

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

**JOINT APPENDIX
VOL. 2 OF 2
(156-286)**

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JOINT APPENDIX – ALPHABETICAL INDEX

Electronic Frontier Foundation,

v.

Superior Court; San Bernardino County District Attorney's Office et al.

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10	8/3/2020	Real Party in Interest San Bernardino County Sheriff's Department	Objection Statement (Declaration of Miles Kowalski, For Real Party in Interest – Sheriff's Department)	1	90-93
12	8/15/2020	Court	Order Unsealing Court Records	2	166-172
7	10/21/2019	Petitioner	Proof of Service of Summons	1	74-77
18	11/10/2020	Real Party in Interest San Bernardino County District Attorney	Real Party District Attorney's Reply in Support of Motion for Judgment on the Pleadings	2	252-259
1	N/A	N/A	Register of Actions	1	11-19
3	10/8/2019	Petitioner	Reporters Transcript – <i>EFF v. City of San Bernardino</i> , No. CIVDS1827591 (March 8, 2019) (Verified Petition - Exhibit A)	1	34-41

JOINT APPENDIX – ALPHABETICAL INDEX

Electronic Frontier Foundation,
v.
Superior Court; San Bernardino County District Attorney’s Office et al.

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15	10/27/2020	Real Party in Interest San Bernardino County District Attorney	Supplemental Letter for Real Party District Attorney’s Motion for Judgment on the Pleadings	2	212-214
2	10/8/2019	Petitioner	Verified Petition To Unseal Court Records	1	20-33

EXHIBIT 12

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17 *Attorneys for Plaintiff*
18 *Electronic Frontier Foundation*

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DIVISION

AUG 15 2020

BY *E. Randle*
E. RANDLE, DEPUTY

BY FAX

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

14 In re sealed Warrants and Orders, or)
15)
16 ELECTRONIC FRONTIER FOUNDATION,)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)
Petitioner,
v.
SUPERIOR COURT FOR THE STATE OF
CALIFORNIA, COUNTY OF SAN
BERNARDINO,
Respondent.
and
COUNTY OF SAN BERNARDINO, and
OFFICE OF THE SAN BERNARDINO
COUNTY DISTRICT ATTORNEY.
Real Parties in Interest.

Case No. CIVDS 1930054
[proposed] order unsealing court records
(Rule of Court 2.551(h))
Special Proceeding
Judge: Hon. Dwight Moore
Department: 19
Hearing Date:
No trial date set
Case filed 10/9/2019

1 Pursuant to the July 27, 2020 stipulation between Petitioner and Real Parties, the August 3,
2 2020 declarations of counsel for Real Parties, the Court's own review, and the Court's inherent
3 authority over its records, the specified parts of the following files of this Court are hereby ordered
4 unsealed and shall be available for public inspection:

- 5 1. **SBSW 18-0298:**¹
6 a. The warrant portion of the document on pp. 1-4;
7 b. The sealing order on page 8;
8 c. The delayed notification order on page 13.
- 9 2. **SBSW 18-0850:**
a. Entire file. It appears that the Court did not order this file sealed.
- 10 3. **SBSW 17-0615:**
11 a. The warrant portion of the document on pp. 1-3;
12 b. The sealing order on page 3;
13 c. The delayed notification order on page 13.
- 14 4. **SBSW 17-0694:**
a. The warrant portion of the document on pp. 1-3;
15 b. The sealing order on page 3;
16 c. The delayed notification order on page 14.
- 17 5. **SBSW 17-0695:**
18 a. The warrant portion of the document on pp. 1-3;
19 b. The sealing order on page 3;
20 c. The delayed notification order on page 14.
- 21 6. **SBSW 17-0834:**
22 a. The warrant portion of the document on pp. 1-4;
23 b. The sealing order on page 4;
24 c. The delayed notification order on page 11.
- 25 7. **SBSW 17-0890:**
a. The warrant portion of the document on pp. 1-4;

26
27 ¹ The enumerated pages in this packet and the SBSW 18-0259 packet do not match their
28 physical sequence in the stapled packet. The page references refer to the page numbers printed in the
respective pages' footers, no matter a particular page's place in the physical sequence.

- 1 b. The sealing order on page 4;
- 2 c. The delayed notification order on page 16.
- 3 **8. SBSW 17-0892:**
- 4 a. The warrant portion of the document on pp. 1-4;
- 5 b. The sealing order on page 4;
- 6 c. The delayed notification order on page 16.
- 7 **9. SBSW 18-0259:**
- 8 a. The warrant portion of the document on pp. 1-4;
- 9 b. The sealing order on page 8;
- 10 c. The delayed notification order on page 13.

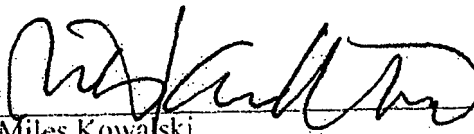
11 This order does not affect or address the status of any portions of these files other than those
 12 specified above.

13 So ordered.

14 _____
 15 Hon. Dwight Moore
 16 Judge of the Superior Court

17
 18 Approved as to Form:

19
 20 August 5, 2020

21 

22 Miles Kowalski
 23 Attorney for Real Party County of San Bernardino

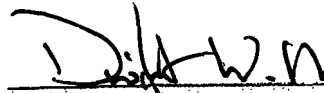
24 _____
 25 Mark Vos
 26 Attorney for Real Party Office of the San Bernardino
 27 District Attorney

- 1 b. The sealing order on page 4;
- 2 c. The dclayed notification order on page 16.
- 3 **8. SBSW 17-0892:**
- 4 a. The warrant portion of the document on pp. 1-4;
- 5 b. The sealing order on page 4;
- 6 c. The delayed notification order on page 16.
- 7 **9. SBSW 18-0259:**
- 8 a. The warrant portion of the document on pp. 1-4;
- 9 b. The sealing order on page 8;
- 10 c. The delayed notification order on page 13.

This order does not affect or address the status of any portions of these files other than those specified above.

So ordered.

8/15/20

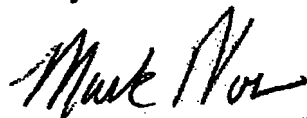

 Hon. Dwight Moore
 Judge of the Superior Court



Approved as to Form:

8/5/20

 Miles Kowalski
 Attorney for Real Party County of San Bernardino



 Mark Vos
 Attorney for Real Party Office of the San Bernardino
 District Attorney

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10 *Attorneys for Plaintiff*
 11 *Electronic Frontier Foundation*

12 **SUPERIOR COURT OF CALIFORNIA**
 13 **COUNTY OF SAN BERNARDINO**

14 In re sealed Warrants and Orders, or)
 15)
 16 ELECTRONIC FRONTIER FOUNDATION,)
)
 17 Petitioner,)
)
 18 v.)
)
 19 SUPERIOR COURT FOR THE STATE OF)
 CALIFORNIA, COUNTY OF SAN)
 20 BERNARDINO,)
)
 21 Respondent,)
)
 22 and)
)
 23 COUNTY OF SAN BERNARDINO, and)
)
 24 OFFICE OF THE SAN BERNARDINO)
 COUNTY DISTRICT ATTORNEY,)
)
 25 Real Parties in Interest.)

Case No. CIVDS 1930054

 Proof of Service
 Special Proceeding

 Judge: Hon. Dwight Moore
 Department: 19
 Hearing Date:
 No trial date set
 Case filed 10/9/2019

1 I am employed in the County of Alameda, State of California and a member of the
2 bar of this court. I am over the age of eighteen years, and not a party to this action. My business
3 address is 2081 Center St. #154 Berkeley CA 94702. I caused to be served a copy of the following
4 document(s):

- 4 1. [proposed] order to partially unseal court records
- 5 2. Proof of Service

6 on each of the following persons

7 Miles Kowalski
8 San Bernardino County Sheriff's Department
9 655 East Third Street
10 San Bernardino, California 92415-0061
11 Email: mkowalski@sbcasd.org

7 Mark Allen Vos
8 Ofc District Attorney
9 303 W 3rd St Fl 5
10 San Bernardino, CA 92415
11 Email: mvos@sbcda.org

10 Jay Stephen Pascover #159009
11 Superior Court,
12 247 W 3rd St,
13 San Bernardino, CA 92415
14 Email: spascover@sb-court.org

13 by the method(s) marked with an x below:

14 I enclosed a true and correct copy of these document(s) in an envelope addressed to the
15 persons listed above and deposited the sealed envelope with the United States Postal
16 Service at a post office or mailbox, with the postage fully prepaid, on August 5, 2020.

17 I enclosed a true and correct copy of these document(s) in an envelope or package
18 designated by the express service carrier for overnight delivery and deposited it in a box or
19 other facility regularly maintained by the express service carrier, with delivery fees paid or
20 provided for, on August 5, 2020, for delivery on _____

21 I sent a true and correct copy of these document(s) by facsimile transmission to
22 (_____) on August 5, 2020.

23 A true and correct copy of the above document(s) was emailed on August 5, 2020 to the
24 persons listed above at the email addresses listed.

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

27 Executed on August 5, 2020, at Berkeley, California.

28 
Michael T. Risher

EXHIBIT 13

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2 MARK VOS (SBN 190169)
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San Bernardino County District Attorney

7
8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN BERNARDINO**

10 **ELECTRONIC FRONTIER
FOUNDATION,**

11 Petitioner,

12 vs.

13 **SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN
14 BERNARDINO,**

15 Respondent, and

16
17 **COUNTY OF SAN BERNARDINO, and**
18 **SAN BERNARDINO COUNTY DISTRICT
ATTORNEY,**
19 **REAL PARTIES IN INTEREST.**

Case No. CIVDS1930054

**NOTICE OF MOTION FOR
JUDGMENT ON THE PLEADINGS
(CCP § 438 & NONSTATUTORY);
POINTS AND AUTHORITIES IN
SUPPORT & BRIEF IN OPPOSITION
TO UNSEALING; REQUEST FOR
JUDICIAL NOTICE OF FOUR
CRIMINAL COURT CASES;
DECLARATION OF CHRISTINE
MASONEK, UNDER SEAL.**

Date: November 13, 2020

Time: 1:30 p.m.

Dept: S19, Hon. Dwight Moore, Judge.

PUBLIC VERSION--REDACTED

21 To the Court and Involved Parties:
22

1 On November 13, 2020, at 1:30 p.m., in Department S19 of San Bernardino County
2 Superior Court, real party District Attorney will ask for judgment on the pleadings under
3 Code of Civil Procedure section 438 and nonstatutory grounds, namely denial of EFF's
4 petition to unseal court records, filed October 8, 2019. In the alternative, we will argue on
5 the merits in opposition to the petition to unseal and disclose the specified search warrant
6 affidavits and materials that remain sealed.

7 Real party District Attorney bases this motion on the points and authorities and
8 declaration attached,¹ on the record in the present case, CIVDS1930054, including a
9 Response to Petition filed separately, and **on requested judicial notice (Evid. Code § 452,**
10 **subd. (d)) of the existence and status of the following eight sealed search warrant packets**
11 **in possession and control of San Bernardino County Superior Court (and/or its respective**
12 **authorizing magistrates):**

- 13 a. SBSW 18-0298 (second cause of action; unrelated to murder cases)
- 14 b. SBSW 17-0615 (third cause of action)
- 15 c. SBSW 17-0694 (fourth cause of action)
- 16 d. SBSW 17-0695 (fifth cause of action)
- 17 e. SBSW 17-0834 (sixth cause of action)
- 18 f. SBSW 17-0890 (seventh cause of action)
- 19 g. SBSW 17-0892 (eighth cause of action)

20
21 ¹ The District Attorney also submits the attached points and authorities as a brief on the merits in
22 opposition to unsealing and disclosure of the sealed warrant materials; this is in case our motion for judgment
on the pleadings is denied.

1 h. SBSW 18-0259 (ninth cause of action; unrelated to murder cases)

2 The series of warrants at issue were filed in the Superior Court from March 2017
3 through March of 2018.

4 The District Attorney further bases this motion on **requested judicial notice (Evid.**
5 **Code § 452, subd. (d)) of the existence and status of the following criminal court cases**
6 **that have been recently prosecuted by the District Attorney, or that are still pending:**

- 7 a. People v. Isaac Aguirre, FSB18002619, in its pretrial phase currently set for
8 "Dispo./Reset" on January 8, 2021, in Department S14 of Superior Court
9 at the San Bernardino Justice Center, Hon. Ronald R. Christianson
10 presiding;
- 11 b. People v. Robert Fernandez, FSB18002620, currently set for sentencing on
12 January 28, 2021 in Department S4, Hon. W. Powell presiding;
- 13 c. People v. Matthew Manzano, FSB18002623, which is post-sentencing but
14 which is in the early stages of appeal and thus not yet final; and
- 15 d. People v. Richard Garcia, FSB18002622, where Garcia was sentenced to 30
16 years state prison pursuant to plea agreement.

17
18 Respectfully submitted, October 20, 2020.

19
20 
21 Mark Vos
22 Deputy District Attorney
Appellate Services Unit

1 **POINTS AND AUTHORITIES IN SUPPORT OF: (1) DISTRICT ATTORNEY'S**
2 **MOTION FOR JUDGMENT ON THE PLEADINGS AND (2) ANY WEIGHING ON**
3 **THE MERITS WHETHER TO UNSEAL AND DISCLOSE SEALED WARRANT**
4 **MATERIALS.**

3 The District Attorney submits the following points and authorities in support of the
4 motion for judgment on the pleadings. We also submit it in opposition to unsealing and
5 disclosure of the sealed warrant materials specified in the Notice of Motion, supra.

6 **CASE HISTORY**

7 The District Attorney understands that petitioner Electronic Frontier Foundation
8 (EFF) is interested in records showing law enforcement's use of cell cite simulator
9 technology, and that EFF routinely watches a California Department of Justice website
10 where that department publishes notice of warrants authorized to use cell cite simulator
11 technology. At some point, that department published on this website some minimal
12 information about the warrants at issue here. EFF noticed and sought disclosure of the
13 warrant numbers and other information, first, by means of a California Public Records Act
14 request dated August 22, 2018. County Counsel opposed this on behalf of San Bernardino
15 County Sheriff, as the affiants of the sealed warrant packets were all detectives for that
16 department. We understand that EFF only were able to obtain the warrant numbers from
17 that CPRA and related writ pursuit (CIVDS1827591), but not unsealing or disclosure. This
18 CPRA request and related writ pursuit appears to have taken place between 2018 and 2020.

19 During the pendency of the above, the District Attorney became aware that EFF had
20 written a letter to Presiding Judge of the Superior Court, Hon. John Vander Feer. It was
21 dated May 16, 2019. In the letter, EFF briefed its position that our Superior Court's warrant
22

1 sealing practice was awry, and that the Court should fix its process and disclose to EFF the
2 sealed warrant materials of interest. In response, we wrote a letter to the Presiding Judge,
3 dated June 21, 2019, expressing our basic view that the magistrates who signed and sealed
4 the warrants and the superior court judges who presided over related criminal cases were
5 the only ones who had jurisdiction over the sealing status of the respective warrant
6 materials.

7 In a letter dated July 30, 2019, advisory attorney Pascover for the Superior Court
8 wrote EFF stating in part that Presiding Judge Vander Feer would not respond to EFF's
9 letter dated May 16, 2019. Mr. Pascover noted that EFF's writ petition (CIVDS1827591)
10 already dealt with the same issues as in EFF's letter to Judge Vander Feer. Mr. Pascover's
11 letter also stated that the issues were "properly before Judge Cohn and before the judge
12 presiding over the individual actions in which the warrants were sealed. Proceeding in that
13 manner will afford the parties with a process to be heard." Thus, EFF did not get what it
14 wanted by means of its letter to the Presiding Judge.

15 We understand also that EFF presented County Counsel with a second CPRA
16 request, dated January 24, 2019, seeking disclosure of cell site simulator logs, annual reports
17 addressing use of cell site simulators, and search warrant materials related to further
18 website disclosures by California Department of Justice. We understand that this second
19 CPRA request perhaps netted EFF another small number of sealed search warrant numbers.

20 Armed now with a list of sealed search warrant case numbers where law
21 enforcement was authorized to cell cite simulator technology, on October 8, 2019, EFF filed
22

1 the present petition to unseal pursuant to Rules of Court 2.550 and 2.551. The Sheriff
2 through County Counsel and the District Attorney were deemed real parties in interest.

3 The District Attorney has not until now filed an answer or other responsive pleading.
4 Alongside this motion and brief, we file a Response to Petition that incorporates the
5 contents of this brief.

6 Since October 8, 2019, have been occasional communications between petitioner EFF
7 and real parties in interest, most notably and most recently determining there were nine
8 sealed warrant packets at issue (specified in the notice of motion, *supra*), and seeing
9 whether real parties would agree to unsealing of the actual search warrants themselves.
10 Much of this last part was mediated through the court by email correspondence to all
11 involved parties. County Counsel and the District Attorney agreed not to object to the
12 unsealing and disclosure of the entire warrant packet number SBSW 18-0850. Real parties
13 also did not object to the unsealing and disclosure of select documents from the remaining
14 eight sealed search warrant packets, mainly the actual search warrants themselves, their
15 respective sealing order pages, and their respective delayed notification orders. (See
16 “Stipulation and proposed order to partially unseal court records,” dated July 27, 2020; and
17 District Attorney’s Objection Statement, dated August 3, 2020, and County Counsel’s
18 Declaration of Miles Kowalski Regarding Review of Warrant Materials.) Real party District
19 Attorney never conceded that petitioner EFF had standing or any right to access any of the
20 materials including the disclosed ones. We merely did not object to the Court unsealing and
21 disclosing the selected pages at that time.

