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DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Court Address: 270 S. Tejon Street Colorado Springs, CO 80903	DATE FILED: December 5, 2022 FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO DEC 05 2022 SHERI KING CLERK OF THE DISTRICT COURT COURT USE ONLY
PEOPLE OF THE STATE OF COLORADO v. **ANDERSON LEE ALDRICH,** Defendant	Case Number: **22CR6008** Division: 21
Attorney for Media Coalition: Steven D. Zansberg, 26634 LAW OFFICE OF STEVEN D. ZANSBERG, LLC 100 Fillmore Street, Suite 500 Denver, CO 80206 (303) 385-8698 steve@zansberglaw.com	

MEDIA COALITION'S MOTION TO VACATE COURT ORDER SUPPRESSING THE ARREST WARRANT AFFIDAVIT AND FOR PUBLIC ACCESS TO ALL COURT RECORDS

The American Broadcasting Companies, Inc. d/b/a ABC News and 35 other members of the news media,[1] (collectively herein "the Media Coalition") by and through their undersigned counsel, hereby respectfully move this Honorable Court to vacate the Court Order suppressing the affidavit of probable cause in support of arrest, and urge the Court not to enter any other order suppressing any court record on file, or to be filed, in this case, without strictly complying with Rule 55.1 of the Colorado Rules of Criminal Procedure.

[1] The following media companies, newspapers, and television stations (in alphabetical order) comprise "the Media Coalition": American Broadcasting Companies, Inc. d/b/a ABC News, The Aspen Times, The Associated Press, Bloomberg LP, CBS, Colorado Public Radio, Colorado Springs Gazette, Colorado Sun, The Denver Gazette, The Denver Post, Fort Collins Coloradoan, , Gray Media Group, Inc., d/b/a KKTV-TV/Channel 11; Insider.com, KCNC-TV/Channel 4, KDVR-TV/Channel 31, KMGH-TV/Channel 7, KOAA-TV/Channel 5, KRDO-TV/Channel 13, KUSA-TV/Channel 9, KXRM-TV/Channel 21, Los Angeles Times Communications, LLC, Media News Group, NBC Universal, The New York Times Company, Nexstar Media Group, Inc., Ogden Newspapers, The Orange County Register, Pueblo Chieftain, San Jose Mercury-News, Scripps, Steamboat Pilot, Summit Daily News, TEGNA Inc., USA Today, Vail Daily, WP Company LLC d/b/a The Washington Post.

INTRODUCTION

1. The events giving rise to this criminal prosecution hardly need to be stated. Just before midnight on Saturday November 20, 2022, the Defendant entered Club Q, previously thought to be a safe haven for the LGTBQ community, and opened fire, with a semi-automatic assault rifle. Five innocent and precious souls were lost,[2] and eighteen individuals were wounded in the melee. The Defendant was apprehended at the scene and is now facing a host of criminal charges, including, at a minimum five counts of murder and five counts of bias-motivated crime causing bodily injury.

2. It is impossible to overstate the public interest surrounding these proceedings. Coming on the eve of the annual Transgender Day of Remembrance and only days before the Thanksgiving holiday, the deadly assault on Club Q patrons has drawn public and media attention not only in Colorado, or even the United States, but across the planet.[3] Colorado's Governor described the Defendant's acts as "horrific, sickening, and devastating." How the judicial system processes the individual accused of these crimes is of the utmost public interest and concern.

3. This motion, filed by the news media as surrogates for the public, asks the Court to vacate the order suppressing the affidavit of probable cause supporting the Defendant's arrest. Now that charges are being filed, there are no compelling interests that would be prejudiced by immediate disclosure and there are myriad alternative means available to secure a fair trial for the Defendant, months or years from now. In addition, this Motion asks the Court not to enter any order that suppresses any court record to be filed in this case without satisfying the rigorous standards imposed by Rule 55.1 of the Colorado Rules of Criminal Procedure.

ARGUMENT

I. The Media Coalition Has Standing to Be Heard

4. Rule 55.1 of the Colorado Rules of Criminal Procedure sets forth the requirements for suppressing any "court record" on file in a criminal case in this state. The affidavit of probable cause that is the subject of the Court Order entered November 20, 2022 at 7:12 a.m. (hereinafter "the Order"), is one such "court record." The Rule's procedural and substantive requirements for suppression will be addressed below.

