

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 a Writ of Certiorari to the Supreme Court
of the State of Colorado

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 47 MEDIA ORGANIZATIONS IN
SUPPORT OF PETITIONER

BRUCE D. BROWN
Counsel of Record
KATIE TOWNSEND
CAITLIN VOGUS
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
bbrown@rcfp.org
(703) 795-9300

Counsel for Amici Curiae

(Additional counsel for amici listed in Appendix B)

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, Boston Globe Media Partners, LLC, Brechner Center for Freedom of Information, BuzzFeed, California News Publishers Association, Californians Aware, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., Florida Press Association, Hearst Corporation, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, Maine Association of Broadcasters, Maine Freedom of Information Coalition, Maine Press Association, The Marshall Project, The McClatchy Company, The Media Institute, Media Law Resource Center, MPA – The Association of Magazine Media, MTM Acquisition, Inc. , National Freedom of Information Coalition, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, New England First Amendment Coalition, The New York Times Company, The NewsGuild - CWA, Online News Association, Penguin Random House,

¹ Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief has been provided.

Pennsylvania NewsMedia Association, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders, The Seattle Times Company, Serial Productions, LLC, Sinclair Broadcast Group, Inc., SJ Acquisition, Inc., Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.²

As news media organizations, publishers, and organizations dedicated to protecting the First Amendment interests of journalists and authors, *amici* have a strong interest in this case. The Colorado Supreme Court's holding that there is no qualified First Amendment right of access to judicial records in criminal proceedings undermines the press's vital role in informing the public about the workings of the criminal justice system. Among other things, access to court records gives the news media the tools necessary for daily reporting about the criminal justice system, as well allows journalists, writers, and documentarians to shed light on past cases that inform the public about the history of our nation's courts and development of important jurisprudence.

This Court has long recognized that the press acts as a surrogate for the public when it exercises its First Amendment right of access to judicial proceedings and that such access is necessary to the proper functioning of the judicial system. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion). A presumptive First Amendment right of access to records of criminal cases facilitates the

² Full descriptions of each of the *amici* are included as Appendix A.

press's ability to fulfill this role, allowing the benefits of sunlight to be realized.

SUMMARY OF ARGUMENT

The Court should grant certiorari because the Colorado Supreme Court’s refusal to recognize any First Amendment right of access to court records in criminal cases impedes the public monitoring of the judicial system, which is essential for the functioning of our democracy. This Court has long recognized that the First Amendment provides a right of public access to court proceedings in order to promote public trust in the judiciary as well as provide necessary “checks and balances” to guard against injustices. *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring); *see also id.* at 570–72 (plurality opinion) (finding that individuals are likely to trust courts only if they can observe their operations); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (noting that public access to courts “guarantee[s] the fairness of trials”).

The media has traditionally played a central role in ensuring the accountability of—and public trust in—the court system. This Court has called the press the “surrogates” of the public, *see Richmond Newspapers*, 448 U.S. at 573. Because individual citizens cannot realistically attend all criminal trials or pore through court records to stay informed about the goings-on of the judiciary, they depend upon journalists, authors, and news organizations to call their attention to individual cases of importance and systemic flaws in the justice system by attending court proceedings and reviewing court documents on their behalf. *See Cox Broad.*, 420 U.S. at 491–92 (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily

upon the press to bring him in convenient form the facts of those operations”); *see also Grosjean v. Am. Press. Co.*, 297 U.S. 233, 250 (1936) (finding that the press is “a vital source of public information” that serves as a restraint on government abuses by encouraging public accountability); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559–60 (1976) (finding that media reports about the courts allow citizen participation in government administration).

Public oversight of the criminal courts thus relies upon press access to judicial proceedings—access that is guaranteed by the First Amendment. Likewise, press access to court records is also necessary for journalists to bring to the public stories of import about the functioning of the nation’s courts. In addition to requiring access to court records to report fully and accurately on individual criminal cases as they progress, journalists and authors also use court records to recount historical court cases, in which the public interest may not have become clear until after the case was closed. In addition, reporters and authors require access to court records to report on systemic issues in the criminal justice system, which requires not simply attending trials, but also scouring legal filings, transcripts, and opinions to uncover patterns and trends.

