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 the State of Colorado

BRIEF *AMICUS CURIAE* OF NINE COLORADO MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

Gregg P. Leslie
Counsel of Record
First Amendment Clinic,
Public Interest Law Firm
Sandra Day O'Connor
College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(480) 727-7398
Gregg.Leslie@asu.edu

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INTEREST OF *AMICI CURIAE*[1]

The parties to this *amicus curiae* brief are the Colorado Broadcasters Association, the Colorado Freedom of Information Coalition, the Colorado Press Association, the *Colorado Springs Gazette*, the *Denver Post*, the *Durango Herald*, the *Fort Collins Coloradoan*, the *Grand Junction Daily Sentinel*, and the *Greeley Tribune*.

Amici have a significant interest in the issues of this case. They are all either directly involved in reporting on criminal justice issues in Colorado or work to improve access to information in the state. The current state of the law leaves many court proceedings hidden from public view or only allows access if media parties are willing to fight sealing and suppression orders. Recognizing a consistent First Amendment-based right of access to court proceedings, including records connected to such cases, would help *amici* better inform the public about how the courts work and how justice is meted out in Colorado.

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[1] Pursuant to Rule 37(2)a and 37(6), *amici* state that all counsel of record received timely notice of the intent to file this brief, written consent of the parties was obtained, no counsel for a party authored the brief in whole or in part or made a monetary contribution to this brief, and no other person made a monetary contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is vital to Colorado journalism. Access to criminal justice records in the state has reached an untenable point where suppression is routine and difficult to overcome, even though this Court has created a clear roadmap for access to the judicial process.

Court access protects the public from the dangers of a system cloaked in secrecy. More than thirty years ago, this Court acknowledged a qualified right of access to criminal proceedings under the First Amendment. In a series of decisions, this Court crafted a standard in which "experience and logic" determine whether a presumption of access exists. *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986). This test applies to all aspects of a proceeding, including the hearings and the filings that give meaning to hearings.

The Colorado Supreme Court's opinion in the instant case illustrates the challenges faced by Colorado journalists. The decision reflects a misunderstanding of that court's duty to apply the experience and logic standard to judicial proceedings. It perpetuates a statutory scheme in which courts have unbridled discretion to conduct criminal proceedings in secret. The opinion follows a dangerous trend of secrecy in the Colorado criminal justice system. The public cannot have confidence in a judicial system shielded from the scrutiny and accountability offered by a qualified right of access to dispositive proceedings. Currently, as the *Denver Post* reported, "someone could be arrested, charged, convicted and sent to

prison in Colorado without anyone seeing why, how or where, and whether the process was fair." David Migoya, *Shrouded Justice: Thousands of Colorado Court Cases Hidden from Public View on Judges' Orders*, DENVER POST (July 12, 2018), https://www.denverpost.com/2018/07/12/suppressed-colorado-court-cases-hidden-public-view/ [https://perma.cc/W9GF-J5ZW].

A statutory scheme which inhibits access to the courts violates precedent set by this Court and inhibits the public's right to monitor its judicial system. Colorado's statute and court rules presume to create a broad right of access to court records but have instead created a system that in practice interferes with the public's receipt of information about the judicial system. With no meaningful standard for suppressing case information and a cumbersome system for unsealing case files, the public is left in the dark.

The danger posed by Colorado's problematic statutory scheme is enhanced by that state's refusal to apply First Amendment access standards to records as court proceedings. The First Amendment protects the public's qualified right of access to aspects of the judicial process which have traditionally been open to the public and for which public access benefits the process in question. *Press-Enterprise II*, 478 U.S. at 8. This standard does not dictate access in all scenarios. *See id.* at 9. Critically, however, it attaches in all questions of access to the judicial process.

The Colorado Supreme Court erred by failing to apply the experience and logic test to the question of access. A First Amendment-based approach to access to court records would allow the public to re-

main informed while still allowing courts to seal information when necessary.

ARGUMENT

I. Allowing the Colorado Supreme Court's decision to stand significantly limits the right of access to court records in the state.

