**REPORTERS COMMITTEE**
**FOR FREEDOM OF THE PRESS**

1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209-2211
(703) 807-2100
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org
(703) 807-2101



October 2, 2013

The Hon. Carlos A. Samour, Jr.
District Court, Arapahoe County, State of Colorado
7325 S. Potomac Street
Centennial, CO 80112

**Re: Defendant's motion D-180 in *The People of the State of Colorado v. James Holmes***

Dear Judge Samour:

The Reporters Committee for Freedom of the Press, along with the Colorado Press Association and the Colorado Freedom of Information Coalition, write in opposition to defendant's motion D-180, in *People of the State of Colorado v. James Holmes*. (Descriptions the amici are attached at the end of this letter.)

The defendant's motion asks the court to (1) suppress all transcripts of the proceedings; (2) suppress the register of actions; and (3) remove access to most pleadings from its website. We support the media petitioners' opposition to defendant's motion, and we write separately to encourage this court to understand the broader implications of defendant's position.

Removing online access to court filings and suppressing the transcripts and register of actions will serve no constructive purpose. But these actions would significantly burden the public's understanding of issues of national importance. It is tempting to believe, as the defense seems to, that access to the trial and to the record at the courthouse is somehow conceptually distinct from the act of "publicizing" these same records and transcripts through electronic access. But this is a false dichotomy. Electronic access is simply a more efficient and meaningful level of the access that has long been considered a bedrock principle of public justice and openness in this country. It allows public access in ways that were formerly restricted simply because of the burdens of limited time, travel capabilities, and other resources.

The public interest at stake here is profound. This case and other recent mass shootings have prompted nationwide debate and dialogue on a wide range of issues involving violence and mental health: the necessity of requiring mental-health background checks before gun purchases; the efficacy of mental-health treatment in this country; the role of universities in addressing psychiatric issues of students; and the effects of violence in popular culture. (See attachment for sample articles.)

At a vigil in Newtown, Connecticut following the shootings at Sandy Hook Elementary School, President Obama cited the Aurora case before calling for reform, announcing that "I will use whatever power this office

holds to engage my fellow citizens – from law enforcement to mental health professionals to parents and educators – in an effort aimed at preventing more tragedies like this." *See* The White House, Statement by the President, Dec. 12, 2012, available at http://1.usa.gov/TpGDwt. Following that speech, President Obama announced that Vice President Joe Biden would lead an effort to develop policy proposals aimed at reducing gun violence. After the killings at the Navy Yard in Washington, D.C., President Obama again named Aurora before stressing the need for both restrictions on guns and reform in mental health care, stating: "As a society, it's clear we've got to do a better job of ensuring that those who need mental health care actually get it, and that in those efforts, we don't stigmatize those who need help." *See* White House, Statement by the President, Sept. 22, 2013, available at http://1.usa.gov/1f8IR17.

These issues are not just local but national in scope. However, the proposed restrictions severely limit the ability of out-of-state reporters to effectively report on them and of members of the public to understand the court process. A Washington, D.C.-based reporter covering the gun-control debate, a national health reporter writing about mental-health treatment, or a criminal-justice reporter looking at the insanity defense would not be able to access court filings unless they go to the courthouse in Colorado. Given deadline pressures, shrinking newsrooms, and budget concerns, it is likely that important stories on these policy issues would either not get written or would be more limited in their scope and accuracy if access to court records are restricted. This court has a constitutional obligation to let members of the public see all evidence so that they can make informed decisions regarding these important policy debates. Whether members of the public want to argue in favor of gun control or against it, it is important that they have reliable information upon which to base their opinions. The Supreme Court has repeatedly found that excessive secrecy in criminal trials limits truthful reporting on matters of public concern, and therefore implicates the highest First Amendment values. *See, e.g., Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 604-05 (1982); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 586-87 (1980).

Though the defense is concerned about "extensive media coverage," their proposals are likely to have the opposite effect than the one they desire. The public will still want to read about the case and the underlying policy issues. If accurate information from court filings is not readily available, the risk arises that people will learn about the case through rumor, gossip, and speculation. Misinformation would be more harmful to defendant's constitutional rights than accurately reported information. The court can address any individual topics that could warrant sealing on an item-by-item basis when they arise, and not by a wholesale restriction on access to all transcripts and filings. Importantly, in this case, defense attorneys are primarily concerned with whether he qualifies for the insanity defense. This makes it even more important that the public learns about the mental-health issues in the case. If the defendant is found not responsible due to insanity, an informed public would more likely trust that the judicial process was fair.

Moreover, the measures the defense suggests would jeopardize this court's credibility by restricting the public's ability to learn about the judicial process. In *Richmond Newspapers*, where the Supreme Court recognized a First-Amendment based

presumption of open criminal trials, the justices emphasized the importance of openness in legitimizing the criminal justice system itself. 448 U.S. at 572-3 (Burger. CJ., plurality opinion) ("[T]he appearance of justice can best be provided by allowing people to observe it.").

