19-1048

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOSHUA ADAM SCHULTE,
Defendant-Appellant,

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 27 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

Katie Townsend
Counsel of Record
Bruce D. Brown
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Telephone: (202) 795-9300
ktownsend@rcfp.org

Additional amici counsel listed in Appendix B

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The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, Daily News, LP, The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Gannett Co., Inc., Hearst Corporation, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, The New York Times Company, POLITICO LLC, Reporters Without Borders, Reveal from The Center for Investigative Reporting, The Seattle Times Company, Society of Professional Journalists, and Tully Center for Free Speech. A supplemental statement of identity and interest of *amici* is included below as Appendix A.[1]

Journalists require access to court records to report on cases of public interest and to facilitate effective public oversight of the judicial system. As

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local R 29.1(b), *amici* state as follows: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

representatives and members of the news media, *amici* therefore have a strong interest in ensuring that courts safeguard the public's constitutional and common law rights of access to judicial documents, including through careful application of the correct legal standards governing such access.

The district court, below, failed to apply the correct legal standard when it denied public access to specific search warrants and search warrant applications (collectively, the "Search Warrant Materials")—judicial documents to which at least a common law presumption of public access applies. Accordingly, *amici* write to emphasize the important difference between the "good cause" standard applicable when a court enters a protective order pursuant to Federal Rule of Criminal Procedure 16(d) and the more rigorous standard that applies when a court denies access to judicial documents that the public has a common law right to inspect. For the reasons herein, *amici* urge this Court to vacate the district court's orders and remand this matter to require the district court to apply the common law presumption of public access to the Search Warrant Materials.

SOURCE OF AUTHORITY TO FILE

Defendant-Appellant consents to the filing of the *amicus* brief. Appellee United States takes no position on the filing of the *amicus* brief. *Amici* have moved for leave to file this brief in the accompanying motion pursuant to Federal Rule of Appellate Procedure 29(a)(3).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court and this Court have long recognized that the common law affords the public a qualified right of access to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"); *United States v. Erie Cty.*, 763 F.3d 235, 239 (2d Cir. 2014) (stating that the common law presumption of access "is said to predate even the Constitution itself"). This common law "presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*"). Access to judicial documents enables the public to monitor the courts in order to "provide[] judges with critical views of their work and deter[] arbitrary judicial behavior" and to ensure public confidence "in the conscientiousness, reasonableness, or honesty of judicial proceedings." *Id.*

In evaluating a claim of access to court records under the common law, a court must determine (1) whether the documents to which access is sought are "judicial documents" giving rise to a presumption of access; (2) if so, the weight accorded the presumption; (3) the existence of any countervailing factors weighing against public access; and (4) whether the presumption of access outweighs the

countervailing factors. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–26 (2d Cir. 2006).

The Search Warrant Materials at issue here are "judicial documents" to which at least a common law presumption of public access applies. Indeed, the strong common law presumption of access is particularly weighty here, given the heightened public interest in the underlying subject matter of this case. As a result, regardless of whether the Court construes Defendant-Appellant's letter motion as one to modify a protective order or one to unseal judicial documents, and regardless of any initial agreement between the parties to a protective order restricting public access to the Search Warrant Materials, the district court was obligated to consider the public's common law right of access to the Search Warrant Materials when ruling on Defendant-Appellant's motion.

The district court erred in relying solely on the agreed-upon protective order entered into by the parties to justify the continued sealing of the Search Warrant Materials. Because they are judicial documents subject to the common law presumption of access, the showing of good cause needed to justify entry of a protective order governing unfiled documents exchanged in discovery, *see* Fed. R. Crim. P. 16(d), is insufficient to justify restricting public access to the Search Warrant Materials. Accordingly, for the reasons herein, *amici* respectfully urge the Court to vacate the district court's orders and remand with instructions to the district court to apply the common law presumption of public access to the Search

Warrant Materials. To the extent that the district court on remand concludes that countervailing interests require maintaining some portion of the Search Warrant Materials under seal, the district court should state its findings in support of such sealing on the record.

ARGUMENT

I. The district court applied the incorrect standard in holding that the Search Warrant Materials should remain shielded from public view.

A. Different standards govern the entry of protective orders restricting disclosure of unfiled discovery materials and the sealing of judicial documents subject to the common law presumption of access.

In criminal matters, parties may seek to protect information and documents obtained through discovery by requesting the entry of a protective order under Federal Rule of Criminal Procedure 16(d).[2] Under Rule 16(d)(1), which governs "Protective and Modifying Orders," courts may, "*for good cause,* deny, restrict, or defer discovery or inspection, or grant other appropriate relief . . . ." Fed. R. Crim. P. 16(d)(1) (emphasis added). The "good cause" standard of Rule 16(d) mirrors the standard applicable to protective orders in the civil discovery context. *See* Fed. R. Civ. P. 26(c)(1).

While a district court may enter a protective order restricting the use and disclosure of unfiled discovery materials based on a finding of "good cause," Fed.

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[2] Unless otherwise stated, all references to the "Rules" herein are to the Federal Rules of Criminal Procedure.

R. Crim. P. 16(d)(1), a request to seal or otherwise restrict public access to a court record subject to the common law presumption of access triggers a distinct and more rigorous analysis. *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (explaining that unfiled discovery materials may be "put under seal" under Federal Rule of Civil Procedure 26(c) upon a showing of "good cause," but "[a]t the adjudication stage . . . very different considerations apply"). In evaluating a claim of public access to court records under the common law, the court must determine (1) whether the documents to which access is sought are "judicial documents" giving rise to a presumption of access; (2) if so, the weight accorded the presumption; (3) the existence of any countervailing factors weighing against public access; and (4) whether the presumption of access outweighs the countervailing factors. *Lugosch*, 435 F.3d at 119–26.

