4TH CIVIL NO. E076778

COURT OF APPEAL. 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

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

FIRST AMENDMENT COALITION
Glen A. Smith, Cal. Bar No. 106341
David E. Snyder, Cal. Bar No. 262001
Monica N. Price, Cal. Bar No. 335464
534 4th Street, Suite B
San Rafael, CA 94901-3334
415.460.5060
gsmith@firstamendmentcoalition.org
dsnyder@firstamendmentcoalition.org
mprice@firstamendmentcoalition.org

Pursuant to Rule 8.200(c) of the California Rules of Court, proposed amicus curiae First Amendment Coalition ("FAC" or "Amicus"), respectfully submits the enclosed brief in support of Plaintiff and Appellant the Electronic Frontier Foundation ("EFF"). This brief offers a unique perspective on the issues presented by this case. For the reasons set forth in the proposed brief, FAC respectfully requests that the Court to reverse the Superior Court's decision in this case to maintain certain judicial records permanently under seal.

I. INTEREST OF AMICUS CURIAE

FAC is a California-based nonprofit committed to defending free speech, free press, and open and accountable government at all levels. Founded in 1988, one of FAC's primary purposes is the advancement of the public's right to access information regarding the conduct of the people's business. FAC advances this purpose by working to improve governmental compliance with state and federal open government laws. FAC's activities include free legal consultations on access to public records and First Amendment issues, educational programs, legislative oversight of California bills affecting access to government records and free speech, and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, activists, and ordinary citizens. FAC frequently moves to unseal court records, see, e.g., *Fargo v. Tejas*, Case No. B299393, Cal. App. Unpub. Lexis 2370 (Cal. Ct. App., April 15, 2020).

In addition, FAC continues to pursue public access to records under the California Public Records Act in cases such as *Becerra v. Superior Court (First Amendment Coalition)* (2020) 44 Cal.App.5th 897 and *Sander v. State Bar of California* (2013) 58 Cal.4th 300.

Accordingly, FAC is uniquely situated to provide insight into the need for public access to judicial records.

II. ISSUES IN NEED OF FURTHER CLARIFICATION

FAC supports the arguments submitted by EFF, but does not seek to merely repeat those arguments. Rather, the proposed amicus brief presents additional arguments and clarifications that will assist the Court in evaluating the legal issues presented by this difficult case.

This appeal concerns whether judicial records must remain permanently sealed long after the original reasons for that sealing have dissipated, and whether the public even has standing to challenge such orders. There is no law that precludes the public from challenging sealing orders at any stage of the judicial process.

The enclosed brief sets forth additional authorities and analysis regarding the following issues: (1) did the Superior Court make the necessary findings sufficient to justify sealing; and (2) is the public barred from challenging such orders before this Court.

As explained above, FAC is in a unique position to provide this amicus curiae brief because they provide guidance on public access to judicial records on a daily basis and have often appeared in court to vindicate public access rights.

III. CONCLUSION

For the aforementioned reasons, FAC respectfully requests that the Court accept the enclosed brief for filing and consideration.

Dated: December 6, 2021

FIRST AMENDMENT COALITION

By: 

Glen A. Smith
David E. Snyder
Monica N. Price

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.200(c)(3)

FAC hereby certifies under California Rules of Court, Rule 8.200(c)(3)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contributions intended to fund the preparation or submission of the brief. Amicus further certifies under California Rule of Court, Rule 8.200(c)(3)(B) that no person or entity other than Amicus, its members, and its counsel made any monetary contribution intended to find the preparation or submission of the brief.

Dated: December 6, 2021

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Glen A. Smith, Cal. Bar No. 106341
David E. Snyder, Cal. Bar No. 262001
Monica N. Price, Cal. Bar No. 335464
534 4th Street, Suite B
San Rafael, CA 94901-3334
415.460.5060
gsmith@firstamendmentcoalition.org
dsnyder@firstamendmentcoalition.org
mprice@firstamendmentcoalition.org

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I. INTRODUCTION

The Superior Court, and now Real Parties in Interest the San Bernardino County District Attorney and the San Bernardino County Sheriff, have taken a radical position: the orders sealing court records are sacrosanct and beyond the public's ability to challenge. (See, Joint Respondent's Brief ("RB") at 12-13, 17.) Fortunately for those concerned about government transparency and accountability, that radical position is contrary to the law regarding public access to judicial records.

