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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

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

When courts authorize law enforcement's use of surveillance technologies to sweep up innocent people's private data, the public's rights of access to judicial records is critical. In this case, the Electronic Frontier Foundation ("EFF") sought access to long-ago executed search warrants and affidavits to allow the public to understand how the San Bernardino County Sheriff's Department ("Sheriff's Department") seeks warrants to deploy a new type of invasive surveillance. But, as discussed below, the superior court categorically refused to allow access to the affidavits, in violation of the First Amendment, Penal Code § 1534(a), the California Constitution, the Rules of Court, and the common law.

Access to these particular judicial records is especially important because of the heightened public interest in understanding how courts are authorizing law enforcement to use a technology known as a cell-site simulator. A cell-site simulator mimics a cellphone tower and tricks people's phones into connecting with it. The technology allows authorities to collect location data, call details, and other sensitive information from anyone whose phone happens to be in its vicinity. The contents of a person's phone, their digital communications, and even metadata about their communications and other online activities, reflect "the privacies of life." *Carpenter v. United States*, 138 S.Ct. 2206, 2214 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

Law enforcement's use of cell-site simulators is controversial. Concerns that police were using cell-site simulators without first obtaining a warrant prompted the Legislature to enact the 2015 California Electronic Communications Privacy Act (CalECPA), Cal. Penal Code §1546.1. The Legislature also passed a separate statute that year—SB 741—out of a concern that authorities were using cell-site simulators in secret, frustrating

transparency and accountability. These laws placed additional public notice requirements on law enforcement, including public reporting of digital warrants, and enhanced public scrutiny of law enforcement's use of novel surveillance technology.

The San Bernardino County Sheriff's Department regularly seeks warrants to use cell-site simulators. EFF requested a number of these warrants and the supporting affidavits issued between 2017-18, asserting that the public had a right of access to them under the First Amendment, Cal. Penal Code § 1534(a), the California Constitution, the Rules of Court, and the common law. EFF sought public access to the affidavits to learn how the Sheriff's Department justified using the technology, what types of crimes the department was investigating when they sought the warrants, and the training and expertise of the officials who requested them. EFF did not seek to disclose the names of confidential informants or others identified in the records, nor did it seek information that would interfere with ongoing investigations.

Because a large portion of the records EFF sought could not remain under seal as a matter of law, EFF asked the trial court to partially unseal the records. The court denied EFF's petition, holding that EFF had no legal right to access the search warrant affidavits in the first place. The court alternatively held that even if EFF had a right to access the records, they must remain indefinitely sealed in their entirety to protect sensitive information.

The trial court committed multiple legal errors. Longstanding precedent, the First Amendment, Penal Code § 1534(a), the California Constitution, and the Rules of Court allow EFF and any member of the public to seek to unseal records. And the law requires that courts prevent the disclosure of sensitive information by narrowly tailoring sealing, rather than completely withholding records. *See NBC Subsidiary (KNBC-TV, Inc.)*

v. Superior Court, 20 Cal.4th 1178, 1218-19 (1999); Cal. Rule of Court 2.550-2.551. Although EFF lacks access to the records themselves, a review of similar Sheriff's Department affidavits that other judges refused to seal shows that only minor redactions are needed to protect sensitive information. It thus seems implausible that the continued sealing of every word in all of the requested affidavits is justified by law.

The trial court's ruling eviscerates the public's ability to understand law enforcement's requests for judicial authorization to use cell-site simulators and other surveillance technologies. It also establishes a catch-22 for the public's rights of access: the public cannot learn about the techniques when law enforcement initially apply for the search warrants because authorities request that they be sealed. If the trial court grants the sealing request, according to the superior court here, the public can never seek access to those materials, even years later. Thus the public is effectively shut out of any opportunity to be heard on whether perpetual sealing remains justified, even years later.

This Court should reverse the trial court and order the partial unsealing of the search warrant affidavits EFF seeks.

STATEMENT OF APPEALABILITY

The trial court's order denying EFF's petition to unseal eight affidavits filed in support of search warrants issued by the San Bernardino County Superior Court is appealable as a judgment under Cal. Code of Civil Procedure § 904.1(a)(1). The order adjudicated the merits of EFF's petition to unseal judicial records and rendered a final determination of the rights of the parties. *City of Carlsbad v. Scholtz*, 1 Cal.App.5th 294, 299 (2016).

Alternatively, this Court may also consider the appeal of superior court's order as a petition for an original writ of mandate. Courts can treat

an appeal as a petition for a writ of mandate when it meets the elements of a writ, including that the petitioner has no other plain, speedy, and adequate remedy at law to review the superior court's order. *People v. Superior Court*, 104 Cal.App.4th 915, 925-26 (2002).

STATEMENT OF THE FACTS

I. San Bernardino County Law Enforcement Secretly Seek People's Private Digital Data At A Much Higher Rate Than Any Other California Law Enforcement Agency

Authorities in San Bernardino County lead the state in seeking search warrants to obtain private information from people's online accounts, cellphones, and other digital services while also seeking orders that keep these requests under seal or that delay notifying their targets. 2 Joint Appendix ("JA") 246. In fact, a 2018 *Palm Springs Desert Sun* investigation showed that "San Bernardino County's law enforcement agencies were granted the most electronic warrants to search digital property per resident in the state." 2 JA 246.

The Sheriff's Department sought more than 700 search warrants for people's digital data between 2016-2018. 2 JA 246. In each of those warrants, the Sheriff's Department sought to delay notifying the target, a practice that raised concerns that "the department could be using technical loopholes in the system to carry out a broad dragnet of personal and electronic property without the public's knowledge." 2 JA 247. In nearly all cases, authorities filed the search warrant applications and related materials under seal and requested that they remain secret indefinitely. 1 JA 43, 2 JA 237 ¶9. The San Bernardino County Superior Court largely granted those requests. 2 JA 237 ¶6.

The Sheriff's Department "has a controversial history with digital surveillance," including extensive use of cell-site simulators that pretend to

be cell phone towers and force nearby phones to connect with them. 2 JA 248. Cell-site simulators can capture information from any smartphone in its vicinity, including its location, records about the calls and other communications to and from it, and its unique identifier. 1 JA 24 ¶18. By design, cell-site simulators sweep up the personal digital data of innocent people. 2 JA 248.

II. California Legislature Protects People's Digital Privacy, Requires Greater Law Enforcement Transparency

Concerned that law enforcement authorities were obtaining people's private digital data without a warrant and largely in secret, the Legislature enacted two statutes in 2015 to regulate the use of this technology and require governmental transparency: the California Electronic Communications Privacy Act (CalECPA), codified as Penal Code §§ 1546-1546.4, and SB 741, Stats. 2014, c. 659, codified as Gov't Code § 53166. *See* JA 236-37.

CalECPA requires law enforcement to secure warrants before obtaining people's digital data. § 1546.1 (b).[1] CalECPA warrants must meet heightened particularity and notice requirements designed to limit law enforcement intrusions into people's privacy and to ensure better oversight of authorities' activities. § 1546.1(d). CalECPA also required law enforcement seeking warrants for digital data to comply with other statutory and constitutional provisions governing warrants, including § 1534(a)'s requirement that all warrants and related documents be made public 10 days after their issuance and execution.

CalECPA also requires agencies to provide the target of the warrant with information about the search and a copy of the warrant when they

[1] Statutory references are to the Penal Code unless otherwise indicated.

execute it. § 1546.2(a). When authorities do not know the identity of a target or seek to delay notice to a target, authorities must provide that information to the California Department of Justice ("DOJ"). § 1546.2(c). The same provision requires DOJ to publish information about these warrants on its website within 90 days.

CalECPA allows authorities to request that courts permit delayed notice to the targets for 90 days, which can be renewed if they can show a need to do so. § 1546.2(c). Those same provisions, however, require authorities to provide notice to the target once the delayed-notice period expires.

The Legislature enacted SB 741 in reaction to concerns about how cell-site simulators can violate civil liberties and the fact that authorities deployed them in secret. As one committee report explained, cell-site simulators "raise fundamental civil liberty and privacy concerns that deserve to be considered by the public." SB 741 Senate Rules Committee Analysis ("SB 741 Legislative History") (Aug. 31, 2015) at 5.[2] "The secrecy surrounding this technology raises substantial unanswered questions about the privacy and civil liberties implications of these devices, particularly because IMSI catchers collect information from the phones of anyone in the devices' vicinity, not just individuals targeted by law enforcement." *Id*. The Legislature thus wanted to ensure that the public be able to know about the scope of warrants authorizing the use of these devices, and whether these "warrants specifically allow for the collection of data from every cell phone that transmits to the devices." *Id*.

