DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO

Court Address:

7325 S. Potomac St.

Centennial, CO 80112

Plaintiff: PEOPLE OF THE STATE OF COLORADO

VS.

Defendant: SIR MARIO OWENS

and,

Non-Party Movants: The Associated Press; The Colorado Freedom of Information Coalition; The Colorado Independent; *The Denver Post*; Gannett; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KWGN-TV, Channel 2; The New York Times Company; The Reporters Committee for Freedom of the Press; and The E.W. Scripps Company

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Case No.

06-CR-705

COURT USE ONLY

Division:

MOTION TO UNSEAL REGISTER OF ACTIONS AND ALL TRANSCRIPTS OF PROCEEDINGS THAT WERE OPEN TO THE PUBLIC

Movants, The Associated Press; The Colorado Freedom of Information Coalition; The Colorado Independent; *The Denver Post*; Gannett; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; KWGN-TV, Channel 2; The New York Times Company; Reporters Committee for Freedom of the Press; and The E.W. Scripps Company; (collectively "Media Petitioners"), by their undersigned counsel at Levine Sullivan Koch & Schulz, LLP,

respectfully move this honorable Court to unseal the Register of Actions, and all transcripts of proceedings that were conducted in open court.

As grounds for this Motion, movants show to the Court as follows:

INTRODUCTION

The Defendant in this action has been tried in open court, found guilty of murder, and sentenced to death. The merits of the post-conviction review proceedings are presently stayed, pending resolution of the Supreme Court's extraordinary writ petition under C.A.R. 21. *In re People v. Owens*, 2013SA91 (April 18, 2013), but on January 30, 2014, the Colorado Supreme Court, pursuant to C.A.R. 21(g)(2) partially lifted the stay entered April 18, 2013, to permit this Court to address this collateral matter. *See* Ex. 1.

The prior proceedings in this case have generated numerous press reports, as would be expected of a case in which two men are accused, tried, and convicted of murdering a witness who was to testify at a prior murder trial. According to the Defendant's C.A.R. 21 petition to the Colorado Supreme Court in June, 2013 (which was temporarily granted, and then two days later denied), in the post-trial motions filed in this Court, the Defendant has raised serious allegations of prosecutorial misconduct, including the alleged withholding of exculpatory evidence from the defense.

Despite the compelling public interest in these proceedings and court records, all of the transcripts in the Court file are presently under seal, unavailable for public inspection. So too is the index of the filings, the Register of Actions ("ROA").

Not only is this status quo an unequivocal violation of the public's constitutional right of access to court records in criminal cases, it undermines our nation's firm commitment to transparency and public accountability of the criminal justice system.

While the public's right of access to court records is a qualified—not an absolute—right, judicial records may properly be sealed from public view only where findings have been made and entered that sealing is necessary to protect a governmental interest of the highest order, the sealing is narrowly tailored, and no reasonably available alternatives can adequately protect the compelling state interest. Such findings have not been made, nor could they be made, with respect to the ROA or the transcripts of proceedings held in open court in this case.

THE INTEREST OF THE MEDIA PETITIONERS

1. Each of the Media Petitioners is engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it, on various platforms—print, broadcast, cable, internet and mobile devices—to the general public. (There are two non-media petitioners, The Colorado Freedom of Information Coalition, a statewide coalition of organizations, groups and individuals committed to promoting government transparency and accountability, and The Reporters Committee for

Freedom of the Press, a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.)

2. Media Petitioners appear before this Court on their own behalf, as members of the public, entitled to the rights afforded them by the U.S. Constitution, the Colorado constitution, all applicable statutes, and the common law. In addition, they appear on behalf of the broader public that receives the news and information gathered and disseminated by these media outlets. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573-74 (1980) (the print and electronic media function "as surrogates for the public"); Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press "acts as an agent of the public at large").

