

No. 18-404

In the
Supreme Court of the United States
October Term, 2018

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

**Petition for Writ of Certiorari
to the Supreme Court of the State of Colorado**

**OPPOSITION TO MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL APPENDIX UNDER SEAL**

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Pursuant to Supreme Court Rule 21, Petitioner *The Colorado Independent* respectfully files this opposition to the Respondent's motion for leave to file under seal a Supplemental Appendix containing sealed judicial records from the murder prosecution underlying this Petition.

Petitioner does not dispute that records placed under seal by a state court should, at least on a proper showing, be maintained initially under seal by this Court *if* they are accepted for filing. But there is no reason for the sealed records in the proposed Supplemental Appendix to be placed before this Court at all. The content of these records has no relevance to the issue presented by the pending Petition for *certiorari*.

The Petition by *The Colorado Independent* presents the purely legal issue of whether the First Amendment right of access applies to three types of records in a capital murder case: papers filed on a motion to disqualify the prosecutor, the transcript of the hearing on that motion, and the court order resolving the motion. The Petition does *not* ask this Court to order the Colorado courts to unseal any of these records, as Respondent mistakenly asserts. *See* Petition at 2, 28. Rather, it asks the Court to reverse the Colorado Supreme Court's blanket holding that the First Amendment access right does not apply to these records—or any other court records—regardless of their content. According to the Colorado Supreme Court, no judicial findings whatsoever were necessary, under the Constitution, to justify sealing the records at issue.

As demonstrated in the Petition, the Colorado courts failed to apply the standards set by this Court for determining where the public's First Amendment access right attaches, and simply rejected out of hand the existence any constitutional right to inspect any judicial records. As a result, the Colorado courts made no finding that sealing was required in this case to avoid a substantial probability of harm to a compelling interest or that the sealing imposed was narrowly tailored to avoid the demonstrated harm, both of which the First Amendment access right requires.¹ See Petition at 13-14.

There is no factual dispute about what the sealed court records at issue consist of—substantive motion papers, a transcript and an order. See Brief in Opposition at 3-4. The specific content of these records is irrelevant to the legal issue of whether these types of records from a criminal prosecution are subject to the qualified constitutional access right. What the records contain *will* bear directly upon whether they can properly remain sealed consistent with the public's First Amendment access right, but that would be an issue for remand only after this Court reversed the Colorado court's holding that the constitutional sealing standards do not apply.

¹ While Respondent claims without citation that the Colorado Supreme Court reviewed the sealed material, Brief in Opposition at 1, 15; Motion at 2, it bears note that the court's opinion makes no mention of reviewing the records and contains no discussion of the contents of any sealed record. Nothing in that opinion indicates that the Colorado courts "confirmed" that the sealed information has "no bearing on Mr. Owens claims of prosecutorial misconduct or any substantive issue connected with trial, appeal, or post-conviction proceedings," as Respondent baldly asserts. Brief in Opposition at 1.

Accordingly, because the sealed records in the proposed Supplemental Appendix are irrelevant to the pending Petition, Respondent's motion to file the Supplemental Appendix under seal should be denied and the Supplemental Appendix rejected for filing.

Dated: January 14, 2019

Respectfully submitted,

A handwritten signature in blue ink that reads "David A. Schulz". The signature is written in a cursive style and is positioned above a horizontal line.

David A. Schulz

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