As discussed below, California's common law, its statutes and the California Rules of Court all point in the opposite direction. The public has standing to challenge sealing orders at any stage of the proceedings. This is necessary because the public is usually unaware of a sealing order before it takes place and at times the sealing orders themselves are sealed. The public must be allowed to come in after the fact to challenge such orders. This conclusion is buttressed by decisions finding a First Amendment right of public access to judicial records.

The public certainly has an interest in reviewing and accessing search warrant materials, including affidavits. This interest is particularly heightened in this case, which concerns search warrant affidavits supporting the use of cell-site simulators. Cell-site simulators are used by law enforcement to indiscriminately capture and monitor all cell phone traffic in a given geographic area. The cell data intercepted by a cell-site simulator is not limited to law enforcement's target – it acts as a dragnet, swallowing up everything within range. (Dept. of Justice Policy Guidance: Use of Cell-Site Simulator Technology (Sep. 3, 2015) bit.ly/2ZRhK9M, at 2.) Unsuspecting citizens who have done nothing wrong are necessarily caught up in these fishing expeditions. It is very likely that the vast majority of these innocent people are never informed that their personal communications were monitored by the government. With these vital issues at play, the public interest in transparency is even higher.

II. THE PUBLIC HAS A GENERAL RIGHT TO ACCESS JUDICIAL RECORDS, INCLUDING SEARCH WARRANT MATERIALS, UNDER THE COMMON LAW, CALIFORNIA RULES OF COURT, PENAL CODE SECTION 1534 AND THE FIRST AMENDMENT

Search warrant materials, including affidavits, are judicial records. (*Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1295.) The public's right to access search warrants and their accompanying materials is rooted in the common law and confirmed in the California Rules of Court. "Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 784.) Therefore, the public has a general common law right "to inspect and copy public records and documents, including judicial records and documents." (*Nixon v. Warner Communications* (1978) 435 U.S. 589, 597 (*Nixon*).) In that same vein, California Rules of Court, rule 2.550(c) states that court records are presumed to be open to the public unless confidentiality is required by law. California Rules of Court, rule 2.550(b)(1) defines court records as "all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court." Search warrant materials are certainly filed and lodged with the court. Moreover, the public's right to access search warrant materials is protected under Penal Code section 1534 and the First Amendment.

A. Penal Code section 1534 Protects the Public's General Right to Access Search Warrant Materials

California Penal Code section 1534 ("Section 1534") provides that after a search warrant is executed and returned to the court, all "documents and records of the court relating to the [search] warrant . . . . shall be open to the public as a judicial record." (Pen. Code § 1534, subd. (a).) Importantly, the California Legislature did not impose any qualifications or limitations upon this right of access to search warrant materials other than the passage of time (10 days after issuance). "Certainly, an affidavit supporting the issuance of arrest and search warrants—part of the court file—is a public record." (*Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, 6, citing *Craig v. Municipal Court* (1979)

100 Cal.App.3d 69, 78; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 782; *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 349.)

In *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1298-1299, the court specifically contrasts Penal Code section 1524 with Section 1534. Penal Code section 1524 requires complete confidentiality of items seized by a special master, even from the police, at least until the items are submitted into evidence. Therefore, Section 1534's public judicial records requirement excludes the actual items seized, but leaves the search warrant materials themselves open to the public. (*Id*. at [. 1299.) Section 1534 contains a mandate and clear instruction that search warrant materials "shall be open to the public as a judicial record." There is simply no other way to read the statute. As a result, the search warrant affidavits at issue in this case are presumed open to the public as well. Any order sealing public records must be narrowly tailored and supported by specific factual findings (discussed in Part III below).

B. The First Amendment Supports the Public's General Right to Access Judicial Records and Search Warrant Materials

"[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate -- as well as other civic behavior -- must be informed." (*Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 587, citations omitted.) Informed public debate is vitally important in the conflict between indiscriminate government surveillance and public safety.

