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DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Colorado Springs, CO 80903 **Plaintiff:** PEOPLE OF THE STATE OF COLORADO **vs.** **Defendant:** LETECIA STAUCH and, **Non-Party Movants:** The Associated Press; Colorado Freedom of Information Coalition; Colorado Press Association; Colorado Public Radio; *Colorado Springs Gazette*; *Colorado Springs Independent*; *The Colorado Sun*; *The Denver Post*; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOAA-TV, Channel 5; KTTV-TV, Channel 11; and KUSA-TV, Channel 9	DATE FILED: March 9, 2020 3:55 PM ▲ COURT USE ONLY ▲
Attorneys for Movants: Steven D. Zansberg, #26634 BALLARD SPAHR, LLP 1225 17th St., #2300 Denver, Colorado 80202 Phone: (303) 292-2400 FAX: (303) 296-3956 zansbergs@ballardspahr.com	Case No. 20-CR-1358 Division: 5

MOTION TO UNSEAL FORTHWITH THE AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF ARREST

(With request for expedited hearing)

Movants, The Associated Press; Colorado Freedom of Information Coalition; Colorado Press Association; Colorado Public Radio; *Colorado Springs Gazette*; *Colorado Springs Independent*; *The Colorado Sun*; *The Denver Post*; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KOAA-TV, Channel 5; KTTV-TV, Channel 11; and KUSA-TV, Channel 9 (collectively "Media Petitioners"), by their undersigned counsel, respectfully move this honorable Court to unseal forthwith the affidavit of probable cause in support of arrest warrant, which has been fully executed and returned to the court.

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

INTRODUCTION

The Defendant in this action stands accused of four felony counts, including First Degree Murder by a Person in a Position of Trust and Child Abuse Resulting in Death. As set forth in the official press release issued by the El Paso County Sheriff's Office on March 2, 2020, "[t]he investigation into the disappearance of [eleven-year-old] Gannon Stauch began on January 27, 2020, when Letecia Stauch[,] who is Gannon's stepmother[,] called 9-1-1 to report Gannon had not returned from a friend's house. . . . By January 30, 2020, the case was upgraded from runaway to missing/endangered." *See* https://www.epcsheriffsoffice.com/news-releases/arrest-made-in-gannon-stauch-case. Gannon Stauch's disappearance, the extended searches conducted to locate him, and the Defendant's arrest for his murder have understandably garnered significant media attention worldwide.

Defendant was arrested in South Carolina on Monday, March 2, 2020 and has been extradited to Colorado. She appeared for advisement on Wednesday, March 4, 2020. The People have now had sufficient time to complete the bulk of their investigation (following the filing of criminal charges), and therefore **the People *do not oppose* the unsealing of the probable cause affidavit** at this time.[1]

To date, the public has been denied access to the affidavit of probable cause that were filed in the County Court on February 28, 2020, which prompted County Court Judge Ann Maria Rotolo to issue the arrest warrant for the Defendant.

Although the sealing of a probable cause affidavit is routine practice prior to the execution of the warrant, for good and obvious reasons, it is the ordinary practice, even in high-profile felony cases, to unseal such affidavits once the warrant(s) have been executed and the People have completed their preliminary investigation and filed charges thereon. Because the trial in this case – if there is to be a trial– is months away, and there are multiple means to protect the defendant's fair trial rights, there is no basis for continued denial of the public's rights to access judicial records that are on file in this Court.

While the public's right of access to court records is a qualified one – not absolute – judicial records may properly be sealed from public inspection only where findings have been made, on the record, that continued sealing is necessary to protect an extremely weight governmental interest *and* that no less restrictive alternative means exist to adequately protect that interest. Such findings have not been made, nor can they be made, with respect to the affidavit of probable cause on file in this Court. Accordingly, the Media Petitioners respectfully seek the immediate unsealing of the affidavit of probable cause.

[1] The Defendant's counsel has indicated to undersigned counsel that **the Defendant *opposes* the unsealing of the probable cause affidavit**.

THE INTEREST OF THE MEDIA PETITIONERS

1. Each of the Media Petitioners is engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it, on various platforms—print, broadcast, cable, internet and mobile devices—to the general public.

