REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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November 23, 2022

The Honorable Chief Justice and Associate Justices of the
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Letter of Amici Curiae in Support of the Petition for Review in *Electronic Frontier Foundation v. Superior Court of San Bernardino County*, Supreme Court Case No. S277036 (Court of Appeal Case No. E076778)

To the Honorable Chief Justice and Associate Justices:

Pursuant to rule 8.500(g) of the California Rules of Court, amici curiae the Reporters Committee for Freedom of the Press and twenty-two media organizations (collectively, "Amici") respectfully submit this letter in support of the petition for review filed in *Electronic Frontier Foundation v. Superior Court of San Bernardino County*, case number S277036, on October 25, 2022.

I. INTEREST OF AMICI CURIAE

Amici are news organizations and other groups dedicated to defending the newsgathering and First Amendment rights of the press. Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.[1]

News organizations play an essential role in informing public discussion about matters of public concern. (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 573 [100 S.Ct. 2814, 65 L.Ed.2d 973] [explaining that, because the public now acquires information "chiefly through the print and electronic media," members of the press effectively "function[] as surrogates for the public"].) To perform that role, members of the news media routinely rely on court records—including search warrants, search warrant applications, and supporting affidavits—when reporting. But in a decision that threatens that function, the Court of Appeal, Fourth Appellate District (hereinafter the "Court of Appeal"), concluded that the First Amendment presumption of public access to judicial records never applies to warrant materials—even where the search has long since been executed, and even where an indictment has long since issued.

[1] Full descriptions of the other Amici are included below as Appendix A.

That judgment directly conflicts with the decisions of other California courts and federal courts of appeals regarding the scope of the public's First Amendment right of access to court records and, if permitted to stand, would significantly impede journalists' ability to scrutinize government conduct, including law enforcement compliance with the Fourth Amendment's probable cause standard. For the reasons discussed herein, "to secure uniformity of decision" and "settle an important question of law," Amici urge this Court to grant review. (Cal. Rules of Court, rule 8.500(b)(1).)

II. WHY REVIEW SHOULD BE GRANTED

This case concerns an important question of law and a matter of first impression for this Court: whether the First Amendment right of access attaches to search warrant materials.[2] The opinion of the Court of Appeal sets forth the facts and procedural background. (See *Elec. Frontier Found., Inc. v. Superior Ct. of San Bernardino Cnty.* (2022) 83 Cal.App.5th 407, 414–16 [299 Cal.Rptr.3d 480].)

Access to judicial records is essential in a democracy. (*In re Leopold to Unseal Certain Elec. Surveillance Applications and Orders* ("*In re Leopold*") (D.C. Cir. 2020) 964 F.3d 1121, 1123 ["The public's right of access to judicial records is a fundamental element of the rule of law"].) It prevents the government from operating in secret and aids the public—which has a strong interest in understanding how officials in the executive and judicial branches apply and interpret the criminal law—in monitoring the conduct of public servants. (*Cowley v. Pulsifer* (1884) 137 Mass. 392, 394 (Holmes, J.) ["[E]very citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed"].) Recognizing that interest, section 1534, subdivision (a) of the Penal Code mandates that "documents and records" pertaining to executed warrants "shall be open to the public as a judicial record." (Pen. Code, § 1534, subd. (a).)

The Court of Appeal, below, affirmed the denial of Petitioner's application to unseal affidavits related to warrants for cell-site simulators, concluding not just that the First Amendment right of access to judicial records would be overcome on the facts of Petitioner's request but also that the right *never* attaches to warrant materials—full stop. That decision conflicts with the precedent of other California courts, which recognize the broad right of access the First Amendment guarantees. (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 110 [7 Cal.Rptr.2d 841].) The ruling is also out of step with federal circuit courts of appeals that have addressed this issue. (See *In re Search Warrant for Secretarial Area Outside Off. of Gunn* ("*In re Gunn*") (8th Cir. 1988) 855

[2] Amici write to address only the Court of Appeal's holding that the First Amendment right of access does not apply to the warrant affidavits that Petitioner Electronic Frontier Foundation ("Petitioner") requests. Amici do not address the other issues presented and fully addressed in the Petition for Review.

