IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff-Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAN BERNARDINO

Defendant-Respondent.

And

SAN BERNARDINO COUNTY DISTRICT ATTORNEY, and
SAN BERNARDINO COUNTY SHERIFF'S DEPARTMENT,

Real Parties in Interest, and Respondents.

Case No. E076778

JOINT RESPONDENTS' BRIEF (FOR REAL PARTIES IN INTEREST)

San Bernardino Superior Court Case No. CIVDS1930054
Honorable Dwight W. Moore, Judge.

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INTRODUCTION

From 2018 through 2020, appellant Electronic Frontier Foundation (EFF) sought to unseal a number of search warrant packets sealed by San Bernardino County Sheriff's detectives. At first the Sheriff, and later with him San Bernardino County District Attorney, opposed the unsealing. (Real parties in interest, and joint respondents, "the County.") This culminated in a hearing on EFF's petition to unseal under Rule of Court 2.551 and related grounds. The trial court read and evaluated the eight sealed warrant affidavits at issue and denied the petition to unseal. The court found under Constitution-level, First Amendment strict scrutiny review that the warrant affidavits had been properly sealed and ought to remain that way. The original sealing of the affidavits in their entirety was necessary to two compelling state interests. EFF appealed; the County opposes and responds.

This is the County's only brief. It is public. We saw no need to burden this Court with a separate one filed under seal. The sealed warrant affidavits combined with the trial court's public findings should suffice. Also, the Masonek declaration lodged under seal (but not filed below) speaks for itself if this Court gets that far.

BACKGROUND FACTS AND CASE HISTORY[1]

A. Detailed background.

The pertinent facts are as follows. The County understands that appellant Electronic Frontier Foundation (EFF) is interested in monitoring law enforcement's

[1] Appellant's Introduction and the first two sections of appellant's "Statement of the Facts" form more of a subjective mission statement for EFF than an objective background for what has gone on below. There are references to newspaper articles

monitoring of electronic communications, including its use of cell cite simulators, and that EFF routinely watches a California Department of Justice website where that department publishes notices of warrants authorized to use cell cite simulator technology. At some point, that department published on this website some minimal information about the warrants at issue here. EFF noticed and sought disclosure of the warrant numbers and other information, first, by means of a California Public Records Act request dated August 22, 2018. County Counsel opposed this on behalf of San Bernardino County Sheriff, as the affiants of the sealed warrant packets were all detectives for that department. EFF only was able to obtain the warrant numbers from that CPRA and related writ pursuit (CIVDS1827591), but it did not obtain unsealing or disclosure. This CPRA request and related writ pursuit appears to have taken place between 2018 and late 2019. (1 JA 1–5; 2 JA 177, 220.)

During the pendency of the above, EFF wrote a letter to Presiding Judge of the Superior Court, Hon. John Vander Feer, dated May 16, 2019. In it, EFF briefed its

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and claims about San Bernardino County Sheriff's warrant statistics that were not subjected to judicial notice or to factfinding by the trial court. If the County is permitted the same leeway, this Court ought to know that even though the search warrants at issue authorized the use of cell site simulators, they were not, in fact, deployed in *any* of these warrants' execution. (See Ex. 17, 2 JA 240–241, email between Miles Kowalski, counsel for the Sheriff, and counsel for appellant, where Mr. Kowalski affirms that cell site simulators were not used in the execution of three particular warrants.) This unuse appears not to be in the record as it relates to the warrants still at issue, but if appellant can rely on unfound facts, then perhaps so can the County. At any rate, there is nothing in the joint appendix showing that cell site simulator technology was actually deployed. The County also objects to the 2018 Desert Sun article attached to Michael Risher's declaration (Ex. 17, 2 JA 246–251.) There is no sign it was submitted into or accepted as evidence. Mr. Risher did not attest in his declaration to the accuracy of any of the facts asserted therein.

position San Bernardino County Superior Court's warrant-sealing practice was awry, and that the Court should fix its process and disclose to EFF the sealed warrant materials of interest. (Ex. 4, 1 JA 42–67.)

Presiding Judge Vander Feer responded to EFF on June 6, 2019, declining to act on the grounds that EFF's contentions were already before a court in the writ proceeding, and for lack of jurisdiction as presiding judge to interfere with particular trial judges' warrant decisions or with law enforcement and prosecutorial agencies. (Ex. 5, 1 JA 70.)

EFF presented County Counsel with a second CPRA request, dated January 24, 2019, seeking disclosure of cell site simulator logs, annual reports addressing use of cell site simulators, and search warrant materials related to further website disclosures by California Department of Justice. It is likely this second CPRA request netted EFF another small number of sealed search warrant numbers.

Armed now with a list of sealed search warrant case numbers where law enforcement was authorized to use cell cite simulators, on October 8, 2019, EFF filed its petition to unseal, purportedly pursuant to Rules of Court 2.550 and 2.551. (Ex. 2, 1 JA 20–33.) The Sheriff through County Counsel and the District Attorney were deemed real parties in interest. (This is EFF's petition that led to this appeal.)

Neither real party (DA or Sheriff) filed a standard responsive pleading, but Rule of Court 2.551, subsection (h), prescribes a procedure whereby a court proposing to unseal must give notice to the parties, and unless otherwise ordered by the court, any party may serve and file an opposition within 10 days. Because the

trial court never proposed to unseal the sealed search warrant packets, this provision imposing a deadline for an opposition response appears never to have been triggered.

The main brief in opposition to unsealing was the District Attorney's Notice of Motion for Judgment on the Pleadings and Brief in Support, in which the Sheriff joined. (Ex. 13, 2 JA 173–192.) Also, in support of real parties' opposition, the District Attorney filed a supplemental letter on October 27, 2020 [containing argument on procedure and substance]. (Ex. 15, 2 JA 212-214.)

The District Attorney also lodged under seal a confidential declaration by Deputy District Attorney Christine Masonek, who attested therein that six of the eight sealed warrant affidavits remaining at issue pertained to four of her murder cases and that these sealed warrant affidavits must remain sealed in their entirety to preserve the safety of witnesses in her cases. (2 JA Ex. 14 [redacted version].). On October 5, 2021, the County requested that the unredacted declaration lodged under seal be transmitted to this Court, along with the sealed warrant affidavits [appellate exhibit number unassigned].)