ARGUMENT

I. THE MEDIA PETITIONERS HAVE STANDING TO ASSERT THE RIGHT OF PUBLIC ACCESS TO COURT RECORDS

- 3. The First Amendment to the U.S. Constitution, article II, section 10 of the Colorado constitution, and the common law all protect the right of the people to receive information about the criminal justice system through the news media, and the right of the news media to gather and report that information.
- 4. Movants' standing to be heard to vindicate those rights is well established. See Star Journal Publ'g Corp. v. Cnty. Ct., 591 P.2d 1028 (Colo. 1979); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 609 n.25 (1982); Times-Call Publ'g Co. v. Wingfield, 410 P.2d 511 (Colo. 1966); see also In re N.Y. Times Co., 878 F.2d 67 (2d Cir. 1989); In re Dow Jones & Co., 842 F.2d 603, 606-08 (2d Cir. 1988).
- 5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and the Colorado Supreme Court. See In re People v. Thompson, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); People v. Holmes, No. 12-CR-1255, Order Unsuppressing Ct. File ("Sept. 2012 Order") (Arapahoe Cnty. Dist. Ct. Sept. 21, 2012) (first of several court orders granting media representatives' petition to unseal court file in Aurora Theater Shooting case, including requiring a public docket) (attached as Ex. 2); id., Order re: Def.'s Mot. for Specific Procedures to Safeguard Mr. Holmes's Right to a Fair Trial by an Impartial Jury (D-180-A) ("Nov. 2013 Order") (Nov. 22, 2013) (sustaining media representatives' objection to defendant's request to

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

seal the Register of Actions and all hearing transcripts, where Holmes' motion was predicated on the Court's orders herein) (attached as **Ex. 3**); *People v. Bryant*, No. 03-CR-204, Order re: News Media's Mot. for Pub. Access to Complete and Accurate Docket Listing of All Events and Filings in This Crim. Action ("Feb. 2004 Order") (Eagle Cnty. Dist. Ct. Feb. 24, 2004) (granting media representatives' motion to order clerk of the court to release a docket, pursuant to Colo. R. Crim. P. 55 and § 13-1-119, C.R.S.) (attached as **Ex. 4**).

II. THE PUBLIC HAS A QUALIFIED RIGHT OF ACCESS TO JUDICIAL RECORDS UNDER THE FIRST AMENDMENT AND THE COMMON LAW

- 6. The public's right to inspect court documents is enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . public records and documents"); *In re Nat'l Broad. Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same).
- 7. The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), rev'd on other grounds sub nom. Nixon, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); accord United States v. Hubbard, 650 F.2d 293, 314-15 (D.C. Cir. 1980).
- 8. Court records in criminal cases are also subject to public access under the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2013); see Thompson, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, see § 24-72-305(1)(b), C.R.S. (2013), so this Court, not the custodian, must determine whether the sealing order should be lifted.
- 9. Indeed, in September 2007, one of the Media Petitioners, the *Denver Post*, sought to have a single hearing transcript in this case unsealed. *See* Mot. to Vacate Minute Orders Sealing Tr. of a Hr'g that Was Held in Open Ct., Sept. 24, 2007. The Court addressed that motion in a hearing conducted in open court (on October 29, 2007), and denied the relief requested at that time, expressly "until further order of the Court." At present, however, even the transcript of that open judicial proceeding –to determine whether a prior transcript should be unsealed is itself under seal.
- 8. The public's right to inspect court records is also protected by the First Amendment. See, e.g., Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 510-11 (1984) (transcript of closed jury voir dire); Associated Press v. Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983) (various pretrial documents); In re N.Y. Times Co., 585 F. Supp. 2d 83, 89 (D.D.C. 2008) (finding First Amendment and common law right to search warrant materials relating to the 2001 anthrax attacks).

