet. 4. In a lengthy order addressing Mr. Owens' request for post-conviction relief under Colo. Crim. P. 32.2, the Respondent District Court for the Eighteenth Judicial District of Colorado ("District Court") found that the District Attorney's Office for the Eighteenth Judicial District had committed several discovery violations during the course of Mr. Owens' prosecution. BIO App. 30. The District Court nonetheless denied Mr. Owens' motion for post-conviction relief, finding "no reasonable probability that the outcome of the trial or sentencing hearing would have been different if all of the undisclosed evidence had been known to Owens's trial team." BIO App. 31.

The District Court also denied Mr. Owens' related motion seeking to disqualify the District Attorney's Office and to appoint a special prosecutor. Pet. App. 3a. Certain filings related to that motion are subject to a protective order and have been maintained under seal since October 2016. BIO App. 31.

2. The instant proceedings began with a motion by Petitioner, a non-party media organization, to unseal records that were covered by the protective order. *Id.* Petitioner's motion sought access to three specific documents: (1) SOPC-351, Mr. Owens' notice that the motion to disqualify was filed under seal, (2) SOPC-352, Mr. Owens' sealed motion to disqualify the District Attorney's Office, and (3) SOPC-353, Mr. Owens' sealed motion to unseal SOPC-352 and SOPC-

353. *Id.* at 31–32. Petitioner's motion also sought production of any additional court papers or transcripts related to those filings. *Id.* at 31. After considering briefing from both Petitioner and the parties on Petitioner's motion to unseal, the District Court ruled as follows:

- SOPC-351 contains no substantive information covered by the protective order; it was thus unsealed and provided to Petitioner. Pet. App. 8a.

- SOPC-352 included Mr. Owens' motion to disqualify and fifteen appendices; it was followed by a response filed by the District Attorney's Office and an order issued by the District Court. *Id.* A transcript of a hearing held on the motion is also in the court record. *Id.* Each of these documents related to SOPC-352 was maintained under seal pursuant to the protective order. *Id.* After considering Petitioner's motion, the District Court unsealed 45 pages of the motion to disqualify, along with thirteen of the motion's fifteen appendices. *Id.* at 9a. Consistent with the protective order, a few paragraphs of the motion were redacted; the unsealed pages and appendices, however, contain *all* of Mr. Owens' factual allegations of prosecutorial misconduct. BIO App. 32; Pet. App. 9a.

- SOPC-353 likewise did not allege facts upon which the District Attorney Office's disqualification was sought. BIO App. 32. Filed by Mr. Owens' counsel, it sought to unseal both

itself and SOPC-352. *Id.* The District Court denied that motion. Pet. App. 9a.

3. Petitioner sought immediate discretionary review of the District Court's order in the Colorado Supreme Court under Colo. App. R. 21, naming the District Court as a respondent. BIO App. 1–28. Petitioner urged the Colorado Supreme Court to "clarify for trial judges throughout Colorado that *under both [the] state and federal constitutions, the public enjoys a presumed right of access to documents on file in Colorado criminal cases, including documents relating to prosecutorial misconduct*." BIO App. 5 (emphasis in original). Thus, Petitioner sought to establish a new presumed, mandatory right of access to state criminal justice records. Its petition to the Colorado Supreme Court did not cite or rely on this Court's "experience and logic" balancing test for access to court proceedings. *Press-Enterprise II*, 478 U.S. at 9; BIO App. 1–28. Nor did it peg its requested relief to the more limited common law right of access to court records previously recognized by this Court. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

In its response, the District Court asserted that (1) Colorado state court precedent recognizes a presumptive right of access only to court *proceedings*, not court records, (2) this Court's precedent regarding the public's right to access judicial records is rooted in the more limited common law, on which Petitioner does not rely, (3) the common law, in any event, is subordinate to the trial court's inherent supervisory power over its own files, and (4) the Colorado Supreme Court has not recognized a right for the media to inspect sensitive court records under the Colorado state

constitution. BIO App. 33–34. In support of its order partially denying Petitioner's motion to unseal, the District Court also submitted the remaining sealed records to the Colorado Supreme Court for *in camera* review.[1]

The Colorado Supreme Court unanimously rejected Petitioner's argument that the federal and state constitutions grant a presumptive right of access to documents filed in a criminal case. Pet. App. 3a–6a. It explained that the United States Supreme Court has never recognized an "unfettered" or "mandatory" right of access to criminal justice records under the First Amendment. *Id.* at 3a, 5a. The Colorado Supreme Court similarly declined to interpret the Colorado state constitution "as guaranteeing such a sweeping—and previously unrecognized—right of unfettered access to criminal justice records." *Id.* at 6a. The Colorado Supreme Court thus affirmed the District Court's partial denial of Petitioner's motion to unseal the subject records. *Id.*

Petitioner now seeks this Court's review of the Colorado Supreme Court's decision.

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[1] Similar to the procedure followed in the Colorado Supreme Court, the District Court has contemporaneously filed with this Brief in Opposition a motion for leave to submit unredacted copies of all documents related to SOPC-352 and SOPC-353 to this Court under seal.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari for three reasons.

First, Petitioner failed to preserve below the issue that it now advances in this Court. In its petition to the Colorado Supreme Court, Petitioner did not assert that *Press-Enterprise II*'s experience and logic test affords the public a First Amendment right to state criminal justice records. Instead, Petitioner advocated a much different legal rule that the Colorado Supreme Court correctly rejected—namely, that the public is entitled to presumptive and unfettered access to any and all criminal justice records. Petitioner thus waived the issue it presents here on certiorari.

Second, there is no genuine split of authority, as the Colorado Supreme Court's order is not inconsistent with the circuit court precedent cited by Petitioner. That precedent merely shows that the circuits are uniform in applying *Press-Enterprise II*'s experience and logic test to the facts of each particular case. But the Colorado Supreme Court's opinion did not renounce that well-established balancing test. It instead addressed—and rejected—a different legal argument presented by Petitioner.

Third, this case suffers from multiple vehicle problems. Most notably, the parties disagree over the nature and content of the record, complicating this Court's ability to reach the First Amendment issue. And even if this Court manages to reach it, the subject matter of the sealed records implicates material and activities that traditionally fall within the exclusive province of the States. Unlike cases arising from the federal court system, the interests of comity and

respect for the States' judicial procedures in this *state* case would needlessly complicate this Court's constitutional analysis. The Petition for Writ of Certiorari should therefore be denied.

I. The issue that Petitioner raises here was not preserved below.

Petitioner did not present the issue it raises in this Court to the Colorado Supreme Court. Because the Colorado Supreme Court appropriately resolved the issue presented to it, and because Petitioner failed to preserve below the issue it now presses here, the Petition for Writ of Certiorari should be denied.

Petitioner complains about the breadth of the Colorado Supreme Court's ruling and, more specifically, the fact that it affirmed the District Court's partial denial of Petitioner's motion to unseal the records without first applying the "experience and logic" test of *Press-Enterprise II*. Pet. 14. But the Colorado Supreme Court appropriately addressed the claims and arguments that Petitioner presented to it. Those arguments urged the Colorado Supreme Court to adopt a new substantive holding that the media and the general public have a *presumptive* First Amendment right to access any and all criminal justice records. In particular, its petition to the Colorado Supreme Court argued that "*under both [the] state and federal constitutions, the public enjoys a presumed right of access to documents on file in Colorado criminal cases, including documents relating to prosecutorial misconduct*." BIO App. 5 (emphasis in original). In support of that proposed standard, Petitioner relied almost exclusively on Colorado *state* precedent establishing a presumed right of public access to

criminal court proceedings. *See, e.g.*, *Star Journal Publ'g Corp. v. Cty. Court*, 591 P.2d 1028 (Colo. 1979). Nowhere did its petition to the Colorado Supreme Court mention or even cite *Press-Enterprise II*'s experience and logic test. BIO App. 1-28. Petitioner has thus failed to preserve the issue it raises here. *See Beck v. Washington*, 369 U.S. 541, 550–52 (1962) (refusing to consider issue where petitioner "did not even mention" the challenged statute below and admonishing that "[m]ere generalized attacks" on the trial court's holding are insufficient).

The differences between the petition for review in the Colorado Supreme Court (a pleading that Petitioner did not provide to this Court but which is included in the Appendix to this brief) and the Petition in this Court are critical. Petitioner strategically chose to frame the issue it presented to the Colorado Supreme Court in the hope of securing a new, unqualified right of access to all criminal justice records under either the First Amendment or the Colorado Constitution. BIO App. 5, 23. That choice inevitably affected both the scope and focus of the Colorado Supreme Court's opinion. Pet. App. 4a (stating Petitioner "limit[ed] its request for relief to the argument that presumptive access to judicial records is a constitutional guarantee"). For example, in addition to failing to even cite *Press-Enterprise II*'s experience and logic test, its petition to the Colorado Supreme Court made no substantive argument on that point. The words "experience" and "logic" do not even appear in its petition below, nor did Petitioner engage in the type of historical balancing test that *Press-Enterprise*

II requires.[2] BIO App. 1–28. Similarly, while its Petition in this Court repeatedly describes the right at issue as a "qualified" First Amendment right, its petition below advocated for a "presumptive" access right only. *Compare* Pet. 2–4, 11, 15, 17, 20, 24–25, 28, *with* BIO App. 4–5, 10, 23, 26. Thus, the issue that Petitioner presents to this Court—and that it faults the Colorado Supreme Court for not addressing—was not preserved below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Beck*, 369 U.S. at 549–50 (refusing to address argument that was "neither considered" by nor "properly presented" to the state supreme court below).