A First Amendment presumption of public access to judicial proceedings, alone, is not enough; a constitutional right of access to court records is necessary if the press is to offer the public an accurate account of systemic issues plaguing our justice system, and of individual criminal cases. By rejecting a First Amendment right of access to criminal court records, the Colorado Supreme Court jeopardizes the

media's ability to bring accurate and detailed reporting to the public. To ensure the press may continue its role in serving the public as a watchdog over the criminal justice system, this Court should grant the Petition for Certiorari.

ARGUMENT

- I. **The Court should grant certiorari because the Colorado Supreme Court's rejection of a First Amendment right of access to judicial records inhibits public monitoring of the judicial system.**
 - A. **This Court has long recognized that the First Amendment protects the public's ability to monitor the judicial system and that the press acts as a surrogate for the public when it reports on judicial proceedings.**

The role of the press in fostering public accountability of the government by informing the citizenry is well established. In 1931, this Court noted:

[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press[.]

Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 719–20 (1931).

Since *Near*, this Court has repeatedly recognized the critical role the press plays in informing the public about the workings of government, which in turn

allows the public to hold government officials accountable for their decisions and actions. See *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 585 (1983) (stating the “basic assumption of our political system that the press will often serve as an important restraint on government”). In holding that Louisiana could not impose a special tax on publications with a circulation of more than 20,000 copies per week, for example, this Court recognized that the press prevents government abuses of power by contributing to an informed public. *Grosjean*, 297 U.S. at 250 (“[A]n untrammelled press [is] a vital source of public information. . . . [S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”). As Justice Black, writing for the Court in *Mills v. Alabama*, stated: “[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials, and as a constitutionally chosen means for keeping officials . . . responsible to all the people whom they were selected to serve.” 384 U.S. 214, 219 (1966).

The Court also has specifically recognized that the public relies upon the news media for information about the judicial system. In *Cox Broadcasting Corp. v. Cohn*, for example, the Court stated:

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those

operations. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

420 U.S. at 491–92.

Similarly, in *Richmond Newspapers, Inc. v. Virginia*, the Court found that the media often acts as “surrogates for the public” in monitoring the judiciary and holding all participants in judicial proceedings to account. 448 U.S. at 573. As the Court stated, while in earlier times public attendance at court was common, people now acquire information about trials “chiefly through the print and electronic media.” *Id.* “With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime.” *Id.* at 572; *see also Nebraska Press Ass’n*, 427 U.S. at 587 (“Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government.”).

As Petitioner notes, Pet. for Writ of Cert. at 12, *Colorado Indep. v. Dist. Court*, No. 18-404 (U.S. Sept. 28, 2018), court proceedings have been historically open to the public for two primary reasons: First, public access encourages citizens to trust the judicial process. *Richmond Newspapers*, 448 U.S. at 570–72 (stating that “[p]eople in an open society do not demand infallibility from their institutions, but it is

difficult for them to accept what they are prohibited from observing”). Second, public access promotes fairness of the judicial process by preventing abuses of power. *Id.* at 570–72; *see also id.* at 592 (Brennan, J., concurring) (noting that “public access to court proceedings is one of the numerous ‘checks and balances’ of our system”). In modern times, both of these purposes are fulfilled through the public’s consumption of press reports about the courts and specific cases. *See Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (“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.”).