Before the hearing, having met and conferred, the parties narrowed the sealed warrant affidavits at issue to eight. The County agreed not to object to the unsealing and disclosure of entire warrant packet number SBSW 18-0850. Real parties also did not object to the unsealing and disclosure of select documents from the remaining eight sealed search warrant packets, mainly the actual search warrants themselves, their respective sealing order pages, and their respective delayed notification orders.

(Exs. 9 & 10, 1 JA 84-89 (District Attorney's Objection Statement), and 90-93 [Sheriff's Objection Statement].)

EFF filed an opposition brief (Ex. 16, 2 JA 215–234), and the District Attorney filed a Reply. (Ex. 18, 2 JA 252–259.)

The District Attorney contested and never conceded that appellant EFF had standing to unseal search warrants required to be "kept confidential under law," or any right to access any of the materials including the select pages disclosed in August of 2020. We merely did not object to the trial court unsealing and disclosing the selected pages at that time. (Ex. 9, 1 JA 088, paragraph 12.)

B. The Hearing and ruling.

1. The specific warrant affidavits.

At issue below was whether the trial court should unseal and disclose the following *sealed* search warrant affidavits, all of which remained in possession and control of San Bernardino County Superior Court (and/or its respective authorizing magistrates):[2]

[2] The references to "cause of action" come from EFF's Petition to Unseal. (Ex. 2, 1 JA 20, 26–31.) All but the first and last warrants in the list relate to four murder cases in San Bernardino County, prosecuted by Deputy District Attorney Christine Masonek. Those four murder cases are: (1) People v. Isaac Aguirre, FSB18002619, in its pretrial phase currently set for "Dispo./Reset" (status conference) on November 12, 2021, in Department S14 of Superior Court at the San Bernardino Justice Center, Hon. Ronald R. Christianson presiding; (2) People v. Robert Fernandez, FSB18002620, currently set for sentencing on January 6, 2022, in Department S4, Hon. W. Powell presiding; (3) People v. Matthew Manzano, FSB18002623, which is on post-judgment appeal in E075445; and (4) People v. Richard Garcia, FSB18002622, where Garcia was sentenced to 30 years state prison pursuant to plea agreement.

a. SBSW 18-0298 (second cause of action; unrelated to DDA Masonek's murder cases);

b. SBSW 17-0615 (third cause of action);

c. SBSW 17-0694 (fourth cause of action);

d. SBSW 17-0695 (fifth cause of action);

e. SBSW 17-0834 (sixth cause of action);

f. SBSW 17-0890 (seventh cause of action);

g. SBSW 17-0892 (eighth cause of action);

h. SBSW 18-0259 (ninth cause of action; unrelated to DDA Masonek's murder cases).

These warrants at issue were signed by magistrates (and retained by them or the Superior Court) from March 2017 through March of 2018. The affiants were all San Bernardino County Sheriff detectives (or peace officers of other rank). Each of the warrants was sealed by the issuing magistrates under one or more of the following grounds: *People v. Hobbs* (1994) 7 Cal.4th 948; Evidence Code section 1040 [official information privilege], Evidence Code section 1041 [identity of confidential informant]; and Evidence Code section 1042 [rules regarding privileged information in same Article, including sections 1040 and 1041].)

2. The trial court's principal ruling: by findings of strict scrutiny, the court held that the warrant affidavits ought to remain sealed indefinitely.

After recounting his extensive judicial search warrant experience, Judge Moore affirmed that he had "personally read all of these warrants and all of the appended affidavits." (RT 22: 20–21.) Judge Moore was "satisfied that there is

nothing in any of those affidavits—in the Hobbs' declarations and those affidavits—that should be released now or ever." (RT 23:9–11.)

Judge Moore ruled that there was a "compelling state interest" in protecting both confidential informant identity and in protecting police sources and methods, which was "unquestionably and issue in all of these [warrants]." (RT 24: 12–16.)

EFF contends that the court failed to apply strict scrutiny correctly. They say the court didn't consider narrow tailoring, but Judge Moore's language made it clear he did even though he may not have used those words. He said, "There is nothing about these [warrant affidavits] that can be partially released." (RT 24: 6–7.) He then explained that releasing any portion of these affidavits "begins to give somebody an opportunity to being to unwind the confidential information that is contained therein." (RT 24 8–12.)

The judge's findings were very specific to these *particular* warrant affidavits. (RT 32: 11–14.) EFF found it hard to believe that there was no reasonably segregable portion of the warrant affidavits. (RT 25.) But the court explained that these warrants were *unlike* many others it had seen, where the affidavits had separate "*Hobbs*" portions separate from the rest of the affidavit. (RT 26.) The court again explained that revealing any portion of these affidavits would allow agents for the criminal defense to discover police methods and informant identities. (RT 26–27.)

And so Judge Moore, a second time, said there was "[a] compelling state interest in keep that [sealed condition] as a state of affairs." (RT 27: 5–7.)

Although EFF finds fault in the Notice of Ruling's version of the court's ruling—saying the court found only an "important state interest" instead of a "compelling" one in protecting the identity of the informants (Ex. 20, Notice of Ruling, 2 JA 268: 22), this was merely a drafting error on the part of the County. Nowhere in the reporter's transcript of the hearing on January 15, 2021 did Judge Moore refer to the sealing interest as anything besides "compelling."[3] The reporter's transcript of the proceedings is prima facie evidence of such proceedings (Code Civ. Proc., § 273), and "[s]tands as proof of the particular facts therein set forth until it is both contradicted and overcome by other evidence [citation]...." (*In re Evans* (1945) 70 Cal.App.2d 213, 214.) Conflicts between the reporter's and clerk's transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter's transcript unless the particular circumstances dictate otherwise. (*In re Merrick V.* (2004) 122 Cal. App. 4th 235, 249.)

Then came the third mention. Anticipating appellate review, the trial court reaffirmed it had read "each and every warrant,"

> [a]nd, as to each warrant, I have found a compelling public interest that there is no lesser remedy available other than to keep these documents sealed, those documents being those portions in each warrant that you have not already received.

(RT 29:17–30:2.)

[3] The word "important" was never used in the hearing—at all. There were six instances of "compelling," five of which the court uttered, four of which it used to describe the sealing interest at stake.