Under the First Amendment, the Supreme Court has adopted a two-part test for access to judicial records. (*Press-Enterprise v. Superior Court* (1986) 478 U.S. 1.) First, the court looks at whether "the place and process have historically been open to the press and general public" because a tradition of access implies the favorable judgement of experience. (*Id*. at pp. 7-8.) The second part of the test looks at whether public access

would play a "significant positive role in the functioning" of the particular process in question. (*Id*. at p. 9.) Functional benefits can include public oversight of the judicial system, judges, and prosecutors, education of the public to ensure the constitutionally protected discussion of governmental affairs is informed, and assurance of the appearance of fairness. There is a presumption of openness. (*Id*. at p. 9.) The *Press-Enterprise* test was adopted by the California Supreme Court in *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC Subsidiary*).

1. The History of Search Warrant Access in California

Penal Code section 1534 was enacted in 1872, and it stated that "[a] search warrant must be executed and returned to the magistrate who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void." In 1963, the Legislature amended Section 1534 and added: "The documents and records of the court relating to the search 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 served, such documents and records shall be open to the public as a judicial record." (Emphasis added.) For almost 60 years, the state of California has mandated access to search warrants and their corresponding materials, including affidavits.

The District Attorney and Sheriff argue that the *Times-Mirror* decision forecloses access under the historical prong entirely. (RB at p. 25, citing *Times-Mirror v. United States* (9th Cir. 1989) 873 F.2d 1210.) However, *Times-Mirror* is inapplicable because it is a federal case answering an entirely different question and it does not address the history of public access under Section 1534 at all. *Times-Mirror* concerned federal warrant procedures at the pre-indictment stage, whereas this case concerns California warrant materials post warrant execution. (*Id*. at p. 1211.) Under Section 1534, warrant materials are not public prior to execution, but are publicly available between execution and indictment unless the requirements for sealing are satisfied in findings by the court.

Times-Mirror deliberately left the question of post-investigation and post-indictment access to search warrant materials open. (*Id*. at p. 1211). However, in a later

opinion, the Ninth Circuit did recognize public access rights to post-investigation search warrant materials. *United States v. Bus. of the Custer Battlefield Museum* (9th Cir. 2011) 658 F.3d 1188 recognized a common law right to access search warrant materials post-investigation, while declining to reach the First Amendment right of access due to lack of briefing and the presence of a common law right. (*Id*. at p. 1196.)

The Eighth and Fourth Circuits have also recognized a right of access. The Eighth Circuit has held that there was a qualified First Amendment right of access to search warrant applications post-execution, even if the investigation had not been complete. (*In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn* (8th Cir. 1988) 855 F.2d 569.) However, the pre-indictment status of an investigation can tip the balance in favor of nondisclosure as well. (See *Certain Interested Individuals, John Does I-IV, etc. v. Pulitzer Pub. Co.* (8th Cir. 1990) 895 F.2d 460, 463.) The Fourth Circuit held that there was no constitutional right to access search warrants, but held that a common law right of inspection attached once the warrant was filed in *In re Baltimore Sun Co.* (4th Cir. 1989) 886 F.2d 60. In *United States v. Applebaum* (4th Cir. 2013) 707 F.3d 283, the court only upheld sealing under the First Amendment and common law due to the active investigation status. (*Id*. at p. 293.)

2. The Public Has an Interest in Reviewing Search Warrant Materials

While evidence of a historical tradition "strengthens the finding of a First Amendment right of access, the absence of explicit historical support would not . . . negate such a right of access." (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1214.) Therefore, public interest alone is enough to establish a First Amendment right of access. *NBC Subsidiary* emphasized that open trials "serve to demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings" and "[m]ore importantly, open trials provide a means, akin in purpose to the other checks and balances that infuse our system of government, by which citizens scrutinize and "check" the use and possible abuse of judicial power; and finally, "with some limitations" (*ibid*.), open trials serve to enhance the truth-finding function of the proceeding ." (*Id*. at

pp. 1201-1202, citing *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 594-598.) Public access to search warrant materials serves many of the same purposes. Access to search warrant materials is a "check and balance" that allows citizens to scrutinize the government's intrusion into private homes. The public has a particular interest in knowing if they are being repeatedly caught up in the dragnet of indiscriminate surveillance simply due to their zip code. The public has a right to know how much information the government really needs to achieve the court's blessing to monitor their communications. There is also a public interest in knowing why the court would approve such extensive monitoring when the District Attorney and Sheriff allege that they did not, in fact, even deploy the authorized cell-site simulators in these cases. (RB at p. 8.) The public may decide that such invasive technology should only be authorized when it is critical to a case.

