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April 28, 2022

Hon. Priscilla Loew
District Judge, Division L
1100 Judicial Center Drive
Brighton, CO 80601

Re: Motion to vacate unconstitutional prior restraint in *People v. Woodyard*, No. 2021CR2794

Honorable Judge Loew,

The Reporters Committee for Freedom of the Press and seven Colorado news organizations, including hundreds of its members, respectfully submit this letter as *amici curiae* in support of *The Denver Gazette's* (“The Gazette’s”) motion to immediately vacate the unconstitutional prior restraint order entered in the above-referenced proceeding. Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As organizations devoted to defending First Amendment freedoms, including the rights of journalists and media organizations to gather and publish newsworthy information, *amici* are uniquely positioned to address the issues presented by this Court’s order, including the unconstitutionality of the prior restraint it imposes.

A protective order was issued by this Court on April 25, 2022, mandating that “several suppressed and/or sealed court filings” that were inadvertently disclosed to The Gazette by Court clerk staff be (i) deleted and destroyed; and (ii) that The Gazette shall not reveal any contents of the materials they obtained to any person or entity. The undersigned respectfully urge this Court to vacate its order barring The Gazette from reporting on these records because the order constitutes an unconstitutional prior restraint on speech and violates the First Amendment.

As the United States Supreme Court has recognized, prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). This is because prior restraints have “an immediate and irreversible sanction,” not only “chilling” speech but “freezing” it, at least for a time. *Id.* at 559. It is most telling that the Supreme Court has held that a prior restraint “comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also People ex rel. McKevitt v.*

Harvey, 491 P.2d 563 (Colo. 1971). Since prior restraints on speech are presumptively unconstitutional, and can be overcome only in “exceptional cases,” *Near v. State of Minnesota*, 283 U.S. 697, 716 (1931), this Court’s order prohibiting the publication of truthful information about a matter of public concern is presumptively invalid and must be vacated. *See also CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1984) (stating that “prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances”). A prior restraint barring a news organization from publishing newsworthy information poses a grave danger not just to The Gazette, but to all members of the press—and by extension to the public.

Here, The Gazette has a First Amendment right to publish the contents of court records it obtains legally. An order that restrains the press from publishing lawfully obtained, truthful information is deemed an unconstitutional prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also People v. Denver Publ’g Co.*, 597 P.2d 1038 (Colo. 1979) (orders requiring the prior approval by the court ahead of publication is unconstitutional prior restraint). Here, on April 14, 2022, Gazette reporter Julia Cardi went to the Adams County Clerk’s office and asked for publicly available filings related to each pending criminal proceeding for the police officers and paramedics charged in Elijah McClain’s death. In response to her request, the Court Clerk provided judicial records including suppressed filings for the Nathan Woodyard case, among others. In good faith, Ms. Cardi advised the Attorney General’s Office and attorneys for Mr. Woodyard that she had planned to run a story based on the records that were disclosed to her and sought comment.

It is well-settled law that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”¹ *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (imposing damages against newspaper for publishing rape victim’s name that was obtained from a publicly available police report violates the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (media’s publication of the recording of telephone conversation that it lawfully obtained could not be punished under federal wiretap statute, even though the media’s source had unlawfully recorded the conversation, and the media was well aware of the illegality of the recording). In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the Supreme Court reversed an injunction preventing reporting on the name or likeness of a

¹ Accordingly, here, the fact that the records that Ms. Cardi lawfully obtained included a summary of evidence that was presented to a grand jury cannot overcome the heavy presumption against validity of this Court’s order. Indeed, the records at issue here stand in stark contrast with the Pentagon Papers, for which the federal government sought—and the Supreme Court denied—a prior restraint to protect military secrets. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). This is particularly so given that a [grand jury indictment detailing the facts](#) that led to the charges against the Defendants has already been released to the public by the Colorado Attorney General’s office.

juvenile criminal defendant, after his name and picture were publicly revealed in connection with the prosecution of a crime, in spite of a state law that required juvenile proceedings to be held in private. The United States Court of Appeals for the Fourth Circuit, too, has recognized that a reporter cannot be held in contempt for reporting on sealed court records which a court clerk provided the reporter by mistake. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000). Most critically, it is impossible to now force publicly disclosed information, even if it was disclosed by mistake, back into its box, because “once ... truthful information [is] ‘publicly revealed’ . . . [a] court [cannot] constitutionally restrain its dissemination.” *Florida Star*, 491 U.S. at 535-536.

Finally, disclosure of these materials to the public would not endanger the state’s interest in the defendants’ right to a fair trial and impartial jury. Courts have held that there are myriad less restrictive means than halting publication to maintain trial fairness. *See Nebraska Press*, 427 U.S. at 563-64 (surveying multiple “less restrictive” means to protect a defendant’s fair trial rights, in finding a prior restraint on the press’ publication of his confession unconstitutional). Indeed, the Supreme Court has struck down prior restraints in cases where the justifications for suppressing speech included the Sixth Amendment rights of criminal defendants. *Id.* at 539, 570.

In sum, since there is no dispute that The Gazette obtained the court records at issue by lawful means, and that the information contained in those court records concern a matter of public interest and concern, *amici* urge this Court to grant the petitioner’s motion to vacate and reverse its protective order barring The Gazette from publishing Ms. Cardi’s news report. Lastly, because each minute an unconstitutional prior restraint remains in place constitutes a separate and distinct First Amendment violation, causing “irreparable harm” The Gazette and its readers, we urge the Court to lift its prior restraint order immediately.

Regards,



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On behalf of:

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The Colorado Sun

Colorado Public Radio
The Denver Post
KMGH-TV, The Denver Channel
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