What *was* preserved below was an argument that the Colorado Supreme Court properly rejected, namely that the public is entitled to "presumptive" access to all criminal justice records under the First Amendment. Pet. App. 3a; BIO App. 4–5. The Colorado Supreme Court correctly determined that this Court has never recognized a First Amendment right of access that is so sweeping in scope. Pet. App. 3a. To the contrary, the public possesses a more limited *common law* right "to inspect and copy records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597. Yet that common law right is "not absolute." *Id.* at

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[2] While Petitioner cited *Press-Enterprise II* in its *reply brief* in the Colorado Supreme Court, by then it was too late to change course. Colorado appellate courts follow the well-settled rule that arguments raised for the first time in a reply brief will not be considered. *See, e.g., People v. Czemerynski,* 786 P.2d 1100, 1107 (Colo. 1990).

598. Instead, "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.*; *see also id.* at 608–09 (rejecting media organization's argument that First Amendment's guarantee of freedom of the press mandated release of Watergate tapes).

Given the arguments presented to it, the Colorado Supreme Court correctly rejected Petitioner's attempt to create a new presumptive right of access to criminal justice records under the First Amendment. The court appropriately cabined its ruling to that issue, rejecting *only* the argument that access to such records is "unfettered," "presumptive," or "mandatory" under either the First Amendment or the Colorado Constitution. Pet. App. 3a–6a; *accord Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508, 1512 (10th Cir. 1994) ("[T]here is no general First Amendment right in the public to access criminal justice records."). Contrary to Petitioner's suggestion, the opinion did not go further to also reject the *qualified* right of access under *Press-Enterprise II*'s experience and logic test. Petitioner did not present that argument to the Colorado Supreme Court, nor did that court address the issue. Petitioner is therefore barred from raising the issue in this Court. *See Singleton*, 428 U.S. at 120; *Beck*, 369 U.S. at 549–53.

II. Petitioner has not identified a split of authority, and the Colorado Supreme Court did not deviate from uniform circuit court precedent.

Petitioner claims that federal circuit courts have reached "broad, uniform and stable" agreement that the First Amendment guarantees access to criminal justice records as a matter of course. Pet. 16. But Petitioner's cited cases merely demonstrate what one would expect from the consistent application of *Press-Enterprise II*'s two-step experience and logic test—that multiple categories of proceedings and documents have "historically been open to the press and the general public" and that "public access plays a significant positive role in the functioning of the particular process in question."[3] *Press-Enterprise II*, 478 U.S. at 8–9. None of the cited cases endorses the type of unfettered right of access to "any and all court records" that Petitioner advocated for below. Pet App. 5a. Instead, a historical and fact-bound analysis of the specific proceeding or document at issue has been necessary in each case.

This has been true of cases in every circuit, as shown by the following examples:

- First Circuit: *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502–03 (1st Cir. 1989) (applying *Press-Enterprise II*'s experience and logic test to criminal records where a conviction was not obtained and observing that access to court

[3] While this Court has not addressed whether *Press-Enterprise II*'s experience and logic test governing access to judicial *proceedings* also extends to criminal justice *records*, the lower circuit courts have uniformly applied it to proceedings and records alike.

records "has never been unfettered") (internal quotations omitted).

- Second Circuit: *United States v. Haller*, 837 F.2d 84, 86–87 (2d Cir. 1988) (applying *Press-Enterprise II*'s experience and logic test to plea agreements and hearings).
- Third Circuit: *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (applying experience and logic test to indictments and informations).
- Fourth Circuit: *In re Washington Post Co.*, 807 F.2d 383, 389–90 (4th Cir. 1986) (applying *Press-Enterprise II*'s experience and logic test to plea and sentencing hearings and documents).
- Fifth Circuit: *United States v. Edwards*, 823 F.2d 111, 115–17 (5th Cir. 1987) (applying *Press-Enterprise II*'s experience and logic test to conclude that midtrial questioning of jurors over potential misconduct should *not* be open to the public).
- Sixth Circuit: *United States v. DeJournett*, 817 F.3d 479, 484–85 (6th Cir. 2016) (applying *Press-Enterprise II*'s experience and logic test to plea agreements).
- Seventh Circuit: *United States v. Corbitt*, 879 F.2d 224, 228–29 (7th Cir. 1989) (applying *Press-Enterprise II*'s experience and logic test to conclude presentence reports should remain confidential).
- Eighth Circuit: *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855

F.2d 569, 572–74 (8th Cir. 1988) (applying *Press Enterprise II*'s experience and logic test to documents filed in support of search warrants).

- Ninth Circuit: *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084–85 (9th Cir. 2014) (applying *Press-Enterprise II*'s experience and logic test to conclude multiple categories of documents should remain closed, including transcripts relating to motions to quash grand jury subpoenas, closed portions of contempt proceedings discussing matters before the grand jury, and motions to hold a grand jury witness in contempt).

- Tenth Circuit: *United States v. McVeigh*, 119 F.3d 806, 812–14 (10th Cir. 1997) (applying *Press-Enterprise II*'s experience and logic test to conclude that suppressed evidence, inadmissible interview notes, and severance documents were properly sealed).

- Eleventh Circuit: *United States v. Valenti*, 987 F.2d 708, 712–15 (11th Cir. 1993) (citing *Press-Enterprise II*'s experience and logic test in analysis affirming the district court's denial of newspaper's emergency motion to unseal transcripts of closed bench conferences and *in camera* motions).

- D.C. Circuit: *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (applying *Press-Enterprise II*'s experience and logic test to plea agreements).

In this case, the Colorado Supreme Court did not disavow the context-specific analysis that *Press-*

Enterprise II's test contemplates and that the circuit courts uniformly perform. It merely rejected Petitioner's invitation to grant unqualified access without engaging in any analysis whatsoever. Pet. App. 3a–5a.

In any event, Petitioner fails to identify any discernable conflict among the circuit courts or state courts of last resort, and certainly not a "recurring" one. *Clay v. United States*, 537 U.S. 522, 524 (2003). Rather, Petitioner seeks only to correct what it claims is an erroneous decision by the Colorado Supreme Court. That alone is sufficient to deny the Petition. *See* Sup. Ct. R. 10; *cf. Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974).

III. The Petition should be denied due to vehicle problems.

Beyond waiving the question presented and failing to identify any split among the lower courts, Petitioner overlooks the vehicle problems that plague this case. Two are especially noteworthy.

First, there are substantial factual disagreements among the parties and Petitioner as to what has been unsealed and what remains sealed. The District Court's response brief in the Colorado Supreme Court explained that the unsealed material provided to Petitioner contained "*all* of Owens' factual allegations of prosecutorial misconduct." BIO App. 32. The remaining sealed documents, by contrast, "do not allege facts upon which disqualification [of the prosecutors] was sought." Pet. App. 9a. To support its order, the District Court submitted the sealed records to the Colorado Supreme Court for *in camera* review. After

reviewing the materials, the Colorado Supreme Court affirmed the District Court's refusal to unseal them. *Id.* at 3a–6a.

Mr. Owens, however, disputes the District Court's description and has sought to "correct the factual record." Owens Br. 4. In his view, the motion for a special prosecutor, the motion to unseal, and the related appendices include factual material that is "not publicly known." *Id.* Petitioner likewise disagrees with the District Court, claiming that "[t]he judicial records that remain sealed . . . present a criminal defendant's grounds for seeking the removal of a prosecutor for misconduct." Pet. 24. Petitioner advances this claim even though the records have been sealed from the outset, depriving it of any non-speculative basis for making such an assertion.

These factual disagreements over the content of the record render this case a poor vehicle for deciding the First Amendment issue framed in Petitioner's question presented. *See Mitchell v. Or. Frozen Foods Co.*, 361 U.S. 231 (1960) (dismissing as improvidently granted "[i]n view of ambiguities in the record as to the issues sought to be tendered"); *see also Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring) (joining in dismissal of writ as improvidently granted and stating the record was "too opaque" to permit resolution of the federal question). Indeed, if the District Court's description is correct, this Court would have no need to reach the First Amendment question. *See Rogers v. United States*, 522 U.S. 252, 259 (1998) (dismissing as improvidently granted where the record did "not fairly present" the question on certiorari).

Relatedly, regardless of which party's characterization of the record proves more accurate, any detailed argument over the substance of the sealed material would necessarily require its full or partial disclosure. As Mr. Owens himself explains, "explication of why this Court should authorize public access . . . cannot be set forth . . . with any meaningful specificity." Owens Br. 4. This vehicle problem, too, militates in favor of denying the Petition. *See Kimbrough v. United States*, 364 U.S. 661 (1961) (question on certiorari was "not presented with sufficient clarity").