SB 741 imposes a number of requirements on jurisdictions that wish

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[2] Attached to this brief pursuant to Rule of Court 8.204(d). It is also available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB741#.

to use this technology. A city or county that wants to acquire a cell-site simulator must first create a "usage and privacy policy." Gov. Code § 53166(b)(2), (c)(1). It must then enact an ordinance or resolution at a public meeting "authorizing [the] acquisition and the usage and privacy policy required by this" law. *Id*. § 53166(c)(1). A sheriff who wishes to acquire a simulator must similarly provide notice to the public and implement a usage-and-privacy policy. *Id*. § 53166(c)(2).

III. EFF Files Lawsuits Seeking To Make Public Search Warrants Documenting Law Enforcement's Use Of Cell-Site Simulators And Other Warrants For Digital Data.

EFF has been engaged in litigation since 2018 to enforce CalECPA's enhanced transparency provisions and to access records documenting the Sheriff Department's use of cell-site simulators.

EFF filed its first case in 2018 to enforce a public records request it sent to the Sheriff's Department for copies of six search warrant applications and pen register/trap-trace orders. *EFF v. County of San Bernardino*, No. CIVDS1827591. 1 JA 22-23 ¶7. After disclosing the search warrant numbers, the Sheriff's Department asserted that the search warrant materials were otherwise exempt from disclosure because the issuing judges had sealed them indefinitely. 1 JA 22-23 ¶7. The trial court hearing EFF's public records act case indicated that it would not entertain a motion to unseal the search warrant materials as part of the lawsuit. 1 JA 40:2-7.

EFF then requested that the Sheriff's Department release additional search warrants and warrant numbers. 1 JA 23 ¶8. The Department provided the warrant numbers, but once more refused to release the warrants, stating that they remained under sealing orders issued by the superior court. 1 JA 23 ¶8.

EFF next wrote a letter to the Superior Court Presiding Judge and

asked that the court unseal 22 search warrants, arguing that CalECPA, other provisions of the Penal Code, the California Rules of Court, and the First Amendment and California Constitution all required that the materials be unsealed. 1 JA 44-67. This letter also noted that the Sheriff's Department's template contains confusing checkboxes that create the danger that warrants will be treated as sealed even though the issuing magistrate refuses to seal them. 1 JA 51; *see* 1 JA 58 (example of this attached to letter). The Presiding Judge responded by letter that he did not intend to act on EFF's unsealing request. 1 JA 70.

In October 2019, EFF dismissed the prior public-records case and filed the Verified Petition to Unseal Court records that forms the basis of this appeal, asking the court to unseal nine of the warrants and related materials listed in the letter. 1 JA 21-33. It named the Court as respondent and the San Bernardino District Attorney's Office and the County itself as real parties because of their expressed interests in the matter. 1 JA 23-23 ¶¶12-14.

During the course of the litigation, the parties stipulated that the "warrants, sealing orders, and non-disclosure orders at issue" should be unsealed, with limited redactions requested by the government.1 JA 79:1-3; *see* 1 JA at 79-93 (specifying which parts the government wished to remain sealed). This stipulation did not affect the status of the supporting affidavits or other materials in the files. 1 JA 81:5-8. In the course of reviewing these records, the government noticed that, as EFF had feared, one of the warrants had been incorrectly designated as sealed, even though the issuing judge had refused to grant the sealing order that the Sheriff's Department had requested. 1 JA 86:13-16; 1 JA 92:8-9. That warrant and related papers were released in full. *See* 1 JA 105-114 (Warrant SBSW 18-0850).

IV. The San Bernardino Sheriff's Department Requests Perpetual Complete Sealing Orders in Nearly All of Its Electronic Search Warrant Applications, and The Superior Court Almost Always Grants Them

Of the 24 CalECPA warrants that EFF requested in its letter to the presiding judge, the Sheriff's Department had requested that 23 of them and their supporting affidavits be indefinitely and completely sealed. 2 JA 237-38 ¶¶ 3-10. The issuing judges refused three of these sealing requests. *See* 2 JA 237 ¶ 7; 1 JA 86:13-16. An examination of the warrants that the court refused to seal shows that there was no justification for indefinitely sealing them or their supporting affidavits; the small amount of sensitive information in them was easily redacted. *See* 2 JA 238 ¶ 11; 2 JA 240; 1 JA 56-58 (VVSW 18-1048); 1 JA 105-111 (SBSW 18-0850).[3] For example, the sealing request in one of them appears to be pure boilerplate, stating that sealing is necessary to preserve confidential information without any indication of what that information is. *See* 1 JA 112. The last line of this request states "Add addition information to HOBBS the PROBABLE CAUSE," which appears to be leftover template instructions. 1 JA 112. It thus appears that the Sheriff's Department seeks blanket indefinite sealing of nearly all of the CalECPA search warrants it requests, whether or not there is any justification for that sealing.

The sealing orders themselves also appear to be boilerplate; they do not contain any specific justifications for sealing and are legally insufficient. One of them states that "the Affiant has requested" sealing under various provisions, and that "the Affiant has stated that if any of the

[3] It is unclear whether the shading of the text of this warrant at 1 JA 108 is redaction or highlighting—the government provided that page as it appeared in the records it was reviewing and saw no need to further redact it. 1 JA 96:15-17.

information within the requested sealed portion of the affidavit is made public it will reveal or tend to reveal the identity of any citizen/confidential informant(s), endanger the lift of the citizen/confidential informant(s), and impair further related investigations." 1 JA 102 (SBSW 18-0298). Nowhere does it even suggest that the affiant has provided facts to support this claim or that the court has found that any of these results are likely to occur; just that the Affiant has concluded that they will. And although this part of the order suggests that only a portion of the affidavit will be sealed, the actual sealing order indefinitely sealed the entire "Warrant and all accompanying documents." 1 JA 101 ("Pending further order of the Court, this Search Warrant and all accompanying documents shall not become a public record and shall be sealed . . . .). One of the other warrants contains identical boilerplate language without specifics. *See* 1 JA 152, 153 (SBSW 18-0259). The other sealed warrants have the same broad sealing orders but do not even have the boilerplate language justifying sealing. *See* 1 JA 118 (SBSW 17-0615); 123 (SBSW 17-0694); 128 (SBSW 17-0695); 133 (SBSW 17-0834); 139 (SBSW 17-0890); 145 (SBSW 17-0892). These orders are identical to the one in the warrant that was improperly considered to be sealed even though the issuing judge had refused to do so. *See* 1 JA 109. From all appearances there is thus nothing to distinguish the sealed warrants from those that have been released to the public with only minor redactions.

STANDARD OF REVIEW

Where the trial court relied on a paper record and did not take testimony, appellate courts generally conduct an "independent review [that] is the equivalent of de novo review" of a lower court's refusal to unseal records. *People v. Jackson*, 128 Cal.App.4th 1009, 1014-15, 1020 (2005) (reviewing denial of media request to unseal search warrant affidavit and

indictment); *see Overstock.com v. Goldman Sachs Grp., Inc.*, 231 Cal.App.4th 471, 490 (2014); *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 81 (2007).

The exception to this general rule is that where sealing is challenged as violating the common law, review is for an abuse of discretion. *See Overstock.com*, 231 Cal.App.4th at 490. In doing so, appellate courts "review de novo any errors of law upon which the court relied in exercising its discretion." (quoting *Ameziane v. Obama*, 699 F.3d 488, 494 (D.C. Cir. 2012)).

ARGUMENT

"Open court records safeguard against unbridled judicial power, thereby fostering community respect for the rule of law." *In re Marriage of Nicholas*, 186 Cal.App.4th 1566, 1575 (2010). Recognizing this, the First Amendment, the California Rules of Court, the California Constitution, and the common law give any member of the public standing to seek access to closed records and proceedings while also providing courts with the jurisdiction to entertain those requests.

Court records (or parts of them) can be sealed only if doing so is justified under the four-part constitutional test articulated in *NBC Subsidiary*, 20 Cal.4th at 1217-18, which has been codified in Rules of Court 2.550 and 2.551 ("Sealing Rules"). This test requires courts to make specific findings establishing compelling reasons for overriding the public's rights of access. The court must consider all alternatives—most importantly here, redaction—to address those concerns, rather than keeping the records under seal in their entirety. Moreover, the Legislature has expressly mandated public access to search-warrant affidavits after the warrants have been served. § 1534(a).

