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The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 941102-4749

Re: Amicus Letter in Support of Petition for Review in *Electronic Frontier Foundation, Inc. v. Superior Court of San Bernardino County*, No. S277036 (Court of Appeal opinion reported at 83 Cal.App.5th 407 (2022), petition for review filed October 25, 2022)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The First Amendment Coalition (“FAC”) and the Northern California Chapter of the Society of Professional Journalists (“SPJ NorCal”) (collectively, “amici curiae”) urge the Court to grant the Petition for review in this matter, and to restore journalists’ and the public’s right of access to search warrant materials in California.

Search warrants have been much in the news lately, due in part to an unwelcome and unhappy intersection between politicians and the criminal justice system. FBI agents obtained a search warrant to raid the estate of a former President.¹ Closer to home, FBI agents obtained a search warrant in their investigation of a former Anaheim Mayor, who resigned after the warrant affidavit was unsealed.² The affidavit “detailed [the former Mayor] using personal email for city business” and contained startling allegations of misconduct.³ The L.A. County Sheriff’s Department obtained a warrant to search the home

¹ (Wire, et al., *FBI conducts ‘raid’ on Trump’s Mar-a-Lago estate, former president says* (L.A. Times Aug. 8, 2022), <https://www.latimes.com/politics/story/2022-08-08/mar-a-lago-raided-by-fbi-agents-trump> [discussion of FBI raid on Mar-a-Lago shortly after FBI raid].)

² (Fenno, et al., *Anaheim mayor resigns amid corruption probe into his role in Angel Stadium land sale* (L.A. Times May 23, 2022), <https://www.latimes.com/california/story/2022-05-23/anaheim-mayor-harry-sidhu-resigns-corruption-probe-angel-stadium-land-sale>.)

³ (Fenno, et al., *Ex-Anaheim mayor refuses to publicly disclose emails amid FBI corruption investigation* (L.A. Times Oct. 25, 2022), <https://www.latimes.com/california/story/2022-10-25/anaheim-harry-sidhu-emails-disclosure-corruption-investigation-scandal>.) No criminal charges have been brought against the former Mayor yet, but, in response to a Public Records Act request that called for records on the former Mayor’s “personal” electronic accounts and devices consistent with *City of San Jose v. Superior Court* (2017) 2

and offices of a County Supervisor, based on allegations of corruption, and then published the search warrant materials itself, on its website, amidst questions about whether the raid had been politically motivated.⁴ A few days later, the California Attorney General's Office took control of the investigation.⁵ And, at least one top San Francisco official is on his way to jail after pleading guilty to his role in a wide-ranging “play-to-play” scandal in the City by the Bay.⁶

One thing the political and justice systems have in common, whether those running them behave well or badly, is a core truth laid down by this Court fifteen years ago: “Openness in government is essential to the functioning of a democracy.” (*International Federation of Professional and Technical Engineers Local 21 v. Superior Court* (“*IFPTE*”) (2007) 42 Cal.4th 319, 328.) This Court explained in *IFPTE*, quoting its seminal decision on the First Amendment right of access to judicial records and proceedings, “As we have observed in the context of the public’s right of access to court proceedings and documents, public access makes it possible for members of the public ‘to expose corruption, incompetence, inefficiency, prejudice and favoritism.’” (*Id.* at p. 333, quoting *NBC Subsidiary (KNBC-TV, Inc.) v. Superior Court* (“*NBC Subsidiary*”) (1999) 20 Cal.4th 1178, 1211.)

The Petition in this case requests review of a published Fourth District Court of Appeal decision that didn’t get this Court’s message and explicitly held that *NBC Subsidiary* doesn’t apply to search warrant materials, contrary to the First District Court of Appeal’s decision in *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1020. Along the way, the lower court gave short shrift to Penal Code section 1534(a),⁷ Rules of Court 2.550-2.551, and the common law right of access. It also endorsed a narrow reading of these laws, and an expansive reading of their exceptions – precisely the opposite of what article I, section 3(b) of the California Constitution, the “Sunshine Amendment” added by an 83 percent vote for Proposition 59 in 2004, requires. (See Cal. Const., art. I, § 3(b)(2) [mandating that any “statute, court rule, or other authority” be “broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access”].) Finally, the decision disagreed with *Jackson, supra*, 128 Cal.App.4th at pp. 1018-

Cal.5th 608, the former Mayor refused, citing his Fifth Amendment right against self-incrimination. (*Ibid.*)

⁴ (See Tchekmedyian, *L.A. County Supervisor Sheila Kuehl’s home searched by sheriff’s investigators* (L.A. Times Sept. 14, 2022), <https://www.latimes.com/california/story/2022-09-14/1-a-county-supervisor-sheila-kuehls-house-search-by-sheriffs-investigators>; *Multiple Search Warrants Served Today in Connection with Ongoing Public Corruption Investigation* (L.A. Cnty. Sheriff’s Department Sept. 14, 2022), <https://lasd.org/public-corruption-investigation/>.)