Under the current state of Colorado law, access to criminal court records is rooted in an inadequate statutory scheme that regularly deprives the public of information about the justice system. Because journalists depend on timely information to inform the public about criminal justice issues, a meaningful standard of access to case records is critically important.

A. The current records access scheme hinders access by failing to set a clear standard.

Access to criminal court records in Colorado is based on a statutory scheme that seems to confuse even the courts and leads to excessive sealing and suppressing of court records, as well as arbitrary decisions that are nearly unreviewable by higher courts.

1. The statutory scheme.

The Colorado Criminal Justice Records Act ("CCJRA") governs access to criminal justice records, including court records. Colo. Rev. Stat. §§ 24-32-301 to -309 (2018). While Colorado has a separate open records act that governs access to most public records, criminal justice records are explicitly excluded

from the open records act and fall under the purview of the CCJRA. *Id.* § 24-72-202(6)(b).

The CCJRA governs all records held by a criminal justice agency. The definition of a criminal justice agency is broad, and includes any court with criminal jurisdiction or any agency that takes part in criminal justice activities. *Id.* § 24-72-302(3). Because Colorado courts are considered criminal justice agencies, access to criminal court records is controlled by disclosure restrictions under the Act. *Office of the State Court Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 431 (Colo. 1999).

Under the CCJRA, there are two categories of criminal justice records. "Records of official actions," an extremely narrow set of documents including records of arrests, indictments, and dispositions, are subject to mandatory disclosure, unless prohibited by law. *Id.* § 24-72-303(1), (7). All other criminal justice records, a category which includes simply any record kept by any criminal justice agency, are subject to disclosure at the sole discretion of the custodian. *Id.* § 24-72-304(1), (4). That custodian's discretion is guided by a simple balancing test, which weighs various competing interests. *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005).

This balancing test has shifted over time from a broad public-interest consideration to a narrow standard that emphasizes privacy and confidentiality. Early on, an appellate court stated that a custodian could deny access if "disclosure would be 'contrary to public interest.'" *Johnson v. Colo. Dep't of Corr.*, 972 P.2d 692, 695 (Colo. App. 1998) (quoting Colo. Rev. Stat. § 24-72-305(5)). In 2005, the high court

stated that a custodian must balance a number of competing interests, including

> the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request.

Harris, 123 P.3d at 1175. These factors were affirmed in 2008, but the court went further to state "the CCJRA preference for disclosure is tempered by the privacy interests and dangers of adverse consequences involved in the inspection request." *In re Freedom Colo. Info., Inc.*, 196 P.3d 892, 899 (Colo. 2008) (stating that a custodian balances public and private interests but the CCJRA favors less broad disclosure than the open records act).

The process for appeal of a custodian's decision is subject to a narrow standard of review. When a custodian denies access to a criminal justice record, the applicant can ask for a written statement that "shall cite . . . the general nature of the public interest to be protected by the denial." Colo. Rev. Stat. § 24-72-305. An applicant can then apply for an order to show cause why the record should not be released. *Id.*

Under the CCJRA, the court examines the custodian's decision under an abuse of discretion standard, where the court cannot substitute its own

balancing test for the custodian's discretion. *In re Freedom Colo. Info., Inc.*, 196 P.3d at 901. The court can only review the custodian's decision to see if the denial was proper based on the written statement. *Id.* If the court finds the custodian's denial was reasonable, the denial will stand. *Madrigal v. City of Aurora*, 349 P.3d 297, 300 (Colo. App. 2014). This standard of review hinders access because a custodian could provide a generalized statement purporting to protect the public interest, and if granted, that decision is nearly unreviewable.

2. The court rules.

Under the CCJRA, the custodian of court records is, naturally, the courts. *Background Info. Servs., Inc.*, 994 P.2d at 431. In a directive issued by the Chief Justice of the Colorado Supreme Court, clerks of the court are designated as official custodians of court records and may only release court records under certain guidelines. Chief Justice Directive 05-01 (amended October 2016).