The trial court failed to follow, much less rigorously apply the *NBC*

Subsidiary standard and it ignored § 1534(a)'s command altogether. In fact, it took the position that when the issuing judge seals a search warrant affidavit, no part of that affidavit can ever be unsealed. *See* Reporter's Transcript of Oral Proceedings ("RT") 23:17-23. This ruling contradicts the Sealing Rules, § 1534(a), and longstanding caselaw providing the public with presumptive rights of access. It also effectively shuts the public out from ever accessing these affidavits and similar court records.

And when the court addressed the propriety of ongoing sealing, it simply recited the legal standard and made general references to the safety of individuals and the protection of law-enforcement techniques, without any explanation of how sealing every single word of these lengthy affidavits could be necessary to protect these interests. RT 32:8-19. The findings stand in contrast to the information contained in the two similar warrant affidavits that EFF obtained because the issuing judge refused the Sheriff's Department's request to seal them. *See* 1 JA 63-67, 108-11. These affidavits contain only limited information that could affect either of these interests. *Id*. Although EFF does not have access to the other sealed affidavits and therefore cannot say exactly what they contain, it is likely that they could similarly be made public with only limited redactions. Indeed, the other CalECPA affidavits EFF has obtained strongly suggest that these types of affidavits contain little sensitive information. This Court should reverse and order the disclosure of those materials, redacted only to protect information that meets the stringent standards for sealing judicial records.

I. EFF Has Standing To Petition For Access To The Sealed Search Warrant Affidavits And The Trial Court Had Jurisdiction To Entertain The Petition

Any member of the public has standing to challenge a superior court's sealing orders, such as those EFF challenged here. Correspondingly,

courts have broad jurisdiction to consider the public's request to access judicial records or proceedings. The trial court ignored longstanding law affirming these principles. RT 28:10-17; 29:15-16.

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) (quoting *Estate of Hearst*, 67 Cal.App.3d 777, 782 (1977)). The public's standing to seek access recognizes that "the power to unseal is a critical safeguard for the public's right to know." *In re Marriage of Nicholas*, 186 Cal.App.4th at 1577.

California courts have thus long recognized the public's standing to seek access to court records. *Craemer v. Superior Court of Marin Cty.*, 265 Cal.App.2d 216, 218 n.1 (1968); *Alvarez v. Superior Court*, 154 Cal.App.4th 642, 647-48 (2007); *see also Jackson*, 128 Cal.App.4th at 1014. So too have federal courts. *See, e.g.*, *Globe Newspaper Co*., 457 U.S. 596, 609 n.25 (1982); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 787 (1st Cir. 1988); *Seattle Times Co. v. U.S. Dist. Court for W. Dist. of Washington*, 845 F.2d 1513, 1515 (9th Cir. 1988).

In addition, Rule of Court 2.551(h)(2) expressly provides that a "member of the public may move, apply, or petition … to unseal a record."

Finally, our state Constitution protects the public's right to obtain the writings of government officials: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the writings of public officials and agencies shall be open to public scrutiny." California Constitution, article I, section 3(b)(1). Search warrants and the affidavits are all writings of government officials. And courts can enforce the public's right just as they can enforce all other provisions of the Constitution. *See Katzberg v. Regents of Univ. of California*, 29 Cal.4th 300, 307 (2002). Moreover, this provision, like all California laws promoting transparency, must be broadly construed to further public access

to governmental information. California Constitution, article I, section 3(b)(2) ("A statute, court rule, or other authority [. . .] shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."); *see Overstock.com*, 231 Cal.App.4th at 495-96 (applying rule to judicial records).

The government presented no contrary authority below. And the District Attorney conceded that EFF has standing to request unsealing. RT 27:16-21. EFF, like any member of the public, thus has standing to request access to the affidavits at issue here. The question is whether continued sealing of these records is justified.

Concurrent with the public's broad standing to seek access to court records, courts have both jurisdiction and a continuing obligation to ensure that sealing orders do not unnecessarily obstruct public access to records. *See In re Marriage of Nicholas*, 186 Cal.App.4th at 1576-77. This is particularly important where a court enters an initial sealing order without opposition and without providing the public "an opportunity to be heard" to contest the need for secrecy. *See NBC Subsidiary*, 20 Cal.4th at 1217, n.36. That was the case here, as authorities sought the initial sealing orders without public notice or opposition of any party. Further, the need to revisit initial sealing orders is even more critical here because, as discussed above, the original sealing orders simply sign-off on the Sheriff's Department boilerplate requests. *See, e.g.*, 1 JA 112.

The fact that a record was once properly sealed does not deprive the court of jurisdiction to later consider whether ongoing sealing is justified. *See In re Marriage of Nicholas*, 186 Cal.App.4th at 1575. Every court has the inherent "supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). And the initial sealing orders here explicitly recognize this and order that the materials be sealed "unless further ordered by the Court." *See, e.g.*, 1 JA 58.

II. The Public's Rights Of Access To Judicial Records Attach To The Sealed Search Warrant Affidavits

The search warrant affidavits EFF seeks to unseal are judicial records subject to the public's presumptive right of access under the First Amendment, the California Rules of Court, the California Constitution, and the common law. Moreover, the Penal Code specifically mandates that search warrant materials, including the affidavits at issue here, be open to public inspection after authorities execute them.

A. The First Amendment Right Of Access Attaches To The Affidavits

The First Amendment provides a "broad access right to judicial hearings and records." *Copley Press v. Superior Court*, 6 Cal.App.4th 106, 111 (1992). The First Amendment right of access attaches to judicial proceedings and records when there is a (1) a "specific structural utility of access" and (2) a historic tradition of access to those records. *NBC Subsidiary*, 20 Cal.4th at 1221-23. California appellate courts have already found that the First Amendment's right of access attaches to search warrant materials, including affidavits. *See Jackson*, 128 Cal.App.4th at 1021-23.

Once the First Amendment right of access attaches to judicial records, a court cannot seal them without expressly finding facts establishing that (1) there is an overriding interest that supports sealing the record, (2) there is a substantial probability of harm absent sealing, (3) the sealing is narrowly tailored to serve the overriding interest, and (4) there is no less restrictive means of addressing the overriding interest. *NBC Subsidiary*, 20 Cal.4th at 1217-18

This Court should thus affirm that the First Amendment's right of access attaches to the affidavits EFF seeks here and requires their partial disclosure.

1. Public Access To These Search Warrant Affidavits Enhances Structural Utility By Allowing Scrutiny Of Novel Surveillance

The most important factor in determining whether the public has a First Amendment right of access is utility. *See NBC Subsidiary*, 20 Cal.4th at 1213-14 ("[A]lthough evidence of … a historical tradition is a factor that strengthens the finding of a First Amendment right of access, the absence of explicit historical support would not, contrary to respondent's implicit premise, negate such a right of access."). Hence, utility "alone, even without experience, may be enough to establish the right" of access." *In re Copley Press*, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008).

Disclosure of the search warrant affidavits EFF seeks will enhance public understanding of when courts authorize digital surveillance and enable greater public oversight of law enforcement. The utility prong of the public's First Amendment right of access concerns the role public access will play in enhancing self-governance and other democratic values. As the Supreme Court has recognized, public scrutiny of judicial proceedings and records "enhances the quality and safeguards the integrity" of the judicial process, "fosters an appearance of fairness," and "permits the public to participate in and serve as a check upon the judicial process." *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 606 (1982); *see also NBC Subsidiary*, 20 Cal.4th at 1219.

The Legislature has enacted laws that recognize the heightened utility for public access to and scrutiny of the digital search warrant affidavits EFF seeks. SB 742, codified as Gov't Code § 53166, recognized that cell-site simulators used by law enforcement raised significant civil liberties issues, and that authorities' secret use of the technology frustrated public access and accountability. SB 741 Legislative History at 5.

CalECPA also demonstrates why public access to the digital search

warrant affidavits at issue here enhances structural utility. CalECPA increased privacy protections for Californians by requiring warrants before law enforcement can obtain people's private digital data. § 1546.1(d). The law also generally required law enforcement to report their warrants to the DOJ, which then must publish information about the warrants on its website within 90 days of receiving it. § 1546.2(c). These provisions show that the Legislature was concerned about law enforcement's ability to obtain people's sensitive digital data without a warrant, and that authorities were often doing so in secret.

