Appellate Case No. E076778

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

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff and Appellant,
v.

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

Defendant and Respondent,

and

THE PEOPLE OF SAN BERNARDINO COUNTY, and
SAN BERNARDINO DISTRICT ATTORNEY, and
SAN BERNARDINO COUNTY SHERIFF'S DEPARTMENT,

Real Parties in Interest and Respondents.

Appeal from the Superior Court for the County of San Bernardino
The Honorable Brian S. McCarville, Presiding Judge
The Honorable Dwight W. Moore
Case No. CIVDS1930054

REPLY BRIEF OF PLAINTIFF AND APPELLANT ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF INTERESTED ENTITIES

Pursuant to California Rules of Court 8.208, Electronic Frontier Foundation states that it is a donor-funded, non-profit civil liberties organization. Electronic Frontier Foundation has no parent corporation and no publicly held corporation owns 10% more of its stock.

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INTRODUCTION

The San Bernardino County Sheriff's Department and San Bernardino County District Attorney have not provided this Court with any lawful justification to keep every single word contained within the search warrant affidavits at issue sealed in perpetuity. The affidavits relate to law enforcement's digital surveillance activities, techniques that that the Legislature has recognized create acute risks to individual privacy and can often sweep up intimate details on wholly innocent individuals. Disclosure of redacted versions of the search warrant affidavits would enable public scrutiny of those activities and oversight of the superior court's authorization of them while allowing any true need to keep some information in those affidavits sealed. More fundamentally, this disclosure is required by the public's rights of access under the First Amendment, Penal Code § 1534(a), the California Constitution, the Rules of Court, and the common law.

The Sheriff's Department and District Attorney (collectively, "the County") argue that EFF lacks standing to bring this petition and that none of these authorities provide the public with a right to seek disclosure of the search warrants in the first instance. The County is wrong. Every case to have addressed the issue has held that members of the public have standing to request access to judicial records; the County's contrary argument is unsupported by any authority and incorrectly conflates standing with the merits.

The County's argument that evidentiary privileges completely foreclose any public right of access to the search warrants is also incorrect as a matter of law. Although these exceptions may limit the disclosure of specific information contained in search warrant materials and other judicial records, they do not swallow the laws that presume the public can

access the affidavits. Further, the County's argument confuses the question of whether the public has a presumptive right of access to the search warrant affidavits with the question of whether a specific affidavit—and all the information within it—must be publicly disclosed. Along the way, the County's argument misinterprets relevant constitutional provisions, statutes, cases, and court rules. The County also outright ignores the explicit command of the Legislature, which mandated access to search warrant materials more than 50 years ago and recently passed multiple laws to provide more transparency and public oversight of law enforcement's use of search warrants that authorize digital surveillance.

Moreover, the County's argument that these affidavits should remain completely and eternally sealed needlessly throws the relevant constitutional provisions, statutes, court rules, and cases into conflict. But as EFF has already shown, there is another path this Court can take that harmonizes all the relevant legal principles and competing interests: the affidavits should simply be redacted to address any need to withhold specific information in them before they are unsealed. This is the result required by the First Amendment, Penal Code § 1534(a) as interpreted by the California Supreme Court, the California Constitution, the Rules of Court, and the common law. That outcome is legally correct for all the reasons EFF explained in its opening brief. California law provides both a history of access to search warrant affidavits and recent legislation demonstrates why utility supports disclosure of these records: instilling greater awareness and oversight of law enforcement's digital surveillance activities.

Importantly, holding that the public has a presumptive right of access to search warrant affidavits under the First Amendment will not result in the myriad of harms the County envisions. As with other judicial records, the public's presumptive right to access these materials can be

overridden in particular circumstances based on an appropriate showing and detailed factual findings by a court. The presumption does not limit the ability of law enforcement or judges to seal information and protect law enforcement interests, the integrity of ongoing investigations, the identities of witnesses, and other legitimate, compelling concerns. It only requires that they meet the test to override the public's presumptive right. And that courts address those concerns narrowly by redacting those details, rather than by wholesale sealing.

Although EFF lacks access to the sealed information contained within the affidavits, it submits that the County's concerns can be addressed via narrow redactions. And it asks that this Court review the materials to determine what portions of the affidavits should be released.

RESPONSE TO THE COUNTY'S BACKGROUND FACTS AND CASE HISTORY

The County makes several preliminary errors regarding the California Constitution, EFF's standing, the record before this court, and the standard of review.

I. Article I, § 3 Of The California Constitution Requires The Court To Interpret All Legal Authorities Broadly To Support Public Access

As an initial matter, the Court must keep in mind that Article I, § 3(b) of the California Constitution, adopted by the voters in 2004, requires that every California "statute, court rule, or other authority, including those in effect [in 2004], shall be broadly construed if it furthers the people's right of access [to "information concerning the conduct of the people's business"], and narrowly construed if it limits the right of access." Cal. Const. Art. I § 3(b)(2); *see Sierra Club v. Superior Ct.*, 57 Cal.4th 157, 166 (2013). As our Supreme Court has explained, this "constitutional

canon" of interpretation requires courts to construe California law "in a way that maximizes the public's access to information unless the Legislature has expressly provided to the contrary." *Id*. at 175 (internal quotes omitted). It applies to statutes, rules, and other legal authority governing access to judicial records. *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal.App.4th 471, 495 (2014). The Court therefore must interpret all the California authorities discussed below broadly if they facilitate access, and narrowly if they impede it.

II. EFF Has Standing To Request Access To The Sealed Search Warrants

The government concedes that EFF has standing to "approach the court to seek unsealing," but then claims, without citation to authority, that if the court determines that the records are "confidential," EFF's standing evaporates. *See* County Response Brief ("RB") 17-18, 36. This erroneously conflates standing with the merits. As our Supreme Court has explained, the Court must determine whether the plaintiff has standing before it reaches the merits: "standing concerns a specific party's interest in the outcome of a lawsuit. [California Courts] therefore require a party to show that he or she is sufficiently interested as a prerequisite to deciding, on the merits, whether a party's challenge [to government] action independently has merit." *Weatherford v. City of San Rafael*, 2 Cal.5th 1241, 1247 (2017). Standing thus goes to the question of whether a particular party has an interest in the relief it seeks, not to the merits of its claims. *See, e.g., San Francisco Apartment Assn. v. City & Cty. of San Francisco*, 3 Cal.App.5th 463, 472 (2016) ("A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits."). A party is not somehow stripped of standing just because it may not be entitled to all the relief it requests.

As previously discussed, every member of the "public has a legitimate interest and right of general access to court records." *Sander v. State Bar of California*, 58 Cal.4th 300, 318 (2013); AOB 21-23. This right of access is grounded in the common law, the First Amendment, and the California Constitution, and the Rules of Court (and, here, also the Penal Code). *See Sander*, 58 Cal.4th at 309-310.

Thus, every member of the public has standing to request access to a judicial record, regardless of whether they are ultimately entitled to it. Courts universally recognize this, and the government has cited absolutely nothing that even suggests to the contrary. *See* AOB at 22 (collecting cases); *e.g.*, *Craemer v. Superior Ct. In & For Marin Cty.*, 265 Cal.App.2d 216, 218 & n.1 (1968) (public had standing to request access to grand-jury transcripts). The rule is so well established that courts rarely even discuss it in the numerous cases requesting unsealing or access to hearings. *See*, *e.g.*, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 20 Cal.4th 1178 (1999) (allowing media to challenge closure of civil courtroom); *In re Marriage of Burkle*, 135 Cal.App.4th 1045, 1050, 1061-62 (2006) (press intervened to successfully challenge sealing of records that were sealed as expressly authorized by statute that the court held unconstitutional). It is codified in Rule of Court 2.551(h)(2), which expressly allows any member of the public to request unsealing. This Rule and the other relevant State laws must be read broadly in favor of furthering public access to the affidavits in question. EFF has standing.[1]

[1] The County in passing suggests EFF lacks standing because its inability to access the affidavits is not an injury cognizable by law under *Six4Three, LLC v. Facebook, Inc.*, 49 Cal.App.5th 109 (2020). But that case did not concern the public's right to access sealed materials. It merely held that a litigant could not appeal a sealing order when it had full access to the sealed materials. *Id*. at 115-17. In fact, the court expressly emphasized "the

III. Before Considering Non-Public Material In The Masonek Declaration, This Court Must Conclude That It Was Properly Sealed

The County asks this Court to consider non-public parts of the declaration of Christine Masonek that the superior court refused to consider. RB 15-16. If this Court believes consideration of the non-public Masonek declaration is necessary to resolve the case, it may consider it only as allowed by Rule of Court 8.46.