And, near the hearing's end, the court said it all again, a fourth time:

> The petition is denied. I am denying the request to unseal the specified court records. I'm not going to list them all. They are listed in the moving papers. So I am denying the petition as to all.
>
> I am finding that the law does not provide for the kind of release that Petitioner seeks. Beyond that, I am finding that, even if such a release would under some circumstances be authorized, I am finding that under the circumstances of *these specific warrants*, having reviewed them all, all should remain sealed because without specifying details, they are *compelling State reasons* involving either the safety of individuals or the protection of law enforcement technics [sic] and methods all which justify sealing these documents. And there is no legislature [sic; "less restrictive"?] remedy available other than to *keep them sealed*.

(RT 32: 2–19, italics added.)

As for sealing duration, the court ruled that the affidavits should not be disclosed "now or ever," although it speculated that somewhere in the far future this ruling could be revisited, but only after "everyone in the case is dead" and the need for secrecy and technological progress obviate the court's "now or ever" comment. (RT 23:11–16.)

3. Other issues addressed.

In addition to this principal ruling, the court addressed several other intertwined issues.

First, the court declined to file and consider the District Attorney's proffered declaration under seal by Christine Masonek. (Ex. 14, 2 JA 193–211; sealed version transmitted].) The court declined to consider it because it was ex parte and EFF did

not have a chance to test it by cross-examination. (RT 21:24–22:5.) With respect, the County believes this was error, although it did not prejudice the ruling in our favor.

Subsection (2) of Rule of Court 2.551(h), upon which EFF relied for its petition, provides that a "motion, application, or petition" to unseal "

> and any opposition, reply, *and supporting documents* must be filed in a *public redacted version and a sealed complete version* if necessary to comply with (c).

The very rule invoked to unseal contemplates redacted and sealed "supporting documents" such as the County proffered below. This stands to reason because if the affidavits themselves are privileged, the only way for the real parties in interest to discuss the consequences of disclosure with the court is ex parte, under seal. The District Attorney obeyed this rule with its proffer of the Masonek declaration. Therefore, should this Court vacate the ruling for any reason, and remand the case, it should also order that the trial court to filed under seal and consider the Masonek declaration.

Second, the trial court did not rule on the parties' differences concerning who had the burden. EFF thought it was real parties' burden to seal or to maintain the sealing. We thought the opposite and still do, although we invited strict scrutiny and argued as if we did have the burden. We discuss burden issues in the argument section as they arise.

Third, the trial court addressed Penal Code section 638.52 [trap and trace or pen register authorization procedure], which EFF had included in its "causes of action" and in its petition. By the hearing, EFF had backed away from 638.52. The

court had researched its text and legislative history and noted that the statute did not provide for unsealing and disclosure to the public of sealed warrants. (EFF argued that use of cell site simulators, which it thought was at issue, was not governed by that statute but instead by regular search warrant law, Penal Code section 1534. See RT pp. 17–19.) The court was correct to spot this new and developing issue, although EFF appears to be correct, at least about the early trend: the County's research shows the few jurisdictions to consider it hold that judicial authorizations under trap and trace and pen register statutes do not cover the use of cell site simulators. (33 A.L.R.7th Art. 8, § 19 [mentioning the Fifth Circuit, Maryland, and New York].)

Fourth, throughout the hearing, the court was skeptical and critical of EFF's novel notion of unending scrutiny of warrants sealed under *Hobbs* and Evidence Code sections 1040 and 1041. (RT 21: 14–22.) "[U]p until this petition," the court had

> never seen an argument raised based on the longstanding language of 1534 that, once something has been sealed, it needs to be rereviewed and resealed and the sealing extended. You haven't cited any case authority for that. I think your interpretation of the language here really flies in the face of the underlying intentions of *Hobbs*.

(RT 21: 15–22.) The court was correct, here, as the County will show.

Fifth, the District Attorney questioned EFF's standing to seek unsealing throughout the leadup to the hearing. Then there, we clarified that EFF of course can *approach* the court to seek unsealing, but once the court sees that the search warrants have been sealed under *Hobbs* or Evidence Code sections 1040, 1041, or 1042, the matter should end there. That is the end of petitioner's standing. (RT 27:22–28:3.) The

court declined to rule on that issue, believing it was better addressed at the appellate level. (RT 28: 4–17.) The County preserves that issue, here.

C. A Note of clarity regarding EFF's appeal.

At various places in EFF's opening brief, it refers to the trial court as having "sealed" the warrants. (See, e.g., AOB 37, heading IV. A., alleging the trial court erred "… Before Sealing the Affidavits in Their Entirety"; and 39, heading IV. A. 2., alleging trial court error for failing to make required findings supporting "… The Overriding Justification for Sealing."

This characterization is wrong. The County was not trying to seal anything; EFF was instead trying to unseal that which already had been sealed. (Ex. 2, 1 JA 20-33 [EFF's Verified Petition to *Unseal*]; and Ex. 16, 2 JA 215-234 [EFF's Motion to *Unseal* Court Records…"], italics added.) The County defended the status quo. EFF had the burden, especially because it has failed to demonstrate any right of access. (*See NBC Subsidiary v. Superior Court* (1999) 20 Cal.4th 1178, 1218, fn. 40 ["[T]he burden of demonstrating reasonable alternatives to closure rests with the press."].)

Moreover, contrary to EFF's position, an order to unseal a court record, as well as an order denying sealing, "[d]oes *not* require express factual findings by the trial court." (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 488, italics added.) "Motions to unseal court records are governed by rule [of Court] 243.2(h)[now 2.551(h)], which does not impose a requirement of express findings." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1020, citing *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301–302.)

Nevertheless, in addition to contending against EFF's wholesale standing argument, the County *invited* strict scrutiny below, confident that the trial court's review of the particular warrant affidavits at issue in EFF's effort to *unseal* would meet that standard, and thereby meet any lesser standard, and, at last, survive appellate review.

It is important to keep all this straight in order to select and apply the correct standards of review. (We say "standards," plural, because each asserted right of access has a pertinent standard of review.)

ARGUMENT

I.

The standard of review depends on the ground for each applicable right of access.

The County acknowledges appealability. Orders concerning the sealing and unsealing of documents are appealable as collateral orders. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1064); *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77.)

The standard of review in right-of-access cases depends on the right of access invoked below. (*See Overstock.com*, *supra*, 231 Cal.App.4th 471, 485 [different levels of protection may attach to various records in a given case, depending on whether access is predicated on First Amendment or common law].)

Here, in denying EFF's petition to unseal the warrant affidavits, upon the County's invitation, the court applied strict scrutiny commensurate with the First

Amendment right-of-access analysis. Review of such rulings calls for independent review, which on a cold record like this one, is the same as *de novo* review. (*People v. Jackson*, *supra*, 128 Cal.App.4th at 1021.)

