Supreme Court of California
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Supreme Court of California
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Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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.

After a Published Decision by the Court of Appeal, Fourth Appellate District, Division Two (Case No. E076778), Affirming a Judgment Entered by the Superior Court for the County of San Bernardino, Case No. CIVDS1930054
The Honorable Brian S. McCarville and The Honorable Dwight W. Moore presiding

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PETITION FOR REVIEW

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PETITION FOR REVIEW

I. Introduction.

Cell-site simulators are highly invasive surveillance tools that have been used by police for years with little oversight and even less transparency. These tools pretend to be cell towers and connect with every phone near them, meaning that they can capture details of both criminal suspects and wholly innocent people. Slip Op. at 2-3.[1] As the California legislature has recognized, cell-site simulators "raise fundamental civil liberty and privacy concerns that deserve to be considered by the public." SB 741 Senate Rules Committee Analysis ("SB 741 Legislative History") (Aug. 31, 2015) at 5.[2]

The Electronic Frontier Foundation (EFF), a nonprofit digital civil liberties organization, has long been concerned about law enforcement's use of cell-site simulators (CSS). EFF helped pass SB 741, California's landmark statute requiring authorities that deploy cell-site simulators to notify the public, to seek approval for their use, and to publish a use policy. Stats. 2014, c. 659, codified as Gov't Code § 53166. EFF also helped pass the California Electronic Communications Privacy Act (CalECPA), which created greater privacy protections for people's digital data and required greater transparency from authorities seeking that private information. Codified as Penal Code §§ 1546-1546.4.

Because of EFF's longstanding concerns about CSS, it sought access to search warrants materials and affidavits to understand how law

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[1] Attached as Exhibit 1.

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

enforcement use CSS and other technologies. Slip. Op. at 2-3. "San Bernardino County's law enforcement agencies were granted the most electronic warrants to search digital property per resident in the state," seeking more than 700 search warrants between 2016-18. 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, 2018) (Damien and Wyloge, *20 times more likely*);[3] *see* Slip Op. at 3. San Bernadino authorities almost always asked that the trial court keep their warrant and affidavit records secret indefinitely. *Id*.

EFF asked the San Bernadino Superior Court to unseal nine affidavits filed by the San Bernadino Sheriff's Department in support of search warrants issued and executed before March 2018. EFF relied upon Cal. Penal Code § 1534(a), which expressly makes all search warrant materials "open as judicial records" after execution of the warrant. In addition, EFF relied on the presumptive rights of access provided by the California Rules of Court, the common law, the California Constitution, and the First Amendment. EFF acknowledged that continued sealing of *some* parts of the affidavits might be warranted (for example, any information that might identify an informant), but argued that the remainder should be released with appropriate redactions.

There was no evidence in the record—outside of the warrants themselves—that unsealing these years-old affidavits would cause harm. Slip Op. at 31, n.7. And the related criminal investigations associated with the warrants had already ended, with some resulting in convictions. *Id*. at 4.

The superior court refused to unseal any part of the affidavits, based

[3] Available at https://www.desertsun.com/story/news/2018/07/23/san-bernardino-countys-electronic-records-probed-most-california/820052002/.

purely on its review of the affidavits and the warrants themselves. The Court of Appeal affirmed in a published opinion. *EFF v. Superior Court* (2022) 83 Cal.App.5th 407.

In affirming the superior court, the Court of Appeal expressly rejected the Second District's holding in *People v. Jackson* (2005) 128 Cal.App.4th 1009, that the public's rights of access presumes that search warrant affidavits are public court records, and that their sealing is governed by the First Amendment standard set forth in this Court's opinion in *NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court* (1999) 20 Cal.4th 1178. *Compare* Slip Op. at 17-18 with *Jackson*, 128 Cal.App.4th at 1021-23. Instead, the lower court held that the warrants can remain completely sealed under *People v. Hobbs* (1994) 7 Cal.4th 948, despite that case affirming partial unsealing of affidavits, even if they contain information about confidential informants. *Id*. at 971-72. The Court of Appeal also rejected *Jackson*'s holding that appellate courts must independently review the denial of a motion to unseal. Slip. Op. at 8-13.

The lower court's opinion creates a direct conflict with a sister court and new law that categorically bars access to search warrant affidavits if law enforcement includes any privileged information in the documents. Yet California has a long mandated public access to search warrants specifically, via § 1534(a), and more broadly under the Rules of Court, the common law, the California Constitution, and the First Amendment. In addition, the California Constitution guarantees that all of these public rights of access must be interpreted broadly. *Sierra Club v. Superior Ct.* (2013) 57 Cal.4th 157, 166. Despite this, the appellate court's decision elevated statutory privileges above the public's rights of access. The decision goes well beyond protecting specific law enforcement interests—it chips away at the public's fundamental right to know what their government is doing.

This Court should resolve these pure questions of law regarding the public's presumptive right to access court records and whether they attach to search warrant affidavits that have been executed and returned to a court. Resolving those legal questions does not require this Court to make factual determinations about whether law enforcement's needs for confidentiality overrode the public's presumptive rights of access to these particular affidavits.

If this decision is allowed to stand, the public could be unable to access court records reflecting law enforcement's use of invasive surveillance technologies, even years later, depending on whether trial courts follow *Jackson* or the lower court's decision. *See McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, n.4 (recognizing the dilemma of allowing trial courts to pick between conflicting appellate court authorities "until the Supreme Court resolves the conflict").

The decision is also out of sync with the Legislature's efforts—via SB 741 and CalECPA—to ensure greater transparency into and oversight of law enforcement's use of CSS, precisely because the technology raises distinct privacy concerns.

Without this Court's intervention, the Court of Appeal's decision also creates perverse incentives. Law enforcement agencies will be able to completely and indefinitely bar any access to search warrant affidavits simply by co-mingling information about confidential informants with other, less-sensitive information in affidavits. This conflicts with the clear mandate of § 1534(a) that these materials are made public after authorities execute the warrants, the Rules of Court, the constitutional rights of access to government information, and *Hobbs* itself: "[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." *Hobbs*, 7 Cal.4th at 954-55, 963. For these reasons, this Court should grant review.

II. Issues Presented for Review.

1. Penal Code section 1534(a) commands that search warrant affidavits "shall be open to the public as a judicial record" shortly after the warrant is executed. The California Constitution requires that this statute be read broadly in favor of transparency. *See* Cal. Const., art. I, § 3(b). May a court order that every word in eight search warrant affidavits remain sealed, years after the warrants have been executed?

2. California Rule of Court 2.550 states: "Unless confidentially is required by law, court records are presumed to be open" and defines "record" as "all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court." The California Constitution requires that the rule be read broadly in favor of transparency. *See* Cal. Const., art. I, § 3(b). Does the presence of any confidential material within a search warrant affidavit require a court to order that the record must remain sealed in its entirety?

3. The public's common law right of access attaches to all court orders, judgments, and all "documents filed in or received by the court." *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113. The Legislature and the people of California have supplemented the right via § 1534(a) and the Cal. Const., art I, § 3(b). Does the common law's presumption of public access require the disclosure of search warrant affidavits after they are executed and result in post-indictment proceedings, including criminal convictions?

4. Do the public's presumptive rights of access under the California Constitution and First Amendment attach to search warrant affidavits after the warrants are executed and result in post-indictment proceedings, including criminal convictions?

5. Should appellate courts engage in independent, de novo review of a trial court's order sealing judicial records when the trial court's conclusions are based solely on its review of the records in question?

III. Review Is Necessary To Resolve Several Legal Conflicts Regarding The Public's Right To Access Search Warrant Materials.

Review of the decision below is essential to resolving multiple clear conflicts in law that jeopardize the public's ability to access an entire category of judicial records—all search warrant affidavits reflecting law enforcement's use of invasive surveillance technologies. The Court of Appeal departed from well-settled law on how courts analyze whether to grant public access to judicial records. *NBC Subsidiary*, 20 Cal.4th at 1190-1218. The first step analyzes whether any legal authority creating a presumptive right of access attaches to a given judicial record or proceeding. *Id*. at 1190. If any public right of access attaches to the proceeding or record, they are "presumptively open" and can only be closed unless a court makes factual findings consistent with *NBC Subsidiary*. *Id*. at 1217-18.

The Court of Appeal's decision mangled this analysis. The decision held that specific concerns about material contained in the affidavits—factual questions that are addressed at the second step—foreclosed public access to an entire category of court records: search warrant affidavits executed and returned to a trial court. Slip Op. at 5.

This Court should grant review for at least three reasons.

First, the ruling conflicts with the public's presumptive rights of access to court records under Penal Code § 1534(a),[4] California Rules of Court 2.550-2.551 (Sealing Rules), and the common law. This conflict is all

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

the more pronounced because the California Constitution requires courts to construe these public access authorities broadly in support of transparency, while any exceptions must be interpreted narrowly. Ca. Const. art I, § 3(b).

Second, in departing from its sister court's decision in *Jackson*, the Court of Appeal's decision conflicts with the public's rights of access under the California Constitution and First Amendment, which attach to search warrant materials and presume they are public. *Compare Jackson*, 128 Cal.App.4th at 1021-23 *with* Slip Op. at 17-18. On top of conflicting with *Jackson*, the decision is an outlier among the federal appellate courts that have considered whether the First Amendment right of access attaches to search warrant materials after an investigation concludes and prosecutors initiate criminal proceedings.

Third, the Court of Appeal created another conflict with *Jackson* regarding the standard appellate courts use to review trial court sealing orders. Slip Op. at 9-13. *Jackson* held that appellate courts conduct independent, de novo review of a trial court's decision to seal search warrant affidavits from the public when its findings are based on a paper record. 128 Cal.App.4th at 1021. Despite *Jackson* being on all fours with EFF's case, the Court of Appeal held that trial court orders sealing certain privileged information should be reviewed for an abuse of discretion. Slip Op. at 9-13. Aside from the explicit conflict, the Court of Appeal's decision will insulate sealing orders from meaningful appellate court review—further frustrating public access in the process.

EFF respectfully requests that the Court grant review to resolve these conflicts and to vindicate the public's rights to access judicial records.

STATEMENT OF THE CASE

The Court of Appeal's opinion sets forth the facts of the case. Slip Op. at 2-5.

