IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

MEDIA COALITION, *Petitioner*, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES *Respondent*.	No. _____ Los Angeles County Superior Court / Norwalk Courthouse Search Warrant No. NW20500854 *[No superior court case number assigned*] Hon. Margaret Miller Bernal Department SE-F
COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT *Real Parties in Interest*.	

PETITION FOR WRIT OF MANDATE OR PROHIBITION; MEMORANDUM OF POINTS & AUTHORITIES
(Appendix of Exhibits Filed Under Separate Cover)

*SUSAN E. SEAGER (SBN 204824)
JACK LERNER (SBN 220661)
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
PRESS FREEDOM PROJECT
INTELLECTUAL PROPERTY, ARTS,
AND TECHNOLOGY CLINIC
P.O. Box 5479
Irvine, CA 92616-5479
Telephone: (949) 824-5447
Facsimile: (949) 824-2747
sseager1.clinic@law.uci.edu
jlerner@law.uci.edu

DAVID LOY, (SBN 229235)
FIRST AMENDMENT COALITION
534 Fourth Street, Suite B
San Rafael, CA 94901
Telephone: (415) 460-5060
Fax: (415) 460-5155
dloy@firstamendmentcoalition.org

Attorneys for Petitioner Media Coalition

CERTIFICATE OF INTERESTED PARTIES

This form is being submitted on behalf of the following party: Petitioner Media Coalition, comprised of Knock LA and First Amendment Coalition.

Pursuant to Rules of Court, rule 8.208, the undersigned certifies that the following persons or entities have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

1. Petitioner *Knock LA*, which is part of Petitioner Media Coalition, is a news website that is wholly owned by Ground Game LA, a 401(c)(4) non-profit organization with its principal base of business in Los Angeles, California

Date: November 1, 2022

/s/ Susan E. Seager
Susan E. Seager

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Statutes

Constitutional Provisions

Other Authorities

ISSUE PRESENTED

Do Penal Code § 1534(a), the First Amendment to the United States Constitution, common law, and Rules of Court 5.550(d) and 5.551(h) permit a superior court to issue a blanket sealing order for court records related to a two-year-old executed search warrant where no charges have been filed, there is no confidential informant, and a federal court ruled that there is only one sentence discussing supposed confidential investigatory methods that can be easily redacted?

INTRODUCTION

Petitioner Media Coalition files this petition to seek immediate reversal of respondent Los Angeles County Superior Court's constructive denial of Petitioner's motion to unseal criminal court records expose the Los Angeles County Sheriff's Department's attempt to punish critics and journalists exercising their First Amendment rights.

Petitioner seeks to unseal a two-year-old search warrant that allowed the Sheriff's Department to probe into the intimate lives of 17 people, including one journalist, by searching their cell phones. The 17 were arrested on September 8, 2020 for alleged "failure to disperse," a non-violent misdemeanor. It is now two years since the 17 were arrested and the deputies performed their invasive search. Yet not a single charge has been filed against the 17 cell phone owners.

Earlier this year, a federal court ordered the Sheriff's Department to unseal copies of the *very same search warrant records* and provide them to two people whose cell phones were searched. The federal court did not order redactions to protect a confidential informant (because there isn't one), found that only one sentence mentioned confidential investigatory methods, and ordered that sentence redacted.

Petitioner Media Coalition – comprising the Los Angeles news organization *Knock LA* and California government watchdog group First Amendment Coalition – filed a motion nearly three months ago to unseal the search warrant records. Petitioner

sought the records under Penal Code § 1534(a), which mandates that a superior court "*shall* … *open* … documents and records of the court relating to the warrant … to the public as a judicial record" after execution of the warrant. Penal Code § 1534(a) (emphasis added). Petitioner also sought the court records based on the First Amendment, common law, and Rules of Court, Rule 2.550(c)-(d).

Instead of holding an open hearing and unsealing the search warrant records, the Superior Court invited secret testimony by a sheriff's official in chambers and issued a "tentative" ruling denying Petitioner's motion to unseal. As of today, it has been two weeks after the hearing, and the Superior Court has not yet issued a final order, constructively denying Petitioner's motion. This constructive denial violates the First Amendment, especially where Petitioner filed the motion to unseal nearly three months ago -- on August 10, 2022 – and the hearing was delayed twice.

This matter is especially urgent because voters will decide within a few days whether to re-elect Sheriff Alex Villanueva.

The Superior Court erred in the following three ways at its hearing on October 17, 2022:

First, the Superior Court allowed a surprise witness – a Sheriff's Department official – to testify *ex parte* in chambers without providing advance public notice of the court closure and without making the required findings to justify closure. The Superior Court's closure of the criminal court hearing violated the presumptive public right of access to substantive chambers proceedings provided by the First Amendment, the common law,

and Civil Code § 124. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1178, 1199-1213 (1999); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 108, 117 (1992) ("*Copley II*").

Second, the Superior Court violated Petitioner's due process rights under the Fourteenth Amendment by allowing testimony by a sheriff's deputy in an *ex parte*, in camera proceeding. *See Concepcion v. Amscam Holdings*, Inc., 223 Cal. App. 4th 1309, 1326 (2014); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995). Due process required the Superior Court to allow Petitioner cross-examine the witness and rebut all evidence submitted by that witness.

Third, the Superior Court issued a "tentative" sealing order that sealed the search warrant records in their entirety in violation of California Penal Code § 1534(a), the First Amendment, Rule of Court 5.550(d)-(e) and 5.551(h), and common law. The Superior Court cited only boilerplate findings that there was overriding interest to support sealing to protect "official information." This is far from adequate to justify sealing these search warrant records.

Glaringly absent from the Superior Court's tentative oral ruling was a finding that sealing was necessary to protect the identity of a confidential informant, as required by *People v. Hobbs*, 7 Cal. 4th 948, 971 962–63 (1994) and *PSC Geothermal Services Co. v. Superior Court*, 25 Cal. App. 4th 1697, 1714-15 (1994). The Superior Court tentatively ruled that the affidavit, search warrant, return listing on what was searched, and all other related court records must be sealed in their entirety to protect the

Sheriff's Department's sources and methods. But this finding is contradicted by a federal court's finding that only one sentence in the very same search warrant records contains "sources and methods" information, which can easily be redacted.

WRIT RELIEF IS NECESSARY

Immediate writ relief is necessary here, where criminal court records have been sealed for two years in violation of the public right to examine executed search warrant records pursuant to Penal Code section 1534(a), the First Amendment, and common law. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)*; see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) ("[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). Media Coalition member *Knock LA* is a news organization that has been seeking these Search Warrant Court Records since August 10, 2022, when Petitioner filed its motion to unseal. In *NBC Subsidiary*, the California Supreme Court held that even temporary abridgements of the public's right of access to court proceedings and records "are subject to exacting First Amendment scrutiny." 20 Cal. 4th at 1219 n.42 (citations and quotations omitted).

The Superior Court's refusal to unseal this court record harms Petitioner's and the public's First Amendment right to know what happens in our courts and undermines confidence in law enforcement and the judiciary more generally.

Writ relief is especially necessary here, where Los Angeles County voters will decide on November 8, 2022 whether to re-elect Los Angeles County Sheriff Alex Villanueva, whose department has a history of punishing journalists, protesters, and department critics with arrests, jailing, criminal investigations, and search warrants. Also on the ballot is Measure A, which, if approved by voters, would give the Los Angeles County Board of Supervisors the unprecedented power to fire elected county sheriffs for misconduct.

In Florida, a federal court recently ordered the unsealing of the search warrant documents with minimal redactions in the high-stakes national security criminal investigation of former President Donald Trump – even though that case is active and involves a confidential informant and the alleged theft of nuclear secrets. Here, there is no confidential informant or anything close to stolen nuclear secrets involved. There is no valid basis to keep these search warrant court records under seal any longer.

