STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
	)	49 SWA 19-911
IN THE MATTER OF THE	)	49 SWA 20-402
INVESTIGATION OF THE IMPLICATED	)	49 SWA 20-403
INDIVIDUAL	)	49 SWA 20-404
	)	49 SWA 20-405
	)	
	)	IMPLICATED INDIVIDUAL'S
	)	BRIEF IN OPPOSITION TO MOTION
	)	TO UNSEAL AFFIDAVIT IN
	)	SUPPORT OF SEARCH WARRANT

COMES NOW the Implicated Individual, by and through his attorney Marty Jackley, of Gunderson, Palmer, Nelson and Ashmore, LLP, and respectfully files this brief in opposition to ProPublica's[1] motion to unseal affidavit in support of search warrant.

The sound legal principles of res judicata and collateral estoppel prevent re-litigating the claim, issue, and relief sought in ProPublica's motion. Even if this Court were to conclude that ProPublica's motion is not barred by those principles, ProPublica has not shown that it is entitled to its requested relief under SDCL 23A-35-4.1. This Court should decline accepting ProPublica's invitation to "make up" or judicially create (with no legal support) "implicit burdens", "threshold burdens", "rebuttable presumptions" as to SDCL 23A-35-4.1, as well as to impose requirements upon executive branch law enforcement "to provide future status updates" to the judicial branch (this Court). *See generally* ProPublica's Brief in Support of Motion to Unseal Affidavit at p. 2, 3-6. This includes any request for investigative authorities to violate Department of Justice Rule 1–7.400 on the disclosure of information concerning ongoing criminal investigations. *See* https://www.justice.gov/jm/jm-1-7000-media-relations#1-7.400.

[1] To avoid confusion in the record and based upon this litigation's past procedure, references to ProPublica encompass both ProPublica and the Argus Leader.

Finally, the Implicated Individual's privacy rights support the continued sealing of the affidavits, and to the extent that SDCL 23A-35-4.1 prevents consideration of those federal constitutional rights of the Implicated Individual in this case, and as to any other individuals, it is unconstitutional on its face and as applied.

Ultimately, it seems that ProPublica's latest action of filing this motion may be more about creating news to continue destructing the reputation of a private citizen that has not been charged and ignoring the constitutional presumption of innocence. *See* Exhibit 1 (ProPublica Files Motion to Unseal Search Warrant Affidavits in Child Porn Probe of South Dakota Billionaire (December 16, 2021)). Accordingly, ProPublica's renewed motion for the unsealing of the affidavits in support of search warrants should be denied.

I. Factual Background

A. Unsealing the Search Warrant Affidavits

This request for the unsealing of search warrant documents originated on July 23, 2020, when ProPublica contacted the Second Circuit administrator to obtain copies of all search warrant documentation including the very same affidavits in support of search warrant that is the subject of this motion. *See* e-mail of July 23, 2020 and ensuing e-mails. ProPublica continued its quest for the affidavits in support of the search warrant in its initial briefing to this Court for its motion to release search warrant documents and at the October 7, 2020 hearing. *See* ProPublica's Brief in Support of Motion for Release of Search Warrant Documents filed September 4, 2020 at p.1 (statement of the issues presented); Hearing Transcript (Oct. 7, 2020). Interestingly, while ProPublica clearly stated the issue to be whether the Court had authority to seal the affidavits in support of a search warrants, it went on to state that it "[w]ill reserve argument on sealing of supporting affidavits for their reply brief." *Id.* at n.3. Through his

Response, and notwithstanding the forthcoming prejudice of ProPublica's submission of its argument on the sealing of the affidavits in a reply brief – at a time in which the Implicated Individual would no longer be able to submit a written response, the Implicated Individual addressed the issue of the sealing of the search warrants, arguing that the Court had the authority and properly exercised that authority to seal the affidavit supporting the search warrant. *See* Implicated Individual's Response Brief filed September 21, 2020 at p. 8.

At the October 7, 2020 hearing on this matter, and without any doubt given the following exchange, ProPublica again made clear that it was requesting this Court to unseal the affidavits in support of the search warrants:

> **THE COURT**: And so you are trying to convince me that I don't have reasonable cuase for the affidavit and search – in support of the search warrant to continue to be sealed; is that what you're saying?
>
> **MR. BECK**: The underlying affidavit.
>
> **THE COURT**: Correct.
>
> **MR. BECK**: Just the underlying affidavit, Judge, yes.
>
> **THE COURT**: Okay. So, let's focus on that for a second. What, what's your argument why that document shouldn't continue to be sealed?
>
> **MR. BECK**: And, and those would all go to essentially that um, well, cause primarily the common law argument. . . .

See Hearing Transcript (Oct. 7, 2020) (8:21-9:7). This Court then unmistakably ruled that the affidavits in support of the search warrants are to remain sealed because of the "sensitive nature of the subject matter of the investigation", the "reputational interests" and the ongoing investigation. *See id.* at 38. Consistent therewith and from the very

beginning of this case, at issue was the Court's authority to seal documents relating to search warrants, which includes the supporting affidavits. *See* Implicated Individual's Appellate Brief filed November 6, 2020 at p. 2-3 (Statement of Case and Facts).