I. Cell-Site Simulators Raise Fundamental Civil Liberty And Privacy Concerns.

The California Legislature has recognized that CSS "raise fundamental civil liberty and privacy concerns that deserve to be considered by the public." SB 741 Legislative History at 5.[5] "By simulating a cellular communications tower's functions, these devices force all cell phones within the vicinity to transmit information to the devices." *Id*. at 4. That means a CSS is capable of capturing every phone call, text, email, and other data that routes its connection through the device. *Id*. CSS can capture other personal data from a device, including its location, records about the calls and other communications to and from it, and its unique identifier. *Id*. By design, CSS capture the signals from devices belonging to criminal suspects and anyone who happens to be near one. *Id*.

"The secrecy surrounding this technology raises substantial unanswered questions about the privacy and civil liberties implications of these devices, particularly because IMSI catchers collect information from the phones of anyone in the devices' vicinity, not just individuals targeted by law enforcement." *Id*. at 4. The Legislature also asked whether the search warrants that authorize law enforcement to use cell-site simulators "specifically allow for the collection of data from every cell phone that transmits to the devices." *Id*. at 5.

Between 2016-2018, San Bernardino law enforcement sought more than 700 search warrants for people's digital data. *See* Damien and Wyloge, *20 times more likely*. For the vast majority of those warrants, the Sheriff's Department sought to delay notifying the target, a practice that raised

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

concerns that "the department could be using technical loopholes in the system to carry out a broad dragnet of personal and electronic property without the public's knowledge." *Id*. In nearly all cases, authorities filed the search warrant applications and related materials under seal and requested that they remain secret indefinitely. Slip. Op. at 3.

II. EFF's Petition To Unseal Search Warrant Materials.

To learn more about San Bernadino County's extensive use of CSS, EFF filed a Verified Petition to Unseal Court Records in October 2019, asking the San Bernardino County Superior Court to make public, with redactions, a dozen search warrants and related materials filed with the court, executed, and then returned between 2017 and 2018. EFF learned about these warrants from a California Department of Justice website that publishes information about search warrants for digital data, as required by CalECPA. § 1546.2(c).

EFF sought public access to the search warrant materials to learn about:

> (1) the nature of the offenses under investigation, (2) the expertise and qualities of the affiants, (3) why the affiant believes the searches will assist the investigation, (4) the nature of the information to be provided under the warrant, (5) what providers must do to comply with the warrant, and (6) reasons for seeking sealing and/or nondisclosure.

Slip Op. at 3. EFF acknowledged that law enforcement could redact sensitive or privileged information contained in the search warrant materials while making the rest of the documents public. *Id*. at 26.

The District Attorney and Sheriff's Department initially stipulated that the court should unseal certain records from nine warrant filings with limited redactions: the warrants themselves, the sealing orders, and non-

disclosure orders that accompanied them. Slip Op. at 4. Law enforcement refused to disclose the search warrant affidavits for eight of the nine warrant filings. *Id*.

For the ninth warrant filing, law enforcement disclosed that in the course of reviewing it, they learned that the superior court had refused to seal anything in the warrant filing, meaning that the affidavit and all other materials should have been public. *Id*.

The District Attorney and Sheriff's Department moved for judgment on the pleadings to keep the remaining eight search warrant affidavits entirely under seal indefinitely. *Id*. at 4. By that time, law enforcement had completed all of its investigations related to every search warrant at issue, and several had resulted in advanced criminal proceedings—three criminal indictments and two convictions, with another defendant awaiting trial. *Id*.

The trial court declined to consider any evidence from the District Attorney and Sheriff's Department offered in support of their indefinite sealing request, which they attempted to file under seal without complying with the Sealing Rules. Slip Op. at 31, n.7. The trial court denied EFF's petition and ruled that information protected by *Hobbs* and evidentiary privileges for confidential informant identities and investigatory sources and methods required that the affidavits be sealed in their entirety indefinitely. *Id*. at 5.

III. The Court Of Appeal's Decision.

The Court of Appeal affirmed that the superior court's ruling that the search warrant affidavits could remain entirely under seal indefinitely. The court held:

1. EFF and all members of the public have standing to seek access to sealed judicial records. Slip Op. at 5-6.

2. The public had no presumptive right of access to the affidavits under § 1534(a). *Id*. at 6-7, 14-15.

3. The presumption of public access provided by Rules of Court 2.550-2.551 did not apply, much less require disclosure. *Id*. at 14-15.

4. The public's common law right of access did not require disclosure of the affidavits. *Id*. at 30.

5. The public's First Amendment right to access judicial records did not attach to search warrant affidavits. *Id*. at 16-17.

6. The right to access judicial records under Cal. Const. art. I, §§ 2, 3(b)(1) did not attach to the search warrant affidavits. *Id*. at 28-29.

7. The California Constitution's interpretive canon requiring that all laws providing public access to government records and proceedings be construed broadly, art. I, § 3(b)(2), did not change the outcome. *Id*.

8. The trial court's decision to seal the materials was subject to an abuse of discretion standard, despite Jackson's holding that such decisions are reviewed de novo. *Id*. at 8-15. The Court of Appeal further held it would have affirmed even under a de novo standard of review. *Id*. at 15.

9. Alternatively, the trial court's order sealing the search warrant affidavits in their entirety and indefinitely satisfied this Court's four-part test in *NBC Subsidiary*, 20 Cal.4th at 1217-18. Slip Op. at 25-26.

ARGUMENT

I. The Court Should Grant Review Because The Lower Court's Decision Significantly Expands Evidentiary Privileges To Categorically Deny The Public's Rights of Access To Search Warrant Affidavits.

The Court of Appeal transformed concerns about disclosing specific parts of search warrant affidavits into a categorical bar on public access to

these records. This created a clear conflict between statutory privileges and the California Constitution's command to interpret all transparency laws broadly. The privileges recognized by this Court's *Hobbs* decision and the Evidence Code effectively supersede the public's right to access search warrant affidavits, according to the Court of Appeal.

That conclusion conflicts with fundamental notions of law. Our state's Constitution reigns supreme, particularly when it comes to Californians' rights to access to government records. Art. I, § 3(b)(2) requires that every California "statute, court rule, or other authority, including those in effect [in 2004], shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." *See Sierra Club*, 57 Cal.4th at 166.

A. The Court of Appeal's Decision Conflicts With Section 1534(a)'s Search Warrant Disclosure Mandate.

The Court of Appeal neither followed § 1534(a)'s mandate nor gave it the interpretation required by the California Constitution. Section 1534 (a) "require[s] that the contents of a search warrant, including any supporting affidavits setting forth the facts establishing probable cause for the search, become a public record once the warrant is executed." *Hobbs*, 7 Cal.4th at 962. Section 1534(a) provides a 10-day period in which search warrant materials "need not be open to the public," but "[t]hereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record." § 1534 (a).[6]

Section 1534(a) additionally requires that warrants be served within

[6] The mandate has existed since at least 1963. Stats. 1963, c. 1331, p. 2855, § 1. Available at: https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1963/63Vol2_Chapters.pdf#page=2.

10 days of issuance. *See id*. It thus allows search warrant materials to be sealed while they may still be executed, but, if the warrant is executed, requires that they be made available to the public when that period expires.

1. The Decision Conflicts With *Hobbs*.

The Court of Appeal held that the public did not enjoy access to any search warrant affidavit that contained *Hobbs* materials. Slip Op. at 6-15.

The Court of Appeal did not follow this Court's instructions in *Hobbs*. *Hobbs* read § 1534(a) together with the privilege for confidential informants to hold that a court may seal only those parts of a search warrant affidavit that are "necessary to implement the privilege and protect the identify of [the] informant." 7 Cal.4th at 971. This Court instructed: "If the trial court, in entertaining a defense motion challenging the warrant, finds that any portions 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 disclosures should be ordered." *Id*. at 972, n.7. This Court then explained how courts can disclose search warrant affidavits while permitting law enforcement to withhold specific information subject to the privilege. *Id*. at 963. The decision allowed the government to withhold one of what must have been at least three exhibits to the search warrant affidavit (Exhibit C), while making the remainder available. *See id*. at 954-55.

This Court's analysis in *Hobbs* applies with even greater force in light of art. I, § 3(b)(2)'s pro-transparency interpretive canon. The rule of construction required the Court of Appeal to give a broad reading to § 1534(a)'s disclosure mandate and to construe *Hobbs* and the Evidence Code narrowly. *See Sierra Club*, 57 Cal.4th at 175. Thus the court should have presumed that the records could be released in redacted form.

The Court of Appeal further erred by concluding that art I, §

(3)(b)(5)'s statement that the constitutional canon did not repeal existing exceptions to disclosure, including for confidential law enforcement materials, supported its holding. *See* Slip Op. at 28-29. EFF never argued that art. I, § 3(b)(2) nullified *Hobbs* or any law enforcement privilege to withhold specific information in search warrant affidavits. EFF argued that art. I, § 3(b)(2) simply required redactions, rather than wholesale sealing.

Moreover, the Court of Appeal's decision renders the California Constitution's pro-transparency canon a nullity. The Court of Appeal's decision does not construe § 3(b)(5)'s exception language in harmony with § 3(b)(2)'s broad transparency mandate. If it had, the Court of Appeal would have released redacted versions of the affidavits, as it admitted that not every single sentence in the affidavits contained confidential information. Slip Op. at 27. Rather, its interpretation of *Hobbs* nullifies the transparency canon, permitting even less public access to search warrant affidavits than *Hobbs*. *Compare* Slip Op. at 28-29 *with* 7 Cal.4th at 971.

2. The Decision Expands Evidence Code Privileges To Swallow Public Access.

The Court of Appeal allowed naked invocations of Evidence Code §§ 1040-41 privileges to foreclose access to the affidavits, once more conflicting with section 1534(a) and the constitutional interpretive canon. Slip Op. at 6-15. The Court of Appeal's analysis of privilege claims under Evidence Code §§ 1040-41 in conjunction with § 1534(a)'s transparency mandate should have proceeded as follows.

First, the Court of Appeal should have determined whether the County met its burden to substantiate its privilege claims. Evidence Code § 1040's official-information privilege requires the government to show that it acquired the information at issue in confidence. *Shepherd v. Superior Ct.* (1976) 17 Cal.3d 107, 124-25, *overruled on other grounds by People v.*

Holloway (2004) 33 Cal.4th 96; *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126. It must then show that the information has not been disclosed to the public at the time it invokes the privilege. Evid. Code § 1040(a); *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 400. Similarly, Evidence Code § 1041's informant privilege requires the government to show that "the information is furnished in confidence to specified persons, the privilege is claimed by a person authorized by the public entity to do so, and disclosure is forbidden by an act of the United States Congress or California statute or disclosure of the informer's identity is against the public interest." *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 497–98. The Court of Appeal did not perform this step.