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

ARGUMENT

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

3. The First Amendment to the United States Constitution, article II, section 10 of the Constitution of the State of Colorado, C.J.D. 05-01, the Colorado Criminal Justice Records Act, § 24-72-301, *et seq*., C.R.S. (2019), ("CCJRA") and the common law all protect the right of the public to receive information about the criminal justice system through the news media, including access to judicial records on file in this Court, and the right of the news media to gather and report that information.

4. Movants' standing to be heard to vindicate those rights is well established. *See Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979) (newspaper's successful challenge to closure of preliminary hearing); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (recognizing press' right to be heard prior to closure of criminal trial); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966) (press permitted to be heard in asserting their rights to access documents on file in civil action, which are founded upon federal and state constitutions' provisions); s*ee also In re N.Y. Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).[2]

5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and Colorado's Supreme Court. *See People v. Robert Lewis Dear*, 2016 SA 13 (Colo. Mar. 21, 2016) (following grant of C.A.R. 21 petition by media

[2] In addition, the Colorado Rules of Civil Procedure authorize a motion by "any person" to review an order limiting access to a court file. Colo. R. Civ. P. 121(c) § 1-5(4) (2019) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

entities, ordering District Court to reconsider its order denying public access to arrest warrant); *People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); *People v. Holmes*, No. 12-CR-1522 (Arapahoe Cty. Dist. Ct. Apr. 4, 2013) (recognizing Media Petitioners' right to seek unsealing of court file and ordering affidavits of probable cause in support of arrest unsuppressed) (attached as **Ex. 1**); *People v. Cox*, No. 10-CR-861 (Douglas Cty. Dist. Ct. June 22, 2011) (district court's order granting media organizations' motion to unseal arrest warrant affidavit in sexual assault case, after defendant had waived preliminary hearing) (attached as **Ex. 2**); *People v. Lamberth*, No. 2006-CR-1048 (El Paso Cty. Dist. Ct. Mar. 27, 2006) (Schwartz, J.) (ordering unsealing of affidavit of probable cause in response to media petitioners' motion to unseal) (attached as **Ex. 3**).

II. THE PUBLIC HAS A QUALIFIED RIGHT TO ACCESS JUDICIAL RECORDS

6. The public's right to inspect court records is enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re NBC, Inc.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is indisputable"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same).

7. The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

8. Second, court records in criminal cases are also subject to public access under the CCJRA;[3] *see Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, *see* § 24-72-305(1)(b), C.R.S., so this Court, not the custodian, must determine whether the sealing order should be lifted. *See also* **Ex. 2** at 4 (recognizing that requiring a party seeking to lift an existing sealing order to file a separate legal action "is unnecessary, unduly burdensome and an inefficient use of court resources and time.").

III. NO PROPER BASIS EXISTS FOR THE CONTINUED SEALING OF THE AFFIDAVIT OF PROBABLE CAUSE

8. Regularly, and routinely, courts have held that arrest warrant affidavits must be made available to the public after a defendant's arrest and initial charging. *See, e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987); *Greenwood v. Wolchik*, 544

[3] CJD 05-01 declares that court records in criminal cases are to be provided to the public, in accordance with § 24-72-301, C.R.S.

A.2d 1156, 1158 (Vt. 1988) ("Public access to affidavits of probable cause is all the more important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries.").

9. "Public scrutiny of the . . . warrant process – even after the fact – can shed light on how and *why a warrant was obtained*, and thereby further the public's interest in understanding the justice system." *United States v. Loughner*, 769 F. Supp. 2d 1188, 1194 (D. Ariz. 2011) (emphasis added). And more importantly, "[p]ublic access to . . . warrants may also serve to deter unreasonable warrant practices, either by the police or the courts." *Id.* "Permitting inspection of . . . warrants [and] the accompanying affidavits . . . will further public understanding of the response of government officials . . . and allow the public to judge whether law enforcement functioned properly and effectively . . . ." *Id.*

10. Recognizing the compelling importance of public access to such probable cause affidavits, the U.S. District Court for the Western District of North Carolina rejected a criminal defendant's argument that the right of access should be abridged because a search warrant affidavit contained statements that would not be admissible at trial and publicity given to such statements could compromise his right to a fair trial. *See United States v. Blowers*, No. 3:05CR93-V, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005). Courts regularly have required warrant affidavits to be disclosed under the common law presumption of access. *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (common law right of inspection attaches once a search warrant affidavit is filed with the clerk); *In re Eye Care Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same); *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993) (same); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 573 (8th Cir. 1988) (same).