In earlier cases, the Supreme Court emphasized the press' role as a watchdog of the judicial system. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to bring to bear the beneficial effects of public scrutiny upon the administration of justice."); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.") (internal quotation marks omitted). While these cases discuss the importance of press access, it is clearly as a proxy for the public; greater public access will fill this function even more directly.

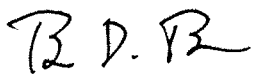
Finally, this court should reject defendant's argument that restricted access is necessary for a fair trial because courts have regularly found that public knowledge does not jeopardize that right. Although criminal defendants often raise that argument, courts have repeatedly found that the effects of publicity are difficult to assess and overstated. *See Nebraska Press*, 427 U.S. at 565 ("pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial"); *Beck v. Washington*, 369 U.S. 541, 557-58 (1962) (upholding conviction because claim of jury bias "matter of speculation" instead of "demonstrable reality") (internal quotation marks omitted). Even in such high profile cases as the Watergate scandal and the trial of Oklahoma City bomber Timothy McVeigh, courts have rejected defendants' claims that extensive publicity jeopardized their fair-trial rights. *See U.S. v. Haldeman*, 559 F.2d 31, 62 n.37 (D.C. Cir. 1976) (finding that "most of the venire" in prosecution of Attorney General John Mitchell and President Nixon's top aids "did not pay an inordinate amount of attention to Watergate."); *United States v. McVeigh*, 153 F.3d 1166 1180-81, 1184 n.6 (10th Cir. 1998) (majority of potential jurors did not know of McVeigh's alleged confession despite extensive press coverage). Similarly, the Supreme Court found that former Enron CEO Jeffrey Skilling received a fair trial despite extensive – and unkind – media coverage and the "widespread community impact" his company's scandal. *Skilling v. U.S.*, 130 S. Ct. 2896, 2914-15, 2916-17 (2010) ("Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.")

Even if this court thinks that defendant's rights are in jeopardy, it has many alternatives to restricting media access. These include undertaking extensive *voir dire*; enlarging the size of venire; increasing the number of peremptory challenges; and instructing jurors to decide issues only on the evidence presented in open court. *See Id.* at 2917; *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991) (finding jurors exposed to extensive and prejudicial publicity able to disregard that information and instead base their verdict on evidence presented in court). These safeguards show that defendant's concern that potential jurors may follow links to court pleadings from news articles are unfounded. A person with such a high level of interest in the case would

almost certainly be weeded out of the jury pool during *voir dire*. If he is not, it is better that any knowledge he may have comes from accurate reports rather than rumor or speculation.

For the above-mentioned reasons, as well as the points discussed in the media coalition's opposition, we request that this court deny defendant's motion in its entirety.

Sincerely,



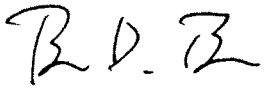
Bruce D. Brown, Executive Director
Gregg P. Leslie, Legal Defense Director
Jamie T. Schuman, McCormick Foundation
Legal Fellow
The Reporters Committee for
Freedom of the Press

**Certificate of Service**

I hereby certify that on this 2nd day of October, 2013, a true and correct copy of this letter was delivered via facsimile and by U.S. mail to the attorneys listed below:

Carol Chambers, Esq., District Attorney
Karen Pearson, Esq., Deputy District Attorney
6450 S. Revere Pkwy.
Centennial, CO 80111
Fax No. (720) 874-8501

Daniel B. King, Esq.
Tamara A. Brady, Esq.
Chief Deputy Trial Public Defenders
Office of the State Public Defender
1290 Broadway #900
Denver, CO 80203
Fax No. (303) 764-1478



Bruce D. Brown

**Attachment**

The parties submitting this letter are:

**The Reporters Committee for Freedom of the Press** ("The Reporters Committee") is 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. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

**The Colorado Press Association** is a 501c6 trade association with more than 200 newspaper members. It has a dedication and passion for the pursuit of First Amendment freedoms, an open and transparent government, and the right of citizens to know important information about issues that impact their communities and their lives.

**The Colorado Freedom of Information Coalition** is a nonpartisan alliance of groups and individuals dedicated to ensuring the transparency of state and local governments in Colorado by promoting freedom of the press, open courts and open access to government records and proceedings. Member organizations include the Associated Press, the Colorado Bar Association, the Colorado Broadcasters Association, Colorado Common Cause, the Colorado Press Association, Colorado Press Women, The Gazette (Colorado Springs), the Colorado Springs Press Association, the League of Women Voters of Colorado, the Public Relations Society of America and the Society of Professional Journalists.

**Representative news stories demonstrating the public interest in these issues:**

Paula Dvorak, *Let's connect the dots on mental illness before the violence occurs*, Wash. Post, Sept. 19, 2013, available at http://wapo.st/1btEdIJ

Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. Times, July 20, 2012, available at http://nyti.ms/1aLhTXw

Stephen Marche, *Don't Blame the Movie, but Don't Ignore it Either*, N.Y. Times, July 26, 2012, available at http://nyti.ms/16Z2Y7S.

Michael D. Shear, *In a State That Knows the Gun Debate, the President Urges Both Sides to Listen*, N.Y. Times, April 3, 2013, available at http://nyti.ms/1738w2m