Crucial for purposes of this Motion, while the Implicated Individual and the State[2] filed a Notice of Appeal as to the Court's Amended Orders unsealing the search warrants and inventories, **ProPublica did not file a Notice of Appeal or Notice of Review of the Court's final and appealable denial of its request to unseal the affidavits in support of the search warrants**. In its appellee brief to the Supreme Court, ProPublica recognized the Circuit Court ordered the affidavits to remain sealed yet further advised the Supreme Court with respect thereto, "To the best of Press's knowledge, there is no ongoing investigation at the state level." *See* ProPublica Appellate Brief filed November 6, 2020 at p. 3 n.3.[3] The Supreme Court ultimately, and in no uncertain terms, made very clear that the affidavits in support of the five search warrants shall remain sealed. *See In the Matter of an Appeal by an Implicated Individual*, 966 N.W.2d at 588–89.

Despite this procedural history with the litigation seemingly resolved by the South Dakota Supreme Court, ProPublica has now renewed its request for this Court to unseal the affidavits in support of the search warrants.

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[2] Although later withdrawing its own Notice of Appeal, the State supported the positions set forth to the South Dakota Supreme Court by the Implicated Individual.

[3] ProPublica's own articles state, acknowledge and recognize this matter was referred to the Department of Justice for further investigation. See ProPublica article published August 28, 2020 (Exhibit 4 to Affidavit of attorney Marty J. Jackley filed September 1, 2020).

B. The Investigation and Exonerating Evidence

As a result of obvious and very concerning leaks in the investigation process and violations of a court order to seal, the uncharged Implicated Individual maintains his innocence yet has already been severely defamed and his privacy interest violated. *See* Appellate Record 405R, 21, 23, 118–19.[4] The Implicated Individual has been further wronged through the State's labeling him as a "defendant" in search warrant records, and has been specifically denied the discovery an actual defendant would be entitled to under Rule 16. *See* Appellate Record 405R, 212. Further concerns exist regarding the ongoing media frenzy with these court proceedings being used as a forum for press statements. *See* Exhibit 1 (*ProPublica Files Motion to Unseal Search Warrant Affidavits in Child Porn Probe of South Dakota Billionaire*).

Finally, in addition to the concerns associated with this leaked and compromised investigation,[5] concerns exist with respect to whether information that was provided in an affidavit to this Court[6] (or that was leaked to ProPublica) included actual and provable exculpatory information supporting the innocence of the Implicated Individual. A forensic examination on the very e-mail account and relevant timeframe that is the subject of the search warrant in this case has uncovered the specific name of an individual other than the Implicated

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[4] *See In re Application of WP Co*, 201 F. Supp. 3d 109, 122 (D.C. 2016) ("[T]he mere association with alleged criminal activity as the subject or target of a criminal investigation carries a stigma that implicates an individual's reputational interest.").

[5] *Cf. United States v. Walters*, 2017 WL 11434158 (S.D.N.Y. 2017) (slip copy) (discussing the importance of the governmental entity's investigation into, and pursuit of charges against, the source of leaked information, and also weighing the effect of an FBI agent's leak of a criminal investigation to the press on subsequent grand jury proceedings to determine whether dismissal of an indictment is an appropriate remedy).

[6] The Implicated Individual acknowledges that this information may not have been available to law enforcement until executing the search warrant and therefore not available at the time of the affidavit in support of the search warrant.

Individual having gained access to that very account. Further exonerating evidence includes corroborating evidence of hacking into the Implicated Individual's various accounts, unknown to the Implicated Individual until a forensic examination was performed that sought to uncover the truth in this matter. The evidence includes hacked e-mail messages ranging from 2016 to 2019, including one from the search warrant email account dated December 29, 2019, literally ten (10) days from the date of the first search warrant was issued. *See* Exhibit 2 (hacked email of December 29, 2019). *See also* Exhibit 3 (hacked message of Tuesday, January 2, 2018); and Exhibit 4 (hacked e-mail of February 14, 2016).

II. Standard and Burden of Proof

ProPublica, as the requester of the affidavit documents and the entity challenging the Court's sealing of the affidavits, bears the burden of proof in this matter. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (indicating that the burden of proof generally lies "on the party seeking relief."). Ultimately, a court's decision to seal its records would be reviewed for an abuse of discretion. *See Flynt v. Lombardi*, 885 F.3d 508, 511 (8th Cir. 2018). *See also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989). As established herein, this Court has the authority to seal the search warrant affidavits based upon SDCL § 23A–35–4.1, and has not abused its discretion in sealing the search warrant affidavits. Furthermore, this Court's decision to seal the affidavits was final, not appealed by ProPublica, and otherwise confirmed by the South Dakota Supreme Court. *See In the Matter of an Appeal by an Implicated Individual*, 966 N.W.2d 578 at p. 588-89.