We denied below and continue to deny that EFF or the public has any right of access to the sealed warrant affidavits, but we willingly submitted our contention to constitution-level strict scrutiny, below. And we do not object now to its corresponding review standard. This is because "First Amendment standards ultimately involve a balancing test, and the First Amendment right of access receives more protection than the common law right." (*Overstock.com* at 485–486.) Thus, if this Court finds the trial court order (denying petition to unseal) "satisfy[ies] the First Amendment standard … [it] will necessarily find that the order satisfies the common law standard as well." (*Id.*)

When the common law right of access applies, appellate courts generally employ the abuse of discretion standard in reviewing sealing orders, while reviewing de novo any errors of law upon which the court relied in exercising discretion. (*Overstock.com* at 490.)

II.

Because there is no First Amendment right of access to sealed search warrant affidavits, the trial court did not err, and this Court need not review its ruling under the First Amendment review standard.

From the get-go, EFF has claimed that several grounds bestow a qualified right of access to unsealing and disclosure of the sealed search warrant contents. The one looming most notably in the foreground is the First Amendment right of access to

court records. But the County's position is that the public, including EFF, has *no* First Amendment right of access to *any* warrant materials sealed upon privileged grounds. Not even a qualified right. The California Supreme Court has never ruled there is such a right. Nor, to our knowledge, has any appellate court, although the *Jackson* case seems to have assumed otherwise without objection.

Courts have inherent and implied powers to issue protective and sealing orders where appropriate. (*PSC Geothermal Services Co. v. Superior Court*, *supra*, at 1712; *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 206; *United States v. Mann* (9th Cir. 1987) 829 F.2d 849, 853.) There are also a pair of multipurpose Rules of Court, 2.550 [sealing] and 2.551 [unsealing] congruent and intertwined with First Amendment access, but as we will show in a dedicated section, these rules do not help EFF unseal what they seek and are wholly inapplicable for at least three reasons.

But in the litigation below and in its briefing now, EFF has not and cannot show that California has recognized a First Amendment right of access to warrant materials sealed under privilege law.

A. California courts have not declared a First Amendment right of access.

California's principal First Amendment right-of-access case is *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. There, the California Supreme Court ruled that under Code of Civil Procedure section 124, as construed to be constitutional under a First Amendment overlay, the public has a right of access to civil trial proceedings. The state high court comprehensively examined First Amendment rights of access in both criminal and civil cases, and then left us with

two steps for allowing the sealing of judicial records. The first step is notice, and the second is a four-part scrutiny. More on this test, below.

But the California Supreme Court did not arrive at its holding in *NBC Subsidiary* until after it answered a key question that EFF leaves unsatisfactorily hanging in this case—whether there is a First Amendment right of access to begin with.

The County believes EFF has no First Amendment right of access to sealed warrant materials, because under *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501 ("*Press-Enterprise II*"), the parent of *NBC Subsidiary*, when deciding whether a qualified right of access to court procedures attaches under the First Amendment, the Supreme Court examines (1) the historical openness of the proceeding in question, and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." (*Id.* at 8.) Then, "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute. [Citation.]" (*Id.* at 9.)[4] This two-part analysis has come to be known as the "experience and logic" test. (*See In re Search of Fair Finance* (6th Cir. 2012) 692 F.3d 424, 430.)

NBC Subsidiary is not a universal solvent, or a confidential file opener. That case involved a sequel suit to Sondra Locke's original "palimony" suit against actor

[4] *Press-Enterprise II* involved access to transcripts of a preliminary hearing.

Clint Eastwood. The civil court there sealed all documents and hearings except what was done in the presence of the jury to protect the litigants from publicity harming their fair trial. The media petitioned to unseal the transcripts already logged, and to open future hearings. In granting relief to the media, the California Supreme Court applied the *Press-Enterprise II* test and held the public has a qualified right of access to "ordinary civil trials and proceedings." (*NBC Subsidiary*, *supra*, 20 Cal.4th at 1212.)

But to date there appears to be no California case holding that sealed warrant materials (1) have been historically open within the meaning of First Amendment case law, or (2) that public access to affidavits sealed to protect confidential informants and law enforcement methods plays a significant positive role in the warrant process. Not even *People v. Jackson*, *supra*, 128 Cal.App.4th 1009, which we address, below. (*See Guerrero v. Hestrin* (2020) 56 Cal.App.5th 172, 196 [appellate court refrained from deciding whether uncharged wiretap target had a First Amendment right to unseal wiretap application and supporting affidavits; reversed and remanded on separate ground.].)

Some court proceedings and documents are accessible via the First Amendment and some are not. *NBC Subsidiary* made this plain in footnote 29:

> In *Press–Enterprise II,* the high court distinguished "presumptively open" preliminary hearings from other proceedings as to which there is no First Amendment right of access. It observed: "Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the

> secrecy of grand jury proceedings.' [Citation.] Other proceedings plainly require public access." (*Press–Enterprise II, supra,* 478 U.S. at pp. 8–9, 106 S.Ct. 2735.)

(*NBC Subsidiary*, *supra*, 20 Cal.4th at 1212, fn. 29 [also recounting decisions refusing to extend right of access to executive branch or congressional meetings, deliberations and conferences of an appellate court, and the trial notes of a trial judge].)

As with grand jury proceedings, "it takes little imagination to recognize" that the search warrant process involving affidavits sealed under privilege law would be "totally frustrated" if they remained always under threat of exposure.

This reasoning is congruent with the application of the *Press-Enterprise II* test in related contexts—our position has plenty of unsurprising company. Since *Press-Enterprise II* and *NBC Subsidiary*, we have learned from their progeny and cousin cases that the public has no First Amendment right of access to:

- Records relating to a peace officer's administrative appeal of a disciplinary matter (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1301–1305);
- Juvenile court records. (*Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821, 832);
- Attend commitment proceedings under the Lanterman-Petris-Short (LPS) Act (*Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409);
- Juvenile dependency proceedings. (*San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal.App.3d 188, 195);
- Government records regarding persons detained after terrorist attacks. (*Center for National Security Studies v. U.S. Dept. of Justice* (D.C. Cir. 2003) 331 F.3d 918, 935);
- Police accident reports. (*Amelkin v. McClure* (6th Cir. 2000) 205 F.3d 293, 296);

- Presentence reports. (*United States v. Corbitt* (7th Cir. 1989) 879 F.2d 224, 228.)