Parties cannot file a record under seal without a judicial order sealing the specific record; they must instead conditionally lodge the materials and file a motion to seal them. Rule 2.551(a) ("A record must not be filed under seal without a court order"); 2.551(b)(1) (parties seeking to seal records "must file a motion or an application for an order sealing the record"). Even if a party complies with those provisions of the Sealing Rules, the materials are not "filed" under seal until and unless the court enters an order sealing them, based on the substantive standards for sealing records under Rule 2.550. Rule 2.551(d).

The County initially failed to follow these procedures and simply tried to file the unredacted Masonek declaration under seal. *See* 2 JA 221. After Plaintiff pointed this out, *see id*., the County did file a motion to seal, but this motion provided no facts or concrete argument supporting the request. *See* 2 JA 262-264. The superior court expressly stated that it would not accept that declaration into evidence. Reporter's Transcript of Proceedings ("RT") 22:4-5, 18-19. It never ordered that the unredacted

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importance of the public's interest in access to" sealed court records but explained that no "party purporting to represent the interests of the public has joined in this appeal." *See id*. at 115-16. If anything, the case thus supports the standing of a member of the public that seeks access to sealed records.

Masonek declaration be sealed, meaning that this declaration was returned to the County and never filed with the Court. If it had been filed, it would be public. *See* Rule of Court 2.551(b)(6); *Huffy Corp. v. Superior Ct.*, 112 Cal.App.4th 97, 109-10 & n.5 (2003).[2] Nothing in the superior court's register of actions suggests that the unredacted Masonek declaration was ever filed. *See* 1 JA 15-19.

On appeal, the County nevertheless argues that Rule 2.551(h)(2) allowed it to simply file the Masonek declaration under seal, because that Rule contemplates parties filing redacted materials in response to petitions to unseal judicial records. RB 16. This is incorrect. The County does not argue that the Masonek declaration is a record that must by law be kept confidential; no statute even suggests that it is, and the County filed some of it publicly. The Sealing Rules thus apply to it. *See* Rule 2.550(a). Therefore, this declaration "must not be filed under seal without a court order." Rule 2.551(a). Nothing in provision of Rule 2.550(h) that the County cites even suggests otherwise. Instead, this subsection simply ensures that when a party moves to unseal records, it cannot include sealed information in its public filings, a practice that would circumvent Rule 2.551(c) (which subdivision (h) cites). If this provision exempted papers submitted to support or oppose motions to seal from the Sealing Rules, it would run afoul of the First Amendment.

Because the unredacted Masonek declaration was not filed in the trial court, it is governed here by Rule of Court 8.46(d). *See Huffy Corp.*, 112 Cal.App.4th at 109-10 & n.5 (decided before Rule 12(e) was renumbered as Rule 8.46 (d)). A party asking this Court to file such a document under seal must file a motion to seal. Rule 8.46 (d)(1)-(2). As in

[2] *Huffy Corp*. may have been abrogated on unrelated grounds. *See Curtis v. Superior Ct.*, 62 Cal.App.5th 453, 471 (2021).

the superior court, if the Court denies the sealing motion, it must either file the record publicly or return it without considering or filing it. Rule 8.46(d)(6)-(7); *Huffy Corp.*, 112 Cal.App.4th at 109-10. Any sealing order must be narrowly tailored so that it covers only those documents or parts of documents that meet the First Amendment standards discussed above. Rule 8.46(d)(8). "All other portions of each document or page must be included in the public file" or returned to the submitting party and not filed. See Rule 8.46(d)(8). This Court may consider the redacted portions of the Masonek declaration only under these procedures.

IV. The Superior Court Was Required To Make Factual Findings Before Sealing The Search Warrant Affidavits, And This Court Must Conduct An Independent, De Novo Review Of That Order

The superior court ordered that the search warrant affidavits EFF seeks "shall remain sealed," RT 32:13, and that nothing in the affidavits "should be released now or ever." RT 23:11. The superior court's order thus sealed judicial records, and the First Amendment and the Rules of Court required the superior court to make express factual findings before ordering that the affidavits remain sealed. *NBC Subsidiary*, 20 Cal.4th at 1218; Rule 2.550(d). Further, this Court conducts an independent, de novo review of the superior court's sealing order because it was based on a paper record. *People v. Jackson*, 128 Cal.App.4th 1009, 1014-15 (2005); AOB 19-20.

The County argues that these principles do not apply here because EFF petitioned the superior court to unseal the search warrant affidavits that had been previously sealed. RB 18-19. According to the County, because EFF was seeking to unseal affidavits that were already under seal, the superior court was not obligated to make any factual findings. *Id.* And the County implies that this Court need only review the superior court's

order for an abuse of discretion. *See id*.

The County is incorrect and its position directly conflicts with the holding of *NBC Subsidiary*, 20 Cal.4th at 1183–84. The County places too much weight on the fact that EFF was petitioning to unseal judicial records. Yet as *NBC Subsidiary* shows, the superior court's ruling on EFF's motion to unseal determines whether a court must make factual findings and the relevant appellate standard of review, not the procedural posture of EFF's request and the relief it sought.

NBC Subsidiary involved the denial of a media organization's "application to vacate [an existing] closure order. *Id*. at 1182–84 (closure order issued on September 10; media moved to vacate order two days later). It was thus in the context of a motion to lift a closure order that our Supreme Court held that trial courts must "expressly find" facts that override the presumption of openness. *Id*. at 1217-18. And the high court held that the superior court's failure to make the required findings meant that it must grant the requested relief—to vacate the previously ordered closure order. *See id*. at 1182-86.

The motion to vacate the closure order at issue in *NBC Subsidiary* is procedurally identical to a motion to unseal. It therefore does not matter whether the sealing order here is viewed as one that simply denies unsealing or as one that requires the search warrant affidavits remain under seal indefinitely. RT 23:11; 32:13. *NBC Subsidiary* holds that factual findings and all other requirements under the First Amendment and Sealing Rules are required in either posture.

Because the superior court entered an order sealing judicial records, rather than one that unsealed the affidavits EFF seeks, the portions of *Overstock.com*, 231 Cal.App.4th at 488 and Rule 2.551(h) that the County relies on do not apply here.

The relaxed standards articulated in *Overstock.com* and the Sealing

Rules governing when a court orders a record unsealed are designed to promote public access to judicial records, not restrict them. These standards are intended to insulate court orders that unseal records, in contrast to the requirement of a factual record and a more searching standard of review for orders sealing records, which is designed to prevent improper sealing. The case law bears this out. The portion of *Overstock.com* cited by the County restates the holding from *In re Providian Credit Card Cases*, 96 Cal.App.4th 292, 301-02 (2002). The *Providian* court held that the Sealing Rules and the First Amendment intentionally create lower requirements for courts to unseal court records "in light of the First Amendment issues involved." *Id*. at 302. Courts do not have to make specific findings before ordering records to be unsealed or denying motions to seal records because the order "is clearly, if impliedly, determining that there is no 'overriding interest that overcomes the right of public access to the record,' and/or that the other requirements of [the Sealing Rules] have not been met.'" *Id*.

That same principle is why the *Jackson* court held that an order to unseal judicial records should be reviewed for an abuse of discretion, while an order to seal judicial records should be subject to independent, de novo review: "*Providian*'s rationale arguably is persuasive in applying an abuse of discretion standard of review when deciding the propriety of an order to unseal documents." 128 Cal.App.4th at 1020. But the court went on to "doubt whether it is the appropriate standard when sealing the type of documents involved in the instant case," including search warrant materials like those at issue here. *Id*. *Jackson* then held that the superior court's order sealing search warrant materials was subject to de novo review. *Id*. at 1021.