In *NBC Subsidiary*, the California Supreme Court held that the ban on media attendance at trial proceedings that were not before the jury violated California Code of Civil Procedure section 124 ("Section 124"), which mandated that the "sittings of every court shall be public." (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1196.) The Court then went out of its way to find that there was a First Amendment right of access in addition to the statutory right of access under Section 124. The long line of First Amendment access cases informed the Court's interpretation of Section 124, "which, of course [the Court] must construe in a fashion that avoids rendering [Section 124's] application unconstitutional." (*Id*. at p. 1216 (citations omitted).) Like Section 124, Penal Code section 1534 mandates public access to judicial records. This court should similarly construe Section 1534 in a manner that preserves its constitutionality by affirming a general right of access to search warrant materials.

There is a First Amendment right to access search warrant materials in California after the search warrant has been executed. At our nation's founding, the execution of a search warrant in a home would have been obvious to anyone whose items were seized, indeed they would have been proactively informed by the government. In today's digital era, more and more search warrants are being issued for electronic information. The

unintended targets are never informed and never able to challenge this intrusion on their liberties. When the government uses indiscriminate surveillance on whole neighborhoods, unsuspecting citizens are placed under a microscope for weeks or even months at a time. What kind of support does the government have for an intrusion of this magnitude? The people will never know if they are indefinitely denied access to search warrant affidavits and other search warrant materials as soon as the government whispers "*Hobbs*" to a judge behind a closed door. Public scrutiny and the media provide a check on government overreach that is inimical to a free society -- indeed we can hardly call ourselves free without it.

C. The District Attorney and Sheriff Confuse the Presumption of Access with the Possibility of Sealing

The District Attorney and Sheriff misconstrue the holdings and analyses in multiple cases. For example, they cite *In re Granick* (N.D. Cal. 2019) 388 F. Supp. 3d 1107 (2019) for the proposition that there is no common law right to access search warrant materials. (RB at pp. 28-29.) However, the *Granick* court specifically stated that there is a common law and First Amendment right to access the materials, but it can still be overcome by a compelling government interest, with restrictions "narrowly tailored" to serve that interest. The court stated that the petitioner's request for 13 years' worth of search warrant materials overcame the "strong presumption" in favor of public access due to law enforcement concerns and the resulting administrative burden. The District Attorney and Sheriff failed to acknowledge the significant length of the *Granick* request or that the administrative burden played a significant factor. Once again, if there is a general right to access materials under the law, it can be overcome by other concerns, but this does not mean the right does not exist at all.

The District Attorney and Sheriff also assert that the *People v. Jackson* Court "assumed without objection" that there is no First Amendment right to access sealed search warrant materials. (RB at p. 21.) The reality is quite the opposite. The *Jackson* court started with the assumption that the First Amendment recognizes "a general right to inspect and copy public records and documents, including judicial documents and

records." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1021, quoting *Nixon v. Warner Communications* (1978) 435 U.S. 589.) The court then lamented that they were faced with a "trying task" due to the clash of free-speech and fair-trial rights -- "two of the most cherished policies of our civilization." (*Id*. at p. 1021, citations omitted.) The court stated that the First Amendment did apply, but was outweighed by factors affecting entertainer Michael Jackson's right to a fair trial -- the unique combination of his celebrity status, the crimes alleged (child sexual abuse), and the ongoing nature of the criminal investigation (65 additional search warrants followed immediately afterwards). (*Id*. at pp. 1023-24.) Importantly, this denial of access was a qualified one and was only valid "until, at a minimum, the arraignment in the matter." (*Id*.) Continued sealing requires a constant, ongoing need that outweighs presumption of public access under the First Amendment.