The directive differentiates between sealed and suppressed records. "Sealed" records are any court records accessible only to judges and court staff, or, in criminal cases, as defined by law under Colo. Rev. Stat. § 24-72-701 to -710; CJD 05-01, § 3.07. This is comparable to an expungement process in other states, where records are removed from public view as a remedial measure. In sealed cases, party names are not accessible to the public or discoverable through online searches. CJD 05-01, § 3.07. In contrast, "suppressed" records are any court records accessible only to judges, court staff, and parties to the case. *Id.* § 3.08. The directive does not make name indices or registers of actions unavailable to

the public for suppressed cases. Any record can be suppressed by a court order, paralleling other states' schemes for sealing records before and during trial.

Though the directive creates these categories of records, neither this directive nor the court rules generally specify what standards are used to suppress court records. Moreover, there are no clear standards for how long a court record should remain suppressed, or whether a record should be unsuppressed following the resolution a case.

These categories are apparently not clear even to judges, as evidenced by several trial court orders that respond to a motion to suppress records. *See generally* Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order"), *Colorado v. Holmes*, No. 12CR1522, 2012 Colo. Dist. LEXIS 1862 (D. Colo. Aug. 13, 2012); Order Unsuppressing Court File, *Colorado v. Holmes*, No. 12CR1522, 2012 Colo. Dist. LEXIS 1870 (D. Colo. Sept. 21, 2012); Final Order Regarding Def.'s Motion to Seal Court Record From the Pub., This Order Is Not Sealed/Suppressed, *People v. Collins*, No. 2016CR1882 (D. Colo. Oct. 25, 2016) (acknowledging that suppression is the correct term but sealed and suppressed are used interchangeably by the attorneys).

Together, the CCJRA and Chief Justice Directive 05-01 purport to "maximize accessibility to court records." CJD 05-01 § 1.00. However, between the discretionary authority granted to a custodian of court records and the vague categories created by the Chief Justice's directive, Colorado has created a confusing statutory scheme that lacks clear standards. Decisions are nearly unreviewable, leading to a system that is ripe for abuse.

B. This statutory scheme has led to widespread court secrecy that interferes with the public's right to know how its courts operate.

A recent *Denver Post* series by investigative reporter David Migoya documents how the lack of an identifiable standard for suppression of individual records and the broad discretion granted to judges to make those decisions has created a system in which suppression is often the norm rather than the exception. Migoya discovered, through his own reporting because the records were not publicly available, that more than 6,700 civil and criminal cases were suppressed and hidden from public view since 2013. Migoya, *Shrouded Justice*, *supra.*

> In every suppressed case . . . the judge's suppression order and the reasons supporting it are shielded from public scrutiny. Courthouse employees and many law enforcement officials, including prosecutors, will not even acknowledge the suppressed cases exist . . . That means someone could be arrested, charged, convicted and sent to prison in Colorado without anyone seeing why, how or where, and whether the process was fair.

Id. Custodians routinely deny the existence of suppressed cases though the statute does not allow for denial. When asked about a suppressed 2013 case, a spokesman for the Denver district attorney's office told the *Denver Post*, "The short answer is that suppressed and sealed means the same thing to the extent the public is barred from access." Then, without

confirming or denying that the record in question existed, the spokesman continued, "So, if whatever case you're referring to is in fact suppressed by a court order, then respectfully, I'm not going to violate a court order and release case information to the public." *Id.*

The process by which a party requests suppression is generally as simple as a request by one party to a judge, which is nearly always granted. David Migoya, *18th Judicial District Implements New Rules to Make Felony Prosecutions Harder to Suppress from the Public*, DENVER POST (July 12, 2018), https://www.denverpost.com/2018/07/12/18th-judicial-district-rules-harder-suppress-felony-prosecutions/ [https://perma.cc/8WNE-KH4V]. The office of George Brauchler, District Attorney for the 18th Judicial District, told the *Denver Post* that it could not recall an instance in which a judge had denied a request for suppression. *Id.* According to the *Post* series, protecting an ongoing investigation is a common justifications for suppressing records. However, in practice, the reasons for suppression are varied and often questionable, such as to avoid unwanted media attention. Migoya, *Shrouded Justice*, *supra.* Some judges opt to suppress cases before any motion has been made, as in 2016 case against an Adams County school board member for attempting to lure a child for sex, which was suppressed because the judge "had concerns about releasing information." *Id.*

Members of the press or the public must obtain a court order to gain access to a suppressed record. CJD 05-01, § 3.08. This often results in cases being suppressed for years or indefinitely, long after the original justification for suppression has ceased to exist and the balance has clearly tipped in favor of

the public's right of access to information in order to monitor the fairness of the justice system.