Finally, the County's argument, if it were correct, would allow parties that wish to keep the public in the dark about how they are using the courts to game the system. "Most litigants have no incentive to protect the public's right of access [to judicial records]. Both sides may want

confidentiality. Even when only one party does, the other may be able to extract a concession by agreeing to a sealing request (this type of tradeoff is common in settlement agreements)." *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 211-12 (5th Cir. 2019). Although the parties cannot merely stipulate to a sealing order, they may cooperate in moving to obtain one before the public is even aware of the case, depriving the court of any way to test the accuracy of the alleged need for sealing. *See Uniloc USA, Inc. v. Apple, Inc.*, 508 F.Supp.3d 550, 554 (N.D. Cal. 2020) ("Our adversarial system collapses when, as often occurs in these suits, *both parties* seek to seal more information than they have any right to and so do not police each other's indiscretion.") (emphasis in original). Then, if some member of the public learns of the case and moves to unseal, the parties can point to the prior order and insist upon a more deferential standard of review than would have been the case had there been a real opposition to the initial sealing motion.[3] The law should not promote these types of collusive strategies to prevent public access to judicial records.

ARGUMENT

I. The Public's First Amendment Right Of Access Attaches To Executed And Returned Search Warrant Affidavits

EFF has already demonstrated the great utility of granting public access to search warrant affidavits and that California has a historic

[3] Even if the abuse-of-discretion standard did apply, the court would still review legal issues de novo and factual findings for substantial evidence. *See Aguilar v. Atl. Richfield Co.*, 25 Cal.4th 826, 860 (2001); *Overstock.com*, 231 Cal.App.4th at 491. As far as EFF can tell, there is no evidence in the record supporting the superior court's order. And "[w]here the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion." *People v. Superior Ct. (Humberto S.)*, 43 Cal.4th 737, 742 (2008).

tradition of public access to executed search warrants returned to courts. AOB 24-29. Thus, the public's First Amendment right of access attaches to the search warrant affidavits EFF seeks.

The utility prong of the First Amendment's right of access test—the most important factor—is met here. *NBC Subsidiary*, 20 Cal.4th at 1213-14; *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008) (holding that utility "alone, even without experience, may be enough to establish" the right of access). The County does not engage with any of EFF's argument demonstrating how public access to search warrant affidavits will have salutary benefits. *See* AOB 26 (describing the Legislature's actions—§1534(a),[4] CalECPA, and SB 724—to ensure that there is greater public access to records that enable oversight of these invasive digital surveillance activities).[5]

The history prong is also met here. For nearly 60 years, §1534(a) has mandated public access to search warrant materials—"if the warrant has been executed, the documents and records shall be open to the public as a judicial record." AOB 28-29. The County does not refute this history of public access. It argues only that the affidavits fall wholly outside the statute's plain text. RB 27, n.5. For the reasons explained below, the

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[4] All statutory references are to the Penal Code unless otherwise stated.

[5] The County's claim, in a footnote, that the Court should not consider aspects of the record below showing law enforcement's high rate of using digital surveillance on the grounds it was not "submitted into or accepted into evidence" is wrong. The newspaper article EFF relies on was submitted as an attachment to an exhibit to a declaration "in support of Plaintiff's Motion to Unseal." *See* 2 JA 236, 238 ¶ 13. It was not necessary for the superior court to formally admit it into evidence for it to become part of the record. *See Waller v. Waller*, 3 Cal.App.3d 456, 465–66 (1970). To the extent the government is now arguing that that it is hearsay or not based on personal knowledge, it forfeited this objection by failing to raise it below. *See People v. Johnson*, 222 Cal.App.4th 486, 493 (2013).

County cannot use other laws and cases that exempt specific information from public disclosure to swallow § 1534(a)'s general command requiring disclosure.

A. Federal Courts Recognize A Historic Tradition Of Access To Search Warrant Materials After Their Execution Or At Least Post-Indictment

The County cites a series of federal cases to argue that there has never been a historic right of access to search warrant materials. RB 23-29. The argument mischaracterizes these federal cases and ignores others that expressly find a history of access to search warrant materials. As EFF's opening brief demonstrated, there is a dividing line between federal courts' recognition of a history of access to warrant materials. AOB 28-29. At the early stages of the criminal proceedings, warrants have not been historically available to the public. *United States v. Bus. Of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1193 (9th Cir. 2011) ("*Custer Battlefield Museum*"). "Post investigation, however, warrant materials 'have historically been available to the public.'" *Id.* (quoting *In re N.Y. Times Co.*, 585 F.Supp.2d 83, 88 (D.D.C. 2008). And at least one federal court has recognized a history of access to warrants once they have been executed, mirroring the statutory mandate of § 1534(a). *See In re Search Warrant for the Secretarial Area Outside the Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988) ("*Gunn"*). The search warrant affidavits EFF seeks are at precisely these later stages. 2 JA 231-33, 244.

1. Federal Cases Recognizing A History Of Access To Search Warrants At Later Stages In Proceedings Are Analogous To California's History Of Access Under § 1534(a)

The County misstates the law when it argues that most federal courts

"have determined that warrant materials have not historically been open or accessible." RB 28. Rather, as the cases the County rely on show, the question of the historic accessibility of search warrant materials turns on the stage of the proceedings in which access is sought, just as it does under California law.[6]

The County characterizes the Eighth Circuit's recognition of a history or access to post-executed search warrant materials as an outlier that this Court should disregard. *Gunn*, however, is the most analogous federal case to California's history of access to these materials. *Gunn* recognized that historically, "search warrant applications and receipts are routinely filed with the clerk of the court without seal," making them open for public inspection once they were executed. *Gunn*, 855 F.2d at 573. This history of public access mirrors California's mandate in § 1534(a), which establishes a 10-day period in which the materials are not open to the public but post-execution, "the documents and records shall be open to the public as a judicial record." Here, the search warrant affidavits EFF seeks were executed and returned to the superior court, well past the statute's 10-day period. 1 JA 25 ¶ 23. Thus, the holding of *Gunn* aligns with the public's historic right of access under § 1534(a).

The County also relies on *Times-Mirror v. United States*, 873 F.2d 1210, 1214-15 (9th Cir. 1989). But the Ninth Circuit there held that "the experience of history implies a judgment that warrant proceedings and materials should not be accessible to the public, at least while a pre-

[6] The County appears to argue that EFF is seeking access to the *ex parte* proceedings in which law enforcement seek judicial authorization for search warrants. RB 37. EFF has never sought access to those proceedings. The issue in this case has always been public access to the judicial records that are the outcome of those proceedings and have been executed and returned to the court that issued them. *See* 1 JA 25.

indictment investigation is still ongoing as in these cases." *Id*. *Times-Mirror* thus recognizes a historical distinction in public access in which post-indictment, the public has traditionally been able to access search warrant materials.

Times-Mirror supports a historic right of access to the search warrant materials EFF seeks, even if *Gunn* were not on point and the Legislature had not enacted § 1534(a). First, most of the search warrant affidavits at issue here concern investigations that have resulted not just in indictments (or information) but in convictions. 2 JA 231-33, 244. That the remainder were sought between 2017-18 is evidence that these proceedings have long since passed their initial, investigatory stage, diminishing the concerns articulated in *Times-Mirror*. 1 JA 26-31. The County's reliance on *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), is similarly misplaced because that decision merely adopts the post-investigation distinction articulated in *Times-Mirror*. *Goetz*, 886 F.2d at 64-65. Thus, to the extent that the federal court cases are relevant to this Court's inquiry regarding the history of public access to search warrant affidavits, they support EFF's position, because the investigations here have long been complete.