⁵ (Tchekmedyian, *L.A. sheriff stripped of control of Kuehl investigation by attorney general* (L.A. Times Sept. 20, 2022), <https://www.latimes.com/california/story/2022-09-20/kuehl-warrant-order>.)

⁶ (*Former San Francisco Public Works Director Sentenced To Seven Years In Federal Prison* (U.S. Dept. of Justice Aug. 25, 2022), <https://www.justice.gov/usao-ndca/pr/former-san-francisco-public-works-director-sentenced-seven-years-federal-prison>.)

⁷ Penal Code section 1534(a) provides that documents and records relating to executed search warrants “shall” be made open to the public as a judicial record 10 days after issuance or after a return has been filed, whichever comes first.

21, in yet another respect, concluding that the standard of review in an appeal from a ruling on a motion to unseal is “abuse of discretion,” rather than “independent review,” as the *Jackson* court held. (*San Bernardino, supra*, 83 Cal.App.5th at pp. 418-23.)

This is a textbook example of a case that deserves this Court’s scarce time and attention. The issue presented is of vital statewide importance and is timely. A published decision conflicts with another decision. And, to put it simply, the Fourth District Court of Appeal got important issues wrong, and its decision will interfere with journalists’ work and public access to important information if it is not reviewed and reversed. The Petition should be granted.

I. INTEREST OF AMICI CURIAE

The amici curiae’s members include many California journalists, for whom amici curiae regularly advocate. The amici curiae thus offer an important perspective on the issues presented in this case: that of California journalists and media advocates who have used and wish to continue using search warrant materials and the rights of access to them at issue in this case.

A. First Amendment Coalition

FAC is a California-based nonprofit committed to advancing freedom of speech, freedom of the press, and openness and accountability at all levels of government. Founded in 1988, one of FAC’s primary purposes is the advancement of the public’s right to access information regarding the conduct of public business. FAC advances this purpose by working to improve governmental compliance with state and federal open government laws. FAC’s activities include free legal consultations on access to public records and First Amendment issues, educational programs, legislative oversight of California bills affecting access to government records and free speech, and public advocacy, including extensive litigation and appellate work. FAC’s members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, activists, and ordinary citizens.

FAC regularly advocates for and litigates cases involving access to judicial records and proceedings, including search warrant materials. FAC filed an amicus brief with the Fourth District Court of Appeal in this case. In *In Re Application of Media Coalition to Unseal Search Warrant Materials Pertaining to Warrant Numbers SW43684 and SW43687* (S.F. Cnty. Super. Ct.) Case No. SW43684, SW43687, FAC, SPJ NorCal, and the Reporters Committee for Freedom of the Press (“RCFP”) successfully moved to unseal records related to five unlawful search warrants that targeted a San Francisco journalist in 2019. And, in *First Amendment Coalition v. Governor of the State of California* (Cal. Supr. Ct.) No. S251879, FAC successfully petitioned this Court to unseal clemency-related records, invoking some of the same access cases and principles that are relevant to this case.

FAC also regularly advocates for and litigates cases involving access to government agency records under the Public Records Act and the Freedom of Information Act. Recent examples at the appellate level include *Becerra v. Superior Court (First Amendment Coalition)* (2020) 44 Cal.App.5th 897, in which FAC was a party, and *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, in which FAC was part of the coalition of news media

amici curiae that participated, through counsel, in the argument in that case before this Court.

B. SPJ NorCal

SPJ NorCal supports journalists throughout Northern California by, among other things, engaging in public advocacy and educational outreach to working journalists and journalism students and hosting two annual awards ceremonies to celebrate local journalists' achievements. It is a chapter of the national Society of Professional Journalists ("SPJ"), the nation's most broad-based journalism organization. SPJ NorCal has advocated for access in amicus curiae letters and briefs on several occasions, including in *City of San Jose, supra*, 2 Cal.5th 608 and *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488. SPJ NorCal also joined with FAC and RCFP in successfully moving to unseal records related to five unlawful search warrants targeting a San Francisco journalist in *In Re Application of Media Coalition to Unseal Search Warrant Materials Pertaining to Warrant Numbers SW43684 and SW43687* (S.F. Cnty. Super. Ct.) Case No. SW43684, SW43687 in 2019.