1 Through communications by email between the parties, by email involving this
2 Court, and through a telephonic Court hearing on August 7, 2020, the issues have been
3 narrowed, and, we suggest, any “meet and confer” requirements that can be read into the
4 petition procedure contemplated by Rules of Court 2.550 and 2.551 have been met. EFF
5 seeks unsealing and disclosure of the remaining sealed materials and the District Attorney
6 opposes such. We rely heavily on the factual reasons set forth in the Declaration by
7 Christine Masonek, under seal, and on law and argument, below.

8 I.

9 The Court should grant judgment on the pleadings in favor of real party in interest, the
10 District Attorney.

11 **A. Judgment on the pleadings is available.**

12 Code of Civil Procedure section 438 allows a party to move for judgment on the
13 pleadings (CCP § 438(b)(1), but a court may grant judgment on the pleadings on its own
14 motion. (CCP § 438(b)(2).) If the Court on its own motion does grant our motion for
15 judgment on the pleadings in favor of the District Attorney as “defendant,” it shall be on
16 the ground that “The complaint does not state facts sufficient to constitute a cause of action
17 against that defendant.” (CCP § 438(c)(3)(ii)). The grounds for judgment on the pleadings
18 “shall appear on the face of the challenged pleading or from any matter of which the court
19 is required to take judicial notice.” (CCP § 438(d).) The motion may also be based on matters
20 subject to permissive judicial notice. (*Id.*; Evid. Code §§ 452, 453.)

21 Here, for the reasons that follow, the District Attorney asks the Court on its own
22

1 motion to order judgment on the pleadings.²

2 In the alternative, the District Attorney moves for a nonstatutory motion for
3 judgment on the pleadings. (Rutter Grp. (2020), Cal. Prac. Guide Civ. Pro. Before Trial
4 7:277.)

5 **B. Because EFF has stated no facts or legal grounds available to it in its Causes of**
6 **Action, the Court should grant judgment on the pleadings in favor of the**
7 **District Attorney.**

8 We now are dealing only with the Second through Ninth causes of action.³ Although
9 petitioner EFF captioned and noticed its motion to unseal based on California Rules of
10 Court 2.551(h)(2), petitioner seems to allege the same five grounds for unsealing each of the
11 remaining packets of sealed search warrant affidavits.

12 **(1) Petitioner states no facts entitling it to unsealing and disclosure under Penal**
13 **Code § 638.52(g).**

14 Petitioner invokes in all its causes of action Penal Code section 638.52(g) as authority
15 by which it can seek the unsealing and disclosure of sealed search warrant materials,
16 presumably to the extent such materials were obtained and kept under this pen register and

17 ² Although we believe we can meet most of the statutory motion requirements, it appears we
18 fall short on the requirement to have filed an answer. (CCP § 438(f)(2).) Hence, the invitation for the Court to
19 consider judgment on its own motion, or to construe this as a nonstatutory motion for judgment on the
20 pleadings.

21 ³ This is because the entirety of sealed warrant packet SBSW 18-0850, the subject of the First
22 cause of action, was ordered unsealed and disclosed to petitioner in August, and in fact, it was. The District
23 Attorney did not concede petitioner had standing as to any of the causes of action, including the first; we
24 merely did not object to the Court's unsealing and disclosure of SBSW 18-0850 and select pages from the other
25 warrant packets. The Tenth cause of action, dealing with SBSW 17-0615, appears to repeat the Second cause
26 of action. The Eleventh cause of action, dealing with SBSW 17-0892, appears to repeat the Seventh. And the
27 Twelfth cause of action, dealing with SBSW 17-0834, appears to repeat the Fifth. This leaves causes of action
28 two through nine as the *practical* subject of this motion.

1 “trap and trace” statute. Subsection (g) states:

2 (g) An order or extension order authorizing or approving the
3 installation and use of a pen register or a trap and trace device
4 shall direct that the order be sealed until the order, including
5 any extensions, expires, and that the person owning or leasing
6 the line to which the pen register or trap and trace device is
7 attached not disclose the existence of the pen register or trap and
8 trace device or the existence of the investigation to the listed
9 subscriber or to any other person.

10 Neither this statute nor its interpretive case law of which we are aware says anything
11 about unsealing, or anything about providing standing to members of the public to seek
12 unsealing, or any other remedy for any perceived defect regarding the sealing order of a
13 pen register or trap and trace application. The complaint, therefore, “does not state facts
14 sufficient to constitute a cause of action” on this ground, and the Court should so rule.

15 **(2) Petitioner states no facts entitling it to unsealing and disclosure under Penal
16 Code § 1534(a).**

17 Petitioner also invokes in all its causes of action Penal Code section 1534(a) as
18 authority by which it can seek the unsealing and disclosure of the sealed search warrant
19 materials, presumably to the extent such materials were sealed or kept sealed contrary to
20 section 1534(a).

21 A search warrant shall be executed and returned within 10 days
22 after date of issuance. A warrant executed within the 10-day
period shall be deemed to have been timely executed and no
further showing of timeliness need be made. After the expiration
of 10 days, the warrant, unless executed, is void. 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.

1 First, although this statute on its face does not address further sealing possibilities,
2 case law does. For example, *PCS Geothermal Services Co. v. Superior Court* (1994) 25
3 Cal.App.4th 1697 recognized that search warrants could be sealed under Evidence Code
4 sections 1040 and 1042(b) (apart from section Penal Code section 1534) to further an ongoing
5 investigation and to protect informant identity. (*Id.* at 1714.) Of course. We also add
6 Evidence Code section 1041 and *People v. Hobbs* (1994) 7 Cal.4th 948. Prosecution of many
7 kinds of cases would be impossible without these sealing tools to protect informants from
8 harm, as well as ongoing investigations. The California Supreme Court long ago in *Hobbs*
9 held:

10 We therefore conclude that, taken together, the informant's
11 privilege (§ 1041), the long-standing rule extending coverage of
12 that privilege to *information* furnished by the informant which, if
13 disclosed, might reveal his or her identity, and the codified rule
14 that disclosure of an informant's identity is not required to
15 establish the legality of a search pursuant to a warrant valid on
16 its face (§ 1042, subd. (b)) compel a conclusion that all or any part
of a search warrant affidavit may be sealed if necessary to
implement the privilege and protect the identity of a
confidential informant. Section 915, subdivision (b), expressly
authorizes lower courts to utilize an in camera review and
discovery procedure to effectuate implementation of the
privilege.

17 (*People v. Hobbs*, supra, 7 Cal. 4th 948, 971.)

18 Here, all the warrants at issue were sealed under one or more of these grounds:
19 *Hobbs*, and/or Evidence Code §§ 1040, 1041, 1042, and we ask the Court to expressly make
20 this finding.

21 Meanwhile, Penal Code section 1534 does not provide standing to members of the
22

1 public to seek *unsealing of warrant materials that have been sealed according to Hobbs or other*
2 *similar grounds* such as Evidence Code sections 1040 through 1042.

3 **(3) Petitioner states no facts entitling it to unsealing and disclosure under Rules**
4 **of Court 2.550 and 2.551.**

5 Petitioner invokes Rules of Court 2.550 and 2.551 seemingly as its principal ground
6 and mechanism for unsealing and disclosure of the sealed warrant materials. Rule 2.551(h)
7 is the sole ground invoked in the Petition's caption. (And see Petition paragraphs 4, 10, 28,
8 and the headings for each cause of action.

9 The problem is these Rules of Court are unavailable to unseal search warrants at
10 issue, here. Rule of Court 2.550, subdivision (a)(2) states that "These rules do not apply to
11 records that are required to be kept confidential by law." What does that mean? The
12 Advisory Committee Comment elaborates:

13 This rule and rule 2.551 provide a standard and procedures
14 for courts to use when a request is made to seal a record. The
15 standard is based on *NBC Subsidiary (KNBC-TV), Inc. v.*
16 *Superior Court* (1999) 20 Cal.4th 1178. These rules apply to civil
17 and criminal cases. They recognize the First Amendment right
18 of access to documents used at trial or as a basis of adjudication.
19 The rules do not apply to records that courts must keep
20 confidential by law. *Examples of confidential records to which public*
access is restricted by law are records of the family
conciliation court (Family Code, § 1818(b)), in forma pauperis
applications (Cal. Rules of Court, rules 3.54 and 8.26), and search
warrant affidavits sealed under People v. Hobbs (1994) 7 Cal.4th
948. The sealed records rules also do not apply to discovery
proceedings, motions, and materials that are not used at trial or
submitted to the court as a basis for adjudication. (See *NBC*
Subsidiary, supra, 20 Cal.4th at pp. 1208-1209, fn. 25.)

21 (Emphasis added.) These rules, 2.550 and 2.551, thus expressly steer around warrants sealed
22

1 under *Hobbs* and similar *Hobbs*-like grounds. The reason is because, as the Advisory
2 Committee Comment explains, these rules codify the First Amendment right of access to
3 court records, and we recognize that “record” is broadly defined. (See Rule 2.550, subd.
4 (b)(2).) But there is no First Amendment right of access to warrant materials sealed under
5 *Hobbs* and similar grounds to protect informant safety and privacy, and integrity of ongoing
6 investigation. As the declaration under seal by Christine Masonek makes abundantly clear,
7 the compelling interests of informant safety and the integrity of a pending murder case
8 endure as these relate to four murder cases, one of which is still pending. We expect that
9 informant safety to remain a compelling concern into the foreseeable future, even after all
10 four related murder cases are final on appeal.

11 Even if, for purposes of the motion for judgment on the pleadings, the Court takes
12 no note of Ms. Masonek’s declaration under seal, judicial notice of the grounds for sealing
13 each of the sealed warrants should suffice.

14 Hence the Rules’ inapplicability, here. This is what we meant during pretrial
15 communications when we claimed petitioner had “no standing.” Even though Rule of
16 Court 2.551(h)(2) says a party or member of the public may move to unseal a court record,
17 that very subdivision is part of “these rules” (2.550 and 2.551) that were expressly made off
18 limits to unseal the kinds of warrant materials at issue here.

19 The complaint, therefore, “does not state facts sufficient to constitute a cause of
20 action” on this ground.

1 **(4) Petitioner alleges no facts entitling it to unsealing and disclosure under the**
2 **First Amendment of the United States Constitution.**

3 Petitioner invokes the right of access to court records under the First Amendment
4 United States Constitution. The first and principal problem is that Rules of Court 2.550 and
5 2.551 codify procedural implementation of that right,⁴ yet records sealed as confidential by
6 law are exempted. If the First Amendment could pry open warrant materials sealed under
7 *Hobbs* and similar grounds, so then could Rules of Court 2.550 and 2.551. It would have
8 been absurd for the California Supreme Court to publish these rules of court as codifying
9 the First Amendment right of access as it did, while abridging that right of access contrary
10 to the superior right it purports to implement.

11 But more directly and basically, case law casts doubt whether there is a First
12 Amendment right of access to sealed warrant materials. Under *Press-Enterprise Co. v.*
13 *Superior Court* (1986) 478 U.S. 1 (“*Press-Enterprise II*”), when deciding whether a qualified
14 right of access to court procedures attaches under the First Amendment, the Supreme Court
15 examines (1) the historical openness of the proceeding in question, and (2) “whether public
16 access plays a significant positive role in the functioning of the particular process in
17 question.” (*Id.* at 8.) Then, “If the particular proceeding in question passes these tests of
18 experience and logic, a qualified First Amendment right of public access attaches. But even

19
20 ⁴ The Advisory Committee Comment to Rule 2.550 states in relevant part: “The standard is based
21 on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178,” a First Amendment access case.
22 Furthermore, “These rules apply to civil and criminal cases. They recognize the First Amendment right of
 access to documents used at trial or as a basis of adjudication.” That is another reason the Rules or the First
 Amendment right of access do not work, here... the sealed warrant materials have not been used at trial or
 as a basis for adjudication.

1 when a right of access attaches, it is not absolute. [Citation.]” (*Id.* at 9.)⁵

2 To date we are unaware of any California case holding that sealed warrant materials
3 have been historically open, or that public access to them before trial plays a significant
4 positive role in the warrant process. (*See Alvarez v. Superior Court* (2007) 154 Cal.App.4th
5 642 [holding no First Amendment right of access to sealed grand jury transcripts, even
6 though, unlike here, the newspaper petitioner at least had standing under Rule 2.550 to seek
7 unsealing]; and *see Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1297 [no historical
8 tradition of pretrial public access to property seized under search warrant].)

9 The majority of federal courts that have considered the related question of access to
10 warrant materials as it relates to the timing of trial have determined that warrant materials
11 have not been historically open or accessible. (*See, e.g., Times-Mirror Co. v. United States,*
12 *supra* (1989) 873 F.2d 1210 [no First Amendment *or* common law right of access to warrant
13 materials before indictment]; *Baltimore Sun Co. v. Goetz* (4th Cir. 1989) 886 F.2d 60
14 [newspaper had no First Amendment right of access to search warrant affidavits – *even after*
15 *indictment*]; *but see In re Search Warrant for the Secretarial Area Outside the Office of Thomas*
16 *Gunn* (8th Cir. 1988) 855 F.2d 569 [a qualified First Amendment right of access to search
17 warrant materials exists after execution of the warrant].)

18 Nor would access to warrant materials sealed under *Hobbs* play a significant positive
19 role in warrant proceedings because “public access would hinder, rather than facilitate, the
20
21

22 ⁵ *Press Enterprise II* involved access to transcripts of a preliminary hearing.

1 warrant process and the government's ability to conduct criminal investigations." (*Times-*
2 *Mirror Co. v. United States, supra*, 873 F.2d at 1215.) Here, it would ruin a pending murder
3 trial and get people killed.

4 Without case holdings declaring historical openness of warrant materials sealed
5 under *Hobbs, et al*, and the positive role public access to them would play, there can be no
6 right of access to them under the First Amendment.

7 Even if there *were* a First Amendment right of access, it would be a *qualified* one,
8 subject to the further balancing of countervailing interests. (*See United States v. Connolly*
9 (*Boston Herald*) (2003) 321 F.3d 174, 181-182.) Even where a statute exists such as Penal Code
10 section 1534 requiring search warrants to be open to the public after execution and return,
11 there are judicially recognized privileges and interests that permit sealing such documents.
12 (*See, e.g., People v. Hobbs* (1994) 7 Cal.4th 948 [informant's privilege].)

13 Additionally, court records are expressly exempted from disclosure under
14 California's Public Records Act. (Government Code §§ 6252; *Pantos v. City & County of San*
15 *Francisco* (1984) 151 Cal.App.3d 258, 262). And any copies the District Attorney and Sheriff
16 have are permanently exempt from disclosure under the investigatory file exemption (Govt.
17 Code § 6254(f), and under Evidence Code section 1040 along with the magistrates' sealing
18 orders, all made applicable under Government Code section 6254(k)[incorporated other
19 exemptions and privileges into CPRA].)

20 Additionally, Code of Civil Procedure section 124, which states that the "... sittings
21 of every court shall be public" is a general "public trial" injunction. We are unaware of any
22

1 case construing that section to reach the sealing of warrant materials. Besides, public access
2 falls to higher rights under that code section, anyway. (*See Kirstowsky v. Superior Court* (1956)
3 143 Cal.App.2d 745.)

4 Because there is no right of access under the First Amendment to warrant materials
5 sealed as these are, or perhaps to any nonpublished warrant materials, the complaint,
6 therefore, “does not state facts sufficient to constitute a cause of action” on this ground.

7 **(5) Petitioner alleges no facts entitling it to unsealing and disclosure under the**
8 **California Constitution, art. I, Section 3.**

9 Petitioner touts a right of access to court records located in article I, Section 3 of the
10 California Constitution. The voters enacted the relevant portion as Proposition 59 (Prop.
11 59), effective November 4, 2004. It put into the state Constitution

12 the right of access to information concerning the conduct of the
13 people’s business, and, therefore, the meetings of public bodies
and the writings of public officials and agencies shall be open to
public scrutiny.

14 (Cal. Con., art. 1, § 3, subd. (b)(1).) Although Prop. 59 mandated liberal construction of
15 statute or court rules in favor of disclosure and narrow construction of statutes or rules
16 limiting disclosure (subd. (b)(2)), Prop. 59 expressly did not abridge the right to privacy
17 (subd. (b)(3)) and dispositively, here, Prop. 59 expressly stopped short of interfering with
18 existing exceptions “protecting the confidentiality of law enforcement and prosecution
19 records.”

20 Nowhere in the text of Prop. 59 or its interpretive case law does it purport to abridge
21 warrant sealing protocols under *Hobbs*, or under Evidence Code sections 1040 through 1042.
22

1 (See *Saunders v. Superior Court* (2017) 12 Cal.App.5th Supp. 1, 16, fn. 11 [holding that even
2 if seized text messages fell within Prop. 59 as records subject to it rather than seized
3 property, they likely would fall under the law enforcement exception of subdivision (b)(3)].)

4 Because there is no right of access under the California Constitution (Prop. 59) to
5 warrant materials sealed as these are, or perhaps to any nonpublished warrant materials,
6 the complaint, therefore, “does not state facts sufficient to constitute a cause of action” on
7 this ground.

8 In sum, because petitioner fails to state facts sufficient to constitute a cause of action
9 under all five of his asserted grounds, the Court should grant judgment on the pleadings in
10 favor of real party District Attorney.