In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012), which the County chiefly relies upon, is the outlier. RB 26-27. The Sixth Circuit's holding that there is no historic right of access to search warrant materials, either after their execution or post-indictment, is incorrect as a matter of law. As just described, most federal courts to consider whether the First Amendment right of access attaches to warrant materials have found a history of access at some point after their execution or at the initiation of criminal proceedings. Further, the decision is mistaken to broadly claim there is no historic right of access when jurisdictions, such as California, have mandated access under state laws such as § 1534(a). Relatedly, a

statute requiring disclosure of search warrant materials returned to California courts is of a different character—a legal command—than a practice of publicly filing some executed search warrants while seeking to seal others. *In re Search of Fair Finance*, 692 F.3d at 430-31.

Finally, *In re Granick*, 388 F.Supp.3d 1107 (N.D. Cal. 2019) is distinguishable for many of the same reasons described above. To the extent the *In re Granick* district court held that there was no history of public access to the search warrant materials, it merely restated the distinction in pre-indictment access recognized by the Ninth Circuit in *Times-Mirror* and *Custer Battlefield Museum*. *See* 658 F.3d at 1193. As said above, that conflicts with § 1534(a). *See In re Granick*, 388 F.Supp.3d at 1124.

2. Federal Courts Recognize The Utility Of Granting Public Access To Post-Executed Search Warrant Materials

Federal courts have also recognized the utility of public access to search warrant materials after their execution or post-indictment. For example, in *Gunn* the Eighth Circuit held that "access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct." 855 F.2d at 573. The logic behind granting such access is analogous to the purpose behind § 1534(a), as access provides the public with "knowledge about the execution of the search warrant and about the activities in regard thereto." *Oziel v. Superior Court*, 223Cal.App.3d 1284, 1296 (1990).

The County argues to the contrary that, as far as the utility prong is concerned, the secrecy necessary to search warrants and the criminal investigations they relate to "would be entirely frustrated—perhaps destroyed" by a First Amendment presumptive right of access to the search

warrants. RB 25. The County argues that recognizing a presumptive right of access would endanger witness safety, harm active investigations, and frustrate law enforcement's investigative techniques. *Id*. This is a mischaracterization of the relief EFF seeks and what the presumption of public access under the First Amendment requires.

EFF does not seek to disclose any details that would endanger the safety of witnesses, informants, or anyone else identified in the search warrant affidavits. 1 JA 23 ¶ 10; RT 25:11-13. Nor does EFF seek to hamper law enforcement's ongoing investigations (though on the record here, these search warrants do not appear to relate to active investigations). 2 JA 231-33, 244. From the start, EFF has acknowledged those concerns and conceded that they can be addressed by redacting details from the affidavits. 1 JA 23 ¶ 10; 1 JA 31 (requesting partial unsealing).

Further, recognizing the utility of public access to post-executed search warrants would not result in widespread public disclosure of witness identities, non-public details of ongoing investigations, or secret law enforcement techniques. A First Amendment presumptive right of access to post-executed search warrants is not an absolute mandate that every single word in every search warrant must be disclosed. Rather, it is a default that can be overridden based on the factors identified by our Supreme Court in *NBC Subsidiary*. Nothing in the presumption suggests that law enforcement cannot overcome it and withhold specific information or even entire records on the appropriate showing. *See Jackson*, 128 Cal.App.4th at 1022-28. Indeed, the concerns articulated by the County, and others, can be addressed when considering whether to unseal a particular document. But as EFF has shown, those concerns cannot wholly foreclose public access. AOB 36-48.

B. The County's Other Cases Do Not Foreclose The First Amendment Right Of Access To Post-Executed Search Warrant Materials That EFF Seeks

The County's reliance on other states' history of public access to search warrant materials is unavailing because those states appear to have no analog to § 1534(a)'s public right of access. RB 28-29. In *Seattle Times Co. v. Eberharter*, 713 P.2d 710 (Wash. 1986), the state's high court held that "no uniform tradition of public access to search warrants existed in the state" prior to the initiation of criminal proceedings. *Id*. at 713-14. In contrast to Washington State, California has a tradition of mandating public access to post-execution search warrants, codified by the Legislature in § 1534(a).

The Supreme Court of Nebraska's decision in *In re 3628 V Street*, 628 N.W.2d 272 (Neb. 2001), offers little more than recognizing the distinction that *Times-Mirror* and other federal courts have drawn in finding a lack of historic public access to search warrant materials prior to an indictment. *See id*. at 274 (noting that no criminal proceedings were initiated against the owner of the home targeted by the search warrant). *In re Investigation into Death of Cooper*, 683 S.E.2d 418 (N.C. App. Ct. 2009) similarly follows the Fourth Circuit's adoption of *Times-Mirror* standard in *Baltimore Sun*. *See* 683 S.E.2d at 425-26. The cases thus do not help the County for the reasons described above.

The County also cites a series of other cases that it claims supports the lack of historic access to search warrant materials like those that EFF seeks. RB 23-26. But they concern issues far afield from this case.

Several cases cited by the County concern whether the public has a First Amendment right of access to records created by state or federal executive or administrative agencies, rather than judicial records at issue here. *See* RB 24-25. *Copley Press v. Superior Court*, 39 Cal.4th 1272,

1301-05 (2006) involved access to law enforcement officer disciplinary records filed with a state administrative agency, not judicial records. *Id*. The court's observation that there is no First Amendment right of access to California administrative agency records has no relevance to whether the public has a First Amendment right of access to the judicial records EFF seeks. Both *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003) and *Amelkin v. McClure*, 205 F.3d 293 (6th Cir. 2000) also concern whether the First Amendment right of access attaches to non-judicial records, and are thus inapposite.

The County's reliance on California cases holding that there is no right to access juvenile proceedings and records is also misplaced. *San Bernardino County Dept. of Public Social Services v. Superior Court*, 232 Cal.App.3d 188 (1991), holds that there is no First Amendment right of access to juvenile proceedings and records, *id*. at 200-05, and *Pack v. Kings County Human Services Agency*, 89 Cal.App.4th 821 (2001) restates *San Bernardino*'s holding. *Pack*, 89 Cal.Appr.4th at 832.

Both cases are distinguishable because they concern a specific application of the First Amendment's history and utility test to a category of juvenile judicial proceedings and records that bear little resemblance to the search warrant affidavits EFF seeks here.[7] Moreover, the public is able to see how the juvenile-justice system operates because juvenile appellate

[7] The County cites *KNSD Channel 7/39 v. Superior Court*, 63 Cal.App.4th 1200 (1998), for the proposition that the right of access to judicial records derives from the common law and not the First Amendment. RB 28. That case misstates the law at the time of the decision—the U.S. Supreme Court had already recognized the opposite in *Press-Enterprise v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*"). Further, the California Supreme Court rejected such a distinction in *NBC Subsidiary*, 20 Cal.4th at 1205-12, a few years after *KNSD*. *See also Jackson*, 128 Cal.App.4th at 1022 (holding that the First Amendment's right of access extends to both judicial proceedings and records).

decisions are available to the public; the privacy rights of minors are protected by using initials or partial names and, perhaps, omitting or sealing any other information that might identify the minor. *See In re Edward S.*, 173 Cal. App. 4th 387, 392 n.1 (2009). In contrast, the public has no access to the sealed warrants here.

C. California Has A Tradition of Public Access To Grand Jury Records Much Like The Tradition of Access To Search Warrant Materials

The County's reliance on grand jury secrecy for an example of why this Court should foreclose the public's First Amendment right of access to search warrant affidavits ignores that there is a statutory scheme that mandates public access to grand jury records that largely resembles

§ 1534(a). The County argues that recognizing a presumptive right of access to the search warrant affidavits here would totally frustrate the process of obtaining search warrants, just as it would frustrate the process of obtaining indictments from grand jury proceedings. RB 24.

The Legislature, however, has enacted a law requiring the disclosure of grand jury records. Section 938.1(a) states: "If an indictment has been found or accusation presented against a defendant," a "reporter shall certify and deliver to the clerk of the superior court in the county an original transcription of the reporter's shorthand notes." Section 938.1(b) states:

> The transcript shall not be open to the public until 10 days after its delivery to the defendant or the defendant's attorney. Thereafter the transcript shall be open to the public unless the court orders otherwise on its own motion or on motion of a party pending a determination as to whether all or part of the transcript should be sealed. If the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial, that part of the transcript shall be sealed until the defendant's trial has been completed.