Second, because this case arises from a state court rather than a federal court, certiorari review by this Court risks intruding into existing state judicial and regulatory oversight in an area that has traditionally been left to the States. As this Court has repeatedly stated, "[t]he notion of 'comity' includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

As will be evident from an *in camera* review of the sealed material that has been submitted to this Court, the sealed records relate to information and proceedings that are exclusively within the province of state regulation and have traditionally remained confidential. Any opinion by this Court declaring a new

rule for access to judicial records in this case will inevitably have to navigate the innumerable categories of information in which the States have an overriding interest in maintaining confidentiality. *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) (recognizing that the existence of a privilege under state law can "bear on the question" of whether the federal courts should also recognize the privilege); *cf. Press-Enterprise II*, 478 U.S. at 9 ("[E]ven when a right of access attaches, it is not absolute").

Colorado's comprehensive open records laws and administrative procedures, for example, prescribe in detail the categories of information that are open, those that are confidential, and the procedures for seeking access. Criminal justice records relating to "official actions" as defined by Colorado law are required to be open for inspection. COLO. REV. STAT. §§ 24-72-302(7) & 303(1). Multiple categories of other records, however, are understandably off-limits, including but not limited to: records pertaining to domestic relations, paternity, and adoption, Colo. Chief Justice Directive 05-01 § 4.60(b) & (d)[4]; records related to medical marijuana registry information, *id.* at § 4.60(d)(18); records containing judicial work product related to the deliberative process, *id.* at § 3.03(b); records identifying sensitive financial information, social security

[4] Colorado Chief Justice Directives contain administrative policy statements issued by the Colorado Chief Justice as executive head of the Colorado judicial system. *Bye v. District Court*, 701 P.2d 56, 59 (Colo. 1985). They are available on the Colorado Supreme Court's website: https://www.courts.state.co.us/Courts/Supreme_Court/cjds/ (last visited Jan. 7, 2019).

numbers, tax identification numbers, and credit reports, *id.* at § 4.60(d) & (e); and records pertaining to certain state licensees and proceedings involving licensees, *id.*; *e.g.*, COLO. REV. STAT. § 25-1.5-106(7)(e)(III); C.R.C.P. 251.31(b); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("[T]he States have a compelling interest in the practice of professions within their boundaries").

Each of these categories of confidential information reflects an individual "policy decision[ ] of the States" that seeks to protect not only the privacy of the States' citizens, but also "the integrity of the factfinding functions of their courts." *Jaffee*, 518 U.S. at 12–13. To be sure, the Colorado legislature can be trusted to develop appropriate policy on these topics, particularly where they concern matters within the exclusive province of state regulation, as here.

Even assuming this Court were inclined to recognize a new constitutional rule for access to criminal justice records, this case presents unnecessary roadblocks because any First Amendment right of access will necessarily have to be balanced against the States' important interest in maintaining confidentiality for certain sensitive materials and regulatory activities that fall within the States' exclusive domain. The required balancing task in this state case is further complicated both because the parties disagree over the nature of the sealed material and because any meaningful analysis of Colorado's interest will likely disclose the sealed material's content, as described above. In contrast, a case arising from a lower federal court involving access to *federal* judicial records, and where the record's content is more

certain, would not present the same level of analytical challenges.

Accordingly, because multiple problems render this case a poor vehicle to consider the question presented, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 29, 2018 2:32 PM FILING ID: 6067D78F80C25 CASE NUMBER: 2018SA19
Arapahoe County District Court, Case No. 06CR705 Hon. Christopher Munch, Retired Senior Judge Hon. Gerald R. Rafferty, Retired Judge	
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)	▲ COURT USE ▲

Attorneys for Non-Party Movant: Steven D. Zansberg, #26634 Gregory P. Szewczyk, #46786 BALLARD SPAHR LLP 1225 17th Street, Suite 2300 Denver, Colorado 80202 Phone: (303) 292-2400 FAX: (303) 296-3956 zansbergs@ballardspahr.com szewczykg@ballardspahr.com	Case No. ___SA____ Related Case Below: 06-CR-705 (*People v. Sir Mario Owens*) – Arapahoe Cnty. Dist. Ct.
PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21	

*** Certificate of Compliance and Tables Omitted in this Appendix***

INTRODUCTION

A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.[1]

This Petition asks this Honorable Court to enter an order directing the District Court to show cause why the public should be denied its right, under the state

[1] *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (emphasis added).

and federal constitutions, to inspect judicial records "concerning the activities of its government" in a completed capital murder case.

Nearly a decade ago, the Defendant in this action was tried in open court, found guilty of murder, and sentenced to death. In the course of post-trial proceedings, the District Court found that the District Attorney's Office for the Eighteenth Judicial District (the "District Attorney") withheld from the Defendant or suppressed exculpatory evidence. This exculpatory evidence included, but was not limited to, the fact that the District Attorney had promised to give a witness a car and work with out-of-state authorities to clear warrants so that she could get her license. In a post-conviction order, the District Court ultimately found that the District Attorney's prosecutorial misconduct was "harmless error" because it did not sufficiently prejudice the Defendant's right to a fair trial.

Following the issuance of the post-conviction order, Petitioner discovered that there were various sealed documents relating to the prosecutorial misconduct, which is now known to consist of a motion to disqualify and appoint a special prosecutor, a motion to unseal the motion to disqualify, the District Attorney's responses, a hearing transcript, and the District Court's orders resolving those motions (the "Prosecutorial Misconduct Records"). The only reason the District Attorney has publicly given for wanting the Prosecutorial Misconduct Records sealed is to avoid reputational harm and embarrassment to the District Attorney.

Petitioner moved the District Court to unseal the Prosecutorial Misconduct Records. In that motion,

Petitioner explained that this Court had previously recognized that judicial records on file in cases of public interest are subject to a presumptive right of public access guaranteed by both federal and state constitutions. Petitioner also articulated clearly the constitutional standard that must be applied when a party seeks to deny the press and public their right to access criminal court records—*i.e.*, the District Attorney must *prove* and the District Court must expressly *find*, *both*: (1) that access poses 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.

The District Attorney responded to the motion below by filing a motion to seal and an objection. The motion to seal asked the District Court to suppress from Petitioner and its counsel the District Attorney's Sealed/Suppressed Statement of Interest (the "Statement of Interest"), which set forth the arguments and legal authorities the District Attorney believes justifies the sealing of the Prosecutorial Misconduct Records. The motion to seal presented no case law or legal standard to justify its request for an *ex parte* decision on the merits of the issue.

In its publicly-filed objection, the District Attorney argued that the public enjoys no presumptive right of access—under either the First Amendment or the common law—to any judicial records in the court file in a capital murder case.

The District Court resolved the motions in two summary orders that are utterly devoid of any legal standards or analysis. Indeed, despite the fact that this

Court has previously held that judicial records are subject to a presumptive right of public access under the Constitution, the District Court did not articulate or apply any standard at all. Rather, the District Court simply (1) granted the District Attorney's motion to seal without any explanation or analysis whatsoever, and (2) denied access to nearly all of the Prosecutorial Misconduct Records—including the District Attorneys' responses (including legal arguments and authorities), the hearing transcript, and the District Court's own orders—and vaguely cited to the District Attorneys' unexplained "considerations."

Petitioner now urges this Court to correct immediately the District Court's errors and to restore the public's right to monitor the operations of its courts and public officials. This Petition urges the Court to clarify for trial judges throughout Colorado that ***under both state and federal constitutions, the public enjoys a presumed right of access to documents on file in Colorado criminal cases, including documents relating to prosecutorial misconduct***, and to hold, accordingly, that such judicial records may not be sealed from public view in the absence of detailed and specific findings, on the record, that (a) such continued sealing is necessary to protect a governmental interest of the highest order (for example, to preserve the fair trial rights of the defendant), and (b) each of the myriad alternative means to protect that interest is either not available or not adequate to do so.

Petitioner, through its undersigned attorneys, pursuant to Rule 21 of the Colorado Rules of Appellate Procedure, respectfully requests this Honorable Court

to enter a Rule to Show Cause why the District Court's Orders—denying access the vast majority of the Prosecutorial Misconduct Records—should not be immediately vacated and the Prosecutorial Misconduct Records unsuppressed unless and until the requisite judicial findings have been entered.

IDENTITIES OF PARTIES AND THEIR PARTY STATUS IN THE PROCEEDING BELOW

Petitioner is a not-for-profit online journalism organization, engaged in gathering news and other information on matters of public concern, and disseminating to the public newsworthy information, including reports on the proceedings of this state's courts, and in particular, the proceedings underway in *People v. Owens*, No. 06-CR-705. Petitioner moved the District Court, as a non-party, to unsuppress the Prosecutorial Misconduct Records in that capital murder case. In response, the District Attorney filed a motion to seal the Statement of Interest, which contained the arguments and legal authorities the District Attorney believes justifies denying public access to the Prosecutorial Misconduct Records.