If the government satisfies these initial burdens, it must then make "a clear showing that disclosure is against the public's interest." *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656 ; *see Marylander*, 81 Cal.App.4th at 1126.[7] When the question is whether material should be released to the public—rather than whether it should be disclosed to a party in discovery—this is the same test as under Government Code § 6255. *CBS*, 42 Cal.3d at 656. Under this test, information must be made public unless the government "can demonstrate that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." *Id*. at 652. Appellate courts are required to "conduct an independent review of the trial court's statutory balancing analysis." *Id*. at 650–51.

The Court of Appeal's decision does not track this analysis or

[7] The government does not here claim that disclosure of the material is legally prohibited, which would also justify non-disclosure. *See* Evid. Code §§ 1040(b)(1), 1041(a)(1).

engage in the rigorous balancing required. Indeed, it could not. Both the trial court and Court of Appeal refused to consider any evidence, outside of the affidavits themselves, submitted by law enforcement in support of its privilege claims. Slip Op. at 30, n. 7. Law enforcement created the affidavits long before EFF's unsealing petition, so those documents do not speak to any current interest in nondisclosure, much less that the government had continued to maintain official information in confidence.

And, like the *Hobbs* analysis above, the Court of Appeal should have performed a more searching review of law enforcement's privilege claims in light of the constitutional canon of construction. *Sierra Club*, 57 Cal.4th at 175.

B. The Decision Conflicts With The Plain Text Of The Sealing Rules

The Court of Appeal's holding that the Sealing Rules do not attach to search warrant affidavits conflicts with their plain text and the constitutional interpretive canon. The Court of Appeal relied on the Advisory Committee's comments that "the rules do not apply to records that must be kept confidential by law," including "search warrant affidavits" sealed under *Hobbs*. Slip Op. at 15-16.

The Sealing Rules' plain text highlight the Court of Appeal's error. The Sealing Rules apply to all "records sealed or proposed to be sealed by court order." Rule 2.550(a)(1). The Sealing Rules presume those records are open to public inspection. Rule 2.550(c).

The Sealing Rules define a "record" subject to their presumption of public access as "*all or any portion of* any document, paper, exhibit, transcript, or other thing filed or lodged with the court." Rule 2.550 (b)(1) (emphasis added). Thus, for purposes of the Sealing Rules, "record" is capacious: it encompasses *both* entire judicial records and the contents of

those records. And that "record" definition must be construed broadly. Art. I, § 3(b)(2).

The Sealing Rules contain exceptions, but they too must be read in light of the textual "record" definition and the California Constitution's interpretive canon. Rule 2.550(a)(2) contains an exception for "records that are required to be kept confidential by law." Viewed in light of the Sealing Rules' definition of record—"all or any portion of any document"—Rule 2.550(a)(2)'s text except specific information contained in documents, rather than excepting entire documents. Thus, the Sealing Rules recognize the existing standards in the Evidence Code and *Hobbs* that restrict disclosure of particular information, rather than entire documents.

The Sealing Rules interpretation above is also consistent with the constitutional interpretive canon, because it requires Rule 2.550(a)(2)'s exception be interpreted narrowly. *See Sierra Club*, 57 Cal.4th at 175.

Finally, the Court of Appeal's decision committed plain error in relying on the Advisory Committee's comments, rather than the Sealing Rules' text. Those comments cannot trump the plain language of the Sealing Rules, any more than legislative history can trump the language of a statute. *See In re Alonzo J.* (2014) 58 Cal.4th 924, 933.

C. The Decision Conflicts With California's Common Law Right Of Access To Court Records.

The Court of Appeal's holding that EFF had no right to access the search warrant affidavits under the common law was also incorrect. Slip Op. at 30. The Legislature has bolstered this right of access via § 1534(a)'s mandate, the people of California have strengthened it in via art. I, § 3(b), and codified it via the Sealing Rules. The public's common law right of access, which attaches to all court orders, judgments, and all "documents filed in or received by the court," *Copley Press*, 6 Cal.App.4th at 113, is

therefore coextensive with these authorities for all the reasons discussed above. The Court of Appeal's decision thus conflicts with the common law right of access for the same reasons.

II. Review Is Necessary Because The Court Of Appeal's Decision Conflicts With The Public's Robust Rights Of Access To Court Records Under The California Constitution And The First Amendment.

A. The California Constitution's Right Of Access Cannot Yield To *Hobbs* And Evidence Code Privileges.

Article I, § 3 (b)(1) provides an independent right of access to search warrant materials, both because they are judicial records and because they comprise the writings of law enforcement officers. *See Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 (judicial records). The Court of Appeal treated this independent constitutional right of access as yielding to the interests protected by *Hobbs* and the Evidence Code privileges. Slip Op. at 28-29. This Court should take the opportunity to interpret art. I, § 3(b)(1)'s scope regarding public access to search warrant affidavits and to correct the Court of Appeal's misinterpretation of the clause.

The Court of Appeal overlooked that California's Constitution expanded the scope and substance of the public's right to access government records. "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Art. I, § 3 (b)(1). The provision "create[d] a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how." Argument in Favor of Proposition 59;[8]

[8] Available at https://vigarchive.sos.ca.gov/2004/general/propositions/prop

see also Official Title and Summary of Proposition 59 (stating that the amendment would establish a "right of access to . . . writings of government officials.")[9] *See Pro. Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037 (ballot materials are relevant to interpretation of constitutional amendment).

The Court of Appeal should have interpreted art. I, § 3(b)(1) as the supreme California authority on the public's right of access, taking precedence over statutory and other disclosure restrictions. In this case, that required the Court of Appeal to presume public access to the affidavits and to ensure any privileges applicable to information contained within the documents applied narrowly.

Although art. I, § 3(b) does not eliminate or supersede any constitutional or statutory exceptions to public access, *see* § 3(b)(5), its plain language mandates public access unless the government shows that some such provision authorizes it to withhold information. Yet there is no provision prohibiting access to search warrant affidavits generally.

Further, the Court of Appeal's observation that Californian's constitutional right of access is narrower than that enjoyed by the public under the First Amendment is also in conflict with art. I, § 3(b)(1) for three reasons. Slip Op. at 29-30.

First, the Court of Appeal ignored that the public's access rights emanate from both art. I, § 2's free expression clause and the substantive right of access in art. I, § 3(b)(1). That combination of overlapping constitutional access rights augurs in favor of access, particularly because art. I, § 2's free expression rights are "in both language and scope . . .

59-arguments.htm.

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

broader than the First Amendment." *San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498, 508.

Second, the Court of Appeal's observation that Californians enjoy less constitutional access rights than under the U.S. Constitution relied on cases decided before voters enacted art. I, § 3(b) in 2004. *See* Slip Op. at 29 (citing *San Jose Mercury-News*, 30 Cal.3d 498 (decided in 1982); *Press-Enterprise Co. v. Superior Court* (1984) 37 Cal.3d. 772, *overruled by Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1; *NBC Subsidiary*, 20 Cal.4th 1178 (decided in 1999). Art. I, § 3(b)(1) superseded these authorities to the extent they held or implied that California's Constitution provided less public access than the First Amendment.

Third, the Court of Appeal reasoned that because California does not recognize a right of access to law enforcement's *ex parte* warrant application proceedings, the public lacked a right to access the court records from that proceeding. Slip Op. at 30. Yet courts have recognized that the public's right to access judicial records arising out of otherwise closed proceedings must be analyzed separately from the public's right to access the underlying proceeding, and that analysis can yield different results. *See U.S. v. Index Newspapers* (9th Cir. 2014) 776 F.3d 1072 (holding that although the grand jury proceedings are traditionally secret, the public had a First Amendment right of access to judicial records reflecting ancillary grand jury proceedings).[10] Allowing public access to warrant proceedings would be absurd because it would allow the targets of those warrants to flee or to destroy (or to simply move) incriminating evidence. Allowing access to affidavits years after the warrants have been

[10] EFF never sought access to law enforcement's *ex parte* search warrant application proceedings, nor did it dispute that the public traditionally lacks access to them.

executed poses no such problems, as the Legislature recognized when it enacted § 1534(a).

B. The Court of Appeal's Holding That The First Amendment Right Of Access Does Not Attach To Search Warrant Affidavits At Any Stage In A Proceeding Is An Extreme Outlier.

1. The Decision Conflicts With *Jackson*.

The Court of Appeal was not the first California appellate court to decide whether the public's First Amendment right of access attached to search warrant affidavits. *Jackson* had already held that the First Amendment and Sealing Rules attached and presumed that affidavits should be public. *See* 128 Cal.App.4th at 1021-23.

Jackson contains no language to qualify its holding that the public's right of access attached to search warrant affidavits, nor can that aspect of its decision be considered dicta. Quite the opposite: the public's First Amendment right to access search warrant affidavits was a central issue to resolving the case. *Jackson*, 128 Cal.App.4th at 1020-23 (reviewing this Court's precedent and analyzing the history and utility supporting access to search warrant affidavits). Another appellate court has recognized *Jackson* as holding that the First Amendment right of access attaches to search warrant affidavits. *See Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 651.

The Court of Appeal created an express conflict with *Jackson*'s holding that the First Amendment presumes access to search warrant affidavits. This Court should resolve that conflict.

2. The Decision Conflicts With This Court's First Amendment Analysis In *NBC Subsidiary*.

The Court of Appeal's decision also conflicts with *NBC Subsidiary*.

The decision fails to follow the two-part history and utility test this Court has adopted for determining when the First Amendment right of access attaches to judicial records. Slip Op. at 22-25.

The most important factor in determining whether the public has a First Amendment right of access is utility. *See NBC Subsidiary*, 20 Cal. 4th at 1206. This prong of the test asks whether public access enhances public understanding of the justice system. *Id*. at 1219.

The utility factor is well met here. Public access to the affidavits long after law enforcement has executed and returned the warrants, and concluded their underlying investigations, allows public scrutiny of the court's willingness to authorize law enforcement's surveillance. With respect to the specific affidavits at issue here, access will enhance the public's understanding of law enforcement's use of technologies that can impact innocent people's civil liberties and privacy. The Legislature has indicated those concerns require greater transparency. *See* SB 741 Legislative History at 4-5.

