District Court, City and County of Denver, Colorado Lindsey-Flanigan Courthouse, Room 135 520 W. Colfax Ave Denver, CO 80204 **Plaintiff**: The People of the State of Colorado **Defendant**: STEPHEN D. MATTHEWS (DOB 10/08/1987) **Non-Party Media**: Colorado News Collaborative (CoLab)	**COURT USE ONLY** Case Number: 2023CR002763 Div: Criminal Ctrm: 4G
Bree A. Beasley, Reg. No. 43867 Victoria Kelley, Reg. No. 46377 Senior Deputy District Attorney's For: Beth McCann, Reg No. 5834 District Attorney 201 W. Colfax Ave. Dept. 801 Denver, CO 80202 Phone Number: (720) 913-9000 Fax Number: (720) 913-9035 **Attorney for Non-Party Media:** Rachael Johnson, #43597 Reporters Committee for Freedom of the Press c/o Colorado News Collaborative 2101 Arapahoe Street Denver, CO 80205 Telephone: (970) 486-1085 Facsimile: (202) 795-9310 rjohnson@rcfp.org	

OBJECTION BY NON-PARTY COLORADO NEWS COLLABORATIVE TO THE ORDER SUPRESSING, *INTER ALIA*, EXHIBITS ADMITTED INTO EVIDENCE DURING PRELIMINARY HEARINGS

Pursuant to the order issued by this honorable Court on October 27, 2023, Non-Party Colorado News Collaborative ("COLab") by and through undersigned counsel, hereby submit this objection to a denial of access to the documents "reclassified as suppressed" by this Court, including but not limited to exhibits admitted during the Preliminary Hearings conducted in open court on August 18, 2023 and September 12, 2023. In support of its objection, COLab states as follows:

BACKGROUND

1. The Colorado News Collaborative ("COLab") is a nonprofit, statewide media resource hub and ideas lab that serves all Coloradans by strengthening high-quality local journalism, supporting civic engagement, and ensuring public accountability. This dynamic coalition unites journalists from over 180 newsrooms—print, online, radio and television; for profit and nonprofit—to create comprehensive news reporting and to enhance local journalism.

2. As members of the news media and as members of the public, COLab has standing to seek access to judicial records on file in this Court. *StarJournal Publ'g Corp. v. Cnty. Court*, 591 P.2d 1028 (Colo. 1979); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 609 n.25 (1982); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966). Additionally, according to this Court's October 27, 2023 Order, objections "will be entertained for the next 14 days." Order, p. 4. As such, COLab submits this timely objection in response to the Court's Order.

3. In this high-profile case of great public interest[1], Defendant Stephen D. Matthews has been charged by the state of Colorado in a multi-count criminal indictment with the alleged

[1] *See, e.g., Denver doctor accused of drugging, sexually assaulting women he met on dating apps pleads not guilty*, ABC News, https://abcnews.go.com/US/denver-doctor-accused-sexually-assaulting-women-dating-apps/story?id=103785572 (Oct. 6, 2023); Keiran Nicholson,

sexual assault and alleged drugging of thirteen adult accusers. Case No. 2023CR002763. At his October 6, 2023 arraignment, Defendant entered a not guilty plea.

4. This Court held Preliminary Hearings in this matter on August 18, 2023, and September 12, 2023, where certain documentary exhibits (the "Exhibits"), appear to have been admitted into evidence and were also provided in open court with members of the public present.

5. On September 29, 2023, the Fuller Project filed a Motion to Unsuppress Court Records Forthwith and sought access to "55 documentary exhibits that were entered in to evidence in the preliminary hearing." Fuller Motion at 2.

6. On October 4, 2023, this Court issued an Order permitting the District Attorney and Defense counsel 14 days to respond to the Fuller Project's Motion to Unsuppress.

7. On October 13, 2023, Defendant filed a Notice Regarding Pending Response to Non-Party's Motion to Unsupress. Dkt. No. 4DBD5928A5D24.

8. And on October 16, 2023, the People filed a Response to the Fuller Project's Motion to Unsuppress, Dkt. No. A495E8CE74C90, requesting that "the Court keep the entirety of the Court record restricted; if the Court declines to do so, the People seek an order keeping identifying information of the victim's restricted."

9. Defendant filed its Response to the Fuller Motion and Request for Distinction Between Restricting Access on October 18, 2023, Dkt. No. 64C6F50FD7B56, requesting that this Court "make a clear distinction between restricting access to 'court records' pursuant to directive, rule or statute, versus identification of accusers in public hearings."

