DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Place Brighton, CO 80601	DATE FILED: April 26, 2022 3:24 PM FILING ID: 5086A4D66A221 CASE NUMBER: 2021CR2794 ▲ COURT USE ONLY ▲
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **NATHAN WOODYARD,** Defendant	Case Number: 2021CR2794 Division: L
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THE DENVER GAZETTE'S FORTHWITH MOTION TO VACATE UNCONSTITUTIONAL PRIOR RESTRAINT

The Denver Gazette newspaper ("The Gazette"), by and through its undersigned counsel, hereby respectfully moves this honorable Court immediately to vacate the unconstitutional prior restraint order ("Protective Order") issued on April 25, 2022, which bars The Gazette from publishing truthful information on a matter of legitimate public concern that was lawfully obtained by a reporter for the newspaper.

As set forth below, decisions from both the Supreme Court of the United States and the Colorado Supreme Court make clear that the Order therefore violates the newspaper's rights under the First Amendment to the United States Constitution and Article II, Section 10 of the

Colorado Constitution. The Gazette therefore respectfully requests that the order be vacated immediately.

INTRODUCTION

The Court's order restricts publication by the Gazette of information contained in official court records that were provided to a reporter upon her requesting access only to "publicly available" filings in this case. As set forth below, the Order violates two well established bodies of First Amendment jurisprudence: (1) that forbidding the imposition of prior restraints in all but the most exceptional cases; and (2) that forbidding states from prohibiting the publication of lawfully-acquired, truthful information about a matter of public concern absent extraordinary circumstances.[1]

ARGUMENT

I. Prior Restraints Are Presumptively Unconstitutional

Orders that restrain the press from publishing lawfully obtained information "are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also People v. Denver Publ'g Co.,* 597 P.2d 1038 (Colo. 1979) (orders requiring the media to seek court approval prior to publication are also unconstitutional prior restraints). As the United States Supreme Court has stated emphatically, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), cited and quoted in *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004). The reason is clear and straightforward: "A prior restraint . . . by definition, has an immediate and

[1] This Motion addresses only the second paragraph on page 2 of the Protective Order. However, paragraph 1 is also contrary to the holding of the Colorado Supreme Court in *People v. Bryant*, 94 P.3d 624, 638 (2004) (vacating portion of trial court's order that had commanded news outlets to delete all copies of sealed court records they had lawfully obtained).

irreversible sanction. If it can be said that a threat of criminal or civil sanctions *after* publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n,* 427 U.S. at 559. Accordingly, the Supreme Court has held that a prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (cited by *Denver Publ'g Co*., 597 P.2d at 1039); *People ex rel. McKevitt v. Harvey*, 491 P.2d 563 (Colo. 1971). Indeed, more than a century ago, in a case arising from this state, the United States Supreme Court declared that "the main purpose of [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other governments.' *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 462 (1907) (citations omitted); *see also In re Providence Journal Co.,* 820 F.2d 1342, 1345 (1st Cir.), *modified*, 820 F.2d 1354 (1st Cir. 1986) (explaining why a prior restraint on publication of news information is so disfavored: such an order is "the very essence of censorship.").

Indeed, the Supreme Court is even reluctant to approve a prior restraint in the name of national security or to protect a competing constitutional right:

> Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citations omitted) (quoting *Nebraska Press Ass'n*, 96 S. Ct. at 2804) (alteration in original); *see also, e.g., Procter & Gamble Co. v. Bankers Trust Co*., 78 F.3d 219,225 (6th Cir. 1996) (prior restraint, "under all but the most exceptional circumstances, violates the Constitution"). This presumption against enjoining publication of news information is so strong that **the Supreme Court has not ever affirmed the imposition of a prior restraint.**

The Colorado Supreme Court has expressly recognized "the basic proposition that statutes or court decisions which tend to prohibit or suppress the publication of truthful and awfully obtained information can seldom satisfy constitutional standards." *Denver Publ'g Co*., 597 P.2d at 1039-40. Thus, "in cases involving First Amendment rights [the Court] will closely scrutinize statutes [or court orders] that seek to prohibit or penalize the free exercise of those rights." *Id.* at 1039.