II. THE PETITION SHOULD BE GRANTED TO BRING UNIFORMITY TO THE LAW REGARDING SEARCH WARRANT UNSEALING, TO PROMOTE ACCESS TO SEARCH WARRANTS, AND TO ANSWER IMPORTANT LEGAL QUESTIONS.

Under Rule 8.500(b)(1), this Court "may order review" "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Both of these justifications for review are present here. The decision below expressly conflicts with *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1020 with respect to the First Amendment right of access and the standard of review. (*San Bernardino, supra*, 83 Cal.App.5th at pp. 418-29.) Thus, there is no question that review is "necessary to secure uniformity of decision" here. Moreover, the questions of law presented in this case are not just "important," but "essential" to the democratic process. (See *IFPTE, supra*, 42 Cal.4th at pp. 328-29 ["Openness in government is essential to the functioning of a democracy."].)

III. THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES TO THE SEARCH WARRANT MATERIALS AT ISSUE HERE, CONTRARY TO THE COURT OF APPEAL'S DECISION.

The press and the public have a presumptive right of access to judicial records and proceedings under the First Amendment. In *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 573, the United States Supreme Court recognized that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."⁸ The Court held that the First Amendment guarantees the public and the press a presumptive right of access to criminal trials, emphasizing that openness had "long been recognized as an indispensable attribute of an Anglo-American trial." (*Id.* at p. 569; see also *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 602 [holding that a statute

⁸ Justices Brennan and Marshall elaborated that the First Amendment embodies both a "commitment to free expression and communicative interchange for their own sakes" and an "antecedent assumption that valuable public debate – as well as other civic behavior – must be informed." (*Richmond Newspapers, Inc., supra*, 448 U.S. at p. 587 [Brennan, J., Marshall, J., concurring].)

excluding public and press from trial testimony of minor victims in sex offense cases violated the First Amendment right of access]; *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”) (1984) 464 U.S. 501, 509-10 [holding that an order sealing a transcript of voir dire proceedings in a murder case violated the First Amendment right of access].)

In *NBC Subsidiary*, *supra*, 20 Cal.4th 1178, this Court fully embraced and broadly construed the United States Supreme Court’s First Amendment right of access jurisprudence. After surveying several notable First Amendment right of access decisions,⁹ this Court held that the First Amendment right of access applies in civil cases, *id.* at pp. 1207-12, and emphasized that a First Amendment right of access to judicial records “filed in court as a basis for adjudication” had also been recognized by “[n]umerous reviewing courts,” *id.* at p. 1208 & n.25 [collecting cases]. (See also *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111 [stating that “[b]oth the federal and the state Constitutions provide broad access rights to judicial hearings and records,” and correctly holding that “A lengthy list of authorities confirms this right in general, and in particular as it pertains to the press, both in criminal and civil cases”] [citations omitted]; *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1208 n.25 [citing *Copley Press, Inc.* with approval as to the First Amendment right of access to judicial records].)

Many courts use the “experience and logic” test set forth in *Press-Enterprise II* to evaluate whether the First Amendment right of access applies a new kind of record or proceeding. (See, e.g., *United States v. Loughner* (D. Ariz. 2011) 769 F.Supp.2d 1188, 1191-94 [applying the *Press-Enterprise II* “experience and logic” test and holding that there is a First Amendment right of access to search warrant materials after the underlying investigation is no longer active or has ended and a final indictment has issued].) This test strongly supports holding that the First Amendment right of access to search warrant materials as a general matter, so long as their corresponding search warrants have been executed. *A fortiori*, this test supports holding that the First Amendment right of access applies to records related to the search warrants at issue here, all of which relate to criminal investigations that the County has closed, and some of which contributed to “three indictments and two convictions.” (*San Bernardino*, *supra*, 83 Cal.App.5th at pp. 415-16.)

The *Press-Enterprise* test considers (1) “the place and process have historically been open to the press and general public” because a tradition of access implies the favorable judgement of experience, *Press-Enterprise II*, *supra*, 478 U.S. at pp. 7-8, and (2) whether public access plays a “significant positive role in the functioning of the particular process in question,” *id.* at p. 8; see also *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1203 [describing this inquiry as assessing “the specific structural value or utility of access in the circumstances”]. Both considerations support recognizing a First Amendment right of access to search warrant materials as a general matter, and especially to the search warrant materials that EFF seeks here.

First, contrary to the Court of Appeal, there is a substantial history of openness in

⁹ This Court reviewed *Richmond Newspapers*, *supra*, 448 U.S. 555, *Globe Newspaper*, *supra*, 457 U.S. 596, *Press-Enterprise I*, *supra*, 464 U.S. 501, *Waller v. Georgia* (1984) 467 U.S. 39, and *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”) (1986) 478 U.S. 1, 8.

search warrant materials after search warrants are executed, in California and nationally, that tilts the “experience” consideration toward recognizing a First Amendment right of access.