Petitioner respectfully requests that this Court direct the Superior Court to vacate its October 17, 2022 blanket sealing order and immediately release the two-year-old search warrant court records to the public.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

To The Honorable Presiding Justice And Associate Justices of The Court Of Appeal of The State of California For the Second Appellate District:

Petitioner Media Coalition, composed of non-party Los Angeles press organization *Knock LA* and non-party California government watchdog group First Amendment Coalition, respectfully petition this Court to issue a Writ of Mandate and/or Prohibition, or other appropriate relief, directing Respondent Superior Court of the State of California for the County of Los Angeles to vacate its October 17, 2022 order denying Petitioner's Motion to Unseal Court Documents Related to Executed Search Warrant No. NW20500854 and enter a new and different order granting Petitioner's request to unseal the search warrant court records.

A. The Parties.

1. Petitioner Media Coalition is made up of Los Angeles news organization *Knock LA* and California government watchdog group First Amendment Coalition.

2. Respondent is the Superior Court of the State of California, County of Los Angeles.

3. Real Parties in Interest are the County of Los Angeles and Los Angeles County Sheriff's Department.

4. The Los Angeles County District Attorney's Office was served with Petitioner's Motion to Unseal and did not file an opposition or make an appearance in the Superior Court.

B. Statement of the Case.

5. This Petition arises from an October 17, 2022 order issued by respondent Superior Court denying Petitioner's Motion to Unseal Court Documents Related to Executed Search Warrant No. NW20500854. Before denying the motion, the Superior Court abruptly held a hearing in chambers without advance notice or making any required findings justifying the closed proceeding. In chambers, the court heard in camera, *ex parte* testimony from Real Parties in Interest County of Los Angeles and Los Angeles County Sheriff's Department (collectively, "County"), which opposed the unsealing. The Superior Court then returned to open court and denied Petitioner's Motion to Unseal even though the search warrant was executed two years ago, no charges have been brought, there is no confidential informant and only one sentence discusses supposed confidential investigatory methods.

2. The Superior Court's first action, to hold a portion of the hearing on Petitioner's Motion to Unseal in chambers without advance public notice, violated the First Amendment, common law, and Civil Code § 124. The Superior Court erred by failing to provide advance public notice of the closed proceeding and apply the First Amendment test to justify closing a criminal court hearing to the public.

3. The Superior Court's second action, to decide Petitioner's Motion to Unseal based solely on in camera, *ex parte* testimony, violated Petitioner's due process rights under the Fourteenth Amendment.

4. The Superior Court's third action, denying Petitioner's Motion to Unseal, violated Penal Code § 1534(a), the First Amendment to the United States Constitution; Article I, Section 2 of the California Constitution; Rules of Court, Rule 2.550(d)-(e) and Rule 2.551(h). The Superior Court erred by relying on vague factual findings and secret evidence and failing to satisfy the First Amendment test for sealing court records. The Superior Court failed to cite a legitimate public interest to justify barring the public's view of two-year-old search warrant court records where no charges have been filed, there is no confidential informant to protect, and the supposed confidential investigatory methods are mentioned in one sentence that can easily be redacted. The Superior Court's blanket order is not narrowly tailored, as required by the First Amendment.

C. Statement Of Facts.

Deputies Arrest 17 Individuals on September 8, 2020

5. On September 8, 2020, the Los Angeles Sheriff's Department chased and arrested 17 people as they fled from deputies riding in trucks in the streets of South Los Angeles. Petitioner's Appendix ("PA") 100. The deputies arrested the 17 individuals after breaking up a small street protest at the intersection of Imperial Highway and South Normandie Avenue for Dijon Kizzee, a young black bicyclist fatally shot by deputies

several days earlier. PA 100. All 17 individuals were arrested for alleged failure to disperse under Penal Code § 409, a non-violent misdemeanor. PA 100. The Sheriff's Department seized 17 cell phones and two digital cameras from the 17 arrestees. PA 73-75, 97-99. The District Attorney's Office immediately rejected the failure to disperse case submitted by the Sheriff's Department and declined to file any charges. PA 153.

6. Hugo Padilla, one of the individuals arrested, posted a livestream video on September 8, 2020 on YouTube showing that he was riding his bike down a dark, empty street six blocks from the protest when he was suddenly knocked down and arrested by a deputy without warning. *See* Normandie and Imperial hwy los angeles protest at sheriff station blm dijon keezee - YouTube (Mr. Padilla's arrest can be seen at 36:02). The Sheriff's Department filmed its own videos of the events of that night but has refused to provide those videos to the public to show supposed "violence."

7. Deputies claimed that some of the protesters were carrying gear that is "commonly used to promote violence or inflict immediate damages and/or injury to property or any person." PA 77. But most of the seized items were everyday gear like a skateboard, a bike, flashlights, helmets, and anti-police signs such as "Unforgivable & Unreformable Abolish the Police," "PPD Pasadena, LASD Sheriffs, LAPD = Killers," and "No Justice No Peace Abolish Police." PA 77.

8. Only one arrested protester was allegedly found to be carrying "smoke grenades," as well as shoulder pads, a plastic

tactical vest, gloves, and an electronic bullhorn, which deputies claimed was "makeshift riot gear." PA 76. Deputies failed to sort out which cell phone belonged to this individual protester and "mixed up" the cell phones for all 17 arrestees "during the booking process" and *"were unable to link any of the cell phones to any of the suspects arrested*." PA 101 (emphasis added).

Deputies Obtain Warrant to Search 17 Cell Phones

9. Despite having no individualized probable cause for each of the 17 arrestees, the Sheriff's Department obtained a search warrant from the Superior Court to search all 17 cell phones seized from the 17 arrested individuals, apparently to investigate a supposed conspiracy to riot and/or assault peace officers. PA 76-77, 100-111, 126.

***Unzueta v. County of Los Angeles* Civil Rights Lawsuit**

10. Pablo Unzueta, a photojournalist arrested by deputies on September 8, 2020, filed a civil rights lawsuit against the County, *Unzueta v. County of Los Angeles*. Petitioner's Motion for Judicial Notice, Exhibit AA, at pp. 11-31. Mr. Unzueta, then a journalism student at California State University, Long Beach, was arrested six blocks away from the protest, which had already been broken up by deputies. *Id.* Mr. Unzueta was wearing a college press badge and had been videotaping and photographing the protest with his cell phone and digital Nikon camera. *Id.* Mr. Unzueta's lawsuit alleges that the deputies unlawfully arrested him, hurled homophobic slurs at him, jailed him overnight at the Twin Towers Correctional Facility, and repeated strip-searched him, all in violation of his First, and Fourth Amendment rights and the Tom Bane Act, Civil Code § 52.1, which bans the use of

force to interfere with the exercise of First Amendment rights. *Id.* Mr. Unzueta's lawsuit also alleges that the deputies' use of a search warrant to search his unpublished newsgathering materials in his cell phone and digital camera violated the federal Privacy Protection Act of 1980, 42 U.S.C. Sect. 2000aa, and Penal Code § 1524(g), which ban the use of search warrants for journalists' unpublished materials in non-urgent circumstances. *Id.* Mr. Unzueta's lawsuit alleges that the Sheriff's Department returned his digital camera without its digital memory card with two years of work. *Id.*

11. The Sheriff's Department provided a copy of its detailed incident report of its September 8, 2020 arrests and seizure of property ("Incident Report") to counsel for Mr. Unzueta pursuant to a California Public Records Act request, and the Incident Report was filed in federal court as part of Petitioner's Motion to Unseal. PA 63-112. The Incident Report lists the names of all the 17 individuals who were arrested and all the supposed "evidence" seized by deputies that supposedly showed their plan to riot and assault police officers, including 17 cell phones and two digital cameras. PA 154.