The proposed respondent is the District Court for the Eighteenth Judicial District of Colorado (Hon. Christopher Munch, Retired Senior Judge, presiding), which ordered that (1) the vast majority of the Prosecutorial Misconduct Records would remain under seal; and (2) the Statement of Interest would remain entirely under seal.

IDENTITIES OF THE COURT BELOW AND RELEVANT CASE NAMES AND NUMBERS

People v. Sir Mario Owens, No. 06-CR-705, District Court for the Eighteenth Judicial District of Colorado (Arapahoe County).

IDENTITIES OF THE PERSONS OR ENTITIES AGAINST WHOM RELIEF IS SOUGHT, THE ACTION COMPLAINED OF, AND THE RELIEF BEING SOUGHT

Petitioner asks the Court to declare unconstitutional, under both the federal and Colorado constitutions, two orders issued by the District Court on January 12, 2018: (1) the Order Re: Motion to Unseal Judicial Records in the Court File (the "Order Denying Access") (Ex. 1 hereto), which denied Petitioner and the public access to the majority of the Prosecutorial Misconduct Records; and (2) the Order Re: People's Motion to Seal/Suppress (the "Sealing Order") (Ex. 2 hereto), which suppressed from *The Colorado Independent*, its counsel, and the public the arguments and legal authorities which the District Attorney believes justify denying access to the Prosecutorial Misconduct Records in a nine-year old capital murder case.

Petitioner also asks this Court to issue a writ of mandamus directing the District Court to immediately make available to Petitioner, and to the public, all portions of the Prosecutorial Misconduct Records and the Statement of Interest for which the requisite evidentiary findings have not been entered.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

Original jurisdiction under C.A.R. 21 is appropriate where a district court has abused its discretion and an appellate remedy would not be adequate. *See Morgan v. Genesee Co.*, 86 P.3d 388, 391 (Colo. 2004); *see also People v. Nichelson*, 219 P.3d 1064, 1066 (Colo. 2009) (original jurisdiction "necessary to clarify and correct the district court's misreading of our prior case law"); *Weaver Constr. Co. v. Dist. Ct.*, 545 P.2d 1042, 1044 (Colo. 1976) (original jurisdiction appropriate where an appeal after trial would not provide a "plain, speedy, and adequate remedy") (citation omitted). Relief in the nature of prohibition or mandamus is particularly appropriate "in matters of great public importance." *See Smardo v. Huisenga*, 412 P.2d 431, 432 (Colo. 1996).

It is beyond dispute that entry of a judicial order in violation of rights protected by the First Amendment to the United States Constitution and article II, section 10 of the Colorado Constitution is of great public importance. Indeed, this Court has repeatedly issued writs pursuant to C.A.R. 21 when members of the news media challenged orders closing judicial proceedings or criminal case judicial records to the public. *See People v. Dear*, No. 2016SA13 (Jan. 27, 2016) (Order and Rule to Show Cause issued to El Paso Cty. District Court Hon. Gilbert Anthony Martinez to explain why warrant affidavits should remain under seal); *People v. Sigg*, No. 2013SA21 (Colo. Feb. 21, 2013) (preliminary hearing); *People v. Thompson*, 181 P.3d 1143 (Colo. 2008) (indictment); *Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028 (Colo. 1979) (preliminary hearing);

Times-Call Publ'g Co. v. Wingfield, 410 P.2d 511 (Colo. 1966) (judicial records in a civil case); *see also People v. Dear*, No. 2016SA13 (Colo. Mar. 21, 2016) (ordering reconsideration of motion to unseal judicial records); *P.R. v. Dist. Ct.*, 637 P.2d 346 (Colo. 1981) (non-media petitioner in a civil contempt hearing).

And, there is no dispute that Petitioner does not have an adequate appellate remedy. Petitioner is not a party to the criminal proceeding and therefore has no mechanism for a direct appeal at any time, making this Petition particularly appropriate for review under C.A.R. 21. *See People v. C.V.*, 64 P.3d 272, 274 (Colo. 2003) ("[O]riginal jurisdiction may be necessary to review a serious abuse of discretion that could not adequately be remedied by appellate review."); *see also CBS v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) ("*Mandamus* is the appropriate procedure for CBS to seek review of orders denying it access to the sealed documents.") (emphasis added).

Further, even if Petitioner had a mechanism to somehow join the direct appeal, the relief requested herein cannot await the ultimate decision by this Court on the Defendant's appeal—the briefing of which has not even begun—because the damage caused by the District Court's violation of the First Amendment is immediate, irreparable, and ongoing. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) (noting, in the context of news media's effort to access judicial records, that the "loss of First Amendment freedoms, even for minimal periods of

time, unquestionably constitutes irreparable injury") (citations omitted).[2]

As the United States Court of Appeals for the Fourth Circuit has recognized, "each passing day [that court records are improperly sealed from public inspection] may constitute a separate and cognizable infringement of the First Amendment." *Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (citations and quotation marks omitted).

THE ISSUES PRESENTED

1. Does the First Amendment right of public access apply to judicial records in the court file in a capital murder case, including briefs, judicial orders, and a hearing transcript related to allegations of prosecutorial misconduct?

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[2] Because the public's presumptive right to access judicial records attaches as soon as a document is filed with the Court, any delays in access are effectively denials of that right, even though they may be limited in time. *See, e.g., Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (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, 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 explained, the reason that even short delays constitute denials is because "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976).

2. Does the Colorado Constitution create a constitutional right of public access to judicial records in the court file in a capital murder case, including briefs, judicial orders, and a hearing transcript related to allegations of prosecutorial misconduct?

3. Did the District Court err by failing to apply the appropriate constitutional standards when it denied public access to judicial records in the court file in a capital murder case, including briefs, judicial orders, and a hearing transcript related to allegations of prosecutorial misconduct?

FACTUAL BACKGROUND

A. Nearly a Decade Ago, the District Attorney Withholds or Suppresses Exculpatory Evidence in a Capital Case.

Over nine years ago, Sir Mario Owens was tried in open court, found guilty of murder, and sentenced to death. In post-conviction proceedings, Owens alleged that the District Attorney had failed to disclose, or had actively suppressed, evidence that would have been favorable to his defense.

In its September 17, 2017 P.C. Order (SO) No. 18 Re: SOPC-163 (the "Post-Conviction Order"), the District Court found that there were numerous instances in which the District Attorney *had*, *in fact*, failed to disclose, or had actively suppressed exculpatory evidence. Specifically, the Post-Conviction Order concludes that the District Attorney either withheld from the Defendant or suppressed evidence related to multiple issues, including, but not limited to, the facts that:

- The District Attorney had negotiated with a witness' attorney before the arrest of the Defendant (Ex. 3 at 150);
- The District Attorney 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);
- 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 District 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 District Court found that although *prosecutorial misconduct had, in fact, occurred,* it was "harmless error" because it did not sufficiently prejudice the Defendant's right to a fair trial.

B. With the Permission of this Court, The Colorado Independent Seeks to Unseal Records in the Court File Related to Established Prosecutorial Misconduct.

Following the District Court's release of the Post-Conviction Order, *The Colorado Independent* came to believe that the Defendant had filed one or more motions asking the District Court to disqualify the District Attorney and appoint a special counsel due to prosecutorial misconduct. However, the District Court sealed virtually all information regarding such motion practice.

On October 27, 2017, *The Colorado Independent* moved this Court to partially restore jurisdiction to the District Court to permit it to address the collateral issue of public access to judicial records in the court file—*i.e.*, the sealed judicial records relating to the prosecutorial misconduct and the Defendant's motion to appoint a special counsel.

On November 6, 2017, this Court granted *The Colorado Independent's* motion and restored jurisdiction to the District Court for the limited purpose of addressing *The Colorado Independent's* forthcoming motion to unseal. Prior to filing its motion to unseal, counsel for *The Colorado Independent* conferred with counsel for the Defendant and the District Attorney. The Defendant did not, and does not, oppose unsealing the Prosecutorial Misconduct Records. The District Attorney, however, stated he would oppose the motion on the grounds that unsealing the records would "improperly serve as a reservoir of libelous statements for press consumption." Ex. 4 (Nov. 7, 2017 email from R. Orman to S. Zansberg).

On November 7, 2017, *The Colorado Independent* filed its Motion to Unseal Judicial Records in the Court File (the "Motion"). Although the precise nature of the documents could not be listed due to the lack of information available to *The Colorado Independent*, the Motion identified specific entries on the Register of Actions that it believed were relevant and requested all motions, responses, replies, exhibits, transcripts, minute orders, orders, or records of any kind related to the Defendant's motion seeking the appointment of a special prosecutor.

The Motion sought the unsealing of these records on four separate but clearly-articulated grounds: pursuant to the First Amendment; article II, section 10 of the Colorado Constitution; the common law; and the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. *See* Ex. 5 (Motion) at 5-7.