The public thus generally has access to grand jury records 10 days after an indictment has been issued. § 938.1(b). And the statute specifically contemplates partial sealing, rather than wholesale closure, of grand jury transcripts to the extent disclosure may prejudice a defendant's right to a fair trial. § 938.1(b).

The 10-day delay in § 938.1(b) is analogous to § 1534(a)'s delayed disclosure mandate for search warrant materials. Thus, the Legislature has directly addressed the County's concerns about frustrating grand jury proceedings via § 938.1(b), just as the Legislature has addressed concerns around search warrant secrecy in § 1534(a).

D. The County Cannot Avoid *Jackson*'s Direct Application To The Search Warrant Materials EFF Seeks

The County cannot escape that *Jackson* held that the public's First Amendment right of access attached to search warrant affidavits like those EFF seeks here. *Jackson*, 128 Cal.App.4th at 1022-23.

The County asks this Court to ignore on-point appellate case law holding that the public enjoys a presumptive right to access search warrant affidavits like those sought by EFF under the First Amendment and Sealing Rules. RB 30-32. But the County's argument is illogical—it faults *Jackson* for what it claims is a failure to apply the history and utility test under the First Amendment while asking this Court to distinguish *Jackson* on grounds entirely unrelated to the history and utility test.

The County is mistaken when it says *Jackson* skipped the history and utility test before holding the public had a First Amendment qualified right of access to search warrant affidavits. RB 32. *Jackson* summarized the California Supreme Court's holding in *NBC Subsidiary* regarding the utility and logic test, noting that "it exhaustively reviewed United States Supreme Court and Federal Circuit Court of Appeals opinions that speak to the

issues of public access in criminal and civil cases." 128 Cal.App.4th at 1022. *Jackson* then applied the First Amendment presumption articulated in *NBC Subsidiary* to the sealed search warrants, holding that the history and utility prongs had been met. *Id*.

To the extent this Court believes it must bolster *Jackson*'s analysis of the First Amendment right of access to search warrant materials, EFF has amply demonstrated both a history of access and a utility of access to them. AOB 24-29. And as *Jackson* shows, the County's concerns are not ignored under the First Amendment. Instead, they are addressed when considering whether specific facts in any given case override the public's presumptive right of access to specific documents and the information contained within them. 128 Cal.App.4th at 1022-28.

Nor can *Jackson* be distinguished based on the purported interest in sealing at issue in that case, as the County suggests. RB 31-32. The County argues that because the sealed search warrant affidavits here contain information subject to Evidence Code privileges and *People v. Hobbs*, 7 Cal.4th 948 (1994), rather than the privacy and constitutional fair trial rights at issue in *Jackson*, that "makes a decisive difference." RB 31-32. But the argument is reasoning backwards from the County's preferred result.

As the County repeatedly acknowledges, the proper analysis to determine whether the public's First Amendment right of access attaches to judicial proceedings and records is whether there is a history of access and enhanced utility via that access. *See* RB 20-24 (citing the history and utility First Amendment test). Yet the County's argument departs from that doctrinal analysis and asks this Court to endorse a new one: when the interests of secrecy in specific information contained in judicial records is sufficiently compelling, a court must ignore the history and utility analysis and categorically exclude judicial records from the public's presumptive

right of access. RB 31-32. There is no law to support the County's test and it would defy controlling precedent from the U.S. Supreme Court's decision in *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). And the result would be that the public's First Amendment rights would turn on the information contained in any judicial record, rather than the public's history of access and the utility of access to the records.

The County's argument carries troubling implications. The County suggests that compelling concerns about identifying witnesses, informants, and other interests protected by evidentiary privileges can foreclose the public's First Amendment access rights entirety. Concerns about individual privacy and a defendant's constitutional right to a fair trial, according to the County, do not require the same result. RB 32 ("The records in *Jackson* apparently were not [required to be kept confidential by law]; the ones here demonstrably are."). The County's argument suggests that the interests it seeks to protect are more compelling than a defendant's constitutional right to a fair trial. The County thus tries to value its own secrecy interests over the constitutional rights of the public and the accused.

Yet this Court does not need to resolve whether the County's interests are weightier than a defendant's constitutional rights or the public's First Amendment rights. AOB 24-32. The significance and weight of any compelling interest in specific information contained in search warrant materials can be addressed at the second stage of the analysis, on a case-by-case basis, applying the four-part test articulated by *NBC Subsidiary*. *See Jackson,* 128 Cal.App.4th 1025-28. That result avoids requiring this Court to settle potential conflicts between constitutional rights and the evidentiary privileges the County relies on while still permitting secrecy when it is justified.

II. The County's Interpretation Of The Sealing Rules Conflicts With Their Plain Text And Purpose

The County's interpretation of the Sealing Rules, which it claims renders these search warrant affidavits wholly inaccessible to the public, conflicts with their text and would permit narrow exceptions to swallow their presumption of public access. RB 34-36.

The Court must interpret the sealing rules as it would a statute. *See In re Alonzo J.*, 58 Cal.4th 924, 933 (2014); *Trans-Action Com. Invs., Ltd. v. Jelinek*, 60 Cal.App.4th 352, 362–63 (1997). That the Judicial Council adopted them in response to the Supreme Court's decision in *NBC Subsidiary* does not mean that the rules merely codify that decision. *See Trans-Action*, 60 Cal.App.4th at 362–63 ("Courts, counsel, and litigants are entitled to rely on the plain language of a rule of court, without having to explore the files of the Judicial Council to verify the rule's meaning."); *see also In re Marriage of Siller*, 187 Cal.App.3d 36, 46 (1986) (applying same principle to statute); *contra* RB at 34. Instead, the unambiguous text of the rules determines their meaning. *See Alonzo J.*, 58 Cal.4th at 933; *Trans-Action*, 60 Cal.App.4th at 362–63.

A. The Sealing Rules Apply To Search Warrant Affidavits

The sealing rules apply to all "records sealed . . . by court order." Rule 2.550(a)(1). The term "'record' means all or a portion of any document, paper, . . . or other thing filed or lodged with the court." Rule 2.550(b)(1). "A 'lodged' records is" one that is temporarily deposited with the court but not (yet) filed. Rule 2.550(b)(3). The only exceptions to the Rule's scope are expressly set forth: records that must be kept confidential by law, and certain records filed in connection with discovery motions. Rule 2.550(a)(2)-(3). The "enumeration of [these] specific exceptions precludes implying others." *S.V. v. Superior Ct.*, 13 Cal.App.5th 1174,

1182 (2017).

Search warrant affidavits are filed or lodged with the court. *See* Penal Code § 1534(a). The affidavits here were plainly so filed—the one that was unsealed is so marked, *see* JA 110, and if they had not been filed or lodged, they could not be sealed. They therefore fall squarely within the Rule's definition of "record". The fact that the Advisory Committee Comment to Rule 2.550 expressly states that the Rule's procedures do not apply to "search warrant affidavits sealed under [*Hobbs*]" confirms that it generally applies to search warrant affidavits—the exception proves the rule. If there were any doubt that the sealing rules apply to search-warrant affidavits, the constitutional imperative the rules be read in favor of transparency would eliminate it. Cal. Const. Art. I, § 3(b). And the affidavits here are plainly sealed by court order. The sealing rules thus apply to them.

The County's argument that the search warrant materials fall outside the scope of the Sealing Rules because they have never "been revealed or used at trial or submitted as a basis for adjudication" is incorrect for at least three reasons.