***Astorga v. County of Los Angeles* Civil Rights Lawsuit**

12. Mr. Padilla and Christina Astorga filed a civil rights lawsuit against the County of Los Angeles, Los Angeles Sheriff Alex Villanueva, and the Los Angeles County Sheriff's Department arising from the September 8, 2020 arrests and seizure of their cell phones and other property in U.S. District

Court, Central District of California, *Astorga v. County of Los Angeles*. PA 135.

13. Ms. Astorga said that deputies took her cell phone and kept it for several months. PA 31. When deputies finally returned her phone, which was not password-protected, her Instagram account, "Wall of Vets – Los Angeles," had been changed so that her profile description said, "Blue Lives Matter #supportbluelives," a pro-police slogan. PA 31.

14. In 2021, the *Astorga* plaintiffs filed a motion for a preliminary injunction to require the Sheriff's Department to return their cell phones, cameras, and other property seized by deputies on September 8, 2020 and not yet returned. PA 151-153. Just as in this proceeding, U.S. District Judge Andre Birotte permitted the Sheriff's Department to submit *ex parte*, in camera testimony and denied the Astorga plaintiffs' motion based on that secret evidence. PA 151-153.

Ninth Circuit Rules That Judge Birotte Unlawfully Decided Motion Based on *Ex Parte*, In Camera Evidence

15. The *Astorga* plaintiffs filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals, contending that Judge Birotte violated their due process rights by deciding their preliminary injunction motion based on *ex parte*, in camera evidence submitted by the Sheriff's Department. PA 151-153.

16. The Sheriff's Department made a "concession at oral argument" before the Ninth Circuit that Ms. Astorga and Mr. Padilla "likely are no longer suspects in an ongoing criminal investigation." PA 153.

17. On July 15, 2021, the Ninth Circuit granted the *Astorga* plaintiffs' writ petition challenging Judge Birotte's denial of their preliminary injunction motion based on *ex parte*, in chambers evidence. PA 152-153.

***Astorga* Motion to Unseal**

18. On November 1, 2021, the *Astorga* plaintiffs filed a motion to unseal Los Angeles County Superior Court records related to the search warrant obtained by the Sheriff's Department to search Astorga plaintiffs' cell phones and cameras, Search Warrant No. NW20500854 ("Astorga Motion to Unseal"). PA 114-115.

19. On December 14, 2021, the Superior Court held a hearing on the Astorga Motion to Unseal. Just as Judge Birotte did, the Superior Court permitted a Sheriff's Department employee to present *ex parte*, in camera information about the search warrant court records to the Superior Court. PA 114-115.

The Superior Court did not issue an order satisfying the test for closing its court proceedings to the public, as required by the First Amendment and common law. PA 114-115. Following the in-chambers hearing, the Superior Court issued a minute order on December 14, 2021 denying the Astorga Motion to Unseal based on the Sheriff's Department's *ex parte*, in camera evidence. PA 114-115. The Superior Court's minute order did not cite factual finding or satisfy the five-part test to justify denying the motion to unseal, as required by the First Amendment and Rule of Court 2.551(h). PA 114-115. The Superior Court ordered the search warrant court records transmitted under seal to a U.S. District Court Judge Birotte, who is presiding over the collateral civil rights case arising from the September 8, 2020 events, *Astorga v. County of Los Angeles*. PA 114-115.

Federal Court Ruling on *Astorga* Motion to Unseal

20. On December 27, 2021, U.S. Magistrate Judge Rosenberg, who is presiding over discovery matters for *Astorga v. County of Los Angeles*, ordered the Sheriff's Department to present the Superior Court's search warrant court records for review *ex parte*, in camera review. PA 117.

21. On January 3, 2022, Judge Rosenberg held an *ex parte*, in camera hearing to review the search warrant records and hear testimony from Los Angeles County Sheriff's Department Sergeant Peter Hish. PA 156. Judge Rosenberg ordered the Sheriff's Department to submit the search warrant court records for further in *ex parte*, in camera review with some limited redactions. PA 156-57. Judge Rosenberg did not mention

any confidential informants requiring redaction. PA 156-57. When it came to protecting the Sheriff's Department's purported confidential sources and methods, Judge Rosenberg found that there was only "*one sentence* on page 11 that reveals 'sources and methods.'" PA 156-157 (emphasis added). Judge Rosenberg ordered that sentence redacted and some other redactions, such as the name of the deputy who signed the affidavit and images of deputies.

22. On January 7, 2022, after reviewing the Sheriff's Department's redacted search warrant court records *ex parte*, in camera, Judge Rosenberg ordered the Sheriff's Department to produce 29 pages of the redacted search warrant records to Mr. Padilla and Ms. Astorga as part of the defense discovery production in the federal civil rights case. PA 158. Magistrate Rosenberg allowed the Sheriff's Department to designate the records as non-public records under the federal court's "good cause" protective order and did not analyze the First Amendment or common law right of public access to the court records. PA 158.

Check the Sheriff Coalition Motion to Unseal

23. On or about July 6, 2022, non-party Check the Sheriff Coalition filed a Motion to Unseal the Norwalk Search Warrant No. NW20500854 and related records. PA 5.

24. The Check the Sheriff Coalition motion to unseal asserts that it is "very concerned about the LASD's pattern and practice of opening politically targeting investigations against" journalists and department critics, including *Los Angeles Times* reporter Alene Tchekmedyian, Los Angeles County General Max Huntsman, and "department whistleblowers." PA 11. The Check

the Sheriff Coalition motion to unseal includes declarations from six of the 17 arrestees – Ms. Astorga, Mr. Padilla, Alexandra Marsella, Atish Chakravarti, Michelle Manos, and Roxanne McQueen – stating that they waive any privacy rights in the Search Warrant Court Documents and support the unsealing of those court records. PA 24-43.

Media Coalition Motion to Unseal

25. On August 10, 2022, Petitioner Media Coalition filed a Motion to Unseal Court Documents Related to Executed Search Warrant, asking the Superior Court to unseal the Sheriff's Department's affidavit, search warrant, return, and all other documents filed with the Superior Court in connection with Search Warrant No. NW20500854 ("Search Warrant Court Records"). The Media Coalition is composed of non-party Los Angeles news organization *Knock LA* and non-party California government watchdog group First Amendment Coalition. PA 47.

26. The Media Coalition sought the unsealing of the search warrant records based on Penal Code §1534(a), First Amendment, Article I, § 2(a) of the California Constitution, and California Rule of Court 2.550(c). PA 47.

27. California alleged that the Sheriff's Department and Sheriff Villanueva have "declared war on the First Amendment" by unsuccessfully urging prosecutors to criminally charge NPR affiliate reporter Josie Huang for filming police in 2020, announcing this year his department's criminal investigation of *Los Angeles Times* reporter Tchekmedyian "for reporting that Villanueva covered up deputy misconduct," and by arresting and

searching the cell phones of the 17 individuals who were protesting or filming deputies on September 8, 2020. PA 49.

28. Petitioner asserted that it had standing to challenge the sealing order as a non-party under the First Amendment and common law, citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (based on the First Amendment presumption of open criminal proceedings, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion") (citations and quotations omitted); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1217 n.36 (1999) (recognizing that press has standing to challenge orders closing court proceedings and sealing court records); *Estate of Hearst*, 67 Cal. App. 3d 777, 782 (1977) (same). PA 50. *See also* California Rules of Court, Rule 2.551(h) ("member of the public may move, apply, or petition the court ... to unseal a record."). PA 50 n. 3.