Cardiologist now faces 34 felony counts for drugging or sexually assaulting 16 women, THE DENVER POST, https://www.denverpost.com/2023/06/07/stephen-matthews-cardiologist-sexual-assault-charges/ (June 7, 2023).

10. On October 27, this Court issued an Order Limiting Public Access to Specified Documents (the "Order") in response to the above-filed motions. In support thereof, the Court cited "a substantial interest in shielding third parties' private, sensitive information from the public eye, as well as in protecting the individuals, who have no connection to this case, from potential physical harm, embarrassment, harassment, intimidation, tampering, and other risks arising from the individuals' public association with this high-profile matter." Order at ¶ 7.

11. The Court's Order also references concerns with "references to medically protected information" under the federal Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 100 Stat. 2548 (codified as amended in scattered sections of U.S.C.) ("HIPAA"), even though neither the Court nor any of the parties is a covered entity under HIPAA in this context. *Id*. at ¶ 8; 45 CFR § 160.103.

12. The Order further states: "Based upon the pre-trial publicity to date, it is probable that if public access to certain court documents (or portions thereof) is not limited press or social media coverage would interfere with the ability of the court to pick neutral, fair, and impartial jury." Order at ¶ 11.

13. The Court "reclassified as 'suppressed'" the following documents:

a. Affidavit for Arrest Warrant, 9 pages, filed 16 May 2023.

b. Mandatory Protection Order Pursuant to § 18-1-1001 filed 17 May 2023.

c. Supplemental Endorsed List of Witnesses filed 12 June 2023.

d. Supplemental Endorsed List of Witnesses filed 14 June 2023.

e. Supplemental Endorsed List of Witnesses filed 21 June 2023.

f. All Mandatory Protection Orders issued by the Court on 22 June 2023.

g. Supplemental Endorsed List of Witnesses filed 28 September 2023.

h. Expert Witness Endorsement filed 10 October 2023.

i. All exhibits admitted during the preliminary hearing held on 18 August and 12 September 2023.

14. Pursuant to the October 27, 2023 Order, "[o]bjections to this Order becoming permanent will be entertained for the next 14 days, after which the Court will either set a hearing on this issue or enter a ruling based on the pleadings." COLab hereby objects to the Order becoming permanent and in support state as follows.

ARGUMENT

I. The Court's Order does not comply with Colorado Rule of Criminal Procedure 55.1(a)(6)(II).

15. Colorado Rule of Criminal Procedure 55.1 requires Colorado Courts to apply a strong presumption of public access to judicial records in criminal cases.

16. Since C.R.Cr.P 55.1 went into effect in May 2021, Colorado courts have applied it to unseal court records in contravention of its provisions. *See, e.g.*, *People v. Mark D. Thompson*, No. 2021CR264 (Colo. Dist. 2021) (the sealing of the entire case file after the district attorney argued that the defendant "is a prominent member of the Summit County community" and that the release of court records in the defendant's criminal case "could jeopardize the ongoing investigation" was improper and contravened C.R.Cr.P 55.1).

17. The judicial and court records in this case that have been reclassified as "suppressed" pursuant to the Court's Order are subject to C.R.Cr.P. 55.1, which imposes a high burden on any party seeking to overcome the public's strong presumptive right to access a "court record" in a criminal case. *See* C.R.Cr.P. 55.1(a)(1) ("Court records in criminal cases are *presumed* to be accessible to the public.") (emphasis added).

18. Under C.R.Cr.P. 55.1(a)(6), a "court shall not grant any request to limit public access to a court record or to any part of a court record, or enter an order on its own motion limiting such public access, unless it issues a written order in which it":

> (I) specifically identifies one or more substantial interests served by making the court record inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public;
>
> (II) *finds that no less restrictive means than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect any substantial interests identified*; *and*
>
> (III) concludes that any substantial interests identified override the presumptive public access to the court record or to an unredacted copy of it.

C.R.Cr.P. 55.1(a)(6) (emphasis added.)

19. Although this Court "conclude[s] that no less restrictive means than limiting access exists to achieve or protect the substantial interests identified; and concludes that any substantial interests identified override the presumption of public access," COLab respectfully submits that this generalized, conclusory finding of the supposed need for blanket suppression of the entirety of documents does not pass muster. *See In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987)("Broad and general findings by the trial court…are not sufficient to justify closure."). The Order fails to offer any explanation why the release of redacted records, withholding only the identities of victims and particularly sensitive medical information, cannot adequately protect the substantial interests the Court has identified. *See*, e.g., *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 947, 951 (9th Cir. 1998) ("[e]ven where denial of access is appropriate, it must be no greater than necessary to protect the interest justifying it" and "redaction [of the hearing transcript] would have safeguarded the jurors' anonymity.") (quoting *United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982)); *U.S. v. Index*