F.2d 569, 573 [concluding that the First Amendment right of access extends to warrant materials].) And if the Court of Appeal's decision is allowed to stand, it will preclude the unsealing of warrant materials even where no concrete harm, whatsoever, would result from release. Not only, then, does this case present "an important question of law," but the practical stakes for news reporting that relies on warrant materials, and by extension the free flow of information to the public, are stark. (Cal. Rules of Court, rule 8.500(b)(1).)

A. Access to search warrant materials plays a vital role in investigative reporting on matters of public concern.

As any number of news stories can illustrate, access to search warrant materials plays a vital role in investigative reporting on matters of public concern. For one, access allows the press to evaluate whether police officers follow the law when fundamental rights of privacy and liberty are at stake. For example, the public release of the warrant obtained to enter the home of Breonna Taylor, who was shot and killed by a Louisville, Kentucky police officer executing the warrant, made clear that the search was predicated on an officer's claim that Taylor's boyfriend—whom the police believed to be a drug dealer—was receiving packages at her home. (Bogel-Burroughs & Kovaleski, *Breonna Taylor Raid Puts Focus on Officers Who Lie for Search Warrants*, N.Y. Times (Aug. 6, 2022) <https://perma.cc/UFC7-AS6H> [as of Oct. 26, 2022].) This turned out to be untrue, and the officer who swore to the claim in the affidavit is now being prosecuted by the Department of Justice for lying. (*Ibid.*) But under the Court of Appeal's decision, in California, that information might have been kept secret indefinitely.[3]

Access to warrant materials also helps the public understand and evaluate the basis for investigations with newsworthy subjects. As the Department of Justice recently explained, for instance, in moving to unseal certain warrant materials related to the search of former President Donald Trump's Mar-a-Lago home, the public has a "clear and powerful interest" in understanding law enforcement actions that "concern[] public officials or public concerns." (United States' Motion to Unseal Limited Warrant

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[3] For other examples of reporting that rely on warrant materials to advance police accountability, see, e.g., Hollister, *Florida's Justification for Raiding COVID Data Whistleblower Rebekah Jones Is Looking a Little Shaky* (Dec. 9, 2020) The Verge <https://perma.cc/SAJ4-3P2Y> [as of Nov. 1, 2022] [noting that publicly available information cast doubt on the asserted basis for a warrant to search the home of a prominent critic of Florida's COVID policies]; Fenton et al., *Cops and Robbers, Part I: The Rise of Wayne Jenkins*, Baltimore Sun (June 12, 2019) <https://perma.cc/U57V-MWZA> [as of Nov. 1, 2022] [describing allegations that members of Baltimore's Gun Trace Task Force fabricated evidence included in affidavits in support of search warrants].

Materials at p. 4, *In re Sealed Search Warrant* (S.D. Fla., Aug. 11, 2022, No. 22-mj-8332) (ECF No. 18) [quoting *Romero v. Drummond Co.* (11th Cir. 2007) 480 F.3d 1234, 1246].) The recent court-ordered unsealing of warrant materials related to the federal insider-trading investigation of Sen. Richard Burr illustrates the same point: Reporting on the contents of the unsealed warrant materials not only allowed the public to better evaluate the conduct of one of its elected representatives, but also helped inform a national debate about whether members of Congress should be prohibited from trading individual stocks.[4]

Access to warrant materials plays an especially important role in the specific context presented by Petitioner's request, where transparency would inform the public about police use of new technologies. Reporters have relied on court records to inform the public about controversial law enforcement surveillance tools, such as keyword warrants, which trawl through individuals' online search history for keywords related to a criminal investigation, or geofence warrants, which collect the location data of anyone present within a given geographic zone. (Brewster, *Warrants Can Force Google To Look Through Your Search History–A Tragic Arson Case May Decide If That's Constitutional* (June 30, 2022) Forbes <https://perma.cc/Z8UR-4L7V> [as of Nov. 2, 2022]; Brewster, *Cops Turn To Google Location Data To Pursue A Death Penalty For 2015 Murder* (July 28, 2022) Forbes <https://perma.cc/ZZD4-NNVH> [as of Nov. 2, 2022].) In such cases, access to warrant materials provides the public with essential insight into the government's understanding of its investigative powers—and whether or not courts share its view.