The Motion also set forth the precise standard that must be applied when a party seeks to deny the press and public their right to access judicial records in a criminal case: (1) access must be shown, and found, to pose a substantial probability of harm to the administration of justice or to some equally compelling governmental interest; *and* (2) there must be a showing and finding that no alternative exists to adequately protect that interest (the "Constitutional Standard"). *Id.* at 7.

C. The District Attorney Argues that the Public Does Not Have a Presumptive Right of Access to Judicial Records Under the First Amendment or the Common Law.

On December 21, 2017, the District Attorney responded by filing the People's Motion to Seal/Suppress: People's Sealed/Suppressed Statement of Interest in Opposition to Unsealing (the "Motion to Seal") and the People's Objection and Response to Colorado Independent's Motion to Unseal Judicial Records in the Court File (the "Objection") and. *See* Ex. 6 (Motion to Seal) and Ex. 7 (Objection).

1. The Motion to Seal

The Motion to Seal requested that the District Court seal the District Attorney's Statement of Interest and that "neither Colorado Independent [sic] nor its counsel have access to the People's Sealed/Suppressed Statement of Interest." Ex. 6 (Motion to Seal) ¶ 3.a and c. The Motion to Seal also asked that, if *The Colorado Independent* wished to reply to the Objection, its counsel must do so without showing the reply to *The Colorado Independent*. *Id.* ¶ 3.e. The Motion to Seal was utterly devoid of any case law citations or mention of any legal standard to govern the further sealing request.

On December 27, 2017, *The Colorado Independent* responded to the Motion to Seal by citing to numerous legal authorities demonstrating that such requests for *ex parte* determination of the merits in this context are unprecedented and violate basic precepts of due process. *See* Ex. 8 (Response to Motion to Unseal). *The*

Colorado Independent also explained that conspicuously absent from the Motion to Seal was the only public reason given by the District Attorney for wanting the Prosecutorial Misconduct Records to remain under seal—*i.e.*, the desire to avoid negative publicity concerning the prosecutors' own official conduct.

2. The Objection

In the publicly-filed Objection, the District Attorney argued that a member of the public enjoys no presumptive right of access—under either the First Amendment or the common law—to judicial records in the court file in a capital murder case. *See* Ex. 7 (Objection) at 7-12. The Objection ignores entirely the Colorado Constitution.

The Objection also stated that "[t]he applicable court rules and procedures that govern in this case include the following: *A. See Sealed Statement of Interest for specific legal authority*." *Id.* 6 ¶ 19. In other words, the District Attorney hid from *The Colorado Independent*, its counsel, and the public *the legal authorities* the District Attorney argues govern the public's access to court files.

On January 4, 2018, *The Colorado Independent* replied to the District Attorney's Objection. *See* Ex. 9 (Reply). In the Reply, *The Colorado Independent* explained in detail the decades of controlling precedent that required the District Court to apply the Constitutional Standard in determining public access to court records. *See id.* at 5-9.

D. The District Court Issues the Sealing Order and the Order Denying Access, Both of Which Are Devoid of Any Legal Standards or Analysis.

On January 12, 2018, the District Court resolved the Motion to Seal and the Motion by issuing the Sealing Order and the Order Denying Access, respectively.

The Sealing Order is less than one page, contains no substantive discussion of the underlying facts and arguments, does not reference or discuss any legal standards, and does not cite to a single legal authority. Ex. 2 (Sealing Order). Nonetheless, the Sealing Order grants the People's Motion to Seal and orders that "the Statement in Interest [sic] shall be suppressed" in full and "only available to the prosecution and Owen's post-conviction counsel." *Id.*

The Order Denying Access is, excluding the pleading block, approximately two pages. Ex. 1 (Order Denying Access). Most of the Order Denying Access is an explanation of what documents are actually at issue. Specifically, the District Court explained that the Prosecutorial Misconduct Records consist of: (1) the Defendant's Sealed Motion to Disqualify the 18th Judicial District Attorney's Office and to Appoint a Special Prosecutor, including appendices thereto; (2) the Defendant's motion to unseal the motion to disqualify; (3) the District Attorney's sealed responses to those motions; (4) a sealed transcript from a December 12, 2016 hearing on those motions; (5) the District Court's sealed orders resolving those motions. *Id.* at 1-2.

The Order Denying Access devotes only two paragraphs to the substance of the Motion and Objection, neither of which articulates any legal standard applied by the Court to resolve the motion or cites even a single legal authority. *Id.* at 2-3. Indeed, not only did the District Court fail to apply the Constitutional Standard, but the Order Denying Access does not even acknowledge that *The Colorado Independent* and the District Attorney disagreed on the applicable standard.

Rather, the Order Denying Access simply "recognizes" *The Colorado Independent*'s "legitimate interest in investigating the underlying facts and claims of alleged government misconduct" and the undisclosed (entirely secret) "countervailing considerations" of the District Attorney. *Id.* at 2-3. Nor does the Order Denying Access offer any insight into the manner or standard by which the District Court weighed the government's undisclosed "countervailing considerations" against *The Colorado Independent*'s "legitimate interest."

Accordingly, by plain *ipse dixit*, the District Court denied the public its right to access portions of the motion to disqualify and the entirety of the motion to unseal, both associated responses, both orders, and the hearing transcript. *Id.* at 3.

ARGUMENT

I. This Court Has Firmly Established That the First Amendment Provides the Public a Constitutional Right of Access to Court Records in Cases Involving Matters of Public Concern.

More than half a century ago, this Court recognized that the public enjoys a *constitutional* right of access to judicial records in cases whose subject matter is of public interest. *See Times-Call Publ'g v. Wingfield*, 410 P.2d 511, 513-14 (Colo. 1966). In *Wingfield*, a newspaper challenged the application of a state statute that declares that no "person, except parties in interest, or their attorneys, shall have the right to examine pleadings or other papers filed in any cause pending in such court." *Id.* at 512 (quoting C.R.S. 1963, § 35-1-1; presently codified at § 30-10-101(1)(a), C.R.S.).

The Court resolved the case by observing that a literal interpretation of the statute (barring public access to filed court records in all cases) "would raise serious questions of *constitutional law involving freedom of the press* and the separation of governmental power." *Id.* at 513 (emphasis added). By agreeing on a saving construction of the statute, the Court recognized that a statute barring public access to the court records in a case involving matters of significant public interest would be unconstitutional under the First Amendment. *Id.*

In 1979, this Court directly and explicitly recognized a constitutional right of public access to judicial *proceedings* in Colorado. *See Star Journal*, 591 P.2d at 1029-30. In that case, the trial court had

excluded the press, but not the public, from a preliminary hearing on the grounds that the preliminary hearing might reveal potentially prejudicial information. *Id.* at 236. This Court found the exclusion of the press from the preliminary hearing unconstitutional under both the First and Sixth Amendments:

> An accommodation of these constitutional provisions and underlying policies compels the conclusion that criminal trials and pretrial proceedings should not be closed to media representatives unless an overriding and compelling state interest in closing the proceedings is demonstrated . . . and [] the prejudicial effect of such information . . . cannot be avoided by any reasonable alternative means.

Id. at 1030.

Most importantly, for the case at bar, the *Star Journal* Court adopted Standard 8-3.2 of the *ABA Standards for Criminal Justice Relating to Fair Trial and Free Press* (the "*ABA Standards*"). *Star Journal*, 591 P.2d at 1030. That standard applies to criminal court *records*, including "all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding." *ABA Standards*, § 8-3.2.

In the wake of *Star Journal*, this Court reaffirmed the *Star Journal* test for closure in a criminal case, explaining that:

> 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 omitted) (emphasis added); *see also Associated Press*, 705 F.2d at 1145 ("There is no reason to distinguish between pretrial proceedings and documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents.").

Moreover, the Colorado Supreme Court's Committee on Public Education, then chaired by Hon. Thomas Ossola, confirmed the above understanding of the binding precedents, when it published the "Media Guide to Colorado Courts" (6th edition) in 1998, declaring:

> In *Times-Call Publishing Co. v. Wingfield*, 159 Colo.172, 410 P.2d 611 (1966), the Colorado Supreme Court held that the statute governing access to court files authorizes access to the media [as members of the public] *because of First Amendment considerations*, and that access must be permitted where the subject matter of the case is of public interest. . . .
>
> Generally, court records in criminal cases are open for public inspection. *This includes . . . motions. and other information contained in the file. . . . The First Amendment require[s]* the party seeking to seal the file to *show* that there is a clear and present danger to the fairness of the trial and that the prejudicial effect of such

> information on trial fairness cannot be avoided by any reasonable alternative means.

Id. at 49 - 50 (emphasis added) (attached as Exhibit 10).

Thus, this Court has unambiguously held that judicial records on file in cases of legitimate public interest, such as this capital murder case, are subject to a *constitutional right* of public access. Accordingly, the District Court was required to apply the Constitutional Standard, under which the District Attorney had the burden of proving that disclosure of the Prosecutorial Misconduct Records would *both*: (1) pose a substantial probability of harm to an overriding and compelling governmental interest; *and* (2) no less restrictive alternative exists to adequately protect that interest.