III. Argument

A. Res Judicata/Collateral Estoppel

Res judicata and collateral estoppel bar the claim, issues, and relief sought in

ProPublica's renewed motion as ProPublica is foreclosed from raising issues that were, or should have been, raised earlier in this matter. It has long been established that res judicata and collateral estoppel have the dual purpose of protecting litigants from the burden of re-litigating an identical issue or claim with the same party or his or her privy and of promoting judicial economy by preventing needless litigation. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 (1979). Res judicata is a judicially created doctrine that prevents a party from re-litigating a claim or issue that had been actually litigated by the parties in an earlier suit. *Long v. State*, 2017 S.D. 79, ¶ 50 n.13, 904 N.W.2d 502, 519 n.13 (quoting *Lawrence Cty. v. Miller*, 2010 S.D. 60, ¶ 24, 786 N.W.2d 360, 369). "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Estate of Johnson ex rel. Johnson v. Weber*, 2017 S.D. 36, ¶ 41, 898 N.W.2d 718, 733 (quotation omitted). Issue preclusion refers to a prior judgment's ability to foreclose re-litigation of a matter that has been litigated and decided. *Id.* Broader claim preclusion refers to a judgment which forecloses litigation of a matter which has never before been litigated, based on a determination that it should have been brought in an earlier suit. *Id.*

As explained by Justice Kern, to invoke the doctrine of res judicata, the following four elements must be satisfied:

> (1) a final judgment on the merits in an earlier action;
> (2) the question decided in the former action is the same as to the one decided in the present action;
> (3) the parties are the same; and
> (4) there was a full and fair opportunity to litigate issues in the prior proceeding.

Estate of Johnson, 898 N.W.2d at 733 (quoting *People ex rel. L.S.*, 206 S. D. 76 ¶ 22, 721 N.W.2d 83, 89–90). Ultimately, it is well settled that when an issue of fact or law is actually litigated and determined by a valid judgment, that determination is conclusive in a subsequent

action between the parties, whether on the same or a different claim. *See B & B Hardware Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1303 (2015); *Estate of Johnson by through Johnson v. Weber*, 898 N.W.2d 718, 729–30 (S.D. 2017).

A review of the elements of res judicata shows that issue preclusion or, in the alternative, claim preclusion bars ProPublica's renewed motion for the unsealing of the affidavits in this case. As to the first element, this Court has ruled, and the South Dakota Supreme acknowledged, that the affidavits in support of the five search warrants shall remain sealed. *See In the Matter of an Appeal by an Implicated Individual*, 966 N.W.2d at 588–89. The time for ProPublica to appeal or to request rehearing has passed. Indeed, it is well-established that even if ProPublica considers itself the prevailing party from the Supreme Court appeal as at least its news articles reflect, it may appeal an adverse ruling collateral to the judgment so long as it retains a stake in the litigation via a case or controversy. *See Black Hills Jewelry Mfg. Co. v. Felco Jewel Industries, Inc.*, 336 N.W.2d 153, 158 (S.D. 1983) (citing *Deposit Guarantee Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)).

As detailed above, ProPublica has requested from its very beginning e-mails, the search warrant affidavits. That request has continued throughout its briefing to this Trial Court and the oral argument before this Trial Court, and has been confirmed by the South Dakota Supreme Court decision. The South Dakota Supreme Court has made very clear that the affidavits in support of the five search warrants remain sealed. *See In the Matter of an Appeal by an Implicated Individual*, 966 N.W.2d at 588–89.

If ProPublica did not like the result of this Court's decision to keep sealed the affidavits in support of the search warrants, or in any way disputed the directive of the Supreme Court, it needed to appeal this Court's decision as to the affidavits or to file a petition for rehearing with

the Supreme Court. It failed to do either and ProPublica does not now get "a second bite of the apple" to raise its issues and arguments. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003) (in denying a party's appeal of a renewed motion to unseal documents because the party did not appeal the earlier Order denying the initial motion to unseal documents, stating that "[t]hey are precluded from a second bite of the apple").

As an example, ProPublica has readily admitted that the Implicated Individual is uncharged and that it has no evidence that the ongoing investigation has concluded. Yet, ProPublica's request for this Court to make up and judicially create "implicit burdens", "threshold burdens" and "rebuttable presumptions" flies in face of the well-established law of res judicata and collateral estoppel. If ProPublica indeed believed that either this Court or the Supreme Court should make judicial law, it had every opportunity to do so in this ongoing litigation and neither this Court nor the Supreme Court accepted any such invitation.

As another example, ProPublica had every opportunity to raise the issue that this Court should not have considered the status of a federal investigation for purposes of SDCL 23A-35-4.1 when it decided to keep the affidavits sealed. If it disagreed with the Court's consideration of any federal investigation, it was required to appeal that question to the Supreme Court. It chose not to do so, and these parties should not be summoned back to this Court yet again to address that very argument in ProPublica's renewed motion. *Cf.* ProPublica's Brief in Support of Motion to Unseal Affidavit in Support of Search Warrant (Dec. 9, 2021).

The third and fourth elements of res judicata are likewise satisfied. As to the third element, ProPublica, the Implicated Individual and the State remain the same parties as the prior litigation. Finally, regarding the fourth element, there was clearly a full and fair opportunity to litigate the issue of unsealing the search warrant affidavit at both this Court and the Supreme

Court, and if the Court wished to engage in creating new burdens and law enforcement reporting requirements in the prior proceedings it wisely declined. Accordingly this motion is subject to and should be dismissed pursuant to the well-established doctrine of res judicata.