In recognition of the long history of public access and the positive contribution that public access makes to the effective administration of justice, this Court has held that the First Amendment creates a presumptive right of access to criminal court proceedings. *See Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) (*Press-Enterprise II*); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 509 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606–07 (1982); *Richmond Newspapers*, 448 U.S. at 580. This Court has also recognized that transcripts of certain criminal proceedings are subject to the First Amendment right of access. *See Press-Enterprise II*, 478 U.S. at 13 (holding that the First Amendment right of access applies to preliminary hearings in criminal cases as they are conducted in California and stating that “[d]enying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the ‘community therapeutic

value’ of openness”); *Press-Enterprise I*, 464 U.S. at 513 (finding a First Amendment right of access to a transcript of a *voir dire* in a criminal case). Thus, the Colorado Supreme Court’s decision conflicts with this Court’s precedent on the right of access to transcripts in criminal cases.

But this Court has not squarely addressed whether the First Amendment creates a presumptive right of access to records of criminal court proceedings other than court transcripts.³ This gap in the Court’s jurisprudence enabled the Colorado Supreme Court’s decision, and, if that decision is permitted to stand uncorrected, it will undermine the press’s ability to fulfill its constitutionally mandated role as a surrogate for the public.

³ As Petitioner notes, every federal circuit court of appeals to consider the specific issue of whether the qualified First Amendment right of access applies to criminal court records has held that it does. *See* Pet. for Writ of Cert. at 16–23, *Colorado Indep. v. Dist. Court*, No. 18-404 (U.S. Sept. 28, 2018) (collecting cases). The U.S. Court of Appeals for the Tenth Circuit has not specifically resolved whether a qualified First Amendment right of access to criminal court records exists. *See United States v. McVeigh*, 119 F.3d 806, 811–12 (10th Cir. 1997) (discussing that many federal circuit courts have determined the First Amendment requires press access to at least some court documents, but reiterating that the Tenth Circuit has not yet decided the issue); *see also* Pet. for Writ of Cert., *supra*, at 20 n.5. Petitioner also correctly notes that several federal circuit courts have recognized a First Amendment right of access to civil court records. Pet. for Writ of Cert., *supra* at 19 n.4 (collecting cases).

B. The media's ability to inform the public about the workings of the justice system depends on the First Amendment right of access to judicial records.

A First Amendment right of access to judicial records of criminal proceedings is necessary if journalists and authors are to act as the eyes and ears of members of the public, informing them about the workings of the criminal justice system so they can take an active role in their government. News organizations and other members of the media rely on access to court records in criminal cases every day for routine reporting on the courts. In addition, they also use criminal court records to uncover problems within the judicial system so that they can be addressed and to inform public understanding of the judicial process, enhancing trust in the outcomes of that process.

Access to court documents is essential to routine reporting on ongoing criminal cases. Such access provides journalists with a reliable source of information, allowing them to better understand the facts of a case and legal positions of the parties so that they can accurately convey that information to the public. For this reason, news stories about criminal investigations and prosecutions frequently cite to and discuss court records. *See, e.g.,* Pete Williams et al., *New York Terrorist Attack: Suspect Hit With Federal Charges*, NBC News (Nov. 1, 2017), <https://perma.cc/LD9Y-Y5SL> (quoting from a criminal complaint and reporting about the federal charges brought against a man accused of a deadly attack using a truck in New York City); Scott Glover & Sara Sidner, *Las Vegas Shooting: Unsealed documents reveal new details*, CNN (Jan. 13, 2018),

<https://perma.cc/KC2N-WQHH> (relying on “[h]undreds of pages of court documents” to report on the investigation into the motivations of a man who carried out a mass shooting on a crowd of concertgoers in Las Vegas); Maya Salam, *Brock Turner Is Appealing His Sexual Assault Conviction*, N.Y. Times (Dec. 2, 2017), <https://nyti.ms/2khwJom> (discussing and linking to an appellate brief filed by the defendant whose trial and sentencing in a sexual assault case sparked a national outcry); Chao Xiong, *Evidence supports charges against officer in Castile shooting, prosecution argues*, Star Tribune (Jan. 18, 2017), <https://perma.cc/7XXE-7G34> (discussing and quoting from a memorandum filed by the prosecution with the court in the criminal trial of a police officer accused of shooting an African-American man during a traffic stop).