11 II.

12 **Even if the Court were to deny judgment on the pleadings, the compelling interests at**
13 **stake should keep the warrant materials sealed under any test under any ground for**
14 **disclosure.**

15 If the Court denies the motion for judgment on the pleadings, it must then select a
16 plausible ground for disclosure where EFF also has standing so to seek. Although we
17 disagree that there is such a ground on the facts here, no matter which ground the Court
18 selects, and under any test, we believe the interests at stake in preserving the sealing orders
19 will survive any sort of weighing or balancing test, and we invite the Court to make such
20 an alternative finding.

21 As far as we can tell, petitioner EFF’s proffered interest in unsealing and disclosure
22 of the sealed warrant materials at issue is to:

1 encourage and challenge industry, government, and courts to support
2 free expression, privacy, and transparency in the information society.

3 (Petition, paragraph 11.) Perhaps we can infer from EFF's fervency and mention of cell site
4 simulator technology authorized by the subject warrants that EFF seeks to perform a
5 watchdog function against the misuse of such technology.

6 Against this general and speculative interest, the District Attorney pits the very
7 specific, concrete, and real interests of:

- 8 • informant safety in four related murder prosecutions, only one of which is
9 arguably "final" as it relates to criminal appeal, and one of which is still
10 pending, *People v. Isaac Aguirre*, FSB18002619, as established by Christine
11 Masonek's attached and incorporated declaration under seal;
- 12 • the integrity of the pending murder prosecution that could be harmed by
13 unsealing and disclosure of the warrant materials; and
- 14 • privacy of the individuals discussed in the warrant materials and their
15 private, personal information.

16 We must leave this balancing to the Court, but it appears not to be a close call. The
17 state's (real party's) interest in nondisclosure deals imminently with life, limb, safety here
18 and now, murder prosecutions, and privacy of specific persons, whereas EFF's interest in
19 transparency and ethical government use of technology, although understandable and
20 important, is general and is of subordinate urgency.

21 We invite the Court to find that the sealing order – at least in the six warrants related
22 to Ms. Masonek's four murder cases – are justifiable sealed to further a compelling state
interest and that no less restrictive means were available to further that interest. We believe
such findings are true and will pass any review scrutiny, whether under Rules of Court

1 2.550 and 2.551, the First Amendment right of access to court records, the state Constitution,
2 or even any claimed common law right of access test.

3 As to the two other sealed warrant packets unrelated to Ms. Masonek's murder cases,
4 real party does not submit anything further. As to them, we rest and submit on the motion
5 for judgment on the pleadings.

6

7

CONCLUSION

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Respectfully submitted, October 20, 2020.

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Mark Vos
Deputy District Attorney
Appellate Services Unit

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EXHIBIT 14

EXHIBIT 1

1 JASON ANDERSON
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2 MARK VOS (SBN 190169)
Deputy District Attorney
3 Appellate Services Unit
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4 San Bernardino, CA 92415
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5 Email: mvos@sbcda.org
Attorneys for the Respondent, People of the State of California

6 **SUPERIOR COURT OF CALIFORNIA**

7 **COUNTY OF SAN BERNARDINO**

8 **ELECTRONIC FRONTIER**
9 **FOUNDATION,**

10 Plaintiff-Petitioner,

11 vs.

12 **SUPERIOR COURT**

13 Defendant;

14 **COUNTY OF SAN BERNARDINO, and**

15 **SAN BERNARDINO COUNTY**
16 **DISTRICT ATTORNEY,**

17 Real Parties in Interest.

Case No. CIVDS1930054

**EXHIBIT 1, DECLARATION OF
DEPUTY DISTRICT ATTORNEY
CHRISTINE MASONEK. (UNDER
SEAL.)**

18 I, Christine Masonek, state:

19 1. I am a Deputy District Attorney V with the San Bernardino County District
20 Attorney's Office, in San Bernardino, California, assigned to the gang unit. I have worked
21 for San Bernardino County District Attorney's office for just over 14 years. I have been
22

1 assigned to the gang unit for approximately 5 years.

2 2. As a Deputy District Attorney V, I am assigned some of the most complex
3 felonies at the San Bernardino County District Attorney's Office. My caseload has included
4 and includes murders, gang murders, conspiracies to commit murder, gang and non-gang-
5 related carjackings, solicitations to commit murder, gang-related conspiracies to sell
6 controlled substances in San Bernardino County with some cross over into other counties,
7 gang-related drive-by shootings, gang-related attempted murders, non-gang-related
8 attempted murders where the evidence relies significantly on one recanting witness who
9 is reluctant to testify out of fear of retaliation, cases that involve the use of wiretaps, along
10 with the attendant litigation, and more. In addition, I have prosecuted special
11 circumstances cases that involved use of wiretaps and conspiracy. Some of my cases
12 involve the use of informants whose lives are in danger as a result of their disclosures and
13 testimony for the prosecution. While I have not kept track of the exact number of cases that
14 I have prosecuted and/or taken to trial, I have taken at least 11 murders to trial where some
15 of those cases involved codefendants who had different levels of involvement in the
16 murder. In the murder cases that I took to trial, jail calls on some of them revealed threats
17 to prosecution witnesses, or efforts to dissuade witnesses from testifying during trial.
18 Moreover, I have prosecuted multiple attempted murder cases either gang-related or a
19 gangster committed the crime for a non-gang-related reason. Most of those cases involved
20 shootings where victim often suffered great bodily injury. In at least one case, given the
21 threats as recorded on jail calls, I added additional counts of witness intimidation where

22

1 the jury convicted the defendant of both murder and the witness intimidation counts along
2 with the gang enhancement as to both (as well as other charged counts). In my experiences,
3 both through training but, more importantly, through listening to jail calls and speaking
4 to witnesses, material witnesses may become the targets of threats and attacks, especially
5 in gang-related cases as a result of their participation in assisting the prosecution. I have
6 experienced witnesses fleeing in an effort to avoid testifying in court, requiring exhaustive
7 location efforts and ultimately material witness holds to ensure those witnesses'
8 appearance in court for purposes of testimony. Given the threats, some witnesses in my
9 cases have entered into witness relocation programs to ensure their safety. Some witnesses
10 relocated themselves out of fear of gang retaliation.

11 3. I write and submit this declaration at Deputy District Attorney Mark Vos's
12 request. Last year Mr. Vos made me aware that Electronic Frontier Foundation (EFF) was,
13 by informal letter demands to the presiding judge, seeking unsealing and disclosure of a
14 number of sealed search warrants and their supporting affidavits. I also learned that EFF
15 had sought the same outcome by means of a California Public Records Act request, which
16 was handled by Deputy County Counsel Miles Kowalski, on behalf of San Bernardino
17 County and its Sheriff's Department. I understand that EFF did not get the unsealing and
18 disclosure of the warrant materials it sought by these means.

19 4. I understand that earlier this year, EFF filed a civil action to obtain unsealing
20 and disclosure of the warrant materials, *Electronic Frontier Foundation (EFF) v. Superior*
21 *Court*, San Bernardino County civil court case no. CIVDS1930054. Mr. Vos is representing
22

1 my Office as a real party in interest. Because I have prosecuted, and continue to prosecute,
2 Isaac Aguirre in court case FSB18002619, Robert Fernandez in court case FSB18002620 who
3 has entered a plea but has not yet been sentenced in the matter, and Matthew Manzano in
4 court case FSB18002623 where his appeal has not yet been heard (although his trial
5 completed in January, 2020) are of direct relevance to six of the sealed warrant materials
6 that EFF seeks to unseal, and because of the extreme dangers to the lives of witnesses
7 should those materials be unsealed and disclosed, Mr. Vos has consulted me regularly on
8 developments concerning CIVDS1930054.

9 5. The following names and case numbers are related to the sealed warrants at
10 issue:

- 11 a. People v. Isaac Aguirre FSB18002619, where Mr. Aguirre is charged
12 with Carmen Rodriguez's murder in violation of Penal Code Section
13 187(a), where he personally used and intentionally discharged a
14 firearm causing death of another in violation of Penal Code Section
15 12022.53(d)/(e), committed for the benefit of, at the direction of, or in
16 association with a criminal street gang (the Mexican Mafia) with the
17 specific intent to promote, further or assist in criminal conduct by
18 gang members in violation of Penal Code Section 186.22(b)(1)(C) is
19 currently set for Disposition/Reset in superior court in Department
20 S14, at the San Bernardino Justice Center, in front of the Honorable R.

1 Christiansen for January 8, 2021. Trial dates are expected to be set at
2 the next hearing.

3 b. [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 c. People v. Matthew Manzano FSB18002623 is charged with Carmen
4 Rodriguez's murder, in violation of Penal Code Section 187(a), where
5 a principal personally used and intentionally discharged a firearm
6 causing death of another in violation of Penal Code Section 12022.53(e)
7 where the murder was committed for the benefit of, at the direction
8 of, or in association with a criminal street gang with the specific intent
9 to promote, further, or assist gang members in criminal conduct in
10 violation of Penal Code Section 186.22(b)(1)(C). Mr. Manzano is post-
11 sentencing however, his conviction is not yet final and, depending on
12 the Appellate Court's opinion on the case, could be affirmed or,
13 possibly set for a new trial, or otherwise.

14 d. People v. Richard Garcia FSB18002622 , was charged with Carmen
15 Rodriguez's murder, in violation of Penal Code Section 187(a), where
16 a principal personally used and intentionally discharged a firearm
17 causing death of another in violation of Penal Code Section 12022.53(e)
18 where the murder was committed for the benefit of, at the direction
19 of, or in association with a criminal street gang with the specific intent
20 to promote, further, or assist gang members in criminal conduct in
21 violation of Penal Code Section 186.22(b)(1)(C). Mr. Garcia, mid-trial,
22

1 entered into a plea bargain agreement on this case and was sentenced
2 to 30 years state prison. Any post conviction relief he may seek has
3 not yet been addressed.

4 6. EFF is not a party or witness in the two criminal cases listed in (5) above. EFF,
5 moreover, has had no role whatsoever in the criminal litigation of this trial.

6 7. I understand that on or about August 7,2020, the Court presiding in
7 CIVDS1930054 ordered the search warrants themselves to be unsealed and disclosed by
8 the District Attorney to EFF, and that the remaining search warrant materials at issue in
9 the action are principally the sealed affidavits and other supporting materials in the
10 following nine sealed warrant packets:

- 11 a. SBSW 18-0298
- 12 b. SBSW 17-0615
- 13 c. SBSW 17-0694
- 14 d. SBSW 17-0695
- 15 e. SBSW 17-0834
- 16 f. SBSW 17-0890
- 17 g. SBSW 17-0892
- 18 h. SBSW 18-0259

19 8. Two of these warrant packets are unrelated to my murder cases, so I make
20 no comment on them: SBSW 18-0298 and SBSW 18-0259. I understand SBSW 18-0850 was
21 once a sealed warrant packet subject to this litigation, but that pursuant to court order, it
22

1 was fully unsealed and fully disclosed to EFF in August. As for the remaining six sealed
2 warrant affidavits, I offer the following substantive reasons why they should remain sealed
3 in perpetuity. I have read the contents in their entirety. I am familiar with the contents of
4 the remaining sealed materials.

5 9, [REDACTED]

[REDACTED]

[REDACTED]

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1 14. The warrants' supporting affidavits contain information about other law
2 enforcement personnel, including corrections officers who work at Pelican Bay State
3 Prison, who participated in the investigation that resulted in a life without the possibility
4 of parole sentence for a Mexican Mafia associate, Matthew Manzano, who is currently
5 housed in State Prison. Such disclosure of corrections officers names in a Mexican Mafia
6 ordered hit of another Mexican Mafia member's wife increase risks to those corrections
7 officers for assaults, and even death, for participating in the investigation in the Carmen
8 Rodriguez murder. Since the affidavits contain their names and their job locations, such
9 disclosure to EFF could lead to harm to the corrections officers involved.

10 15. It is important to point out that Isaac Aguirre's jury trial has not yet
11 commenced. Any public disclosure of the contents of the wiretap might cause potential
12 jurors in his case to become aware of the facts of the case, including the homicide itself as
13 well as the Mexican Mafia's involvement, and how the Mexican Mafia conducts business
14 both in the custodial setting and carries out its orders on the streets. These are critically
15 important facts that will be elicited in Mr. Aguirre's jury trial and could adversely affect
16 Mr. Aguirre's ability to get fair and impartial jurors.

17 Since at least some of the affidavits themselves detail the names, dates of births, and
18 the incident, and the Mexican Mafia connection to the murder, the harm to Mr. Aguirre's
19 right to a fair trial may be adversely affected should the information be made public to a
20 third party, such as EFF, and would be irreparable.

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16.

[REDACTED]

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17. I have no first-hand knowledge as to why EFF seeks the sealed search

14

warrants other than through Mr. Vos. My understanding is that they are seeking to

15

determine whether cell cite stimulators were used in the case.

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18.

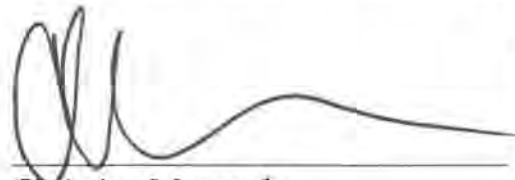
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[REDACTED]

I declare under penalty of perjury that the foregoing is true. Executed this 20th day of October, 2020, at San Bernardino, California.



Christine Masonek
Deputy District Attorney
Gang Unit
San Bernardino Co. D.A.'s Office

1 OFFICE OF THE DISTRICT ATTORNEY
2 SAN BERNARDINO COUNTY

3 PROOF OF SERVICE BY EMAIL

4 STATE OF CALIFORNIA

EFF v. Superior Court;
Case no. CIVDS1930054

5 COUNTY OF SAN BERNARDINO

6 Mark Vos says:

7 That I am a citizen of the United States and employed in San Bernardino County,
8 over eighteen years of age and not a party to the within action; that my business address
9 is: 303 W. Third St., Fifth Floor, San Bernardino California 92415-0511.

10 That I am readily familiar with the business practice of sending court briefs over
11 county email; that service and receipt is dependable and takes a matter of seconds, and that
12 it is usually verifiable by means of read-receipt;

13 That on October 20, 2020, I served the within:

14 **Motion for Judgment on the Pleadings**

15 on interested party by sending an electronic copy in pdf format via San Bernardino County
16 email to:

17 **Michael T. Risher**
2081 Center St. #154
Berkeley, CA 94702

18 Email:
michael@risherlaw.com

19 **Miles Kowalski**
San Bernardino Co.
Sheriff's Dept.

655 E. Third St.
San Bernardino, CA

92415-0061
CA 94107
Email:
mkowalski@sbcasd.org

20 **Stephen Pascover**
Superior Court
247 West Third St.

San Bernardino, CA
92415

Email: **spascover@sb-court.org**

21 I certify under penalty of perjury that the foregoing is true, and that this
22 declaration was executed at San Bernardino California, on October 20, 2020.

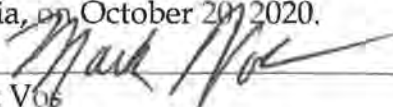

Mark Vos

EXHIBIT 15



County of San Bernardino
Office of the District Attorney
JASON ANDERSON, District Attorney

October 27, 2020

Honorable Dwight Moore, Judge
San Bernardino County Superior Court
247 W. Third Street, Dept. S19
San Bernardino, CA 92415-0240

Re:

- Electronic Frontier Foundation v. Superior Court, CIVDS193005: Supplemental letter for real party District Attorney's motion for judgment on the pleadings (filed October 20, 2020).

Your Honor:

The undersigned asks the Court's indulgence to register a thought about procedure that ought to have been in our motion for judgment on the pleadings. Rule of Court 2.551, subd. (h)(2) provides for a "petition," which petitioner EFF has deployed. It is not a regular civil complaint that requires a responsive pleading such as an answer or demurrer, to be filed within a particular time limit. It does not appear that default is available, or most of the other trappings of civil pleading procedure.

Petitions similar to EFF's in related contexts tend to be subject to courts' orders to show cause. (See, e.g., Govt. Code § 6259 [when a verified petition makes a prima facie case that certain public records are being withheld improperly, the superior court may issue order requiring disclosure or that public officer show cause why the officer should not do so.]) Habeas corpus responses also await orders to show cause. But habeas corpus courts also have developed the "informal response" which allows respondents or real parties to address whether a petitioner has made a prima facie case.

Here, although Rule of Court 2.551, subd. (h)(3) provides for further procedure akin to (although not identical to) other petition procedure, the District Attorney's argument for judgment on the pleadings is that Rules of Court 2.550 and 2.551 – including this procedural portion – do not even apply to warrant materials sealed under *Hobbs* and the like.

Still, the jurisdictional document before the Court remains EFF's petition. Because it is a petition and not a complaint, the rules and deadlines generally surrounding complaints do not apply. And the Court never issued an order to show cause. Therefore, the Court could regard the District Attorney's motion for judgment on the pleadings instead as both (1) an informal response to the petition, to the extent it argues why EFF has not made a prima facie case as a matter of law, and (2) as a return or similar responsive pleading to the extent it alleges facts that contradict EFF's factual allegations.

Appellate Services Unit
303 W. Third St., Fifth Floor, San Bernardino, California 92415-0511

Tel. (909) 382-7758
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At any rate, our main concern is that the Court please should not strike or disregard our motion because it missed some civil case deadline pertinent to civil complaints or garden-variety causes of action. We now realize that those do not apply, here.

While we're here, we register two further thoughts on substance. First, if a disclosure will impose a risk of harm to some informant, the informant's identity must be withheld under the official information privilege. (See, e.g., *Ochoa v. Superior Court* (2011) 199 Cal.App.4th 1274 [identity of inmate-informant who revealed drug sales information that would scuttle another inmate's pending parole held confidential to protect informant safety].)