Public access to the affidavits at issue here provides the specific utility recognized by the First Amendment by allowing scrutiny of the court's willingness to authorize law enforcement's surveillance. *See Globe Newspaper Co.*, 457 U.S. at 606. As EFF explained to the trial court, it seeks public access to the affidavits to learn more about (1) the nature of the offenses under investigation, (2) the expertise and qualities of the affiants, (3) why the affiant believes the searches will assist the investigation, (4) the nature of the information to be provided under the warrant, (5) what providers must do to comply with the warrant, and (6) reasons for seeking sealing and/or nondisclosure. 2 JA 233.

Further, disclosure will directly advance the Legislature's concerns that led to the passage of CalECPA and SB 724: greater public awareness and oversight of law enforcement's digital surveillance activities. One of CalECPA's principle purposes was to allow the public to learn more about when and how law enforcement seek court approval to use technologies like cell-site simulators. And SB 724's protections were the result of similar concerns that authorities were using cell-site simulators in secret, which stifled accountability and democratic control over law enforcement. SB 741 Legislative History at 5. Disclosure here thus furthers the goals of these laws.

More generally, the statute that mandates public disclosure of executed search warrant, § 1534(a), demonstrates the importance of public access to the affidavits EFF seeks. The text of § 1534(a) provides that "A search warrant shall be executed and returned within 10 days after date of issuance." The statute then mandates a clear timeline for public disclosure of the search warrant and related materials filed with it:

> 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) (emphasis added). The statute thus gives law enforcement 10 days to execute a search warrant, during which time the materials are closed to the public. If the police fail to execute the warrant, the materials may remain sealed. But if the warrant is executed, they become public at that time.

Section 1534(a) mandates public access and, as described below, provides a separate statutory right of access to the affidavits EFF seeks. In addition, § 1534(a) embodies the structural utility prong of the First Amendment right of access because disclosure lets the public learn about law enforcement investigations and activities. The mandated disclosure required by § 1534(a) ensures that, for example, the public can see whether authorities complied with the federal and state constitutions when they sought and executed the warrant. *See Oziel v. Superior Court*, 223 Cal.App.3d 1284, 1296 (1990) (recognizing that right of access to search warrant provides the public with "knowledge about the execution of the search warrant and about the activities in regard thereto"). Thus, § 1534(a)'s requirement of public access safeguards the integrity of judicial proceedings by ensuring public knowledge, which in turn allows for the

people to serve as a check on the judicial process. *Globe Newspaper Co.*, 457 U.S. at 606. With respect to the affidavits here, public access provides the critical first step before the public can advocate for changes to law enforcement policies or new laws to better protect individual privacy.

2. California Law Establishes A Tradition of Public Access To The Search Warrant Affidavits

Section § 1534(a) also demonstrates that California courts have a decades-long tradition of mandating public access to search warrant materials. As described above, § 1534(a) provides a 10-day period in which search warrant materials "need not be open to the public." But "[t]hereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record." § 1534(a).

The statute's public access mandate has been law since at least 1963, when the Legislature amended § 1534. Stats. 1963, c. 1331, p. 2855, § 1.[4] California has therefore codified a tradition of access to post-executed or returned search warrants via § 1534(a).

Section 1534(a)'s post-execution public access mandate demonstrates that California has historically provided a right of access to search warrant materials, including affidavits, during even early stages of investigations.

Apart from § 1534 (a), there is a tradition of public access to post-investigation search warrant materials, precisely the type of records EFF seeks here. Although warrant materials "have not historically been accessible to the public during the *early stages* of criminal proceedings, [. . .] [p]ost investigation, however, warrant materials 'have historically

[4] Available at: https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1963/63Vol2_Chapters.pdf#page=2

been 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) (quoting *In re N.Y. Times Co.*, 585 F.Supp.2d 83, 88 (D.D.C. 2008) (emphasis in original).

The affidavits EFF seeks here concern post-investigation materials. The fact that the search warrants at issue here were executed between 2017-18 is evidence in itself that all of the investigations are well beyond their early stages. 1 JA 26-31. Indeed, several investigations have resulted in indictments and convictions. 2 JA 231-32, 244. The public thus has a tradition of public access to these materials given that law enforcement's investigations have advanced well beyond their early stages.

B. The California Rules Of Court Codify The Public's Right Of Access To The Affidavits Under The First Amendment, The California Constitution, And The Common Law

The California Rules of Court's provisions governing the sealing of judicial records also apply to the affidavits EFF seeks and presume that they are open for public inspection. Rules 2.550-2.551 guarantee public access to judicial records and set forth procedural and substantive requirements that courts must meet before they can seal any records.

But is a mistake—one the trial court made–to read the Sealing Rules as being merely one dimensional. Rather, the Sealing Rules have a constitutional dimension because they implement the public's rights of access under the First Amendment, the California Constitution, and the common law.

Shortly after the California Supreme Court's decision in *NBC Subsidiary*, the Judicial Council codified its standards and procedures for public access in Rules 2.550 and 2.551. *See Jackson*, 128 Cal.App.4th at 1022 (2005); *Mercury Interactive Corp.*, 158 Cal.App.4th at 67-68; Rule 2.550 Advisory Committee Comment.

The Sealing Rules also embody the California Constitution's right of access to judicial records and public officials' writings. This state's free expression clause, California Constitution, article I, section 2, provides a right of access to judicial records that is coextensive with the First Amendment. *See Copley Press*, 6 Cal.App.4th at 111-12. Thus the Rules of Court's incorporation of the First Amendment right of access under *NBC Subsidiary* necessarily incorporated the California Constitution's free expression clause. The Sealing Rules also implement the California Constitution's right of public access to the writings of public officials. California Constitution, article I, section 3(b)(1).

The Sealing Rules also incorporate the broad scope of public access recognized under the common law. The common law right of access attaches to court orders, judgments, and all "documents filed in or received by the court." *Copley Press*, 6 Cal.App.4th at 113. The public's right of access attaches to all of these materials because "these documents represent and reflect the official work of the court, in which the public and press have a justifiable interest." *Id*. Similarly, the California Rules of Court define records subject to its sealing provision as "all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, by electronic means or otherwise." Rule 2.550(b)(1).

The Sealing Rules thus restate and amplify the public's long-recognized constitutional and common law rights of access described above. Hence the Sealing Rules' codification of the presumption of public access: "Unless confidentiality is required by law, court records are presumed to be open." Rule 2.550(c). And the Sealing Rules' incorporation of *NBC Subsidiary*'s test, requiring that before courts seal a record, they must "expressly find[] facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability

exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." Rule 2.550(d).[5]

A court order sealing records must "[s]pecifically state the facts that support the findings." Rule 2.550(e)(1)(A). The fact that part of a record merits sealing does not allow the court to seal the entire record. Instead, it can order only "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." Rule 2.550(e)(1)(B). "All other portions of each document or page must be included in the public file." *Id*.

C. Penal Code § 1534(a) Expressly Requires Public Access To Executed Search Warrants And Related Materials

Section 1534(a) provides its own statutory right of access to the affidavits EFF seeks, separate and apart from the public's right of access to the search warrant affidavits under the First Amendment, Sealing Rules, California Constitution, and common law. As explained above, once "a warrant has been executed, the documents and records shall be open to the public as a judicial record." § 1534(a). By its terms, the statute establishes both that search warrant affidavits are judicial records and that public access to the records.

The statute's mandate applies to affidavits sought here. When the Legislature enacted CalECPA's warrant requirements for searches of digital data, it made explicit that § 1534(a) applied. § 1546.1(d)(3) ("Any warrant for electronic information . . . shall comply with all other provisions of California and federal law . . . ."). Authorities executed the search warrants

[5] Rule 2.550(d) restates the four-part *NBC Subsidiary* test in five parts. For consistency, EFF applies the four-part *NBC Subsidiary* test.

here at issue in 2017 and 2018, long before EFF filed this suit in October 2019. 1 JA 26-31, 98-154 (disclosed warrants).

The search warrant affidavits EFF seeks are therefore open judicial records under § 1534(a) that should have been disclosed long ago, with only limited redactions to protect truly sensitive information, as discussed below.

III. The Superior Court Violated EFF's Rights Of Access By Refusing To Apply The First Amendment, Rules Of Court, And § 1534(a) To The Affidavits

The superior court violated the public's overlapping rights of access under the First Amendment, the Sealing Rules, the California Constitution, § 1534(a), and the common law when it categorically refused to unseal any part of any of the affidavits. RT 29:15-16, 32:8-9. The trial court's conclusion that Evid. Code §§ 1040-42 ("Evidence Code") and *People v. Hobbs*, 7 Cal.4th 948 (1994), foreclosed EFF's entitlement to seek access to the search warrant affidavits creates a constitutional conflict between those authorities and the public's right of access under the First Amendment. *See State v. Chen*, 309 P.3d 410, 414-15 (Wash. 2013) (holding constitutional right of access overrides a statutory sealing provision).