II. The Colorado Constitution Establishes a Right of Public Access to Judicial Records That Is Broader Than the Constitutional Right Afforded by the First Amendment.

In addition to the federal constitutional right of access, a state constitutional right of access must also be recognized under the Colorado Constitution's stronger protections for free speech rights in article II, section 10.

This Court has repeatedly held that "the Colorado Constitution provides broader free speech protections than the Federal Constitution." *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002), *as modified on denial of reh'g* (Apr. 29, 2002); *see also Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991) ("Colorado's tradition of ensuring a broader

liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment.") (collecting cases).

This Court's precedents interpreting article II, section 10 dictate that the public enjoys a presumptive right under our State Constitution to access judicial records on file in a criminal case to enable citizens meaningfully to exercise their role in the body politic. *See Bock*, 819 P.2d at 62-63 (holding that the protections of article II, section 10 are meant to protect public discourse in the "marketplace of ideas" and to enable citizens to engage each other on topics of any kind, "including the political").

Over sixty years ago, Justice O. Otto Moore recognized this structural aspect to the protections of article II, section 10, especially when viewed in concert with the "public trial" guarantee of article II, section 16: "It has repeatedly been held that the right to a 'public trial' is abridged if the press is excluded. . . ." *In re Hearings Concerning Canon 35*, 296 P.2d 465, 467 (Colo. 1956) (*per curiam*, adopting Referee's report) (citation omitted); *see also People v. Vaughan*, 514 P.2d 1318, 1323 (Colo. 1973) ("First Amendment freedoms are the cornerstone of our democracy and the source of the strength and vitality of our society. It is the unfettered and public discussion of ideas of every sort that keeps the institutions of government responsive to the people.").

Indeed, in extending the public's right to attend criminal proceedings to a hearing on contempt of a grand jury witness, this Court expressly premised its holding on both the federal and state constitutional

provisions protecting free speech. *See P.R.*, 637 P.2d at 354; *cf. Tattered Cover, Inc.*, 44 P.3d at 1052 ("Without the right to receive information and ideas, the protection of speech under the United States *and Colorado Constitutions* would be meaningless." (emphasis added)); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997) ("The right of privacy may potentially clash with the rights of free speech and free press guaranteed by the United States and Colorado Constitutions.") (citation omitted).

In sum, Colorado's accentuated constitutional protection for free speech compels the recognition of a concomitant state constitutional right of public access to judicial records on file in cases addressing matters of legitimate public concern.

III. The District Court Failed to Apply the Correct Constitutional Standard in the Sealing Order and the Order Denying Access to the Prosecutorial Misconduct Records.

Under the Constitutional Standard, the District Court was required to grant *The Colorado Independent* access to the Prosecutorial Misconduct Records and the Statement of Interest unless the District Attorney sustained the burden of proving that disclosure would *both*: (1) pose a substantial probability of harm to an overriding and compelling governmental interest; *and* (2) no less restrictive alternative exists to adequately protect that interest. The District Court did not articulate or apply this standard in either the Sealing Order or the Order Denying Access. For that reason alone, this Court should issue the Rule to Show Cause requested herein.

In any event, even if it is assumed that the District Court applied, without articulating, the Constitutional Standard, the First Amendment, as interpreted and applied by the U.S. Supreme Court and this Court, requires that any order denying the public's right of access must be preceded by, and founded upon, *specific factual findings*, based on the *presentation of evidence*. *See Star Journal*, 591 P.2d at 1030 (recognizing, as part of the Court's holding, "the requirements that evidence be presented," *and* "that the trial judge issue a written order *setting forth specific factual findings*") (emphasis added).[3] Neither the Sealing Order nor the Order Denying Access satisfy this requirement.

The Sealing Order does not contain any finding of fact or any citation to evidence. Ex. 2 (Sealing Order). Instead, the less than one-page order simply grants the Motion to Seal and orders the Statement of Interest sealed from *The Colorado Independent*, its counsel, and the public. *Id.*

The Order Denying Access is similarly devoid of any findings of fact or citations to evidence. Instead, and in clear contravention of this Court's precedent, the District Court implicitly holds that the public enjoys not even a *presumption* of access to portions of the court file that are not mere recitations of fact—*i.e.*, briefs and orders that explain the bases for the parties'

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[3] *See also In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (after holding that First Amendment protects the public's right to inspect judicial records in criminal cases, further holding that among the "certain procedural requirements" for a court order sealing such records, is that the court "must state its reasons on the record supported by specific findings").

positions and the trial court's rulings. Ex. 1 (Order Denying Access) at 2-3 (denying access to "the associated responses, orders, and transcript" solely on the Court's stated grounds that such records reflect "argument or rhetoric (as opposed to factual assertions)").

As a preliminary matter, the District Court's legal holding is simply incorrect, particularly in the context of briefings relating to prosecutorial misconduct. *See U.S. v. Stevens*, Crim. No. 08-231 (EGS), 2008 WL 8743218, at *7-8 (D.D.C. Dec. 19, 2008) (First Amendment provides presumptive right of access to a complaint and any subsequent motions that "attack[] the conduct of police and prosecutor in a highly publicized trial") (internal quotation omitted); *see also Waller v. Georgia*, 467 U.S. 39, 47 (1984) ("The public in general has a strong interest in exposing *substantial allegations* of [governmental] misconduct to the salutary effects of public scrutiny.") (emphasis added).

Simply put, the District Court failed to apply the required Constitutional Standard when issuing its Sealing Order and Order Denying Access, and the Orders violate the First Amendment.

SUPPORTING DOCUMENTS

1. Order Re: Motion to Unseal Judicial Records in the Court File

2. Order Re: People's Motion to Seal/Suppress

3. Relevant Excerpts from P.C. Order (SO) No. 18 Re: SOPC-163

4. November 7, 2017 email exchange between R. Orman and S. Zansberg, Subject: "RE: Colorado Independent's motion to unseal in People v. Owens"

5. Motion to Unseal Judicial Records in the Court File

6. People's Motion to Seal/Suppress: People's Sealed/Suppressed Statement of Interest in Opposition to Unsealing

7. People's Objection and Response to Colorado Independent's Motion to Unseal Judicial Records in the Court File

8. Movant's Response in Opposition to the People's Motion to Seal/Suppress the People's Statement of Interest

9. Reply in Support of *The Colorado Independent's* Motion to Unseal Judicial Records in the Court File

10. Relevant excerpts from The Colorado Supreme Court, *Media Guide to Colorado Courts* (6th ed., 1998)

CONCLUSION

Under the standards enunciated by both the U.S. Supreme Court and by this Court, applying the First Amendment and article II, section 10 of the Colorado Constitution, the District Court's Sealing Order and Order Denying Access cannot stand. Petitioner, as any other member of public, has a constitutionally-protected right to inspect all judicial records on file in a criminal case (and especially those that relate to prosecutorial misconduct in a capital murder case). The

District Court did not enter factual findings on the record that are constitutionally required to justify the abridgement of the public's constitutional rights.

WHEREFORE, Petitioner respectfully requests that this Court forthwith issue a Rule to Show Cause directing the Proposed Respondent to show cause, if any, why the relief sought by this Petition should not be granted.

Respectfully submitted this 29th day of January, 2018, by:

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*** Certificate of Mailing Omitted in this Appendix***

APPENDIX 2

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 19, 2018 4:32 PM FILING ID: 67858B5BF62AA CASE NUMBER: 2018SA19
Original Proceeding Pursuant to C.A.R. 21 District Court, Arapahoe County, Case No. 06CR705	
In Re: Plaintiff, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant, SIR MARIO OWENS.	▲ **COURT USE ONLY** ▲ Case No. 2018SA19

CYNTHIA H. COFFMAN, Attorney General MATTHEW D. GROVE, Assistant Solicitor General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720 508-6157 FAX: 720 508-6041 E-Mail: matt.grove@coag.gov Registration Number: 34269 *Counsel of Record	
DISTRICT COURT'S RESPONSE TO RULE TO SHOW CAUSE	

*** Certificate of Compliance and Tables Omitted in this Appendix***

Respondents, the Arapahoe County District Court and the Honorable Christopher J. Munch, by and through undersigned counsel, submit the following response to the Court's order and rule to show cause.

STATEMENT OF THE CASE AND FACTS

Respondents generally concur with Petitioner's description of the facts. Sir Mario Owens was convicted of first-degree murder in 2008 and sentenced to death. In 2017, in a lengthy order denying Owens' request for postconviction relief pursuant to Crim. P. 32.2, the district court found that the district attorney's office had committed several discovery violations during the course of Owens' prosecution. The district court

nonetheless denied Owens' request for postconviction relief, finding that there was "no reasonable probability that the outcome of the trial or sentencing hearing would have been different if all of the undisclosed evidence had been known to Owens's trial team." Petition Ex. 3 at 371.

Certain filings related to the Owens' motion to disqualify the 18th Judicial District Attorney's Office and to appoint a special prosecutor have been subject to a protective order and have been maintained under seal since October 2016. Although not part of this appeal, it should be noted that Owens disagreed with the district court's decision to enter a protective order and, in March 2017, filed a C.A.R. 21 petition in this Court asking that it be vacated. *See In re People v. Owens*, Case No. 17SA59.[1] This Court declined to issue a rule to show cause.