5. Even before Rule 55.1 was adopted, courts in the state, including Colorado's Supreme Court, routinely recognized the rights of the public (including members of the press) to be heard in opposition to suppression of judicial records and/or closure of court proceedings to the public. *See, e.g., People v. Dear*, No. 2016SA13, Order and Rule to Show Cause (Jan. 27, 2016) (allowing members of the news media to challenge suppression of court records in a criminal case); *People v.*

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[2] The five victims who lost their lives are Daniel Aston, Kelly Loving, Ashley Paugh, Derrick Rump, and Raymond Green Vance.

[3] *See, e.g.,* https://www.lemonde.fr/en/international/article/2022/11/20/suspect-arrested-in-colorado-lgbtq-nightclub-shooting_6004987_4.html; https://www.theguardian.com/us-news/2022/nov/25/colorado-springs-shooting-club-q-lgbtq-people-facing-different-kind-of-hate; https://www.spiegel.de/ausland/colorado-springs-das-ist-zur-attacke-in-lgbtq-nachtclub-bekannt-a-6c4a4582-ec34-439e-a710-0d1e4f4077b4

Thompson, 181 P.3d 1143 (Colo. 2008) (same); *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966) (same, in a civil case); *see also 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).

II. The Order Suppressing the Affidavit of Probable Cause Does Not Comply with Colo. R. Crim. P. 55.1

6. As noted above, the affidavit of probable cause is a "court record" in this case. As such, any order denying the public's right to inspect that record, or any portion thereof, must comply with Colo. R. Crim. P. 55.1(a)(1), which declares that "Court records in criminal cases are presumed to be accessible to the public. . . . [Accordingly,] the court may deny the public access to . . . *any part* of a court record *only* in compliance with this rule." (emphasis added). The substantive standard set forth in "this rule" is contained in subsection (a)(6):

> The court *shall not grant any request to limit public access to a court record or to any part of a court record* . . .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.

7. Furthermore, C.R.C.P. 55.1(a)(7) states that "[a]ny order limiting public access to a court record or to any part of a court record shall indicate a date or event certain by which the order will expire." This subsection of the Rule recognizes "the importance of immediate access when a right of access is found." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (access to court records "should be immediate and contemporaneous."); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) ("the public interest encompasses the public's ability to make a *contemporaneous review* of the basis of an important decision") (emphasis added).

8. Quite clearly, the Order does not comply with several of the explicit requirements of the Rule. Specifically, it does not satisfy either subsections (a)(6)(II) or (III). The Order also does not "indicate a date or event certain by which the order will expire." Stating that the suppression

order shall remain in effect until "completion of the investigation in this case" does not identify a "date or event certain."

9. Because the Order does not comply with the applicable Rule, which imposes clear and specific requirements on all courts in this state to deny the public's presumptive right to inspect all "court records," the Order should be vacated forthwith.

III. The Defendant Cannot Make The Showing That Would Permit The Court to Enter Findings Necessary to Continue Suppressing the Arrest Warrant Affidavit

10. Any party wishing to have the Court maintain the suppression of the affidavit of probable cause, *or any other court record*, must come forward with evidence that persuades the Court to enter the findings required in Colo. R. Crim. P. 55.1(a)(6). Neither party can do so.

11. Prior to filing this motion, undersigned counsel conferred with counsel for the People and for the Defendant. The People indicated that once the preliminary investigation has been completed, with the filing of formal charges on December 6, 2022, they do not oppose the relief sought herein. Counsel for the Defendant has indicated that he opposes the relief sought herein.