The *Denver Post* identified two high-profile cases involving sex crimes in which the public's access to information was severely inhibited by Colorado's suppression practices. A Douglas County sheriff's deputy was arrested on suspicion of trying to solicit a teen for sex. David Migoya, *How News Coverage of Two High-Profile Sex-Crime Cases Faded After They Were Suppressed by Colorado Judges*, DENVER POST (July 12, 2018), https://www.denverpost.com/2018/07/12/sex-crime-cases-suppressed-colorado-judges/ [https://perma.cc/23BY-8BFZ]. At the district attorney's request, all details surrounding his arrest and charges were suppressed. *Id.* The news media were unable to obtain any further information about the case until his sentencing hearing, and the case itself remained suppressed for four years. *Id.*

Similarly, a case involving a Douglas County school teacher was originally suppressed to protect an ongoing investigation, but was only unsuppressed years later, after he had been sentenced and required to register as a sex offender, and after the *Denver Post* asked a prosecutor to request the suppression be lifted. *Id.* While suppression may be proper during an ongoing investigation, and some details of a record, such as the identity of a victim who is a minor, can properly remain permanently suppressed, the indefinite suppression of entire cases is contrary to the public interest. This has led the press, the public, and even the government to request a standard for suppression that takes the public's First Amendment right of access into account.

The *Denver Post*'s revelations on suppressed cases motivated at least one judicial district to acknowledge that its procedures need to change. Migoya, *18th Judicial District*, *supra.* The 18th Judicial District announced it will require approval from senior district attorneys for suppression requests. *Id.* In addition, if a suppressed case leads to a conviction, the district attorney's office will also require the approval of a senior district attorney to maintain the suppression, creating a presumption that most cases should be unsuppressed after a conviction. *Id.* These changes, however, represent only an alteration in local practices, and do not change the fact that there is no standard to govern the suppression of cases in the Colorado judicial system. *Id.* A spokesman for the 18th Judicial District told the *Denver Post* that his office "would absolutely support the establishment of a court rule or statutory standard and procedure" regarding suppression and the maintenance of suppression orders post-conviction, *id.,* recognizing the significance of the issue.

The criminal action underlying this petition is only one of many high-profile Colorado cases that have highlighted the particular difficulty that journalists and others have in accessing court records. Migoya, *Shrouded Justice*, *supra.* Aurora theater shooter James Holmes was convicted in 2015 in a trial that garnered nationwide publicity, yet many of the records connected to the case were suppressed, and the orders requiring suppression were themselves suppressed. *Id.* In that and other cases, reporters were only able to learn about future hearings by being present at the hearings in which they were scheduled. *Id.* In spite of strong public interest in the trial, many records remain suppressed today. *Id.* The

psychiatric reports that were essential to Holmes's insanity defense were finally released this summer, at the request of the *Denver Post*. Noelle Phillips, *Aurora Theater Shooter's Psychiatric Reports Unsealed by 2015 Trial Judge*, DENVER POST (July 3, 2018), https://www.denverpost.com/2018/07/03/-james-holmes-psychiatric-reports-unsealed/ [https://perma.cc/AB5F-EBGG].

In his ruling on the motion to release the records, in which he held that the reasons for suppression no longer existed, 18th Judicial District Chief Judge Carlos Samour acknowledged the importance of public access to such a consequential case.

> Throughout the proceedings in this case, the Court repeatedly insisted on openness because it understood the critical role that transparency plays in fostering the public's confidence in the justice system, especially in a case which garners widespread interest locally, nationally, and even internationally. The justice system, which is one of the bedrocks of this nation's democracy, cannot survive if the public loses trust in it, and the public does not trust that which is concealed from it.