Newspapers LLC, 766 F.3d 1072, 1095 (9th Cir. 2014) ("Redactions shall be limited . . . and should sweep no more broadly than necessary to protect [the compelling state interest]"); *U.S. v. Pickard*, 733 F.3d 1297, 1304-05 (reversing trial court's blanket sealing order because "the district court did not consider whether selectively redacting just the still sensitive, and previously undisclosed, information from the [records]…would adequately serve the government's interest"); *Kanza v. Whitman*, 325 F. 3d 1178, 1181 (9th Cir. 2003)(where release of court records poses risk to national security, "[p]ublic release of redacted material is an appropriate response."); *In re N.Y. Times Co*., 834 F.2d 1152, 1154 (2d Cir. 1987)(approving of requirement "to minimize redaction in view of First Amendment considerations"); *In re Providence Journal Co., Inc*., 293 F.3d 1, 15 (1st Cir. 2002)("The First Amendment requires consideration of the feasibility of redaction on a document-by-document basis").

20. Here, the Order's expression of generalized concerns with respect to disclosure of certain information contained in a set of court records does not satisfy Rule 55.1; it requires specific, page-by-page, and line-by-line findings of the need to override the strong presumption of public access.

21. Further, the Court's stated concern that the Exhibits contain information otherwise protected under HIPAA is incorrect. The disclosure of any medical records by third-party medical providers in connection with this litigation is consistent with HIPAA, and the Court's unsealing of court records containing medical information does not implicate HIPAA at all. *See* 45 C.F.R. § 164.501 (where a covered entity is party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations); 45 C.F.R. § 164.512(e)(1)(i)

(disclosure of medical records appropriate where made pursuant to a court order). Accordingly, the judicial records may be unsealed without implicating HIPAA.

II. The public has a right to access judicial records in criminal cases.

a. The public's right to access is rooted in the common law.

22. The press has succeeded in challenges to denials of access to court records before both trial courts and Colorado's Supreme Court with respect to the common law right of access. *See People v. Robert LewisDear*, 2016 SA 13 (Colo. Mar. 21, 2016) (following grant of C.A.R. 21 petition by media 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); *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); *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)[2].

[2] Courts across the country have likewise found that the public has a presumptive right to inspect court records rooted in the common law. *See, e..g., 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). Among other things, the common law right of access to judicial records ensures that courts "have a measure of accountability" and promotes "confidence in the

23. Although the Colorado Supreme Court has declined to recognize that the qualified First Amendment right of access applicable to criminal proceedings extends to documents on file in criminal cases, the Colorado Supreme Court has recognized that "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

24. Press interest will certainly continue as this case progresses. It is vital that the press be able to inform the public and affected industries about this case and help the public understand how our system of justice functions. Access to the Exhibits already presented in open court is essential to the news media's ability to explain the process and eventual verdict to the public. The Court's retroactive sealing order undermines the fundamental principles upon which the presumptions of public access to court records are founded and would prevent the press from doing its job properly.

b. There is an even stronger right of access to evidence and documents that have already been admitted in pre-trial criminal proceedings in open court.

25. Because the Exhibits were admitted in open court, with no motion to seal at the time they were admitted into evidence, there is no interest that can justify their retroactive sealing. As the Supreme Court has stated, "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Accordingly, members of

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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).

the media and the public are free to report on whatever occurs in open court. *Estes v. Texas*, 381 U.S. 532, 541–42 (1965).

26. The Exhibits appear to have been admitted in open court and readily observed by anyone in the courtroom, including the public and the press. Having allowed these public observations, this Court cannot now try to put the genie back into the bottle and restrict access to the Exhibits.

III. Defendant's fair trial rights can be protected without depriving the public of access to judicial or court records.

27. As the U.S. Supreme Court has explained, "pretrial publicity, even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press Association*, 427 U.S. 539, 554 (1976). And in *People v. McCrary*, 549 P.2d 1320, 1325 (Colo. 1976), the Colorado Supreme Court reasoned that pre-trial publicity is not enough to require a change of venue, even if the publicity is extensive.[3] The court held that "[o]nly when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required *before* voir dire examination." *Id.* at 1326 (emphasis added)[4].

