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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The plainly erroneous arguments advanced in Respondent's brief in opposition (BIO) only confirm that *certiorari* should be granted. Respondent argues for waiver by groundlessly claiming that "presumptive" means "mandatory;" portrays the Colorado court's order as consistent with precedent by improperly conflating the "experience and logic" test for determining *where* the First Amendment access right applies with the separate context-specific analysis required to determine *if* the right may be overcome; and, points to entirely irrelevant factual uncertainties and State regulatory interests that have no bearing on the proper resolution of scope of the First Amendment access right squarely presented by the Petition. None of Respondent's grounds for opposing *certiorari* has any merit.

Respondent strains to portray the Colorado Supreme Court's ruling as necessary "to ensure the safety of witnesses," BIO 1, but cites to nothing in the record because the Colorado courts never provided any explanation for the broad secrecy imposed. It also asserts that all relevant facts in the sealed records have been disclosed. *Id.* 3. But even if true (and defendant Owens denies it, Owens Resp. 4), the claim says nothing about disclosure of counsel's arguments over an alleged prosecutorial conflict of interest and other grounds for disqualification, Pet. App. 8a, or about the court's reasons for declining to disqualify the prosecutor, all of which remain hidden from the public.

Respondent's effort to downplay the factual significance of the Colorado Supreme Court's ruling is unpersuasive, but the ruling's legal significance is unquestionable. The ruling contradicts holdings of this Court and the uniform holdings of other appellate

courts. It eviscerates the First Amendment right of access to court records in this and every other case in Colorado, a state where more than 6,700 case files are reportedly undisclosed on court dockets and entirely invisible to the public today. *See* Pet. 26; *see also* Amicus Curiae Br. of Nine Colo. Media Orgs. 9-11. The singularly incorrect ruling of the Colorado Supreme Court warrants review and prompt reversal.

ARGUMENT

I. The Issue Presented Was Not Waived and Was Squarely Decided by the Colorado Supreme Court

Respondent contends that Petitioner waived its right to argue for the existence of a qualified constitutional access right because it supposedly argued previously for a mandatory access right, and also claims the Colorado Supreme Court "cabined its ruling to that issue," rejecting *only* the existence of an unqualified access right. BIO 10. Its contentions are flatly refuted by the record.

Respondent acknowledges that Petitioner argued for "a *presumed* right of access to documents on file in Colorado criminal cases," *id.* 7 (emphasis added), and that "[t]he Colorado Supreme Court unanimously rejected Petitioner's argument that the federal and state constitutions grant a *presumptive* right of access to documents filed in a criminal case" *id.* 5 (emphasis added). But Respondent unfathomably reads "presumptive" to mean "mandatory" and "unqualified." *See id.* 4, 5, 8-10. This definitional distortion is the lynchpin of Respondent's argument that Petitioner waived the right to seek review of whether a "*qualified* First Amendment right of access" applies to certain court records because it supposedly never argued for a

"qualified right" until now. Pet. (i); BIO 8, 10. The argument is baseless.

As a threshold matter, Respondent's factual premise is wrong. In its motion to the district court, Petitioner did expressly characterize the constitutional right it was asserting as a "qualified" one. *See* Pet. App. 18a. But even if Petitioner had never used that term, Respondent's semantic argument is wrong because it rests upon a non-existent distinction between a "presumptive" right and a "qualified" one.

By any ordinary understanding, the two terms in this context mean the same thing: a "qualified" right is one that is "not complete or absolute;"[1] a "presumptive" right is one that is "presumed in the absence of further information."[2] Indeed, this Court has described the First Amendment access right interchangeably as "presumptive" or "qualified," without connoting the slightest distinction between the two terms. *Compare, Richmond Newspapers v. Virginia*, 448 U.S. 555, 598 (1980) (Brennan, J., concurring) (finding a constitutional "presumption of openness" for criminal trials that can be overcome or rebutted only by "sufficiently compelling" interests); *Press-Enterprise Co. v. Super. Ct.* ("*Press-Enterprise I*"), 464 U.S. 501, 567 (1984) (explaining that the "presumptive openness of jury selection" may only be overcome "by an overriding interest"); *with Press-Enterprise Co. v. Super. Ct.* ("*Press-Enterprise II*"), 478 U.S. 1, 13-14 (1986) (describing a "qualified First Amendment right

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[1] *Qualified*, OXFORD DICTIONARY (2019), https:en.oxford dictionaries.com/definition/qualified.

[2] *Presumptive*, OXFORD DICTIONARY (2019), https:en.oxford dictionaries.com/definition/presumptive.

of access" to pre-trial proceedings that requires a compelling interest to override).