29. The Media Coalition asserted that it was not collaterally estopped from challenging the December 17, 2021 sealing order by the Superior Court or the January 7, 2022 order by Judge Rosenberg allowing the County to keep the search warrant records secret from the public under a protective order because Petitioner was not a part to those proceedings. PA 53. *See Wilson v. Science Applications International Corp.*, 52 Cal. App. 4th 1025, 1028. (1997) (members of public may challenge sealing order if not parties to prior sealing proceeding) and *In re Marriage of Nicholas*, 186 Cal. App. 4th 1566, 1569 (2010) ("[P]rior sealing orders" are not permanent; they are not "a

juridical black hole from which no light can ever escape."). PA 53, 57.

Sheriff's Department Publicizes Another Search Warrant Targeting Sheriff's Critics

30. On September 14, 2022, while Petitioner's Motion to Unseal was pending in the Superior Court, the Los Angeles Sheriff's Department posted on its official website a press release and copy of a 39-page search warrant and affidavit, revealing a public corruption probe – even though the case was still active and involved a confidential informant. PA. 173-214. The Sheriff's Department's press release and search warrant records posted on its website revealed that deputies raided the homes and offices of two government officials who have been highly critical of Sheriff Villanueva: Los Angeles County Supervisor Sheila Kuehl and Patricia Giggans, a member of the Civilian Oversight Commission that oversees the Sheriff's Department. PA 173-214.

31. The Sheriff's Department made only minor redactions to the public corruption search warrant and affidavit, redacting the name of the confidential informant but revealing that the informant works at the Los Angeles County Metropolitan Transportation Agency, the informant's job description, number of years working at the MTA (four), gender (woman), and that she has a law degree but does not practice law. PA 196. Shortly after the Sheriff's Department publicized the search warrant and raid of Sheriff's Villanueva's political enemies, the California Attorney General's Office took control of the investigation. *See* Petitioner's Motion for Judicial Notice,

Exhibit BB, pp. 33-36; also available at https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-department-justice-will-assume-responsibility (last visited on Oct. 30, 2022). The Attorney General stated in an official press release that "the public unfolding of an unprecedented investigation has raised serious questions for residents of Southern California and beyond," prompting the Attorney General to take over the investigation. *Id.* "We are committed to a thorough, fair, and independent investigation that will help restore confidence for the people of our state. If there is wrongdoing by any party, we will bring it to light." *Id.*

Superior Court Constructively Denies Petitioner's Motion

32. On October 17, 2022, the Superior Court held a hearing on Petitioner's Motion to Unseal.[1] PA 241.[2] Before oral argument began, the County brought forward Sheriff's Department Sergeant Hish to be sworn in as a witness in open court. PA 241. Without any advance public notice, the Superior Court immediately ordered Sergeant Hish and counsel for the County to come into chambers to give secret testimony in opposition to Petitioner's Motion to Unseal while excluding Petitioner's counsel and the public. PA 241. Petitioner objected to the closed-door, *ex parte* proceeding. PA 241. The court reporter

[1] The Superior Court held a combined hearing for the motions to unseal filed by Petitioner and the Check the Sheriff Coalition and tentatively denied both motions on the same grounds. PA 241.

[2] Petitioner will file the reporter's transcript of the open portion of the October 17, 2022 hearing with this Court as soon as it can be obtained from the court reporter.

went into chambers to transcribe the proceeding. PA 242. After hearing testimony from Sergeant Hish in chambers, the Superior Court returned to the bench and held the remainder of the hearing in open court. PA 242.

33. The Superior Court issued a lengthy tentative ruling from the bench, although the tentative ruling is not reflected in the minute order.[3] The Superior Court tentatively held that Petitioner had standing to file a motion to unseal the court records related to the search warrant. The court also tentatively held that Petitioner was not collaterally estopped from bringing its own Motion to Unseal because it had not been a party to the previous proceedings related to the Astorga Motion to Unseal in the Superior Court or in the U.S. District Court.

34. The Superior Court tentatively denied Petitioner's Motion to Unseal, citing the secret testimony by Sergeant Hish in generalized terms. The Superior Court said the sealing was necessary because there are currently "open" cases related to the warrant and the warrant contains the Sheriff's Department's sources and methods that are protected by the official information privilege. The Superior Court tentatively held that the Search Warrant Court Records must be sealed in their entirety and that redacting the records was not possible. Notably absent from the Superior Court's tentative ruling was any mention of any confidential informants. The Superior Court said

[3] This portion of the Statement of Facts is based on notes taken Petitioner's counsel during the hearing.

it would issue a final written order (PA 242) but has issued no such order as of today, more than two weeks after the hearing.

D. Absence Of Adequate Remedy at Law.

35. Other than the writ mechanism, Petitioner, who is a non-party in the trial court, has no plain, speedy, and adequate remedy at law for the Superior Court's incorrect denial of its motion, which seeks the disclosure of information to which the public and press have a presumptive statutory, constitutional, and common law right of access and information that is vital to the public interest. *See* Code of Civ. Proc. § 1086.

36. Petitions for writs of mandamus, prohibition, and review provide a means for extraordinary relief, and should be granted to protect "substantial right[s]" when it is shown that "some substantial damage will be suffered by the petitioner if said writ is denied." *Schinier v. Supreme Court*, 78 Cal. App. 4th 703, 707-08 (2000). Petitioner has filed this Petition to enforce important statutory, constitutional, and common law rights that guarantee the public's and press's right of access to criminal court proceedings and records. Allowing the Superior Court to keep criminal court records for an executed search warrant where no charges have been filed in more than two years, prosecutors do not oppose unsealing, and the Sheriff's Department has a history of using arrests and search warrants to punish its critics and journalists, and secrecy invites public distrust and suspicion of law enforcement and the judicial process.

37. As the United States Supreme Court has made clear, "[t]he loss of First Amendment freedoms, even for minimal

periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)*; see also New York Times Co. v. United States* (1971) 403 U.S. 713, 714-15 (1971) (Black, J., concurring) ("[E]very moment's continuance" of a wrongful restraint on speech "amounts to a flagrant, indefensible, and continuing violation of the First Amendment".) In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976), the Court rejected the claim that a restraining order was acceptable because it only "delayed" the dissemination of information. "[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Id.* at 560-61.

38. In *NBC Subsidiary*, this Court acted quickly on the media's writ petition challenging the trial court's pattern of holding substantive proceedings in chambers and closing the courtroom to the public and press, ordering the trial court to submit a preliminary response *on the same day the media* filed its petition, issuing an order to show cause to the trial court three days later, and holding oral argument and issuing a peremptory writ ordering the trial court to vacate its closure orders. 20 Cal. 4th at 1182-87. When the case reached the California Supreme Court, that court held that abridgements of the public's right of access to court proceedings and records, even if temporary, "are subject to exacting First Amendment scrutiny." *Id.* at 1219 n.42 (citations and quotations omitted).

39. Earlier California appellate decisions recognized the same urgency and use of writ petitions to challenge court secrecy

orders based on the common law right of access to our courts. *See*, *e.g., Copley Press II,* 6 Cal. App. 4th at 108, 117 (holding that respondents "failure ... to ... open[] court records to public view" justified issuance of a writ of mandamus); *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 1202, 1205 (1998) ("*Copley III*") (issuing writ petition to order trial court to release copy of tape played to jury as exhibit in criminal case).

40. Courts across the country likewise have recognized that even the temporary deprivation of a First Amendment right constitutes irreparable harm, which cannot be justified merely because the infringement is purported to be of short duration. In *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1993), the Ninth Circuit issued a writ of mandamus to vacate an order sealing pretrial pleadings in the criminal trial of celebrity automaker John DeLorean. Although the sealing order in that case provided that most documents would remain under seal for only 48 hours — as opposed to the indefinite sealing order here — the Ninth Circuit found that extraordinary relief necessary. *Id.* at 1145-47. "[E]ven though the restraint [wa]s limited in time,' the Ninth Circuit held that a writ of mandamus was required because the "effect of the order is a total restraint on the public's first amendment right of access." *Id.*

41. As another court explained, the public's right of access is "threatened whenever immediate access ... is denied," regardless of "whatever provision is made for later disclosure." *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989). In that case, the respondent court found that a temporary sealing order

was constitutional because it would cause only "a 'minimal delay' in access." *Id.* at 854. The Fourth Circuit rejected this argument, criticizing the respondent court for its "misapprehension and undervaluation of the core first amendment value at stake." *Id.* at 856. After reiterating that "mandamus" is the "preferred method" for the press to seek review of orders denying access, the court ordered the transcript to be released immediately. *Id.* at 852, 856.

