UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN RE PETITION FOR WRIT OF MANDAMUS OF LOS ANGELES TIMES COMMUNICATIONS LLC	Civ. Action No. 21-cv-1508 Related Cases: No. 1:21-SW-00028 No. 1:21-MJ-00009

MEMORANDUM OF LAW IN SUPPORT OF LOS ANGELES TIMES COMMUNICATIONS, INC.'S PETITION FOR WRIT OF MANDAMUS COMPELLING UNSEALING OF JUDICIAL RECORDS IN CASE NO. 1:21-SW-00028 OR, IN THE ALTERNATIVE, MOTION TO INTERVENE AND UNSEAL

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INTRODUCTION

Los Angeles Times Communications LLC (the "Los Angeles Times") respectfully submits this Memorandum of Law in support of its Petition for Writ of Mandamus Compelling Unsealing of Judicial Records in Case No. 1:21-SW-00028 or, in the Alternative, Motion to Intervene and Unseal (hereinafter the "Petition"). By its Petition, the Los Angeles Times seeks an order directing the Clerk of the Court to unseal the sealed judicial records in Case No. 1:21-SW-00028, including the search warrant, search warrant application, any supporting affidavits, return, docket sheet, and any other judicial records connected to the search warrant served on Klete Derik Keller ("Keller") at his residence in Colorado Springs, Colorado on or about January 14, 2021 (the "Search Warrant Materials"). Alternatively, the Los Angeles Times moves to intervene for the limited purpose of seeking an order unsealing the sealed Search Warrant Materials in Case No. 1:21-SW-00028.

The Tenth Circuit has recognized that members of the public, like the Los Angeles Times, have a qualified common law right to inspect judicial records, including, specifically, search warrant materials. *Matter of Search of 1638 E. 2nd Street, Tulsa, Okl.*, 993 F.2d 773, 775 (10th Cir. 1993) (search warrant affidavit is judicial record subject to qualified common law right of access). And the Los Angeles Times—and, indeed, the public at large—has a particularly powerful interest in access to the specific Search Warrant Materials at issue here. The target

of the search warrant, Keller, is a former U.S. swimmer and Olympic gold medalist with ties to Southern California who has been charged with federal crimes for his alleged participation in the January 6, 2021 riot at the U.S. Capitol (hereinafter the "Capitol Riot"). *See* Peter Baker and Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, New York Times (Feb. 13, 2021) (describing the events as "a violent attempt to subvert the peaceful transfer of power, the first in American history."), https://nyti.ms/2Ra5sVP. Because, for the reasons detailed herein, there can be no countervailing interests that overcome the public's qualified right to inspect the Search Warrant Materials, the Court should enter an order directing the Clerk of the Court to unseal them.

STANDING

The Los Angeles Times has standing for the limited purpose of seeking access to the sealed Search Warrant Materials. Courts have long recognized that members of the public, including members of the press, "must be given an opportunity to be heard on the question of their exclusion [from judicial proceedings]." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (internal marks and citation omitted)). And the Tenth Circuit has expressly held that a news organization has standing to challenge a court order that "impede[s] its ability to gather news" because such an "impediment is within the zone of interest sought to be protected by the first amendment." *Journal Publ'g*

Co. v. Mechem, 801 F.2d 1233, 1235 (10th Cir. 1986) (holding that a newspaper had standing to challenge gag order prohibiting communications with former jurors in a high-profile case). Here, because the Court's continued sealing of the Search Warrant Materials is impeding the Los Angeles Times' newsgathering efforts, and an order unsealing those judicial records will remove that impediment, the Los Angeles Times has standing to seek such an unsealing order. *Compare Exum v. U.S. Olympic Comm.*, 209 F.R.D 201, 204–05 (D. Colo. 2002).

The Tenth Circuit has indicated that a petition for writ of mandamus pursuant to 28 U.S.C § 1361 is the proper procedural mechanism for a member of the public to challenge a court order sealing court documents in a criminal proceeding. *See United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997). Pursuant to 28 U.S.C § 1361, district courts have original jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

In the alternative, both the Tenth Circuit and courts in this district have held that intervention is a proper procedural mechanism for members of the press to challenge sealing or other orders that impede its ability to gather news. *See United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (explaining, in the context of a civil matter, that "courts have widely recognized that the correct procedure for a nonparty to challenge a protective order is through

intervention for that purpose.") (citation omitted); *see also Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993) (holding that newspaper had standing to intervene in civil matter to challenge order requiring confidentiality of a settlement even though it had failed to strictly comply with Rule 24 of the Federal Rules of Civil Procedure).