Order of June 29, 2018, *State v. Holmes*, No. 12CR1522 (Colo. Dist. Ct.). Nevertheless, Judge Samour highlighted the problem in this case by citing the Colorado Supreme Court's decision to state that there is, at least in Colorado, no presumptive right to court records as there is to court proceedings. *Id.* The confusion surrounding the application of the CCJRA is a matter for the Colorado courts to resolve.

But the confusion leads to a practice of denying access, which makes the instant opinion more troubling.

II. The Colorado Supreme Court was obligated to attach the "experience and logic" standard to the issue of access to records, rather than avoid the question.

The Colorado Supreme Court rejected a request for court records from local journalists, finding that there was no First Amendment precedent directly *applying* this Court's access standard to dispositive judicial records. *See* Petition for a Writ of Certiorari, *Colo. Indep. v. Dist. Court for the Eighteenth Judicial Dist. of Colo.*, No. 18-404 ("Petition"), Appendix A at 1a-6a. However, this Court has made clear that when presented with a question of access to the criminal judicial process, the First Amendment supplies the standard. This Court has justified this standard by finding that

> the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to crimi-

> nal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.

Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 606 (1982).

The role access plays in the *process* would be meaningless without access to the documents which give that process context. *See United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (noting access to documents can be "an important factor in understanding the nature of proceedings themselves").

To answer the access problem, a court must turn to the experience and logic test, which requires a court to evaluate "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8.

The access inquiry is a two-step process. A court must recognize first that *Press-Enterprise II* mandates that the experience and logic test attaches, and second that those two factors must then be fully analyzed. This distinction is important: the precedent does not call for a specific outcome of access. Rather, the precedent requires a court to *apply* the experience and logic test to determine whether there is a qualified constitutional right of access to that specific component of the judicial process. Here, the Colorado Supreme Court found that there was no prece-

dent *applying* the First Amendment standard to dispositive judicial records. *See* Petition, Appendix A at 1a-6a. But its duty under *Press-Enterprise II* was to actually attach and apply the standard itself.

The Colorado Supreme Court's refusal to apply the experience and logic test is no small error. Public access to the judicial system is "an essential component in our structure of self-government," *Globe Newspaper Co.*, 457 U.S. at 606, which increases public confidence in and understanding of our judicial system. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980). It is plainly insufficient to ignore the First Amendment access cases from this Court and continue with a statutory scheme that severely inhibits meaningful access.

A. The test for a qualified First Amendment right of access has been routinely considered for all aspects of the judicial process, including hearings and associated records.

Following this Court's guidance, a majority of circuit courts have attached the experience and logic test to various aspects of the judicial process — both hearings and records — resulting in both positive and negative outcomes on whether the public's qualified right dictated access. See, for example, the following eleven circuit cases which apply the experience and logic test to court records: *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392 (5th Cir. 2014) (criminal citations); *In re Search of Fair Fin.*, 692 F.3d 424, 429–30 (6th Cir. 2012) (search warrants); *In re Bos. Herald, Inc.*, 321 F.3d 174, 182 (1st Cir. 2003) (financial documents); *United States v. Smith*, 123 F.3d 140, 146 (3d Cir. 1997) (sentencing memo-

randum); *Wash. Post v. Robinson*, 935 F.2d 282, 283 (D.C. Cir. 1991) (plea agreement); *Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (plea agreement); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (presentence reports); *United States v. Haller*, 837 F.2d 84, 86–87 (2d Cir. 1988) (plea agreement); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant documents); *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (documents filed for plea hearing). Significantly, as examined below, these courts have not treated the application of the experience and logic test to records as a departure from precedent, but as an action logically flowing from this Court's line of First Amendment access cases.

Some circuits have interpreted this Court's jurisprudence to directly require the application of the experience and logic test to records or documents. In *Oregonian Publishing*, the court began its analysis with the proposition that the First Amendment applied to "court proceedings and documents." *Oregonian Publ'g Co.*, 920 F.2d at 1465. The Ninth Circuit cited to this Court's guidance on access in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984), but did not further justify applying the experience and logic test to records or describe applying the test as diverging from existing precedent.