11. Though Colorado's Supreme Court has declined to recognize a First Amendment-based right of public access to documents on file in criminal cases, other courts have concluded that the First Amendment independently protects public access to warrant affidavits on file in a court. As the U.S. Court of Appeals for the Eighth Circuit held: "[T]he **first amendment right of public access *does* extend to the documents filed in support of . . . warrant applications**." *In re Search Warrant for Secretarial Area*, 855 F.2d at 573 (emphasis added) (citations omitted). *See also, In re N.Y. Times Co.*, 585 F. Supp. 2d at 89.[4]

12. While not expressly addressing warrant affidavits, the Colorado Supreme Court has also recognized that "Public confidence cannot long be maintained where important judicial decisions [e.g. authorizing an arrest warrant] are made behind closed doors and then announced in conclusive terms to the public, *with the record supporting the court's decision sealed from*

[4] In some instances, courts have declined to apply the constitutional access right to search warrant affidavits before charges have been brought, to avoid interference with an on-going investigation. *See Baltimore Sun Co. v. Goetz.*, 886 F.2d 60, 62-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989).

public view." *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (emphasis added) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

13. Absent disclosure of the factual bases for the issuance a warrant, the public cannot properly assess the propriety of the government's conduct. As Chief Justice Burger observed:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . .
>
> **The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner.** It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, **it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.**

Richmond Newspapers, Inc., 448 U.S. at 571-572 (emphasis added) (citations, quotation marks, and minor alterations omitted).

A. THE DEFENDANT'S FAIR TRIAL RIGHTS ARE ADEQUATELY PROTECTED WITHOUT DEPRIVING THE PUBLIC OF INFORMATION CONCERNING THE CONDUCT OF PUBLIC INSTITUTIONS

14. At this early stage of these criminal proceedings, the Defendant cannot possibly meet her burden of demonstrating that unsealing the probable cause affidavit, will create a "substantial probability of prejudice" to her fair trial rights, which is the first of two prerequisites for continued sealing.

15. Courts have recognized that boilerplate concerns about "high-profile" criminal cases posing a difficulty to empanelling an impartial jury are frequently overstated. *See, e.g.*, *see Skilling v. United States*, 561 U.S. 358, 398 (2010) (finding no presumption of prejudice arising from pervasive negative pre-trial publicity and approving of trial court's *voir dire* to empanel an impartial jury); *CBS, Inc. v. U.S. Dist. Ct.*, 729 F.2d 1174, 1179 (9th Cir. 1984) ("even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage"); *In re Charlotte Observer*, 882 F.2d 850, 855-56 (4th Cir. 1989) ("Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which – remarkably in the eyes of many – were satisfactorily

disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity."); *see also United States v. McVeigh*, 153 F.3d 1166, 1180-81, 1184 n.6 (10th Cir. 1998) (noting that more than one half of potential jurors were unaware of Timothy McVeigh's purported *confession* to having bombed the Alfred P. Murrah building in Oklahoma City despite ubiquitous press coverage given to that confession on the eve of trial).

16. In highly publicized cases "'[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)).

17. Any party who seeks to continue the sealing of a court record must *show*, ***in addition to*** a "substantial probability of prejudice" to fair trial rights necessarily flowing from disclosure of the sealed information, *that there are no less restrictive measures available* to protect the defendant's fair trial rights short of continued sealing. *Cf. P.R.*, 637 P.2d at 354 (holding that a finding of clear and present danger to the fair administration of justice, by itself, is not sufficient to warrant court closure; such a finding merely "triggers the next level of inquiry – that is, whether reasonable and less drastic alternatives *are available*" (emphasis added)); *Star Journal Publ'g*, 591 P.2d at 1030 (same); *Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise II*), 478 U.S. 1, 14 (1986) (same); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81(same).[5]

18. Myriad alternative measures exist to protect the Defendant's fair trial rights, *see Press-Enterprise II*, 478 U.S. at 15, that would properly balance the Defendant's fair trial rights with the news agencies' free press rights, such as:

> The trial judge may: (1) cause extensive voir dire examination of prospective jurors; (2) change the trial venue to a place less exposed to intense publicity; (3) postpone the trial to allow public attention to subside; (4) empanel veniremen from an area that has not been exposed to intense pretrial publicity; . . . or [(5)] use emphatic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.