42. Similarly, in *Oregonian Publ. Co. v. District Court,* 920 F.2d 1462 (9th Cir. 1990), the Ninth Circuit reiterated that the "extraordinary remedy" of "mandamus" is appropriate in access cases because "without immediate review, the press will face a serious injury to an important first amendment right." *Id.* at 1465 (emphasis added); *see also CBS, Inc. v. District Court*, 765 F.2d 823, 825 (9th Cir. 1985) ("Mandamus is the appropriate procedure for [the press] to seek review of orders denying it access to ... sealed documents"; vacating sealing order); *Globe Newspaper Co. v. Pokaski,* 8 F.2d 497, 507 (1st Cir. 1989) ("[E]ven a one to two day delay [in access to court records] impermissibly burdens the First Amendment"; invalidating statute requiring temporary sealing of some court records.)

43. As in the cases cited above, the Superior Court's decision to prohibit public and press access to a criminal court proceeding and records without meeting the substantive and procedural requirements announced by the United States Supreme Court, the California Supreme Court, and California Rule of Court 2.550 and 2.551, is an ongoing violation of

Petitioners' and the public's constitutional and common law rights.

44. The Superior Court also violated Penal Code § 1534(a), which provides that a court "shall" unseal executed search warrant records filed with the court, and Code of Civil Procedure § 124, which provides that all substantive court proceedings are presumptively open.

45. For these reasons, urgent action by this Court is warranted, before the unlawful sealing of this criminal court record continues one more day.

E. Writ Petition Is Timely.

46. This petition is timely filed. The Superior Court issued its order denying Petitioners' motion to unseal on October 17, 2022. PA 241. Petitioners filed this petition within 15 days, well before 60 days from the order. *Cal West Nurseries, Inc. v. Superior Court*, 129 Cal. App. 4th 1170, 1173 (2005).

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court:

1. Issue an extraordinary writ of mandate or prohibition – without further hearing or notice, or with such further hearing or notice as the Court deems proper – directing the Superior Court to (1): vacate its October 17, 2022 tentative ruling denying Petitioner's Motion to Unseal Court Documents Related to Executed Search Warrant based on *ex parte*, in camera testimony and (2) enter a new and different order granting Petitioner's Motion to Unseal; or, in the alternative,

2. Issue an alternative writ of mandate or prohibition, or an order to show cause, compelling the Superior Court to show cause why a writ of mandate or prohibition should not issue and, upon return of the alternative writ or order to show cause, if any, issue an extraordinary writ as set forth above; and,

3. Grant such other and further relief as may be just and proper.

DATED: November 1, 2022 Respectfully submitted,

UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
PRESS FREEDOM PROJECT
INTELLECTUAL PROPERTY, ARTS, AND
TECHNOLOGY CLINIC

By: */s/Susan E. Seager*
SUSAN E. SEAGER

Attorneys for Petitioner
MEDIA COALITION

VERIFICATION

I am the attorney for Petitioner Media Coalition in this case. I have read the foregoing Petition and know its contents. All facts alleged in the foregoing Petition, not otherwise supported by documents in the record submitted in support of the Petition in the concurrently filed Petitioner's Appendix and Petitioner's Motion for Judicial Notice, which adds two exhibits, are true to the best of my knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

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

Executed on November 1, 2022, at Los Angeles, California.

By: */s/Susan E Seager*
SUSAN E. SEAGER

Attorneys for Petitioner
MEDIA COALITION

MEMORANDUM OF POINTS AND AUTHORITIES

As a matter of constitutional law and common law, courts have consistently held that criminal proceedings and records are presumptively open to the public and press, and that this right is overcome only where a countervailing interest demands closure and/or sealing.

There is no justification here, let alone a compelling justification, to close part of a criminal court hearing or maintain secrecy for a two-year-old search warrant where there is no confidential informant to protect. The Superior Court's October 17, 2022 tentative ruling constructively denying Petitioner's Motion to Unseal the Court Documents Related to Executed Search Warrant should be vacated immediately, and a new order should be entered granting Petitioner's Motion to Unseal.

F. The Standard of Review Is De Novo.

The Second Appellate District applies de novo review to trial court orders sealing executed search warrant records. *People v. Jackson*, 128 Cal. App. 4th 1009, 1021 (2005). In *Jackson*, this Court held that it would apply de novo review to a superior court order denying the media's motion to unseal a search warrant affidavit in the child molestation case against celebrity Michael Jackson. *Id.* The Court of Appeal accepted the media's contention that the First Amendment right of access applies to post-execution search warrant court records and applied the First Amendment-based test for sealing court records outlined in *NBC Subsidiary*. *Id.* at 1021, 1023-26

G. The Superior Court's In-Chambers Hearing Violated the Public Right of Access to Criminal Court Proceedings Provided by the First Amendment, Common Law, and Code of Civil Procedure § 124.

The United States Supreme Court has long recognized that the public and press have a presumptive First Amendment right of access to a variety of criminal proceedings, from pre-trial hearings to trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-508 (1984) ("*Press-Enterprise I*") (voir dire); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (suppression hearing); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13 (1986) ("*Press-Enterprise II*") (preliminary hearings).

The First Amendment right of access to criminal court proceedings may not be abridged by a court order lacking specific factual and legal findings. To the contrary, any order closing criminal court proceedings must be placed in the public record and "specific, on-the-record findings" must be "made" by the court. *Press-Enterprise II*, 478 U.S. at 13. The Supreme Court has outlined a strict test for a government agency seeking to seal court proceedings: "Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U. S. at 510 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U. S. 596, 606-607

(1982). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values, and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* (quoting *Globe Newspaper*, 457 U.S. at 606-607.)

Relying on *Press-Enterprise I*, the California Supreme Court adopted the same test for closing court proceedings: "[B]efore substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." *NBC Subsidiary*, 20 Cal. 4th at 1217-1218. This test has been codified in Rule of Court 2.550 and 2.551.

Closing the court is also inconsistent with Code of Civil Procedure § 124, which provides that "[e]xcept as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court *shall be public*." Code Civ. Proc. § 124 (emphasis added).

In *NBC Subsidiary*, the California Supreme Court held that a Los Angeles Superior Court violated § 124 and the First Amendment by repeatedly excluding the public and press from

substantive proceedings in chambers and the courtroom during a civil trial without providing advance public notice of the closures or following the test for closing court proceedings mandated by the First Amendment and United States Supreme Court authority. 20 Cal. 4th at 1216-17, 1221-26. As the court held in *NBC Subsidiary*, "substantive chambers proceedings are categorically … part of the trial process … subject to the First Amendment right of access"; "a trial court must provide notice to the public of the contemplated closure" of "substantive trial or chambers proceedings." *Id.* The trial court's closure of substantive proceedings in chambers violated the First Amendment because the closure order failed to meet the test for closure established by the United States Supreme Court. *Id.*

Just as in *NBC Subsidiary*, the Superior Court violated the First Amendment by abruptly moving the key portion of its hearing on Petitioner's Motion to Unseal into chambers without any advance notice issuing an order that included on-the-record findings that satisfied the test outlined in *Press-Enterprise I*, 464 U. S. at 510 and *NBC Subsidiary*. The Superior Court provided no advance notice it would hold a closed hearing and failed to make any on-the-record factual findings that sealing was necessary to protect an overriding interest and the closure was narrowly tailored, as required by the First Amendment. There was no valid basis to close the hearing the search warrant records do not involve a confidential source and a federal court previously held that the Sheriff's Department "sources and

methods" are mentioned in only one sentence of the search warrant records.