III. THE PUBLIC HAS A RIGHT TO CHALLENGE SEALING ORDERS

The interest in access to public and judicial records can be based on a "citizen's desire to keep a watchful eye on the workings of public agencies" or a newspaper's desire to "publish information concerning the operation of government." (*Nixon, supra,* 435 U.S. at p. 597.) In California, the right to access public records, including judicial records, was codified in 1872. (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 313-314.) The right was not limited to parties in a lawsuit or potential litigants. (*Id*. at p. 314.) It was also not limited to official records of public entities, but included "other matters" in which the "whole public may have an interest." (*Id*. at p. 314, citing *Whelan v. Superior Court* (1896) 114 Cal. 548, 550.) The test for whether "other matters" were public was very fact-dependent and mirrored the later standards in *Press-Enterprise* and *NBC Subsidiary*.

California Rules of Court, rule 2.551(h)(2) provides the means for enforcing this right of access; it states that a "member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record." Rule 2.551 does not make an exception for how a record was sealed and simply states that the sealing can be challenged.

The District Attorney and Sheriffs' suggestion that Electronic Frontier Foundation, or any other member of the public, cannot challenge orders sealing search warrant materials is simply wrong. (RB at pp. 11-12.) The District Attorney and Sheriff state that *Hobbs* and the Evidence Code are some kind of magic words that prevent an appellate court from even considering a sealing order's validity. (RB at p. 17.) However, case law on the subject of public access frequently originated with a request for access to sealed records by the public or the media. (See Appellant Electronic Frontier Foundation's Reply Brief ("ARB") at p. 17; *United States v. Guerrero* (2012) 693 F.3d 990 [the public was allowed to challenge sealing and the court discussed the mechanisms available for a public challenge in great detail]; *Wilson v. Sci. Applications International Corp.* (1997) 52 Cal.App.4th 1025 [media was permitted to challenge the parties' stipulation sealing the court file].) The mere challenge to search warrant sealing in this case prompted the District Attorney and Sheriff to release previously withheld search warrant materials and an entire search warrant that they suddenly deemed safe to disclose. (RB at p. 10.) This reflects the District Attorney and Sheriffs' implicit recognition that continued sealing requires continued justification. This lawsuit also revealed that the court erroneously designated at least one file as "sealed" when the court did not actually order sealing at all. (Appellant's Opening Brief ("AOB") at p. 19.) This error further demonstrates the necessity of challenging sealing "orders."

Without intervention on behalf of the public, many public judicial records would never come to light. The process of allowing the public to challenge their exclusion has righted many wrongs from overzealous, yet well-meaning judges, increased public oversight of the judiciary, and strengthened our democracy.

IV. SEALING ORDERS ARE APPROPRIATE IN LIMITED CIRCUMSTANCES AND REDACTION IS REQUIRED UNLESS EACH AND EVERY PART OF A DOCUMENT WOULD REVEAL PROTECTED INFORMATION

No matter the standard, the court must make specific factual findings justifying the sealing of judicial records. If the court is unable to articulate reasons for keeping an entire document closed, then they must redact only the information that the court is

justified in withholding from the public. Specific factual findings are required for meaningful judicial review.

Under the common law, a party seeking to seal a judicial record can overcome the presumption of openness by only by showing a "sufficiently compelling reason" that overcomes the public policies favoring disclosure. (*Foltz v. State Farm Mut. Auto. Ins.* (9th Cir. 2003) 331 F.3d 1115, 1135 (*Foltz*); *United States v. Sleugh* (9th Cir. 2018) 896 F.3d 1007, 1013.) The court "must articulate a factual basis for each compelling reason to seal," without relying on "hypothesis or conjecture." (*Kamakana v. City and County of Honolulu* (2006) 447 F.3d 1172, 1179; *Hagestad v. Tragesser* (1995) 49 F.3d 1430, 1434.) In addition, compelling reasons must continue to exist to keep judicial records sealed. (*Foltz*, *supra*, 331 F.3d at p. 1136.) "This process allows for meaningful "appellate review of whether relevant factors were considered and given appropriate weight." (*Id.* at p. 1135.)