First, to support this claim the County relies upon the Advisory Committee Comment that the sealing rules "recognize the First Amendment right of access to documents used at trial or as a basis of adjudication." But, as discussed above, this does not suggest that the Rule was intended merely to codify that case, and even if it did, the comment cannot trump the text of the rule. Rule 2.550 sets forth a broad, straightforward, easy-to-apply rule; it does not require litigants and courts to delve into the history-and-utility First Amendment test whenever they need to determine whether a particular record is subject to the Sealing Rules. The Rule's simplicity and clarity promote efficiency and lead to predictable results; the County's position would destroy these virtues and

force every litigant and member of the public to become a constitutional scholar.

Second, a court order authorizing a search warrant is an adjudication and thus the accompanying records of it are subject to the Sealing Rules. A search warrant is a court order. *See* § 1523. To issue it, a neutral, detached magistrate must determine whether there is probable cause to authorize the warrant. *See* § 1528; *People v. Escamilla*, 65 Cal.App.3d 558, 562-63 (1976). This determination is an adjudication. *See In re Marriage of Mallory*, 55 Cal.App.4th 1165, 1170 n.5 (1997). Law enforcement submits affidavits to provide the basis for the magistrate to make this finding. They are therefore "submitted as a basis for adjudication." The County offers no legal authority for its bald assertion that search warrants are not adjudications. And as this case demonstrates, law enforcement may also ask the court reviewing its warrant application to issue accompanying orders to seal the records or to force a third-party service not to disclose the warrant to a target. 2 JA 237 ¶ 7; 1 JA 86:13-16. Courts' decisions granting or denying those request are also adjudications.

Third, the County's argument that the Sealing Rules' treatment of discovery materials somehow supports its argument is nonsense. The Sealing Rules generally exclude "records filed or lodged in connection with discovery motions or proceedings" from their purview. Rule 2.550(a)(3). But they create an exception to this exception: "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." *Id*. This distinction comes from case law that has "found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication." *NBC Subsidiary*, 20 Cal.4th at 1208, n.25. "By contrast, decisions have held that the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a

basis for adjudication." *Id*. The drafters of the Sealing Rules thus decided to incorporate these existing principles regarding access to discovery materials. But this says nothing about search warrant affidavits or any other types of records other than discovery materials. This provision has no relevance to the search warrant affidavits at issue here, except to confirm that when the Judicial Council wanted to exclude certain types of records from the requirements of the Sealing Rules it did so expressly.

B. The Sealing Rules' Confidential Records Exception Does Not Foreclose Public Access To The Affidavits

The County nevertheless argues that the sealing rules do not apply to the search warrant affidavits here at issue based on Rule 2.550(a)(2)'s exception that they "do not apply to records that are required to be kept confidential by law." RB 34.

1. The Sealing Rules' Plain Text And Definitions Govern

As EFF explained in its opening brief, the Sealing Rules define "record" to mean "all or any portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court." Rule 2.550(b)(1). Thus, the term "record" as used in Rule 2.550(a)(2) can refer to specific parts of affidavits containing information that must be sealed; it does not mean that the entire documents are outside of the Rules' purview simply because some information in them is confidential. *See* AOB 35-36. Similarly, the Advisory Committee's comment to Rule 2.550's statement that "the rules do not apply to records that must be kept confidential by law" means only that the Sealing Rules do not require the disclosure of specific information contained within search warrant affidavits, not that the inclusion of a single confidential word in a document justifies sealing the entire document.

The Advisory Committee's citation to "affidavits sealed under

[*Hobbs*]" as an example of confidential material that need not be disclosed does not support the County's position that these rules do not apply the warrants here at issue. *Contra* RB 34-35. The Committee's comment cannot trump the plain language of the Rule, any more than legislative history can trump the statutory language. *See Alonzo J.*, 58 Cal.4th at 933. And the County's position conflicts with *Hobbs* itself as well as with the text of the Rules.

2. The County Misreads *Hobbs* To Conflict With The Sealing Rules' Text

Both *Hobbs* and the Sealing Rules recognize that specific information contained within search warrant affidavits can be kept confidential while other non-confidential information must be disclosed. The County's reading of the Sealing Rules and *Hobbs*, by contrast, requires misreading *Hobbs* to exempt entire categories of records from public disclosure despite our state Supreme Court's ruling to the contrary.

As explained in EFF's opening brief, *Hobbs* does not permit sealing of an entire affidavit when redaction can sufficiently protect any privileged information. AOB at 34-35. To the contrary, *Hobbs* held that a court may seal only the portions of a search warrant affidavit that are "necessary to implement the privilege and protect the identity of [the] informant." 7 Cal.4th at 971. "Any portions of the sealed materials which, if disclosed, would not reveal or tend to reveal the informant's identity must be made public." *Id.* at 963 (citing *Swanson v. Superior Ct.*, 211 Cal.App.3d 332, 339 (1989)).

Decisions of the Court of Appeal over the last 30 years have consistently applied this same rule. *See, e.g., Swanson*, 211 Cal.App.3d at 338-39 ("We conclude that the only portion of an affidavit that may be concealed from the defendant is that portion which necessarily would

reveal the identity of a confidential informant."); *People v. Greenstreet*, 218 Cal.App.3d 1516, 1519 (1990) (same); *PSC Geothermal Servs. Co. v. Superior Ct.*, 25 Cal.App.4th 1697, 1714–15 (1994) (superior court erred in sealing entire affidavit without "consider[ing] the possibility of redacting the affidavit and sealing only that portion" covered by official-information privilege); *cf. People v. Seibel*, 219 Cal.App.3d 1279, 1291 (1990) ("[T]he privilege to conceal the identity of an informant is well established, as is the notion that the privilege can properly be implemented by use of partially sealed affidavits.").

Moreover, the affidavit in *Hobbs* itself segregated all the privileged information into a separate exhibit. *See Hobbs*, 7 Cal.4th at 954-55. That separate document was the only part of the affidavit that was sealed. *See id*. And all the information in this separate document related to the confidential informant, such that "disclosure of any portion of the factual allegations set forth in the confidential attachment Exhibit C would effectively reveal the informant's identity." *Id*. at 976. To the extent the Advisory Committee's use of the term "affidavits sealed under *Hobbs*" refers to entire documents, it applies only to documents that, as in *Hobbs*, contain only the privileged information submitted as part of the warrant application.

For these reasons, nothing in the text of the Sealing Rules supports the County's claims that search warrant affidavits in general—or these affidavits in particular—are beyond the scope of those rules. See AOB 29-30. If there were any doubt, the California Constitution's requirement that the Rules be read in favor of transparency and the First Amendment right of access would eliminate it. *Id*.

III. Penal Code Section 1534(a) Provides An Independent Right of Access To The Search Warrant Affidavits

Section 1534(a) could not be clearer: "documents and records of the

court relating to" executed search warrants "shall be open to the public" 10 days after they are issued:

> A search warrant shall be executed and returned within 10 days after date of issuance . . . . The documents and records of the court relating to the warrant need not be open to the public until the execution and return of the warrant or the expiration of the 10-day period after issuance. Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record.
>
> § 1534(a).

The phrase "documents and records of the court relating to the warrant" encompasses search-warrant affidavits. *See Hobbs*, 7 Cal.4th at 962-63; *PSC Geothermal Servs. Co.*, 25 Cal.App.4th at 1713; *People v. Tockgo*, 145 Cal.App.3d 635, 641–42 (1983). If there were any doubt about this, the constitutional rule that the statute must be interpreted broadly in favor of transparency would eliminate it. Section 1534(a) thus requires that the affidavits be unsealed unless some other statute or constitutional provision allows sealing.

As the government notes, the Supreme Court in *Hobbs* held that the informant privilege of Evidence Code § 1041 and the decisions interpreting it "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." *Hobbs*, 7 Cal.4th at 962 (citing § 1534(a)); *see* RB at 38-39. But the government reads *Hobbs* much too broadly in two respects.