Yet this Court can avoid the constitutional conflict and harmonize the various constitutional provisions, statutes, and court rules at issue to hold that EFF is entitled to seek access to the search warrant affidavits. The Court should thus clarify that concerns regarding disclosure of confidential informants or other interests are best addressed by applying *NBC Subsidiary*, rather than wholly foreclosing public access.

A. The Public's Rights Of Access Attach To Judicial Records, While Evidentiary Privileges Protecting Confidential Informants Concern Specific Information Within Them

The primary source of the trial court's error was its failure to properly construe *Hobbs* and the Evidence Code in light of the public's broad rights of access under the First Amendment, the Sealing Rules, the California Constitution, §1534(a), and the common law. RT 20:14-16. As described above, the public's rights of access under all of those authorities attach to the affidavits here. *See NBC Subsidiary*, 20 Cal.4th at 1218-19; Rule 2.550-2.551; *Copley Press*, 6 Cal.App.4th at 113. And the California Constitution separately requires that these authorities "shall be broadly construed" because they further public access. California Constitution, article I, section 3(b). The same constitutional provision requires provisions of law that limit the public's rights of access, such as *Hobbs* and statutory privileges, to be "narrowly construed." *Id*.

Following the California Constitution's rule of construction required the trial court to rule that the public had a presumptive right of access to the affidavits under the authorities above because they are judicial records. And although all of the rights of access all apply, § 1534(a)'s statutory mandate has particular force and should have been construed to require public disclosure here. *See Sierra Club*, 57 Cal.4th at 175 (holding that state Constitution requires statutory access rights to be construed broadly).

On the other hand, the California Constitution required the trial court to construe *Hobbs* and the Evidence Code narrowly, as they permit the withholding of specific information contained in judicial records, rather than foreclosing access to the records in their entirety. Indeed, our Supreme Court recognized this principle in *Hobbs*. There, the high court first held 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.

Construing the Evidence Code narrowly in light of the public's rights of access—specifically, the statutory mandate of access under § 1534(a)—our Supreme Court held that a court may only seal those parts of a search warrant affidavit that are "necessary to implement the privilege and protect the identify of [the] informant." *Id.* at 971. But "[a]ny 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 (emphasis in original). By extension, the same broad constructions should also apply to the public's rights of access under the First Amendment, the Rules of Court, the California Constitution, and the common law.

The high court in *Hobbs* then devoted several paragraphs to endorsing methods that would mandate public disclosure of search warrant affidavits while permitting law enforcement to withhold specific information subject to the privilege. *Id*. at 963.

For example, *Hobbs* requires superior courts to "evaluate the necessity for sealing all or part of a search warrant affidavit on such a claim of privilege [and] take whatever further actions may be necessary to ensure full public disclosure of the remainder of the affidavit." *Id.* at 971.

If a court "finds that any portion of the affidavit sealed by the magistrate can be further redacted, and the remaining excerpted portion made public without thereby divulging the informant's identity, such additional limited disclosure should be ordered." *Id*. at 972 n.7.

Courts must make further findings to decide "whether the entirety of the affidavit or any major portion thereof is properly sealed, *i.e.*, whether the extent of the sealing is necessary to avoid revealing the informant's identity." *Id.* at 972.

Hobbs therefore does not permit the wholesale sealing of all of the eight affidavits at issue. Instead, it allows the sealing only of those parts of

affidavits that identify a confidential informant. And as explained below, it is unlikely that sealing every word of every one of the search warrant affidavits here is necessary to protect the identity of confidential informants.

The trial court's ruling is in conflict with *Hobbs* and more broadly turns the California Constitution's special rule of construction on its head: it permits *Hobbs* and the Evidence Code to broadly foreclose public access to search warrant affidavits and practically leaves the public with no substantive right to challenge sealing orders of those materials. RT 29:7-12; 2 JA 267:11-22.

B. The Sealing Rules' "Record" Definition Requires Access

Separately, the superior court's ruling that the Sealing Rules did not attach to the search warrant affidavits misread their text to wholly foreclose access. Thus, in addition to failing to construe the Sealing Rules broadly, the superior court appeared to let an exception in the rules swallow the public's more general right of access. This was legal error and was likely the result of confusion regarding the rule's definition of "record."

The trial court's legal error began when it accepted the District Attorney's argument that Rule 2.550(a)(2)'s exception—"[t]hese rules do not apply to records that are required to be kept confidential by law"—forecloses the public's rights of access to the affidavits. RT 28:7-9, 16-17; 2 JA 268.

The Sealing Rules state that a "record means *all or a portion of* any document, paper, exhibit, transcript, or other thing filed or lodged with the court." Rule 2.550 (b)(1). (emphasis added). This definition encompasses *both* judicial records and the contents of those records. Thus, Rule 2.550(a)(2)'s exception for "records that are required to be kept confidential by law" applies to "a portion of any document" required by law to be kept

confidential, such as the identities of informants, not to the entire document. Rule 2.550(b)(1). Read in that way, the exception in 2.550(a)(2) codifies the existing standards in the Evidence Code and *Hobbs* that restrict disclosure of particular information. This interpretation of the rules harmonizes both the evidentiary privileges and the public's rights of access, rather than putting them into conflict.

If there were any doubt, the California Constitution's mandate that the Rules be read so as to maximize the public's access to information. *See* California Constitution, article I, section 3(b)(2); *Sierra Club v. Superior Ct.*, 57 Cal.4th 157, 175 (2013) ("To the extent that [a statute, court rule, or other authority] is ambiguous, the constitutional cannon requires us to interpret it in a way that maximizes the public's access to information unless the Legislature has *expressly* provided to the contrary.") (emphasis in original).

IV. The Trial Court Erred In Concluding That The Affidavits' Wholesale, Indefinite Sealing Was Justified

The trial court's ruling that the search warrant affidavits must remain under seal indefinitely failed to follow *NBC Subsidiary* and lacked the findings necessary to indefinitely close all public access to the records. RT 24:6-16. Nor did it even purport to apply the test for sealing records under the common law. The failure to follow either test before sealing the records was legal error. *See NBC Subsidiary*, 20 Cal.4th at 1217-18; *Copley Press*, 63 Cal.App.4th at 376 (holding failure to establish compelling reasons for sealing to rebut the common law right of access was legal error).

The public's presumptive rights of access make wholesale, perpetual sealing exceedingly rare and require incredibly detailed findings before denying public access. *See NBC Subsidiary*, 20 Cal.4th at 1182 (acknowledging compelling interests in closure to avoid jury learning of

inadmissible evidence but nonetheless rejecting wholesale closure of the courtroom). Before authorizing such broad, ongoing secrecy, trial courts must methodically analyze secrecy requests, make specific findings, and consider all alternatives short of total closure. *Id*. at 1223 ("the trial court's blanket and sweeping order closing the courtroom during *all* nonjury proceedings was not narrowly tailored") (emphasis in original).

A. The Trial Court Failed To Follow *NBC Subsidiary* Before Sealing The Affidafits In Their Entirety

The trial court's ruling that the affidavits must remain sealed indefinitely did not follow the four-part *NBC Subsidiary* test. Instead, the trial court justified sealing the record because (1) the search warrants were properly sealed when they were initially filed, (2) "there currently exists an important state interest in protecting the identities of parties" and information about unspecified law enforcement techniques and methods and (3) that "there is no alternative means to release any of the information without compromising the identities of the parties." 2 JA 268; *see* RT 24:6-16. The findings do not track *NBC Subsidiary*'s legal standard or provide an adequate basis for maintaining the affidavits under seal.

1. The Court Could Not Rely On The Propriety Of A Previous Order Sealing the Affidavits

The trial court's ruling that the initial sealing orders required the search warrants to remain under seal indefinitely finds no basis in *NBC Subsidiary* or the Sealing Rules. *In re Marriage of Nicholas*, 186 Cal.App.4th at 1575. The trial court stated that it lacked "any authority for the proposition that I can now create a new precedent and order that these warrants which have been reviewed by a judge or sealed by a judge are subject to publication or a continuing review process to justify nonpublication." RT 23:19-23.

The ruling is erroneous because it ignored that the public's rights of access explicitly empower courts to examine the propriety of sealing orders on an ongoing basis. "Since orders to seal court records implicate the public's right of access under the First Amendment, they inherently are subject to ongoing judicial scrutiny, including at the trial court level." *In re Marriage of Nicholas*, 186 Cal.App.4th at 1575. This ensures the public has "an opportunity to be heard on the question of their exclusion." *NBC Subsidiary*, 20 Cal.4th at 1217, n.36 (quoting *Globe Newspaper Co.*, 457 U.S. at 609, n.25).