Courts within the Tenth Circuit have taken a flexible approach to considering requests from members of the public to unseal judicial records regardless of whether those requests are styled as a motion to unseal or a petition for writ of mandamus. *See, e.g., United States v. McVeigh*, 918 F. Supp. 1452, 1456 (W.D. Ok. 1996) (considering news media's requests for access presented via motions, but noting that because news media were not "parties to this criminal proceeding" the "motions are more appropriately considered as a collateral or ancillary civil action in the nature of a petition for a writ of mandamus . . . "); *Riker v. Lappin*, No. 05-cv-01178, 2008 WL 11434592, at *1 (D. Colo. Mar. 24, 2008), *aff'd sub nom. Riker v. Fed. Bureau of Prisons,* 315 F. App'x 752 (10th Cir. 2009) (rejecting defendants' argument that a motion to unseal should be denied because it was not styled as a petition for writ of mandamus, noting that "even assuming—without necessarily finding" that a petition for writ was required, "there is no reason why this Court cannot construe [the] motion as a request for such a writ.").

STATEMENT OF FACTS

Klete Keller is a two-time Olympic gold medalist swimmer who completed his collegiate swimming career at the University of Southern California in Los Angeles. *See* Nathan Fenno, *Olympian Klete Keller Rebuilt His Life Following Struggles. Then Came the Capitol Riot*, Los Angeles Times (Jan. 13, 2021), https://lat.ms/3tMhWQH. Keller allegedly participated in the Capitol Riot on January 6, 2021. According to the criminal complaint filed in his case, his Olympic team jacket made him identifiable to law enforcement in video footage. *See* Statement of Facts at 3, *United States v. Keller*, No. 1:21-cr-00104-RJL (D.D.C. Jan. 13, 2021), ECF No. 1-1; *see also* Declaration of Nathan Fenno ("Fenno Decl.") ¶ 5, Ex. B (Nathan Fenno, *Federal Agents Searched Klete Keller's Home on Day He Was Arrested*, Los Angeles Times (Feb. 23, 2021), https://lat.ms/33J1gPf).

A grand jury indicted Keller on seven counts for his alleged participation in the Capitol Riot, including disorderly conduct in a restricted building, civil disorder, and obstruction of an official proceeding. Indictment at 1, *United States v. Keller*, No. 1:21-cr-00104-RJL (D.D.C. Feb. 21, 2021), ECF No. 10. Keller pleaded not guilty in the U.S. District Court for the District of Columbia in March 2021. Minute Entry, *United States v. Keller*, No. 1:21-cr-00104-RJL (D.D.C. Mar. 9, 2021); *see also* Nathan Fenno, *Klete Keller Pleads Not Guilty to Charges*

Related to U.S. Capitol Riot, Los Angeles Times (Mar. 9, 2021), https://lat.ms/3hliEBO.

As part of the government's investigation into his participation in the Capitol Riot, federal agents searched Keller's home, out-buildings, vehicles, and person at the time of his arrest on January 14, 2021. *See* Fenno Decl. ¶¶ 4–5, Exs. A–B. Though the entries on the docket themselves were sealed, the docket for this search warrant matter—No. 1:21-SW-00028—was initially available to the public via PACER. *See id.* ¶ 4, Ex. A. When the Los Angeles Times inquired about access to the underlying documents listed on the docket, a spokesperson for the U.S. District Court for the District of Colorado stated that the Search Warrant Materials are sealed. *See id.* ¶ 5, Ex. B. Within hours after this inquiry, the docket was no longer publicly accessible. *See id.* ¶ 6.

ARGUMENT

I. The Search Warrant Materials are judicial records presumptively open to the public under common law.

Courts have long recognized the public's "right to inspect and copy public records and documents, including judicial records and documents" under the common law. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *see also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013); *Keymark Enterprises, LLC v. V.P.T., Inc.*, No. 08-cv-00662, 2008 WL 1801186, *1 (D. Colo. Apr. 18, 2008) (recognizing the common law right of access and noting that

"[o]nly in the rarest of cases is the sealing of documents appropriate[.]"). As the Tenth Circuit has observed, this common law right "is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985); *see also Riker*, 2008 WL 11434592 at *2 (noting the common law right of access is "premised upon the recognition that public monitoring of the courts fosters important values such as respect for the legal system").

The Tenth Circuit—like other federal courts around the country—has held that a search warrant affidavit is a judicial record subject to the qualified common law right of access. *See Search of 1638 E. 2nd Street*, 993 F.2d at 775 ("We agree that 'the press and the public have a common law qualified right of access to judicial records,' and that 'affidavits for search warrants are judicial records'" (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989))); *see also Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (finding common law right of access to search warrant application); *United States v. Business of Custer Battlefield Museum and Store Located at Interstate 90, Exit 514, South of Billings, Mont.*, 658 F.3d 1188, 1190 (9th Cir. 2011) (finding qualified common law right of access applies to search warrant applications after investigation terminated); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) (recognizing qualified First Amendment right of access to

documents filed in support of search warrant). As this overwhelming weight of authority makes clear, the Search Warrant Materials at issue here are judicial records subject to the qualified common law right of access.[1]