Similarly, in *Washington Post*, the D.C. Circuit directly applied the experience and logic test to a record without elaborate explanation. 935 F.2d at 287–88. There, the court faced a question of disputed access to a plea agreement. *Id.* It began its analysis

by acknowledging that the D.C. Circuit had not previously addressed whether the right of access extended to plea agreements, and then applied the experience and logic test to that specific type of record. *Id.* at 287–88. The court did not debate extending the experience and logic test to records generally and then approach the question of the plea agreement. Instead, relying on this Court's access guidance in *Press-Enterprise I* and *Globe Newspaper*, it found that "[t]he first amendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." *Id.* at 287.

The First Circuit likewise found this Court's guidance encompassed a First Amendment right of access to court documents, attached the experience and logic test, and directly applied the test to documents with contested access. *In re Bos. Herald, Inc.*, 321 F.3d at 182. After its analysis, the court found access was not justified by experience and logic considerations. *Id.* at 189. But it still properly attached and evaluated the experience and logic test for the record at issue. *Id.* at 184–89. These circuits did not suggest that attaching the experience and logic test to court records was a departure from this Court's existing guidance on access.

Even those circuits that have not interpreted this Court's guidance as directly applicable to judicial records have still extended the experience and logic test to records based on the same access justifications. The First Circuit, for example, described its actions as independently extending a qualified First Amendment right of access to records. *Globe News-*

paper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989). It then explained that "[t]he basis for this right is that without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system." *Id.* (citation omitted). The principles that guide inquiries into hearing access "apply as well to the determination of whether to permit access to information contained in court documents because court records often provide important, *sometimes the only*, bases or explanations for a court's decision." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) (emphasis added).

Furthermore, applying the experience and logic test to records comports with the understanding that court records are themselves a type of proceeding. *See Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining proceeding to include "the pleadings" and "all motions made in the action"); *see also In re Grand Jury Subpoena*, 103 F.3d 234, 242 (2d Cir. 1996) (describing motion to disclose as the "legal proceeding" in question for the purposes of the experience and logic test); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986) (alluding to documents comprising discovery motions as "discovery proceedings").

The Colorado Supreme Court's failure to recognize the applicability of the experience and logic test to records, no matter its eventual decision on access, fails to align with First Amendment access precedent.

B. Courts that limit access to records recognize the distinction between judicial and tangential records.

Applying *Press-Enterprise II* to judicial records that are a part of the proceedings is consistent with the actions of those circuits that weigh the interest in access based on the connection to the proceeding. "It is access to the content of the *proceeding* — whether in person, or via some form of documentation — that matters." *United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994). Accordingly, circuit courts have distinguished not between records and other proceedings, but between types of materials. *See, e.g.*, *In re Bos. Herald, Inc.*, 321 F.3d at 180 (considering whether certain documents are "essentially judicial in character"); *United States v. Amodeo* (*Amodeo I*), 44 F.3d 141, 145 (2d Cir. 1995) (defining "judicial document subject to the right of public access" as distinct from "mere filing of a paper or document").

Courts acknowledge a strong right of access for records that are part of dispositive actions or are essential to the proceedings, but may use a lower common law balancing test for those other materials that are not essential. "The common law does not afford as much substantive protection to the interests of the press and public as the First Amendment does." *In re Wash. Post Co.*, 807 F.2d at 390. Accordingly, circuit courts apply the First Amendment-driven experience and logic test — or a similar heightened standard — to proceedings and other materials that are dispositive in nature.

This Court has distinguished between those records constituting proceedings and materials that may be "only *tangentially* related to the underlying

cause of action." *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (emphasis added) (referring to non-public pretrial discovery). As proceedings, court records are analyzed under *Press-Enterprise II* standards or a similar, heightened standard. Tangential materials, however, may still be analyzed under the earlier common law standards, such as those set forth in *Nixon v. Warner Commc'ns*, 435 U.S. 589 (1978) (addressing audio recordings submitted as evidence). Courts may describe tangential materials as "quasi-judicial documents," *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) (addressing pre-indictment search warrants and supporting affidavits) and materials "generated as part of a ministerial process ancillary to the trial." *In re Bos. Herald, Inc.*, 321 F.3d at 189 (addressing financial documents related to application for discounted attorneys' fees under statute).