Current events provide a vivid example of the why public access to search warrant affidavits matters. After federal law enforcement searched former President Donald Trump's residence at Mar-a-Lago, the contents of the search warrant and the affidavit became of intense interest to the public. *See* Patricia Mazzei and Alan Feuer, *Judge May Release Affidavit in Trump Search, but Only After Redaction*, New York Times (Aug. 18, 2022).[11] In response, a federal court ordered the disclosure of the affidavit, with sensitive information redacted. *See In re Sealed Search Warrant* (S.D. Fla. Aug. 22, 2022) No. 22-8332-BER, 2022 WL 3582450, at *5; *In re Sealed Search Warrant* (S.D. Fla. Aug. 25, 2022) No. 22-8332-BER, 2022 WL

[11] Available at https://www.nytimes.com/2022/08/18/us/politics/trump-fbi-affidavit-warrant.html.

3656888, at *1. Although the court resolved the access question on common law grounds, the decision demonstrates how disclosure of a redacted affidavit can provide important information to the public regarding the conduct of law enforcement and the court, all while maintaining the secrecy of sensitive national security information.[12]

The Court of Appeal did not follow *NBC Subsidiary*'s utility analysis. Slip Op. at 23-25. Instead the Court of Appeal allowed generalized law enforcement concerns to override the public's interest in obtaining access to these records, even though all of the underlying investigations had concluded and several had resulted in convictions. Slip Op. at 23-25 (citing *In re Search of Fair Finance* (6th Cir. 2012) 692 F.3d 424). According to the Court of Appeal, the public benefit of disclosing these affidavits can never outweigh law enforcement's interests—even months or years after a conviction.

3. The Decision Conflicts With The Majority of Federal Appellate Courts.

The Court of Appeal's First Amendment analysis also conflicts with the majority of federal appellate courts that have considered whether the public's right of access attaches to search warrant materials.

First, the Court of Appeal's decision conflicts with Ninth Circuit law holding, just as this Court held in *NBC Subsidiary*, that utility "alone, even without experience, may be enough to establish the right of access." *In re Copley Press, Inc.* (9th Cir. 2008) 518 F.3d 1022, 1026.

On the history prong, the Court of Appeal's decision conflicts with three federal circuits.

The Eighth Circuit has recognized a history of access to warrant

[12] Available at https://apps.npr.org/documents/document.html?id=22267188-mar-a-lago-affi.

materials once they have been executed. *See In re Search Warrant for the Secretarial Area Outside the Office of Thomas Gunn* (8th Cir. 1988) 855 F.2d 569. The court held that historically, "search warrant applications and receipts are routinely filed with the clerk of the court without seal," making them open for public inspection once they were executed. *Id*. at 573.

The Ninth Circuit has held that although courts have historically not granted public access "while a pre-indictment investigation is still ongoing," public access is presumed after an indictment has been issued. *Times-Mirror v. United States* (9th Cir. 1989) 873 F.2d 1210, 1214-15. "Post-investigation, however, warrant materials 'have historically been available to the public.'" *United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Montana* (9th Cir. 2011) 658 F.3d 1188, 1193 (*Custer Battlefield*) (quoting *In re N.Y. Times Co.* (D.D.C. 2008) 585 F.Supp.2d 83, 88.[13]

The Fourth Circuit has adopted the Ninth Circuit's recognition of a history of public access to search warrant materials after prosecutors have initiated criminal proceedings. *See Baltimore Sun Co. v. Goetz* (4th Cir. 1989) 886 F.2d 60, 64-65 (adopting *Times-Mirror*'s analysis).

The Court of Appeal declined to follow any of these federal appellate courts and instead adopted the Sixth Circuit's analysis in *Fair Finance*. Slip Op. at 20-21. That decision is an outlier when compared to the other federal appellate cases above. It holds that there is no historic tradition of public access to search warrant materials at any stage of a

[13] The Court of Appeal faulted EFF's reliance on *Custer Battlefield* because it concerned the common law right of access to search warrant materials, rather than a First Amendment right of access. Slip Op. at 22-23. EFF's point was that the judiciary's historical treatment of search warrant affidavits can apply to both the common law and First Amendment analysis, particularly when both doctrines consider whether certain records or proceedings have historically been open to the public.

criminal proceeding, even after an indictment. *See Fair Finance*, 692 F.3d at 431-32.

III. The Court of Appeal's Decision Creates a Conflict Concerning The Standard Used to Review Appeals From Trial Court Orders Sealing Judicial Records.

The Court of Appeal adopted an abuse-of-discretion standard of review, conflicting with *Jackson* and undermining the public's substantive rights to access judicial records. The Court of Appeal created additional conflict beyond *Jackson*, including with authorities holding that (1) pure legal questions are reviewed de novo, (2) in open-government cases, withholdings under the official-information privilege are reviewed de novo, and (3) cases implicating constitutional rights are reviewed independently.

A. The Court of Appeal Should Have Applied *Jackson*'s De Novo Review Standard.

This case is identical to *Jackson*. EFF asserted the public's right to access judicial records in an effort to unseal several search warrant affidavits that had been filed with the court, executed on their targets, and returned to the court. Slip. Op. at 3-4. In *Jackson*, a television station sought to unseal an affidavit in support of search warrant that was executed at Michael Jackson's Neverland Ranch and returned to the court. 128 Cal.App.4th at 1015. And much like in *Jackson*, in EFF's unsealing petition, there was no live testimony for the court to review, and the trial court did not consider any evidence submitted by the Respondents in support of sealing. Slip Op. at 31, n.7; *see Jackson*. 128 Cal.App.4th at 1021. Thus in both cases, there was only a paper record.

Jackson concluded that independent, de novo review was the appropriate standard after analyzing cases reviewing other trial court orders concerning access to sealed judicial records, the standards applied when

reviewing legal issues, and the standards applied when cases raise First Amendment issues. *Id*. at 1018-20.

Jackson relied on *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 302, which held that the presumption of public access to court records under the First Amendment and Sealing Rules encourages courts to unseal court records. 96 Cal.App.4th at 302. The presumption makes it easier for courts to unseal records by not requiring courts to make specific findings when they enable greater transparency. *Id.* And it is why *Providian* held that appellate courts reviewing unsealing orders creating greater public access should employ an abuse-of-discretion standard, rather than reviewing them de novo. *Id*. at 299-300.

But an abuse-of-discretion standard is not appropriate when reviewing a trial court order sealing records because they close off public access, which is contrary to the pro-transparency presumptions in the Sealing Rules and First Amendment. *Jackson*, 128 Cal.App.4th at 1020.

B. California And Federal Courts Review Legal Questions De Novo

The Court of Appeal failed to follow this Court's instruction that appellate courts must review pure questions of law de novo. *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 860. Whether the public has a right to access search warrant affidavits under Penal Code § 1534(a), the Sealing Rules, the common law, the California Constitution, or the First Amendment are pure legal questions. Federal appellate courts reviewing sealing decisions similarly engage in de novo review of legal questions regarding whether the public's rights of access attach to particular judicial records. *See United States v. Doe* (9th Cir. 2017) 870 F.3d 991, 996.

The Court of Appeal's adoption of an abuse of discretion standard plainly conflicts with this Court's direction on reviewing pure legal

questions. And the decision's reliance on federal court's employing abuse of discretion standards in unsealing cases is also misplaced. Slip Op. at 11.

The Ninth Circuit uses an abuse of discretion standard only after it determines that the district court (1) applied the correct law and (2) that it "'conscientiously balance[d]' the interests of the public and the party seeking to keep secret certain judicial records." *Doe*, 870 F.3d at 996. (quoting *Custer Battlefield*, 658 F.3d 1195). That balancing must be based on a robust record that ensures meaningful appellate review of the sealing order. *See Phoenix Newspapers v. District Court* (9th Cir. 1998) 156 F.3d 940, 949. A district court's failure (1) to apply the correct substantive law or (2) to consciously weigh specific facts is an abuse of discretion. *U.S. v. Sleugh* (9th Cir. 2018) 896 F.3d 1007, 1012.

Thus, even if the Ninth Circuit's abuse-of-discretion standard applied here, the Court of Appeal's decision would conflict with it. The decision both failed to apply the correct law and lacked a robust record upon which it could review the trial court's findings. Slip Op. at 31, n.7

C. In Open-Government Cases, California Courts Review Public Records Act Withholdings Involving Evidence Code Privileges De Novo

The Court of Appeal's decision also conflicts with the standard courts use when reviewing similar privilege claims to withhold records under the California Public Records Act, Gov. Code § 6250 *et seq* (CPRA). Appellate courts review trial court orders to withhold records under the CPRA de novo, deferring only to any factual findings made by the trial court. *See CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 66-67. This review requires the appellate courts to "undertake the weighing process anew." *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 612.

The conflict means that trial court sealing orders under the Evidence Code and *Hobbs* are subject to less searching review than other decisions withholding government records from the public based on the same legal privileges. This will produce anomalous results: the appellate court's standard of review of the same public records could turn on whether the request for public disclosure comes via the CPRA or via an assertion of public access to court records.

D. Courts Review Cases Implicating Constitutional Rights Independently

The Court of Appeal also conflicts with decisions by this Court and others that apply heightened review to cases that implicate First Amendment rights. Those cases conduct a more searching review precisely because courts must tread carefully when deciding cases that may intrude upon people's constitutional rights, to ensure "that protected expression will not be inhibited." *In re George T.* (2004) 33 Cal.4th 620, 633 (quoting *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 505). The Ninth Circuit reviews de novo "mixed questions of law and fact that implicate constitutional rights," for the same reason. *Wright v. Incline Vill. Gen. Improvement Dist.* (9th Cir. 2011) 665 F.3d 1128, 1133 (citations omitted).

The Court of Appeal rejected these authorities, reasoning that the public's First Amendment right of access to judicial records is a lesser right than other First Amendment rights. Slip Op. at 10-11. The implication of that line of reasoning reflects a dangerously narrow view of the public's rights to understand what California courts do in their name.

IV. The Court of Appeal's Decision Will Allow Law Enforcement To Bar Access To Search Warrant Affidavits By Co-Mingling Sensitive Information With Material That Should Be Public.

Finally, the Court of Appeal's decision will allow police agencies to

circumvent the constitutional and statutory disclosure requirements described above simply by co-mingling sensitive information with information that can and should be disclosed to the public. It has been clear since *Hobbs* that affidavits should segregate sensitive information (there, in a separate attachment) so that the remainder can be released to the public. *See Hobbs*, 7 Cal.4th at 954-55, 963. The government has not suggested any reason that law enforcement cannot do this. Yet the Court of Appeal's decision gives them incentive to co-mingle sensitive and non-sensitive information and then argue that this makes it impracticable to release any part of an affidavit. *See* Civ. Code § 3517 ("No one can take advantage of his own wrong.").