Further, the Court's sealed docket sheet in Case No. 1:21-SW-00028 is a judicial record to which at least the qualified common law right—if not a First Amendment right—of access applies. Though the Tenth Circuit has not expressly held that the public's presumptive rights of access extend to docket sheets, it has acknowledged that "dockets are public records" and "our 'national heritage' suggests that dockets are open to public inspection." *United States v. Mendoza*, 698 F.3d 1303, 1306-07 (10th Cir. 2012) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) (holding that the public has a qualified First Amendment right to inspect docket sheets)). In doing so, the Tenth Circuit

[1] Given the clarity of the relevant case law establishing that the common law presumption of public access applies to the Search Warrant Materials, the Court need not reach the separate question of whether the qualified First Amendment right of access also applies to these records. *See McVeigh*, 119 F.3d at 811–12 (assuming, without deciding, that the First Amendment right of access applies to judicial documents); *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998) (same). By asserting its right to inspect the sealed Search Warrant Materials under the common law, the Los Angeles Times does not concede that the First Amendment right of access does not also apply to the Search Warrant Materials. *See In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 575; *In re Appl. of N.Y. Times*, 585 F. Supp. 2d 83, 92 (D.D.C. 2008) (recognizing both First Amendment and common law rights of access to warrant materials after conclusion of investigation).

noted that the common law right of access likely extends to dockets, explaining that "[h]istory therefore demonstrates that docket sheets and their equivalents were, in general, expected to remain open for public viewing and copying." *Id.* at 1307 (quoting *Hartford Courant Co.*, 380 F.3d at 95) (internal quotation marks omitted).

II. No countervailing interests overcome the Los Angeles Times' common law right to access the Search Warrant Materials.

As the Tenth Circuit has observed, the public's common law right to inspect judicial records, while "important," is not absolute: sealing or redaction may be warranted "'if the public's right of access is outweighed by competing interests.'" *Hickey*, 767 F.2d at 708 (quoting *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984)). "The party seeking to overcome the presumption [of access] bears the burden of showing some significant interest that outweighs the presumption." *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (quotation marks and citation omitted). And a party seeking to maintain sealing must demonstrate that "redacting documents instead of completely sealing them would [not] adequately serve [the] [] interest to be protected." *Pickard*, 733 F.3d at 1304 (citation omitted).

Here, no substantial interests justify the continued sealing of the Search Warrant Materials. The search warrant at issue has been executed and returned. *See* Fenno Decl. ¶ 4, Ex. A. Further, Defendant has been indicted and pleaded not guilty in ongoing criminal proceedings pending before the U.S. District Court for

the District of Columbia. *See United States v. Keller*, No. 1:21-cr-00104-RJL (D.D.C. 2021); *see also* Fenno*, Klete Keller Pleads, supra.* These factors weigh heavily in favor of disclosure of the Search Warrant Materials. *See, e.g.*, *United States v. Loughner*, 769 F. Supp. 2d 1188, 1191-93 (D. Ariz. 2011) (finding qualified common law and First Amendment right of access attaches to search warrant materials where "active investigation has [] concluded and a final indictment has issued" and noting that "disclosure of the warrant materials will [not] jeopardize the investigation or hamper the ability of the grand jury to determine the appropriate charges"); *United States v. Kott*, 380 F. Supp. 2d 1122, 1124–25 (C.D. Cal. 2004) (justification for maintaining search warrant materials under seal falls away once pre-indictment investigation is completed and indictment has issued).

The case in the District Court for the District of Columbia is proceeding publicly. And the Search Warrant Materials, to the Los Angeles Times' knowledge, contain no information that relates to interests that this Circuit has held may overcome the presumption of public access.[2] *See, e.g.*, *Search of 1638 E. 2nd Street,* 993 F.2d at 776 (information relating to an informant).

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[2] Even assuming, *arguendo*, that any countervailing interest necessitates the continued sealing of any portion of the Search Warrant Materials, limited sealing and/or redaction, rather than continued sealing of the records in their entirety, would be appropriate. *See United States v. Walker*, No. 09-CR-00266-CMA, 2019 WL 6215641, *4 (D. Colo. Nov. 21, 2019), *appeal dismissed*, 838 F. App'x 333

The public, on the other hand, has a particularly powerful interest in transparency in this case, which concerns the issuance of a search warrant in an investigation into an unprecedented event in U.S. history—an attack on the U.S. Capitol. *See* Baker and Tavernise, *supra*. Public access to the Search Warrant Materials would permit the public to more fully understand the criminal proceedings pending against Keller, a public figure who allegedly participated in the Capitol Riot. Given the strong common law presumption in favor of access to the Search Warrant Materials, these judicial records should be unsealed.

CONCLUSION

For the foregoing reasons, the Los Angeles Times respectfully requests that the Court grant its Petition and enter an order directing the Clerk of the Court to unseal and place on the public docket the Search Warrant Materials.

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(10th Cir. 2020) (recognizing that "[o]nce the trial court has exercised its sound discretion in denying public access to certain judicial records, the trial court is then responsible for narrowly tailoring its restrictions.").

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