H. The Superior Court's *Ex Parte*, In Camera Proceeding Violated the First Amendment and Petitioner's Procedural Due Process Rights Provided by Fourteenth Amendments.

The Superior Court violated due process by deciding Petitioner's motion to unseal based on testimony by a sheriff's deputy in an *ex parte*, in camera proceeding without providing Petitioner any opportunity to hear and cross-examine the deputy. "Under our adversarial system of justice," once the County presented evidence to support its position, Petitioner "was entitled to see and respond to it and to present its own arguments as to why it failed to justify" the County's position. *Concepcion*, 223 Cal. App. 4th at 1326. The Superior Court ignored the bedrock rule that "a court may not dispose of the merits of a case on the basis of *ex parte*, in camera submissions." *Id.* (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C. Cir. 1986). Such "*ex parte* proceedings are anathema in our system of justice." *Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989).

By relying on secret testimony to rule against Petitioner, the Superior Court "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately. The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible." *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981). The "very foundation of the adversary process

assumes that use of undisclosed information will violate due process because of the risk of error," and thus "the failure to disclose information prevents its use in the adversary proceeding." A*merican-Arab Anti-Discrimination Committee*, 70 F.3d at 1069-70.

This is not a case involving the "extraordinary circumstances" of the state secrets doctrine, in which a court might potentially rely in part "upon *ex parte* evidence to decide the merits of a dispute," nor did the Superior Court merely review materials in camera for the limited purpose of deciding whether they are disclosable. *Abourezk*, 785 F.2d at 1061. "While it is not unusual for a court to engage in the inspection of in camera materials when a party seeks to prevent" disclosure of those materials, "reliance on *ex parte evidence* to decide the merits of a dispute can be permitted in only the most extraordinary of circumstances," which are not present here. *Naji v. Nelson*, 113 F.R.D. 548, 552 (N.D. Ill. 1986) (emphasis added). Here and in almost all circumstances, "[t]he right to due process encompasses the individual's right to be aware of and refute the evidence against the merits of his case." *Vining*, 99 F.3d at 1057. Our system of justice depends on "open adversarial guidance by the parties," which cannot be obtained when one party is allowed to submit information on the merits that the other party cannot see[4] *United States v. Zolin*, 491 U.S. 554, 571 (1989).

---

[4] The in camera hearing was not justified by Evidence Code § 1042(d), which only applies when "a party demands disclosure of the identity of the [confidential] informant on the ground the

As a result, the Superior Court's order must be vacated, and if this Court does not direct immediate disclosure of the Search Warrant Court Records, the Superior Court must be directed to disregard the in camera testimony and hold an open hearing at which the deputy may be cross-examined.

I. The Superior Court's Constructive Sealing Order Violates Penal Code § 1534(a)'s Mandate to Unseal Executed Search Warrant Records.

California Penal Code § 1534(a) requires that all "documents and records of the court relating to the [search] warrant … *shall be open to the public as a judicial record*" after the warrant is executed. Penal Code § 1534(a) (emphasis added). The California Legislature did not include any limitations to this public right of access to executed search warrant records filed with the court. In *PSC Geothermal Services Co. v. Superior Court*, 25 Cal. App. 4th 1697 (1994), the Court of Appeal explained that the California Legislature's right of access to these court records provides "no exception in the statute for instances … [even] *where the search is used to further an ongoing investigation*." *Id.* at 1713 (emphasis added).

---

informant is a material witness on the issue of guilt" in a criminal trial. That is not the case here, since Petitioner did not demand disclosure of any such informant's identity and the existence of any such informant is not at issue. Also, § 1042(d) allows in camera testimony only on the limited threshold issue whether to disclose the identity of an informant in a criminal trial. It does not authorize an in camera hearing to decide the merits of unsealing court records.

California courts have engrafted *one* exception to this public right of access: where the government seeks redaction or sealing to protect the identity of a *confidential* informant or *confidential information* protected by the official information privilege provided in Evidence Code §§ 1040 and 1042. *See People v. Hobbs*, 7 Cal. 4th 948, 971 962–63 (1994); *PSC Geothermal Services,* 25 Cal. App. 4th at 1714-15. *See also* Evidence Code § 1040(a) ("As used in this section, "official information" means 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.")

But neither *Hobbs* nor *PSC Geothermal Services Co.* permit an automatic blanket sealing order upon request by law enforcement. The *Hobbs* decision recognized "the common law privilege to refuse disclosure of the identity of a confidential informant.," which has been codified in Evidence Code § 1041 *Hobbs*, 7 Cal. 4th at 960. Similarly, *PSC Geothermal* held that the official information privilege, as codified in Evidence Code §§ 1040(a) and 1042(b), permits a court to seal its Search Warrant Court Records only to protect "confidential informants" and confidential information. 25 Cal. App. 4th at 1714-15.

PSC Geothermal made clear that even if there are confidential informants or confidential information, the official information privilege is "conditional," not absolute, and a court must conduct a two-part test to decide whether the public interest in confidentiality outweighs the public interest in openness. *Id.* Even if a court decides the public interest weighs in

favor of keeping the confidential information under seal, the court must "consider[] the possibility of redacting the affidavit and *sealing only the portion ... [containing] official information*." *Id.* (emphasis added). The Court of Appeal remanded the case back to the trial court to re-examine its blanket sealing order, noting that the prosecutor wanted to redact only "one sentence" in the search warrant affidavit, which meant that "*sealing the entire affidavit may have been overbroad*." *Id.* at 1715 (emphasis added).

Here, neither *Hobbs*, *PSC Geothermal*, nor Evidence Code §§ 1040(a) and 1042(b) support a blanket sealing order here. Unlike *Hobbs*, this case does not involve a confidential informant. As in *PSC Geothermal*, the Superior Court's constructive blanket sealing order is overbroad, where only one sentence *might* contain information protected by the official information privilege and there is no confidential informant.

Section 1534(a) does not allow sealing to protect an ongoing investigation. But even if it did, the Superior Court cited no evidence that the Sheriff's Department has submitted the case to prosecutors or is conducting an active investigation. Indeed, the District Attorney's Office was served with Petitioner's Motion to Unseal and did not submit an opposition or appear at the October 17, 2022 hearing. The County's claim that the statute of limitations for the two alleged crimes under investigation "has not yet expired" (PA 126) is not evidence of an active probe.

Because the Superior Court failed to cite any evidence that the Search Warrant Court Records mention any confidential

informants and a federal court found that supposed confidential investigatory methods are mentioned in only one sentence, the Superior Court violated Penal Code § 1534(a)'s mandate that all "documents and records of the court relating to the [search] warrant ... *shall* be open to the public as a judicial record" after the warrant has been executed. Penal Code § 1534(a) (emphasis added).

The Superior Court held that every word in the affidavit, search warrant, return, and other court records related to the search warrant must be sealed. The Superior Court is apparently relying on *Hobbs,* which affirmed a blanket sealing order on the grounds that "the disclosure of *any* portion of the factual allegations set forth in the confidential attachment ... would effectively reveal the informant's identity." 7 Cal. 4th at 976.

But *Hobbs* is inapposite. In that case, a criminal defendant sought to unseal a court transcript of a magistrate interviewing a confidential informant at great length, eliciting testimony about the informant's criminal history, observations about the defendant, and other information that would have made it impossible to release a redacted version that would protect the identity of the informant. *Id.* at 977.