- 9. When, as here, documents in the court's file involve a matter of public interest or concern, access to such records is also guaranteed by article II, section 10 of the Colorado constitution. *See Wingfield*, 410 P.2d at 513-14; *Office of State Ct. Adm'r v. Background Info. Sys.*, 994 P.2d 420, 428 (Colo. 1999).
- 10. Under the standard adopted by the Colorado Supreme Court, the press and public cannot be denied access to the records of this Court unless such access would create *a clear and present danger* to the administration of justice, or to some equally compelling governmental interest, *and* no alternative exists to adequately protect that interest. *See* ABA CRIMINAL JUSTICE STANDARDS § 8-5.2 (2013) (cited as § 8-3.2 (1979) and adopted in *Star Journal Publ'g Corp.*, 591 P.2d at 1030). Moreover, this standard requires "that the trial judge issue a written order setting forth specific factual findings in this regard." *Star Journal Publ'g Corp.*, 591 P.2d at 1030.
- 11. The fact that this case is the subject of much media attention and is also a capital case serves only to increase the burden on any party wishing to shield portions of the court file from public scrutiny. Indeed, in this very courthouse, both judges who have presided over the capital murder case of *People v. Holmes*, No. 12CR1522, have recognized that the First Amendment right of public access applies with full force to the judicial records on file in that case. *See*, *e.g.*, Ex. 2 (Sept. 2012 Order at 1 (recognizing that "the fundamental nature of First Amendment rights . . . may only be abridged upon a showing of an overriding and compelling state interest." (quoting *Star Journal Publ'g Co.*, 591 P.2d at 1030)); *Holmes*, No. 12CR1522, Order re: Media Pet'r's' Mot. to Unseal Affs. of Probable Cause in Supp. of Search and Arrest Warrants and Reqs. for Prod. of Docs. (C-24) at 8 (Apr. 4, 2013) (attached as Ex. 5):

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

III. UNDER THE CONTROLLING STANDARD, NO PROPER BASIS EXISTS FOR SEALING THE REGISTER OF ACTIONS IN THIS CASE

- 12. The ROA for this case is currently unavailable for public inspection. The Clerk of the Court has informed the press that it is "a suppressed case" and CoCourts.com search for the defendants' names or the case numbers produces zero results.
- 13. Sealing the ROA from public inspection violates the public's constitutional right of access to the courts. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). As the U.S. Court of Appeals for the Second Circuit has explained, the constitutional access right applies fully to a court docket because "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." *Id.*; *see also United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029-30 (11th Cir. 2005) ("[P]ublic docket sheets are essential to provide meaningful access to criminal proceedings." (internal quotation marks omitted)); *Grove Fresh Distribs., Inc. v. Everfresh*

Juice Co., 24 F.3d 893, 897-98 (7th Cir. 1994) (holding that the district court erred in sealing, inter alia, the civil docket for a case), superseded by rule on other grounds as stated in Bond v. Utreras, 585 F.3d 1061 (7th Cir. 2009); Wash. Post v. Robinson, 935 F.2d 282, 289 (D.C. Cir. 1991) (striking down a trial court's practice of failing to publicly docket certain filings in criminal cases); In re State-Record Co., 917 F.2d 124, 128-29 (4th Cir. 1990) (per curiam) (requiring public docketing of a criminal case because of the constitutional right of access); In re Search Warrant for Secretarial Area, 855 F.2d 569, 575 (8th Cir. 1988) (reversing order sealing docket entries); Associated Press, 705 F.2d at 1147 (striking down district court's blanket order requiring sealed filings in a high-profile criminal prosecution).²

14. Consistent with the constitutional right of access, Colorado law provides:

The judgment record and register of actions *shall* be open at all times during office hours for the inspection of the public without charge, and it is the duty of the clerk to arrange the several records kept by him in such manner as to facilitate their inspection. In addition to paper records, such information may also be presented on microfilm or computer terminal.

§ 13-1-119, C.R.S. (2013) (emphasis added); see also § 13-1-102, C.R.S. (2013); Colo. R. Crim. P. 55.