Without access to those records, the press and public would be denied an important avenue for scrutinizing government use of novel surveillance techniques, as well as for judging whether courts and investigators have adequately confronted the thorny legal and policy questions they raise. (See *In re U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device* (S.D. Tex. 2012) 890 F.Supp.2d 747, 749 [denying the government's application to use a cell site simulator and noting "shortcomings" in the application's explanation of the technology]; Zetter, *Emails Show Feds Asking Florida Cops to Deceive Judges* (June 19, 2014) WIRED <https://perma.cc/Z43Q-X8WB> [as of Oct. 25, 2022] [noting documents produced in litigation that revealed police in Florida were "conceal[ing] their use of [cell site simulator] equipment when they seek probable cause warrants"].) Lawmakers and the

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[4] (See, e.g., Wire, *Justice Department Seized Sen. Burr's Phone Over 'Well-Timed Stock Sales'*, L.A. Times (Sept. 6, 2022) <https://perma.cc/WTK5-DERZ> [as of Nov. 1, 2022]; Wilkie, *Unsealed FBI Docs Reveal a Flurry of Calls and Stock Trades by Sen. Burr in Early 2020* (Sept. 6, 2022) CNBC <https://perma.cc/KE8P-ZK5F> [as of Nov. 1, 2022]; Rabinowitz & Lybrand, *Burr Avoided Tens of Thousands in Losses with 'Well-Timed' Stock Sales in Beginning of Pandemic* (Sept. 6, 2022) CNN <https://perma.cc/W3U8-AUZW> [as of Nov. 1, 2022].)

public would be handicapped, in turn, in gauging whether new legislation is necessary to regulate those techniques. (See Woolf, *Congressman Introduces Bill to End Warrantless Stingray Surveillance*, The Guardian (Nov. 4, 2015) <https://perma.cc/58MK-HYWX> [as of Oct. 25, 2022].) This Court should not permit the Court of Appeal's decision to cut the flow of this information—vital to ongoing debates about government's police power and Fourth Amendment rights—to the public.

B. The Court of Appeal erred in concluding that the press and public have no First Amendment right of access to warrant materials.

The Court of Appeal erred in its analysis of the First Amendment right of access to the warrant materials sought by Petitioner. California courts have long recognized that the First Amendment provides "broad access rights to judicial hearings and records." (*Copley Press, Inc.*, *supra*, 6 Cal.App.4th at p. 111.) As courts in other jurisdictions have explained, these rights protect the public's qualified right to inspect warrant materials (see *In re Gunn*, *supra*, 855 F.2d at p. 573), and that constitutional guarantee may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," (*Press-Enter. Co. v. Superior Court* ("*Press-Enterprise I*") (1984) 464 U.S. 501, 510 [104 S.Ct. 819, 78 L.Ed.2d 629], citation omitted.)

This issue is one of first impression for this Court, but California appellate courts have presumed in the past that the First Amendment right attaches to search warrant materials. (See *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1021–23 [27 Cal.Rptr.3d 596].) To determine whether the First Amendment supports a presumption of access to a particular class of judicial records, courts look to two complementary considerations: "experience and logic." (*Press-Enter. Co. v. Superior Court* ("*Press-Enterprise II*") (1986) 478 U.S. 1, 9 [106 S.Ct. 2735, 92 L.Ed.2d 1].) Both favor recognizing a First Amendment right of access to warrant materials.

1. Experience favors access to search warrant materials.

With respect to experience, "routine historical practice countenances in favor of a qualified First Amendment right of access to warrant materials" because "warrant applications and receipts are routinely filed with the clerk of court without seal." (*In re N.Y. Times Co.* (D.D.C. 2008) 585 F.Supp.2d 83, 88; see also *Baltimore Sun Co. v. Goetz* (4th Cir. 1989) 886 F.2d 60, 64 ["Frequently—probably most frequently—the warrant papers including supporting affidavits are open for inspection by the press and public in the clerk's office after the warrant has been executed"]; *In re Gunn*, *supra*, 855 F.2d at pp. 572–73.) That practice is widespread and longstanding. (See *In re Leopold* (D.D.C. 2018) 300 F.Supp.3d 61, 88 [noting an "unbroken, uncontradicted history of openness [citation]" with respect to "post-execution search warrant materials"], revd. on other grounds (D.C. Cir. 2020) 964 F.3d 1121.) The Court of Appeal reached a different result

only by confusing the history of warrant materials with the history of warrant proceedings and ignoring the relevance of the common law.