If ProPublica is able to convince this Court the matter of unsealing the affidavit has never been litigated before, it clearly could have and should have been brought in the earlier suit and is foreclosed by claim preclusion for the same reasons as set forth above. *See Estate of Johnson ex rel. Johnson*, 898 N.W.2d at 733. *See generally Black Hills Jewelry Mfg. Co.*, 336 N.W.2d 153 at 157. ProPublica's renewed motion, including the arguments regarding the distinction between federal and state investigations and the requested imposition of reporting requirements upon the investigative authorities are arguments that could have, and should have, been addressed by this Court and the South Dakota Supreme Court. For the foregoing reasons, ProPublica is legally foreclosed from bringing this renewed motion and raising arguments set forth therein.

B. Statutory Authority Forecloses Relief Requested

If this Court concludes that ProPublica's claim or arguments are not barred by res judicata and collateral estoppel principles, ProPublica has failed yet again to prove that it is entitled to its relief requested. SDCL 23A–35–4.1 provides as follows:

> If not filed earlier, any affidavit in support of a search warrant shall be filed with the court when the warrant and inventory are returned. Upon filing the warrant and supporting documents, the law enforcement officer may apply by separate affidavit to the court to seal the supporting affidavit from public inspection or disclosure. **The court, for reasonable cause shown, may order the contents of the affidavit sealed from public inspection or disclosure but may not prohibit disclosure that a supporting affidavit was filed, the contents of the warrant, the return of the warrant, nor the inventory. The court may order that the supporting affidavit be sealed until the investigation is terminated or an indictment or information is filed**. In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1. However, a court order sealing a supporting affidavit may not affect the right of any defendant to discover the contents of the affidavit under chapter 23A-13.

(Emphasis added). Furthermore, SDCL 15–15A–7 specifically provides that "The following information in a court record is not accessible to the public: . . . (3)(d) affidavit filed in support of search warrant (sealed if so ordered by court, *see* statutory directives); SDCL 23A–35–4.1." As admitted to by ProPublica in its request, there has been no indictment or information filed, and ProPublica has provided no new evidence in relation to meeting its burden that the investigation is terminated. Accordingly, ProPublica has failed to meet its burden and the inquiry should end.

ProPublica contends "[i]t seems likely that an investigation that began at least two years ago and has produced no formal criminal charge(s) is finished." ProPublica's Brief at 6. ProPublica seems to argue that conjecture is sufficient to establish a rebuttable presumption that an investigation is terminated to then shift the burden to the State to show that the investigation is not terminated. *Id.* Yet this Court should not accept further invitation to judicially create or make up new burdens and reporting requirements, **including the issuance of any order compelling the Attorney General's Office and the Division of Criminal investigation to produce discovery in a criminal investigation to one other than the Implicated Individual**. *See* Motion for Order Compelling Discovery from South Dakota Attorney General's Office or Division of Criminal Investigation (undated) (emphasis added). The very Affidavit submitted today, where a Division of Criminal Investigation Special Agent details the status of the investigation to the prosecuting attorney, shows the absurdity and inappropriateness of such a requirement on the executive branch.

It is apparent that DOJ policy as applicable to joint task forces with State authorities, has been pushed to the limits (or beyond) in this case. DOJ Rule 1–7.400 subsection B specifically mandates as follows:

> DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.

See https://www.justice.gov/jm/jm-1-7000-media-relations#1-7.400. Any request for the authorities to violate the foregoing, including through PoPublica's Motion for Order Compelling Discovery from South Dakota Attorney General or Division of Criminal Investigation (undated), should be denied. It does not go unnoticed that ProPublica has not cited any legal authority supporting the imposition of such a requirement on the executive branch law enforcement to report a status update of a criminal investigation to the judicial branch.

In effect, ProPublica is requesting this Court to judicially create a statute of limitations for criminal matters earlier than the South Dakota legislature or the United States Congress. Such request has no sound legal or practical basis and must be rejected.

After consideration of an affidavit supporting the sealing of the search warrant file, which included the affidavits, the Court ordered the file to be sealed. The Court's decision to seal the affidavits is subject to review under an abuse of discretion standard. Here, there is no indication or evidence that the Court abused its discretion in deciding to seal the court file. And ProPublica has again failed to show in its renewed motion that it is entitled to the same.

C. Implicated Individual's Privacy Rights

Again to the extent that the Court concludes this matter is not precluded through res judicata or collateral estoppel principles, and aside from ProPublica's failure to meet its burden under SDCL 23A-35-4.1, the circumstances of this matter (including the Implicated Individual's privacy interests, presumption of innocence, and leaked and compromised investigation) also support the continued sealing of these affidavits. Although absent from ProPublica's briefing,

this Implicated Individual has constitutional rights which include the presumption of innocence and privacy rights recognized under federal law. These protections go beyond the protections outlined in SDCL § 23A-35-4.1 and SDCL § 15-15A-7 and to the extent that SDCL 23A-35-4.1 does not allow this Court to consider those constitutional rights, SDCL 23A-35-4.1 is both unconstitutional on its face and as applied to this situation involving the affidavits and the Implicated Individual.