First, the government is wrong to suggest that *Hobbs* somehow authorizes courts to create exceptions to § 1534(a)'s requirements that are not based on a statute or constitutional provision. California courts may not create new privileges or exceptions to disclosure requirements. *See Sierra Club*, 57 Cal.4th at 175 (Art. I § 3(b) requires that information be public

"unless the Legislature has expressly provided to the contrary."); *Prudential Reinsurance Co. v. Superior Ct.*, 3 Cal.4th 1118, 1149 (1992) ("courts cannot create exceptions to rules of general application in the absence of an explicit legislative intention to do so"); *Marylander v. Superior Ct.*, 81 Cal.App.4th 1119, 1126–27 (2000) ("Courts are not free to create additional privileges" beyond those authorized by statute or constitutional provisions). The "decisional rules" that *Hobbs* discusses are derived from cases interpreting the statutes protecting the identity of informants; nothing in *Hobbs* or the cases it cites suggests that courts can create non-statutory exception's to § 1534(a)'s requirement that executed warrants be available to the public. *See Hobbs*, 7 Cal.4th at 962-63. Thus, *Hobbs* and similar cases allow only when authorized by a statutory or constitutional provision.

Second, for all the reasons stated above in Section II.B.2, *Hobbs* does not allow the sealing of entire affidavits when redaction would suffice to protect the identity of an informant or other privileged information. The government cites no authority even suggesting a different rule. Instead, it seems to suggest that the affidavits here at issue can remain completely sealed because they apparently intermingle privileged and non-privileged information, whereas the affidavit in *Hobbs* segregated all of the privileged information into a separate exhibit. *See Hobbs*, 7 Cal.4th at 954-55; RB at 13. But as every case to have addressed the issue makes clear, this simply means that the privileged parts of the affidavits must be redacted and the rest unsealed. *See Hobbs*, 7 Cal.4th at 963, 971. *Swanson*, 211 Cal.App.3d at 338-39; *Greenstreet*, 218 Cal. App. 3d at 1519; *PSC Geothermal Servs.*, 25 Cal.App.4th at 1714–15; *see also People v. Acevedo*, 209 Cal.App.4th 1040, 1054 (2012) ("By their extension to wiretaps, the *Hobbs* procedures provide that the wiretaps' supporting documentation may validly be withheld from disclosure only to the extent necessary to protect official

information or an informant's identity.").

Moreover, the County—which is of course bound to follow and respect Article I § (3)(b)—has a duty to protect the public's constitutional right to non-privileged information. *See Katzberg v. Regents of Univ. of California*, 29 Cal.4th 300, 307 (2002) ("all branches of government are required to comply with" state constitution); *see also Seibel*, 219 Cal.App.3d at 1298 (law-enforcement "may wish to avoid imposing the arguably burdensome [review and redaction] procedure on the trial courts by managing their investigations in a way that reduces or eliminates the need for sealed affidavits."). It cannot circumvent § 1534(a) by comingling privileged and non-privileged information and then arguing that that the entire affidavit is a privileged "*Hobbs* affidavit." Whether the County follows the best practice of in *Hobbs*—segregating the confidential information into a separate attachment so that the remainder can easily be released to the public under § 1534(a)—or not, it cannot use its failure to follow that best practice as a reason to avoid its public disclosure obligations. *See* Civ. Code § 3517 ("No one can take advantage of his own wrong.").

Section 1534(a) thus requires that all non-privileged portions of the affidavits be unsealed and made available to the public.[8]

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[8] Although *Hobbs* involved a request by a criminal defendant to gain access to an affidavit, these requirements apply equally here. When a criminal defendant moves to challenge a warrant, *Hobbs* requires a two-step process. The first step is the one discussed above: to determine what parts of the affidavit are privileged and therefore properly sealed as an exception to § 1534's public-access mandate. *Hobbs*, 7 Cal.4th at 962, 972. It is only if the court determines that materials are properly sealed that it must proceed to the second step and decide whether due process nevertheless requires that the defendant have access to that privileged information. *See id*. at 964-65, 972-75. Although this second step is not applicable to this case, the first step—public access under § 1534(a)—is.

The government has the burden to show that a privilege to § 1534(a) disclosure mandate applies. *In re Marcos B.*, 214 Cal.App.4th 299, 308 (2013). The only privileges that the government invokes are the informant privilege and the official-information privilege, Evidence Code § 1041 and § 1042, respectively. But the County has failed to show—and the superior court never determined—that all the materials at issue are privileged. EFF is confident that the Court's *in camera* review of these records will show that they contain a substantial amount of unprivileged information that must be unsealed under § 1534(a). AOB 47-48.

A. Official Information Privilege (Evidence Code § 1040)

To invoke the official-information privilege, the government must first show that it acquired the information at issue in confidence. *Shepherd v. Superior Ct.*, 17 Cal.3d 107, 124-25 (1976), *overruled on other grounds by People v. Holloway*, 33 Cal.4th 96 (2004); *Marylander*, 81 Cal.App.4th at 1126. If the government satisfies this initial burden, it must then make "a clear showing that disclosure is against the public's interest." *CBS, Inc. v. Block*, 42 Cal.3d 646, 656 (1986); *see Marylander*, 81 Cal.App.4th at 1126. When the question is whether material should be released to the public—rather than whether it should be disclosed to a party in discovery—this is the same test as under Government Code § 6255. *CBS*, 42 Cal.3d at 656. Under this test, information must be made public unless the government "can demonstrate that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." *Id.* at 652. "[T]his court must conduct an independent review of the trial court's statutory balancing analysis." *Id.* at 650–51. "A trial court commits error under [§ 1040] if the court fails to make the threshold determination or fails to engage in the process of balancing the interests." *Marylander*, 81 Cal.App.4th at 1126; *see*

Shepherd, 17 Cal.3d at 125.

The trial court here erred under both steps of the § 1040 analysis.

First, the trial court never indicated that all the information in the affidavits had been acquired in confidence. The only references to confidential information that the court made are at page 18 of the transcript, where it stated that releasing any of the affidavits "begins to give somebody an opportunity to begin to unwind the confidential information that is contained therein." RT 24:10-12. This is far from a finding that all the information the affidavits was acquired in confidence.

Second, the superior court completely failed to balance the public interest in non-disclosure against the public interest in disclosure. In fact, the court never even mentioned the public interest in disclosure of these records. And that interest is substantial. Public access to judicial records related to criminal proceedings "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *See Satele v. Superior Court*, 7 Cal.5th 852, 860–61 (2019); *see also Comm'n on Peace Officer Standards & Training v. Superior Ct.*, 42 Cal.4th 278, 297–98 (2007) (discussing heightened public's "interest in the qualifications and conduct of law enforcement officers"); *Brian W. v. Superior Ct.*, 20 Cal.3d 618, 625 (1978) (recognizing "the beneficial effects of public scrutiny" to "the administration of justice").

Moreover, public access to these affidavits is especially important, because, as the Legislature has recognized, these new types of electronic searches raise fundamental privacy and civil-liberties issues. *See* AOB 15; *see also, e.g., Andrews v. Baltimore City Police Dep't*, 8 F.4th 234, 235-37 (4th Cir. 2020); *United States v. Thorne*, ___ F.Supp.3d ___, 2021 WL 2682631, at *28 (D.D.C. June 30, 2021). These searches can affect not just the target of the search but also all the cell phones in the area. AOB 13-14;

see Andrews, 8 F.4th at 235-37. They therefore implicate the privacy rights of Californians who are not even suspected of any criminal activity. *See* AOB 15. Public access will show whether the warrant applications advised the issuing magistrates about these important privacy concerns. The public interest in this information is particularly high because San Bernardino law enforcement obtains more of these warrants per capita than any other California agencies. *See* 2 JA 246.

The Legislature has recognized the importance of public access to executed affidavits by requiring that they be open to the public. §§ 1534(a), 1534.1(d)(3). This requirement must be read broadly in favor of disclosure; exceptions to it must be read narrowly. *See* Cal. Const. Art. I § 3(b)(2). Although Evidence Code § 1040 may allow the continued sealing of some information in these affidavits, it cannot swallow this express transparency mandate. The superior court should have balanced the important interests supporting unsealing against any interest in secrecy. Its failure to do so in itself merits reversal.