In *United States v. Bus. of the Custer Battlefield Museum* (9th Cir. 2011) 658 F.3d 1188, 1196, the Ninth Circuit recognized the qualified common law right to access search warrant materials post-investigation. The pre-investigation concerns articulated in *Times-Mirror*, such as destruction of evidence, suspect flight, and suspect coordination, were greatly diminished after the investigation finished. (*Id*. at p. 1194.) In addition, the court held that the District Court abused its discretion in denying access to the search warrant materials because "the court may not restrict access to the documents without articulating both a compelling reason and a factual basis for its ruling." (*Id*.) Concerns such as privacy interests should be redressed through redaction if possible. (*Id*.)

Under the common law, the court must articulate specific reasons with supporting facts to keep public judicial records sealed. If the court finds support for sealing some parts of a record, but not others, then the proper remedy is redaction of only the necessary material because sealing is not supported. In this case, the court did not articulate a factual basis for each "sufficiently compelling reason" to keep the search warrant affidavits sealed in their entirety. (RB at pp. 12-13.) The court simply declared that it had reviewed the affidavits and that they should all be sealed under various provisions

(without specification) until "everyone in the case is dead" and technological progress renders the techniques obsolete. (RB at p. 14.) In addition, the District Attorney and Sheriffs' contention that they do not need to justify continued sealing is also wrong. (RB at pp. 17-18.)

The First Amendment also mandates redaction over wholesale sealing. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1204, citing *Press-Enterprise Co. v. Superior Ct.* (1984) 464 US 501, 510 (*Press-Enterprise I*).) That an interest exists in the abstract is not enough, the court must make a finding that "prejudice to that interest was *substantially probable* absent closure and temporary sealing." (*Id*. at p. 1222.) Under the First Amendment, closure must be absolutely essential. In order to narrowly tailor the sealing, the court must consider any alternatives, including redaction and articulate its reasoning. Redaction is required if it protects the compelling interest at issue. While Judge Moore claimed that he considered redaction, it is impossible for this court to review his considerations because he simply did not provide them. (RB at pp. 12-14.) Instead, Judge Moore sweepingly stated that all the warrants needed to remain sealed under various portions of the law. If the Evidence Code changed tomorrow, nobody would know which warrants were affected.

California Rules of Court, rule 2.550 also requires narrowly tailored redaction. Rule 2.550 codifies the standards outlined in *NBC Subsidiary*. It also states that the order sealing the record must "[s]pecifically state the facts that support the findings" and "direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file." (Cal. Rules of Court, rule 2.550(e).)

The District Attorney and Sheriff make much of the Advisory Committee Comment to Rule 2.550, which states that the Rule 2.550 does not apply to confidential records, such as "search warrant affidavits sealed under *People v. Hobbs* (1994) 7 Cal.4th 948." This comment suggests that in the case of a true confidential informant, these factors will always be satisfied. Importantly, records are confidential under *Hobbs* only if they are properly sealed. Simply writing "*Hobbs*" with no justification or support does not indisputably confirm that an entire record was properly sealed and sealing was narrowly tailored. In addition, sealing under *Hobbs* or the Evidence Code does not render decisions unappealable, insulated from further review. Indeed, it is very hard to believe that three to four years after the search warrants in this case were issued, none of the information in the search warrant affidavits has been otherwise made public. According to the District Attorney and Sheriff, three out of four of the murder cases at issue have already been prosecuted and just one awaits trial. (RB at p. 10, fn. 2.) *Hobbs* protects confidential informants, and any informants or information that has since been publicly revealed is no longer confidential and must be released. This lawsuit also revealed that the court erroneously designated at least one file as "sealed" when in fact, the court did not order sealing at all, further indicating the necessity for review. (AOB at pp. 18-19.)

The California Rules of Court only have the force of statute "to the extent that they are not inconsistent with legislative enactments and constitutional provisions." (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.) The usual rules of statutory construction also apply to the interpretation of the rules of court. (*Maides v. Ralphs Grocery Co.* (2000) 77 Cal.App.4th 1363, 1369.) Therefore, a court must "first look to the words of the statute, giving them their usual and ordinary meaning." (*Id*. (citation omitted).) In this case, the District Attorney and Sheriffs' interpretation of the advisory committee comment conflicts with the public access requirements in Section 1534, the First Amendment and common law. To the extent that the Advisory Committee Comment conflicts with the standard for sealing in Rule 2.550, Rule 2.550 should prevail.