In California, Penal Code section 1534(a) has provided the public with a powerful statutory right of access to search warrant materials after a warrant is executed for *almost sixty years*. The Legislature amended Penal Code section 1534(a) in 1963 to include a requirement that records related to executed search warrants be made public ten days after execution, or after a return is filed, whichever is sooner. Section 1534(a) now provides:

The documents and records of the court relating to the search warrant need not be open to the public until the execution and return of the warrant or the expiration of the 10-day period after issuance; thereafter, if the warrant has been served, *such documents and records shall be open to the public as a judicial record.*

(Emphasis added.) The fact that Californians have had a statutory right of access to search warrant materials for more than sixty years “implies the favorable judgment of experience” and weighs at least somewhat in favor of a First Amendment right of access. The decision below erred by dismissing this consideration entirely on the grounds it was regional rather than national. (*San Bernardino, supra*, 83 Cal.App.5th at pp. 424-25.) Even regional history can “imply the favorable judgment of experience,” if perhaps to a lesser extent than national history, and the Court of Appeal should have factored that implication into its “experience” analysis.

Further, courts around the country have acknowledged that “although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal.” (*Gunn, supra*, 855 F.2d at p. 573; see, e.g., *In re Application of New York Times Co.* (D.D.C. 2008) 585 F.Supp.2d 83, 88-89; *Loughner, supra*, 769 F.Supp.2d at pp. 1191-93; see also *United States v. Business of the Custer Battlefield Museum and Store Located at Interstate 90, Exit 514, South of Billings, Mont.* (“*Battlefield Museum*”) (9th Cir. 2011) 658 F.3d 1188, 1193-94 [recognizing, when evaluating whether there is a common law right of access to post-investigation search warrant materials, that “[p]ost-investigation . . . warrant materials ‘have historically been available to the public,’ ” and that “ ‘[s]earch warrant applications . . . generally are unsealed at later stages of criminal proceedings, such as upon the return of the execution of the warrant or in connection with post-indictment discovery.’ ”].) This history, too, “impl[ies] the favorable judgment of experience” with respect to access to search warrant materials.

Confirming that the “experience” consideration favors recognizing a First Amendment right of access, especially with respect to the search warrant materials at issue here, many states have enacted own statutes that, similar to Penal Code section 1534(a), mandate that search warrant materials be disclosed, though their details vary. (See *Loughner, supra*, 769 F.Supp.2d at p. 1192.) As one court explained in rejecting an argument against a First Amendment right of access to the search warrant materials at issue there:

. . . in the aftermath of Watergate, numerous states enacted ‘sunshine laws’ codifying the requirement that documents maintained by public entities must be available for public inspection. Many state statutes applied the requirement to search warrant materials, specifying that warrants must be open to the public either after they are served or after criminal charges are filed.

(*Loughner, supra*, 769 F.Supp.2d at p. 1192, citing Ariz. Rev. Stat. Ann. § 13-3918 [search warrant materials “shall be open to the public” after execution]; Del. Ct. R., Admin. Directive No 2000-5 [search warrant materials shall be open after return]; N.H. R. Stat. § 595-A:4 [materials related to executed search warrant open after return]; N.C. Gen. Stat. § 132-1.4(k) [search warrants open after return]; Tex. Code Crim. Proc. Ann. Art. 18.011 [search warrant materials open no later than 60 days after filing]; Va. Code Ann. § 19.2-54 [search warrant materials open after execution subject to temporary sealing]; Alaska R. Crim. P. 37(e)(2) [search warrant materials “shall be open to public” after charges filed]; S.D. Codified Laws § 23A-35-4.1 (2010) [search warrant materials open after investigation terminated or indictment issues].) The Montana Supreme Court recognized a presumptive right of access to search warrant materials under its state constitution in 1996, more than twenty-five years ago. (*Associated Press v. State of Montana* (1991) 250 Mont. 299, 301-303, abrogated on a separate issue in *Plumb v. Fourth Judicial Dist. Court, Missoula Cnty.* (1996) 279 Mont. 363, 368-70 [holding that a Montana statute purporting to require that warrant materials be presumptively sealed violated the public right to know in Montana’s state constitution].) The Eighth Circuit held that there is a First Amendment right of access to search warrants in *Gunn, supra*, 855 F.2d at pp. 572-74 in 1988. And, several circuit courts of appeals have held that there is a common law right of access to search warrants at some stage of a criminal investigation. (*Battlefield Museum, supra*, 658 F.3d at pp. 1193-94; *In re Application and Affidavit for a Search Warrant* (4th Cir.1991) 923 F.2d 324, 331; *Application of Newsday, Inc.* (2nd Cir.1990) 895 F.2d 74, 79.) This confirms that the “experience” consideration in *Press-Enterprise II* favors a First Amendment right of access here.