People v. Botham, 629 P.2d 589, 596 (Colo. 1981); *see also Associated Press*, 705 F.2d at 1146 ("[W]e believe that careful jury selection is an alternative that can adequately protect the right to a fair trial. In a large metropolitan area . . . it is unlikely that 'searching questioning of

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[5] Colorado's Supreme Court is currently considering a proposed new Rule of Criminal Procedure (55.1), that, once adopted, will require all District Court judges to enter written findings supporting the suppression of judicial records, *inter alia* "that no less restrictive means than making the record inaccessible . . . or allowing a redacted copy . . . accessible to the public exists to achieve or protected the identified interest(s)." *See* https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/ACCESS%20TO%20COURT%20RECORDS%20IN%20CRIMINAL%20CASES%20%20January%202020.pdf

prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence' and 'the use of emphatic and clear instructions . . . to decide the issues only on evidence presented in open court' will fail to produce an unbiased jury, regardless of the nature of the pre-trial documents filed." (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976)).

19. Under applicable law, therefore, the issue is not whether the Defendant or the Court would *prefer* not to resort to "cumbersome" measures such as change of venue, extensive jury *voir dire* or detailed jury instructions. Rather, before continued sealing may be ordered, the alternatives must be considered and expressly found by the Court to be *unavailable* or *inadequate*, based on specific reasons that the court must articulate on the record. *Press-Enterprise I*, 464 U.S. at 513; *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004); *P.R.*, 637 P.2d at 354; *see also Rockdale Citizen Publ'g Co. v. State*, 463 S.E.2d 864, 866 (Ga. 1995) (holding that news media have a right of access to pretrial evidentiary hearings where the availability of a potential change of venue eliminates any basis for a claim of prejudice).

20. The argument that press reports might expose jurors to information in the probable cause affidavits that may not ultimately be admissible at a possible trial is <u>not</u> sufficient to pose a "substantial likelihood of prejudice" to Defendant's fair trial rights; nor does it mean that less restrictive measures than sealing the affidavit would not be available or adequate if there were to be a trial. As the Supreme Court noted more than thirty years ago, in any "important case,"

> Scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin v. Dowd, 366 U.S. 717, 722-23 (1961) (citations omitted). This same sentiment was echoed by the Colorado Supreme Court:

> [A]n important criminal case can be expected to generate much public interest and usually the best qualified jurors will have heard or read something about the case. **To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. It is therefore sufficient if jurors can lay aside the information and opinions they have received through pretrial publicity.**

People v. McCrary, 549 P.2d 1320, 1325 (Colo. 1976) (emphasis added).

21. Moreover, empirical research confirms that jurors are able to set aside their conclusions, based on extensive and prejudicial pretrial publicity, and to base their verdict solely on the evidence admitted in the course or the trial. *Gentile v. State Bar of Nev.*, 501 U.S. 1030,

1054-55 (1991); *see Skilling*, 561 U.S. at 396-98 (holding that defendant had "failed to establish that a presumption of prejudice arose or that actual bias infected the jury" because "[i]t is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court" where trial was held amidst massive press coverage concerning Enron's collapse and alleged crimes perpetrated by firm's management, including the defendant) (quotation omitted); *id.* at 391 n.28 (citing numerous cases where, despite extensive pretrial publicity, the court was able to seat an impartial jury).