All apart from the plain meaning of a "presumptive" right, Respondent's claim that Petitioner never made clear that it was asserting a qualified right is indefensible. Petitioner left no doubt that the access right it was advancing could be limited or overcome on a proper showing of need, both in its district court filings, *see* Pet. App. 20a, 24a, and in the Colorado Supreme Court, *see id.* 37a, 51a, 52a-56a, 63a-65a; BIO App. 4, 5, 6, 14, 21, 22, 24, 28. Its briefing to the Colorado Supreme Court, for example, made this point unambiguously clear:

> This Petition urges the Court to clarify for trial judges throughout Colorado that under both state and federal constitutions, the public enjoys *a presumed* right of access to documents on file in Colorado criminal cases . . . and to hold, accordingly, that such judicial records may not be sealed from public view *in the absence of detailed and specific findings*, on the record, that (a) continued sealing is necessary to protect a governmental interest of the highest order (for example, to preserve the fair trial rights of the defendant), and (b) each of the myriad alternative means to protect that interest is either not available or not adequate to do so.

BIO App. 5 (emphasis added). Petitioner cited *Press Enterprise II* and its explanation of how the qualified right can be overcome,[3] and also cited lower court

[3] Respondent contends that because Petitioner specifically cited *Press-Enterprise II* for the first time in its "reply" brief to the Colorado Supreme Court it had waived its right to "change

opinions that themselves cited, explained and applied the *Press-Enterprise II* standard to overcome the access right. *See, e.g.*, Pet. App. 45a-49a; BIO App. 25 n. 3. Petitioner repeatedly asserted that the district court's sealing order did not comply with the First Amendment specifically because it did not contain the judicial findings needed to overcome the public's presumptive First Amendment access right. *E.g.*, BIO App. 5, 6, 22, 24-26. The contention that Petitioner did not make clear it was asserting a qualified right that could be limited is entirely off base.

Even a simple side-by-side comparison of questions Petitioner presented to the Colorado Supreme Court and to this Court underscores the emptiness of Respondent's "waiver" argument: [4]

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course" at that point. BIO 9 n. 3. Both its premise and conclusion are incorrect. No new legal theory was presented in Petitioner's reply brief, and this Court, in any event, may consider the arguments made in Petitioner's reply as well as in its subsequent petition for rehearing. *See Erckman v. United States*, 416 U.S. 909, 911 n. 1 (1974) (finding argument persevered for *certiorari* review when raised for first time in petition for rehearing). The cases cited by Respondent, BIO 9, do not hold to the contrary.

[4] In preserving an issue in state court, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

C.A.R. 21 Petition Issue Presented (BIO App. 10-11)	**Question Presented (Pet. (i))**
1. Does the First Amendment right of public access apply to judicial records in the court file in a capital murder case, including briefs, judicial orders, and a hearing transcript related to allegations of prosecutorial misconduct? . . .	Does the public's qualified First Amendment right of access defined by this Court in a series of cases . . . apply to the substantive motion papers, hearing transcripts and court orders filed in a capital murder prosecution?
3. Did the District Court err by *failing to apply the appropriate constitutional standards* when it denied access to judicial records in the court file in a capital murder case, including briefs, judicial orders, and a hearing transcript . . . ? (emphasis added).	

Nor is Respondent correct to suggest that the Colorado Supreme Court denied only a "mandatory" First Amendment access right and did not "reject the *qualified* right of access." BIO 10. Its Opinion does not differentiate between a mandatory and a qualified right; it differentiates between access to court proceedings and to court records and holds that there is no constitutional right whatsoever to the latter. As the

Opinion states: "While presumptive access to judicial *proceedings* is a right recognized under both the state and federal constitutions, neither the United States Supreme Court nor this court has ever held that *records* filed with a court are treated the same way . . . . We decline to conclude [so] here . . . ." Pet. App. 3a (underlining added).

Petitioner never contended that the constitutional access right it asserted was absolute or irrebuttable, and the Colorado Supreme Court clearly understood that. Petitioner did not obscure the nature of the right it was asserting and it waived nothing.

II. The Colorado Supreme Court's Ruling Conflicts With Every Other State Court of Last Resort and Every Circuit That Has Addressed the Question Presented, and With This Court's Opinions in the Two *Press-Enterprise* Cases

Respondent is equally in error in its portrayal of the Colorado court's ruling as consistent with precedent. Respondent admits, as it must, that "circuit courts have uniformly applied" the experience and logic test articulated by this Court "to proceedings and records alike." BIO 11 n. 3. But Respondent then argues that the Colorado Supreme Court did not break from this precedent because other cases do not require "unfettered" access to "any and all court records," *id.* 11, and claims the Colorado court did not expressly "disavow the context-specific analysis that *Press-Enterprise II*'s test contemplates." *Id.* 13-14. The argument misstates both the prior holdings of other courts and the holding of the Colorado Supreme Court.

In each of the Circuit Court cases cited by Respondent (a subset of those catalogued by Petitioner, Pet. 17-

19), the courts held that the First Amendment access right does indeed *apply* to judicial records where the "experience and logic" test articulated in *Press Enterprises II* is satisfied; no court rejected the existence of a First Amendment right of access to substantive motion papers, hearing transcripts or judicial orders, as did the Colorado Supreme Court. *See* Pet. 17-19; BIO 11-13.