The Court of Appeal erroneously relied on the observation that a warrant proceeding "is necessarily *ex parte*," (*Franks v. Delaware* (1978) 438 U.S. 154, 169 [98 S.Ct. 2674, 57 L.Ed.2d 667]), but whether the "process of *issuing* search warrants has traditionally not been conducted in an open fashion" is irrelevant here, (*In re Gunn*, *supra*, 855 F.2d at p. 573, italics added.) Petitioner has not moved to *attend* a warrant proceeding. And while the First Amendment right of access certainly encompasses documents that are "derived from or a necessary corollary of the capacity to attend the relevant proceeding," it is not limited to them. (*Hartford Courant Co. v. Pellegrino* (2d Cir. 2004) 380 F.3d 83, 93.)

In that vein, this Court has declined to broadly exempt "chambers proceedings" from the First Amendment right of access. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1215 [86 Cal.Rptr.2d 778, 980 P.2d 337] [the "assertion that chambers proceedings . . . are not subject to the First Amendment right of access [] is erroneous"].) And other courts have likewise found a right of access to transcripts and other records generated by proceedings that were themselves sealed. (See, e.g., *Phoenix Newspapers, Inc. v. U.S. District Court* (9th Cir. 1998) 156 F.3d 940, 947 [refusing "to conflate" the two issues].) If the Court of Appeal had asked the right question—have warrant *materials* rather than warrant *proceedings* historically been made accessible to the public—it would have found that experience supports a constitutional presumption of access to search warrant materials, even if that presumption is sometimes overcome by other considerations before the warrant is executed. (See *In re Gunn*, *supra*, 855 F.2d at p. 573; *In re Newsday, Inc.* (2d Cir. 1990) 895 F.2d 74, 79 [explaining that "the fact that search warrants are commonly filed under seal until the warrant is executed does not change their status as public documents"].)

The Court of Appeal also rejected out of hand the long line of federal circuit cases that have recognized a right of access to warrant materials on the theory that those cases arose "under the common law," not the First Amendment. (*Elec. Frontier Found., Inc.*, *supra*, 83 Cal.App.5th at p. 426.) But the common law right of access "played a crucial role in the development of First Amendment jurisprudence" on access to judicial records. (*United States v. Antar* (3d Cir. 1994) 38 F.3d 1348, 1361; see also *Anderson v. Cryovac, Inc.* (1st Cir. 1986) 805 F.2d 1, 13 ["The common law presumption that the public may inspect judicial records has been the foundation on which the courts have based the first amendment right of access to judicial proceedings"].) Thus, it should come as no surprise that courts "have generally invoked the common law right of access to judicial documents in support of finding a history of openness," because, as a practical matter, records presumptively open to the public under the common law have historically been open to public inspection for First Amendment purposes. (*Hartford Courant Co.*,

supra, 380 F.3d at p. 92.)[5] Simply put, experience favors presumptive public access to warrant materials, and the Court of Appeal's conclusion to the contrary is erroneous.

2. Utility favors access to search warrant materials.

Utility (or logic), too, strongly supports application of the First Amendment presumption of access to the warrant materials sought by Petitioner.[6] Utility is the most important factor when determining the applicability of the First Amendment right of access. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1213–14 ["[T]he absence of explicit historical support would not, contrary to respondent's implicit premise, negate such a right of access"].)