- 15. Moreover, Colorado Supreme Court Chief Justice Directive 05-01, entitled "Directive Concerning Access to Court Records," explicitly requires the Register of Actions for a case (including "a listing of documents filed in [the] case") to be made available for public access and remote electronic access unless there has been a sealing order that meets the "least restrictive means" test of Section 4.50 of the Directive. See C.J.D. 05-01 § 4.20(a)(3).
- 16. The important role played by a public ROA was underscored by then-Eagle County Chief District Judge Terry W. Ruckriegle in addressing the need to identify adequately the nature of records filed in the Kobe Bryant prosecution:

The Court does not agree that all sealed documents are to be referenced only as "sealed document." Failure to reference the nature of the documents precludes or unnecessarily complicates any meaningful opportunity for public or Media review or challenge. Although specific factual assertions may be prejudicial, general identification of the contested issues is typically not prejudicial and is necessary for an informed public.

Other courts have reached the same conclusion—requiring public access for court dockets—under the common law right of access to judicial records, without reaching the question of a constitutional right of access. See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1377 (8th Cir. 1990); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1988); In re Knoxville News-Sentinel Co., 723 F.2d 470, 475-76 (6th Cir. 1983).

Ex. 4 (Feb. 2004 Order (emphasis added) (interpreting prior language of C.J.D. 98-05, which was superseded by C.J.D. 05-01)).

- 18. More recently, Judge William Sylvester ordered the unsealing of the docket in the *People v. Holmes* case, and Judge Carlos Samour denied Mr. Holmes' subsequent motion seeking to seal the ROA in that case. *See* Ex. 2 (Sept. 2012 Order) & Ex. 3 (Nov. 2013 Order).
- 19. That redaction of certain discreet information in the ROA is a readily available "less restrictive means" than sealing the entire ROA is not only self-evident, it is demonstrated by the redaction in the public court file of certain "Index of Pleadings" filed by the parties. *See*, *e.g.*, **Ex. 6** (Mr. Owens Filing Index of 8/06/07 [SO-199]]) & **Ex. 7** (Index of Motions [DA-#53-SO]).
- 20. Without access to the ROA, the public is unable to determine whether any filed pleadings, orders, exhibits, etc. are *missing* from the redacted "public file" in this case. That there may, in fact, be items omitted from the "public file" casts doubt on the accuracy of that file to reflect documents the Court has considered as the basis of its substantive rulings herein.
- 21. Accordingly, the Media Petitioners respectfully request the Court to direct the Clerk of the Court to make available to the public, forthwith, the complete Register of Actions.

IV. UNDER THE CONTROLLING STANDARD, NO PROPER BASIS EXISTS FOR SEALING TRANSCRIPTS OF PROCEEDINGS HELD IN OPEN COURT

- 19. The First Amendment right of public access "encompasses equally the live proceedings and *the transcripts* which document those proceedings." *United States v. Antar*, 38 F.3d 1348, 1359 (3rd Cir. 1994) (emphasis added).
- 20. Transcripts are "court records." As explained in the MEDIA GUIDE TO COLORADO COURTS (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education:

Generally, court records in criminal cases are open for public inspection. . . . 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 other reasonable means.

Id. at 50 (emphasis added) (copy attached as **Ex. 8**).

21. This conclusion is based not solely on the First Amendment right of access, but also on the broader protections conferred to free speech by article II, section 10 of the Colorado constitution. *P.R. v. Dist. Ct.*, 637 P.2d 346, 354 (Colo. 1981).

- 22. Because both the ROA and the transcripts of all proceedings in this case are presently unavailable for public view, the Media Petitioners cannot determine what was the stated basis for the Court's orders to continue the sealing of transcripts of proceedings held in open court. Thus, Media Petitioners can only speculate about the bases for this Court's ruling to maintain the sealing of the transcripts herein.
- 23. In its Consolidated Order No. 5, entered August 8, 2007, citing a concern for witness safety prior to the trial herein, the Court placed the entirety of the Register of Actions under seal "until further order of the Court."
- 24. On September 12, 2007, the Court entered Consolidated Order No. 6, which sealed all transcripts, again, only "until further order of court." In that Order, the Court stated

It should be noted that this order is not intended to deprive the media of access to the transcripts forever. It is simply a prophylactic effort to ensure a fair trial in these high profile cases.