II. The Gazette Has an Independent First Amendment Right to Publish the Contents of Court Records It Lawfully Obtained from the Clerk's Office

On April 14, 2022, Gazette reporter Julia Cardi entered the clerk's office in this courthouse and specifically asked to inspect "all publicly available records" that were filed in this (and four related) criminal cases, since February 1. In response to that clear and unambiguous request, a records clerk provided her with copies of certain suppressed records. Thus, The Gazette's rights derive not only from prior restraint doctrine, but also from a separate line of First Amendment jurisprudence protecting the publication of truthful information about matters of public concern that is lawfully obtained. The Supreme Court has made clear in a long line of cases that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star v. B.JF.,* 491 U.S. 524, 533 (1989) (award of damages against newspaper for publishing rape victim's name obtained from publicly available police report does not comport with First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (media's dissemination of recording of telephone conversation that it lawfully obtained could not be punished under federal wiretap statute, even where media's source had unlawfully recorded the conversation, and the media was well aware

of the illegality of the recording); *Smith v. Daily Mail Publ'g Co*., 443 U.S. 97, 103 (1979) (juvenile delinquent's name discovered by monitoring police band radio frequency and interviewing eyewitnesses was lawfully obtained and First Amendment did not permit punishing the press for publishing it); *Cox Broad Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (First Amendment prevents civil liability in connection with broadcast of rape victim's name disclosed in judicial records open for public inspection, notwithstanding that such information was supposed to have been withheld from the public file); *Oklahoma Pub'g Co. v. District Court*, 430 U.S. 308, 311 (1977) (per curiam) (trial court's order barring the press from publishing juvenile delinquent's name and photograph violated First Amendment where the press had obtained that information lawfully). When it comes to information the press obtains from the government, as here, the protection for publishing is absolute**: "once ... truthful information [is] 'publicly revealed' . . . [a] court [cannot] constitutionally restrain its dissemination."** *Florida Star*, 491 U.S. at 535 (quoting *Daily Mail*, 443 U.S. at 103) (emphasis added); *accord*, *Cox*, 420 U.S. at 495 ("The First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."). The reason for this is that "[p]ublic records by their very nature are of interest to those concerned with the administration of government":

> [A] public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Cox, 420 U.S. at 495 (emphasis added).[2]

That the court clerk's office erred in releasing suppressed court records to The Gazette does not alter the analysis. *See, e.g., Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 787 (3d Cir. 2005) (affirming dismissal of tort claim against newspaper because newspaper could not be held liable for publishing information about a child's arrest even though the police "violated Pennsylvania law prohibiting the release of juvenile arrest records" by giving the information to the newspaper); *Ostergren v. Cuccinelli*, 615 F.3d 263,280 (4th Cir. 2010) ("Even where disclosure to the press was accidental, Florida Star indicates that the press cannot be prevented from publishing the private information.").

This argument was expressly raised and rejected by the Supreme Court in *Florida Star.* In that case, a Florida state statute made it unlawful to publish the name of a victim of sexual assault. A weekly newspaper obtained a sexual assault victim's name from a police report that had been provided to the press. The newspaper published a story on the crime and included the name of the victim. 491 U.S. at 526-27. The victim sued the newspaper and argued to the Supreme Court that, "under Florida law, police reports which reveal the identity of the victim of a sexual offense are not among the matters of 'public record' which the public, by law, is entitled to expect." *Id.* at 536. The State's own failure to protect this highly sensitive information was not relevant to the Court's determination of whether the newspaper had a constitutional right to publish it; what mattered, in the view of the Court, was whether the newspaper lawfully

[2] Moreover, by making information publicly available, even by mistake, the government gives "implied representations of the lawfulness of dissemination." *Florida Star*, 491 U.S. at 536; *see id.* (noting that otherwise the media would be burdened with the "onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication").

obtained it from the state: "The fact that state officials are not required to disclose such reports [and, in fact, are statutorily prohibited from doing so] does not make it unlawful for a newspaper to receive them when furnished by the government." *Id.* (holding that imposition of damages against press, for violating state statute prohibiting publication of sexual offense victim's name, was unconstitutional); *Cox*, 420 U.S. at 495-96 (where name of sexual assault victim was on official court document, it was not "obtained in an improper fashion" by the press, which therefore had constitutional right to publish it; "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.").[3]

Under this well-established body of law, The Gazette is constitutionally entitled to publish the contents of the suppressed court records it lawfully obtained. First, there is no dispute that the Gazette obtained the court records at issue by lawful means. Second, the information contained in those court records – a motion filed by the defendant asking for a probable cause review in light of evidence presented to the grand jury suggesting the decedent's death was not the result of his actions – plainly concerns a matter of public significance.[4] Finally, there is no "state interest of the highest order" here that justifies the prior restraint order, even though the information the Court seeks to prevent from being published has not yet been

[3] As the Court reasoned in the most recent of this line of cases, "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki*, 532 U.S. at 529-30.

[4] This is not a high threshold. *See, e.g., Snyder v. Phelps,* 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.") (internal citations and quotation marks omitted).

deemed admissible at trial. *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 563-64 (surveying multiple "less restrictive" means to protect a defendant's fair trial rights, in finding a prior restraint on the press' publication of his confession unconstitutional).