The compelling interest in maintaining the confidentiality of these search warrant affidavits lies within the "[grave] risk of serious injury to innocent third parties[.]" *Times Mirror Co.*, 873 F.2d 1210, 1216 (9th Cir. 1989) (quoting *United States v. Smith*, 776 F.2d 1104 (3rd Cir. 1985)). With no indictment or other charge, the individual implicated here "will not have an opportunity to prove [his] innocence in a trial. This means that the clearly predictable injuries to the reputation[] of the named individual[] is likely to be irreparable." *Id.* This is especially the case where ProPublica has sensationalized these matters and failed through its "anonymous sources" to mention or recognize the clear forensic evidence that the e-mail accounts at issue were hacked. *See generally* Exhibits 2-4.

Likewise, significant privacy concerns are further implicated in relation to the sealed affidavits. As the alleged investigation involves a serious matter in which this Implicated Individual asserts his innocence, "[p]ublication of the documents could inflict [further] serious injury to [his] reputation[.]" *In re Matter of Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Inc.*, 710 F. Supp. 701, 705 (D. Minn. 1989) (indicating that potential serious harm to an individual's reputation and career is the reason "that the government is generally required to present evidence secretly to a grand jury and obtain an indictment before making criminal accusations."). The privacy interests of the uncharged, yet

implicated, individual "should weigh heavily in a court's balancing equation." *See United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) (quoting *In re Newsday, Inc.,* 895 F.2d 74, 79-80 (2d Cir. 1990)).

> Such interests, while not always fitting comfortably under the rubric "privacy," are a venerable common law exception to the presumption of access. Courts have long declined to allow public access simply to cater to a morbid craving for that which is sensational and impure. As the Supreme Court noted in *Nixon v. Warner Communications, Inc.,*435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), courts have the power to insure that their records are not "used to gratify private spite or promote public scandal," and have "refused to permit their files to serve as reservoirs of libelous statements for press consumption."

Id. at 1051 (internal citations and quotation marks omitted). *See generally* Exhibit 1 (ProPublica Article).

When determining the weight to be accorded to an individual's privacy interests in a particular case, the case of *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corp. v. Pulitzer Pub. Co.,* 895 F.2d 460, 467 (8th Cir. 1990), is instructive. In that case, the Eighth Circuit considered the effects of a release on wiretapped conversations on an individual:

> [I]n the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. Without an indictment, there can be no trial and, from their perspective, no acquittal. Thus, [w]here privacy interests in wiretapped conversations are asserted, the court must consider how disclosure of the information would affect the persons identified and society's interests in disclosure. A number of factors enter into this analysis, including the extent of public knowledge of the material, the accusatorial nature of the material, and the need for public scrutiny of the government operations disclosed in the material.

Id. at 467 (quoting *In re Unisys, Inc.*, 710 F. Supp. at 705). Applying these factors to this matter confirms that sealing of the search warrant affidavits is appropriate because of the Implicated Individual's privacy interests. As in *Certain Interested Individuals*, **"the pre-indictment [and**

quite possibly non-indictment] status of the government's criminal investigation tips the balance decisively in favor of the privacy interests and against disclosure of even the redacted versions of the search warrant affidavits *at this time.*" *See id.* (emphasis in original).

The Implicated Individual has never been charged and is constitutionally presumed innocent. He has set forth exonerating evidence that may or may not be contained in the search warrant affidavits as the search warrants may well have been necessary in order to produce or uncover this evidence, yet this matter is now being tried in the media. *See, e.g.,* Exhibit 1. This is precisely why privacy interests and fundamental fairness require maintaining confidentiality of these affidavits and avoiding further "grave risk of serious injury to innocent third parties" or requiring an uncharged individual to prove his innocence in the public arena without a trial.

Importantly, continued sealing of the search warrant affidavits in this matter does not undermine the three critical public interests that were discussed in Circuit Judge Bowman's concurring opinion in *In re Gunn*: 1) "the public interest in [ultimately] knowing the facts produced by an uncompromised investigation"; 2) "the public interest in the successful prosecution [of a guilty party]"; and, most importantly in this matter, 3) "the public interest in fairness to any innocent persons . . . who are shown by the documents as being linked to the investigation." *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) (Bowman, J. concurring). Of note, this is not a situation where "all of those involved with the investigation, as targets or otherwise, know its details, and only the general public remains in the dark." *Id.* at 576 (Heaney, J. dissenting). Under this authority and the circumstances in this matter, the Court appropriately sealed the search warrant affidavits and they should remain sealed.