(emphasis added).

- 25. Finally, in denying a post-conviction motion by the defendant and his family members to unseal (SOPC-157) in October 2012, the Court stated, in open court, that there would be no public release of transcripts in this case "without a court order. . . . [I]f someone wants the transcript, they can file a petition with me, I'll hopefully give it fair and due consideration and decide whether or not that transcript should be released."
- Tr. 132-33, Oct. 20, 2012 (as quoted in Pet. for Original Proceeding and Issuance of Rule to Show Cause Under C.A.R. 21 Pet. at 25, *In re People v. Owens*, 13SA161 (Colo. June 21, 2013)).
- 26. Particularly with respect to proceedings that have been conducted in open court and that have been the subject of extensive press reports, *see* Ex. 2, there can be no possible showing, and the requisite judicial finding, that disclosure of those transcripts poses a substantial probability of harm (much less a "clear and present danger") to a defendant's "fair trial" rights (in post-conviction review proceedings) or to any other compelling governmental interest.
 - 27. As the Ninth Circuit Court of Appeals has held:

If the public has a right to attend the hearings, it necessarily follows that it is entitled to read the transcript of those parts of the proceeding that were public.

In re Copley Press, Inc., 518 F.3d 1022, 1027 (9th Cir. 2008) (emphasis added); see also State v. Adams, No. 09-012523CF10A (FZ), 39 Media L. Rep. (BNA) 1253, 1256 (Fla. Cir. Ct. Nov. 12, 2010) ("Once information is disclosed in open court the transcript of the open court proceeding may not be sealed.") (courtesy copy attached).

24. Similarly, in this Court, Judge Carlos Samour has rejected defendant James Eagan Holmes' request to seal the transcripts of hearings that had been conducted in open court:

[I]t would defy logic and common sense to suppress the transcripts of those proceedings. As the People aptly note, the transcripts simply "document what is said in open court" and provide "an accurate means of recording what the media [and the public] are already capable of hearing."

Ex. 3 (Nov. 2013 Order at 7 (alteration in original) (citation omitted)).

28. Recently, the Massachusetts Supreme Court, in reliance on *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13-15 (1986), held that

[T]he First Amendment right of access to the court room provides not only a strong presumption that the public is entitled to attend a criminal trial but also a strong presumption that those who were unable to attend may learn what occurred at the trial by purchasing a transcript of the proceeding.

Commonwealth v. Winfield, 985 N.E.2d 86, 90 (Mass. 2013) (emphasis added); id. ("The First Amendment right of access to court trials includes the right to purchase a transcript of the court proceeding that was open to the public").

- There is no basis to partially seal, through redaction, any information that was disclosed to the public in open judicial proceedings (e.g., the names of protected witnesses). See United States v. Pickard, 733 F.3d 1297, 1305 (10th Cir. 2013) (holding that information that has "been disclosed in public . . . court proceedings" is not properly subject to sealing); see In re Herald Co., 734 F.2d 93, 101 (2d Cir. 1984) (holding that a closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); United States v. Loughner, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011) (holding that because "much of the information in the warrant materials has already been reported by the media and is known to the public" there was no basis to continue the sealing of court records).
 - A. PARTIAL SEALING THE RELEASE OF COURT RECORDS IN REDACTED FORM IS A "LESS RESTRICTIVE MEANS" THAT MUST BE EMPLOYED AS AN ALTERNATIVE TO BLANKET SEALING
- 30. Any order that removes from the public information posing no harm to "an interest of the highest order" while also sealing discreet, sensitive information, does not comport with the constitutionally-imposed standard for closure. See P.R., 637 P.2d at 354

³ The names of seven "protected witnesses" who testified at the trial herein have been published by the Colorado Supreme Court. *See In re People v. Ray*, 252 P.3d 1042 (Colo. 2011).