Likewise, here. Along with grand jury proceedings and records, and these other proceedings, California has not recognized a historical right of access on the part of the public to search warrant proceedings. And just like inaccessible grand jury proceedings and records, search warrant materials are inherently investigative. (*See Times-Mirror v. United States (*9th Cir. 1989) 873 F.2d. 1210, 1214 [the process of disclosing information to a neutral magistrate to obtain a search warrant has always been considered an extension of the criminal investigation itself].) Thus, the first *Press-Enterprise II* element is not satisfied.

Moreover, the proper functioning of search warrants would be entirely frustrated—perhaps destroyed, if uninvolved third parties like EFF could demand the unsealing and exposure of information in affidavits that would endanger the safety of witnesses and frustrate law enforcement investigations, techniques, and strategies. And so the second *Press-Enterprise II* element also goes unsatisfied.

No doubt this is why one court held that access to records from California judicial proceedings exists "not by virtue of the First Amendment," "but rather as a continuation of the common law right to inspect and copy judicial records." (*KNSD Channels 7/39 v. Superior Ct.* (1998) 63 Cal. App. 4th 1200, 1203.) All the more true as to sealed warrant materials.

B. The predominant federal court rule favors the County's position.

Amongst federal cases, *In re Search of Fair Finance* (6th Cir. 2012) 692 F.3d 424 stands out. There, federal investigators obtained search warrants targeting a company's owner who was involved in a Ponzi scheme. The government had the warrant material sealed until after the suspect was indicted, then it got the magistrate to release all but the supporting affidavit and the docket sheet, which remained sealed. Along the way, four newspapers, including the Wall Street Journal, had unsuccessfully moved to unseal these documents. On appeal, the Sixth Circuit panel applied *Press-Enterprise II's* two-part experience and logic test.

In perhaps tactical deference to the sensitive nature of search warrant procedures early in a criminal investigation, the newspapers argued that a First Amendment right of access attaches not upon the warrant materials filing but instead after the related search is executed. Yet the court responded,

> We find no evidence, however, of documents filed in search warrant proceedings historically being made open to the press and public at that later point in time.

(*Id.* at 430.) The newspapers also argued for historical openness post-execution because the government routinely filed the search warrant documents without seal. But the court noted that just as routinely, the government in a "longstanding practice" sought and maintained post-execution sealing orders to protect "legitimate interests" in nondisclosure. The court reasoned, therefore, that the government's publishing of search warrant documents in some instances did not equate to a

"historical tradition of accessibility."[5] And thus the newspapers' proposition failed the first *Press-Enterprise II* element.

The proposition—First Amendment right of access to search warrant materials—also flunked the second element of the *Press-Enterprise II* test because disclosure would, among other consequences, likely: identify information sources, endanger confidential witnesses, compromise wiretaps and undercover operations, reveal the government's preliminary theory of the crime, enable suspects to figure out which other places are likely to be searched, impede flow of information to magistrates, and reveal the identities of innocent people, causing them embarrassment or censure. (*In re Search of Fair Finance*, *supra*, 692 F.3d at 432.)

The court also rejected the newspapers' argument that unsealing would promote proper procedure and appearance of fairness, holding instead that such interests are better protected by the Fourth Amendment's Warrant Clause, and by motions to suppress when needed. (*Id.* at 432–433.)

The majority of other federal courts that have considered these questions also have determined that warrant materials have not been historically open or accessible. (*See, e.g., Times-Mirror v. United States, supra*, 873 F.2d. 1210, 1215 [no First Amendment *or* common law right of access to warrant materials before indictment because under *Press-Enterprise II*, there was no historical openness and "public access

[5] Likewise, because Penal Code section 1534 is subject to sealing exceptions, its standard, post-execution disclosure provision does not equate to a historical tradition of accessibility.

would hinder, rather than facilitate, the warrant process and the government's ability to conduct criminal investigations]; *Baltimore Sun Co. v. Goetz* (4th Cir. 1989) 886 F.2d 60 [no First Amendment right of access to search warrant affidavits—*even after indictment*]; *but see In re Search Warrant for the Secretarial Area Outside the Office of Thomas Gunn* (8th Cir. 1988) 855 F.2d 569 (*Gunn I*) [recognizing a qualified First Amendment right of access to search warrant materials exists after execution of the warrant].)

Gunn I appears to be an outlier that has not been followed by most other federal circuits and many states and has been called "unpersuasive." (*In re Search of Fair Finance*, supra, 692 F.3d 424, at fn. 3.)

C. Sister states appear consistent with our position on the First Amendment.

Limited resources prevent us from stating whether our position is the majority rule amongst the states, but we would be surprised if it were otherwise. (See *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R.3d 598 [surveying public right of access to various documents in state and federal jurisdictions].)

For example, in *Seattle Times Co. v. Eberharter* (1986) 105 Wash. 2d 144, where a newspaper petitioned for access to a warrant affidavit sealed in an unfiled criminal case, the Washington Supreme Court concluded that there was no First Amendment right of access. The holding appears not to have depended merely on the timing, because the court declared more generally that, "The probable cause affidavits in support of search warrants do not share the long historical tradition of public access."

(*Id.* at 154.) This is the recognition that the search warrant process and supporting materials have not been historically open.

The Nebraska supreme court also held there is no First Amendment right of access to search warrant applications because such records have neither been historically open, and because public access would totally frustrate the main purpose. (*In re 3628 V Street* (2001) 262 Neb. 77, 83-84; 628 N.W.2d 272, 277-278.) This opinion also handily catalogues the many federal circuits in agreement, expressly isolating *Gunn I*, *supra*, as a unique outlier.

This also is the way it is in North Carolina, where an appellate court held that search warrants and related documents fail the first prong of the test in *Baltimore Sun* and therefore media plaintiffs did not have even a qualified First Amendment right of access. The court recognized that historically, the issuance of search warrants has not been open to the press and general public. (*In re Investigation into Death of Cooper* (2009) 200 N.C.App. 180, 189.)

D. Because the *Jackson* case dealt with warrants sealed on different grounds, and because it never analyzed whether there is a First Amendment right of access to sealed warrant materials, it does not control, here.

