REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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December 11, 2023

Hon. Kandace Gerdes
District Judge, Division 275
1437 Bannock Street
Denver, Colorado 80202

Re: Notice of Reason for Noncompliance and Motion to Vacate November 30, 2023 Order Re: Requests for Suppressed Filings in *Farb v. Spay, Inc.*, No. 2023CV33477

Honorable Judge Gerdes:

The Reporters Committee for Freedom of the Press and Colorado news organizations, including hundreds of its members, and freedom of information organizations, respectfully submit this letter as *amici curiae* in support of BusinessDen, LLC and its reporter Justin Wingerter's motion to vacate the unconstitutional prior restraint order entered in the above-referenced proceeding.

Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As organizations devoted to defending First Amendment freedoms, including the rights of journalists and media organizations to gather and publish newsworthy information, *amici* are uniquely positioned to address the issues presented by this Court's order, including the unconstitutionality of the prior restraint it imposes.

An "Order re: Requests for Suppressed Filings" was issued by this Court on November 30, 2023, mandating that "all documents obtained by any media outlet, including but not limited to those obtained by Justin Wingerter of BusinessDen, shall be returned to the Court by hand-delivery… by 4:00 p.m., on November 30, 2023. All electronic copies of said documents shall be permanently deleted from servers as well. Failure to do so will be considered contempt of this Court's Order." The undersigned respectfully urge this Court to vacate this Order because it constitutes an unconstitutional prior restraint on speech and violates the First Amendment.

As the United States Supreme Court has recognized, 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). This is because prior restraints have "an immediate and irreversible sanction," not only

"chilling" speech but "freezing" it, at least for a time. *Id*. at 559. It is most telling that the Supreme Court has held that a prior restraint "bear[s] a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also People ex rel. McKevitt v. Harvey*, 491 P.2d 563 (Colo. 1971). Since prior restraints on speech are presumptively unconstitutional, and can be overcome only in "exceptional cases," *Near v. State of Minnesota*, 283 U.S. 697, 716 (1931), this Court's order prohibiting the possession of truthful information about a matter of public concern is presumptively invalid and must be vacated. *See also CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1183 (9th Cir. 1984) (stating that "prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances"). A prior restraint barring a news organization from access to newsworthy information poses a grave danger not just to Wingerter and BusinessDen but to all members of the press—and by extension to the public.

Here, Wingerter and BusinessDen have a First Amendment right to retain and publish the contents of court records Wingerter obtained legally. An order that restrains the press, either directly or indirectly, from publishing or possessing lawfully obtained, truthful information is an unconstitutional prior restraint. *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 prior approval by the court ahead of publication is unconstitutional prior restraint). On November 27, 2023, attorneys for the plaintiffs in *Farb v. Spay, Inc*., No. 2023CV33477 asked for their complaint and exhibits to be suppressed on the asserted grounds that the filings contained "Confidential and Proprietary Information." On November 28, 2023, before this Court ruled on that motion, Wingerter sought the duly filed pleadings and exhibits in that case from the court clerk. The records were disclosed to Wingerter and BusinessDen on November 29. However, later that day, this Court granted plaintiffs' Motion after the records had already been disclosed to Wingerter and BusinessDen and ordered Wingerter and BusinessDen to return and/or delete all documents on threat of contempt.

It is well-settled 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) (imposing damages against newspaper for publishing rape victim's name that was obtained from a publicly available police report violates the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (media's publication of telephone conversation recording that it lawfully obtained could not be punished under federal wiretap statute, even though the media's source had unlawfully recorded the conversation, and the media was well aware of the illegality of the recording). For example, in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the Supreme Court reversed an injunction preventing reporting on the name or likeness of a juvenile criminal defendant, after his name and picture were publicly revealed in connection with the prosecution of a crime, in spite of a state law that required juvenile proceedings to be held in private. In another case, the United States Court of Appeals for the Fourth Circuit recognized that a reporter cannot be held in contempt for reporting on sealed court records which a court clerk provided the reporter by mistake. *Ashcraft v.*

Conoco, Inc., 218 F.3d 288 (4th Cir. 2000). Most critically, it is impossible to force publicly disclosed information, even if it was disclosed by mistake, back into its box, because "once ... truthful information [is] 'publicly revealed' . . . [a] court [cannot] constitutionally restrain its dissemination." *Florida Star*, 491 U.S. at 535-536.

Moreover, an order demanding the destruction or deletion of lawfully obtained information or court documents is improper. For example, in *Bryant*, the Colorado Supreme Court struck down the portion of the district court's order that demanded the return of *in camera* transcripts. *People v. Bryant*, 94 P.3d 624, 638 (Colo. 2004) ("The District Court ordered Recipients to delete the electronic transmission they received and destroy any copies made of them. We strike that portion of the District Court's order that required Recipients to delete the electronic transmission and destroy any and all copies of the in camera transcripts.").

In sum, since there is no dispute that Wingerter and BusinessDen obtained the court records at issue by lawful means, and that the information contained in those court records concern a matter of public interest and concern, *amici* urge this Court to grant the petitioner's Motion to Vacate November 30, 2023 Order Re: Requests for Suppressed Filings. Lastly, because each minute an unconstitutional prior restraint remains in place constitutes a separate and distinct First Amendment violation causing "irreparable harm" to BusinessDen and its readers, we urge the Court to lift its prior restraint order immediately.

Regards,

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On behalf of:

Colorado Broadcasters Association + 271 members
Colorado Press Association + its members
Colorado News Collaborative (COLab) + 180 members
Colorado Freedom of Information Coalition (CFOIC)
National Freedom of Information Coalition (NFOIC)