Access to criminal court records can also help the media report on potential injustices or allegations of misconduct in individual cases. For example, in this matter, *The Colorado Independent* sought access to sealed motion papers, a hearing transcript, and an order after defendant Sir Mario Owens, who was convicted of first-degree murder and sentenced to death, sought post-conviction relief and to disqualify the District Attorney’s Office. *People v. Owens*, 420 P.3d 257, 258 (Colo. 2018) (*en banc*). Owens alleged that the District Attorney had failed to disclose evidence that would have been favorable to his defense, *id.*, including that the District Attorney’s Office had paid thousands of dollars to informant witnesses who testified against him. Susan Greene, *Three Men Still on Colorado’s Death Row After Judge Denies Capital Appeal*, Colorado Independent (Sept.

14, 2017), <https://perma.cc/7H3Q-TWWF> (noting that certain records in the case “remain sealed to this day”). Access to the sealed records in this case would assist *The Colorado Independent* and other media in revealing the full story about Owens’ allegations to the public.

In addition to facilitating reporting on individual cases, access to court records also allows news organizations and other media to identify and report on broader trends in the criminal justice system. For example, during a crime wave in the U.S. Virgin Islands in the 1990s, reporter Melvin Claxton and project editor J. Lowe Davis spent six months poring over criminal court records and conducting interviews to publish a series of articles that identified “the Virgin Islands people and institutions that [made] crime easy, rewarding and acceptable,” and analyzed “what the territory can do about crime.” See Melvin Claxton, *About This Series*, Virgin Islands Daily News (Dec. 12, 1994), available at <https://perma.cc/XNN2-DT44>. The investigation revealed the local criminal justice system—including the police, courts, offices of the federal and territorial Attorneys General, and probation offices—was unprepared to address the wave of serious and violent offenses being committed, including murder, assault, and rape. *Id.*

Many of the stories in the series reported about the system’s handling of specific crimes. In one story, for example, Claxton reported that a 16-year-old boy who had robbed and raped a middle-aged Norwegian tourist at knife point had been in custody just a year prior to the attack, after raping another woman and admitting to the sexual assault of a dozen others. Melvin Claxton, *Inept Prosecution*, Virgin Islands

Daily News (Dec. 20, 1994), *available at* <https://perma.cc/XNN2-DT44>. The assailant had escaped consequence when the Attorney General's office filed the wrong charges and the case was dismissed, leaving him free to commit additional crimes. *Id.* In another example, Claxton reported that a man who confessed to bludgeoning a taxi driver to death with a rock could not be prosecuted after the murder weapon disappeared from the police evidence locker. Melvin Claxton, *Police Bungle Evidence: Mistakes and Indifference Let Criminals Free*, Virgin Islands Daily News (Dec. 14, 1994), *available at* <https://perma.cc/XNN2-DT44>.

These examples were buttressed in the reporting by statistics gleaned from a thorough "review of Territorial Court records since 1990." *Inept Prosecution, supra.* This review revealed, among other things, that half of cases handled by the territorial Attorney General's Office were dismissed before trial; 81% of all convictions came from plea bargains to lesser charges; and a third of cases in the Territorial Court had been dismissed due to lack of money for transporting out-of-town witnesses or defendants in the five years preceding the report. *Id.*

The investigation earned *The Daily News* the 1995 Pulitzer Prize for Public Service Journalism. *The Virgin Islands Daily News, St. Thomas, VI*, Pulitzer Prizes, <https://perma.cc/XNN2-DT44>. It also led to widespread reforms to the criminal justice system on the Islands. *Id.* This Pulitzer prize-winning series and the reforms it inspired would not have been possible, however, had Claxton and Davis not had

access to criminal court records to begin their investigation.