CONCLUSION

EFF respectfully requests that this Court grant its petition for review.

Dated: October 25, 2022

Respectfully submitted,

/s/ Aaron Mackey

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ATTACHMENT

Exhibit 1

Court of Appeal, Fourth Appellate District, Division Two
Kevin J. Lane, Clerk/Executive Officer
Electronically FILED on 9/15/2022 by K. Mendez, Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ELECTRONIC FRONTIER FOUNDATION, Plaintiff and Appellant, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Defendant and Respondent; SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S OFFICE et al., Real Parties in Interest and Respondents.	E076778 (Super. Ct. No. CIVDS1930054) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville and Dwight W. Moore, Judges. Affirmed.

Electronic Frontier Foundation and Aaron Mackey; Law Office of Michael T. Risher and Michael T. Risher, for Plaintiff and Appellant.

Neon Law Foundation and Nicholas Shook; First Amendment Coalition, Glen A. Smith, David E. Snyder and Monica N. Price as Amici Curiae on behalf of Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Jason Anderson, District Attorney, and Mark A. Vos, Deputy District Attorney, for Real Party in Interest and Respondent, District Attorney.

Michelle D. Blakemore, County Counsel, and Miles Kowalski, Deputy County Counsel, for Real Party in Interest and Respondent, the Sheriff.

I.

INTRODUCTION

Between 2018 and 2020, Electric Frontier Foundation (EFF) moved to unseal affidavits filed in support of executed search warrants requested by the San Bernardino County Sheriff's Department (the Sheriff) and issued under seal by the San Bernardino Superior Court between March 2017 and March 2018. The trial court denied EFF's motion and ordered the affidavits to remain sealed. EFF appeals, and we affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

EFF is a "non-profit civil liberties organization working to protect and promote fundamental liberties in the digital world." According to EFF, cell-site simulators always collect the digital data of innocent people. "A cell-site simulator works as its name suggests—it pretends to be a cell tower on the network of the target phone's service provider. It takes advantage of the fact that a cell phone—when turned on—constantly seeks out nearby cell towers, even if the user is not making a call. Furnished with identifying information concerning the target phone, the cell-site simulator searches for

that phone. When the cell-site simulator is close enough, the target phone will connect to it as though it were a cell tower." (A.L.R. Criminal Law, Art. XVII, § 392.38(15).

EFF claims law enforcement authorities in San Bernardino County lead the state in the use of cell-site simulators. According to EFF, the Sheriff regularly seeks warrants to use cell-site simulators while moving to keep the warrants sealed indefinitely, and the San Bernardino County Superior Court (the Superior Court) largely grants the request when issuing the warrants. EFF has sought information about numerous search warrants issued by the Superior Court, but this case is about EFF's request for eight search warrants.

Because of its concerns about the use of cell-site simulators, EFF petitioned to unseal eight "search warrant packets" that contained warrants issued by the Superior Court between March 2017 and March 2018 that allowed the Sheriff to use cell-site simulators. (See Cal. Rules, rule 2.551(h)(2).[1]) EFF sought the search warrant materials "to learn more about (1) the nature of the offenses under investigation, (2) the expertise and qualities of the affiants, (3) why the affiant believes the searches will assist the investigation, (4) the nature of the information to be provided under the warrant, (5) what providers must do to comply with the warrant, and (6) reasons for seeking sealing and/or nondisclosure."

[1] All further references to the "Rules" are to the California Rules of Court.

The Sheriff and the San Bernardino County District Attorney (collectively, the County) did not object to the unsealing of one warrant packet (SBSW 18-0850), but opposed the unsealing of portions of the seven other warrant packets.

Specifically, the County argued the returns to the executed search warrants and the so-called "*Hobbs* affidavits"[2] in support of the warrants should remain sealed indefinitely, because they contain sensitive information about confidential informants (Evid. Code, § 1041) and "official information," meaning information "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) In total, the County argued about 80 pages of information from about 120 pages of the search warrant packets should remain sealed. Under the parties' stipulation, the County provided EFF with portions of the search warrant packets that the County did not oppose unsealing. The County then moved for judgment on EFF's petition and requested that the warrant packets remain sealed except for the select portions that the County had provided to EFF.

The trial court held a hearing on the County's motion in January 2021. At the time of the hearing, the proceedings related to the eight search warrants were at different stages. All of the warrants had been executed and their related investigations had all been completed. Some of the warrants had contributed to three indictments and two convictions, while another defendant was still awaiting trial at the time of the hearing.

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[2] *People v. Hobbs* (1994) 7 Cal.4th 948, 962 (*Hobbs*).

After a hearing on the parties' requests, the trial court denied EFF's petition and ordered the affidavits to remain sealed indefinitely.[3] The trial court found that EFF was not entitled to the release of the affidavits and, even if it were, the County had a compelling interest in keeping them sealed to protect "confidential informant identity" and investigatory "sources and methods." The court further found that nothing in the *Hobbs* affidavits could be even partially released. EFF timely appealed.

III.

DISCUSSION

EFF argues the trial court should have unsealed the search warrant affidavits under Penal Code section 1534, subdivision (a) (section 1534(a)), Rules 2.550 and 2.551, the First Amendment, the California Constitution, and common law. We disagree.

1. *EFF's Standing*

The County suggests that EFF lost standing to move to unseal the affidavits once the trial court decided that they should remain sealed. We disagree. "'A litigant's standing to sue is a threshold issue to be resolved *before* the matter can be reached on the merits. [Citation.]'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345, italics added.) A party's standing is thus a jurisdictional issue "unrelated to the merits" of the action. (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592.) EFF, like every other member of the public, "'has a legitimate interest and right of general access to court

[3] The trial court also ordered that the returns to the search warrants remain sealed, but EFF does not challenge that order. EFF appeals only the trial court's order sealing the *Hobbs* affidavits.

records'" and thus has standing to sue to unseal the search warrants. (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 318; Rule 2.551(h)(2) ["A party or member of the public may move, apply, or petition . . . to unseal a record."].)

2. *Section 1534(a)*

Section 1534(a) provides that a warrant and its related documents need not be made public for 10 days after its issuance. "Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record." (§ 1534(a).)

EFF argues that the search warrant packets had to be unsealed under section 1534(a) because the warrants had been executed long before EFF moved to unseal them. But, as the County correctly observes, the confidential informant privilege in Evidence Code section 1041 creates "an exception to [section 1534(a)]." (*Hobbs*, *supra*, 7 Cal.4th at p. 962.) Under this exception, a search warrant affidavit that contains information about a confidential informant, also known as a "*Hobbs* affidavit," may be sealed in whole or in part to protect the informant's identity. (*Id.* at pp. 971-975; *People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1052.) Similarly, under Evidence Code section 1040, a public entity has a qualified right not to disclose official information if "[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, subd. (b)(2).) This privilege applies to official non-public information obtained by prosecutors and their law enforcement counterparts. (See *Wood v. Superior Court* (2020) 46 Cal.App.5th 562, 584;

Shepherd v. Superior Court (1976) 17 Cal.3d 107, 123, overruled on other grounds by *People v. Holloway* (2004) 33 Cal.4th 96, 131.)

EFF argues we should apply the four-part test in *NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC Subsidiary*) to determine whether the trial court properly found the *Hobbs* affidavits should not be unsealed under section 1534(a). But EFF does not cite, and we are unaware of, any case in which that test was used to evaluate whether a *Hobbs* affidavit should be unsealed.[4]

On the other hand, *Hobbs* outlines a procedure trial courts must follow to determine whether to unseal a *Hobbs* affidavit. (*Hobbs*, *supra*, 7 Cal.4th at pp. 972-975.) "The court's first step is to determine whether the affidavit or any major portion of it has been properly sealed. [Citation.] This question entails two determinations: 'It must first be determined whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. It should then be determined 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.' [Citation.] If the court 'finds that

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[4] For instance, EFF relies heavily on *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, for the proposition *Hobbs* affidavits may be sealed only if *NBC Subsidiary*'s four-part test is satisfied. But that civil proceeding did not concern sealed search warrant materials. Noting that there is a "strong presumption . . . of public access to court records in ordinary civil trials," the court there held that "family law departments may close their courtrooms and seal their court records only in limited circumstances, and only when they expressly identify the particular facts that support the existence of *NBC Subsidiary*'s constitutional standards." (*Id.* at p. 1575.) As explained in more detail below, orders sealing search warrant materials apply different standards given the substantive and procedural differences between civil court records and search warrant materials.

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.' [Citation.]" (*People v. Heslington* (2011) 195 Cal.App.4th 947, 957.) Trial courts must follow a similar procedure to determine whether official information should remain sealed under Evidence Code section 1040. (See *People v. Acevedo*, *supra*, 209 Cal.App.4th at p. 1056; *People v. Bradley* (2017) 7 Cal.App.5th 607, 626; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021.) We are unaware of any authority that suggests the *NBC Subsidiary* test supplanted these procedures.

EFF argues, and the County agrees, that we review de novo the trial court's ruling that nothing in the *Hobbs* affidavits should be unsealed. We disagree. Our Supreme Court has held that a trial court's ruling that official information under Evidence Code section 1040 should not be disclosed is reviewed for an abuse of discretion. (See *People v. Suff* (2014) 58 Cal.4th 1013, 1059 ["A trial court has discretion to deny disclosure [of official information] . . . when the necessity for confidentiality outweighs the necessity for disclosure . . . [and its] ruling is reviewed under the abuse of discretion standard."].) The court in *Hobbs* also held that the trial court did not abuse its discretion "in conducting its own in camera review of the sealed materials [and] affirming the magistrate's determination that the sealing of the entirety of [the search warrant application] was necessary to implement the People's assertion of the informant's privilege" under Evidence Code section 1041. (*Hobbs*, *supra*, 7 Cal.4th at p. 976.)

These holdings are consistent with the court's many cases holding that a trial court's ruling that evidence is statutorily privileged and need not be disclosed is reviewed for an abuse of discretion. (E.g., *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 457, fn. 18; *People v. Avila* (2006) 38 Cal.4th 491, 607.)

At oral argument, EFF vigorously argued that we should apply a de novo standard of review. But the cases EFF cited in its briefs and at oral argument are either distinguishable or unpersuasive.