In making these arguments, the County is fully aware of *People v. Jackson* (2005) 128 Cal. App. 4th 1009, an opinion dealing with the unsuccessful child abuse prosecution of pop singer, the late Michael Jackson. But because the warrants there were not sealed on the same grounds as the ones here, and because that case skipped

essential analysis and omitted discussion of important authorities, it offers no precedent for EFF's First Amendment claim.

In the *Jackson* prosecution, the trial judge had sealed the grand jury transcript, the indictment, numerous search warrant affidavits, and later denied a motion to unseal these records. Various news organizations appealed the denial on First Amendment grounds. The court of appeal disavowed the trial court's order sealing the indictment but upheld the order sealing other documents. Its analysis included consideration of the Rule of Court provisions for sealing documents in court cases. (Former Rule of Court 243.1, predecessor and substantive twin to today's Rule of Court 2.550, and see 2.552.)

The appellate court in *Jackson* viewed its main task as reviewing the balance between the First Amendment's "general right to inspect and copy public records and documents, including judicial documents and records" and the accused's right to a fair trial. (*Id*. at 1021–1022.) *Jackson* then deployed the four-factored test in *NBC Subsidiary* in order to weigh that balance (in favor of maintaining the affidavits' sealing).

EFF believes this shows that *Jackson* supports a qualified First Amendment right of access to sealed search warrant materials. But *Jackson* never held this because nobody there contested whether sealed warrant materials passed *Press-Enterprise II's* threshold, two-part test. Not only that, *Jackson* fails even in its own words to ask whether search warrant materials have been historically open, or what effect openness would have on that process.

Moreover, *Jackson* began with a similar, unfounded and uncontested assumption about former Rule of Court 243.1 (now Rules of Court 2.550 and 2.551)—that that rule applied and governed the sealing of warrant materials. The County contests this and explains why, below.

More fundamentally, the warrant affidavits sealed in *Jackson* apparently were not sealed under *Hobbs*, or Evidence Code sections 1040, 1041, or 1042, as were the ones, here. Instead, they were sealed as a result of balancing the interest of disclosure against the rights of victim privacy and the defendant's fair trial. This alone makes a decisive difference. (See Rule of Court 2.550(a)(2)["These rules do not apply to record that are required to be kept confidential by law."; and see section on Rules of Court 2.550 and 2.551, below.)

To sum up, and to make our position unmistakably clear, *NBC Subsidiary's* four-factor test and that test's codification in Rules of Court 2.550 and 2.551 do not apply to *any* records if the records at issue are of the kind required to be "kept confidential by law." The records in *Jackson* apparently were not; the ones here demonstrably are.

And *Jackson* assumed there was a qualified right of access to those records under the First Amendment. But without state or federal Supreme Court precedent, we think *Jackson* should not have skipped the two-part *Press-Enterprise II* test to see whether there was a First Amendment right of access to *any* kind of search warrant affidavit, but it did. And these two reasons are why EFF cannot lean on *Jackson* to evade the majority—and the likely California—rule.

E. Even if this Court concludes the public has a First Amendment right of access to warrant materials sealed under privilege law, it is a qualified right, and the trial court's sealing order here meets that test.

Even *if* there were a First Amendment right of access to warrant materials sealed under privilege law, it would be a qualified one subject to the further balancing of countervailing interests. (See *People v. Jackson*, *supra*, 128 Cal. App. 4th 1022–1023 [deploying the four-factor *NBC Subsidiary* strict scrutiny test to the clashing interests]; and Rules of Court 2.550 and 2.551.)

Judge Moore's ruling meets this test.[6] He made it clear after reading each and every warrant affidavit that: (i) there were two compelling (or "overriding" in *NBC* parlance) state interests outweighing the public's interest in disclosure, the safety of witnesses, and the preservation of law enforcement techniques; (ii) that these interests would be compromised by disclosure; (iii) although he did not utter the precise words "narrowly tailored," it was clear from extended discussion that the court found that there preserving the preexisting sealing orders was the only way to protect the two compelling interests (*see People v. Jackson* (2005) 128 Cal.App.4th at 1026 [redacting information from a search warrant affidavit was impossible because benign information was inextricably intertwined with prejudicial information]); and (iv) there was no less restrictive means of achieving the overriding interests. (*See People v Jackson*, *supra*, 128 Cal.App.4th at 1022 [applying the *NBC Subsidiary* balancing factors after assuming a qualified right of access].)

[6] Again, the County invited the trial court to apply strict scrutiny despite asserting the lack of First Amendment access. (Ex. 13, 2 JA 191, 18:12–19:5.)

Therefore, even if there is a qualified right of access to search warrant affidavits that are sealed on grounds required to be kept confidential by law, this Court should affirm the denial of EFF's petition to unseal.

III.

Because Rules of Court 2.550 and 2.551 expressly exempt themselves from application to search warrants required to be "kept confidential by law," and because these Rules of Court merely codify the *qualified* First Amendment right of access, these rules do not provide EFF a right of access to the sealed warrants.

Rules of Court 2.550 and 2.551 do not help EFF for at least three reasons. Rule 2.550 lays out the scope of both rules, key definitions, and the *NBC Subsidiary* factors for sealing and unsealing court records. Rule 2.551 prescribes the procedure for sealing and unsealing court records *subject to these rules*. But these rules do not apply to the sealing and unsealing of search warrant materials such as those at issue here.

Before listing the reasons, it is important to remember these rules are the procedural codification of *NBC Subsidiary, Inc. v. Superior Court*, supra, 20 Cal.4th 1178—a First Amendment right-of-access case. (Rule 2.550 Advisory Committee Comment ["The standard [for Rules 2.550 and 2.551] is based on *NBC Subsidiary, Inc., v Superior Court* (1999) 20 Cal.4th 1178."].) Thus, the rules cannot stand for more, or exceed the bounds, of *NBC Subsidiary*, which understood there were classes of records to which there was *no* First Amendment right of access. (*Id.* at fn. 29.)

First, the Rules themselves expressly state they do not apply to situations like this case: "These rules do not apply to records that are required to be kept confidential by law." (Cal. Rule of Court 2.550(a)(2).) This is not ambiguous or a gray

area. Although the Advisory Committee Comment to 2.550 affirms the rules apply to civil and criminal cases, it also states:

> They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. *The rules do not apply to records that courts must keep confidential by law*. Examples of confidential records to which public access is restricted by law are . . . search warrant affidavits sealed under *People v. Hobbs* (1994) 7 Cal.4th 948.

(Italics added.)