That is not the case here. There is no lengthy transcript of a magistrate interviewing a confidential informant. Petitioner seeks an affidavit, search warrant, return, and any other related court record in a case without a confidential informant. Much of the information contained in the affidavit, search warrant, and return is already made public in the non-confidential Incident

Report, which describes the arrests, the gear collected from the arrestees, the supposed evidence of conspiracy to riot and attack peace officers, and the names of the 17 arrestees whose cell phones have been searched. The Search Warrant Court Records should be unsealed in their entirety.

J. The Superior Court's Sealing Order Violated the Public's First Amendment Right of Access to Criminal Court Records.

1. The First Amendment Creates a Presumptive Right of Public and Press Access to Criminal Court Records, Including Search Warrant Court Records.

Independently of Penal Code § 1534(a), the First Amendment provides a constitutional presumptive right of access to criminal court records – including these search warrant records filed with the Superior Court. The First Amendment and Rule of Court 2.550 require the Superior Court to issue an on-the-record order citing specific facts and a five-part test to justify sealing.

Federal circuit courts have held that the presumptive First Amendment right of access to criminal court proceedings applies equally to criminal court records. As then-Ninth Circuit Judge Anthony Kennedy stated in *CBS, Inc. v. District Court*, 765 F.2d 823 (9th Cir. 1985), the First Amendment creates a "presumption that the public and the press have a right of access to criminal proceedings and the documents filed therein," which "extends to documents filed in pretrial proceedings as well as in the trial itself." *Id.* at 825. Similarly, in *Associated Press v. District Court*,

705 F.2d 1143, 1147 (9th Cir. 1993), the Ninth Circuit held that "the First Amendment right of access to criminal proceedings applies, in general, to pretrial documents[.]"

The Eighth Circuit has held that the First Amendment right of access applies to search warrant affidavits filed in court because, "even though a search warrant is not part of a criminal trial itself, like voir dire, a search warrant is certainly an integral part of a criminal prosecution," and is often "at the center of pre-trial suppression hearings." *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).

In NBC Subsidiary, the California Supreme Court held that the public and press have a First Amendment right of access to both judicial proceedings and records. The Court's sweeping, unanimous decision cited with approval numerous decisions upholding a First Amendment "presumption of access … [for any] documents or records of … [judicial] proceedings [that] are filed with the court[.]" *Id.* at 1208 n.25 (emphasis added). This First Amendment right of access to court records is codified in Rule 2.550(d)-(e).[5]

In *Jackson*, the Second Appellate District agreed without discussion that the First Amendment right of access to criminal court records applies to executed search warrant affidavits. 128

[5] The Advisory Committee Note on Rule 2.550 asserting that "search warrant affidavits sealed under" *Hobbs* are exempt from Rule 2.550 does not apply to this case, where there is no confidential informant.

Cal. App. 4th at 604-608. This Court implicitly agreed that the First Amendment right of access applied to the search warrant affidavit by analyzing the denial of a motion to unseal the search warrant affidavit pursuant to the First Amendment and the First Amendment test for sealing court records outlined in *NBC Subsidiary*. *Id.* at 605-608.

The Court of Appeal Fourth Appellate District recently issued a narrow ruling regarding the First Amendment right of access to search warrant court records in *Electronic Frontier Foundation v. Superior Court*, -- Cal. App. 5th --, Case No. E076778, at 5, 25 (Sept. 9, 2022) ("*EFF*"). That case, like *Hobbs*, involved a confidential informant and confidential investigative methods. The Fourth District held that the public "does not have a First Amendment right to *Hobbs* affidavits'" and re-affirmed the *Hobbs* holding that a trial court could seal search warrant affidavits "to protect confidential informant identity" and "investigatory 'sources and methods.'" *Id.* at 407. But the *EFF* decision was limited to *Hobbs* affidavits and did not decide whether there is a First Amendment (or common law) right of access to the search warrant itself, the return, or other related search warrant records filed with the court. Nor did it decide whether the First Amendment right of access to criminal court records includes search warrant records filed with a court that do not involve confidential sources. Because this case does not involve confidential informants, the *EFF* case is inapposite.

2. The Superior Court's Sealing Order Failed to Cite Specific Facts and Satisfy the First Amendment Test for Sealing.

The First Amendment right of access to court records cannot be overridden by a vague, boilerplate sealing order lacking in facts. A sealing order must include "specific, on-the-record findings ... made" by the court. *Press-Enterprise II*, 478 U.S. at 13. The Supreme Court has outlined a strict test for a government agency seeking to seal court proceedings: "Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U. S. at 510 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U. S. 596, 606-607 (1982). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values, and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* (quoting *Globe Newspaper*, 457 U.S. at 606-607.)

Relying on *Press-Enterprise I*, the California Supreme Court adopted the same test for sealing court proceedings and records: "[B]efore substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure

and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." *NBC Subsidiary*, 20 Cal. 4th at 1217-1218.

This strict test for sealing means that "the court may not base its decision on conclusory assertions alone, but must make specific factual findings." *Washington Post v. Soussoudis*, 807 383 F.2d 383, 392-93 n.9 (4th Cir. 1986). In *Oregonian Publ. Co. v. District Court*, 920 F.2d 1462 (1990), the Court of Appeals for the Ninth Circuit vacated the trial court's order sealing a court record because the order was "not supported by any factual finding" and because the court provided "no evidentiary support" for its conclusions. *Id.* at 1467. The court found the defendant's motion to seal the court record — his plea agreement — equally defective because the motion did "not present facts." *Id.*

California codified this presumptive First Amendment right of access to court records in civil and criminal court proceedings in California Rules of Court 2.550. *See Savaglio v. Wal-Mart Stores*, 149 Cal. App. 4th 588, 597; *see also* Rule of Court 2.550 Advisory Committee Comment (the standard for sealing a document under the rule "is based on *NBC Subsidiary* …. These rules apply to civil and criminal cases."). Rule 2.550(c)

provides that "[u]nless confidentiality is required by law, court records are presumed to be open." A court "record" is defined broadly as "all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, by electronic means or otherwise." R. Ct. 2.550(b)(1). California

Rule of Court 2.550(d) is titled "*Express factual findings required* to seal records" and provides that a court record may not be sealed absent a finding that: (1) an overriding interest supports sealing; (2) a substantial probability exists that the interest will be prejudiced absent sealing; (3) the sealing is narrowly tailored to serve the overriding interest; and (4) no less restrictive means exist to achieve the identified overriding interest. R. Ct. 2.550(d) (emphasis added); *see also NBC Subsidiary*, 20 Cal. 4th at 1218-19. Rule 2.550(e)(1)(A) instructs that "[a]n order sealing the record must *state the facts* that support the findings" to justify sealing. R. Ct. 2.550(e)(1)(A) (emphasis added). Rule of Court 2.551(h) prohibits a court from denying a motion to unseal court records unless the court issues an order satisfying the same test. Nothing in the First Amendment or Rules of Court 2.550 or 2.551 permits a sealing order to be based on secret evidence.

The Superior Court's October 17, 2022 constructive sealing order did not meet these requirements. The Court lacked specific factual findings and its sealing order is not narrowly tailored – it is a blanket order sealing all Search Warrant Court Records. The sealing order therefore violates the First Amendment and Rules of Court 2.550(d) and 255.1(h) and is invalid.

K. The Superior Court's Sealing Order Violates the Common Law Right of Access to Criminal Court Records.

More than 40 years ago, the United States Supreme Court recognized that there is a common law right to "inspect and copy public records and documents, including judicial records and

documents." *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). The Court indicated that this right includes a presumption in "favor of public access to judicial records." *Id.* at 602. This common law right of access is older than the First Amendment itself. "The existence of this [common law] right, which antedates the Constitution, and is applicable in both criminal and civil cases, is now 'beyond dispute.'" *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (citation omitted).