B. Informant Privilege (Evidence Code § 1041)

The informant "privilege applies only if the information is furnished in confidence to specified persons, the privilege is claimed by a person authorized by the public entity to do so, and disclosure is forbidden by an act of the United States Congress or California statute or disclosure of the informer's identity is against the public interest." *People v. Lanfrey*, 204 Cal.App.3d 491, 497–98 (1988). It does not appear that all the affidavits even contain information about informants—when the court mentioned informants, it did not confirm that this was at issue. *See* RT 24:12-15 (the Court: "there is a compelling state interest both with regard to protecting confidential informant identity, if that is an issue in any of the cases . . . ."). In any event, as discussed above, even if some information in these

affidavits is privileged because it could reveal the identity of an informant, it is hard to imagine that this sensitive information comprises any more than a small part of the records. § 1534(a) requires that the remainder of the affidavits be unsealed.

IV. Article I, § 3 Of The California Constitution Requires That The Affidavits Be Made Available To The Greatest Extent Possible

"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. Art. I § 3(b)(1). As the ballot materials explained to the voters who enacted this section, the provision was meant to "[p]rovide [a] right of access to … writings of government officials." Prop. 59 Official Title and Summary;[9] *see also* Prop. 59 Arguments in Favor (Proposition "will create a new civil right: a constitutional right to know that the government is doing, what it is doing it, and how.").[10] *See also Pro. Engineers in California Gov't v. Kempton*, 40 Cal.4th 1016, 1037 (2007) (ballot materials are relevant to interpretation of constitutional amendment). This provision is, like most of the Constitution, self-executing and enforceable by private parties. *See Katzberg*, 29 Cal.4th at 307. Article I § 3(b) thus provides an independent right of access to search warrant materials, both because they are judicial records and because they comprise the writings of police and other law-enforcement officers. *See Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal.App.4th 588, 597 (2007) (judicial records)

[9] Available at https://vigarchive.sos.ca.gov/2004/general/propositions/prop59-analysis.htm

Although Article I §, 3(b) does not eliminate or supersede any constitutional or statutory provisions that prohibit public access, *see* § 3(b)(5), its plain language mandates public access unless the government shows that some such provision authorizes it to withhold information. The plain language also establishes a constitutional canon that requires courts to construe all laws permitting access broadly. *Sierra Club*, 57 Cal.4th at 166.

The County has not shown that any statute or constitutional provision authorizes a broad denial of public access to the affidavits in question, much less to withhold them in their entirety. *Cf.* RB at 38. Although the County mentions the common law, that is not a statute or constitutional provision. The First Amendment does not affirmatively prohibit public access to any judicial records, any more than it prohibits unprotected speech; at most, it fails to extend its protections to some records or parts thereof. And the government's citation to Public Records Act exemptions contained in Government Code § 6254 is irrelevant because those exemptions do not apply to a request to unseal judicial records. *See* Gov. Code § 6260 ("The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section…."); *Shepherd*, 17 Cal.3d 107, 123–24 (1976) ("the effect of section 6254 is limited to 'this chapter' (i.e. the California Public Records Act … and has no application to any procedure not under that act."), *overruled on unrelated other grounds by Holloway*, 33 Cal.4th 96. And although the official-information privilege and informant privilege could theoretically provide a basis to withhold information under Article I, § 3, the government has failed to carry its burden to show that any—much less all—of the information in the sealed affidavits qualifies for these privileges, as discussed above.

V. The Common Law Right Of Access Requires Disclosure Of The Redacted Search Warrant Affidavits

The public's right of access under the common law attaches to the search warrant affidavits and requires that they be unsealed. As EFF previously showed, the common law right of access attaches to all court orders, judgments, and all "documents filed in or received by the court." *Copley Press, Inc. v. Superior Court*, 6 Cal.App.4th 106, 113 (1992); AOB 30. Further, the Legislature has supplemented the public's right of access under the common law via § 1534(a)'s mandate, the people of California have strengthened in via Art. I, § 3(b) of the California Constitution, and the common law right has been codified via the Sealing Rules. AOB 30-31. Hence, the public's common law right of access is coextensive with these authorities and requires unsealing for all the reasons discussed above.

The County argues that the Legislature has displaced the common law right of access to search warrant materials by enacting Evidence Code §§ 1040-1042 and that the Supreme Court in *Hobbs* failed to extend the common law right of access to the same materials for countervailing policy reasons. RB 39-42. The argument fails for many of the same reasons described above. To briefly recap, to the extent the Legislature has spoken on public access to search warrant materials, it has mandated access in § 1534(a). *See supra*, Section III; AOB 24-32. And the California Constitution and First Amendment require construing both the Evidence Code and *Hobbs* narrowly to restrict access to particular information in search warrant affidavits. *See supra*, Section IV. Thus, the cases cited by the County, including *Craemer*, 264 Cal.App. 216, are in support of EFF's position, as they hold that the common law right of access to judicial records is coextensive with § 1534(a).

VI. The County Provides No Lawful Justification To Prohibit Public Disclosure Of Redacted Versions of the Search Warrant Affidavits.

Glaringly absent from the County's response is any real effort to explain, much less justify, how redacting information sensitive information in the affidavits and unsealing the remainder would not address the interests it seeks to protect. As the record shows, other similar affidavits disclosed by the County contain boilerplate, information about the crime being investigated, and other information that does not identify witnesses or informants, much less intrude on any other interest the County claims. AOB 18-19; 1 JA 56-58; 2 JA 238 ¶ 11; 2 JA 240. And there is unlikely to be much of any secret about the investigations to which these warrants relate—most of them have already resulted in criminal convictions. *See* 2 JA 198-201.

EFF has acknowledged that specific information contained in the affidavits may lawfully be sealed and does not dispute that disclosure may result in the harms described by the County. *See* RT 25:11-13. But the public's rights of access under the authorities described above required the superior court to provide public access to the search warrants to the greatest extent possibly by narrowly applying any countervailing secrecy concerns via redactions to specific information. AOB 37-48. The superior court did not comply with the standards required under the public's rights of access for all the reasons EFF identified in its opening brief. AOB 37-47.

The County defends the superior court's order sealing the records in their entirety and argues that the court's conclusions were sufficient to meet *NBC Subsidiary* and the Sealing Rules' standards. RB 12-15. Those arguments, however, fail for all the reasons EFF identified in its opening brief. See AOB 37-47 (showing how the court's order erred by (1) holding that a prior sealing order is insufficient to justify perpetual sealing, (2)

failing to make detailed factual findings regarding the overriding interests reflected in the affidavits, (3) failing to find a substantial likelihood of harm from disclosure, (4) failing to find that wholesale sealing was narrowly tailored, and (5) finding that there were no less restrictive alternatives to wholesale, indefinite sealing).

Again, EFF does not dispute that disclosure of some information contained within the affidavits may be properly sealed. The problem is that the superior court's order, and the County's defense of it on appeal, do not explain why those interests justify sealing every single world in the affidavits. EFF maintains that should this Court review the affidavits, it will find that some information should be disclosed and that the County's concerns can be addressed via redactions. AOB 47-48.

CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's ruling and order the partial disclosure of the search warrant affidavits.

Dated: November 22, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, counsel for appellant, certify pursuant to California Rules of Court 8.204(c) that this Brief is proportionally spaced, has a typeface of 13 points or more, contains 12,261 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: November 22, 2021

/s/ Aaron Mackey
Aaron Mackey

Counsel for Plaintiff-Appellant

PROOF OF SERVICE

I, Victoria Python, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109.

On November 22, 2021, I served the foregoing documents:

REPLY BRIEF OF PLAINTIFF AND APPELLANT ELECTRONIC FRONTIER FOUNDATION

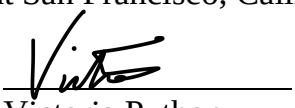
X BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system, TrueFiling. Parties and/or counsel of record were electronically served via the TrueFiling website at the time of filing.

X BY FIRST CLASS MAIL: I caused to be placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid:

San Bernardino Superior Court
Appeals and Appellant Division
8303 Haven Avenue
Rancho Cucamonga, CA 91730

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 22, 2021 at San Francisco, California.



Victoria Python