Finally, as noted above, ProPublica's Motion seeking the unsealing of the affidavits fails to even account for the Implicated Individual's privacy interests. To the extent that SDCL 23A-35-4.1 prohibits this Court from taking into account (or ultimately requiring a violation of) the above constitutional rights of the Implicated Individual, as well as all other individuals that may be the subject of a search warrant, the statute is unconstitutional on its face and as applied here. The requirement of mandatory, total disclosure of the affidavits is unconstitutional because it prohibits the Court from considering the privacy rights of individuals in any case, certainly at stake given the content of affidavits in support of search warrants as compared to the other standard search warrant documents. *Cf. Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (noting that a statute may be unconstitutional "on its face" when "it is unconstitutional in every conceivable application"). Further, SDCL 23A-35-4.1 is unconstitutional as to its application to the Implicated Individual in this case, where the Implicated Individual's privacy rights would not be considered under that statute. *See State v. Rolfe*, 2013 S.D. 2, ¶ 27, 825 N.W.2d 901, 909, *and Globe Newspaper Co. v. Super. Ct. for Cnty. Of Norfolk*, 457 U.S. 596, 607-08 (1982); *see also In re A.L.*, 2010 S.D. 33, ¶ 19, 781 N.W.2d 482, 487 ("The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative.").

D. ProPublica's First Amendment rights are not violated by the sealing of the Affidavits

Sealing the search warrant affidavits does not violate ProPublica's First Amendment rights. Like the common law qualified right, the First Amendment right of public access to criminal proceedings and documents is not an unfettered right. To determine whether there is a First Amendment right of access to a criminal proceeding or criminal document, the Supreme Court has, as a matter of course, considered: 1) whether that criminal proceeding has "historically been open to the press and the general public[,]" and 2) "whether public access

plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8-9 (1986). If both of these questions are answered in the affirmative, then there exists a qualified right to public access.

For purposes of a search warrant proceeding, there is no First Amendment right to access the search warrant affidavits because those search warrant proceedings and affidavits have not "historically been open to the press and the general public." *See id.* at 8. Indeed, a number of cases have rejected that a First Amendment right to public access of court records attaches to search warrant documents at various stages of the proceedings. In *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989), the Ninth Circuit Court of Appeals concluded that there was no First Amendment right to search warrant court records during the pre-indictment stage of an ongoing criminal investigation. *Id.* at 1211. The Fourth Circuit Court of Appeals reached a similar conclusion in *Baltimore Sun Co.*, 886 F.2d 60, concluding that there is no First Amendment right of access to search warrant documents during the time period between execution of the warrant and an indictment:

> "[i]t is undisputable that proceedings for the issuance of search warrants are not, and have not been, public. Such proceedings are "necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." To preserve this interest in secrecy, any documents filed in connection with the application process are also, by necessity, submitted confidentially." *In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012) (quoting *Franks v. Delaware,* 438 U.S. 154, 169, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

Id. at 64 (relying on *Franks* and stating that "proceedings for the issuance of search warrants are not open."); *see also Franks v. Delaware,* 438 U.S. 154, 169 (1978) (stating that a search warrant application proceeding "is necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence").

Next, in *In re Search of Fair Finance*, 692 F.3d 424 (6th Cir. 2012), the Sixth Circuit

Court of Appeals concluded that there is no First Amendment right of access to search warrant documents. *Id.* at 433. Specifically, in concluding that "there is no First Amendment right of access to documents filed in search warrant proceedings," the Sixth Circuit relied in part on "the lack of any evidence that there is a historical tradition of such access[.]" *Id.* at 430. Several United States District Courts have recently followed suit. *See, e.g., United States v. Cohen*, 366 F. Supp. 3d 612, 632-34 (S.D.N.Y. 2019) (indicating that there is no First Amendment right of access to applications for warrants for electronic communications, supporting affidavits, and proceedings to obtain those warrants, and also noting that "like traditional search warrant materials, [electronic communication] warrant materials are typically kept under seal until they are produced in discovery[.]"); *In re Granick*, 388 F. Supp. 3d 1107, 1123-26 (N.D. Cal. 2019) concluding that "there is no qualified First Amendment right of public access to post-investigation search warrant affidavits, applications and related materials"); *In re Application of WP Company LLC*, 201 F. Supp. 3d 109, 122 (D.D.C. 2016) (holding that the "First Amendment right of access does not automatically attach to search warrants issued in any closed criminal investigations[,]" particularly where "an investigation concludes without indictment").

All of these rulings supporting that there is no First Amendment right to public access in search warrant documents and proceedings align with the statement that "A rule to the contrary would endanger the lives of officers and agents and allow the subjects of the investigation to destroy or remove evidence before the execution of the search warrant. Just as importantly, premature disclosure by the executive of the object of an investigation is *not* a Constitutional or common law pre-requisite to further proceedings." *Media Gen. Operations, Inc.*, 417 F.3d at 429. Indeed, it is not uncommon for the government to request, and for the court to grant, a motion to seal search warrant papers. *See, e.g., Baltimore Sun Co.*, 886 F.2d at 65 (citing

Franks, 438 U.S. at 168) ("The motion to seal all or part of the papers is usually made when the government applies for the warrant. Frequently the proceedings must be conducted with dispatch to prevent destruction or removal of the evidence.").

To the contrary, and under very limited circumstances and specific facts, in 1988, the Eighth Circuit in *In re Gunn*, 855 F.2d 569, found that there was generally a First Amendment right of public access to search warrant materials during an ongoing criminal investigation. *Id.* at 573. In reaching that conclusion, the Court relied in part upon the notions that "search warrant applications and receipts are routinely filed with the clerk of court without seal" and that "[u]nder the common law judicial records and documents have been historically considered to be open to inspection by the public." *Id.* But notably, *In re Gunn* was decided prior to the above mentioned case law. And further, the Eighth Circuit ultimately concluded in *Gunn* that the district court "properly concluded that [the affidavits and other materials attached to the search warrants] should be kept under seal." *Id.* at 574.