Search warrant applications and supporting affidavits "are critical to judicial determinations of whether the Fourth Amendment's probable cause standards are met," (*In re Search Warrant* (S.D.N.Y., Dec. 19, 2016, No. 16-MAG-7063) 2016 WL 7339113, at p. *2), and "public access to them facilitates public monitoring of the various government agencies and branches" involved (*United States v. All Funds on Deposit at Wells Fargo Bank* (S.D.N.Y. 2009) 643 F.Supp.2d 577, 583–84.) Indeed, without access to these judicial documents, public oversight not only of a magistrate judge's decision to issue a warrant, but also of the government's grounds for seeking it, would be impossible. (See *United States v. Amodeo* (2d Cir. 1995) 71 F.3d 1044, 1048 [public monitoring of the courts "is not possible" without access to the documents "used in the performance of Article III functions"].) The public would be left with no means to "ensure that judges are not merely serving as a rubber stamp for the police," (*In re N.Y. Times Co.*, *supra*, 585 F.Supp.2d at p. 90), a blow to the public's entitlement to supervise both branches, (see *FTC v. Standard Fin. Mgmt. Corp.* (1st Cir. 1987) 830 F.2d 404, 410 ["[I]n such circumstances, the public's right to know what the executive branch is about

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[5] The majority of federal courts of appeals to consider the issue have recognized a common law presumption of access to warrant materials at some stage of the process. (*United States v. Sealed Search Warrants* (5th Cir. 2017) 868 F.3d 385, 390 ["[T]he qualified common law right of access can extend to . . . pre-indictment search warrant materials . . ."]; *United States v. Bus. of Custer Battlefield Museum & Store* (9th Cir. 2011) 658 F.3d 1188, 1193 ["Post-investigation . . . warrant materials 'have historically been available to the public [citation]'"]; *In re L.A. Times Commc'ns LLC* (D.C. Cir. 2022) 28 F.4th 292, 296 [the common law right of access applies to search warrant materials]; *Baltimore Sun Co.*, *supra*, 886 F.2d at pp. 63–64 [same].)

[6] Courts refer to this consideration as logic and utility interchangeably. This Court has used the term utility in prior cases, and that is the term used by the parties and the Court of Appeal. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1221–23.) Accordingly, Amici refer to this consideration as utility, but cite to some authority that describes it as logic.

coalesces with the concomitant right of the citizenry to appraise the judicial branch"]; *Smith v. U.S. District Court* (7th Cir. 1992) 956 F.2d 647, 650 [same].)

The Court of Appeal incorrectly focused on purely speculative harms in its discussion of the utility prong, while ignoring the concrete benefits of access. In its view, "[p]ublication of search warrant documents would serve *only* to jeopardize" the "confidentiality necessary for criminal investigations." (*Elec. Frontier Found., Inc.*, *supra*, 83 Cal.App.5th at p. 428, italics added, citation omitted.) That broad claim is belied by the experience in other states and federal jurisdictions, where warrant materials are routinely made public post-execution—including during ongoing investigations. (See, e.g., *In re Newsday, Inc.*, *supra*, 895 F.2d at p. 79.) What's more, as the discussion above makes clear, access to search warrant materials has served a range of vital ends and provided the public with insight into a great diversity of important controversies, from police misconduct and public corruption to law enforcement's use of new technologies. Utility, too, supports a constitutional presumption of access to search warrant materials.

C. The Court of Appeal erred in concluding that any First Amendment right of access to search warrant materials would be overcome in its entirety here.

The Court of Appeal concluded, in the alternative, that any First Amendment right of access to search warrant materials would be overcome in its entirety here. But rather than apply the careful scrutiny the Constitution requires, the Court of Appeal simply reiterated its generic reasons for concluding that no First Amendment right of access attaches to warrant materials—without close attention to whether those interests are at stake on the facts of this particular case. That broad conclusion would be just as effective in eviscerating the right of access in practice, and it too deserves review and reversal.

In justifying nondisclosure, the Court of Appeal found that the trial court "reasonably found that the information [the warrant affidavits] contain is either official information under Evidence Code section 1040 or information that must remain sealed to avoid revealing a confidential informant's identity." (*Elec. Frontier Found., Inc.*, *supra*, 83 Cal.App.5th at pp. 421–22.) The Court of Appeal went on to find that the trial court correctly balanced these interests against "EFF's reasons for wanting to unseal the *Hobbs* affidavits—to learn more about the Sheriff's use of cell-site simulators." (*Id.* at p. 422.) On each front, the Court improperly interpreted and applied sections 1040 and 1041 of the Evidence Code.