The trial court disregarded this principle and distinguished *In re Marriage of Nicholas* on the grounds that the cases involved civil matters "far afield" from the law enforcement investigations described in the search warrant affidavits. RT 31:6-17. But the public's substantive rights of access and *NBC Subsidiary*'s sealing requirements do not turn on whether the sealing orders being reviewed concern civil or criminal matters. Instead, as the Rules of Court recognize, the re-evaluation of initial sealing orders is necessary—regardless of the type of case—because the ongoing sealing implicates the public's rights of access under the First Amendment and California Constitution and common law. *In re Marriage of Nicholas*, 186 Cal.App.4th at 1575; *see* Rule of Court 2.551(h)(2), (4) (authorizing public to move to unseal previously sealed records).

The court's ruling that the initial sealing orders both control and dispose of EFF's petition also had the practical effect of foreclosing the public's ability to meaningfully seek access to search warrants filed under seal. Law enforcement sought the search warrants and corresponding sealing orders at issue here *ex parte* and under seal. 1 JA 22-23. Thus the public was afforded no notice or any opportunity to be heard prior to the court granting the initial sealing orders. *See NBC Subsidiary*, 20 Cal.4th at 1217 (holding that motions close proceedings made in open court or

motions to seal filed on public court dockets constitute adequate notice).

Generally speaking, there are sound lawful reasons for courts to grant law enforcement's initial sealing requests accompanying search warrant applications. *See Jackson*, 128 Cal.4th at 1026. But in ruling that those initial sealing order foreclosed EFF's petition for access, the trial court effectively denied the public its right to ever seek access to these judicial records. Moreover, there is reason here to question whether the initial sealing orders were justified. A search warrant disclosed to EFF contains a boilerplate sealing requests, 1 JA 112, and a sealing order contains similar, general findings that merely parrot the requests. 1 JA 102.

And as this case proves, those initial sealing orders make it difficult for the public to ever learn about the contents of these search warrants, as the trial court kept the materials indefinitely under seal despite § 1534(a) and CalECPA's requirements that they be made public after their execution. 1 JA 22-23. This secrecy has frustrated EFF's efforts to make public how law enforcement is using surveillance technology that sweeps up innocent people's private data. 1 JA 22-23.

2. The Court Failed To Make The Required Express Factual Findings Regarding The Overriding Justification For Sealing

The First Amendment and the Sealing Rules required the trial court to specifically identify the overriding interest that justified sealing the search warrant affidavits and to explain why that interest supported sealing. *See NBC Subsidiary*, 20 Cal.4th at 1218; Rule 2.550(d)(1), (2). This step requires courts to specifically identify the harm from disclosure and link that harm to a legal basis that supports sealing the information. *Id*. "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient" to constitute an overriding interest under *NBC Subsidiary*. *Huffy Corp.*, 112 Cal.App.4th at 106 (quoting *In re Cedent Corp.*, 260 F.3d

183, 194 (3d Cir. 2001)).

The superior court failed to do this. Instead, it declared that there "are compelling State reasons involving either the safety of individuals or the protection of law enforcement techniques and methods all [of] which justify sealing these documents." RT 32:14-17; *see also* RT 24:8-12 (describing the materials as containing "confidential information"). *NBC Subsidiary* requires more than this type of conclusory statements regarding the overriding interest that justifies closure. Although protecting the safety of witnesses is certainly an important interest, the court's disjunctive findings were simply too vague to support sealing, particularly given the age of the warrants. This is precisely the type of broad allegations that courts have found insufficient. *See Huffy Corp. v. Superior Court*, 112 Cal.App.4th 97, 106 (2003), *abrogated on other grounds*, *Curtis v. Superior Court*, 62 Cal.App.5th 453, 471 (2021). And the court's assertion that the affidavits contain confidential information is equally insufficient. *See McNair v. NCAA*, 234 Cal.App.4th 25, 35 (2015) (holding that designating documents confidential is insufficient to demonstrate an overriding interest).

Moreover, *NBC Subsidiary* required the court to demonstrate that the overriding interest in nondisclosure of the affidavits had a basis in law. 20 Cal.4th at 1222, n.46 (providing non-exhaustive list of overriding interests recognized by law). The trial court did not explain the legal basis for its finding of an overriding interest and instead merely stated that there was "an important state interest." 2 JA 268.

3. The Court Failed To Find That There Was A Substantial Likelihood Of Harm Should The Affidavits Be Unsealed

The court did not apply the second prong of the *NBC Subsidiary* test. Even when courts find that an overriding interest supports sealing a judicial

record, it must separately find that there would be a substantial likelihood of harm absent sealing the materials. 20 Cal.4th at 1218; Rule 2.550(d)(3). The court ignored this requirement.

The trial court stated that it had reviewed the materials and that its review demonstrated that they must remain under seal. RT 22:20-21. But the trial court's statement was not sufficient for at least three reasons.

First, the court failed to explain how it could conclude that the initial reasons justifying sealing when officials sought the warrants remained years later. The court excluded the sole evidence that the government offered that could have discussed its current interests. RT 21-22; *see McNair*, 234 Cal.App.4th at 32 (court cannot consider material lodged under seal but not filed). The only evidence the Court had before it describing the government's interests was therefore the original sealed search warrant affidavits from 2017 and 2018. It had no way to know whether the names of any informants had already been made public, at trial or otherwise. *See generally Davis v. Superior Ct.*, 186 Cal.App.4th 1272, 1277–78 (2010) (discussing when identity must be revealed). The trial court had no way of knowing whether there were still serious threats to anybody's safety. Nor did it have any way to evaluate whether law-enforcement techniques that an affiant declared were secret in 2017 were still secret in 2021.

The law imposes "'a continuing burden' on the party seeking to seal court records to 'periodically show' the need for restricted access." *In re Marriage of Nicholas*, 186 Cal.App.4th at 1576 (quoting *Estate of Hearst*, 67 Cal.App.3d 777, 785 (1977)). Unless it shows that sealing continues to be justified, the court must unseal the records. *See id.* It must meet this burden with admissible evidence. *Universal City Studios, Inc. v. Superior Court*, 110 Cal.App.4th 1273, 1284 (2003); *McNair*, 234 Cal.App.4th at 32. Because the court considered no current evidence, it could not have found

that sealing is still appropriate, much less that continued sealing of every word of every affidavit at issue is justified.

Second, the trial court did not appear to weigh evidence in the record indicating that circumstance had changed since the warrants were initially sealed. 2 JA 231-33, 244. Although EFF lacks access to the search warrant affidavits and cannot speak to their contents, changed circumstances since the court initially sealed the affidavits likely lessened the potential harm from disclosure. For example, the fact that authorities sought the warrants between 2017-18, roughly 3-4 years prior to the trial court's review of the materials, suggests that initial concerns justifying sealing may no longer be present or as weighty. Specifically, at least three related criminal cases have resulted in convictions and are closed, suggesting that secrecy considerations surrounding those warrant affidavits have changed. 2 JA 231-32. And for another warrant, post-indictment criminal proceedings were ongoing and the defendant's counsel did not object to unsealing the affidavit. 2 JA 244.

Thus, the evidence in the record weighed in favor of granting public access, or, at minimum, raised questions regarding whether the initial overriding interests could continue to justify wholesale sealing. *See NBC Subsidiary*, 20 Cal.4th at 1222, n.47 (holding that the earlier disclosure of information from closed court proceedings can undercut claims of harm from disclosure).

Third, the court's broad comments on the potential harm from disclosure appeared to be based on speculation not grounded in the facts or the relevant law. The court at one point described a general concern regarding disclosure of law enforcement techniques, likening it to the disclosure of classified sources and methods used to gather foreign intelligence. RT 22:23-26 to 23:1-11. From that general concern, the trial court stated "[i]t appears to me that there has been historically a clear

presumption that some information should never get out." RT 22:21-23. There was no factual basis supporting such a broad finding that the affidavits contained materials like intelligence sources and methods, much less that similar harm would flow from disclosure. And the trial court's legal conclusion that there is a historic presumption of secrecy wholly disregarded the public's presumptive rights of access to the records here, § 1534(a)'s requirement that search warrants be made public, and CalECPA's more recent transparency requirements. § 1546.2(c) (requiring DOJ to publish information about CalECPA warrants on its website). The court thus substituted its own speculation for the facts justifying the sealing of the affidavits and adopted a view of the law expressly counter to the presumption of public access and California law.