(stating a finding of clear and present danger by itself is not sufficient to warrant sealing, but merely "triggers the next level of inquiry – that is, whether reasonable and *less drastic alternatives are available*" (emphasis added)).

- 31. To the extent there is *evidence* establishing that disclosure of *certain discrete portions* of the Court's records will pose a "clear and present danger" to a governmental interest "of the highest order," (e.g., the current addresses of witnesses that are *not* already a matter of public record), the proponent of continued sealing must further demonstrate that the *entirety* of the court records must remain under seal. *See Press-Enterprise II*, 478 U.S. at 14 (holding that trial court had committed constitutional error because it "failed to consider whether *alternatives short of complete closure* would have protected the interests of the accused." (emphasis added)); *Pickard*, 733 F.3d at 1303-05 (once a request is made to unseal court records, the burden shifts to the party seeking to maintain sealing to demonstrate the need for continued sealing and that party must show that "redacting documents instead of completely sealing them would [not] adequately serve [the] government interest to be protected." (citations omitted)).
- 32. Accordingly, "it is the responsibility of the district court to ensure that sealing documents to which the public has a First Amendment right is no broader than necessary." *United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008); *see also Pickard*, 733 F.3d at 1304-05 (reversing trial court's blanket sealing order because "the district court did not consider whether selectively redacting just the still sensitive, and previously undisclosed, information from the [records]... would adequately serve the government's interest."); *Kanza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where release of court records poses risk to national security, "[p]ublic release of redacted material is an appropriate response"); *In re N.Y. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (approving of requirement "to minimize redaction in view of First Amendment considerations."); *In re Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) ("The First Amendment requires consideration of the feasibility of redaction on a document-by-document basis").⁴
- 33. In applying the Colorado Criminal Justice Records Act, the Colorado Supreme Court has instructed that custodian of records "should redact sparingly" in order "to provide the public with as much information as possible." *In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008).

B. THE ROA AND TRANSCRIPTS SHOULD BE UNSEALED FORTHWITH

34. The public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits

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

emphasize the importance of *immediate* access where a right of access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, *Inc.*, 24 F.3d at 897 (noting that access to court documents "should be immediate and contemporaneous").

- 35. Since the public's presumptive right of access attaches as soon as a document is submitted to a court, any delays in access are in effect *denials* of access, even though they may be limited in time. *See, e.g., Associated Press*, 705 F.2d at 1147 (even a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 38 Media L. Rep. (BNA) 1890, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24- to 72-hour delay in access to civil case-initiating documents was "effectively an access denial and is, therefore, unconstitutional").
- 36. As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 539, 560-61 (1976).

WHEREFORE, the Media Petitioners respectfully request that the Court forthwith enter an order unsealing the Register of Actions, the transcripts of all hearings and other judicial proceedings that were open to the public, and any other judicial record in the Court file for which no showing of necessity for continued sealing has been made.

Respectfully submitted this 31 st day of January 2014, by:

LEVINE SULLIVAN KOCH & SCHULZ, LLP

Steven D. Zansberg, #26634 Thomas B. Kelley, #1971

Attorneys for Media Petitioners

CERTIFICATE OF MAILING

I hereby certify that on this <u>31st</u> day of January 2014, a true and correct copy of this **MOTION TO UNSEAL REGISTER OF ACTIONS AND ALL TRANSCRIPTS OF PROCEEDINGS THAT WERE OPEN TO THE PUBLIC** was delivered via COURIER to the attorneys below and was deposited in the United States Mail, postage prepaid, correctly addressed to the following:

George Brauchler, District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111

James A. Castle, Esq. Castle & Castle 1544 Race Street Denver, CO 80206

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Mittelly