The main case EFF (and the County) relies on is *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1020 (*Jackson*). There, various news organizations appealed the trial court's denial of their motion to unseal various documents, including search warrant affidavits, under the predecessor to California Rule of Court, rule 2.550 in the child molestation case against pop star Michael Jackson. (*Id.* at p. 1014.) The *Jackson* court broadly read our Supreme Court's decision in *In re George T.* (2004) 33 Cal.4th 620, 634 (*George T.*) and the United States Supreme Court's decision in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485 (*Bose*), as holding that "cases implicating First Amendment rights are subject to independent review."[5] (*Jackson*, *supra*, at p. 1021.)

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[5] "Independent review" is not the same as de novo review. (*George T.*, *supra*, 33 Cal.4th at p. 634.) Under independent review, the appellate court defers to the trial court's credibility determinations, whereas under de novo review the appellate court "'makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different." (*Ibid.*) The distinction is immaterial here because the trial court did not take testimony and made no credibility determinations, so EFF argues (and we agree) that independent review is equivalent to de novo review here. (See *Jackson*, *supra*, 128 Cal.App.4th at p. 1021.)

But *George T.*, *Bose*, and the First Amendment cases it discussed were about whether certain speech was protected under the First Amendment. In that context, courts routinely apply independent review to resolve whether the speech at issue is constitutionally protected. (See *George T.*, *supra*, at pp. 632-634.) In *George T.*, for instance, the court had to decide whether the minor's speech was a criminal threat or lawful speech. (*Ibid.*) In *Bose*, the high court had to decide whether a magazine article was defamatory or protected speech. (*Bose*, *supra*, 466 U.S. at p. 505; *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1162 [applying independent review under *Bose* because "the appellate issue is whether a particular communication falls outside the protection of the First Amendment"].)

But neither decision concerned whether court records should be sealed or unsealed due to First Amendment concerns. Neither *George T.*, *Bose* nor the *Jackson* courts had occasion to consider Evidence Code sections 1040 or 1041 and the corresponding standard of review for a trial court's decision under either provision.

The *Jackson* court did, however, note that "'codified privileges and decisional rules together comprise an exception to [section 1534(a)'s] requirement that the contents of a search warrant . . . become a public record once the warrant is executed.'" (*Jackson*, *supra*, 128 Cal.App.4th at pp. 1022-1023, quoting *Hobbs*, *supra*, at p. 962.) *Hobbs* confirms that trial courts must exercise their "'broad discretion'" to balance these privileges and rules against other interests, such as a defendant's Fourth Amendment rights or his right to a fair trial when deciding whether to keep search warrant materials

sealed. (*Hobbs*, 7 Cal.4th at p. 970.) In *Hobbs*, for instance, the trial court denied a criminal defendant's motion to unseal search warrant materials on the ground that doing so would jeopardize the safety of a confidential informant even though the defendant sought the materials to challenge the legality of a search warrant. (*Id.* at pp. 955-957.) Our Supreme Court held the trial court properly "acted within its sound discretion" in denying the motion. (*Id.* at p. 976.)

We discern no compelling reason why a trial court's ruling on a criminal defendant's motion to unseal search warrant materials that may show that the resulting search violated the defendant's Fourth Amendment rights should be reviewed for an abuse of discretion while a motion to unseal search warrants should be reviewed de novo when the First Amendment is implicated. Several courts have held explicitly that a trial court's sealing order is reviewed for an abuse of discretion even when the First Amendment is at play. (See, e.g., *United States v. Doe* (2d Cir. 1995) 63 F.3d 121, 125 [reviewing order closing court proceedings for an abuse of discretion]; *Flynt v. Lombardi* (8th Cir. 2018) 885 F.3d 508, 511 ["[W]e review the district court's ultimate decision to seal or unseal for an abuse of discretion"]; *United States v. Doe* (9th Cir. 2017) 870 F.3d 991, 996 ["[W]e review a decision whether or not to seal the judicial records for abuse of discretion"]; *In re Los Angeles Times Communications LLC* (D.C. Cir. 2022) 28 F.4th 292, 297 [same].) We therefore respectfully disagree with the *Jackson* court's overly broad reading of *George T.* and *Bose* as holding that that *all* cases implicating the First Amendment require independent or de novo review.

The two other cases EFF primarily relied on in its briefs are similarly distinguishable. Neither *Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471 nor *Mercury Interactive Corp. v. Klein*, 158 Cal.App.4th 60, 81 (2007), involved search warrants, *Hobbs* affidavits, or confidential information subject to nondisclosure under Evidence Code sections 1040 or 1041. These cases therefore do not apply here. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["[C]ases are not authority for propositions not considered."].)

EFF emphasized at oral argument that various appellate courts have applied de novo review in "right to access" cases implicating the First Amendment. But we must decide whether the trial court erroneously denied EFF's motion to unseal under Evidence Code sections 1040 and 1041 or whether EFF's First Amendment rights trump those statutory privileges. Again, our Supreme Court has made clear that we review that decision for an abuse of discretion. (See *Hobbs*, *supra*, 7 Cal.4th at p. 971; *People v. Suff*, *supra*, 58 Cal.4th at p. 1059; see also *People v. Luttenberger* (1990) 50 Cal.3d 1, 21 [trial court has discretion to order discovery concerning confidential informant's statements in warrant affidavit].) Our colleagues in other courts of appeal have followed suit. (See e.g., *People v. Washington* (2021) 61 Cal.App.5th 776, 794 ["We review the trial court ruling on a motion to unseal a search warrant affidavit for an abuse of discretion," citing *Hobbs*, *supra*, 7 Cal.4th at p. 976.]; *People v. Bradley* (2017) 7 Cal.App.5th 607, 620 [reviewing trial court's decision to deny disclosure of an

informant's identity under Evidence Code section 1041 for abuse of discretion]; *People v. Acevedo*, *supra*, 209 Cal.App.4th at p. 1055.)

This makes sense because when deciding whether to seal or unseal a *Hobbs* affidavit when the People invoke the protections of Evidence Code sections 1040 or 1041, the trial court must make a fundamentally discretionary decision. The court must weigh the government's interests in maintaining information confidential against the public's general right to access court records (or a criminal defendant's right to challenge a warrant). (See *Hobbs*, *supra*, 7 Cal.4th at pp. 962, 971-972; *People v. Galland* (2008) 45 Cal.4th 354, 367.) After all, "the First Amendment right of access is flexible, not absolute" and must sometimes yield to "an overriding interest," such as protecting information deemed privileged under Evidence Code sections 1040 and 1041. (See *People v. Connor* (2004) 115 Cal.App.4th 669, 697; *Hobbs*, *supra*, at pp. 962, 971-971; see also *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 222 ["[W]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed."].)

We therefore conclude the abuse-of-discretion standard is appropriate here. (See *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277 ["We review the trial court's ruling concerning the disclosure of the identity of a confidential informant under the abuse of discretion standard," citing *Hobbs*, *supra*, 7 Cal.4th at p. 976; see also *People v. Bradley*, *supra*, 7 Cal.App.5th at p. 620; *People v. Kelly* (2018) 28 Cal.App.5th 886, 906.)

"To establish an abuse of discretion, [a party] must demonstrate that the trial court's decision was so erroneous that it 'falls outside the bounds of reason.' [Citations.] A merely debatable ruling cannot be deemed an abuse of discretion. [Citations.] An abuse of discretion will be 'established by "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. . . ."'" (*People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 390.)

We find no abuse of discretion here. We have thoroughly reviewed the *Hobbs* affidavits and conclude that the trial court reasonably found that the information they contain is either official information under Evidence Code section 1040 or information that must remain sealed to avoid revealing a confidential informant's identity. The trial court thus reasonably found that EFF's reasons for wanting to unseal the *Hobbs* affidavits—to learn more about the Sheriff's use of cell-site simulators—do not outweigh the County's interest in protecting the official information and the identity of confidential informants contained in the affidavits. There was nothing arbitrary, capricious, or patently absurd about the trial court's rulings. (See *Jackson*, *supra*, 128 Cal.App.4th at p. 1020 [noting in dicta that if abuse of discretion standard applied to order denying motion to unseal search warrant materials, the case would be "easily resolved" because the trial courts "reflect careful and reasoned analysis and insight into the important constitutional principles involved"]; *People v. Washington*, *supra*, 61 Cal.App.5th at pp. 794-795.) We

therefore conclude the trial court did not abuse its discretion under section 1532(a) or Evidence Code sections 1040 and 1041 in declining to unseal the *Hobbs* affidavits.

Although we find the abuse-of-discretion standard to be the appropriate standard of review here, we would still affirm the trial court's ruling under Evidence Code sections 1040 and 1041 under a de novo or independent standard of review. Our review of the *Hobbs* affidavits and the record as a whole confirms that unsealing the affidavits "would tend to reveal the identity" of confidential informants. (*People v. Martinez* (2005) 132 Cal.App.4th 233, 242.) Thus, the *Hobbs* affidavits were "properly ordered sealed, and the court correctly denied" EFF's motion to unseal them. (*Ibid.*)

This conclusion is buttressed by our conclusion, explained in more detail below, that EFF does not have a First Amendment right to the affidavits. Given that conclusion, it follows that the trial court properly found that the County's interests in maintaining the *Hobbs* affidavits sealed as privileged under Evidence Code sections 1040 and 1041 outweighed EFF's alleged First Amendment right to the affidavits. We therefore affirm the trial court's order denying unsealing the *Hobbs* affidavits under section 1534(a) under either de novo or abuse-of-discretion review.

3. Rules 2.550 and 2.551

EFF also contends the trial court should have unsealed the *Hobbs* affidavits under Rules 2.550 and 2.551. We disagree.

Rules 2.550 and 2.551 "provide a standard and procedures for courts to use when a request is made to seal a record" or unseal a record, but they "do not apply to records that courts must keep confidential by law." (Rule 2.550, Advisory Committee Comment; *Overstock.com*, *supra*, 231 Cal.App.4th at p. 488 (*Overstock.com*) ["[T]he court must consider the same criteria pertinent to a motion to seal when ruling on a request to unseal (rule 2.551(h)(4)].). Records that must be kept confidential by law include "search warrant affidavits sealed under" *Hobbs.* (Rule 2.550, Advisory Committee Comment.) The Rules thus did not require the trial court to unseal confidential informant information protected under *Hobbs*.