A. Redaction is the Appropriate Remedy Under Penal Code Section 1534, Even When Section 1534 Conflicts With *Hobbs* or the Evidence Code

The District Attorney and Sheriff assert that the search warrant affidavits in this case were all sealed under *Hobbs* and Evidence Code sections 1040-1042. (RB at p. 12.) It is important to note that the exceptions to disclosure under Evidence Code sections 1040-1042 are not absolute and must be in the public interest. These exceptions do not require the public entity to keep the information confidential; public entities are simply permitted to use a privilege if they so choose. When faced with a statutory conflict between Section 1534 and Evidence Code sections 1040-1042, courts still turn to redaction as their preferred remedy.

1. Redaction is Required Under the Official Information Privilege

Evidence Code section 1040, the official information privilege, permits an agency to refuse to disclose information acquired in confidence by a public employee if the information is not already publicly available and the disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code § 1040, subds. (a), (b)(2).) For purposes of evaluating the public interest, "the interest of the public entity as a party in the outcome of the proceeding may not be considered." (Evid. Code § 1040, subd. (b)(2).) Crucially, the government can only rely on Evidence Code section 1040 if they are withholding information that is not already publicly available. Any information that is already in the public domain or known to the public must be disclosed. Even if the information is not already public, nondisclosure must be absolutely necessary and must outweigh the interest in disclosure. The impact on the government as a party in the case is irrelevant.

In *PSC Geothermal Services*, the court discussed Section 1534's requirement that search warrant documents be made available to the public in light of the official information privilege in Evidence Code section 1040. (*PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1713.) Importantly, the court recognized that there is no categorical exemption for information relating to an ongoing

investigation. (*Id*. at p. 1713.) Such an exemption would be impermissibly broad and swallow the rule expressed in Section 1534. (*Id*.) Under Section 1040, the court must undertake a "two-stage analysis of confidentiality and public interest to support sealing the affidavit." (*Id*.) The court emphasized the importance of "redacting the [search warrant] affidavit and sealing only that portion which might be found … to be official information." (*Id*. at pp. 1714-1715 (emphasis added).) Because the trial court failed to conduct the two-stage analysis of confidentiality and public interest, and because sealing appeared overbroad, the court issued a writ of mandate directing the trial court to unseal the affidavit subject to a claim of privilege and further in camera review. (*Id*. at p. 1715.)

In this case, the continued sealing of eight search warrant affidavits is at issue. (RB at p. 10.) The District Attorney's office asserts that some of the affidavits must remain sealed to "preserve the safety of witnesses" in the cases. (*Id*.) Another search warrant affidavit remains sealed because the affiant asserted that it "will reveal or tend to reveal the identity of any citizen/confidential informant(s), endanger the life of the citizen/confidential informant(s), and impair further related investigations." (AOB at p. 19.) However, the court did not make any findings regarding informants or witnesses that may be in danger. There were also no findings showing that these were actually confidential witnesses and the information was not already public. In addition, Judge Moore erroneously stated that sealing was necessary to keep criminal defendants from discovering "police methods," but this is not a legitimate exemption. (RB at pp. 12-13.) Judge Moore did not make particularized findings for each warrant, refusing to "specify details," but instead sweepingly stated that there was a "compelling reason" to keep all of the documents sealed. (RB at pp. 14-15.) We do not know which exemption in the evidence code corresponds to which warrant, frustrating judicial review.

2. Redaction is Required Under the Privilege for Confidential Informants

Similarly, Evidence Code section 1041 permits a public entity to refuse to disclose the identity of a confidential informant if the necessity for preserving confidentiality outweighs the necessity for disclosure in the interest of justice. (Evid. Code § 1041,

subd. (a)(2).) Again, "the interest of the public entity as a party in the outcome of the proceeding may not be considered." (Evid. Code § 1040, subd. (b)(2).) This exception is not absolute and must be in the public interest. The court must specifically take the interest of justice into consideration and analyze the arguments on both sides.