Second, “logic” also supports recognizing a First Amendment right of access to search warrant materials. A right of access to search warrant materials empowers citizens and journalists to more effectively “expose” – and then remedy on the campaign trail or at the ballot box – “corruption, incompetence, inefficiency, prejudice, and favoritism” in warrant proceedings. (See *NBC Subsidiary, supra*, 20 Cal.4th at p. 1211, quoting *Estate of Hearst* (1977) 67 Cal.App.3d 777, 782.) It also acts as a check on the substantial power that law enforcement officers have when applying for and executing search warrants. (See *Gunn, supra*, 855 F.2d at p. 573; *In re Application of New York Times Co., supra*, 585 F.Supp.2d at pp. 89-90; *Loughner, supra*, 769 F.Supp.2d at pp. 1193-95.) As this Court said *CPOST, supra*, 42 Cal.4th at p. 297, “Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain public trust in its police department, the public must be kept fully informed of the activities of its peace officers. . . .” For these reasons, the “logic” consideration, too, favors of a First Amendment right of access to search warrant materials after the search warrant they relate to is executed, and *a fortiori* favors a First Amendment right of access to the search warrant materials at issue here.

Confirming the “logic” of recognizing a First Amendment right of access to search warrant materials, California journalists¹⁰ and news media advocates have used search warrant materials to uncover and inform their readers and the public about important information on a wide variety of issues that might never have come to light otherwise. For example:

- a) *Carmody*. In 2019, as part of a leak investigation, San Francisco police obtained five search warrants targeting San Francisco freelance journalist Bryan Carmody. They then raided Mr. Carmody’s home and office. Media advocates condemned the raid, pointing to California laws that protect journalists against subpoenas and search warrants, Cal. Const., art. I, § 2(b); Evid. Code § 1070, Pen. Code § 1534(g).¹¹ Mr. Carmody successfully moved to quash the warrants on this basis.¹²

Concerned that law enforcement officers had requested and San Francisco judges had signed off on five search warrants that targeted a journalist contrary to the Shield Law, FAC, SPJ NorCal, and RCFP filed a motion to unseal the warrant affidavits submitted by the SFPD, in hopes of getting to the bottom of how this had happened, citing Penal Code section 1534(a), the First Amendment right of access, and this Court’s ruling in *NBC Subsidiary*. (*In Re Application of Media Coalition to Unseal Search Warrant Materials Pertaining to Warrant Numbers SW43684 and SW43687* (S.F. Cnty. Super. Ct.) Case No. SW43684, SW43687.)¹³ The moving parties prevailed, except for limited redactions, and FAC used the information it obtained to publish a detailed account of the Carmody affair.¹⁴ In a September 3, 2019 press release,¹⁵ FAC wrote that the affidavits revealed:

¹⁰ There have been noteworthy examples of search warrant-based reporting outside of California recently, as well, but because petitioner EFF has discussed that at some length, we will not do so again here, except to join in petitioner’s discussion on that issue. (See *supra* at p. 1 n.1.)

¹¹ (*SPJ NorCal Condemns Search of Freelancer Bryan Carmody as Attack on First Amendment* (SPJ NorCal May 5, 2019), <https://spjnorcal.org/2019/05/12/spj-norcal-condemns-search-of-freelancer-bryan-carmody-as-attack-on-first-amendment/>.)

¹² (*The Bryan Carmody Story: In-Depth* (FAC 2019), <https://firstamendmentcoalition.org/the-bryan-carmody-story-in-depth/>.)

¹³ (*Ibid.*)

¹⁴ (*Ibid.*)

¹⁵ (*Fifth Judge Sides With FAC, Orders Release Of Records In Bryan Carmody Raid* (FAC Sept. 3, 2019), <https://firstamendmentcoalition.org/2019/09/fifth-judge-sides-with-fac-orders-release-of-records-in-bryan-carmody-raid/>; see also *FAC, SPJ NorCal Announce Efforts To Protect Press Freedom One Year After Raid On Journalist* (FAC May 12, 2020), <https://firstamendmentcoalition.org/2020/05/fac-spj-norcal-announce-efforts-to-protect-press-freedom-one-year-after-raid-on-journalist> [describing additional efforts by FAC and SPJ NorCal to educate the community on the Carmody affair and the statutory and constitutional rights that it implicated, to reduce the odds that similar warrants will be issued again].)