The Rules also did not require the trial court to unseal official information privileged under Evidence Code section 1040. The Rules control only "'to the extent that they are not inconsistent with legislative enactments.'" (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.) The Rules thus do not override the trial court's proper finding that the official information in the *Hobbs* affidavits should remain sealed under Evidence Code section 1040.

4. First Amendment

EFF argues that it has a First Amendment right to have the *Hobbs* affidavits unsealed and that the privileges afforded by Evidence Code sections 1040 and 1041 must yield to that right. We disagree.

To determine whether a member of the public like EFF has a First Amendment right of access to a judicial proceeding or the documents from the proceeding, we first apply the United States Supreme Court's history and utility test. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1217-1219; *Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 432.) Under that test, we "examine whether 1) historical experience counsels in favor of recognizing a *qualified* First Amendment right of access to the proceeding [and related documents] and 2) whether public access would play a 'significant positive role in the functioning of the particular process in question.'" (*Times Mirror Co. v. United States* (9th Cir. 1989) 873 F.2d 1210, 1213 (*Times Mirror*), quoting *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 8 (*Press-Enterprise*).) When applying this test, our review is de novo. (See *In re in the matter of The Search of Fair Finance* (6th Cir. 2012) 692 F.3d 424, 434, fn. 4 (*Fair Finance*).)

Relying on cases from jurisdictions outside of California, the County argues EFF fails the first prong of the *Press-Enterprise* test because there is no historical tradition of public access to search warrant materials. EFF contends *Jackson*, *supra*,128 Cal.App.4th 1009 applied the history and utility test and found there is a First Amendment right to sealed search warrant materials.

In *Jackson*, the trial court sealed search warrants and supporting materials to protect the privacy of minors allegedly abused by the defendant, pop star Michael Jackson. (*Jackson*, *supra*, 128 Cal.App.4th at p. 1015.) The appellant-newspaper argued the trial court made insufficient findings to support its order sealing the documents,

thereby violating the public's First Amendment rights. (*Id.* at p. 1017.) Jackson and county counsel argued the trial court properly balanced the parties' competing interests, but did not suggest that the newspaper had no First Amendment right to access the documents. (*Ibid.*)

The *Jackson* court noted that "most judicial proceedings and records" are presumptively open to the public under the First Amendment while observing that *NBC Subsidiary* allows a court to keep certain records under seal. (*Jackson*, *supra*, 128 Cal.App.4th at p. 1022.) Without analyzing whether the search warrant records were presumptively open to the public, the *Jackson* court affirmed, holding that the trial court's sealing order met "the standards set forth in *NBC Subsidiary*." (*Ibid.*) In other words, the *Jackson* court and parties simply assumed that the First Amendment applied to the sealed search warrants.

EFF cites no other case to support its position that the First Amendment attaches to the *Hobbs* affidavits here. The County correctly notes that no California court has directly addressed the issue, while several cases from other jurisdictions hold that there is no First Amendment right to search warrant materials and note that courts are split on the issue. (See *In re Granick* (N.D.Cal. 2019) 388 F.Supp.3d 1107, 1123 [noting that "[c]ircuit courts are split on the question whether there is a First Amendment qualified right of access to warrant materials" and that the issue "has divided the district courts"].)

EFF argues that the out-of-state cases the County relies on are not controlling because they did not consider whether California law (namely, section 1534(a), enacted in 1963 and the 2015 California Electronic Communications Privacy Act (Pen. Code, §§ 1546.1 et seq.)), created a tradition of public access to search warrant materials filed in California courts. But in applying the history prong of the history and utility test to search warrant materials, we consider whether there is a longstanding *national* tradition of accessibility to the materials, not whether there is a California law-based tradition. (See *Press-Enterprise*, *supra*, 478 U.S. at p. 10 ["[T]he *near uniform* practice of state and federal courts has been to conduct preliminary hearings in open court"]; *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 563-569; *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 597, fns. 7-8; *United States v. Cohen* (S.D.N.Y. 2019) 366 F.Supp.3d 612, 628; *Seattle Times Co. v. Eberharter* (1986) 105 Wn.2d 144, 154.) This is because state law does not dictate whether a longstanding national tradition of access exists for First Amendment purposes. (*El Vocero de Puerto Rico v. Puerto Rico* (1993) 508 U.S. 147, 151 ["[T]he 'experience' test . . . does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States"]; *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 655 ["California's practice of releasing postindictment grand jury transcripts when there is no reasonable likelihood of prejudice does not transmogrify a purely statutory right of access into a constitutional entitlement."]; see also *Press-Enterprise Co. v. Superior Court* (1984)37 Cal.3d 772 [holding no First Amendment

right to public access to preliminary hearings in part because Penal Code section 868 allowed those hearings to be closed to public], overruled on First Amendment grounds in *Press-Enterprise*, *supra*, 478 U.S. 1, in part because of long tradition in other jurisdictions of keeping preliminary hearings open to the public].)

Moreover, there is no California-based tradition of disclosing materials that are exempt from disclosure under section 1534(a) because they are privileged under Evidence Code sections 1040 or 1041. For the reasons explained above, trial courts may properly keep such records under seal.

EFF alternatively argues that some of the cases the County relies on are distinguishable because they involved pre-indictment requests for search warrant materials, not materials concerning warrants already executed in cases where indictments have already been filed. (E.g., *Times Mirror*, *supra*, 873 F.2d 1210 [holding no First Amendment to search warrant materials "when an investigation is ongoing but before indictments have been returned"].)

But the case the County mainly relies on, *Fair Finance*, *supra*, 692 F.3d 424, held there was no First Amendment right to search warrant materials irrespective of the stage of the proceedings. In that case, the district court denied two newspapers' motion to unseal search warrant materials after the defendant had been indicted. (*Id.* at p. 428.) The Sixth Circuit affirmed, finding that there was "no evidence" that search warrant materials have "historically been [made] open to the press and public," even after the warrants had been executed. (*Id.* at p. 430.) Because there is no "historical tradition of

accessibility to documents filed in search warrant proceedings," the Sixth Circuit held that the newspapers had no First Amendment right to access the warrant materials. (*Id.* at p. 431.)

While acknowledging *Fair Finance*, EFF asks us to follow *In re Search Warrant for Secretarial Area Outside Office of Gunn* (8th Cir. 1988) 855 F.2d 569 (*Gunn*), which held there is a First Amendment right to search warrant materials, even pre-execution. *Gunn* reasoned that because search warrants and supporting affidavits are traditionally filed as public records, they are generally open to the public and thus accessible under the First Amendment. (*Id.* at p. 573.) But *Gunn* ignored the Supreme Court's repeated observation that search warrant proceedings and materials traditionally are *not* publicly accessible. (E.g., *United States v. United States District Court* (1972) 407 U.S. 297, 321 ["[A] warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge"]; *Franks v. Delaware* (1978) 438 U.S. 154, 169 [warrant proceedings are "necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence"].)

As the County correctly puts it, *Gunn* is an "outlier." As far as we are awarel, *Gunn* conflicts with every federal circuit court and all but one state court of last resort that has considered whether there is a First Amendment right to search warrant materials. (See *Fair Finance*, *supra*, 692 F.3d at p. 433, fn. 3; *Times Mirror*, *supra*, 873 F.2d at p. 1218; *Baltimore Sun Co. v. Goetz* (4th Cir. 1989) 886 F.2d 60, 64-65; *Seattle Times Co. v. Eberharter*, *supra*, 105 Wn.2d at p. 154; *Newspapers of New England, Inc. v. Clerk-*

Magistrate of the Ware Division of the District Court Department & others. (Mass. 1988) 403 Mass. 628; *State v. Cummings* (Wis. 1996) 199 Wis.2d 721, 740; *State v. Rybin* (Neb. 2001) 262 Neb. 77, 82; see also *In re Search Warrants Issued in Connection with the Investigation Into Death of Nancy Cooper* (N.C. App. 180) 200 N.C.App. 180, 189; but see *State v. Archuleta* (Utah 1993) 857 P.2d 234, 239 [following *Gunn*].) We therefore join the overwhelming majority of state and federal courts and decline to follow *Gunn*.

EFF alternatively argues that the bulk of these cases are distinguishable because they do not involve post-execution, post-arrest, and/or post-indictment search warrant materials. They argue that the stage of the proceedings is sometimes dispositive, noting that the Ninth Circuit has held that "[p]ost-investigation, however, warrant materials 'have historically been available to the public.'" (*United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Montana* (9th Cir. 2011) 658 F.3d 1188, 1193 (*Custer Battlefield*).) But that statement was in the context of the court's analysis under the common law. (*Ibid.*) The Ninth Circuit expressly declined to address the issue under the First Amendment. (*Ibid.*) Like the Sixth Circuit, "[w]e cannot accept the argument that the common law right of access supports a finding here of an analogous First Amendment right of access to search warrant documents." (*Fair Finance*, *supra*, 692 F.3d at p. 431; see also *In re Granick*, *supra*, 388 F.Supp.3d at p. 1126 [noting *Custer Battlefield*'s holding but finding no First Amendment right to post-execution warrant materials in part because there was no

"controlling [Ninth Circuit] authority on the issue"].) In any event, we agree with *Fair Finance* that there is no tradition of public access to search warrant materials for First Amendment purposes irrespective of the stage of the warrant proceedings and the stage of any resulting indictment.

EFF correctly notes, however, that even without a historical tradition of accessibility to search warrant materials, we may still find there is a First Amendment right to those materials based solely on *Press-Enterprise*'s utility prong. (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1214, 1214, fn. 32; accord, *In re Copley Press, Inc.* (9th Cir. 2008) 518 F.3d 1022, 1026.) As applied here, the utility prong asks whether public access to the *Hobbs* affidavits will "'play[] a significant positive role in the functioning'" of the search warrant process. (*NBC Subsidiary*, *supra*, at p. 1206.)