Claxton and Davis are not alone in using court records to reveal systemic failures within the criminal justice system. For example, in the documentary film *The Thin Blue Line*, documentarians showed a statement written by the defendant and introduced at trial as a “confession” to demonstrate how the prosecution in that case had been dishonest in its presentation of evidence. *See The Thin Blue Line* (American Playhouse 1988). The documentary revealed that a man who had been convicted of murdering a Dallas police officer likely did not commit the crime by demonstrating that key witnesses had perjured themselves, leading to his conviction being overturned. *Id.*; *see also* Douglas Martin, *Randall Adams, 61, Dies; Freed With Help of Film*, N.Y. Times (June 25, 2011), <https://nyti.ms/2lvyzAt>.

Similarly, in the first season of the well-known podcast *Serial*, reporter Sarah Koenig and her team reviewed records entered into evidence, witness statements, court transcripts, and party disclosure statements to report about the case of a man convicted of murdering his ex-girlfriend in the Baltimore area. *See, e.g., Route Talk*, *Serial* (Oct. 23, 2014), <https://perma.cc/Z82F-YHAF>; *The Case Against Adnan Syed*, *Serial* (Oct. 30, 2014), <https://perma.cc/28F5-346B>. The podcast revealed that a known alibi witness was never contacted by either the prosecution or defense, a fact that led to the man’s conviction being overturned. *Id.*; *see also Syed v. State*, 236 Md.App. 183 (2018) (upholding a state circuit court decision overturning Syed’s conviction

and ordering a new trial), *cert. granted*, 460 Md. 3 (2018).

In addition, court records have been pivotal to news reports that:

- Informed the public of the minimal consequences faced by those convicted of felony embezzlement, who often fail to pay court-ordered restitution and face no additional penalties for this failure. *See* Toni Locy, *A Crime with Little Punishment*, Wash. Post (Oct. 1, 1998), <https://perma.cc/PE2C-HNZF> (stating that “Virginia court records show[ed] judges ordered 518 defendants convicted of felony embezzlement to repay more than \$9.6 million[.] . . . But less than \$1.2 million has been repaid, according to an analysis of court orders and payments by The Washington Post”).
- Furthered an FBI probe into a corrupt Philadelphia narcotics squad that had been bribing informants to lie about where they had purchased drugs in order to secure more arrests and false convictions. *See Barbara Laker and Wendy Ruderman of Philadelphia Daily News, Pulitzer Prizes*, <https://perma.cc/8X4R-YZXF> (collecting articles in which Laker and Ruderman used court records to demonstrate that a confidential informant, who admitted to helping the police lie to illegally obtain warrants to search suspects’ homes, had

been instrumental in the arrests of 200 alleged drug dealers and to show that the confidential informant had been renting his home from one of the involved officers).

- Analyzed how two Pennsylvania judges engaged in a kickback scheme in which they received money in exchange for imposing harsh sentences on juvenile offenders and sending them to a for-profit juvenile detention center, *see* William Ecenbarger, *Kids for Cash* xiv (2012) (citing a review of “thousands of pages of court documents”).
- Brought to public light the mishandling of cases by a judge at the Cleveland Justice Center and reported on his formal reprimand by the Ohio Supreme Court on one occasion, *see You’ve Got Some Gauls*, Serial (Sept. 20, 2018), <https://perma.cc/DL4F-BHAL> (relying on court transcripts of mishandled cases).

In addition to relying on court records to report on ongoing criminal cases and systemwide concerns, reporters and authors also employ court records from criminal proceedings to offer the public a glimpse into the historical workings of the justice system. For example, in *Eligible for Execution: The Story of the Daryl Atkins Case*, Thomas G. Walker takes readers through the entire investigation and history leading up to this Court’s decision in *Atkins v. Virginia*, in which the Court held that executions of intellectually disabled individuals violate the 8th Amendment. Thomas G. Walker, *Eligible for Execution: The Story*

of the *Daryl Atkins Case* (2008); see generally *Atkins v. Virginia*, 536 U.S. 304 (2002). The book draws upon trial transcripts and psychiatric evaluations to recount the crime at issue in the case—the murder of Eric Michael Nesbitt. See *Eligible for Execution*, *supra* at 12. To examine the investigation and prosecution of the case, Walker calls upon pre-trial motions hearings transcripts as well as trial transcripts and medical examiner reports. See *id.* at 44. Finally, and perhaps most importantly for the book’s explanation of the historical disposition of the case, Walker cites trial transcripts to discuss the various testimony and evidence offered at trial. *Id.* at 160.