4. The Court Failed To Make The Required Finding That Wholesale Sealing Was Narrowly Tailored And That Less Restrictive Alternatives Would be Insufficient

Any sealing order must be narrowly tailored to the harm to be prevented; broad sealing is improper if less-restrictive sealing would suffice. *NBC Subsidiary*, 20 Cal.4th at 1218; Rule 2.550(d)(4). This requires that the court allow only "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." Rule 2.550(e)(1)(B). "All other portions of each document or page must be included in the public file." *Id*; *see Custer Battlefield Museum*, 658 F.3d at 1195, n.5 (competing concerns can typically be accommodated "by redacting sensitive information rather than refusing to unseal the materials entirely").

The court's finding "that there is nothing in any of those affidavits . . . that should be released now or ever" is the opposite of narrow

tailoring. RT 23:9-11.

The court's wholesale sealing failed to explain why not one single word could be released from any of the affidavits. Search warrant affidavits, like many other documents filed with courts, usually contain "routine verbiage" and other content that is wholly separate from any asserted overriding interest and should thus be disclosed. *Huffy Corp.*, 112 Cal.App.4th at 107. In fact, the Sheriff's Department affidavits supporting similar warrants that EFF has been able to examine contain very little sensitive information; the government released them with limited redactions. *See* 2 JA 238 ¶ 11; 240; 1 JA 55-57 (VVSW 18-1048); 105-111 (SBSW 18-0850). The affidavits at issue here doubtless contain other innocuous information, including the name of the law enforcement agencies seeking the warrant, a description of the affiant's qualifications, and whether the agencies need assistance from a third party to execute the warrant. RT 25:11-26. Notably, the trial court did not say that such information was not contained in the affidavits, much less explain why keeping that information under seal was narrowly tailored.

Further, the fact that some of law enforcement investigations described in the search warrants had proceeded to post-indictment criminal proceedings also suggests that wholesale sealing is far from narrowly tailored here. JA 231-33, 244. This stands in contrast to *Jackson*, where the court found that wholesale sealing of search warrant materials was narrowly tailored because disclosure "could reveal the focus of the investigation and potentially compromise its progress." 128 Cal.App.4th 1025-26. The trial court provided no facts showing that a situation similar to that in *Jackson* was present here. Thus the wholesale sealing was neither justified nor narrowly tailored.

5. The Court Erred In Finding That There Were No Less Restrictive Alternatives to Wholesale, Indefinite Sealing

The trial court failed to justify its finding that there was no alternative means to protecting the identities of parties contained in the affidavits short of keeping the entire affidavits under seal. *NBC Subsidiary*, 20 Cal.4th at 1218; Rule 2.550(d)(5). Throughout this case, EFF has recognized that some information contained in the search warrants may legitimately remain under seal. 1 JA 31 (petitioning to unseal parts of the warrants that cannot be justified by law); RT 25:11-13 ("I appreciate that there is going to be confidential material and sensitive material in these affidavits."). But this cannot justify complete denial of public access to the affidavits. The First Amendment and Rule 2.550(e)(1)(B) require that such information be redacted and the remainder of the records be unsealed.

The trial court made no factual findings in support of its ruling that there were no alternatives short of wholesale sealing, nor did the court indicate that it had even attempted to try to redact the records. RT 32:9-19; 2 JA 268. The trial court thus once more failed to follow *NBC Subsidiary*.

Finally, the trial court's pronouncement "that there is nothing in any of those affidavits . . . that should be released now or ever" foreclosed other less restrictive alternatives to perpetual closure. RT 23:9-11. Even assuming redactions would not be possible and that wholesale sealing was appropriate at the time the trial court made its findings—conclusions that EFF maintains are erroneous—there are less restrictive alternatives.

For one, the court could have required the District Attorney and Sheriff's Department to periodically update it on whether those justifications remained. The court could also have continued the sealing orders for some specific time period—six months or a year, perhaps—and at which time the government would have to renew the orders if it wanted

to continue to keep the materials from the public. After all, the public's rights of access prohibit courts from treating sealing orders "as if they sealed caskets rather than presumptively open court records." *In re Marriage of Nicholas*, 186 Cal.App.4th at 1574. Thus one less restrictive alternative available was "ongoing judicial scrutiny" of law enforcement's sealing claims. *Id*. at 1575.

B. The Trial Court Failed To Apply The Common Law's Test Before Sealing The Affidavits

Separate from failing to follow *NBC Subsidiary*, the trial court failed to make findings establishing that there were compelling reasons that outweighed the public's right of access to the affidavits under the common law. *Copley Press*, 63 Cal.App.4th at 375-76 (holding that to sealing, courts must articulate compelling reasons that outweigh the public's right of access).

As explained above, the trial court failed to make factual findings on the record that specifically articulated what compelling reasons justified wholesale sealing. *See supra*, Section IV.A.4. And to the extent the trial court relied on the compelling reasons that justified initially sealing the order, it was error to continue to do so for the reasons explained above. *Copley Press*, 63 Cal.App.4th at 374-375 ("The circumstances at the time of sealing were unknown to Press precisely because the entire record is sealed."). The failure to apply the correct sealing standard under the common law was legal error. *Overstock.com*, 231 Cal.App.4th at 490.

Even if the trial court's sealing order could be construed as applying the proper test under the common law, its ruling amounted to an abuse of discretion. As described above, the trial court engaged in speculation about the harms that would result and cited to no evidence or fresh findings showing that the compelling interests in disclosure required wholesale

sealing. *See H.B. Fuller Co. v. Doe*, 151 Cal.App.4th 879, 894 (2007) (maintaining documents under seal under the common law requires "specific enumeration of the facts sought to be withheld and specific reasons for withholding them").

C. This Court Should Apply *NBC Subsidiary* And Order Partial Disclosure Of The Affidavits

EFF respectfully requests that, rather than remanding this case to the trial court, this Court should apply *NBC Subsidiary* to the affidavits and order their partial disclosure. Because review is de novo, the Court can and should review the affidavits *in camera* and apply the public's presumptive rights of access to them. 2 JA 281 (stipulation requiring District Attorney and Sheriff's Department to submit affidavits to this Court).

As EFF told the trial court, it does not seek the identities of confidential informants or others, or seek to interfere with ongoing investigations. RT 25:11-13. Further, EFF recognizes that there may be other concerns raised by the District Attorney and Sheriff's Department that may constitute sufficiently compelling interests to override the public's right of access to that specific information.

EFF submits that, upon a proper finding that such compelling interests are reflected in some information contained in the affidavits, *NBC Subsidiary* compels redaction of that material and public release of the remaining portions of the affidavits. This Court thus can order the partial disclosure of the affidavits and fully resolve EFF's petition for public access. This result would be both legally correct and just, as it would avoid further delay in public access to the judicial records EFF has been seeking since 2018. 1 JA 30-31; *see Courthouse News Serv. v. Planet*, 947 F.3d 581, 592, 597 (9th Cir. 2020) (two-week delay in access to court records violated First Amendment by infringing upon public's right of access);

Overstock.com, 231 Cal.App.4th at 496 (recognizing that the Sealing Rules and the public's rights of access are designed to avoid delaying resolution of unsealing requests).

Should this Court instead decide to remand to the trial court for reconsideration of EFF's sealing petition, the Court should provide specific instructions on how redactions can address any compelling interests absent detailed findings such as those in *Jackson*, 128 Cal.App.4th at 1028. Further, the Court should require the superior court to consider all alternatives short of wholesale sealing, including periodic submissions from the District Attorney and Sheriff's Department justifying ongoing secrecy.

CONCLUSION

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

Dated: September 3, 2021

Respectfully submitted,

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ATTACHMENT

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 741
Author: Hill (D), et al.
Amended: 8/31/15
Vote: 21

SENATE GOVERNANCE & FIN. COMMITTEE: 7-0, 4/15/15
AYES: Hertzberg, Nguyen, Bates, Beall, Hernandez, Lara, Pavley

SENATE JUDICIARY COMMITTEE: 7-0, 5/12/15
AYES: Jackson, Moorlach, Anderson, Hertzberg, Leno, Monning, Wieckowski

SENATE FLOOR: 39-0, 5/22/15
AYES: Allen, Anderson, Bates, Beall, Berryhill, Block, Cannella, De León, Fuller, Gaines, Galgiani, Hall, Hancock, Hernandez, Hertzberg, Hill, Hueso, Huff, Jackson, Lara, Leno, Leyva, Liu, McGuire, Mendoza, Mitchell, Monning, Moorlach, Morrell, Nguyen, Nielsen, Pan, Pavley, Roth, Runner, Stone, Vidak, Wieckowski, Wolk

ASSEMBLY FLOOR: 79-0, 9/2/15 - See last page for vote

SUBJECT: Mobile communications: privacy

SOURCE: Author

DIGEST: This bill establishes requirements that local agencies must fulfill before acquiring cellular communications interception technology.