Fair Finance considered the effects that granting access to post-execution, post-indictment search warrant materials would have on the warrant process and found that "access would be detrimental to the search warrant application and criminal investigatory processes." (*Fair Finance*, *supra*, 692 F3d at p. 433.) In reaching that conclusion, the Sixth Circuit made a series of observations: "[T]he execution of the search does not eliminate the possibility of harm from the disclosure of the information contained in the documents. First and most obviously, because the documents must detail the government's evidence of criminal activity so as to establish probable cause for a search, they would likely identify information sources, such as wiretaps and undercover operations, the continued utility of which will be compromised by disclosure. The safety

of confidential witnesses may also be compromised. The publication of search warrant documents may also reveal the government's preliminary theory of the crime being investigated and enable criminal suspects to figure out which other places are likely to be searched as the investigation continues. In addition, although the execution of the search will have already served to alert the owner or occupant of the place being searched that he may be a criminal suspect, publication of search warrant documents, by revealing the extent of the government's knowledge, could alert others that they, too, are suspects and could cause them to destroy evidence or to flee. [¶] A further concern arising from public access to search warrant documents is the fact that the government would need to be more selective in the information it disclosed in order to preserve the integrity of its investigations. This limitation on the flow of information to the magistrate judges could impede their ability to accurately determine probable cause. We are concerned also that access to the documents might reveal the names of innocent people who never become involved in an ensuing criminal prosecution, causing them embarrassment or censure. [¶] These examples are an incomplete list of the potential harms of disclosure. There are a variety of ways in which the criminal investigatory process may be harmed by making documents filed in search warrant proceedings publicly available. The critical point is that the importance of the confidentiality necessary for criminal investigations is well recognized [citations]. Publication of search warrant documents would serve only to jeopardize that interest." (*Fair Finance*, *supra*, 692 F.3d at p. 432.)

These observations apply equally here. We also agree with the Sixth Circuit that "the greatest risk of these harms would stem from [the] release of the affidavits submitted in support of search warrant applications." (*Fair Finance*, *supra*, 692 F.3d at p. 433.) Although granting EFF access to the *Hobbs* affidavits likely would provide some public benefits, such as enabling greater public oversight of County law enforcement, "these benefits are outweighed by the very particular harms described above that would affect the criminal investigatory process." (*Id.* at p. 433.)

We therefore conclude EFF has not satisfied the utility prong of the *Press-Enterprise* test. Because EFF fails both prongs of that test, EFF does not have a First Amendment right to the *Hobbs* affidavits. As a result, we need not determine whether the trial court properly kept the records sealed under *NBC Subsidiary*.

But, even if EFF had a qualified First Amendment right to the *Hobbs* affidavits, the trial court properly kept them sealed under *NBC Subsidiary*'s four-part test that EFF urges us to apply here. Under that test, the *Hobbs* affidavits may be sealed only if the trial court "expressly finds (i) there exists an overriding interest supporting . . . sealing; (ii) there is a substantial probability that the interest will be prejudiced absent . . . sealing; (iii) the proposed . . . sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1217-1218, fns. omitted.)

As for the first prong, the trial court correctly found that protecting the identities of confidential informants and the confidentiality of law enforcement investigatory practices is an "'overriding interest'" supporting sealing. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1222, fn. 46, citing Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond* (1981) 16 Harv. C.R.-C.L. L. Rev. 426, 443 ["A third category of countervailing interests encompasses the preservation of confidential investigative information, both general information regarding investigative procedures and specific information regarding ongoing investigations," fn. omitted.)

We agree with the trial court that those interests would be prejudiced if the *Hobbs* affidavits were unsealed. "We enter into this analysis keeping in mind that assessing the likely effect of an event by its nature calls for speculation." (*In re Willon* (1996) 47 Cal.App.4th 1080, 1100.) But it is probable that confidential informants could be identified, even if their names remained redacted as EFF requests, by piecing together other, unredacted information in the affidavits. The County's "confidential investigatory information" necessarily would be revealed if the affidavits were unsealed given that they contain detailed information about the circumstances and investigations that led County law enforcement to seek search warrants.

The trial court also properly found that all of the *Hobbs* affidavits had to remain sealed and that even select portions of them could not be unsealed. "[R]edacting individual facts from the search warrant affidavit[s] is impossible. Benign information is inextricably intertwined with prejudicial information." (*Jackson*, *supra*, 128 Cal.App.4th

at p. 1026.) Limited redaction therefore may not sufficiently guard the overriding interests that justify sealing the *Hobbs* affidavits. (See *Goff v. Graves* (8th Cir. 2004) 362 F.3d 543, 550.)

Although not every single line of the *Hobbs* affidavits contains confidential information, the affidavits are full of information about confidential informants, facts learned from those informants, and information about the County's investigations and investigatory techniques. Redacting all of the confidential information in the affidavits "would yield, at best, unintelligible paragraphs." (*Jackson*, *supra*, 128 Cal.App.4th at p. 1028.) Thus, a "line-by-line redaction" of the affidavits is "not practicable." (*Gunn*, *supra*, 855 F.2d at p. 574.) "[E]ffective, efficient, and fair procedures must be employed. [Citation.] Access only to those portions of the [*Hobbs* affidavits] that do not contain the implicated information would be a Pyrrhic victory for access, with little benefit to the functioning of the system." (*United States v. Gonzales* (10th Cir. 1998) 150 F.3d 1246, 1261.)

In short, even if the *NBC Subsidiary* test applies here, the trial court's order satisfied it. The trial court therefore properly sealed the *Hobbs* affidavits under *NBC Subsidiary*.

5. *California Constitution*

EFF next argues that it has a right to the *Hobbs* affidavits under article I, section 2 and section 3, subdivision (b) of the California Constitution (sections 2[6] and 3(b)), our state's corollary to the First Amendment. We disagree.

Section 2 provides "broad access rights to judicial hearings and records." (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111.) Section 3(b)(1) provides: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Section 3(b)(2) states that "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Under these constitutional mandates, "we must interpret the sealed records rules broadly to further the public's right of access" unless there is "a clear requirement otherwise." (*Overstock.com*, *supra*, 231 Cal.App.4th at p. 495.)

Section 3(b), however, has an exception that EFF overlooks. Section 3(b)(5) provides that section 3(b), enacted in 2005, "does not repeal or nullify . . . any constitutional or statutory exception to the right to public records . . . including . . . any statute protecting the confidentiality of law enforcement and prosecution records."

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[6] Section 2, subdivision (a) provides in full: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Section 3(b) therefore does not override the exemptions from disclosure granted to search warrant materials under section 1534(a), the Evidence Code, the Rules, or the First Amendment. As a result, section 3(b) does not alter our conclusion above that the trial court properly sealed the *Hobbs* affidavits for the reasons discussed above.

Section 2 likewise does not affect that conclusion. Although "in both language and scope it is broader than the First Amendment," (*San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498, 508), it has not been interpreted "as providing an equally extensive right of public access to court proceedings, even in criminal cases." (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1197, fn. 13.) For instance, our Supreme Court held that the California Constitution does not guarantee public access to preliminary hearings in criminal court. (*Press-Enterprise Co. v. Superior Court*, *supra*, 37 Cal.3d 772, overruled on other grounds in *Press-Enterprise*, *supra*, 478 U.S. 1.) The United States Supreme Court reversed, holding that the First Amendment mandated access. (*Press-Enterprise*, *supra*, 478 U.S. 1.) The high court thus held that the First Amendment granted the public right to access preliminary hearing proceedings that were otherwise closed to the public under the California Constitution.

Across the nation, preliminary hearings have been traditionally open to the public while search warrant proceedings usually have been (and remain) ex parte proceedings closed to the public. (See *El Vocero de Puerto Rico v. Puerto Rico*, *supra*, 508 U.S. at pp. 150-151 ["The established and widespread tradition of open preliminary hearings among the States . . . ."]; *United States v. United States District Court*, *supra*, 407 U.S. at

p. 321.) Given our conclusion that EFF has no First Amendment right to the *Hobbs* affidavits, which were filed and sealed in a closed, ex parte criminal proceeding, it follows that the California Constitution does not require granting EFF access to the affidavits either. (See *ibid.*)

6. *Common Law*

Lastly, EFF argues it has a right to the *Hobbs* affidavits under the common law. "'Common law rights provide the press and the public with less access than First Amendment rights,' and the decision to seal or grant access to warrant papers is '"committed to the sound discretion of the judicial officer who issued the warrant."'" (*Overstock.com*, *supra*, 231 Cal.App.4th at p. 490; accord, *Custer Battlefield*, *supra*, 658 F.3d at p. 1197, fn. 7 ["The First Amendment is generally understood to provide a stronger right of access than the common law."].) Because we conclude the trial court properly denied EFF access to the *Hobbs* affidavits under the First Amendment, the court did not abuse its discretion by denying EFF access under common law.

IV.

DISPOSITION

The trial court's order denying EFF's petition to unseal the *Hobbs* affidavits is affirmed.[7]

CERTIFIED FOR PUBLICATION

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

[7] We need not and do not consider the County's argument that the trial court erroneously declined to consider prosecutor Christine Masonek's declaration.

Exhibit 2

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

UNFINISHED BUSINESS

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

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

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

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

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

SUBJECT: Mobile communications: privacy

SOURCE: Author

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

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

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

This bill:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

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

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

Comments

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

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

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

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

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

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

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

SUPPORT: (Verified 9/2/15)

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

OPPOSITION: (Verified 9/2/15)

None received

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

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

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

CERTIFICATE OF WORD COUNT

I, counsel for appellant, certify pursuant to California Rules of Court 8.504(d)(1) that this Brief is proportionally spaced, has a typeface of 13 points or more, contains 8,050 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: October 25, 2022

/s/ Aaron Mackey.
Aaron Mackey

Counsel for Plaintiff-Appellant

PROOF OF SERVICE

I, Victoria Python, declare:

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

On October 25, 2022, I served the foregoing documents:

PETITION FOR REVIEW

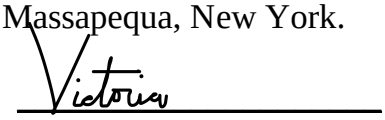
X BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system, TrueFiling. Parties and/or counsel of record were electronically served via the TrueFiling website at the time of filing.

X BY FIRST CLASS MAIL: I deposited the foregoing document in a sealed envelope with the United States Postal Service with the postage fully prepaid addressed to the following:

San Bernardino Superior Court Appeals and Appellant Division 8303 Haven Avenue Rancho Cucamonga, CA 91730	California Court of Appeal 4th District, Division Two 3389 12th Street Riverside, CA 92501
Mark Vos San Bernardino County District Attorney's Office 303 West Third Street San Bernardino, CA 92415 *Attorney for Real Party in Interest and Respondent, San Bernadino County District Attorney*	Miles Kowalski San Bernardino County Sheriff's Department 655 East Third Street San Bernardino, CA 92415 *Attorney for Real Party in Interest and Respondent, San Bernadino County Sheriffs Dept.*
Stephen Pascover San Bernardino Superior Court 247 West Third St. San Bernardino, CA 92415	

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

Executed on October 25, 2022 at Massapequa, New York.



Victoria Python