Second, civil discovery needs generally are trumped by the need for confidentiality in related criminal prosecutions. (See, e.g., *Pacers, Inc., v. Superior Court* (1984) 162 Cal.App.3d 686, 690 [In civil case where depositions might have imperiled the defendants' Fifth Amendment rights in a criminal case, the Court of Appeal followed the federal rule, where "[A]n objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter."]; and see *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759 [homicide case where the appellate court reversed the trial court's disclosure order, holding that "[t]he contents of police investigative files sought in civil discovery must remain confidential so long as the need for confidentiality of the criminal investigation outweighs the benefits of disclosure in any particular case."].) There is a remaining open criminal murder case, here, so this reasoning applies.

Sincerely,



Mark Vos
Deputy District Attorney
Appellate Services Unit

Cc:

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EXHIBIT 16

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*Attorneys for Plaintiff
Electronic Frontier Foundation*

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO**

In re sealed Warrants and Orders, or	)	Case No. CIVDS 1930054
ELECTRONIC FRONTIER FOUNDATION,)	
	)	Memorandum ISO Motion to Unseal and
Petitioner,	)	Opposition to Motion for Judgment on
	)	Pleadings
v.)	
	)	Special Proceeding
SUPERIOR COURT FOR THE STATE OF)	
CALIFORNIA, COUNTY OF SAN	)	Judge: Hon. Dwight Moore
BERNARDINO,	)	Department: 19
	)	Hearing Date: November 13, 2020 at 1:30
Respondent,	)	Case filed 10/9/2019
and	)	Telephonic Appearance
)	
COUNTY OF SAN BERNARDINO, and)	
)	
OFFICE OF THE SAN BERNARDINO)	
COUNTY DISTRICT ATTORNEY,)	
)	
Real Parties in Interest.)	

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The government's arguments against unsealing rest on the faulty premise that if even a single sentence in a search-warrant affidavit is properly sealed, the entire affidavit must forever remain closed to the public. But that is not how sealing works. Instead, Penal Code § 1534, *Hobbs*, the Rules of Court, and the state and federal constitutions all require that sealing orders must be narrowly tailored so as to allow public access to all of the materials except the *specific* information that may be sealed under *Hobbs* or the constitutional standards codified in the Rules of Court. *See People v. Hobbs*, 7 Cal. 4th 948, 963 (1994) (“Any portions of the sealed materials which, if disclosed, would *not* reveal or tend to reveal the informant's identity must be made public” under Penal Code § 1534.); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1218 (1999) (First Amendment requires that “sealing is narrowly tailored”); Rule of Court 2.55(e)(1)(B), (h)(5).

Thus, although it may well be that *some* parts of the materials in question should remain sealed, that does not mean that *all* of these materials can be kept from the public. To the contrary, all documents or parts of documents that do not reveal information protected by *Hobbs* must be unsealed unless they meet the substantive and procedural requirements of Rules 2.550 and 2.551, which apply to all parts of the affidavits not covered by *Hobbs*.

These Rules, which mirror the standards required by the First Amendment, require that the government show that sealing of each fact in these records serves an overriding interest that overcomes the right of public access guaranteed by Penal Code § 1534 and the state and federal constitutions; that unsealing will create a substantial probability of prejudicing these interests; and that there is no other way to avoid this. Rules of Court 2.550(d), 2.551(h)(4).

Although EFF does not have access to the materials in question and is therefore unable to analyze exactly which parts of them do or do not merit sealing, it is inconceivable that all – or even most – of the contents of these files meet these rigorous sealing tests, particularly since EFF is not asking to unseal informant or witness identities or the other information that the government seems most concerned about.

BACKGROUND

EFF has only three points to add to the government's discussion of the background: First, as counsel has previously explained in an email to the Court and counsel, EFF is not seeking to unseal the identities of informants or civilian witnesses, or even the details of the facts showing probable cause. "Instead, EFF is primarily interested in learning the nature of the offense(s) being investigated, the expertise and qualifications of the affiant, why the affiant believes that the requested searches will assist in the investigation, the nature of the information to be provided under the warrant, what a provider is required to do to comply with the warrant, the reasons for sealing the files, the reasons for delaying notification of the target of the warrants or to the Department of Justice, and the information provided in the return to the warrant."¹ This information is unlikely to meet the standards for sealing.

Second, part of the reason EFF is interested in these materials is that local media have reported that, when the warrants involved in this case were issued, "San Bernardino County's law enforcement agencies were granted the most electronic warrants to search digital property per resident in the state"; "almost all" of these that were reported to the Attorney General were requested by the Sheriff's Department.² This article notes the department's "lack of transparency" in this area is a "concern for privacy watchdogs," particularly in light of the Department's "controversial history with digital surveillance." *Id.*

Third, it appears that the Sheriff's Department requests indefinite blanket sealing of the entire file relating to every single warrant it requests under the California Electronic Privacy Act, Penal Code § 1546.1. *See* Petition at 3-4; Dec. of Michael Risher at 2 ¶ 2-9. Judging from the affidavits that EFF has been able to obtain so far, these sealing requests appear to be hugely overbroad. For example, one affidavit provided by the County contains almost nothing that could possibly merit sealing. *See* October 8, 2019 Petition Ex. B (VVSW 18-1048). In fact, when the County provided

¹ September 16, 2020, 10:27 a.m. email from Michael Risher to Court and Counsel.

² Christopher Damien and Evan Wyloge, *In San Bernardino County, you're 20 times more likely to have your Facebook, iPhone secretly probed by police*, Palm Springs Desert Sun, July 23 and 24, 2018, attached as Exhibit C to the Risher declaration.

this affidavit to EFF, it redacted information from only 10 paragraphs in the 13 pages it produced, and most of these 10 paragraphs contain only one or two redactions. *See id.* at 1-13; Risher Dec. at 3 ¶ 11. The Sheriff's Department had nevertheless requested that the entire file be indefinitely sealed when it applied for the warrant (a request that the Court denied). *See* Petition Ex. B at 4 ¶ 9.

PROCEDURAL ISSUES

I. THE REDACTED PORTIONS OF THE MASONER DECLARATION ARE NOT YET PROPERLY BEFORE THE COURT

A party cannot simply file a record under seal. Rule of Court 2.551(a). Instead, it must first lodge the sealed records and file a motion to seal them. *Id.* 2.551(b)(1), (4). The Court must then decide whether to seal the materials in whole or in part under the standards set forth in Rule 2.550(d), discussed below. Any materials that are properly sealed are then filed. *See id.* 2.551(e). But materials that do not meet the standards set forth in Rule 2.550(d) cannot be filed under seal; instead, the submitting party must choose either to have them unsealed and filed or to withdraw them. *See id.* 2.551(d).³

EFF has no objection if the government wishes to belatedly follow this procedure so that the court can consider whether to seal and consider the redacted portions of the affidavit. But it is hard to believe that all of the sealed parts of the Masoner declaration meet the standards for sealing. If the Court does seal and consider any parts of it, EFF moves to exclude any inadmissible evidence that will remain hidden from it, including hearsay, speculation and other material not based on personal knowledge, or improper opinion testimony.

II. THE FORM OF THE GOVERNMENT'S OPPOSITION

The government concedes that all factual allegations in the Petition that are not contradicted by the Masoner declaration must be taken as true. *See* Gov't October 27, 2000 letter brief at 1-2. Although EFF additionally believes that the government's failure to file a responsive pleading means that it has admitted *all* the facts in the petition,⁴ this is immaterial, because it does not appear that the

³ These Rules apply to a special proceeding such as this one. *See* Rules of Court 1.6(1)(2), 2.2.

⁴ EFF additionally believes that the government's failure to file a responsive pleading means that it has admitted *all* the facts in the petition. *See Shaffer v. Superior Court*, 33 Cal. App. 4th 993, 996 n.2

government's evidence contradicts those pleaded facts, which mostly recite undisputed procedural history. For these reasons, and because the parties have stipulated to a briefing schedule, the government's procedural concerns about the form of its opposition to unsealing are immaterial; the only procedural issue the Court must address is the status of the redacted parts of the Masonek declaration.

ARGUMENT

The government raises two issues in its papers: (1) whether EFF has standing, and (2) if so, should the records be completely or partially unsealed. As explained below, EFF has standing to unseal the warrant materials, and the government's arguments for blanket sealing lack merit.

I. EFF has standing to request unsealing.

Courts universally hold that members of the public have standing to request unsealing of judicial records. "At its core, standing concerns a specific party's interest in the outcome of a lawsuit. [California Courts] therefore require a party to show that he or she is sufficiently interested as a prerequisite to deciding, on the merits, whether a party's challenge to [government] action independently has merit." *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1247 (2017). Standing thus goes to the question of whether a particular party has an interest in the relief it seeks, not to the merits of those claims. The question is therefore whether EFF has a sufficient interest in accessing the contents of these judicial records relating to these same warrants. *See* Pet. at 2 ¶ 11.

The answer is unequivocally yes. Every member of the "public has a legitimate interest and right of general access to court records." *Sander v. State Bar of California*, 58 Cal. 4th 300, 318 (2013).⁵ This right of access is grounded in the common law, the First Amendment, and the California Constitution. *Id.* at 309-310. For these reasons, California courts have long held that members of the public have standing to request access to public documents. *See Alvarez v. Superior* (1995). But this is immaterial, because it does not appear that the government's evidence contradicts any pleaded facts, which mostly recite undisputed procedural history.

⁵ EFF likely has more of an interest in these records than do most members of the public: it works to educate the public on law enforcement surveillance and digital privacy issues; it advocates for, and works to enhance, government transparency; and it worked with the Legislature to enact the statute governing electronic-search warrants.

Court, 154 Cal.App.4th 642, 647-48 (2007); *Craemer v. Superior Court In & For Marin Cty.*, 265 Cal. App. 2d 216, 218 & n.1 (1968) (“Petitioners have standing to challenge the superior court’s order” sealing grand jury transcripts.). Federal courts, too, uniformly hold that the common law and the First Amendment give members of the public standing to challenge sealing and closure orders.⁶ And our Supreme Court has confirmed that members of the public may sue to enforce their right of access to judicial records. *See Sander*, 58 Cal. 4th 300, 30823. Rule of Court 2.551 expressly codifies this rule: any “member of the public may move, apply, or petition ... to unseal a record.” Rule of Court 2.551(h)(2); *Alvarez*, 154 Cal.App.4th at 647-48.

For these reasons, EFF indisputably has standing to request unsealing. It properly does so by means of this special proceeding. *See generally People v. Superior Court (Laff)*, 25 Cal. 4th 703, 719-26 (2001) (special proceeding properly brought to determine whether records obtained through search warrant were privileged). The only question is whether the affidavits are properly sealed.

II. The California Constitution requires that all of the relevant statutes, Rules, and other authorities be interpreted so as to maximize the public’s access to these records.

As an initial matter, a special rule of statutory construction applies in this case because the California Constitution expressly creates a “right of access to information concerning the conduct of the” government, including “the writings of public officials.” Cal. Const. Art. I § 3(b). To protect this right, the provision mandates that every “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.” *Id.* This means that the Court must “interpret [the relevant statutes and Rules] in a way that maximizes the public’s access to information” and must allow this access “unless the Legislature has *expressly* provided to the contrary.” *Sierra Club v. Superior Court*, 57 Cal. 4th 157,

⁶ *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *Seattle Times Co. v. U.S. Dist. Court for W. Dist. of Washington*, 845 F.2d 1513, 1515 (9th Cir. 1988); *Petition of Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986); *United States v. James*, 663 F. Supp. 2d 1018, 1020 (W.D. Wash. 2009). Although these and some of the other cases cited in this memorandum involve the press, the same rules apply to the public, because the “press does not have a special right to access, but instead enjoy the same right afforded to the rest of the public.” *See People v. Dixon*, 148 Cal. App. 4th 414, 424 (2007).

175 (2013). As its text indicates, this provision applies to all laws affecting access to records, including the rules for sealing and unsealing judicial records. *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal. App. 4th 471, 495-496 (2014). Thus, if there are any close questions regarding the applicability of Rules 2.550 or 2.551 to the materials here at issue, or what information must be unsealed under any provision of State law, those issues must be resolved in favor of public access.

III. The common law, the state and federal Constitutions, and Penal Code § 1534 provide a right of access to these records.

California recognizes a common-law right of access to all judicial records other than rough drafts, notes, and other preliminary material. *Sander*, 58 Cal. 4th at 318–19. In addition, both the federal and state constitutions “provide broad access rights to judicial records both in criminal and civil cases.” *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992); *see Sander*, 58 Cal. 4th 309-310. Although, as the government notes, some federal courts have refused to recognize a First Amendment right to warrant materials (they all recognize at least a common-law right to them), Govt’ brief at 14, California courts take a broader approach to access under the California Constitution, holding that the public has a presumptive right of access to all “documents filed in or received by the court.” *Copley Press*, 6 Cal. App. 4th at 111-113. And the Legislature has decreed that warrant materials “shall be open to the public as a judicial record” after service of the warrant. Penal Code § 1534. It has thus mandated that the rules of access that apply to other judicial records apply equally to these materials.

Rules of Court 2.550 and 2.551 codify the standards and procedures that are required under these constitutional provisions and the common law. *See Jackson*, 128 Cal. App. 4th at 1021–23. The Court can therefore simply decide the case under these codified rules.

a. *Hobbs* allows sealing only of the specific parts of search warrant materials that would reveal the identity of an informant or other privileged information.

California law allows temporary sealing of search warrants but expressly requires that the “documents and records of the court relating to” an executed search warrants “shall be open to the public as a judicial record” no later than ten days after issuance. Penal Code § 1534(a). In *Hobbs*, our Supreme Court harmonized this statute with Evidence Code § 1042, which creates a privilege protecting the identity of confidential informants. *People v. Hobbs*, 7 Cal. 4th 948, 962, 971 (1994).

The court held that this privilege allows a court to seal whatever part of a search warrant affidavit is “necessary to implement the privilege and protect the identify of [the] informant.” *Id.* at 971. The Court of Appeal has extended this exception to additionally allow sealing of information protected by the official-information privilege until a criminal complaint is filed. *See PSC Geothermal Servs. Co. v. Superior Court*, 25 Cal. App. 4th 1697, 1713- 1715 & n.15 (1994). But these cases make clear that the court may seal *only* those portions of the affidavit that actually reveal privileged information.

Hobbs itself approved only the sealing of a single exhibit to an affidavit. *Hobbs*, 7 Cal.4th at 954-55. The opinion repeatedly emphasizes that “[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*” under § 1534. *Id.* at 963 (emphasis added). For example:

- Superior courts “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 the 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.
- The court must 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.*
- The court must determine “whether the extent of the sealing is justified as necessary to avoid revealing his or her identity.” *Id.* at 973.

Other cases are in accord. *See, e.g., PSC Geothermal*, 25 Cal. App. 4th at 1714–15; *Swanson v. Superior Court*, 211 Cal. App. 3d 332, 339 (1989). The government cites no authority suggesting a different rule.⁷

⁷ Although *Hobbs* involved a request by a criminal defendant to gain access to an affidavit, these requirements apply equally here. When a criminal defendant moves to challenge a warrant, *Hobbs* requires a two-step process. The first step is the one discussed above: to determine what parts of the affidavit are properly sealed. *Hobbs*, 7 Cal. 4th 972. It is only if the court determines that materials *are* properly sealed that it must proceed to the second step and decide whether due process nevertheless requires that the *defendant* have access to that sealed information. *See id.* at 964-65, 972-75. Although the Court here need not undertake this second step, it must make the initial determination of whether the records are properly sealed so that they can be withheld from the public notwithstanding § 1534’s mandate of public access to them.

b. Rules of Court 2.550 and 2.551 apply to all parts of the warrant-materials that are not protected by *Hobbs*.

The Rules of Court relating to sealing and unsealing judicial records “do not apply to records that are required to be kept confidential by law.” Rule 2.550(a)(2). But this does not mean that these Rules are wholly inapplicable to the affidavits here at issue. *Hobbs* and the Rules’ text – particularly their definition of the term “record” – make it clear that their procedural and substantive provisions apply to all parts of the affidavits except those portions that must be kept confidential under *Hobbs*.

The first problem with the government’s contrary claim is that it contradicts the Rules’ definition of the term “record.” As used in Rules 2.550 and 2.551, “‘record’ means all *or a portion* of any document, paper ... or other thing filed or lodged with the court,” unless “the context otherwise indicates.” Rule 2.555(b)(1) (emphasis added). Thus, the exclusion of “records that are required to be kept confidential by law” means only that the Rules do not govern the specific “portions” of the affidavit properly sealed under *Hobbs*.

Nothing in the advisory committee comment to Rule 2.550 suggests otherwise. That comment lists “search warrant affidavits sealed under *People v. Hobbs*” as an example of “records to which public access is restricted by law.” But this comment simply clarifies that information properly sealed under *Hobbs* comes within the exclusion. Nothing in the comment suggests an intent to rewrite *Hobbs* so as to allow sealing of an entire affidavit simply because some part of it is privileged. And, of course, a comment cannot trump the unambiguous text of the Rule or the constitutional imperative that that statutes, rules, and other authorities be interpreted so as to maximize disclosure.

The government’s all-or-nothing interpretation thus conflicts with the Rules’ plain meaning, with *Hobbs*, with the common-law and constitutional rules that sealing must be narrowly tailored, and with the constitutional imperative that the Rules of Court be interpreted in a way that maximizes public disclosure. These sealing Rules therefore apply to all parts of the search warrant affidavits that are not properly sealed under *Hobbs*.⁸

⁸ The government suggests in a footnote that the Rules do not apply because “the sealed warrant materials have not been used at trial or as a basis for adjudication.” Gov’t Br. at 13. n.1. This again ignores the Rules’ definition of the term “record,” which includes any document or other

c. *Hobbs* and the official-information privilege cannot support blanket sealing of these materials.