Next, regarding the second consideration in whether a First Amendment right of public access to search warrant affidavits exists, in this case public access would harm, rather than promote, the functioning of the search warrant process and the criminal investigation process. As emphasized by the Sixth Circuit Court of Appeals in *In re Search of Fair Finance*, 692 F.3d 424, "access to the documents might reveal the names of innocent people who never become involved in an ensuing criminal prosecution, causing them embarrassment or censure." *Id.* at 432. In the context of an ongoing investigation, the Sixth Circuit also pointed to a number of other harms that would arise from the disclosure of search warrant documents, such as compromising undercover operations and confidential witnesses, leading to the destruction of other evidence by alerting a possible suspect and other involved parties, and the holding back of

information submitted by the government in its warrant applications in order to "preserve the integrity of its investigations." *Id.* All of the above support a conclusion that public access to the search warrant file would harm, and not promote, the warrant process and any criminal investigation here. Ultimately, given the above authority, there is no First Amendment right to public access of the search warrant affidavits.

Interestingly, ProPublica promotes and hangs its hat on "transparency" while hiding behind its anonymous sources and failing to acknowledge the fact that statements by the anonymous sources have been discredited by the Attorney General's Office. *See* Attorney General Press Release dated October 28, 2021), available at https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=2282 (stating "[t]hose anonymous statements are inaccurate and do not properly reflect the position of our Office"). ProPublica continues to sensationalize this matter through the submission of this Motion, drawing readers to its earlier articles in its citations, yet failing to recognize the presumption of innocence and exculpatory evidence in this matter. As foreshadowed by the relevant case law, the result has been a trial of the Implicated Individual by the general public and the irreparable damage to his reputation.

IV. CONCLUSION

This Court has already ruled that the very search warrant affidavits at issue in ProPublica's motion are to remain sealed, a fact highlighted by the South Dakota Supreme Court. ProPublica failed to appeal this Court's decision and failed to petition for rehearing. ProPublica is therefore foreclosed by the doctrine of res judicata and collateral estoppel. Furthermore, ProPublica has failed to meet its burden of proof that the statutory requirements of SDCL §23A-35-4.1 have been met. Finally, the Implicated Individual's constitutional and privacy rights

under the unfortunate facts and circumstances of this case justify and require the continued sealing of these search warrant affidavits.

Dated: January 10, 2022.

GUNDERSON, PALMER, NELSON,
& ASHMORE, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that January 10, 2022, I served a true and correct copy of the **Implicated Individual's Brief in Opposition to Motion to Unseal Affidavit in Support of Search Warrant**, via email upon the following individuals:

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By: _____
Marty J. Jackley

ProPublica Files Motion to Unseal Search Warrant Affidavits in Child Porn Probe of South Dakota Billionaire

by ProPublica, Dec. 16, 2021, 11:59 a.m. EST

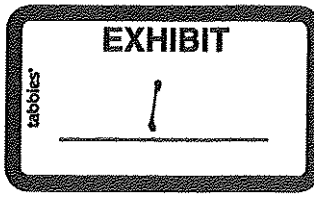
ProPublica revealed last year that billionaire T. Denny Sanford, a subprime credit card magnate and major philanthropist to children's charities, was investigated for possible possession of child pornography. After a yearlong battle to obtain documents about the investigation, the South Dakota Supreme Court ruled in October in favor of granting ProPublica access to search warrants for email and phone data, confirming significant details about the probe. The nonprofit newsroom and The Argus Leader, a leading South Dakota paper, have now followed this major victory by filing a motion to unseal the search warrants' supporting affidavits.

The affidavits will show what evidence investigators relied on to obtain search warrants from the court. This information would help the public better assess the government's decision to seek the search warrants, the court's decision to issue them and why law enforcement was interested in Sanford. It's not clear if the investigation is still ongoing. No criminal charges have been filed against the billionaire.

ProPublica and the Argus Leaders' motion, filed in South Dakota state court on Dec. 9, cited the profound public interest in understanding how the state's richest man attracted the attention of law enforcement. The media organizations urged the court to immediately unseal the search warrant affidavits under the First Amendment and South Dakota law.

"The public and the press have a vital interest in seeing these materials, which should provide information about why the search warrants were issued in the first place," ProPublica General Counsel Jeremy Kutner said. "Rather than allow the basis for the court's decision to continue to be kept secret, we are calling for transparency."

Sanford controls First Premier Bank, a major issuer of high-interest credit cards for people who have poor credit. Worth an estimated $1.6 billion, he is a major donor to Republican causes and the state's political figures, and is a prolific supporter of children's organizations and other charitable causes, including a major hospital system based in South Dakota that bears his name.



ProPublica is represented by Jeff Beck of Beck Law, Prof. LLC in Sioux Falls, South Dakota. The Argus Leader is represented by Jon Arneson in Sioux Falls.