12. The Media Coalition anticipates that Defendant will contend that making the affidavit of probable cause in support of his arrest available to the public will prejudice his right to receive a fair trial. Of course guaranteeing a fair trial to a criminal defendant is a "substantial" governmental interest under prong (I) of Rule 55.1(a)(6). However, to the extent that any information in the affidavit of probable cause has already been revealed to the public, either through prior reports[4] or open court proceedings, or will be disclosed *prior to jury selection* (*i.e.,* in the course of a preliminary hearing that will be open to the public), there can be no showing that disclosure of that same information contained in the probable cause affidavit would pose any cognizable threat to the Defendant's fair trial right. *See, e.g., U.S. v. Pickard,* 733 F.3d 1297, 1305 (10th Cir. 2013) (holding that information that has "been disclosed in public . . . court proceedings" is not properly subject to sealing); *In re Herald Co.,* 734 F.2d 93, 101 (2nd Cir. 1984) (holding that a there is no basis to deny public access if "the information sought to be kept confidential has already been given sufficient public exposure"); *United States v. Gotti,* 771 F. Supp. 567, 569 (E.D.N.Y. 1991) ("Additional publicity which may flow from unsealing the record at this time, would, in my judgment, not give rise to a probability, substantial or otherwise, that defendants' right to a fair trial will be prejudiced."); *In re Charlotte Observer,* 882 F.2d 850, 854 (4th Cir.1989) (finding "highly dubious" the proposition that "the defendant's fair trial right would be decisively prejudiced by republication of [information] earlier put in the public domain"); *In re New York Times*, 828 F.2d 110, 116 (2d Cir. 1987) (holding that sealing of court papers is not proper where much of the information contained in them "has already been publicized").

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[4] By way of example, only, it has been widely reported, and discussed at official press conferences, that the Defendant was apprehended by two patrons of Club Q after he entered the club wearing body armor and armed with an AR-15-style assault rifle, shot and killed five people and wounded eighteen others, that the Defendant identifies as non-binary, that Mx. Aldrich was a former drug user and had previously uttered anti-gay slurs.

13. Even as to information in the probable cause affidavit that has not yet been publicly disclosed, and even if incriminating information therein might potentially be excluded at trial, the Defendant simply cannot to meet his evidentiary burden of satisfying prongs (II) or (III) of the Rule. Regularly, and routinely, courts across the nation have held that arrest warrant affidavits must be made available to the public immediately following a defendant's arrest and initial charging. *See, e.g. People v. Blagg*, No. 02-CR-623 (Mesa County Dist. Ct. June 5, 2002) (first-degree murder arrest affidavit unsealed before trial); *People v. Garcia- Flores*, No. 0l-CR-46, (Pitkin County Dist. Ct. July 20, 2001) (felony sexual assault and attempted murder unsealed upon motion by news media); *People v. Lamberth*, No. 2006-CR-1048 (El Paso Cty. Dist. Ct. Mar. 27, 2006) (Schwartz, J.) (unsealing affidavit of probable cause prior to preliminary hearing over defendant's objection); *accord Greenwood v. Wolchik*, 544 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."); *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987)..

14. Courts similarly have granted public access to affidavits of probable cause (in support of search warrants) long before trial or even a preliminary hearing. "Public scrutiny of the search 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). And more importantly, "[p]ublic access . . . may also serve to deter unreasonable warrant practices, either by the police or the courts." *Id.* "Permitting inspection of the search 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.*

15. The U.S. District Court for the Western District of North Carolina rejected a criminal defendant's request to deny public access to an affidavit of probable cause before trial because it contained inculpatory information that would not be admissible at trial. *See United States v. Blowers*, No. 3:05-CR-0093, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005):

> An "admissibility standard" would ignore the ability of the *voir dire* process to identify jurors who have been prejudiced by pretrial publicity and are therefore unable to render a verdict based upon evidence presented at trial. . .. It would also exclude much of the criminal justice system from the public arena. If information could never be disclosed simply because it might be inadmissible at trial, much about the world of crime and the criminal justice system would be withdrawn from public view. . .. [A]ny negative publicity resulting from unsealing of those portions of the search warrant affidavit can be adequately addressed through the *voir dire* process. It is therefore unlikely that the release of the entire affidavit will interfere with Mr. Blowers' constitutional right to a fair trial. The search warrant affidavit is ordered released in its entirety.

(internal quotation marks and citations omitted); *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.... [I]t is unlikely that 'searching questioning of 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)).