- “Police did not include in their applications key information about Carmody’s profession, omitting that he had a department-issued press pass, an obvious sign of his work as a journalist;”
- “Police described constitutionally protected and routine newsgathering activities as criminal conduct;” and
- Two of five judges who issued search warrants targeting Mr. Carmody had been told that Mr. Carmody “was someone who ‘makes a career out of producing/selling hot news stories,’ ” but issued search warrants targeting Mr. Carmody anyway.¹⁶

The *San Francisco Chronicle* published several detailed articles about the raid and its causes, drawing heavily on the unsealed search warrant materials discussed by FAC.¹⁷

- b) *Golden State Killer*. In 2018, the Sacramento County Superior Court granted a media coalition’s motion to unseal records related to warrants targeting Joseph DeAngelo, the so-called “Golden State Killer” believed to have committed numerous serious crimes, including murders, burglaries, and sexual assaults.¹⁸ The records included search warrant affidavits that described how FBI agents used DNA analysis to establish probable cause, and to then confirm DeAngelo’s identity as the “Golden State Killer” and begin the process of holding him accountable for his crimes.¹⁹
- c) *Papini*. Earlier this year, the Shasta County Superior Court granted a motion by *The Sacramento Bee* to unseal records related to fourteen search warrants obtained by Shasta County law enforcement officers in the early stages of their investigation of the disappearance of Sherri Papini in 2016.²⁰ The *Bee* used information in the

¹⁶ (*The Bryan Carmody Story: In-Depth* (FAC 2019),

<https://firstamendmentcoalition.org/the-bryan-carmody-story-in-depth/>.)

¹⁷ (See, e.g., Sernoffsky & Cabanatuan, *Three judges nullify more search warrants in San Francisco police raid on journalist* (Aug. 2, 2019),

<https://www.sfchronicle.com/crime/article/Three-judges-nullify-more-search-warrants-in-San-14277369.php>; Sernoffsky, *Adachi leak: Second SF judge had evidence subject of police raid was journalist* (Aug. 13, 2019),

<https://www.sfchronicle.com/crime/article/Adachi-leak-Second-SF-judge-had-evidence-subject-14301598.php>.)

¹⁸ (Gutierrez, *Golden State Killer suspect’s DNA taken from car as he shopped at Hobby Lobby* (June 2, 2018), <https://www.sfgate.com/crime/article/Golden-State-Killer-suspect-s-DNA-taken-from-12961700>.)

¹⁹ (*Ibid.*)

²⁰ (See Sabalow, *Hoodwinked: Sherri Papini’s kidnapping hoax played on sympathy and entangled innocent people* (The Sacramento Bee July 28, 2022),

<https://www.sacbee.com/news/local/article263190633.html>; Sabalow, *Hoodwinked: Sherri Papini reappears after missing for 22 days with an unbelievable story* (The Sacramento Bee July 28, 2022), <https://www.sacbee.com/news/local/article263191358.html>;

Sabalow *Hoodwinked: Sherri Papini’s kidnapping hoax ends with arrest outside her kids’ piano lessons* (The Sacramento Bee July 28, 2022),

<https://www.sacbee.com/news/local/article263192703.html>.)

affidavits to provide readers with a more detailed look at the admirable efforts of law enforcement in the immediate wake of Papini’s reappearance in late 2016 and 2017.²¹

- d) *Anaheim*. Last May, an FBI search warrant affidavit that had been submitted to the Orange County Superior Court was unsealed that revealed an FBI agent’s allegation and stated belief, based on a years-long investigation, that there was probable cause to believe the then-Mayor of Anaheim had “committed honest services fraud, obstruction of justice, witness tampering and other crimes” while in office, and had “us[ed] his personal email for City business.”²² After the affidavit was made public, the Mayor resigned.²³ He recently refused to disclose records stored on his personal email or electronic devices under the Public Records Act, despite this Court’s decision in *City of San Jose, supra*, 2 Cal.5th 608, citing his Fifth Amendment right against self-incrimination.²⁴
- e) *Review of a Year of Humboldt County Search Warrants*. In 2010, a team of student journalists at Humboldt State University requested copies of materials related to all search warrants issued by their local court during the preceding year.²⁵ The resulting article discusses warrants obtained for a broad spectrum of purposes, but contains insights of indisputable local importance about where searches are typically conducted, how law enforcement officers conduct investigations, asset seizure and forfeiture, and even the warrant requirement itself.²⁶ Without a strong right of access to search warrant materials, much of the information discussed in the students’ reporting could become significantly more difficult for journalists and members of the public to access.²⁷

For all of these reasons, EFF’s Petition for Review should be granted, and the Court of Appeal’s decision should be reversed, including as to the First Amendment right of access.