The fact that some of the information The Gazette lawfully obtained includes a summary of evidence that was presented before the grand jury – which is deemed confidential by state statute – does not alter the analysis. In *Oklahoma Publishing Company*, the Supreme Court struck down as unconstitutional a trail court's prior restraint court order enjoining newspapers from publishing the name or picture of a minor child involved in a juvenile proceeding, because the press had obtained this information lawfully. The trial court had permitted the press to attend a hearing in the juvenile's case, despite the fact that *state law required those proceedings to be closed to the public*. When the judge attempted to prevent publication by issuing the injunction, the Supreme Court reversed, holding that once such truthful information is "publicly revealed" or otherwise "in the public domain," its further dissemination could not be constitutionally restrained. *Id.* at 311; *see also, e.g., In re The Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) (vacating as an unconstitutional prior restraint an injunction prohibiting the press from reporting information inadvertently disclosed in the course of an open hearing).

In short, the Court's Protective Order contravenes long-settled federal constitutional law. It also violates Article II Section 10 of the Colorado Constitution, which provides, without qualification, that "every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty." The Colorado Supreme Court has repeatedly held that this provision affords greater protection for individuals' free speech rights than does the First Amendment to the United States Constitution. *See, e.g., Bock v. Westminster*

Mall, 819 P.2d 55, 59-60 (Colo. 1991) (collecting cases). Moreover, the Court has cautioned that this constitutional scheme "expressly prohibits [prior] restraints" and contemplates other less restrictive remedies for the abuse of the freedom of speech. *See In re Hearings Concerning Canon 35*, ,296 P.2d 465, 470 (Colo. 1956).

The present case is remarkably similar to one litigated in 2016 in Boulder County District Court, *People v. Collins*, No. 16CR 1882. There, a reporter for the Boulder Daily Camera newspaper lawfully obtained, via email from an a "managerial employee" in the District Attorney's office, the conditionally suppressed arrest warrant affidavit for a minor charged with homicide. Upon learning the arrest warrant affidavit had been provided to the Daily Camera, former Chief District Court Judge Maria Berkenkotter entered an emergency order barring the Daily Camera from publishing or making use of the contents of the suppressed court record. Following a hearing held the very next morning on the Daily Camera's motion to lift the prior restraint order, Judge Berkenkotter granted that motion and vacated the unconstitutional prior restraint. *See* Exhibit 1 attached hereto. Judge Berkenkotter's order lifting the prior restraint assumed, for purposes of that ruling, that Colorado's Children's Code declared the arrest warrant affidavit was not to be made available to the public (i.e., it was "confidential" and restricted to being accessed only by specified participants in the case). Judge Berkenkotter also found that unlike the unique state interest "in providing a confidential evidentiary proceeding under the rape shield statute" that was at issue in *People v. Bryant*, 94 P.3d 624 (Colo. 2004), there were no equally compelling state interests "of the highest order" at stake in a suppressed affidavit of probable cause, even before a criminal trial and any judicial determination on the admissibility of any or all of the information contained in that record.

Just as was the case there, the circumstances here cannot justify the Court's extraordinary order barring publication of truthful information on a matter of public concern that was lawfully obtained by The Gazette. Merely because the Court has ordered that certain records be "suppressed" and not available for public inspection in the court file is not a "state interest of the highest order" and a readily available "less restrictive means" of protecting any state interest that justifies suppression is to ensure that all parties who do have lawful access to such records – the litigants, their counsel, and the court – adhere to their responsibilities to maintain such records as confidential. The case law above makes clear that when government (or private) parties fail to do so, the alternative remedy the Court has utilized – to order, upon penalty of contempt, the press from disseminating that information to the public – cannot satisfy the stringent test the First Amendment (and Article II Section 10) impose on a prior restraint order.

CONCLUSION

For the reasons set forth above, the Court's Protective Order is unconstitutional and should be vacated forthwith. *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) ("even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect"); *Nebraska Press Assn. v. Stuart*, 423 U. S. 1319, 1329 (1975) (Blackmun, J., in chambers) ("Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment."); *CBS v. United States Dist. Ct*., 729 F.2d 1174, 1177 (9th Cir. 1984) (damage resulting from "even a prior restraint of the shortest duration ... is extraordinarily grave").

Respectfully submitted this 26th day of April, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 26, 2022, a true and correct copy of the foregoing **THE DENVER GAZETTE'S FORTHWITH MOTION TO VACATE UNCONSTITUTIONAL PRIOR RESTRAINT** was served through Colorado Courts E-filing as follows:

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