22. Following the indictment of Jared Lee Loughner for the fatal shootings in Tucson, Arizona, the federal district court ruled that Loughner's fair trial rights would not be compromised by release of the warrant affidavits because the court, "with the assistance of counsel . . . intends to develop a comprehensive jury questionnaire, which will help identify the extent of exposure prospective jurors may have had to the news coverage about th[e] case and assist counsel in ferreting out people with fixed opinions." *See Loughner*, 769 F. Supp. 2d at 1196. Further, the court noted it would "permit counsel to personally and extensively voir dire prospective jurors" and would "consider granting additional peremptory challenges to each side, if voir dire establishes that is necessary." *Id.*

23. In 2006, in *People v. Lamberth*, No. 2006CR001048, the accused was charged with murdering Detective Jared Jensen of the Colorado Springs Police Department. This Court ordered the affidavits of probable cause supporting Lamberth's arrest unsealed, over the defendant's objections, four months before the preliminary hearing. *See* **Ex. 3**. Your Honor stated from the bench that evidence establishing probable cause to hold Lamberth over for trial would be presented in open court at the preliminary hearing, which would occur *closer in time* to the actual trial, so there was no logical basis to withhold that information from the public until the time of the preliminary hearing. And this Court ordered the unsealing of the probable cause affidavit notwithstanding the fact that it *included Lamberth's confession* to having murdered Officer Jensen. *See* **Ex. 4** (Dick Foster, *Arrest Affidavit: Suspect Admitted Killing Detective*, Rocky Mountain News, Mar. 28, 2006, at 13A).[6]

24. Lastly, in the high-profile multiple murder case (the "Aurora Theater Shooting" case) in Arapahoe County, *People v. Holmes*, the affidavits in support of arrest and search warrants were unsealed far in advance of trial, and the Court was able to seat a jury of impartial death-qualified jurors; following his conviction and sentencing, Holmes did not appeal the jury's verdict.

25. Because numerous prophylactic measures (*e.g.*, change of venue, extended *voir dire*, jury admonitions and instructions) remain available, and in the absence of any showing that such alternative measures would be ineffective in protecting the Defendant's right to a fair trial,

[6] Lamberth was subsequently convicted of second degree murder and sentenced to 96 years in prison for that crime.

the Court must conclude that the Defendant cannot meet her burden of showing the lack of any alternative measures short of continued sealing. *See Stewart*, 360 F.3d at 102; **Ex. 6** at 5, 7.

B. THE AFFIDAVITS SHOULD BE UNSEALED FORTHWITH, TO PROTECT THE PUBLIC'S RIGHT OF *CONTEMPORANEOUS* ACCESS TO JUDICIAL RECORDS

26. The Court should not countenance any contention that sealing now is appropriate because the public will be fully informed later, either at the preliminary hearing or at the time of trial. It is firmly established that the public's right of access to judicial records is a right of *contemporaneous* access. *See Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access where a right of access is found." (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, 24 F.3d at 897 (noting that access to court documents "should be immediate and contemporaneous").

27. Since the public's presumptive right of access attaches as soon as a document is filed with the Court, any delays in access are, in effect, denials of access, even though they may be limited in time**.** *See, e.g., Associated Press*, 705 F.2d at 1147 (even a 48-hour delay in access constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay impermissibly burdens the First Amendment"); *Courthouse News Serv. v. Jackson*, No. H-09-1844, 38 Media L. Rep. (BNA) 1890, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24 to 72 hour delay in access to civil case-initiating documents was "effectively an access denial").

28. As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. 529, 560-61 (1976).

WHEREFORE, the Media Petitioners respectfully request that the Court forthwith enter an order unsealing the affidavit of probable cause in support of arrest.

In light of the asserted right of the public for *contemporaneous* access to judicial records on file in criminal cases, the Media Petitioners hereby respectfully further request that the Court provide them the opportunity to be heard on the issues presented herein <u>at the earliest practical time</u>.

Respectfully submitted this 9th day of March, 2020, by:

BALLARD SPAHR, LLP

In accord with C.R.C.P. 121 § 1-26(7) a printable copy of this document with electronic signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request

s/ Steven D. Zansberg
Steven D. Zansberg, #26634

Attorney for Media Petitioners

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of March, 2020, a true and correct copy of this **MOTION TO UNSEAL FORTHWITH THE AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF ARREST** was delivered via EMAIL to the attorneys below and was served via ICCES to the following:

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In accord with C.R.C.P. 121 § 1-26(7) a printable copy of this document with electronic signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request

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