IV. THE COURT OF APPEAL ERRED BY AUTHORIZING INDEFINITE, BLANKET SEALING OF ALL REMAINING RECORDS.

The Court of Appeal erred in several respects when it affirmed the trial court’s ruling that the records at issue should remain sealed in their entirety and indefinitely under Evidence Code sections 1040 and 1041.

²¹ (*Ibid.*)

²² (Fenno, et al., *Ex-Anaheim mayor refuses to publicly disclose emails amid FBI corruption investigation* (L.A. Times Oct. 25, 2022), <https://www.latimes.com/california/story/2022-10-25/anaheim-harry-sidhu-emails-disclosure-corruption-investigation-scandal>.)

²³ (*Ibid.*)

²⁴ (*Ibid.*)

²⁵ (HSU Investigative Reporting students, *Permission to Enter: The Total Lowdown on Search Warrants Issued and Served in Humboldt County* (North Coast Journal May 13, 2020), <https://www.northcoastjournal.com/humboldt/permission-to-enter/Content?oid=2131022>.)

²⁶ (*Ibid.*)

²⁷ (*Ibid.*)

Penal Code section 1534(a) provides, using absolute language, that search warrant materials related to executed search warrants for which a return has been filed or that are more than ten days old, whichever comes first, must be made open to the public as judicial records. However, this Court and the Court of Appeal have held that information that is privileged under Evidence Code sections 1040 and 1041 is exempt from Penal Code section 1534(a)'s rule of openness. (*PSC Geothermal Services v. Superior Court* (1994) 25 Cal.App.4th 1697; *People v. Hobbs* (1994) 7 Cal.4th 948, 954-55, 962, 971.) The Court of Appeal held that so much of the information in the “80 pages,” *San Bernardino, supra*, 83 Cal.App.5th at p. 415, of search warrant materials at issue is privileged under Evidence Code sections 1040 and 1041 that redaction is not reasonably possible, and affirmed the trial court's decision that they should remain sealed, in their entirety and indefinitely, on this basis.

This holding is not consistent with the many procedural and substantive prerequisites for invoking and sustaining Evidence Code section 1040 and 1041 privilege claims. These privileges only protect information obtained in a certain way or from a certain type of person, to warrant protection, and that the information qualify as “confidential.” (See Evid. Code §§ 1040(a) [official information privilege only applies to “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.”], 1041(a) [confidential informant privilege only protects “the identity of a person who has furnished information . . . purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state” to a person described in Evidence Code section 1041(b)].) Moreover, both privileges are *qualified*, and require courts to balance the interests in secrecy against the interests in access, without considering “the interest of the public entity as a party in the outcome of the proceeding.” (Evid. Code §§ 1040(b)(2), 1041(a)(2).)

Furthermore, “the burden is on” the proponent of nondisclosure “to prove the elements of the privilege.” (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1128; see also *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656 [section 1040 can only be “applied conditionally on a clear showing that disclosure is against the public interest”].) ²⁸ Courts must therefore assess whether the party asserting these privileges has established each element before affirming a privilege's invocation. (See *Marylander, supra*, 81 Cal.App.4th at pp. 1128-30 [holding that to adjudicate a privilege claim under Evidence Code section 1040, courts must *first* make a “threshold determination” as to whether the information at issue was “acquired in confidence,” and *then* “balance the interests to determine whether the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice,” and reversing a trial court's

²⁸ While *CBS, Inc.* and *Marylander* involved Evidence Code section 1040, their reasoning calls for the same burden of proof allocation in cases involving Evidence Code section 1041. The statutes share very similar structures, are consecutive, are part of the same Article of the Evidence Code (the title of which mentions both privileges “Official Information and Identity of Informer”), and are subject to the same procedural statute, Evidence Code section 1042. (See also *Hobbs, supra*, 7 Cal.4th at p. 961 [referring to the confidential informant privilege as something that the People may or may not “successfully invoc[e]”].)

ruling that section 1040 applied on the grounds that the trial court had not done one part of this analysis].)

Finally, Evidence Code sections 1040 and 1041 both require redaction rather than blanket nondisclosure, at least as a general matter. (See, e.g., *Hobbs*, *supra*, 7 Cal.4th at p. 971 [stating that trial courts should, when evaluating Evidence Code section 1040 and 1041 privilege claims, review the search warrant materials *in camera* to identify any legitimately privileged material and then “take whatever further actions may be necessary to ensure full public disclosure of the remainder of the affidavit”]; *PSC Geothermal Services*, *supra*, 25 Cal.App.4th at pp. 1714-15 [reversing a trial court’s ruling upholding an Evidence Code section 1040 privilege claim where “there [was] nothing to suggest that the court considered the possibility of redacting the affidavit and sealing only that portion which might be found, under the two-prong test above, to be official information”].)