The codified privileges pertaining to sensitive information that either identifies confidential informants (Evid. Code, § 1041) or implicates official information (Evid. Code, § 1040) are both qualified evidentiary privileges, limited in scope by their underlying purpose, and only applicable where their rationales are not outweighed by countervailing interests. (2 Witkin, Cal. Evid. (5th ed. 2022) § 90(1).) This Court made

the same point in *Hobbs* itself: when a party asserts the privilege to block disclosure, a reviewing court must first determine whether the purpose of the privilege applies, and next determine whether that purpose outweighs the interest in disclosure. (*People v. Hobbs* (1994) 7 Cal.4th 948, 958–59 [30 Cal.Rptr.2d 651, 873 P.2d 1246] [noting that "[t]he scope of the privilege is limited by its underlying purpose" (quoting *Roviaro v. United States* (1957) 353 U.S. 53, 60–61 [77 S.Ct. 623, 1 L.Ed.2d 639])].) On both prongs, the Court of Appeal's analysis falls short.

First, the Court of Appeal failed to articulate the degree to which the purpose of the privilege is advanced by upholding it in this case—and did not consider whether narrower restrictions than blanket sealing would suffice. With respect to witness confidentiality, for example, other courts have recognized that the interest in protecting informant identity may justify tailored redactions. (See *In re EyeCare Physicians of Am.* (7th Cir. 1996) 100 F.3d 514, 518, fn. 5.) But because "that interest can be accomplished by simply redacting the identity and personal identifiers of the informants," it typically will not justify blanket sealing. (*In re N.Y. Times Co.*, *supra*, 585 F.Supp.2d at p. 91.) The same is true more broadly with respect to information investigators claim will harm an ongoing investigation: To justify redacting any particular portion of a record, the government must show with specificity "*how* the integrity of the investigation reasonably could be affected by the release" of any specific piece of information in the warrants requested. (*Va. Dep't of State Police v. Wash. Post* (4th Cir. 2004) 386 F.3d 567, 579, italics added.)

To similar effect, California courts have read important qualifications into the Section 1041 privilege for informant confidentiality. For example, the Court of Appeal in *People v. Otte* illustrated its limited scope by clarifying that "it is primarily the *identity* of the informant, which is sought to be kept confidential, and not necessarily the information which he imparts to the police." ((1989) 214 Cal.App.3d 1522, 1529 [263 Cal.Rptr. 393]; see also 2 Witkin, Cal. Evid. (5th ed. 2022) Witnesses, § 325 ["The language of Ev.C. 1041 is clearly limited to identity"].) In *Swanson v. Superior Court*, the Court of Appeal clarified that "the only portion of a[] [warrant] affidavit that may be concealed . . . is that portion which necessarily would reveal the identity of a confidential informant," going on to observe the "well-established procedure" wherein "the [informant's] privilege is ordinarily protected by not identifying the informant by name in the affidavit rather than by sealing the affidavit." ((1989) 211 Cal.App.3d 332, 338–39 [259 Cal.Rptr. 260].)

Here, the Court of Appeal's analysis reflects no such nuance. The conclusory assertion that "unsealing the affidavits 'would tend to reveal the identity' of confidential informants [citation]," (*Elec. Frontier Found., Inc.*, *supra*, 83 Cal.App.5th at p. 422), demonstrates a failure to measure that generic interest against the facts of this case—to ask, for example, whether the affidavits could be unsealed in part, if not in whole; whether the passage of time or conclusion of the corresponding investigations might

mitigate harm from full or partial disclosure; and—most importantly—whether any purported danger to confidential informants is sufficient to justify denying public access to this important class of judicial records indefinitely.

Finally, in a closely related error, the Court of Appeal understated the public interest in release of the warrant materials—just as it did in concluding that no right of access applies in the first place. Only in one short sentence does the Court's opinion recognize the interests on the other side of the ledger, writing that while public access "likely would provide some public benefits, such as enabling greater public oversight of County law enforcement, 'these benefits are outweighed by the very particular harms described above that would affect the criminal investigatory process [citation].'" (*Elec. Frontier Found., Inc.*, *supra*, 83 Cal.App.5th at p. 428.)