California courts have long recognized that California's common law creates a presumptive right of access to court proceedings and court records. "(C)ourt records are public records open to inspection." *Copley II,* 6 Cal. App. 4th at 108, 117. "[P]reclusion from public inspection should be permitted only upon a showing that revelation would 'tend to undermine individual security, personal liberty, or private property, or … injure the public or the public good." *Id.* (citing *Estate of Hearst*, 67 Cal. App. 3d at 782-83). *See also Craemer v. Superior Court,* 265 Cal. App. 2d 216, 216 n.3 (1986) ("The right of a citizen to inspect public writings has its origin in the common law."); *McGuire v. Superior Court*, 12 Cal. App. 4th 1685, 1687 (1993). Courts in other jurisdictions have recognized a common law right to search warrant records filed with the court. *See, e.g.*, *In the Matter of 2 Sealed Search Warrants*, 710 A2d 202, 210-11 (Super. Del. 1997).

Under common law, sealing orders can be justified only in "exceptional" circumstances where sealing is necessary to

promote a "compelling" interest. *Estate of Hearst*, 67 Cal. App. 3d at 785. Because no exceptional circumstances exist here, these Search Warrant Court Records must be unsealed immediately under common law.

In the Trump search warrant case, the federal district court held that "[a]s a practical matter, the analyses [for unsealing a court record] under the common law and First Amendment are materially the same." *In re Sealed Search Warrant*, 2022 WL 3582450, *2. "Both look to whether (1) the party seeking sealing has a sufficiently important interest in secrecy that outweighs the public's right of access and (2) whether there is a less onerous (or said differently, a more narrowly tailored) alternative to sealing." *Id.*

There is no valid basis for excluding search warrant records filed with a court from the common law right of access to court records. The Superior Court erred by failing to find that the search warrant records are presumptively open under common law and by not releasing the records under common law.

L. There Is No Basis to Keep the Search Warrant Records Sealed When the Targets Know About the Warrants and Their Names Are Public.

Once confidential information has been made public, it is no longer confidential. Courts have repeatedly held that there is no basis for sealing documents if their contents have already been made public. *See*, *e.g., Apple Inc. v. Samsung Elecs. Co.* 727 F.3d 1214, 1220 (Fed. Cir. 2013) ("(O)nce the parties' confidential information is made publicly available, it cannot be made secret again"); *Ameziane v. Obama,* 620 F.3d 1, 5 (D.C. Cir. 2010) ("once

[redaction] is revealed publicly, the disclosure cannot be undone"); *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again."); *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 144 n.11 (2d Cir. 2004) ("Once the cat is out of the bag, the ball game is over.") (citation omitted); *SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc.,* 251 F. Supp. 2d 1002, 1009 (N.D. Ill. 2003) (Posner, J., sitting by designation) (granting a motion to seal terms of a settlement agreement but only to the extent he had chosen not to discuss those terms in his opinion, as "there the cat is out of the bag.").

This rule requires disclosure here. The names of all 17 arrestees are listed in the Sheriff's Department Incident Report, which is a public document released by the Sheriff's Department pursuant to the California Public Records Act and filed as an exhibit in Petitioner's Motion to Unseal and this Petition. PA 63-112.

M. There Is a Heightened Public Interest in These Court Records Before the November 8 Election Just Days Away.

One of the fundamental interests vindicated by the First Amendment right of access to courts is "a first principle that people have the right to know what is done in their courts." *Wilson*, 52 Cal. App. 4th at 1030 (citing *Estate of Hearst*, 67 Cal. App. 3d at 782-784); *see also id.* ("[T]raditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of

judicial tribunals ... [I]t is a vital function of the press to subject the judicial process to 'extensive public scrutiny and criticism.'") (citing *Shephard v. Maxwell*, 384 U.S. 333, 350 (1966)).

As the United States Supreme Court noted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 501, 572 (1980), "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Open court proceedings, the Court repeatedly has pointed out, "gives assurance that established procedures are being followed and that deviations will become known"; it thus enhances "both the basic fairness" of the proceeding, "and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

Here, the public has a heightened interest in these records. Sheriff Villanueva is running for re-election this year and the November 8, 2022 election is just days away. Because of numerous allegations of misconduct against the sheriff made by a variety of individuals and groups, the County Board of Supervisors has put a charter amendment on the ballot that would allow the Board to remove a sheriff from office for serious misconduct. The Sheriff's Department has arrested and/or launched criminal investigations of government watchdogs, reporters, photojournalists, street videographers, and protesters exercising their First Amendment rights. PA 11, 49, 173. It is especially important to permit public scrutiny of the Sheriff's Department's unusual procedure of seizing and searching 17 cell phones and two cameras of 17 people who were arrested for non-

violent misdemeanor and never charged, especially when the Sheriff's Department lacked any individualized probable cause for all 17 cell phones.

The unsealing of the Trump search warrant records provides guidance. In that case, a U.S. district court ordered the unsealing of search warrant court records related to an active, high-stakes federal criminal investigation of Trump involving confidential informants, confidential investigative methods, and national security concerns involving nuclear weapon secrets. *In re Sealed Search Warrant,* -F. Supp. 3d --,2022 WL 3582450 (S.D. Fla. Aug. 22, 2022), Case No. 22-8332-BER ("*In re Search Warrant I*"); *In re Sealed Search Warrant*, 2022 WL 366888 (S.D. Fla. Aug. 25, 2022), Case No. 22-8332-BER ("*In re Search Warrant II*"); PA 226-239. The court held that while "[protecting] the integrity and secrecy of an ongoing criminal investigation is a well-recognized compelling government interest," the Department of Justice could not keep the Trump search warrant materials sealed in their entirety and ordered a redacted version placed in the public court docket. *In re Sealed Search Warrant I,* 2022 WL 3582450 at *6; *In re Sealed Search Warrant II,* 2022 WL 366888 at *1; PA 226-239.

CONCLUSION

If a federal court can unseal an FBI affidavit, search warrant, and list of folders of documents seized in a national security investigation involving top-secret nuclear weapons records from the home and office of former President Trump, there is no valid basis to keep the Search Warrant Court Records secret in this low-stakes, inactive case without confidential

informants, with just one sentence discussing investigative sources and methods, and no charges filed after two years.

The public interest in opening these Search Warrant Court Records is very high as the election of Sheriff' Villanueva looms. There is no "overriding" interest sufficient to justify keeping these criminal court records secret two years after deputies probed deeply into the personal lives of 17 individuals by searching their cell phones and no charges have been filed. Petitioner therefore respectfully requests this Court to issue an order directing the Superior Court to vacate its October 17, 2022 order and enter a new and different order granting Petitioner's Motion to Unseal and unsealing the search warrant, supporting affidavits, returns, and any other related court records.

DATED:Nov. 1, 2022

Respectfully submitted,

UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
PRESS FREEDOM PROJECT
INTELLECTUAL PROPERTY, ARTS,
AND TECHNOLOGY CLINIC

By */s/Susan E. Seager*
SUSAN E. SEAGER

Attorneys for Petitioner
MEDIA COALITION

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.486(a)(6) and 8.204(c) of the California Rules of Court, the enclosed "Petition For Writ of Mandate and/or Prohibition or Other Appropriate Relief" is produced using 13-point Century Bookmark type, and that, including footnotes, but excluding the tables, the certificate, the verification, and any supporting documents, the Petition contains approximately 13,392 words, which is fewer than the 14,000 words allowed by these rules. Counsel relies on the word count of the computer program used to prepare this brief.

DATED:November 1, 2022 Respectfully submitted,

UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
PRESS FREEDOM PROJECT
INTELLECTUAL PROPERTY, ARTS,
AND TECHNOLOGY CLINIC

By: */s/ Susan E. Seager*
SUSAN E. SEAGER

Attorneys for Petitioner
MEDIA COALITION