These proceedings began with a motion by *The Colorado Independent*, a non-party movant, to unseal records that were covered by the protective order. The *Independent*'s motion sought access to three main documents, SOPC-351, SOPC-352, and SOPC-353, as well as any additional court papers and transcripts related to those filings. It relied on four different sources of authority: the First Amendment; article II, § 10 of the Colorado Constitution; the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S.; and the common law. Petition Ex. 5 at 6. The *Independent*'s petition in this Court, however, abandons any statutory

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[1] Owens' C.A.R. 21 petition in Case No. 17SA59 was sealed, but this Court's order denying it, which referenced the orders to which it pertained, was not.

or common law claims and instead relies solely on the Colorado and United States Constitutions.

After considering briefing from the *Independent* and the parties on the motion to unseal, the district court ruled as follows.

- SOPC-351, the first of the documents requested by the *Independent*, contains no substantive information covered by the protective order; it was unsealed shortly after the *Independent* filed its motion.
- SOPC-352 is Owens' motion to disqualify, complete with fifteen appendices. It is accompanied by a response filed by the district attorney and an order issued by the district court. A transcript of a hearing on the motion is also in the court record. All of these documents were maintained under seal pursuant to the protective order. After considering the *Independent*'s motion, the district court unsealed 44 pages of the motion to disqualify, along with thirteen of the motion's fifteen appendices. Consistent with the protective order, a few paragraphs of the motion were redacted; the unsealed pages and appendices, however, contain *all* of Owens' factual allegations of prosecutorial misconduct, and are attached hereto as Exhibit A.
- SOPC-353 likewise did not allege facts upon which the District Attorney's disqualification was sought. Filed by Owens' counsel, it sought to unseal both itself and SOPC-352. The district court denied that motion, and also denied the

Independent's motion to unseal with respect to that document.

Unredacted copies of all documents related to SOPC-352 and SOPC-353 are submitted under seal herewith, along with a sealed explanation for the district court's decision not to exempt these documents from the protective order.

STATEMENT OF THE ISSUES

1. Should a new First Amendment right be recognized to guarantee members of the media a right to inspect sensitive judicial records that are unrelated to the facts alleged or found in a criminal case?

2. Should a new right be recognized under article II, § 10 of the Colorado Constitution guaranteeing members of the media a right to inspect sensitive judicial records that are unrelated to the facts alleged or found in a criminal case?

3. In ruling on the motion to unseal, was the district court required to detail its application of the governing constitutional standards in a situation where doing so would have revealed the substance of the information that remains under seal?

SUMMARY OF THE ARGUMENT

The rule to show cause should be discharged.

The *Independent* first argues that the First Amendment to the United States Constitution grants a right to inspect sensitive judicial records in criminal cases. But no precedent from this Court supports Petitioners' claimed right of access to criminal court

records; this Court's cases instead address the very different right of access to court *proceedings*.

The lack of support for Petitioner's claimed First Amendment right fits the jurisprudence of the United States Supreme Court, which has held that the press's right to access judicial records is rooted in the more limited common law, not the First Amendment. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). But the *Independent* does not rely on this common law right in its petition, and that alone is sufficient to discharge the rule. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (stating arguments not raised in the opening brief are deemed waived).

Even if Petitioner could rely on the common law right of access, that right is not absolute. *Nixon*, 435 U.S. at 598. It is subordinate to the trial court's inherent supervisory power over its own files. *Id*. This case, like other high-profile murder cases, demands deference to this inherent power, which will allow the district court to revisit the request to unseal the records in question at an appropriate time, once the countervailing confidentiality concerns have abated.

The *Independent* also seeks to use the Colorado Constitution's article II, § 10 to create a new constitutional right for the media to inspect sensitive court records. This Court, however, has never recognized such a constitutional right. And doing so now would upset the comprehensive statutory and administrative frameworks that currently exist for releasing judicial records to the public under the CCJRA and Chief Justice Directive 05-01.

Finally, if this Court rules in favor of Petitioner and recognizes constitutional rights of access to sealed criminal court records, it should remand this case for further findings, allowing the trial court to consider the new guidance contained in this Court's opinion.

ARGUMENT

I. Whether or not declaratory relief under C.A.R. 21 is appropriate, Petitioner is not entitled to a writ of mandamus.

At the threshold, whether or not it ultimately makes the rule to show cause absolute, this Court should decline to issue the writ of mandamus that the *Independent* seeks. Mandamus is appropriate only where 1) the party seeking it has a clear right to the relief sought; 2) the agency has a clear duty to perform the act requested; and 3) there is no other available remedy. *Widder v. Durango Sch. Dist. No. 9–R,* 85 P.3d 518, 523 n. 8 (Colo. 2004); *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508,518 (Colo. App. 2004). "Mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. *Bd. of Cty. Comm'rs of Cty. of Archuleta v. Cty. Rd. Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000). "It does not lie where," as here, "performance of a trust is sought which is discretionary or involves the exercise of judgment." *Id.*

By definition, a district court's order to seal or unseal records involves the exercise of its judgment. *See, e.g., Anderson v. Home. Ins. Co.*, 924 P.2d 1123 (Colo. App. 1996). Thus, regardless of whether this

Court dismisses its show cause order or makes its rule absolute, it should decline to issue a writ of mandamus.

II. Petitioner's attempt to create a new constitutional right under the First Amendment should be rejected.

On the merits, the *Independent* first contends that members of the media possess a broad First Amendment right to access court records in cases involving matters of public concern. They assert this Court has recognized such a right for more than "half a century". Petition at 18. This argument should be rejected because it misconstrues this Court's precedents and is contrary to case law from the U.S. Supreme Court and other jurisdictions.

A. Standard of Review and Preservation.

Whether particular conduct or expression is subject to the protection of the First Amendment presents a question of law that is reviewed de novo. *Cotter v. Bd. of Trustees of Univ. of N. Colo.*, 971 P.2d 687, 690 (Colo. App. 1998) (citing *Kemp v. State Bd. of Agric.*, 803 P.2d 498 (Colo. 1990)). Petitioner preserved its First Amendment argument by asserting it in the motion to unseal records. Pet. Ex. 5 at 5-6.

B. This Court has never recognized a First Amendment right to inspect sealed court records.

The *Independent* argues that this Court has already recognized a First Amendment right of access to court records. But the decisions that it cites are largely inapposite—they involve either claims under irrelevant

statutes rather than the First Amendment or they involve the very different setting of public access to court *proceedings* rather than court *records*.

In *Times-Call Publishing Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966), for example, this Court interpreted a statute governing access to court records under the section delineating county officers' duties (now codified at § 30-10-101(1)(a), C.R.S.). The *Independent* makes no claim under this statute and nowhere did *Wingfield* determine that the media enjoys a constitutional right to inspect court records. At most, *Wingfield* acknowledged that sealing the records in question under the statute would raise questions of constitutional dimension. But this Court certainly did not resolve those constitutional questions one way or the other in *Wingfield*, nor has it done so in any subsequent opinions.

Petitioner's other cases all concern open access to court *proceedings*, not records. *See People v. Sigg*, No. 2013SA21 (Colo. Feb. 21, 2013) (unpublished order addressing closure of preliminary hearing); *P.R. v. District Court*, 637 P.2d 346, 353 (Colo. 1981) (addressing First Amendment right "in the context of trials"); *Star Journal Publishing Corp. v. Cnty. Court*, 197 Colo. 234, 238, 591 P.2d 1028, 1030 (1979) (determining when trial court may close pretrial hearing). These cases, however, are inapposite, because access to court proceedings is not governed by the same analytical framework as access to court records. *See United States v. Hickey*, 767 F.2d 705, 709 (10th Cir. 1985). While the First, Sixth and Fourteenth Amendments guarantee that criminal proceedings with be conducted in the open, *see, e.g.*, *Richmond*

Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980), these constitutional rights do not extend in the same way to sealed court records.

Petitioner's reliance on the *ABA Standards for Criminal Justice Relating to Fair Trial and Free Press*, as well as the "Media Guide to Colorado Courts" faces the same problem. The *Independent* cites no cases, and the district court is aware of none, in which either of those sources of authority have been cited in Colorado as a basis for ensuring public access to sealed court records. Instead, to the extent the standards have been utilized at all, they have been invoked only to provide access to court proceedings. *See Star Journal Publishing Corp.*, 197 Colo. at 237, 591 P.2d at 1030; *Stapleton v. District Court*, 499 P.2d 310, 311 (Colo. 1979).

C. The U.S. Supreme Court and other jurisdictions have rejected a First Amendment right for members of the media to access court records; any such right is governed by the more limited common law.