Assembly Amendments (1) modify the requirements that a local agency's usage and privacy policy must fulfill; (2) specify that an adopted ordinance or resolution must authorize the acquisition, but not the use of, cellular communications interception technology; and (3) allow a county sheriff to acquire cellular communications interception technology after providing public notice, as specified, rather than after the adoption of an authorizing resolution.

ANALYSIS: Existing law, with some exceptions for law enforcement agencies, makes it a crime to manufacture, assemble, sell, advertise for sale, possess, transport, import, or furnish to another a device that is primarily or exclusively designed or intended for eavesdropping upon the communication of another, or any device that is primarily or exclusively designed or intended for the unauthorized interception of reception of communications between a cellular radio telephone, as defined, and a landline telephone or other cellular radio telephone.

This bill:

1) Requires every local agency that operates cellular communications interception technology to do both of the following:

   a) Maintain reasonable security procedures and practices, including operational, administrative, technical, and physical safeguards, in order to protect information gathered through the use of cellular communications interception technology from unauthorized access, destruction, use, modification, or disclosure.

   b) Implement a usage and privacy policy to ensure that the collection, use, maintenance, sharing, and dissemination of information and data gathered through the use of cellular communications interception technology complies with all applicable law and is consistent with respect for an individual's privacy and civil liberties. This usage and privacy policy must be available in writing, and, if the local agency has an Internet Web site, the usage and privacy policy must be posted conspicuously on that Internet Web site. The usage and privacy policy must include:

      i) The authorized purposes for using cellular communications interception technology and for collecting information using that technology.

      ii) A description of job title or other designation of the employees who are authorized to use, or access information collected through the use of, cellular communications interception technology. The policy must identify the training requirements necessary for those authorized employees.

      iii) A description of how the agency will monitor its use of cellular communications interception technology to ensure the accuracy of the information collected and compliance with all applicable laws.

iv) The existence of a memorandum of understanding or other agreement with another local agency or any other party for the shared use of cellular communications interception technology or the sharing of information collected through its use, including the identity of signatory parties.

v) The purpose of, process for, and restrictions on, the sharing of information gathered through the use of cellular communications interception technology with other local agencies and persons.

vi) The length of time information gathered through the use of cellular communications interception technology will be stored or retained, and the process the local agency will utilize to determine if and when to destroy retained information.

2) Prohibits a local agency, with the exception of a county sheriff, from acquiring cellular communications interception technology unless the agency's legislative body adopts an authorizing resolution or ordinance at a regularly scheduled meeting held pursuant to the Ralph M. Brown Act.

3) Prohibits a county sheriff from acquiring cellular communications interception technology unless the sheriff provides public notice of the acquisition, which must be posted conspicuously on his or her department's Internet Web site, and his or her department has a usage and privacy policy, as specified in this bill.

4) Specifies that, in addition to any other sanctions, penalties, or remedies provided by law, an individual who has been harmed by a violation of this bill's provisions may bring a civil action in any court of competent jurisdiction against a person who knowingly caused that violation.

5) Allows a court to award a combination of any one or more of the following:

a) Actual damages, but not less than liquidated damages in the amount of $2,500.

b) Punitive damages upon proof of willful or reckless disregard of the law.

c) Reasonable attorney's fees and other litigation costs reasonably incurred.

d) Other preliminary and equitable relief as the court determines to be appropriate.

Background

Some California sheriff's offices and police departments are using surveillance devices that allow investigators to gather cellphone signals to pinpoint a suspect's location. By simulating a cellular communications tower's functions, these devices force all cell phones within the vicinity to transmit information to the devices. The information that these devices can collect reportedly includes a cell phone's number, a phone's unique "International Mobile Subscriber Identification" (IMSI) number, its electronic serial number, the location of the most recent cell tower the phone connected with, and phone numbers dialed from the cell phone. Some reports indicate that the devices can accurately identify a cell phone's location, even if the phone is turned off, and could be modified to capture the content of calls or text messages from a phone. These devices are known as "IMSI catchers" and sometimes referred to by brand names like "StingRay" or "HailStorm."

Exact information about how IMSI catchers work and what they can do is difficult to obtain. Local law enforcement agencies' acquisition and use of these devices is apparently subject to non-disclosure requirements that, according to various sources, are imposed by the devices' manufacturer, the Federal Bureau of Investigation, or both, to prevent the release of information that could compromise the devices' effectiveness. Public information requests for documents relating to the devices are either denied or reveal only heavily-redacted materials. Some news reports indicate that local law enforcement authorities even refuse to reveal information about IMSI catchers to elected officials who are considering whether to approve the acquisition and use of the devices by a sheriff or police department.

IMSI catchers are reportedly used by at least 11 local law enforcement agencies in California including Alameda County, Los Angeles County, the City of Los Angeles, Sacramento County, San Bernardino County, the City of San Diego, the City and County of San Francisco, and the City of San Jose. On February 24, 2015, the Santa Clara County Board of Supervisors authorized the Sheriff's Office to use funding from the State Homeland Security Grant Program to procure a "mobile phone triangulation system," presumably an IMSI catcher.
The secrecy surrounding this technology raises substantial unanswered questions about the privacy and civil liberties implications of these devices, particularly because IMSI catchers collect information from the phones of anyone in the devices' vicinity, not just individuals targeted by law enforcement.

Comments

Because of the non-disclosure agreements that law enforcement officials have used to justify the secrecy surrounding IMSI catchers, the public and their elected representatives know very little about this technology. Some of the unanswered questions about IMSI catchers raise fundamental civil liberty and privacy concerns that deserve to be considered by the public. Important questions that merit public consideration include:

- What data is gathered from the phones of third-parties who are unrelated to the purpose for which an IMSI catcher is deployed? Is that data stored for any period of time? Who can access it? How is it used? Is it secured against unauthorized access?

- Can IMSI catchers be modified to capture voice and text content from cell phones? Can law enforcement agencies determine whether the devices are being used to capture content, regardless of whether such use is authorized by the department?

- What policies govern local law enforcement agencies' deployment and use of IMSI catchers? To what extent do agencies comply with those policies?

- Must local law enforcements agencies' use of IMSI catchers always be subject to a warrant issued by a judge? Do warrants specifically allow for the collection of data from every cell phone that transmits to the devices?

To get answers to some of the above questions, this bill requires that a law enforcement agency that acquires or uses an IMSI catcher must disclose information about the policies that govern how the agency will use the device and the data gathered by the device. This bill allows members of the public and their elected representatives to make informed decisions about law enforcement's deployment of surveillance technology in their communities.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 9/2/15)

Bay Area Civil Liberties Coalition
California Civil Liberties Advocacy
Media Alliance
Small Business California

OPPOSITION: (Verified 9/2/15)

None received

ASSEMBLY FLOOR: 79-0, 9/2/15
AYES: Achadjian, Alejo, Travis Allen, Baker, Bigelow, Bloom, Bonilla, Bonta, Brough, Brown, Burke, Calderon, Campos, Chang, Chau, Chávez, Chiu, Chu, Cooley, Cooper, Dababneh, Dahle, Daly, Dodd, Eggman, Frazier, Gallagher, Cristina Garcia, Eduardo Garcia, Gatto, Gipson, Gomez, Gonzalez, Gordon, Gray, Grove, Hadley, Harper, Roger Hernández, Holden, Irwin, Jones, Jones-Sawyer, Kim, Lackey, Levine, Linder, Lopez, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Nazarian, Obernolte, O'Donnell, Olsen, Patterson, Perea, Quirk, Rendon, Ridley-Thomas, Rodriguez, Salas, Santiago, Steinorth, Mark Stone, Thurmond, Ting, Wagner, Waldron, Weber, Wilk, Williams, Wood, Atkins
NO VOTE RECORDED: Beth Gaines

Prepared by: Brian Weinberger / GOV. & F. / (916) 651-4119
9/2/15 16:00:43

****** END ******

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 11,380 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: September 3, 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 September 3, 2021, I served the foregoing documents:

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 September 3, 2021 at San Francisco, California.

Victoria Python