The warrant materials in this case were sealed under *Hobbs*, or its statutory kin, or both. Every one of the eight warrants at issue was expressly sealed under one or more of *Hobbs*, or Evidence Code sections 1040, 1041, or 1042. Because warrant affidavits so sealed are "required to be kept confidential by law," these two rules do not apply.

In other words, the warrant affidavits were not sealed under these rules; they cannot be unsealed by them, either.

Second, Rule 2.550(a)(3) illuminates how the scope of these rules does not reach sealed warrant affidavits. This subsection says the rules do not apply to discovery motions and related records, but the rules do apply to "discovery materials that are *used at trial* or *submitted as a basis for adjudication* of matters other than discovery motions or proceedings." (Italics added.) The Advisory Committee Comment elaborates, "They [2.550 and 2.551] recognize the First Amendment right of access to documents used at trial or as a basis of adjudication." Because the warrant affidavits sealed under law here have never been revealed or used at trial,

or submitted as a basis for adjudication, they fall outside the scope, the intent, and the spirit of these Rules of Court.

Third, because Rules of Court 2.550 and 2.551 merely systematize qualified access to those records to which a First Amendment right of access already attaches, they have nothing to say about whether that right attaches in the first place aside from the rules' express exemption. Anything to which the rules apply must already have passed through the *Press-Enterprise II* filter. But because there is no historical openness regarding warrants sealed under confidential law, (or search warrants at all), and because public access would frustrate that process, sealed warrants never come under the umbrella of Rules of Court 2.550, 2.551, or their parent, *NBC Subsidiary's* strict scrutiny test.

For these three reasons, nobody, including EFF, has standing under these rules of court to unseal warrant affidavits required to be "kept confidential by law."

Because these points are true, and because Rules of Court 2.550 and 2.551 codify the First Amendment qualified right of access, logically this Court can affirmatively hold that in California, there is no right of access to warrant materials sealed under *Hobbs*, or Evidence Code sections 1040–1042.

Finally, we point out again that a trial court that denies a petition to unseal under Rule of Court 2.551(h) *need not make express factual findings*. (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 488.)

Again, though, even if the County is wrong, we believe Judge Moore's order still would meet the Rules' standards for denial of the petition to unseal.

IV.

The California Constitution does not provide EFF any greater right of access to search warrants sealed under law than does the First Amendment.

Article I, section 2 of the California Constitution presents no obstacle to keeping the warrant affidavits sealed. While that charter provides "an even broader guarantee of the right of free speech and press than does the First Amendment" (*Gilbert v. National Enquirer* (1996) 43 Cal.App.4th 1135, 1144), and while those rights include "broad access rights to judicial hearings and records" in both civil and criminal cases (*Copely Press v. Superior Court* (1992) 6 Cal.App.4th 106, 111), those rights of access have not been extended to the unique, ex-parte, in-camera proceedings whereby arrest and search warrants are obtained.

In fact, the California Supreme Court observed that:

> Past California decisions have not interpreted the state Constitution as providing an equally extensive right of public access to court proceedings, even in criminal cases. [Citation.]

(*NBC Subsidiary v. Superior Court*, *supra*, 20 Cal.4th 1178, 1197, fn. 13.)

And one decision held that the right of the public to attend preliminary hearings [which are historically far more open than warrant proceedings—*see, e.g. El Vocero v. Puerto Rico* (1993) 508 U.S. 147] is *not* anchored in the state constitution. (*San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498, 508.) If so, certainly the state constitution provides no public access to ex-parte warrant proceedings, or to sealed warrant materials.

Article I, section 3(b) of the California Constitution (enacted into law in 2004 by the passage of Proposition 59) offers no access, either, because it features a well-known law enforcement exception:

> This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. (Cal. Con., Art. I, Sec. 3, §(b)(5).)

Proposition 59 elevated to the state constitution access to public records, but it did not abridge preexisting law enforcement exceptions, and it expressly says so. Because access to sealed warrant materials could be denied under many grounds before the passage of Proposition 59, (California common law (see below), the First Amendment test (see Rules of Court 2.550 and 2.551, their predecessors, and *NBC Subsidiary, supra*), and the California Public Records Act (Govt. Code §§ 6254(f)[investigatory file exemption] & 6244(k) with Evid. Code § 1040[official information privilege)), the courts' powers to seal warrant materials remain precisely what they were before passage. We know of no authority allowing Proposition 59 to pry open sealed warrant materials.

V.

Search warrants sealed under *Hobbs* and similar codified privileges are exempt from disclosure and any access provided by Penal Code section 1534. The

warrants at issue here fall directly under this exemption. Therefore, the trial court did not err on this ground.

EFF makes much of Penal Code section 1534's provision making "documents and records of the court relating to the warrant" open to the public as a judicial record. (Pen. Code § 1534, subd. (a); RT pp. 18—21.) Although EFF somewhat acknowledges *Hobbs*, it seems to think that section 1534 lades opponents with a sort of perpetual pressure to unseal. The trial court was puzzled at this claim and found no authority for it. (See RT 21.) No doubt, this is because the court knew that the California Supreme Court had long ago held:

> These codified privileges [Evidence Code §§ 1041 and 1042] and decisional rules together comprise *an exception to the statutory requirement* that the contents of a search warrant, including any supporting affidavits setting forth the facts establishing probable cause for the search, become a public record once the warrant is executed. (Pen. Code, § 1534, subd. (a); see Seibel, supra, 219 Cal.App.3d at p. 1291.)

(*People v. Hobbs*, *supra*, 7 Cal.4th 948, 962, italics added.) An exception means the general rule does not apply, not that it applies somewhat. And *Hobbs* itself does not prescribe unending scrutiny or lingering pressure to unseal. EFF was and is simply wrong.

EFF was also wrong when it claimed below that "anything that cannot be sealed under some specific provision of either *Hobbs* or the factors in the *Jackson* case has to be released." (RT 21: 11–13.) This statement was wrong about *Hobbs* because *Hobbs* recognized that both "codified privileges" and "decisional rules" comprised an exception to Penal Code section 1534. *Hobbs* never said the exception canon was

closed. For example, *Hobbs* did not expressly include Evidence Code section 1040 [official information privilege] as an exception because it was not raised, but no doubt it would have been included had it been raised.

And EFF is wrong about its *Jackson* claim because the *Jackson* affidavits were not sealed under confidential law, as were ours, and because *Jackson* assumed a qualified First Amendment right of access.