As discussed above, *Hobbs* allows sealing of a search-warrant affidavit only to “the extent of the sealing is necessary to avoid revealing the informant's identity.” *Hobbs*, 7 Cal. 4th at 972. The party claiming the privilege has the burden of proof to establish that the privilege applies. *See In re Marcos B.*, 214 Cal. App. 4th 299, 308 (2013). Although EFF does not seek to unseal the identities of confidential informants, it is concerned about overbroad sealing of *other facts* that the government may claim would somehow provide a clue to informant identities. The government must show that all of the information it claims is covered by *Hobbs* would, if revealed, more likely than not reveal an informant’s identity. *See* Evid. Code § 115.

The government also asserts that information may be sealed under the official-information privilege, citing *PCS Geothermal*, 25 Cal.App.4th 1697. It is not clear that this provisions even applies after a prosecution has commenced. *See id.* at 1713–14 & n.14. But to the extent it applies to any of the materials here, it is only a conditional privilege. To invoke it, the government has the burden to show as a threshold matter that the information at issue was obtained in confidence and has not been disclosed to the public (for example, though discovery to a criminal defendant or during a trial or preliminary examination). Evid. Code § 1040 (a); *People v. Roberts*, 2 Cal. 4th 271, 302 (1992) (disclosure to defense); *Marcos B.*, 214 Cal. App. 4th at 308. If it meets this burden, it must then show that “[d]isclosure of the information 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 (b)(2). The government must make its arguments and present its evidence in open court except to the extent doing so will itself compromise the privilege. *Torres v. Superior Court*, 80 Cal. App. 4th 867, 873–74 (2000).

When, as here, the government uses the privilege to prevent the disclosure of records to the public, rather than in the course of civil or criminal discovery, this balancing test is that same as that “thing filed or lodged with the court.” Rule 2.550(b)(1); *see People v. Jackson*, 128 Cal. App. 4th 1009, 1022–23 (2005) (applying Rules of search warrant materials). It also ignores the fact that “the judicial act of issuing the warrant” is an “adjudication” based on the supporting affidavit. *See Allison v. Cty. of Ventura*, 68 Cal. App. 3d 689, 697 (1977). Finally, the advisory committee’s reference to *Hobbs* affidavits would make no sense if the Rules didn’t apply to search-warrant affidavits.

of the Public Records Act's "catchall" provision. *CBS, Inc. v. Block*, 42 Cal. 3d 646, 656 (1986); *ACLU of N. California v. Superior Court*, 202 Cal. App. 4th 55, 68–69 (2011) (*ACLU-NC*). To satisfy this test, the government must show that the public interest in non-disclosure of the information "clearly outweighs" the public interest in disclosure. *CBS*, 42 Cal. 3d at 652; *see ACLU-NC*, 202 Cal. App. 4th at 68 (government must "demonstrate a clear overbalance on the side of confidentiality."). The public interest in disclosure of search-warrant materials is particularly high, because public access to them "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *Satele v. Superior Court*, 7 Cal. 5th 852, 860–61 (2019). They are not papers filed by private litigants; they are "the writings of public officials," which our constitution declares "shall be open to public scrutiny." Cal. Const. Art. I § 3(b). Given the strength of the public interest in disclosure of these records, the government's burden to show an interest in non-disclosure is especially high. Even if the government can make this showing as to some of the materials at issue, it seems extremely unlikely that all of these materials are exempt from unsealing, much less that the narrow range of information that EFF seeks can remain sealed.

The cases the government cites in its October 27 letter do not suggest otherwise. One of them holds only that the government need not disclose the identity of a confidential informant in a parole hearing. *Ochoa v. Superior Court*, 199 Cal. App. 4th 1274, 1282-83 (2011). Another held that discovery in a civil-rights case brought by murder suspects should be stayed until the investigation was completed. *Cty. of Orange v. Superior Court*, 79 Cal. App. 4th 759 (2000)). Although the court indicated that the need to prevent suspects from "learn[ing] crucial information that would enable them to avoid apprehension" or intimidate witnesses "while the suspects are still at large" justified withholding the investigatory reports while the investigation was ongoing and before an arrest had been made, it made clear that once charges were brought (or the investigation had been closed without an arrest and prosecution), Evid. Code § 1040 would no longer bar access. *See* at 768-769 & n.4.

County of Orange, which was decided before the voters amended our constitution to require

that statutes preventing access to government writings be read narrowly, therefore stands only for the unremarkable proposition that § 1040 may broadly protect investigatory files *during* the investigation and *before* arrest. The case does not apply after the suspects have been arrested, much less after they have received discovery and had a preliminary hearing or a trial where the prosecution has presented the fruits of its investigation. *See PSC Geothermal*, 25 Cal. App. 4th at 1713- 1714 & n.14 (distinguishing pre-charging and post-charging cases in application of official-information privileges to search warrant materials). Because there is no indication that any of the materials here at issue involve pending investigations where there has not been an arrest (and, apparently, at least a preliminary hearing), *County of Orange* is irrelevant.

IV. The Rules of Court and the state and federal constitutions cannot support blanket sealing of these materials.

Any material not properly sealed under *Hobbs* is governed by Rules of Court 2.550 and 2.551, which incorporate the standards required by the First Amendment and the California Constitution. *See People v. Jackson*, 128 Cal. App. 4th 1009, 1022-1028 (2005) (applying Rules and First Amendment to search warrant affidavit and indictment). Under these Rules,

[t]he court may order that a record be filed under seal only if it expressly finds 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 of Court 2.550(d).

If a particular record contains a mix of information that does and does not meet these standards, the court must “seal[] 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.” Rule 2.550(e)(1)(B). Since practicable means “capable of being put into practice or of being done or

accomplished,”⁹ this requires that the Court allow redaction only of those specific words or sentences that meet the standard for sealing if this can reasonably be done.¹⁰

The Court must apply these same standards and procedures when determining whether to unseal a record. Rule 2.551(h)(4); *see Jackson*, 128 Cal. App. 4th at 1022-1028.

a. The government has failed to show that its interests justify sealing any substantial portion of the materials at issue.

The government asserts the sealing is necessary to protect four interests and types of information: the identity of informants and other witnesses, the integrity of a pending murder prosecution, privacy, and the investigation of “a remaining open criminal murder case,” which seems to refer to this same pending prosecution. Govt. Br. at 3, 18; October 27 letter at 2. None of these supports blanket sealing.

Informant and the witness identities. EFF agrees that if nondisclosure of the names of informants is justified under *Hobbs* or the Rules of Court, then this information should remain sealed. If there is evidence showing a specific risk of harm to a witness whose involvement in the investigation has yet to be revealed to the defendant or made public then continued sealing of that witness’s name may also be justified. *Cf. Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014) (names of police officers involved in shootings must be disclosed under Public Records Act unless government shows “it is essential to protect an officer's anonymity for safety reasons or for reasons peculiar to the officer's duties”). EFF asks only that any such sealing be narrowly tailored to what is necessary to protect these individuals’ safety.

Privacy. Privacy interests can only justify sealing “highly sensitive” information, such as information about sex crimes committed against minors, and perhaps home addresses. *See Jackson*,

⁹ Merriam-Webster Online, available at <https://www.merriam-webster.com/dictionary/practicable>.

¹⁰ The government would of course make this process easier if it followed the practice approved in *Hobbs* of separately submitting any information that it believes should be sealed. *See Alameda County District Attorney’s Office, Point of View* (Summer 2011) at 5-6 (“If the affiant is requesting that only part of the affidavit be sealed, he will present the judge with two affidavits for review: one containing information that may be disclosed; the other containing information that would be subject to the sealing order.”), available at https://le.alcoda.org/publications/point_of_view/files/POV_summer_2011.pdf

128 Cal.App.4th at 1024; *see NBC Subsidiaries*, at 1202-03 and n. 19 & 46. If less-restrictive alternatives exist – such as redacting the identities of victims – the Court must employ them instead of broader sealing. Rule 2.551(d)(4)-(5). These matters do not appear to involve sex crimes or minors. EFF is not requesting that the Court unseal home addresses or information about the identities of witnesses or victims. To the extent the government is requesting sealing based on any other privacy interests, it must at the very least identify those interests so that EFF can, if appropriate, explain why they do not meet the high standard needed to seal court records to protect privacy.

Other Interests: The government presents no reason to seal any additional parts of the files. The only information it provides about two of these files (numbers 18-0298 and 18-0259) is to say that they do *not* relate to murder cases. *See* Gov't Br. at 2-3; Masonek Dec. at 7 ¶ 8. Under any standard – the common law, the state and federal constitutions, or the Rules of Court -- “at a minimum ... the party seeking to seal documents, or maintain them under seal, must come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them.” *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 894 (2007). The government's failure to do this requires that these two files be unsealed.

The government does not present anything to suggest that a substantial part of the files relating to the three cases that have already resulted in a conviction should remain sealed. *See* Gov't Br. at 3. These investigations are no longer open. The defendants in two of these cases have plead guilty. *See* Masonek Dec. at 4:-3 (People v. Fernandez, FSB18002620); *id.* at 6-7 (People v. Garcia, FSB18002622). The defendant in the other one was convicted at trial. *See* Masonek Dec. at 6; (FSB18002623, People v. Manzano). To the extent the government suggests that the possibility of a retrial following appeal justifies continued sealing, this is far too speculative to justify sealing, especially because less than 9% of criminal defendant's appeals result in any sort of reversal.¹¹ The chance that the defendants who pled guilty would somehow have their convictions set aside and then choose to go to trial is even smaller. It is not “substantially probable” that any of these cases will even go before a jury in the future, much less that information released in this proceeding would

¹¹ Judicial Council of California, 2020 Court Statistics Report, at 34, available at <https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf>

somehow prejudice that hypothetical jury under the standards discussed below.

Although the final case that the government discusses – *People v. Aguirre* – may potentially go to trial at some unspecified time after January 2021, even here there is no indication that release of information from any affidavit would cause prejudice. The mere fact that a case involves a homicide or has been the subject of media attention cannot justify sealing. *See Skilling v. United States*, 561 U.S. 358, 380-81 & nn. 12-14 (2010) (Enron prosecution, also discussing murder and robbery cases); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1514, 1518 (9th Cir. 1988) (Excedrin poisonings). Instead, the Court must decide whether the party requesting sealing has shown that it is “substantially probable” that release of the information would “result in publicity so inherently prejudicial as to endanger a fair trial.” *Jackson*, 128 Cal. App. 4th at 1022, 1025. To do this it must evaluate “how much publicity will result from the release, how much information is already public, [and] the size of the pool of potential jurors.” *Id.* at 1025. It is only the jury’s exposure to inflammatory or inculpatory “facts that would be inadmissible at trial, such as a criminal record or evidence obtained in an illegal search or interrogation” that can prejudice a jury. *People v. Leonard*, 40 Cal. 4th 1370, 1396 (2007); *NBC Subsidiary*, 20 Cal. 4th at 1224; *Jackson*, 128 Cal.App.4th at 1023 (“inaccurate information or inadmissible evidence”). Thus, summaries of alleged facts supporting the charges cannot be sealed. *Jackson*, 128 Cal.App.4th at 1028. The release of information months before trial is unlikely to have a prejudicial effect. *Seattle Times*, 845 F.2d at 1518.

If the Court determines that the files contain prejudicial material, it must then determine whether voir dire, jury admonishments, and other measures could allow a fair trial even if prejudicial material is released. *NBC Subsidiary*, 20 Cal. 4th at 1224; *Jackson*, 128 Cal.App.4th at 1025, 1028. The government has the burden to show that these measures would be inadequate. *NBC Subsidiary*, 20 Cal. 4th at 1224; Rule of Court 2.550(d)(5).

EFF has notified Mr. Aguirre’s counsel about this motion, but she has not opposed sealing. *See Risher Dec.* at 3 ¶ 12 and Ex. B. To the extent the government can properly raise the issue, it has failed to sustain its burden. The only reason it gives to support sealing this file is that disclosure

might reveal “facts that will be elicited in ... trial.” Masonek Dec. at 14 ¶ 15. But, as just discussed, disclosure of facts that the jury will hear is not prejudicial. Moreover, the Court’s online docket shows that a preliminary hearing was held in the case on November 16, 2018; there is no indication that this hearing was closed to the public. Two other people accused of the same murder have gone to trial (although one of them pled mid-trial). *See* Masonek Dec. at 4-6. The government has not shown that the facts of these cases are still secret, and “there is no justification for sealing records that contain only facts already known or available to the public.” *H.B. Fuller Co.*, 151 Cal. App. 4th at 898.

b. No other interests can justify sealing the information that EFF is asking to unseal.

The government has not presented any other basis for sealing any of the records at issue, and although it may be able to rely on secret evidence to support sealing, it cannot rely on secret arguments. If it has additional arguments, it must disclose them and any supporting evidence, except to the extent that doing so will compromise a privilege or other properly sealed facts. *See Torres*, 80 Cal. App. 4th 873–74; Rule of Court 2.550. Until and unless that happens, EFF can only make a few general statements: First, the government has the burden to show that sealing of each fact in the these records serves an overriding interest that overcomes the right of public access guaranteed by Penal Code § 1534 and the state and federal constitutions, that unsealing will create a substantial probability of prejudicing these interests, and that there is no other way to avoid this. Rule of Court 2.550. Second, the fact that the government’s arguments and unsealed evidence are so overbroad suggests that the existing sealing is similarly overbroad and based upon speculation and arguments that do not satisfy the government’s burden. Third, there is no reason to seal the information that EFF is most interested in. For example, the nature or Penal Code designations of the offenses being investigated cannot be sealed. Nor can officers’ descriptions of their qualifications and experience, the nature of the information they are requesting, or why they believe that information will assist in the investigation; all of this information is routinely revealed in § 1538.5 hearings or trials. Lastly, it seems unlikely that any information presented to the magistrates in support of a request to seal the affidavit or warrant could meet the standards for sealing. All of this information should therefore be

made public.

CONCLUSION

Under the Rules of Court and the statutory, constitutional and common-law rights of access, the Court should unseal all parts of the affidavits and other materials at issue except those that can properly be sealed under *Hobbs* and Rule of Court 2.550.

November 6, 2020.

Sincerely,



Michael T. Risher

EXHIBIT 17

1 Michael T. Risher (State Bar No. 191627)
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2 2081 Center St. #154
Berkeley CA 94702
3 Email: michael@risherlaw.com
T: (510) 689-1657
4 F: (510) 225-0941

5 David Greene (State Bar No. 160107)
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9 Email: davidg@eff.org

10 *Attorneys for Plaintiff*
11 *Electronic Frontier Foundation*

12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF SAN BERNARDINO**

14 In re sealed Warrants and Orders, or)
15)
16 ELECTRONIC FRONTIER FOUNDATION,)
17) Plaintiff,)
18) v.)
19) SUPERIOR COURT FOR THE STATE OF)
CALIFORNIA, COUNTY OF SAN)
20) BERNARDINO,)
21) Defendant, and)
22) COUNTY OF SAN BERNARDINO, and)
23) OFFICE OF THE SAN BERNARDINO)
COUNTY DISTRICT ATTORNEY,)
24)
25) Real Parties in Interest.)

Case No. CIVDS 1930054

**Declaration of Michael T. Risher in
Support of Plaintiff's Motion to
Unseal/Opp. to Mot. for Judgment on
Pleadings**

Special Proceeding

Judge: Hon. Dwight Moore
Department: S19
Date: November 13, 2020
1:30 pm
Case filed 10/9/2019

Telephonic Appearance

1 I, Michael T. Risher, declare as follows:

- 2 1. I represent Plaintiff Electronic Frontier Foundation (EFF) in this matter.
- 3 2. I also represented EFF in CIVDS-1827591, *EFF v. County of San Bernardino*, which sought
4 copies of six electronic-search warrants numbers -- as well as the warrants and related
5 material -- from the County under the Public Records Act. Those warrants are listed in the
6 May 16, 2019 letter attached as Exhibit B to the October 8, 2019 Petition in the current
7 matter, at page 2 footnote 2.
- 8 3. These, and all of the other of the warrants mentioned in this declaration, were requested by
9 San Bernardino Sheriff's Department personnel.
- 10 4. In the course of that CPRA litigation, I was informed by counsel for the County that all six
11 of the requested warrants had been indefinitely sealed by the Court.
- 12 5. In early 2019, EFF requested an additional 18 electronic-search warrants from the County.
13 Attached as Exhibit A to this declaration is a true copy of an email chain between the
14 County, EFF, and me discussing this request.
- 15 6. The County informed EFF and me that all but two of these warrants were indefinitely sealed
16 by the Court.
- 17 7. In the course of litigating the present case, the San Bernardino District Attorney's Office
18 reviewed some of these warrants (those at issue in this case) and discovered that one of them
19 – SBSW 18-0850 – was not in fact sealed. It has now disclosed that warrant, the supporting
20 affidavit, and the other materials in that file.
- 21 8. A review of the three warrant files that were not sealed – SBSW 18-0850, VVSW 18-1048,
22 and VVSW 18-1286 – shows that the Sheriff's Department requested that the warrants and
23 all related materials be indefinitely sealed in the first two of them, but that the Court denied
24 the sealing request.
- 25 9. It thus appears that the Sheriff's Department requested indefinite sealing of all but one of the
26 24 the warrants that EFF requested (22 of which are listed on page 10 of Exhibit B to the
27 Petition in this matter).
- 28

1 10. I am not aware of any other electronic-search warrants requested by the Sheriff's department
2 in which the Department did not request such sealing.