Similarly, in the documentary *Central Park Five*, award-winning documentarians Ken Burns, Sarah Burns, and David McMahon used court records, including confessions entered into evidence at trial, coupled with interviews of the defendants and others, to demonstrate how the justice system initially failed in allowing teenagers’ false confessions—elicited after many hours of questioning—to lead to their convictions for rape. *Central Park Five* (Florentine Films 2012). The documentary then demonstrated how the judicial system ultimately succeeded in exonerating the five individuals wrongly convicted of rape when another man confessed to the crime. *Id.*

As these examples illustrate, journalists, authors, documentarians, and news organizations need access to court records, and not solely court proceedings, not only for routine, daily reporting, but also to examine issues facing the criminal justice system as a whole and to report on cases of historical importance.

Investigations into systemic issues within the criminal justice system often require examination of a large number of court records to identify patterns, make comparisons, and draw conclusions. *See, e.g. About this Series, supra* (relying on thousands of court records to report not only how problems arose in individual cases, but also how issues such as prosecutorial disorganization, rampant loss of evidence, and over-reliance on plea bargaining had become endemic to the entire system). This type of information, gleaned from hundreds or thousands of court records, is not available from attendance at court proceedings alone.

Journalists, authors, and other members of the media also often must rely on court records to report about cases that have long since concluded. At times, public interest in a case may not surface until after proceedings have completed. For example, in the *Atkins* case, it was not clear that the judicial proceedings were especially noteworthy until the defendant appealed his decision to this Court, resulting in a landmark legal ruling. *Eligible for Execution, supra*. With cases such as these, the newsworthiness of or public interest in a particular case may not become evident until it is too late for reporters to attend court proceedings. Thus, journalists and others writing or otherwise reporting about these cases must rely on court documents to create an accurate account.

Even in such cases in which court transcripts are available,⁴ access to other court records is often essential to make sense of what occurred during the proceedings. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (finding 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”); *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1145 (9th Cir. 1983) (noting that court documents offer a better understanding of the judicial process and government functioning). As a result, some federal circuit courts have recognized an additional basis for the First Amendment right of access to court records, in addition to the “experience and logic” test set forth in this Court’s decision in *Press-Enterprise II*. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92–93 (2d Cir. 2004). Those federal circuit courts have identified a First Amendment right of access to court records “derived from or a necessary corollary of the capacity to attend the relevant proceedings.” *Id.* at 93; *see also Co. Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014).

⁴ In this case, of course, the Arapahoe County District Court denied Petitioner’s request to unseal even the transcripts of criminal proceedings, among other court records. *People v. Owens*, No. 06CR705 (Dist. Ct., Arapaho Cty., Jan. 12, 2018) (available as Appendix B to Petitioner’s Petition for a Writ of Certiorari. *See* Pet. for Writ of Cert. at App. 9a, *Colorado Indep. v. Dist. Court*, No. 18-404 (U.S. Sept. 28, 2018)). The Colorado Supreme Court affirmed the district court’s decision, *Owens*, 420 P.3d at 259, and thus even transcripts are unavailable to the press in this case.

If journalists and authors are to obtain access to the criminal court records necessary to inform the public and fulfill the purposes of the First Amendment presumption of access to court proceedings, it is essential that this Court recognize a First Amendment presumption of access to records of criminal proceedings. News organizations and other members of the media cannot rely on attorneys, law enforcement, victims, and defendants, each of whom may have their own biases and agendas, for their investigations into the criminal justice system. Court records obtained from the court itself are among the most reliable and authoritative sources of information about the criminal justice system, and about particular cases. *See generally*, Toni Locy, *Covering the Courts: A Clash of Rights* 9 (2013) (explaining that court records can help to verify source accounts of a case).