The most likely reason that this Court has not recognized a First Amendment right to inspect court records is the U.S. Supreme Court's refusal to do so. The U.S. Supreme Court has held that members of the media, like the general public, possess a more limited *common law* right "to inspect and copy records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted); *see id.* at 608-09 (rejecting media's argument that First Amendment's guarantee of freedom of the press mandates release of

Watergate tapes). In this Court, the *Independent* does not make a claim under the common law; it has therefore waived any claim under the Supreme Court's jurisprudence in this area. *See Czemerynski*, 786 P.2d at 1107.

But even assuming Petitioner may rely on federal cases like *Nixon*, its right of public access under the common law "is not absolute." 435 U.S. at 598. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* For example, the *Nixon* court emphasized that the common law right of inspection is subordinate to the power of the court to prevent private spite or public scandal from being broadcast "through the publication of the painful and sometimes disgusting details of a divorce case." *Id.* (internal quotations omitted). Accordingly, because of its fact-bound nature, whether to permit access to court records is committed to the "sound discretion of the trial court." *Id.* at 599.

The Tenth Circuit has confirmed the lack of a broad First Amendment right to inspect criminal court records. In *United States v. Hickey*, the Tenth Circuit rejected the same argument Petitioner makes now, refusing to equate open access to court proceedings with open access to court files. 767 F.2d 705, 709 (10th Cir. 1985). The court explained that *Nixon* "remains the only decision by the Supreme Court directly dealing with the more narrow issue of access to court files." *Id.* *See also United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997) (stating, "Although we have held that there is at least a common law right of access to court documents, we have not previously decided, nor

do we need to decide in this case, whether there is a First Amendment right to judicial documents.").

And in *Lanphere & Urbaniak v. Colorado*, the court declined a law firm's commercially motivated request for the names and telephone numbers of persons charged with misdemeanor driving offenses, stating "there is no general First Amendment right in the public access to criminal justice records." 21 F.3d 1508, 1512 (10th Cir. 1994).

Decisions from other federal courts and state supreme courts are in accord—they routinely recognize that there is no First Amendment right to inspect court records, and any such right is governed by the common law. *See, e.g., Fisher v. King*, 232 F.3d 391, 396 (4th Cir. 2000); *United States v. Webbe*, 791 F.2d 103, 105 (8th Cir. 1986); *United States v. Beckham*, 789 F.2d 401, 408-09 (6th Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426-27 (5th Cir. 1981); *In re Four Search Warrants*, 945 F. Supp. 1563, 1566 (N.D. Ga. 1996); *United States v. DeLorean*, 561 F. Supp. 797, 801 (C.D. Cal. 1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 913 (E.D. Penn. 1981); *State v. Archuleta*, 857 P.2d 234, 242 & n.41 (Utah 1993); *Newspapers of New England, Inc. v. Clerk-Magistrate of Ware Div. of Dist. Court Dep't*, 531 N.E.2d 1261, 1266 (Mass. 1988).

Accordingly, because the First Amendment does not create a right for the media to inspect criminal court records, this Court should reject Petitioners' attempt to create such a right. The rule should be discharged.

III. This Court has never recognized a right of public access to judicial records under the state constitution.

In the alternative, the *Independent* argues that it is entitled to all of the sealed records that it requested under article II, § 10 of the Colorado Constitution, because that provision affords it greater free speech rights than the federal constitution. Pet'n, pp. 22-24. Like its First Amendment arguments, Petitioner's attempt to create new, expansive media rights under the state constitution should be rejected. Those arguments lack support under this Court's case law and would undermine the policies in the Colorado Criminal Justice Records Act and Chief Justice Directive 05-01, which have never been held to be unconstitutional.

A. Standard of Review and Preservation.

This Court reviews de novo alleged violations of article II, § 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*, 941 P.2d 266 (Colo. 1997)). Petitioner preserved this argument in its motion to unseal records at issue. Petition Ex. 5 at 6.

B. This Court should decline to create a new, expansive right of access to records under the Colorado Constitution.

Although the Colorado Constitution provides greater free speech rights than the federal constitution, never before has this Court held that the right is so

broad as to guarantee the media unfettered access to inspect confidential court documents. To the contrary, the state constitution does not secure the press any "right of special access" to information that is not generally available to the public. *People v. Bergen*, 83 P.2d 532, 544 (Colo. App. 1994).

The cases that the *Independent* relies on do not counsel otherwise. While they confirm the relative strength of the protections established by art. II, § 10, none involves media access to sealed judicial records. *See Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) (addressing a person's right to purchase books anonymously without government interference); *Bock v. Westminster Mall Co*., 819 P.2d 55 (Colo. 1991) (analyzing access restrictions to the public areas of an enclosed shopping mall); *In re Hearings Concerning Canon 35*, 296 P.2d 465 (Colo. 1956) (adopting a judicial canon excluding press photography, radio and television instruments from the courtroom). In fact, the latter case confirms that trial courts enjoy considerable discretion on matters of access. *See Hearings Concerning Canon 35*, 296 P.2d at 472 (stating "the entire matter should be left to the discretion of the trial judge").

In addition to lacking legal support, the *Independent*'s request for a new right of access under the state constitution would undermine the existing CCJRA and Chief Justice Directive 05-01. These comprehensive statutory and administrative frameworks—whose constitutionality is not in question—are designed to empower trial courts with the discretionary authority to control the public release of sensitive materials.

The CCJRA, for example, provides that criminal justice records, "at the discretion of the official custodian, *may* be open for inspection . . . ." § 24-72-304(1), C.R.S. (emphasis added). Recognizing and codifying trial courts' discretionary power to control the release of their records is fundamentally at odds with Petitioners' suggested constitutional right. *Compare Freedom Colo. Information, Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008) (custodian's decision under CCJRA is reviewed for abuse of discretion), *with Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997) (applying *de novo* standard of review in First Amendment case).

Likewise, applying either the First Amendment or the Colorado Constitution in the manner that the *Independent* suggests would frustrate Chief Justice Directive 05-01. That directive creates a "comprehensive framework" for public access to court records. CJD 05-01 § 1.00(a). It vests trial courts with authority to permit "reasonable access to court records while simultaneously protecting the confidentiality interests of the people whose information may be subject to disclosure." CJD 05-01, preamble. The directive thus contemplates that a court may deny public inspection of a particular court record.

Both the CCJRA and Chief Justice Directive 05-01 recognize that the "judiciary has inherent authority to use all powers reasonably required to protect the efficient function, dignity, independence, and integrity of the court and judicial process." *People v. Aleem*, 149 P.3d 765, 774 (Colo. 2007). Without the ability to exercise this "considerable discretion," trial courts will

be inhibited from assuring criminal defendants a fair trial by an impartial jury—a duty that "is paramount" and may require "limitations upon the exercise of the right of free speech and of the press." *Stapleton*, 499 P.2d at 312.

Accordingly, because article II, § 10 of the Colorado Constitution does not establish a right for the media to inspect confidential court records, the rule should be discharged.

IV. As a review of the accompanying, sealed explanation will reveal, the district court's order was sufficiently detailed under the circumstances.

Finally, the *Independent* argues that the district court was constitutionally required to grant its motion to unseal all of the requested records unless it found that disclosure would both: (1) pose a substantial probability of harm to an overriding and compelling governmental interest; *and* (2) no less restrictive alternative exists to adequately protect that interest. Petition at 24. Petitioner argues that the district attorney, as the party resisting disclosure, had the burden of proving that access should be denied by presenting evidence, and that any order denying access must set forth specific factual findings. *Id.* at 25.

As discussed in detail above, the "constitutional standard" that the *Independent* urges this Court to adopt has never been applied to court records. Given the marked differences between court proceedings and case-related documents in a court's files, this Court should this decline adopt a one-size-fits-all approach in this context. And while the *Independent* complains of

deficiencies in the district court's order—namely its lack "of any findings of fact or citations to evidence"—it fails to acknowledge the conundrum that requiring such a discussion would cause. In short, beyond revealing that it was: (1) unsealing all of the factual allegations underlying the claim of prosecutorial misconduct; and (2) keeping under seal additional information that did not pertain to the prosecution's conduct before, during, or after the trial, the district court could not provide further explanation without disclosing the very information that it had ordered should remain confidential.

Nonetheless, the district court confirms once again that all of the allegations relating to "the conduct of [the] prosecutor in a highly publicized trial" have been unsealed. *United States v. Stevens*, Crim. No. 08-231 (EGS), 2008 WL 8743218, at *7-8 (D.D.C. Dec. 19, 2008). As a consequence, the public's "strong interest in exposing substantial allegations of governmental misconduct to the salutary effects of public scrutiny," *Waller v. Georgia*, 467 U.S. 39, 47 (1984), has been vindicated.

The district court's precise reasons for keeping the remaining information under seal, which necessarily contain a substantive discussion of the nature of those materials, are outlined in the sealed explanation attached to this response. In the event that this Court rules in favor of Petitioner and recognizes constitutional rights of access to sealed criminal court records, it should remand this case for further findings, allowing the trial court to consider the new guidance contained in this Court's opinion.

CONCLUSION

This Court should discharge the rule to show cause.

Respectfully submitted this 19th day of March, 2018.

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*** Certificate of Service Omitted in this Appendix***