Several of the cited courts, on proper factual findings, did seal records after finding them subject to the First Amendment access right, but they did so by applying the separate standards also articulated in *Press Enterprises II* for determining when the access right may be limited. *See* Pet. 11-14. Those standards require a substantial probability of harm to a compelling interest and the absence of available alternatives. This is a "context-specific" analysis that must be undertaken only if the "experience and logic" test first establishes that the right of access applies to the type of record at issue. *See, e.g*, *United States v. Smith*, 776 F.2d 1104, 1105 (3d Cir. 1985) (finding a right of access to bills of particulars that was overridden by "risk of serious injury to third parties")); *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (finding a right of access to transcripts that was overridden by "compelling interest in the protection of a continuing law enforcement investigation"). Respondent's argument entirely misses this distinction.

Respondent also misstates the holding of the Colorado Supreme Court in portraying it as consistent with precedent. The Colorado court's ruling rejects outright the notion that there is ever any First Amendment right of access to court records. It thereby precludes any need for factual findings to justify sealing or to consider the availability of alternatives,

and thus does indeed "disavow the context-specific analysis that *Press-Enterprise II*'s test contemplates." *See* Pet. App. 5a-6a.

This holding contradicts the uniform, stable and unanimous view of every other State Court of last resort and every federal Court of Appeals to have addressed the issue, Pet. 17-19, and its rejection of any constitutional right of access to a hearing transcript in a criminal case directly contravenes this Court's holdings in both *Press-Enterprise* cases. *See* Pet. 13-14 & n. 2; Pet. App. 64a n. 1.

III. No Factual Disputes or Issues Uniquely Within the Province of State Law Are Raised by This Petition

Equally unavailing is Respondent's contention that this case does not present a good vehicle for resolving the important constitutional issue presented. There is no proper prudential reason to defer to the Colorado Supreme Court's categorical rejection of any First Amendment right of access to court records.

First, there is no disagreement about the nature of the four judicial records sealed without judicial findings in this case. Pet. 2; BIO 3. To determine whether the First Amendment access right applies to these *types* of court records, there is no need for "any detailed argument over the substance of the sealed material," as Respondent wrongly suggests. BIO 16. The opinion of the Colorado Supreme Court says nothing about reviewing the sealed records and contains no discussion of their contents.[5] It rejects the

[5] Nothing in any of the rulings of the Colorado courts supports Respondent's assertion that they "confirmed" the sealed information has "no bearing on Mr. Owens claims of prosecutorial misconduct or any substantive issue connected with his trial,

existence of any First Amendment right to inspect these types of records without making any factual findings at all.

Which portions of the sealed records were subsequently made available for public inspection may be in dispute,[6] but the nature and extent of the limited disclosures that have been made has no bearing on the resolution of the constitutional issue presented. Whether these particular records can remain sealed, in whole or in part, in a manner consistent with the First Amendment access right is an issue to be resolved on remand. The record of this proceeding clearly and squarely frames the actual question presented—whether the First Amendment access right applies to substantive motions, transcripts and orders in a criminal case. *See* Pet. (i), 11, 28.

Second, Respondent's purported concern for protecting the confidentiality of subjects traditionally within "the exclusive province" of the States is misdirected for similar reasons. The legal issue presented is the scope of a right extended to all citizens by the First Amendment to the United States Constitution, an issue firmly within the province of this Court. Indeed, this Court's own precedents defining the scope of the First Amendment access right have all arisen out of state court criminal prosecutions conducted pursuant to procedures expressly authorized by state law. *See Richmond Newspapers*, 448 U.S. at 580 (applying First Amendment right to murder trial closed pur-

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appeal, or post-conviction proceeding[s]." BIO 1. BIO 1, 14-15; Mot. for Leave 2.

[6] Respondent contends that "the unsealed material . . . contained 'all of Owens' factual allegations of prosecutorial misconduct.'" BIO 14. Owens disagrees. Owens' Resp. 4.

suant to state statute); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 610-11 (1982) (applying First Amendment right to testimony of minor victim of sex crime closed pursuant to state statute); *Press-Enterprise I*, 464 U.S. at 505-13 (applying First Amendment right to jury selection closed pursuant to state supreme court supervisory instruction); *Press-Enterprise II*, 478 U.S. at 10 (applying First Amendment right to preliminary proceedings in murder trial closed pursuant to state statute).

Petitioner previously requested the Colorado Supreme Court to remand with directions to either make the findings required by the First Amendment to maintain the records under seal, in whole or in part, or to unseal them. BIO App. 5. Its Petition seeks nothing more from this Court.

CONCLUSION

For the foregoing reasons, and those previously set forth in the Petition, this Court should grant *certiorari* and promptly reverse and remand with instructions requiring application of the standards required by *Press Enterprise II* to overcome the public's qualified First Amendment right of access to the records at issue.

Respectfully submitted,

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