In sum, when journalists, book authors, and documentarians have access to court records in criminal proceedings, the public gains a more nuanced view of the workings, shortfalls, and successes of the criminal justice system. The First Amendment right of access to court records is critical to the news media's ability to provide the public with detailed and historical accounts about criminal proceedings. Because the Colorado Supreme Court's conclusion that there is no qualified First Amendment right of access to court records in criminal proceedings ignores this Court's precedent and undermines the essential role of the press and the public in serving as a watchdog over the criminal justice system, this Court should grant the Petition for Certiorari.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant Petitioner's petition for certiorari review of the ruling of the Colorado Supreme Court that the qualified First Amendment right of access does not apply to motion papers, transcripts or orders in a criminal prosecution.

Respectfully submitted,

BRUCE D. BROWN

Counsel of Record

KATIE TOWNSEND

CAITLIN VOGUS

THE REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020

Washington, D.C. 20005

bbrown@rcfp.org

(703) 795-9300

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was 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. The Reporters Committee has represented the interests of the press and the public in numerous cases involving significant freedom of expression issues, including in this Court.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers,

magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

The Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. Since its founding in 1977, the Brechner Center has served as a source of academic research

and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Investigative Reporting (CIR), founded in 1977, is the nation's oldest nonprofit investigative newsroom. CIR produces investigative journalism for its website

<https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. CIR often works in collaboration with other newsrooms across the country.

Dow Jones & Company, Inc., is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new nonprofit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

The Florida Press Association was founded in 1879 as a nonprofit corporation to protect the freedoms and advance the professional standards of the press of Florida. The Florida Press Association includes all of the daily and most of the weekly newspapers in the state in its membership.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Program (IRP) at UC Berkeley's Graduate School of Journalism is

dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Maine Association of Broadcasters is an incorporated 501(c)(6) trade association. It was founded in 1947 to represent the interests of the free, over-the-air radio and television stations federally licensed to serve the state of Maine. MAB advocates for issues and causes that affect the industry, including right-to-know and First Amendment issues.

The Maine Freedom of Information Coalition is a non-profit that unites the Maine Press

Association, the Maine Association of Broadcasters, the New England First Amendment Coalition, the Maine Library Association, public employees, and private individuals in the goal of educating all Mainers, from individual citizens to educators, students, the media, legal professionals, public and business officials, about their rights and responsibilities as citizens of our democracy. The Coalition aims to broaden knowledge and awareness of the First Amendment and state laws aimed at assuring public access to government proceedings and government records.

The Maine Press Association, founded in 1864, is a non-profit statewide association of newspapers. It consists of seven daily, thirty-four weekly, and two digital newspapers across Maine. The Association's purposes include improving the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know.

The Marshall Project is a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the United States criminal justice system. The Marshall Project publishes prize-winning original reporting about the criminal justice system on its website, www.themarshallproject.com, and in partnership with other news organizations.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth)

Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. (“MLRC”) is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and

protecting free press rights under the First Amendment.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

MTM Acquisition, Inc. publishes the *Portland Press Herald / Maine Sunday Telegram*, the *Kennebec Journal* and the *Morning Sentinel*. Its newspapers cover Maine’s largest City, Portland, and the State capital, Augusta, and reach more Mainers than any other news organizations in the State. Having won a Maine Supreme Judicial Court ruling enforcing the public’s constitutional right to access jury voir dire in Maine (*In re. MaineToday Media, Inc.*, 59 A.3d 499, 41 Media L.Rep. 1237 (Me. 2013)), the newspapers have a profound interest in protecting and clarifying the public’s constitutional right to access records of criminal judicial proceedings in state court.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms

that ensure open, transparent and accessible state and local governments and public institutions.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts (which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

NBCUniversal Media, LLC is one of the world’s leading media and entertainment companies in the development, production and marketing of news,

entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the “Today” show, “NBC Nightly News with Lester Holt,” “Dateline NBC” and “Meet the Press.”