16. Indeed, it is firmly established that the myriad "less restrictive means" than suppression of court records adequately protect a criminal Defendant's fair trial rights. The trial judge may:

> (1) [allow] 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; (5) enlarge the size of the jury panel and increase the number of peremptory challenges; or (6) 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). Unless the Court can make the required judicial findings, on the record, that every one of those alternative means is *not* adequate, there is no basis for blanket suppression of the probable cause affidavit, or any other court record.

17. Courts have recognized that boilerplate concerns about "high-profile" criminal cases posing a difficulty to empaneling an impartial jury are frequently overstated. *See, e.g., see Skilling v. United States,* 561 U.S. 358, 384-85 (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. (United States v. DeLorean)* 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 (United States v. Bakker),* 882 F.2d 850, 855-56 (4th Cir. 1989) ("Cases such as those involving the Watergate defendants, the Abscam defendants, and . . . 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 half of potential jurors were unaware of Timothy McVeigh's purported confession to the Oklahoma City bombing despite ubiquitous press coverage given to that confession on the eve of trial).

18. As Colorado's Supreme Court noted 46 years ago:

> [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 the 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).

19. Moreover, empirical research confirms that jurors are able to set aside their conclusions based on extensive and prejudicial pretrial publicity and base their verdict solely on the evidence presented in court. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991); *see Skilling,* 561 U.S. at 398 (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 pervasive local coverage of Enron's collapse and alleged crimes perpetrated by firm's management, including the defendant) (quotation and citation omitted); *id.* at 391 n. 28 (citing cases where, despite extensive pretrial publicity, an impartial jury was empaneled).

20. In the aftermath of the highly-publicized mass shooting in Arizona involving a sitting member of Congress, the federal district court ruled that the defendant'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, that 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.*

21. Because myriad "less restrictive" prophylactic measures are available, and there has been no showing that such alternative measures are not adequate to protect the Defendant's right to a fair trial, the Court cannot enter the record findings required by C.R.C.P. 55.1(a)(6) to justify suppression of the entirety of the probable cause affidavit.[5]

IV. The Court Should Not Suppress Any Other Court Record in This Case Without Complying with Rule 55.1 of the Colorado Rules of Criminal Procedure

22. Because the public's presumptive right to inspect court records is a right of contemporaneous access, post-suppression challenges such as this trammel that right. Accordingly, the Media Consortium hereby object, prospectively, to denial of public access to any portion of any other court records, either presently on file or *to be filed* in this case, unless and until the party seeking to deny that presumptive right of public access meets its burden of proof, and the Court enters the record findings thereon, as required by C.R.C.P. 55.1(a)(6).

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[5] Release of a redacted version of the probable cause affidavit is a "less restrictive alternative" than blanket sealing of court documents in their entirety. *See, e.g., In re Nat'l Prescription Opiate Lit.*, 927 F.3d 919, 939 (6th Cir. 2019) (reversing district court's sealing order and requiring district court, before sealing documents, to "explain . . . why the seal itself is no broader than necessary") (internal quotation marks and citations omitted); *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (holding, in a criminal case, that "wholesale sealing of motion papers was more extensive than necessary to protect defendants' fair trial rights, their privacy interests, and the privacy interests of third persons").

CONCLUSION

For the reasons set forth above, the Media Coalition respectfully asks this honorable Court to vacate the order suppressing the affidavit of probable cause forthwith and urges the Court not to enter any order suppressing any other Court Record without entering the findings required by Rule 55.1 of the Colorado Rules of Criminal Procedure.

DATED: December 5, 2022

By /s/ *Steven D. Zansberg*
Steven D. Zansberg
LAW OFFICE OF STEVEN D. ZANSBERG, LLC

Attorneys for the Media Coalition

THIS MOTION WAS FILED WITH THE COURT THROUGH THE ICCES ELECTRONIC FILING PROCEDURES, UNDER C.R.C.P. 121(C), § 1-26.

AS REQUIRED BY THOSE RULES, THE ORIGINAL SIGNED COPY OF THIS PLEADING IS ON FILE WITH LAW OFFICE OF STEVEN D. ZANSBERG, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served, this day, December 5, 2022, on the following counsel of record, by emailing a courtesy copy to their offices, and by also depositing a hard copy in the United States Postal Service to the addressees below:

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