In *People v. Hobbs*, evidence of methamphetamine manufacturing was seized pursuant to a search warrant. (*People v. Hobbs* (1994) 7 Cal.4th 948.) The issuing magistrate personally interviewed the confidential informant that supplied information for the search warrant. A recording and written transcription of the interaction, and an affidavit attached to the search warrant were then placed under seal. (*Id*. at pp. 954-55.) The Supreme Court held that part or all of a search warrant affidavit may be sealed under the official information privilege to protect the identity of a confidential informant. (*Id*. at 962.) If revealing the communication would reveal the identity of the informer, then the information itself is also privileged. (*Id*.)

The Court's discussion mainly centered "the inherent tension between the public need to protect the identities of confidential informants, and a criminal defendant's right of reasonable access to information upon which to base a challenge to the legality of a search warrant." (*Id*. at p. 957.) It did not address the public's right of access. The Court declared that Evidence Code sections 1041-1042 "together compromise an exception to the statutory requirement that the contents of a search warrant, including any supporting affidavits … become a public record once the warrant is executed." *(Id*. at p. 962.) Importantly, the Court stated that even though information can be redacted from the search warrant materials, a court should "take whatever further action may be necessary to ensure full public disclosure of the remainder" of the records. *(Id*. at p. 971.)

The District Attorney and Sheriff assert that "[t]he burden of demonstrating reasonable alternatives to closure rests with the press." (RB at p. 18, citing *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1218, n. 40.) In this case, the reasonable alternative to complete, indefinite closure is clear, simple, and widely used – redaction. Information must be redacted from an otherwise disclosable document. In the rare instance where an entire document absolutely must be sealed, the court must still demonstrate that it made

the required factual findings and conducted the correct analysis. As a case moves further along, the necessity of sealing search warrant affidavits naturally diminishes. Of the search warrant affidavits at issue in this case, three have already resulted in convictions and another is nearing trial. (RB at p. 10, fn 2.) There are many types of information in these search warrant affidavits that in all likelihood can be released to the public, such as the general type of place being searched (home, electronic, etc.), the information from witnesses who testified at trial, and the qualifications of affiant, which are likely available in court records and news reports.

V. CONCLUSION

The public has a right to access search warrant materials, including affidavits, under the Penal Code, First Amendment, common law and California Rules of Court. Therefore, the public has standing to challenge sealing orders that impinge on these rights to ensure that sealing was justified under the law. The public interest in access to the search warrant affidavits in this case is particularly heightened due to the nature of the search warrants at issue – these warrants allow law enforcement to monitor all cell traffic in a given geographic area, including the communications of ordinary people who are not being investigated at all. It is vital that the public and their advocates have access to these search warrant affidavits so that the public may serve as a check on this invasive practice.

Dated: December 6, 2021

FIRST AMENDMENT COALITION

By: 

Glen A. Smith
David E. Snyder
Monica N. Price

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court Rule 8.204(c)(1) I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 5,723 words.

Dated: December 6, 2021

FIRST AMENDMENT COALITION

By: 

Glen A. Smith
David E. Snyder
Monica N. Price

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Marin, State of California. My business address is 534 4th Street, Suite B, San Rafael, CA 94901-3334.

On December 6, 2021, I served true copies of the following document(s) described as **APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT** on the interested parties in this action as follows:

Aaron Mackey
amackey@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109

Mark A. Vos
Deputy District Attorney
Appellate Services Unit
303 West Third St.
San Bernardino, CA 92415-0511

Miles Kowalski
Deputy County Counsel
Office of County Counsel
Counsel for the Sheriff
385 N. Arrowhead Ave.
San Bernardino, CA 92415

Stephen Pascover, Counsel
San Bernardino County Superior Court
247 West Third St., 11th Floor
San Bernardino, CA 92415

Michael Risher
Law Office of Michael T. Risher
2081 Center St. #154
Berkeley, CA 94704

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

Clerk, California Supreme Court
350 McAllister Street,
Room 1295
San Francisco, CA 94102
(Electronic)

BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

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

Executed on December 6, 2021, at East Palo Alto, California.

Robin P. Regnier