3 11. A true copy of the partially redacted Search Warrant VVSW-1048 provided to EFF by the
4 County is attached to the Petition in this matter, after page 11 of Exhibit B to that Petition.
5 The warrant is labeled as Exhibit B to the May 16 letter. The County informed EFF and me
6 that it did "some minimal redacting [to these materials] in order to protect the integrity of the
7 prosecution in the one case, and to protect the privacy interests associated with both." See Ex.
8 A at 1 (April 17, 2019 email from County Counsel).

9 12. On October 26, 2020, I confirmed from the Court's online Criminal/Traffic Court
10 Information Portal that counsel of record in *People v. Isaac Aguirre*, San Bern. Sup. Ct. No.
11 FSB18002619, is Melanie Roe. I emailed Ms. Roe that same day, at the email address listed
12 for her on the State Bar's website, to provide her with notice of this motion to unseal along
13 with links to the indicated documents, and asked her whether she would like to be heard. A
14 copy of this email is attached to this declaration as Exhibit B. I have yet to hear back from
15 Ms. Roe.

16 13. Attached to this Declaration as Exhibit C is a true copy of Christopher Damien and Evan
17 Wyloge, *In San Bernardino County, you're 20 times more likely to have your Facebook,*
18 *iPhone secretly probed by police*, Palm Springs Desert Sun, July 23 and 24, 2018,
19 downloaded from [https://www.desertsun.com/story/news/2018/07/23/san-bernardino-](https://www.desertsun.com/story/news/2018/07/23/san-bernardino-countys-electronic-records-probed-most-california/820052002/)
20 [countys-electronic-records-probed-most-california/820052002/](https://www.desertsun.com/story/news/2018/07/23/san-bernardino-countys-electronic-records-probed-most-california/820052002/).

21 I declare under penalty of perjury under the laws of the State of California that the forgoing is true.
22

23 11/6/2020
24

Michael T. Risher
25

26 Michael T. Risher
27
28

Michael Risher

From: Kowalski, Miles <mkowalski@SBCSD.ORG>
Sent: Wednesday, April 17, 2019 7:59 AM
To: Dave Maass
Cc: Michael T. Risher; Stephanie Lacambra
Subject: RE: CPRA Request
Attachments: VVSW18-1048_Redacted.pdf; VVSW18-1286_Redacted.pdf

Mr. Maass,

Please find attached the search warrants VVSW18-1048 and VVSW18-1286. We also requested the third warrant (SBSW18-0850) from the court, but, although the partial records I received from DOJ seemed to indicate that it was not ordered sealed, the court informed us that it was sealed and that it would not be provided to us. One of the warrants attached relates to an open attempt murder case, and one relates to a report of an attempted rape. We have done some minimal redacting in order to protect the integrity of the prosecution in the one case, and to protect the privacy interests associated with both. As I stated in my prior email, the cell site simulator was not used in either case.

MILES ABERNATHY KOWALSKI

Deputy County Counsel
Sheriff's Department
909-387-3407



www.SBCounty.gov

From: Dave Maass [mailto:dm@eff.org]
Sent: Tuesday, March 12, 2019 8:11 AM
To: Kowalski, Miles <mkowalski@SBCSD.ORG>
Cc: Michael T. Risher <michael@risherlaw.com>; Stephanie Lacambra <stephanie@eff.org>
Subject: Re: CPRA Request

Thank you, Mr. Kowalski,

I am indeed still interested in SBSW18-0850, VVSW18-1048, and VVSW18-1286. Our research into the application of CalECPA extends beyond cell-site simulators.

On 3/12/19 7:43 AM, Kowalski, Miles wrote:

Mr. Maass and attorneys,

As I mentioned to Mr. Risher and Ms. Lacambra on the phone on February 21, I contacted the California Department of Justice and requested that they send me any documents they have associated with the OpenJustice entries you have asked about in your request. From reviewing the records provided to me by the DOJ, and doing some additional research, I have identified the following search warrant numbers which I believe are responsive to request number 3). Please be advised that there appear to be a few minor inconsistencies in the issuance dates that I am still researching.

<u>S/W issued</u>	<u>Search Warrant #</u>
8/1/17	SBSW 18-0259
8/7/17	SBSW 18-0256
8/28/17	SBSW 18-0269
9/6/17	SBSW 18-0275
9/19/	SBSW 18-0278
9/20/17	SBSW 18-0281
10/26/17	SBSW 18-0292
10/26/17	SBSW 18-0298
10/26/17	SBSW 18-0293
10/30/17	SBSW 18-0302
11/8/17	SBSW 18-0297
1/17/18	VVSW 18-0164
2/15/18	SBSW 18-0849
1/12/18	SBSW 18-0850
5/23/18	VVSW 18-1051
5/21/18	VVSW 18-1048
5/23/18	VVSW 18-1047
7/23/18	VVSW 18-1286

From a preliminary review of the documents provided by DOJ, it appears that the following warrants were not ordered sealed by the court: SBSW18-0850, VVSW18-1048, VVSW18-1286. However, I have also been able to determine that the cell site simulator was not deployed pursuant an authorization in any of these three warrants. I have not yet located complete copies of these warrants. However, given the fact that the cell site simulator was not used in these cases, I wanted to confirm that you are still interested in these documents.

Following our conversation on 2/21, I have been trying to identify a cell site simulator use with an unsealed warrant which I can direct you to. I will update you if/when I am successful.

MILES ABERNATHY KOWALSKI

Deputy County Counsel
Sheriff's Department
909-387-3407



www.SBCounty.gov

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-----Original Message-----

From: Dave Maass [<mailto:dm@eff.org>]

Sent: Thursday, January 24, 2019 9:57 AM

Cc: Kowalski, Miles <mkowalski@SBCSD.ORG>; Michael T. Risher <michael@risherlaw.com>; Stephanie Lacambra <stephanie@eff.org>

Subject: CPRA Request

Mr. Kowalski,

Please find attached a California Public Records Act request. Please direct all email responses to myself and attorneys Michael Risher and Stephanie Lacambra (CC'd here)

Thank you,

Dave

--

Dave Maass
Senior Investigative Researcher
Electronic Frontier Foundation
Phone: +1 415-436-9333 x151
Email: dm@eff.org
Twitter: @maassive

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--

Dave Maass
Senior Investigative Researcher
Electronic Frontier Foundation

Michael Risher

From: Michael Risher <michael@risherlaw.com>
Sent: Monday, October 26, 2020 3:53 PM
To: 'melanie_roe@verizon.net'
Cc: 'Mark Rumold'; Dave Maass
Subject: motion to unseal search-warrant records that apparently relate to People v. Isaac Aguirre, San Bern. Sup. Ct. No. FSB18002619

Dear Ms. Roe –

I'm writing because I am involved in a motion to unseal court records that may relate to one of your cases, People v. Isaac Aguirre, San Bern. Sup. Ct. No. FSB18002619.

Just over a year ago, the Electronic Frontier Foundation filed a petition asking to unseal a number of search warrants and the related affidavits. In August of this year, we obtained a number of the actual warrants, as well as one affidavit, by stipulation with the government. We are now asking the Court to unseal the remaining affidavits at issue. In a declaration to its opposition to unsealing, the District Attorney's Office confirms that one or more of the warrant files at issue relates to Mr. Aguirre's case (we already had been informed that this was the case; in fact, Stephanie Lacambra of EFF may have contacted you about this some time ago). See Masonek Dec. at 3-4.

I have no reason to think that unsealing anything in the records will affect Mr. Aguirre's case; I don't even know which warrants relate to that case or whether any of the information collected under them was used in the investigation or prosecution of the matter. But I wanted to let you know about the records we have received and about the upcoming motion to unseal so that you have an opportunity to weigh in if you think that is appropriate.

The hearing is currently set for November 13, 2020, at 1:30 p.m. in Department S19 in the San Bernardino Justice Center 247 West Third Street, San Bernardino, CA 92415, before Judge Dwight Moore. Our final papers are due on November 6.

I am providing links to our October 8, 2019 petition, the records that were unsealed this August by stipulation, and the District Attorney's October 20, 2020, opposition to unsealing, including the Masonek Declaration (which is itself largely redacted and apparently filed under seal; I do not have access to the redacted portions). The documents themselves are too large to send together in one email. Please let me know if you have any problem opening them and I'll email them separately.

[https://www.dropbox.com/s/uuknkddd61gm0k4/2019.10.08%20Verified%20Petition%20with%20exhibits%20A-C FILED 2018.10.09.pdf?dl=0](https://www.dropbox.com/s/uuknkddd61gm0k4/2019.10.08%20Verified%20Petition%20with%20exhibits%20A-C%20FILED%202018.10.09.pdf?dl=0)

<https://www.dropbox.com/s/du3l91yh8vnl6k/EFF%20-%20Disclosure%20Packet%20-%20080620.pdf?dl=0>

https://www.dropbox.com/s/2gdom4kn7taan7b/2020.10.20%20EFFvSuper.Ct.%20-%20DA%20Mtn.Jt.Pleadings%20%282%29%20-%2020111320_Redacted.pdf?dl=0

Please feel free to email or call if you have any questions or would like to discuss any of this. If you don't have any, please let me know that, too.

mtr

Michael Risher
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Desert Sun.

NEWS

In San Bernardino County, you're 20 times more likely to have your Facebook, iPhone secretly probed by police

Christopher Damien and Evan Wyloge Palm Springs Desert Sun

Published 11:32 a.m. PT Jul. 23, 2018 | Updated 9:30 a.m. PT Oct. 25, 2018

In 2015 California lawmakers passed a law requiring police agencies to publicly disclose some additional details about their use of warrants to access electronic devices or online accounts. Starting in 2016, any time a warrant is issued without the target of the warrant being immediately notified about it, the police agencies must record and provide basic details about the warrant to the California Department of Justice.

Two-and-a-half years of the newly-collected warrant information show a wide variety in how California police agencies are using electronic search warrants.

Since the information has been made public, San Bernardino County's law enforcement agencies were granted the most electronic warrants to search digital property per resident in the state, according to the data. The San Bernardino County Sheriff's Department accounts for almost all of the electronic search warrants reported to the California Department of Justice for the county. And the department is carrying out the electronic searches at an increasing rate.

San Bernardino County Sheriff's Department reported 168 electronic search warrants in 2016, 211 for 2017, and has already filed 336 by May of this year.

SIGN UP FOR FACEBOOK NEWS ALERTS: Message us here to get started

Update: Advocacy group sues San Bernardino sheriff over refusal to release surveillance records

More: California lawmakers move to make police misconduct records more public

More: Which Calif. police forces use eye scanners and facial recognition tech? A new bill could help tell you.

Privacy advocates say 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.

The Sheriff's Department's numbers, along with other local police agencies who used similar warrants a handful of times, mean residents of San Bernardino County are almost twenty times more likely than other California residents to have a search warrant used to probe their electronic records or devices without their immediate knowledge.

A department spokesperson did not dispute the agency's high rate, and did not answer questions about what technology is used to search digital property or which companies they may have petitioned to get users' subscriber information, emails, photos, videos, text messages, and location data.

When police search digital property, the searches can occur with electronic property that belongs to people who they have identified and people they haven't identified.

If, for instance, they seek to search the Facebook account of a person whose identity they know for evidence of a crime, they are required to obtain a warrant from a judge and notify that person in real time that they are being investigated.

If the situation is deemed an emergency, the judge can grant law enforcement the option to delay notification for up to 90 days.

A 90-day delay is also granted in cases when the identity of the person they are investigating is not known by the investigating agency.

Investigating digital property in order to identify a person is common in the California Department of Justice Electronic Search Warrant Notifications database. For example, data indicates warrants are sometimes granted to search phones found on unidentified dead bodies. In another case, a phone was found in a large plastic tub of weed discovered by authorities. In another, a woman found a phone in the engine compartment of her car and notified law enforcement that she believed it was being used as a tracking device.

Warrants are only reported to the California Department of Justice if the warrant receives the 90-day delay for notification. The department does not include records of warrants for electronic property, if the target is notified immediately.

Of the more than 700 warrants reported to the California Department of Justice by the San Bernardino County Sheriff's Department, only 47 received emergency status, meaning 93

percent of their warrants were granted to investigate people whose identity was unknown to the department.

The department did not provide an explanation for why they are investigating the digital property of so many people before identifying them.

Chris Calabrese, vice president of the Center for Democracy and Technology, a digital privacy advocacy group based in Washington DC, said California's privacy laws were designed to prevent this kind of invasive investigation.

Technology: Agua Caliente using new technology to turn food waste to water at Rancho Mirage resort

Technology Meet 'The Melonator,' a harvesting machine developed to counter California minimum wage increase, farmworker shortage

“It implies that there is a substantial fishing expedition,” Calabrese said.

Calabrese was surprised to hear of San Bernardino's high rate, since California's laws have made privacy a priority.

“California has one of the most privacy-protective laws in the nation,” Calabrese said. “It treats the information very carefully,”

The department's lack of transparency isn't the only concern for privacy watchdogs. Privacy advocates, like Calabrese, wonder whether the San Bernardino County Sheriff's Department's high rate is related to the agency's controversial history with digital surveillance and a technology that can target large volumes of unidentified users.

In 2015, the technology media outlet Ars Technica found that San Bernardino County Sheriff's Department had made extensive use of a device that mimics cell towers to intercept user's information in its range – including non-targeted bystanders.

The department had used the device, called a Stingray, 201 times in 2014 and 102 times by May of 2015, and did so without search warrants.

The sheriff responded by saying that, at the time, they were not required by law to obtain a search warrant for using the Stingray.

Digital rights advocates, like Mohammad Tajsar, a staff attorney at ACLU Southern California, said the Stingray controversy helped the California Electronic Communications Privacy Act (CalECPA) become law later that year.

“The fight over Stingrays made people aware that there were a whole lot of transparency problems,” Tajsar said.

The ACLU is still working to make sure that the law is increasing transparency in the way its supporters intended.

“We worked hard to pass CalECPA and we’re still working to make sure that it doesn’t get watered down in its regulatory form,” Tajsar said. “One agency may decide to seek more of these records than another.”

Once CalECPA took effect in 2016, the new law required law enforcement agencies to get a warrant to search the contents of a person’s phone, their social media accounts and email, and any related metadata, like sending email account addresses, recipients, dates, and times.

“CalECPA’s notification process is an attempt at getting you involved in the process,” Tajsar said. “You could get a lawyer, go to Google, and dispute your records being searched. At the very least, you are aware.”

While CalECPA was motivated in part by San Bernardino’s use of the Stingray, it hasn’t stopped the sheriff’s department from continuing to use it.

In April 2016, Assistant Sheriff Dave Williams issued an Interoffice Memo titled “Temporary Order: Use of Cell-Site Simulators,” publicly establishing a policy for using the device and explaining how it enhances their operations.

“Whether deployed as part of a fugitive apprehension effort, a complex narcotics investigation, or to locate or rescue a kidnapped child, cell-site simulators fulfill critical operational needs,” the policy says.

The policy establishes that the technology may be deployed on targets prior to obtaining a warrant, but that in every case a warrant will be filed in court within three days presumably explaining why the department wanted to investigate the individual. The policy does not provide details as to why they would need to use a cell-site simulator without a warrant.

Miles Kowalski, general legal council for the sheriff's department said each use of a Stingray is logged and annual reports are provided to an oversight group within the Sheriff's Department called the Board of Chiefs.

Kowalski said the board meets weekly, but did not say how frequently they discuss Stingray use or electronic search warrants.

The department denied The Desert Sun's public records requests for copies of both the logs and the annual reports.

The department policy further says that a "Gang/Narcotics Division supervisor" must authorize the use of the cell-site simulator and notice must be given to the gang and narcotics division lieutenant.

San Bernardino County Sheriff's Department's gang and narcotics division has 11 subdivisions, including a "High-tech Crime Detail." The county has been plagued with serious gang violence in the past and the District Attorney implemented four permanent gang injunctions, which restrict activity in certain neighborhoods, since 2010.

Of San Bernardino County's electronic search warrant notifications for 2018, when the sheriff's office first began including the information, roughly 11 percent were granted as part of a gang investigation, matching almost exactly the portion for all California police agencies.

"Authorized Department operators (in the gang/narcotics division) can use cell-site simulators to help locate cellular devices whose unique identifiers are already known to law enforcement, or to determine the unique identifiers of an unknown device," the policy says.

San Bernardino County Sheriff's Department filed 444 warrants for narcotics investigations, 62 percent of the agency's reported total. None of the narcotics investigation warrants received emergency status, meaning they were granted for investigating people whose identity was unknown to the agency.

Any of the 444 warrants could have been granted for cell-site simulator investigations of "unknown devices" according to the department's policy.

The way the data is currently reported, it is not possible for the public to differentiate between cell-site simulator use and other types of digital property searches.

If cell-site simulator investigations and searches of any electronic property were authorized by the department's narcotics division and both received 90-day notification delays, the different searches could look identical in the Department of Justice's public data. JA 250

While the sheriff's department has not provided details about their investigations of unidentified targets, technology companies have been among the most vocal advocates for transparency in digital due process.

Many of the largest technology companies publish reports summarizing the requests they receive from law enforcement agencies to investigate their users.

In 2017, Google received 10,383 search warrants from domestic agencies to investigate their user's accounts, a 25 percent increase from the year before.

While they can dispute the legitimacy of the warrants, Google, Facebook, and Twitter produce data about three-quarters of the time.

All three companies have policies saying they will notify users that they are being investigated prior to disclosing information to law enforcement, unless in emergencies.

Law enforcement can try and convince the judge to order a delay in notification, if secrecy would benefit their investigation.