PRIVILEGED AND CONFIDENTIAL

Re:

Sun, Dec 29, 2019 8:05 pm

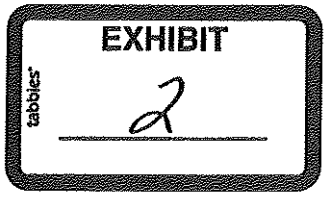
To: you Details

(I also want to make sure someone didn't hack your email account and is sending out requests for personal info. Can I text you my info?)

On Sun, Dec 29, 2019, 6:03 PM Denny Sanford <tdenny1223@aol.com> wrote:

Please send me your bank account info including #s,address and wiring instruction please. Happy New Year! Have a little something for you!

Reply Reply All Forward



From: **Denny Sanford** <denny112355@aol.com>
Date: Wednesday, January 3, 2018
Subject: favor

Good Day,

Hope you get this on time, I made a trip to Manila, Philippines,and had my bag stolen from me with my wallet, cellphone and credit cards in it. luckily for me i still have my passport with me, I just have to pay for a ticket and settle Hotel bills. Unfortunately for me, I can't have access to funds without my credit card, I've made contact with my bank but they need more time to come up with a new one. I was thinking if i could get a quick loan of $2,200 USD from you or anything you can afford.I can give back as soon as I get back tomorrow. I really need to be on the next available flight.

I can forward you details on how you can get the funds to me through western union transfer. You can reach me via email
Let me know if you can be of any help.

Thank you.

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

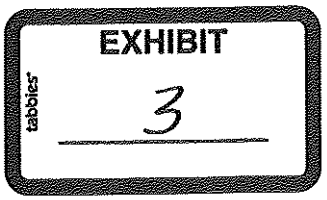
To: denny112355 <denny112355@aol.com>
Sent: Tue, Jan 2, 2018 9:58 pm
Subject: Re: favor

Sure, how can I help?

On Tuesday, January 2, 2018, Denny Sanford <denny1235@aol.com> wrote:
Hi,

how are you? i need your quick favor please.

Thanks,
Denny



Date: February 14, 2016 at 2:29:40 AM GMT+1
To: Denny Sanford <dienny1235@hotmail.com>
Subject: Re: Terrible News....Denny Sanford

Did u get the money

Sent from my iPhone

On Feb 12, 2016, at 9:16 AM, Denny Sanford <dienny1235@hotmail.com> wrote:

I need you to email me the western union confirmation number(MTCN#) including the amount sent.

Subject: Re: Terrible News....Denny Sanford

Date: Fri, 12 Feb 2016 09:14:18 -0800
To: dienny1235@hotmail.com

Yes you should have it by now let me know if you got the money

Sent from my iPhone

On Feb 12, 2016, at 9:01 AM, Denny Sanford <dienny1235@hotmail.com> wrote:

kindly get back to me with the western union confirmation number(MTCN#) including the amount sent.

Subject: Re: Terrible News....Denny Sanford

Date: Fri, 12 Feb 2016 09:00:35 -0800
To: dienny1235@hotmail.com

The money was sent

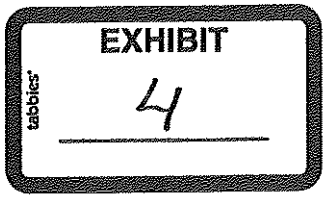
Sent from my iPhone

On Feb 12, 2016, at 8:55 AM, Denny Sanford <dienny1235@hotmail.com> wrote:

Hello,

May i know what is going on as i haven't heard back from you, let me know if you are able to transfer the money via western union. If so kindly get back to me with the western union confirmation number(MTCN#) including the amount sent.

Thanks



Subject: Re: Terrible News....Denny Sanford

Date: Fri, 12 Feb 2016 06:42:25 -0800
To: dienny1235@hotmail.com

Glad to help I am on my way now

Sent from my iPhone

On Feb 12, 2016, at 6:40 AM, Denny Sanford <dienny1235@hotmail.com> wrote:

Glad you replied back, All i need is $2450 USD or anything you can afford, You can have the money wire to my name via any Western Union outlet I'll show my passport as ID to pick it up here, I promise to refund it back as soon as i arrived back home. Here's the info you need:

Name:- Denny Sanford
Location: [redacted]Tutuban Center Manila, Metro Manila 1013
Country: Manila Philippines

As soon as it has been done, kindly get back to me with the MTCN confirmation number. Let me know if you are heading to a western union outlet now.

I owe you a lot.

Subject: Re: Terrible News....Denny Sanford

Date: Fri, 12 Feb 2016 06:34:40 -0800
To: dienny1235@hotmail.com

Sure

Sent from my iPhone

On Feb 12, 2016, at 5:43 AM, "Denny Sanford" <denny1235@aol.com> wrote:

Hello

I really hope you get this fast. I could not inform anyone about my trip, because it was impromptu. Am stranded here in Manila, Philippines since last night. I was hurt and robbed on my way to the hotel I stayed and my luggage is still in custody of the hotel management pending when I make payment on outstanding bills I owe.

Please let me know if you can quickly help with a LOAN. I will refund the money back to you as soon as I get back home.

Thanks.