That cursory aside failed to give adequate weight to the public's interest—grounded in the First Amendment—in accessing the search warrant materials. Not only does access to these materials play a "significant positive role" in the functioning of the judicial system generally, (*Press-Enterprise II*, *supra*, 478 U.S. at p. 8), but Petitioner offered detailed reasons for thinking that access is especially urgent in this case, including the appearance of impropriety on the part of the government. (See Damien & Wyloge, *In San Bernardino County, You're 20 Times More Likely to Have Your Facebook, iPhone Secretly Probed by Police*, Palm Springs Desert Sun (July 23, 2018) <https://perma.cc/DNM5-2SDZ> [as of Oct. 26, 2022].) Its application pointed, for instance, to public reporting that raises serious questions about whether the warrants at issue satisfied the probable cause standard. (*Ibid.*) And as the Supreme Court has often explained, openness is necessary to give "assurance that established procedures [have been] followed and that deviations will become known." (*Press-Enterprise I*, *supra*, 464 U.S. at p. 508.) Public access to warrant materials thus enhances the basic fairness of the warrant process—which adjudicates important Fourth Amendment and, in some cases, First Amendment rights—and is a prerequisite to "the appearance of fairness so essential to public confidence in the system." (*Ibid.*) Those interests appear nowhere, and are given no weight, in the Court of Appeal's decision.

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If allowed to stand, the Court of Appeal's analysis will cut off an important avenue for the free flow of information to the public, undermining public discourse on subjects as weighty as police accountability and the effect of the use of new technologies on constitutional rights. This Court should grant review and reverse that error.

III. CONCLUSION

For the foregoing reasons, Amici urge this Court to grant the petition for review filed by Petitioner.

Dated: November 23, 2022

Respectfully submitted,

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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association which represents nearly 100 alternative newspapers across North America. There are a wide range of publications in AAN, but all share an intense focus on local news, culture and the arts; an emphasis on point-of-view reporting and narrative journalism; a tolerance for individual freedoms and social differences; and an eagerness to report on issues and communities that many mainstream media outlets ignore. AAN members speak truth to power.

The California Broadcasters Association ("CBA") is the trade organization representing the interests of the over 1000 radio and television stations in our state. The CBA advocates on state and federal legislative issues, provides seminars for member education and offers scholarship opportunities to students in the communication majors.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Dow Jones & Company is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

Freedom of the Press Foundation (FPF) is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press

through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Los Angeles Press Club exists to support, promote, and defend quality journalism in Southern California. Our task is to encourage journalists by involving the public in recognizing such journalism together in belief that a free press is crucial to a free society. It is the only SoCal Journalist organization that serve journalists of all stripes (radio, podcast, TV, print, online, documentary filmmakers). The LAPC has existed since the early 1900's and was incorporated in 1948.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper's circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

The Pacific Media Workers Guild, Local 39521 of The NewsGuild-Communications Workers of America represents journalists and other media workers, union staffs and freelancers. It is committed to quality journalism and language services, fair wages and benefits, secure employment, safe workplaces and freedom of information. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 500,000 members in both private and public sectors.

Pro Publica, Inc. ("ProPublica") is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019 prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas

Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Southern California Public Radio is a non-profit, public media organization. We operate KPCC, L.A's largest NPR station. Our signal stretches north to Santa Barbara County, south to Orange County and east to the Inland Empire. We also operate LAist.com, a local news site. Our mission is to strengthen the civic and cultural bonds that unite Southern California's diverse communities by providing the highest quality news and information service.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.

PROOF OF SERVICE

I, Katie Townsend, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th Street NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

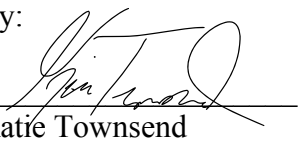
On November 23, 2022, I caused the foregoing document to be served: **Letter of Amici Curiae in Support of the Petition for Review**, as follows:

[x] By Truefiling electronic delivery:

All counsel of record in *Electronic Frontier Foundation v. Superior Court of San Bernardino County* (S277036)

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 23rd day of November, 2022, in Washington, D.C.

By: 

Katie Townsend
Counsel for Amici Curiae