The decision below did not address all of the elements of Evidence Code sections 1040 and 1041 (it did not explain whether or how information had been obtained in confidence, who received the information, whether the a public official had received the information in the course of his or her duty, or whether any information was legitimately confidential), and it did not account for the County’s burden “to prove the elements of” these privileges. (See *Marylander*, *supra*, 81 Cal.App.4th at p. 1128.) Further, as in *PSC Geothermal Services*, *supra*, 25 Cal.App.4th at pp. 1714-15, the Court of Appeal did not meaningfully balance the interests in secrecy against the public interest in access, and made no effort to exclude government interests from its analysis under Evidence Code sections 1040(a) and 1041(b). And, since there was apparently “no evidence” properly before the Court that indicated unsealing would cause harm “besides the warrants themselves,” Ptn., at p. 9 [citing *San Bernardino*, *supra*, 83 Cal.App.5th at p. 431 n.7], and all of the warrant materials at issue were years old and related to closed investigations, the County cannot have met its burden of proof with respect to all of the elements of these privileges. The Court of Appeal thus erred by holding that Evidence Code section 1040 and 1041 justified blanket sealing.

Having established that the First Amendment right of access applies here (see *supra* at § III), the decision below is also inconsistent with the First Amendment. In *NBC Subsidiary*, this Court held that judicial records subject to the First Amendment right of access can be sealed only “in the rarest of circumstances.” (20 Cal.4th at p. 1226.) Under *NBC Subsidiary*, judicial records must be made public unless the proponent of sealing proves and the court finds that: (1) there is an overriding interest that overcomes the public’s right of access; (2) there is a substantial probability that sealing will promote that interest; (3) the sealing order is narrowly tailored to serve the overriding interest; and (4) there are no less restrictive alternatives to sealing. (See *id.* at p. 1208; accord. Cal. R. Ct. 2.550(d), 2.550(e)(1).)

The decision below briefly discussed *NBC Subsidiary* and stated that blanket sealing is permitted even if the First Amendment right of access applies. Not so. The Court of Appeal began its *NBC Subsidiary* analysis by concluding that (1) “protecting the identities of confidential informants,” (2) protecting “the confidentiality of law enforcement investigative practices,” and (3) “preservation of confidential investigative information, both general information regarding investigative procedures and specific information regarding ongoing investigations” all constituted overriding interests that supported sealing.

(*San Bernardino, supra*, 83 Cal.App.5th at p. 428.) But these abstract interests, which simply describe the information at issue rather than explain the basis for the government’s interest in secrecy, cannot and do not qualify as overriding interests under *NBC Subsidiary*. The decision below also stated that these interests would be prejudiced if any of the search warrant materials at issue were unsealed, and that sealing was narrowly tailored and the least restrictive means of protecting these interests, but that reasoning is also dissonant with the huge quantity of material that the decision below held should remain sealed. (*Ibid.*) Finally, further undermining every step of the Court of Appeal’s *NBC Subsidiary* analysis, the County apparently relied entirely on the search warrant materials themselves to justify the proposition that unsealing would cause harm, Ptn., at p. 9 [citing *San Bernardino, supra*, 83 Cal.App.5th at p. 431 n.7], even though it bears the burden of proof as the proponent of secrecy.

The Court of Appeal’s errant Evidence Code section 1040 and 1041 analysis, misapplication of the standard for sealing under the First Amendment and *NBC Subsidiary*, and incorrect holding that all of the search warrant materials at issue should remain sealed in their entirety further supports granting review, and thereafter reversing the decision below.

V. CONCLUSION

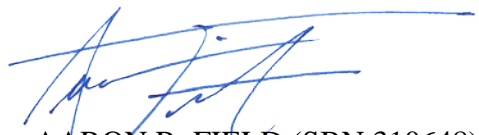
This Court has repeatedly, and correctly, recognized the public importance of access to the democratic process. (See *IFPTE, supra*, 42 Cal.4th at p. 328.) The public interest in access is “strong indeed” in cases involving access to search warrant materials, which enables the press and the public to more effectively “oversee[] the conduct of the prosecutor, the police, and the judiciary.’ ” (*McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 975 [citation omitted].) Given the importance of access to search warrant materials to the amici curiae, their members, and the public, the amici curiae respectfully urge the Court to grant the Petition, reverse the Court of Appeal’s decision, and preserve “openness in government” in a criminal proceeding of great consequence, consistent with its *NBC Subsidiary* decision and article I, section 3(b) of the California Constitution.

Very truly yours,

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