When CalECPA was making its way through the state legislature, Jeff Stone, Coachella Valley's state senator, opposed the bill on the grounds that notifying suspects that their digital property is being searched will give them the opportunity to delete incriminating information.

Joel Anderson, a fellow Republican state senator from San Diego, agreed that the paradox of notification is a widely held cause of concern for police. Citing support from the California District Attorneys Association and the California State Sheriff's Association, he voted for the bill because it would increase transparency.

"This is a delicate balance," Anderson said during Senate floor testimony. "Maybe some criminals may get loose, but 38 million Californians will live in liberty."

EXHIBIT 18

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6 Attorneys for Real Party in Interest,
San Bernardino County District Attorney

7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN BERNARDINO**

10 **ELECTRONIC FRONTIER
FOUNDATION,**

11 Petitioner,

12 vs.

13 **SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN
14 BERNARDINO,**

15 Respondent, and

16
17 **COUNTY OF SAN BERNARDINO, and**
18 **SAN BERNARDINO COUNTY DISTRICT
ATTORNEY,**
19 **REAL PARTIES IN INTEREST.**
20

Case No. CIVDS1930054

**REAL PARTY DISTRICT ATTORNEY'S
REPLY (RE MOTION FOR JUDGMENT
ON THE PLEADINGS.)**

Date: November 13, 2020
Time: 1:30 p.m.
Dept: S19, Hon. Dwight Moore, Judge.

21 To the Court and Involved Parties:
22

1 Real Party District Attorney offers the following few points in reply, with no
2 concession on any points left unaddressed, here. We rely mainly on the arguments in our
3 motion for judgment on the pleadings, and on the supplementary letter filed October 27,
4 2020.

5 We also plan to make available to the Court—should it require an interview in
6 chambers—the attendance of declarant Christine Masonek. Additionally, we understand
7 that real party County Counsel for the Sheriff may be able to produce Sheriff’s Detective
8 Joshua Guerry for the same purpose.

9 **A. Disclosure of the information EFF says it is “primarily interested in” will harm**
10 **real party’s overriding interests in informant and witness safety, prosecution**
11 **case integrity, and privacy.**

11 EFF claims in its response that:

12 EFF is primarily interested in learning the nature of the
13 offense(s) being investigated, the expertise and qualifications of
14 the affiant, why the affiant believes that the requested searches
15 will assist in the investigation, the nature of the information to
16 be provided under the warrant, what a provider is required to
do to comply with the warrant, the reasons for sealing the files,
the reasons for delaying notification of the target of the warrants
or to the Department of Justice, and the information provided in
the return to the warrant.

17 (EFF’s Memo, 4: 5–10.)

18 On the facts of this case, we claim that disclosure of such information presents undue
19 risk to the overriding interests covered in our motion for judgment on the pleadings,
20 including the safety of involved witnesses and informants, as well as risk to the open
21 murder prosecution, and breach of privacy.

1 **B. EFF's stated motives for disclosure should be irrelevant to the Court's decision.**

2 EFF seems to anchor, in part, its interest in unsealing the sealed warrants on media
3 reports of warrant-sealing frequency in San Bernardino County, and on what it perceives
4 as "overbroad" sealing practice by San Bernardino County Sheriff. While these interests are,
5 at face value, no doubt important, they are irrelevant to the issues this Court must decide.
6 (EFF's Memo, 4:12-5:4.) EFF has not established evidence to prove these points, or to link
7 the sealed warrants at issue in this case to such alleged infirmities.¹

8 **C. Our "no standing" argument depends on the inapplicability of Rules of Court
9 2.550 and 2.551 to unseal records "required to be kept confidential by law."**

10 EFF argues that it has standing because courts universally hold that members of the
11 public have standing to request the unsealing of judicial records. Our argument is that that
12 is not true for the kinds of records at issue, here: warrant materials sealed under *People v.*
13 *Hobbs* (1994) 7 Cal.4th 948, and/or under Evidence Code §§ 1040, 1041, or 1042. Rule of
14 Court 2.550, subdivision (a)(2), expressly makes itself and 2.551 inapplicable to what EFF
15 seeks. In our view, although nothing technically stops EFF from filing a petition and asking
16 for something, once the Court sees that the warrant materials at issue have been sealed
17 under "law" such as *Hobbs*, the inquiry and petitioner's standing ought to end. Hence our
18 motion for judgment on the pleadings.

19
20 ¹¹ Just for off-the-cuff speculation, the frequency of electronic warrant-seeking in this County could as
21 easily be explained by its geographic size and by the number of its separate law enforcement agencies as by
22 anything else, and by the presence of a network of interstate highways running both west-east and north-
south, one notable one of which functions as a Southern California chokepoint for traffic heading to and from
Las Vegas, Nevada. This speculation, though, is as irrelevant as EFF's to the issues at hand.

1 EFF argues that this view misunderstands the rule, and that Rules 2.550 and 2.551
2 apply to “all parts of the warrant materials that are not protected by *Hobbs*.” (EFF’s Memo,
3 p. 10.) This argument would gut Rule of Court’s 2.550(a)(2) exclusion because it effectively
4 claims that Rules 2.550 and 2.551 *do* apply to warrant materials sealed under *Hobbs* so long
5 as a petitioner suspects some material should not have been sealed under *Hobbs*.

6 This would be tantamount to having *no exclusion at all* because later review of *Hobbs*-
7 sealed warrants would always be available in every case. Under EFF’s view, were Rule of
8 Court 2.550, subdivision (a)(2) erased from the books, the unsealing process would not
9 change. With or without that exclusion, EFF thinks, it and other have the unending right to
10 have a judge sift through warrant materials sealed by other judges under *Hobbs*.

11 But if the exclusion of Rule 2.550(a)(2) is to mean anything, our view is the most
12 cogent. The exclusion is a threshold determination for the Court, especially a later court not
13 involved in the original sealing. The initial question is whether the sealed materials are of
14 a kind required to be kept “confidential by law.” The Advisory Committee Comment makes
15 clear that the sealed materials sought here are precisely of that nature. Therefore, “These
16 rules do not apply...”

17 Previous courts have ruled that the supporting materials for the six warrants
18 addressed by the Masonek declaration are sealed under *Hobbs* and other provisions of law.
19 Moreover, we invoke the presumption that official duty has been regularly performed.
20 (Evid. Code § 664.)

21 The People note that EFF has not provided the Court with any precedent showing
22

1 that uninvolved third parties have been able to pry open materials sealed under *Hobbs*, or
2 other provisions of law such as Evidence Code §§ 1040-1042.

3 Given: (1) that EFF's argument would construe away the exclusion and would
4 effectively result in endless exposure to scrutiny of warrants carefully sealed under law by
5 previous judges, and (2) that the sealed warrant materials here are "required be kept
6 confidential by law," while (3) keeping in mind given the presumption of official duty
7 regularly performed, this Court should rule that it need not inquire into the merits of
8 weighing the interests in sealing against those of unsealing, and that petitioner EFF has no
9 standing to pursue the matter further. The Court should grant judgment on the pleadings
10 in favor of real part District Attorney.

11 To be on the safe side, the Court could and should rule that even if this
12 understanding is wrong, and that EFF does possess standing to press the matter, that the
13 six packets of sealed warrant materials pertinent to the four murder cases should remain
14 sealed under any measure of scrutiny. We invite the Court to apply the highest level: strict
15 scrutiny.

16 **D. The California Constitution does not eliminate, weaken, or modify the**
17 **exclusion of Rule of Court 2.550(a)(2).**

18 EFF argues that California Constitution, article I, section 3(b) requires the Court to
19 construe its right of access expansively. (EFF's Memo, pp. 7.) This is incorrect, as one of that
20 provision's exceptions, section 3, subdivision (b)(5) expressly applies here:

21 This subdivision does not repeal or nullify, expressly or by
22 implication, any constitutional or statutory exception to the right
of access to public records or meetings of public bodies that is in

1 effect on the effective date of this subdivision, including, but not
2 limited to, any statute protecting the confidentiality of law
enforcement and prosecution records.

3 This constitutional provision was added by Proposition 59, and took effect
4 November 3, 2004. But Rules of Court 2.550 and 2.551 were adopted and effective January
5 1, 2001, and as amended, January 1, 2004. And their predecessor rules 243.1 and 243.2 were
6 on the books many years before that.

7 Therefore, Rule of Court 2.550, subdivision (a)(2) remains in full force, and there is
8 no abridgment by the California Constitution.

9
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11
12 Respectfully submitted, November 10, 2020.

13 

14 _____
15 Mark Vos
16 Deputy District Attorney
17 Appellate Services Unit
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**OFFICE OF THE DISTRICT ATTORNEY
SAN BERNARDINO COUNTY**

PROOF OF SERVICE BY EMAIL

STATE OF CALIFORNIA

**EFF v. Superior Court;
Case no. CIVDS1930054**

COUNTY OF SAN BERNARDINO

Mark Vos says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is: 303 W. Third St., Fifth Floor, San Bernardino California 92415-0511.

That I am readily familiar with the business practice of sending court briefs over county email; that service and receipt is dependable and takes a matter of seconds, and that it is usually verifiable by means of read-receipt;

That on November 10, 2020, I served the within:

DA Reply (Motion for Judgment on the Pleadings)

on interested party by sending an electronic copy in pdf format via San Bernardino County email to:

Michael T. Risher
2081 Center St. #154
Berkeley, CA 94702

Email:
michael@risherlaw.com

Miles Kowalski
San Bernardino Co.
Sheriff's Dept.
655 E. Third St.

San Bernardino, CA
92415-0061
CA 94107
Email:
mkowalski@sbcisd.org

Stephen Pascover
Superior Court
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San Bernardino, CA

92415
Email: **spascover@sb-court.org**

I certify under penalty of perjury that the foregoing is true, and that this declaration was executed at San Bernardino California, on November 10, 2020.



Mark Vos

EXHIBIT 19

1 JASON ANDERSON
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2 MARK VOS (SBN 190169)
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6 Attorneys for Real Party in Interest,
San Bernardino County District Attorney

7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN BERNARDINO**

10 **ELECTRONIC FRONTIER
FOUNDATION,**

11 Petitioner,

12 vs.

13 **SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SAN
14 BERNARDINO,**

15 Respondent, and

16
17 **COUNTY OF SAN BERNARDINO, and**
18 **SAN BERNARDINO COUNTY DISTRICT
ATTORNEY,**
19 **REAL PARTIES IN INTEREST.**
20

Case No. CIVDS1930054

**NOTICE OF MOTION AND MOTION
TO SEAL THE REDACTED PORTION
OF CHRISTINE MASONEK'S
DECLARATION LODGED
CONDITIONALLY UNDER SEAL ON
OCT. 20, 2020 (ATTACHED AS
"EXHIBIT 1" TO THE DISTRICT
ATTORNEY'S MOTION FOR
JUDGMENT ON THE PLEADINGS.)**

Date: November 13, 2020

Time: 1:30 p.m.

Dept: S19, Hon. Dwight Moore, Judge.

21 To the Court and Involved Parties:
22

1 Pursuant to Rule of Court 2.551, subdivision (b), real party District Attorney gives
2 notice that on November 13, 2020, we move that the Court order as filed under seal the
3 motion for judgment on the pleadings and its Exhibit 1 lodged conditionally under seal on
4 October 20, 2020. The public version of the motion and exhibit-with-redactions, was filed
5 that same day. The only difference between the motion lodged under seal and the public
6 version consists of the redactions to Exhibit 1, the Declaration by Deputy District Attorney
7 Christine Masonek.

8 We based this motion on the entirety of the Court record thus far, including the
9 portion of the Masonek declaration lodged conditionally under seal, and including real
10 party's supplemental letter filed October 27, 2020.

11 Ms. Masonek's unredacted declaration establishes compelling state interests in
12 safety of informants and witnesses, and in the integrity of the prosecution's cases, and
13 privacy, in the following murder cases:

- 14 • People v. Isaac Aguirre, FSB18002619
- 15 • People v. Robert Fernandez, FSB18002620
- 16 • People v. Matthew Manzano, FSB18002623
- 17 • People v. Richard Garcia, FSB18002622

18 Ms. Masonek's declaration establishes that the portions of the following six search
19 warrants still under seal and subject to this litigation must remain sealed to further the
20 aforementioned compelling state interests:

21 //

- 1 • SBSW 17-0615
- 2 • SBSW 17-0694
- 3 • SBSW 17-0695
- 4 • SBSW 17-0834
- 5 • SBSW 17-0890
- 6 • SBSW-0892

7 The District Attorney moves to seal the redacted portion of the Masonek declaration
8 under the authority of Rule of Court 2.551, subdivision (b), in accord with Rule 2.550,
9 subdivisions (d) and (e), which provide:¹

10 **(d) Express factual findings required to seal records**

11 The court may order that a record be filed under seal only if it expressly finds
12 facts that establish:

- 13 (1) There exists an overriding interest that overcomes the right of public access
to the record;
- 14 (2) The overriding interest supports sealing the record;
- 15 (3) A substantial probability exists that the overriding interest will be
prejudiced if the record is not sealed;
- 16 (4) The proposed sealing is narrowly tailored; and
- 17 (5) No less restrictive means exist to achieve the overriding interest.

18
19 ¹ Our moving to seal Ms. Masonek's declaration under Rules of Court 2.550 and 2.551 does not
20 implicitly concede that these rules are available to EFF to move to unseal any portion of the declaration or
21 the sealed warrant materials. It seems incongruent for the Rules of Court to be expressly inapplicable to
records required to be kept confidential by law (Rule 2.550, subd. (b); *Hobbs*; Evid. Code §§ 1040-1042), yet
22 *still apply to declarations about such records*, especially where litigation forces such derivative declarations to
be written and filed as a protective measure, as here.

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**OFFICE OF THE DISTRICT ATTORNEY
SAN BERNARDINO COUNTY**

PROOF OF SERVICE BY EMAIL

STATE OF CALIFORNIA

**EFF v. Superior Court;
Case no. CIVDS1930054**

COUNTY OF SAN BERNARDINO

Mark Vos says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is: 303 W. Third St., Fifth Floor, San Bernardino California 92415-0511.

That I am readily familiar with the business practice of sending court briefs over county email; that service and receipt is dependable and takes a matter of seconds, and that it is usually verifiable by means of read-receipt;

That on November 10, 2020, I served the within:

Motion to Seal Declaration of Christine Masonek

on interested party by sending an electronic copy in pdf format via San Bernardino County email to:

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Berkeley, CA 94702

Email:
michael@risherlaw.com

Miles Kowalski
San Bernardino Co.
Sheriff's Dept.
655 E. Third St.

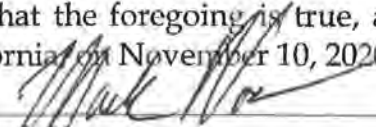
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Superior Court
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92415
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I certify under penalty of perjury that the foregoing is true, and that this declaration was executed at San Bernardino California on November 10, 2020.



Mark Vos

EXHIBIT 20

**JASON ANDERSON
DISTRICT ATTORNEY**

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Attorneys for the People of the State of California and
the San Bernardino County District Attorney

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO**

ELECTRONIC FREEDOM FOUNDATION,

Plaintiff,

vs.

SUPERIOR COURT FOR THE STATE OF
CALIFORNIA, COUNTY OF SAN
BERNARDINO, et al.,

Defendant.

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

Real Parties in Interest.

CASE NO. CIVDS1930054

NOTICE OF RULING

**DATE : 1/15/2021
TIME : 1:30 P.M.
DEPT : S-19**

This matter having come regularly before the Court on January 15, 2021, the Honorable Dwight W. Moore, presiding; Michael Rischer, Esq., appearing for Plaintiff Electronic Freedom Foundation ("EFF"); Miles Kowalski, Deputy County Counsel, appearing on behalf of the San Bernardino County Sheriff's Department (the "Sheriff's Department"); Stephen Pascover, Esq., appearing on behalf of the San Bernardino County Superior Court; and, Mark Vos and James R. Secord, Deputy District Attorneys, appearing on behalf of the People of the State of California and the San Bernardino

1 County District Attorney (collectively, the "District Attorney"); and all counsel appearing
2 either telephonically or by videoconference;

3 The matter having come before the Court on Electronic Freedom Foundation's
4 Petition for release of those certain search warrants and their accompanying affidavits,
5 involving cellular telephone information; and, the Motion for Judgment on the Pleadings
6 and supporting declarations filed by the District Attorney, the opposition and declarations
7 to the Motion for Judgment on the Pleadings filed by EFF, and the reply and supporting
8 declarations of the District Attorney; the Court having read and considered each of the
9 documents filed by EFF and the District Attorney; and following oral argument of counsel;
10 the Court ruled as follows:

11 The Petition of EFF is denied; the Court found that EFF is not entitled to the relief
12 it sought for release of the information contained in the affidavits, including Penal Code
13 sections 638.52(g), 1534(a), California Rules of Court, Rules 2.550 and 2.551, the First
14 Amendment to the United States Constitution, and Article 1, Section 3 of the California
15 Constitution;

16 As an additional and separate ground, the Court further found that, having read
17 each of the search warrant files individually, and pursuant to Penal Code section 1534,
18 and Evidence Code sections 1040, 1041 and 1042, and *People v. Hobbs* (1994) 7 Cal.4th
19 948, and related statutes, at the time the search warrants were issued by the Court, the
20 search warrants, affidavits and supporting documents were properly sealed by the issuing
21 Court; further, regarding the affidavits and supporting papers, there currently exists an
22 important state interest in protecting the identity of the parties, that the entirety of each of
23 the affidavits must remain sealed because there is no alternative means to release any
24 of the information without compromising the identity of the parties, and that the affidavits
25 are to remain sealed indefinitely.