The Second Circuit explained that the materials' relationship to the court's exercise of judicial power affects the presumption of the right of access. *United States v. Amodeo* (*Amodeo II*), 71 F.3d 1044, 1049 (2d Cir. 1995). The *Amodeo II* court distinguished the standards of presumption of access according to the proximity between the documents and the invocation of judicial power. "[T]he weight to be given the presumption of access must be governed by the *role of the material at issue* in the exercise of Article II judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* (emphasis added). The court distinguished between materials that "play only a negligible role" such as discovery documents, and "any other document which is presented to the court to invoke its powers or affect its decisions" such as "a motion filed

by a party seeking action by the court." *Id.* at 1050 (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986)).

A document's initial status is not necessarily determinative: a tangential material may morph into a proceeding. The status of a tangential material shifts from "raw fruits of discovery" once the materials are part of a dispositive motion. *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988). Accordingly, material under seal may shift into a proceeding to which a strong presumption of access attached.

Two decisions in the Ninth Circuit illustrate how courts address questions of access to material previously under seal. In *Oregonian Publishing Co.*, the court applied the *Press-Enterprise II* experience and logic test to a sealed plea agreement sought by a newspaper. 920 F.2d at 1463, 1465. The court found a right of qualified access to plea agreement documents. *Id.* at 1467. Noting the "presumed right of access to court proceedings and documents," the Ninth Circuit applied the *Press-Enterprise II* test and found that plea agreements "have typically been open" and that blocking access to plea agreements would block access "to a significant segment of our criminal justice system." *Id.* at 1465.

In *Kamakana v. City & County of Honolulu*, the Ninth Circuit distinguished between documents attached to dispositive motions and documents attached to non-dispositive motions, applying a heightened right of access standard to the dispositive records. 447 F.3d 1172, 1181 (9th Cir. 2006). In a civil rights action, local and federal governments sought a

stay on the magistrate judge's order to unseal the record — including most of the discovery documents — that had previously been subject to a stipulated protective order. *Id.* at 1176–78. The court applied a higher standard to those documents attached to dispositive motions. "The public policies that support the right of access to *dispositive motions, and related materials*, do not apply with equal force to non-dispositive materials." *Id.* at 1179 (emphasis added).

The heightened standard resembled *Press-Enterprise II*'s test and considered the tradition of keeping such documents secret. *Compare id.* at 1183–84 (considering whether documents have "*neither* a history of access *nor* an important public need justifying access" (quoting *Times Mirror Co. v. United States*, 873 F.2d at 1219)), *with Press-Enterprise II*, 478 U.S. at 10 (discussing "tradition of accessibility" under First Amendment right of access analysis).

The *Kamakana* decision did not reflect a shift in the Ninth Circuit away from *Oregonian Publishing*'s approach to the right of access to proceedings. Rather, *Kamakana* reflects the distinction between tangential materials in pretrial discovery and records attached to dispositive motions, demonstrated by the court's decision to subject non-dispositive materials that are not proceedings to a common law standard. *See Kamakana*, 447 F.3d at 1180 ("A 'good cause' showing under Rule 26(c) will suffice to keep sealed records attached to non-dispositive motions." (citing Fed. R. Civ. P. 26(c))).

As illustrated by circuit courts' analysis, proceedings, especially dispositive records amounting to proceedings, must be subject to the First Amendment-based *Press-Enterprise II* test and must be af-

forded the accompanying protection for the interests of the press and public. Public access to proceedings "[gives] assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569.

The nature of the records at issue in the instant case — as proceedings, rather than tangential materials — should have compelled the Colorado Supreme Court to attach the experience and logic test. The Colorado Supreme Court cannot resolve the question of access to particular judicial proceedings merely by looking for precedent explicitly mandating access. The court's approach jeopardizes the assurances to the public endorsed by this Court in *Richmond Newspapers*.

CONCLUSION

For the reasons set forth above, *amici* Colorado media organizations respectfully urges this court to grant the petition for writ of certiorari.

Respectfully submitted,

Gregg P. Leslie
Counsel of Record
First Amendment Clinic,
Public Interest Law Firm
Sandra Day O'Connor
College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(480) 727-7398
Gregg.Leslie@asu.edu

October 25, 2018