[3] *See Id*. at 1325 (denying change in venue despite many newspaper and broadcast reports on the allegations, including a story about the defendant's family indicating a connection to as many as 22 murders; distinguishing from the kind of massive, pervasive and prejudicial publicity in *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

[4] Evidence admitted in pre-trial criminal proceedings has been found by other courts to be subject to either a First Amendment or common law right of access to judicial records. *See, e.g.*, *Commonwealth v. Upshur*, 592 Pa. 273, 924 A.2d 642 (2007) (audio tape of 911 call played at preliminary hearing); *Commonwealth v. Amoore*, No. CP-46-CR-3723-2016 (Order of June 2, 2016) (allowing press intervenor to copy videotape played and admitted into evidence at preliminary hearing); *New York v. Hyson*, 30 Media .L Rptr. (BNA) 2566, 2567 (N.Y. Sup. Ct. 2001) (granting media intervenor access to videotape interview of defendant describing death of an infant because "once a videotape . . . has been admitted into evidence and played in open court there is a First Amendment protect[ed] right to anyone to inspect and obtain a copy of the tape"); *Cf. United States .v Saunders*, 611 F. Supp. 45 (S.D. Fla. 1985) (stating that numerous courts "have repeatedly recognized that once a tape has been admitted into evidence and played

28. Further, in *People v. Hankin*s, 361 P.3d 1033, 1036–37 (Colo. App. 2014), the Colorado Court of Appeals held that pretrial publicity infringes on a defendant's right to a fair trial only in extreme circumstances.[5] The appellate court in *Hankin*s defined extreme circumstances as present "[o]nly when the publicity is so ubiquitous and vituperative that most jurors ... could not ignore its influence." *Id.* at 1035. The court held the pretrial publicity in the case before it, though extensive, was not so massive, pervasive, and prejudicial as to create presumption of prejudice justifying change of venue before jury *voir dire*.

29. Additionally, it is well-settled that *voir dire* is the "preferred safeguard against" pretrial publicity. *In re Charlotte Observer*, 882 F.2d 850, 855. Careful *voir dire* has been used successfully in "massive[ly]" publicized cases, including the prosecution of defendants involved in watershed controversies like Watergate and Abscam. *Id.* at 855-56; *see also People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983) (where trial court allowed extensive voir dire of potential jurors to ensure impartial verdict and resolved most juror challenges in favor of defendant, voir dire examination failed to establish any obvious nexus between pretrial publicity of the case and juror prejudice against defendant). Indeed, in the high-profile multiple murder prosecution of James Holmes (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

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in open court, the common law and the first amendment establish the right of those interested to inspect and copy the tape.").

[5] For context, in *Hankins*, the defendant was on trial for the murder of his wife. "The Craig Daily Press," published 24 articles regarding the crime, including some mentioning the defendant's confession to the killing and dismemberment of the victim's body. The defendant requested a change of venue because he believed the publicity from such articles would preclude him from receiving a fair trial. The court denied the request, reasoning that the publicity in the case was extensive "but *not* massive, pervasive and prejudicial as to create a presumption that defendant was denied a fair trial."

trial, and the Court was able to seat a jury of impartial death-qualified jurors. *People v. Holmes*, No. 12-CR-1522 (Arapahoe Cty. Dist. Ct. Apr. 4, 2013).

30. As the *McCrary* Court explained, "an 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." *Id*. at 1325.

31. Courts have also held that purely factual reporting is not considered prejudicial. *See U.S. v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) (purely factual coverage creates no presumption of prejudice); *see also McCrary*, 549 P.2d at 1325. There are numerous facts already available to the public related to the charges against the Defendant and such factual information is not, by definition, prejudicial to Defendant's ability to obtain a fair trial. *See Angiulo*, 897 F.2d at 1181; *see also McCrary*, 549 P.2d at 1325.

32. Given the amount of information already in the public record about the charges against Defendant and the prior disclosure of many of the Exhibits at the Preliminary Hearings, there is no demonstrated need to restrict public access to the Exhibits filed in this case.

CONCLUSION

For the reasons set forth above, COLab respectfully requests that the Court grant the public access to the exhibits that appear to be admitted, and were introduced during the Preliminary Hearings; as well as the documents marked "suppressed" pursuant to this Court's Order on October 27, 2023, *see* Order, pp. 3-4.

Respectfully submitted this 9th day of November, 2023.

By */s/Rachael Johnson*

Rachael Johnson
Reporters Committee for Freedom of the Press
Attorney for COLab

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2023, a true and correct copy of the foregoing **MOTION BY NON-PARTY COLORADO NEWS COLLABORATIVE FOR ACCESS TO EXHIBITS ADMITTED INTO EVIDENCE DURING PRELIMINARY HEARINGS** was served through the Colorado Courts E-File & Serve electronic court filing system, pursuant to C.R.C.P. 121(c), § 1-26:

/s/Rachael Johnson
Rachael Johnson