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public’s right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the the editorial and online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Penguin Random House LLC publishes adult and children’s fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world’s

most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business and international affairs.

The Pennsylvania NewsMedia Association (“PNA”), with headquarters located in Harrisburg, Pennsylvania, represents the interests of over three hundred (300) daily and weekly newspapers and other media-related organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150

correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

Serial Productions, LLC is a company dedicated to producing high-quality investigative journalism in the audio digital realm. The Serial podcast, produced by Serial Productions, is the most downloaded podcast in the world.

Sinclair is one of the largest and most diversified television broadcasting companies in the country. The Company owns, operates and/or provides services to 191 television stations in 89 markets. The Company is a leading local news provider in the country and has multiple national networks, live local sports production, as well as stations affiliated with all the major networks.

SJ Acquisition, Inc., publishes the *Sun Journal* and eight weekly newspapers that are distributed in seven counties across central, western, coastal and southern Maine, with combined readership of more than 25,000 in print daily and weekly and topping 1.7 million in monthly page views. The Sun Journal covers Maine's second largest City, Lewiston. It is a news organization dedicated to the public's right to know, and has frequently advocated for that right in its news and opinion pages.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

APPENDIX B

Additional *amici* counsel:

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

Dan Krockmalnic
Boston Globe Media Partners, LLC
1 Exchange Place
Boston, MA 02109
617-929-7157

Frank D. LoMonte, Esq.
Director, The Brechner Center for Freedom of
Information
University of Florida College of Journalism and
Communications
3208 Weimer Hall
P.O. Box 118400
Gainesville, FL 32611-8400

Nabiha Syed
Vice President, Associate General Counsel
BuzzFeed
111 East 18th Street, 13th Floor
New York, NY 10003

Jim Ewert, General Counsel
Nikki Moore, Legal Counsel
California News Publishers Association
2701 K St.
Sacramento, CA 95816

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

D. Victoria Baranetsky
General Counsel
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Jonathan Donnellan
Kristina Findikyan
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Sigmund D. Schutz
PretiFlaherty, LLP
One City Center
Portland, ME 04101
Counsel for Maine Freedom of Information Coalition
Counsel for Maine Press Association
Counsel for MTM Acquisition, Inc.
Counsel for SJ Acquisition, Inc.

Jason P. Criss
Covington & Burling LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
Counsel for The Marshall Project

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for The Media Institute

George Freeman
Media Law Resource Center
520 Eighth Avenue
North Tower, 20th Floor
New York, NY 10018
Telephone: (212) 337-0200
Telecopier: (212) 337-9893
Email: gfreeman@medialaw.org

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
120 Hooper Street
Athens, GA 30602
Counsel for National Press Photographers Association

Jonathan Hart
Ashley Messenger
Micah Ratner
National Public Radio, Inc.
1111 North Capitol St. NE
Washington, D.C. 20002

Beth R. Lobel, Esq.
Senior Vice President, NBCUniversal News Group
NBCUniversal Media, LLC
30 Rockefeller Plaza
New York, NY 10112

Robert A. Bertsche (BBO #554333)
Prince Lobel Tye LLP
100 Cambridge Street
Boston, MA 02114
*Counsel for the New England First Amendment
Coalition*

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The News Guild – CWA

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

Anke E. Steinecke
General Counsel
Carolyn K. Foley, Esq.
Vice President & Associate General Counsel
Penguin Random House LLC
1745 Broadway, 14th Floor
New York, NY 10019

Melissa Bevan Melewsky
PA ID # 91886
Pennsylvania NewsMedia Association
3899 North Front Street
Harrisburg, PA 17110
(717) 703-3048

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Barry Faber
Exec. V.P./General Counsel
Sinclair Broadcast Group, Inc.
10706 Beaver Dam Rd,
Hunt Valley, MD 21030

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

John B. Kennedy
James A. McLaughlin
Kalea S. Clark
The Washington Post
One Franklin Square
Washington, D.C. 20071
Tel: (202) 334-6000
Fax: (202) 334-5075