26 Further, pursuant to agreement of the parties on a prior date, in the document
27 entitled Disclosure of Unsealed Pages From Nine Sealed Search Warrant Packets
28 consisting of 62 pages, which was lodged with the Court and served upon the parties, the

1 search warrants themselves in file numbers SBSW 18-0298, SBSW 18-0850, SBSW 17-
2 0615, SBSW 17-0694, SBSW 17-0695, SBSW 17-0834, SBSW 17-0890, SBSW 17-
3 0892, and SBSW 18-0259 were disclosed to EFF. The Court ordered its attorney,
4 Stephen Pascover, Esq., to ensure that a copy of that 63 page document is placed in the
5 Court's file in this case.

6 The Court further ruled that the District Attorney give notice of the Court's rulings
7 from this hearing in this matter within 10 days.

8 DATED: January 25, 2021

JASON ANDERSON,
San Bernardino County District Attorney

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10 By: 
11 Mark Vos, Deputy District Attorney

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**OFFICE OF THE DISTRICT ATTORNEY
SAN BERNARDINO COUNTY**

PROOF OF SERVICE BY EMAIL AND BY U.S. MAIL

STATE OF CALIFORNIA

**EFF v. Superior Court
Case no. CIVDS1930054**

COUNTY OF SAN BERNARDINO

Mark Vos says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is: 303 W. Third St., Fifth Floor, San Bernardino California 92415-0511.

That I am readily familiar with the business practice of sending court briefs over county email; that service and receipt is dependable and takes a matter of seconds, and that it is usually verifiable by means of read-receipt;

That on January 25, 2021, I served the within:

Notice of Ruling

on interested party by sending an electronic copy in pdf format via San Bernardino County email to:

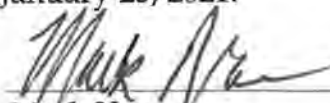
Michael T. Risher
2081 Center St. #154
Berkeley, CA 94702

Email:
michael@riserlaw.com

Miles Kowalski
San Bernardino Co.
Sheriff's Dept.
655 E. Third St.
San Bernardino, CA
92415-0061
CA 94107
Email:
mkowalski@sbcasd.org

Stephen Pascover
Superior Court
247 West Third St.
San Bernardino, CA
92415
Email: **spascover@sb-court.org**

I certify under penalty of perjury that the foregoing is true, and that this declaration was executed at San Bernardino California, on January 25, 2021.



Mark Vos

EXHIBIT 21

BY FAX

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 286647 NAME: Aaron Mackey FIRM NAME: Electronic Frontier Foundation STREET ADDRESS: 815 Eddy Street CITY: San Francisco STATE: CA ZIP CODE: 94109 TELEPHONE NO.: 415.436.9333 FAX NO.: E-MAIL ADDRESS: amackey@eff.org ATTORNEY FOR (name): Electronic Frontier Foundation	FOR COURT USE ONLY FILED SUPERIOR COURT COUNTY OF SAN BERNARDINO RANCHO CUCAMONGA DISTRICT MAR 25 2021 BY <u>[Signature]</u> IKA SCHYMIK, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO STREET ADDRESS: 247 W 3rd St. MAILING ADDRESS: CITY AND ZIP CODE: San Bernardino, 92415 BRANCH NAME: Civil	
PLAINTIFF/PETITIONER: Electronic Frontier Foundation DEFENDANT/RESPONDENT: Superior Court for the State of CA, Co. of San Bernardino,	
<input checked="" type="checkbox"/> NOTICE OF APPEAL <input type="checkbox"/> CROSS-APPEAL (UNLIMITED CIVIL CASE)	CASE NUMBER: CIVDS 1930054

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

- NOTICE IS HEREBY GIVEN that (name): Electronic Frontier Foundation
 appeals from the following judgment or order in this case, which was entered on (date): January 29, 2021
 - Judgment after jury trial
 - Judgment after court trial
 - Default judgment
 - Judgment after an order granting a summary judgment motion
 - Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
 - Judgment of dismissal after an order sustaining a demurrer
 - An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
 - An order or judgment under Code of Civil Procedure, § 904.1(a)(3)-(13)
 - Other (describe and specify code section that authorizes this appeal):
 Judgment under Civ. Proc. Code § 904.1(a)(1) after order denying petition to unseal search warrants and their affidavits pursuant to Penal Code §§ 638.52(g), 1534(a); Cal. R. Court 2.550-2.551; Cal. Const. Art 1, Sec. 3; U.S. Const. amend. 1.
- For cross-appeals only:
 - Date notice of appeal was filed in original appeal:
 - Date superior court clerk mailed notice of original appeal:
 - Court of Appeal case number (if known):

Date: March 24, 2021

Aaron Mackey

 (TYPE OR PRINT NAME)

[Signature]

 (SIGNATURE OF PARTY OR ATTORNEY)

For your protection and privacy, please press the Clear This Form button after you have printed the form.


Print this form

Save this form

IA 272
 Clear this form

EXHIBIT 22

BY FAX

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: Aaron Mackey FIRM NAME: Electronic Frontier Foundation STREET ADDRESS: 815 Eddy Street CITY: San Francisco TELEPHONE NO.: 415.436.9333 E-MAIL ADDRESS: amackey@eff.org ATTORNEY FOR (name): Electronic Frontier Foundation	STATE BAR NUMBER: 286647 STATE: CA ZIP CODE: 94109 FAX NO.:	FOR COURT USE ONLY FILED SUPERIOR COURT COUNTY OF SAN BERNARDINO RANCHO CUCAMONGA DISTRICT MAR 26 2021 BY  DIANE HENRY, DEPUTY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO STREET ADDRESS: 247 W 3rd St. MAILING ADDRESS: CITY AND ZIP CODE: San Bernardino, 92415 BRANCH NAME: Civil		
PLAINTIFF/PETITIONER: Electronic Frontier Foundation DEFENDANT/RESPONDENT: Superior Court for the State of CA, Co. of San Bernardino OTHER PARENT/PARTY:		
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)		
RE: Appeal filed on (date): 3/24/2021		SUPERIOR COURT CASE NUMBER: CIVDS 1930054 COURT OF APPEAL CASE NUMBER (if known):
Notice: Please read <i>Information on Appeal Procedures for Unlimited Civil Cases</i> (form APP-001-INFO) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.		

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

I choose to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court (check a, b, c, or d, and fill in any required information):

- a. A clerk's transcript under rule 8.122. (You must check (1) or (2) and fill out the clerk's transcript section (item 4) on pages 2 and 3 of this form.)
- (1) I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.
- (2) I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record (check (a) or (b)):
- (a) An order granting a waiver of court fees and costs under rules 3.50–3.58; or
- (b) An application for a waiver of court fees and costs under rules 3.50–3.58. (Use *Request to Waive Court Fees* (form FW-001) to prepare and file this application.)
- b. An appendix under rule 8.124.
- c. The original superior court file under rule 8.128. (NOTE: Local rules in the Court of Appeal, First, Third, and Fourth Appellate Districts, permit parties to stipulate (agree) to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.)
- d. An agreed statement under rule 8.134. (You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I choose to proceed (you must check a or b below):

- a. WITHOUT a record of the oral proceedings (what was said at the hearing or trial) in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in deciding whether an error was made in the superior court proceedings.

CASE NAME: Electronic Frontier Foundation v. Superior Court for the County of San Bernardino	SUPERIOR COURT CASE NUMBER: CIVDS 1930054
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2. b. WITH the following record of the oral proceedings in the superior court (*you must check (1), (2), or (3) below*):
- (1) A reporter's transcript under rule 8.130. (*You must fill out the reporter's transcript section (item 5) on pages 3 and 4 of this form.*) I have (*check all that apply*):
 - (a) Deposited with the superior court clerk the approximate cost of preparing the transcript by including the deposit with this notice as provided in rule 8.130(b)(1).
 - (b) Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).
 - (c) Attached the reporter's written waiver of a deposit under rule 8.130(b)(3)(A) for (*check either (i) or (ii)*):
 - (i) all of the designated proceedings.
 - (ii) part of the designated proceedings.
 - (d) Attached a certified transcript under rule 8.130(b)(3)(C).
 - (2) An agreed statement. (*Check and complete either (a) or (b) below.*)
 - (a) I have attached an agreed statement to this notice.
 - (b) All the parties have stipulated (agreed) in writing to try to agree on a statement. (*You must attach a copy of this stipulation to this notice.*) I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.
 - (3) A settled statement under rule 8.137. (*You must check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.*)
 - (a) The oral proceedings in the superior court were not reported by a court reporter.
 - (b) The oral proceedings in the superior court were reported by a court reporter, but I have an order waiving fees and costs.
 - (c) I am asking to use a settled statement for reasons other than those listed in (a) or (b). (*You must serve and file the motion required under rule 8.137(b) at the same time that you file this form. You may use form APP-025 to prepare the motion.*)

3. RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE COURT OF APPEAL

I request that the clerk transmit to the Court of Appeal under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court (*give the title and date or dates of the administrative proceeding*):

Title of Administrative Proceeding	Date or Dates
---	----------------------

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

(*You must complete this section if you checked item 1a above indicating that you choose to use a clerk's transcript as the record of the documents filed in the superior court.*)

a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed, or if that is not available, the date the document was signed.

Document Title and Description	Date of Filing
---------------------------------------	-----------------------

- (1) Notice of appeal
- (2) Notice designating record on appeal (*this document*)
- (3) Judgment or order appealed from
- (4) Notice of entry of judgment (*if any*)
- (5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (*if any*)
- (6) Ruling on one or more of the items listed in (5)
- (7) Register of actions or docket (*if any*)

CASE NAME: Electronic Frontier Foundation v. Superior Court for the County of San Bernardino	SUPERIOR COURT CASE NUMBER: CIVDS 1930054
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4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

b. Additional documents. (If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)

I request that the clerk include in the transcript the following documents that were filed in the superior court proceeding. (You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)

	Document Title and Description	Date of Filing
(8)		
(9)		
(10)		
(11)		

See additional pages. (Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 4b," and start with number (12).)

c. Exhibits to be included in clerk's transcript

I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. (For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the superior court clerk within 10 days after service of this notice designating the record. (Rule 8.122(a)(3).))

	Exhibit Number	Description	Admitted (Yes/No)
(1)			
(2)			
(3)			
(4)			

See additional pages. (Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 4c," and start with number (5).)

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

You must complete both a and b in this section if you checked item 2b(1) above indicating that you choose to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.

a. Format of the reporter's transcript

I request that the reporters provide (check one):

- (1) My copy of the reporter's transcript in electronic format.
- (2) My copy of the reporter's transcript in paper format.
- (3) My copy of the reporter's transcript in electronic format and a second copy in paper format.

(Code Civ. Proc., § 271.)

CASE NAME: Electronic Frontier Foundation v. Superior Court for the County of San Bernardino	SUPERIOR COURT CASE NUMBER: CIVDS 1930054
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5. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1) 1/15/2021	S-19	Partial	Mot. to Unseal Judicial Records	Carrie Lane	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

See additional pages. *(Check here if you need more space to list additional proceedings. List these exhibits on a separate page or pages labeled "Attachment 5b," and start with number (5).)*

6. **NOTICE DESIGNATING PROCEEDINGS TO BE INCLUDED IN SETTLED STATEMENT**

(You must complete this section if you checked item 2b(3) above indicating you choose to use a settled statement.) I request that the following proceedings in the superior court be included in the settled statement. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

See additional pages. *(Check here if you need more space to list additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 6," and start with number (5).)*

7. a. The proceedings designated in 5b or 6 include do not include all of the testimony in the superior court.

b. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. *(Rule 8.130(a)(2) and rule 8.137(d)(1) provide that your appeal will be limited to these points unless the Court of Appeal permits otherwise.)* Points are set forth: Below On a separate page labeled "Attachment 7."

Date: 3/24/2021

Aaron Mackey
(TYPE OR PRINT NAME)

Aaron O'Mackey
(SIGNATURE OF APPELLANT OR ATTORNEY)

EXHIBIT 23

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

STIPULATION FOR JOINT APPENDIX

Aaron Mackey (SBN 286647)
amackey@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: 415.436.9333
Fax: 415.436.9993

Michael T. Risher (SBN 191627)
michael@riserlaw.com
LAW OFFICE OF MICHAEL T. RISHER
2081 Center Street, #154
Berkeley, CA 94702
Tel.: 510.689.1657
Fax: 510.225.0941

Counsel for Plaintiff-Appellant

STIPULATION FOR JOINT APPENDIX

Pursuant to California Rule of Court 8.124(a)(3), Appellant Electronic Frontier Foundation and Respondents Superior Court for the State of California, County of San Bernardino, San Bernardino County District Attorney’s Office, and San Bernardino County Sheriff’s Department (“Parties”), through their attorneys of record, hereby stipulate that the contents of the Joint Appendix in this appeal will consist of the documents listed below. The Parties reserve their rights to supplement the record beyond the contents of the Joint Appendix pursuant to California Rules of Court 8.124(b)(5)-(6).

The Parties further stipulate that pursuant to California Rule of Court 8.124(c)(1), Respondents, at the time they file their Response Brief(s), will also file, *ex parte* and under seal, (1) an unredacted copy of the Declaration of Christine Masonek and (2) copies of all search warrant affidavits ordered sealed by the Superior Court that form the basis of this appeal.


Date	Filing Party	Description
N/A	N/A	Register of Actions
10/8/2019	Petitioner	Verified Petition To Unseal Court Records
10/8/2019	Petitioner	Reporters Transcript – <i>EFF v. City of San Bernardino</i> , No. CIVDS1827591 (March 8, 2019) (Verified Petition - Exhibit A)
10/8/2019	Petitioner	EFF letter to Hon. John P. Vander Feer, Presiding Judge, Santa Barbara Superior Court (May 16, 2019) (Verified Petition – Exhibit B)
10/8/2019	Petitioner	Hon. John P. Vander Feer response letter to EFF (June 6, 2019)

Date	Filing Party	Description
		(Verified Petition – Exhibit C)
10/8/2019	Petitioner	Civil Case Cover Sheet
10/21/2019	Petitioner	Proof of Service of Summons
7/27/2020	Petitioner and Real Parties in Interest	Stipulation and [Proposed] Order to Partially Unseal Court Records
8/3/2020	Real Party in Interest San Bernardino County District Attorney	Objection Statement (Declaration by Mark Vos, For Real Party in Interest – District Attorney)
8/3/2020	Real Party in Interest San Bernardino County Sheriff's Department	Objection Statement (Declaration of Miles Kowalski, For Real Party in Interest – Sheriff's Department)
8/6/2020	Real Party in Interest San Bernardino County District Attorney	Disclosure of Unsealed Pages From Nine Sealed Search Warrant Packets
8/15/2020	Court	Order Unsealing Court Records
10/20/2020	Real Party in Interest San Bernardino County District Attorney	Notice of Motion For Judgment on the Pleadings; Points and Authorities in Support and Brief in Opposition to Unsealing; Request for Judicial Notice of Four Criminal Court Cases
10/20/2020	Real Party in Interest San Bernardino County District Attorney	Declaration of Christine Masonek, Under Seal
10/27/2020	Real Party in Interest San Bernardino	Supplemental Letter for Real Party District Attorney's Motion for Judgment on the Pleadings

Date	Filing Party	Description
	County District Attorney	
11/7/2020	Petitioner	Motion to Unseal Court Records and Opposition to Motion for Judgment on the Pleadings; Memorandum in Support
11/7/2020	Petitioner	Declaration of Michael T. Risher
11/10/2020	Real Party in Interest San Bernardino County District Attorney	Real Party District Attorney's Reply in Support of Motion for Judgment on the Pleadings
11/10/2020	Real Party in Interest San Bernardino County District Attorney	Notice of Motion and Motion to Seal the Redacted Portion of Christine Masonek's Declaration Lodged Conditionally Under Seal on Oct. 20, 2020
1/29/2021	Court	Notice of Ruling
3/25/2021	Petitioner	Notice of Appeal
3/25/2021	Petitioner	Notice of Election to Use Appendix
	Petitioner and Respondents	Stipulation for Joint Appendix

Dated: July 26, 2021

Respectfully submitted,


Aaron Mackey
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109

Michael T. Risher
LAW OFFICE OF MICHAEL T. RISHER
2081 Center Street, #154
Berkeley, CA 94702

Counsel for Plaintiff-Appellant

Dated: July 26, 2021

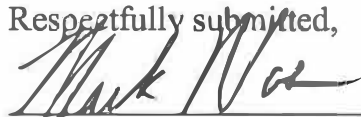
Respectfully submitted,

/s/ Jay Stephen Pascover
Jay Stephen Pascover
Superior Court of California,
County of San Bernardino
247 West Third Street, 11th Floor
San Bernardino, CA 92415

*Counsel for Defendant San Bernardino
County Superior Court-Respondent*

Dated: July 16, 2021

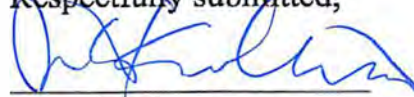
Respectfully submitted,


Mark Vos
James R. Secord
Office of The District Attorney
Appellate Services Unit
303 West 3rd Street, 5th Floor
San Bernardino, CA 92415

Counsel for Real Party in Interest San Bernardino County District Attorney's Office-Respondent

Dated: July 19, 2021

Respectfully submitted,



Miles Abernathy Kowalski
Office of County Counsel
385 N Arrowhead Avenue
San Bernardino, CA 92415

Counsel for Real Party in Interest San Bernardino County Sheriff's Department-Respondent

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 July 26, 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 July 26, 2021 at San Francisco, California.


Victoria Python