Penal Code section 1534 has no bearing on the sealed warrant affidavits, here.

VI.

There is no California precedent recognizing a common law right of access to search warrant affidavits sealed under law, but even if there were, the trial court's ruling survives because it at least meets the common law test.

EFF claims the trial court erred by failing to meet the standards of its right to access under California common law. (See EFF's AOB, p. 46.) But EFF fails to demonstrate there is such a right that applies to search warrants materials "required to be kept confidential by law."

We note initially there would be little point in *Hobbs's* recognition that warrants sealed under statutory and decisional law are exempt from Penal Code section 1534 disclosure, or in such warrants' exemption from Rules of Court 2.550 and 2.551, if mere common law would expose their contents on an equal or lesser showing. In fact, one of California's leading cases on common law right of access to judicial records seems to recognize this:

> Where there is no contrary statute or countervailing public policy, the right to inspect public records must by freely allowed.

(*Craemer v. Superior Court* (1968) 265 Cal.App. 216, 222.) Here, of course, contrary statutes (Evid. Code §§ 1040—1042) directly apply, along with countervailing public policy expressed by the state Supreme Court in *Hobbs*.

In its common law argument, EFF cites *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, which cites *Estate of Hearst* (1977) 67 Cal.App.3d 777, along with *Craemer* to register the well-known presumption of public access to judicial records, and reasons in support. But *Estate of Hearst,* like *Craemer*, exempts from this right of access records made nonpublic by statute and policy. (*Estate of Hearst*, supra, 67 Cal.App.3d at 782 [citing to *Craemer's* recognition of exemptions by statute and policy].)

Craemer, *Hearst*, and any other common law right-of-access cases will have to defer to *Hobbs* and its companion privilege statutes because they are themselves codification of common law privileges. (*See People v. Galland* (2008) 45 Cal.4th 354, 363–364 [Evidence Code section 1041 codifies the common law privilege against disclosure of a confidential informant.].) There is no need to litigate these issues anew each time.

Although it deals with records seized from warrant execution and not records in support of the search warrant, *Saunders v. Superior Court* (2017) 12 Cal.App.5th Supp. 1 bears consideration. *Saunders* marched through and reject several grounds the press there asserted for unsealing the target's seized cell-phone records. When the court addressed whether common law provided a right of access, the court

applied the test from *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106[7] and *Sander v. Superior Court* (2013) 58 Cal.4th 300. That test led the *Saunders* court to conclude that the seized records

> [f]all into the "marginal" third category as they are not either official or public records of the court in the historical sense or the court's predecisional adjudicatory or deliberative materials. That means there is no presumption in favor of access and we must consider as a threshold question whether the public interest would be served by disclosure, meaning, for these purposes, whether disclosure would "contribute significantly to the public understanding of [the court's] activities." (*Sander*, *supra*, 58 Cal.4th at pp. 323-324

(*Saunders v. Superior Court*, *supra*, 12 Cal.App.5th Supp. 1, at 24–25.) After further analysis, the court concluded there was no common law right of access at all, not merely that the balancing test tipped in favor of privacy. (*Id*.) It was a qualitative determination that the seized records were not "public records" worthy of a presumption in favor of access. (*Id.* at 25.)

If this Court applies the *Copley-Sander-Saunders* analysis to the sealed warrant materials here—simply to see whether they fall into the judicial records or public records category that must then be balanced, we expect the same outcome as in *Saunders*. A common law holding otherwise would abrogate *Hobbs* and Evidence Code sections 1040–1042.

The County is unaware of a single California case holding that warrant affidavits sealed under law such as those here are subject to common law access or

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[7] There are at least three different *Copley Press* cases cited herein.

even balancing when challenged by an uninvolved third party like EFF. The only case we have found that says anything remotely close is *Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, where, in the appeal of a summary judgment ruling in favor of police and their municipal employers, the court said that "Certainly, an affidavit in support of arrest and search warrants—part of a court file—is a public record," followed by citations to several cases including *Hearst*. But there is no indication in *Alarcon* that the warrants at issue in *Alarcon* were ever sealed, much less sealed according to *Hobbs* or statutory privileges. In fact, the words "seal" and "sealed" are entirely absent from *Alarcon*. The warrants there appear to have been garden-variety and subject to automatic 10-day disclosure under Penal Code section 1534. At any rate, the warrant materials at issue there somehow became part of the open court file. Ours never have.

No California case has held that sealed warrant affidavits like ours are subject to the common law balancing test. But even if they are, we believe they can pass that test under Judge Moore's findings.

CONCLUSION

The County argued below and continues to maintain that EFF has no right of access under *any* ground to unsealing and disclosure of the eight warrant affidavits, here, even partially. Case law under each claimed avenue of access supports this position. There is no First Amendment right of access because no California court has held that warrants kept confidential by law are historically open or that public access would further the process.

Rules of Court 2.550 and 2.551 are gauged on the First Amendment, but assume that whatever records subject to them already have passed through the *Press-Enterprise II* filter. Sealed affidavits like those, here have never passed through such a filter to bestow a qualified right of First Amendment access, and the rules expressly exempt from their reach records of this kind.

Nor has any authority held that the California Constitution breaches warrant affidavits sealed under *Hobbs* or its companion privilege statutes. There is no reason to suppose any of its provisions offer any greater access in this context than does the First Amendment, the Rules of Court, or Penal Code section 1534.

As for section 1534, *Hobbs* and its companion statutory privileges are recognized exemptions from its standard disclosure mandate. There is no balancing to be done, no continuing or lingering burden on the sealing parties. And whatever rights the public and media have to ensure that section 1534 is followed, they have no right to invoke it where the sealed records are exempt.

And common law offers no access, either, because warrant affidavits sealed like those here have never been held to be presumptively open judicial or court records. Besides, there is no room for such a common law rule since we have *Hobbs* and statutes to control this area.

We believe that the trial court's denial of EFF's petition to unseal will pass any test, including independent review of First Amendment level scrutiny. If it does pass that test, it will necessarily pass all others. But if, somehow, there was a deficiency in Judge Moore's findings enough to cause remand, we ask this Court to examine the

Masonek declaration lodged under seal and then order it filed under seal and considered on remand. We can think of no grounds for its exclusion.

Respectfully submitted, October 25, 2021.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Respondent's Brief is produced using 13-point Book Antiqua, a Roman style font, including footnotes and contains approximately 10,787 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 25, 2021.

_____/s/_____
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