B. A strong presumption of access applies to the Search Warrant Materials under the common law.

Documents filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process" are judicial documents to which the common law presumption of access applies. *Id*. at 119 (quoting *Amodeo I*, 44 F.3d at 145). When the common law presumption of access applies, the court "must 'determine the weight' of the presumption of access[,]" which "is 'governed by the role of the material at issue in the exercise of Article III judicial power and

the resultant value of such information to those monitoring the federal courts.'" *Erie Cty.*, 763 F.3d at 239 (quoting *Amodeo II*, 71 F.3d at 1049).

In elaborating on the weight to be accorded the presumption of access as to particular documents, this Court in *Amodeo II* described a continuum ranging from "matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." 71 F.3d at 1049. The common law presumption of access is more difficult to overcome where materials "directly affect an adjudication," *Lugosch*, 435 F.3d at 121 (quoting *Amodeo II*, 71 F.3d at 1049), and when documents "are used to determine [] substantive legal rights, the presumption of access is at its zenith[.]" *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 142 (2d Cir. 2016). After determining the weight of the presumption of access, the court must consider whether "'countervailing factors' in the common law framework . . . demand" sealing. *Lugosch*, 435 F.3d at 124. In short, a court must only seal judicial documents subject to the common law presumption of access if—and to the extent that—"countervailing factors" outweigh that presumption. *Id.*

The Search Warrant Materials at issue in this case are judicial records to which at least the common law presumption of access applies. Search warrant applications and supporting documents are unquestionably relevant to a "judicial function," *Id*. at 119, because they serve as the basis upon which the court determines whether the Fourth Amendment's probable cause standard has been

met and, thus, whether the applied for search warrant should be issued. *See* U.S. Const. amend. IV; Fed. R. Crim. P. 41(d)(1); *see also, e.g., In re Search Warrant*, No. 16-MAG-7063, 2016 WL 7339113, at *2 (S.D.N.Y. Dec. 19, 2016) ("Search warrant applications require the close and careful scrutiny of a judicial officer, and are thus judicial documents."); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 583 (S.D.N.Y. 2009) (holding that affidavits in support of seizure or search warrants are "judicial documents" because they "are central to a court's probable cause determination").

This Court has previously held that a search warrant application and its supporting affidavit are subject to the common law right of access, at least after the warrant has been executed and returned to the court. *In re Application of Newsday, Inc.*, 895 F.2d 74, 78–79 (2d Cir. 1990) ("*Newsday*"). *Newsday* involved a motion by a member of the news media for access to certain search warrant materials. In determining at what point the common law presumption of access attached to those materials, the Court cited favorably the "middle position" taken in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) ("*Baltimore Sun*"), in which the Fourth Circuit held that the "common law right of inspection attached" to search warrant materials "once the warrant had been filed." *Newsday*, 895 F.2d at 78–79. Accordingly, without deciding whether "the press has a constitutional right of access to documents contained in search warrant applications," the Court held that the common law presumption applied in the case before it, where "the warrant

ha[d] been executed, a plea-bargain agreement ha[d] been reached, the government admit[ted] that its need for secrecy [was] over, and the time ha[d] arrived for filing the application with the clerk." *Id.*; *see also id.* at 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"). Further finding that the district court had "properly balanced the common law right of access to judicial records with the defendant's privacy rights," the Court affirmed the release of a redacted copy of the warrant materials sought by the movant in *Newsday*. *Id*. at 75.

Other federal courts of appeals have likewise concluded that the public has at least a common law right to inspect search warrant materials. *See In re Search of Fair Finance*, 692 F.3d 424, 433 (6th Cir. 2012) (recognizing common law right of access to search warrant proceedings); *United States v. Business of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (same, for access to search warrant materials from closed investigations); *In re EyeCare Physicians of America*, 100 F.3d 514, 517 (7th Cir. 1996) (same, for filed search warrant affidavits); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("*In re Gunn*") (holding that a First Amendment right of access applied to warrant materials connected to ongoing criminal investigation).

In addition, the search warrant itself is a judicial document subject to the common law presumption of access because it is issued by the court, Fed. R. Crim.

P. 41(e), and is therefore directly relevant to a "judicial function." *Lugosch*, 435 F.3d at 119. Indeed, search warrants "represent[] decisions by a judge and are, therefore, quintessentially judicial documents." *In re Sealed Search Warrants Issued June 4 & 5, 2008*, No. 08-M-208 (DRH), 2008 WL 5667021, at *2 (N.D.N.Y July 14, 2008). District courts in this Circuit have correctly concluded that search warrants are subject to the common law presumption of access. *Id.* (finding search warrants, returns, applications, and supporting affidavits to be judicial documents); *see also All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d at 583–84 (citing *Newsday*, 895 F.2d at 74) (finding seizure warrants to be judicial documents).

The presumption of access to search warrant materials under the common law is particularly strong because they are used to determine "substantive legal rights." *Bernstein*, 814 F.3d at 142. A search warrant may issue only upon a judicial determination of probable cause. Fed. R. Crim. P. 41(d). The duty of the court to evaluate a search warrant application and determine whether probable cause exists determines the power of the government to conduct a search and adjudicates an individual's substantive legal right to be free from unwarranted searches and seizures. *See generally United States v. Leon*, 468 U.S. 897, 913–14 (1984) (noting the Fourth Amendment requires that a judicial officer issuing a warrant be "neutral and detached . . . and not . . . a rubber stamp for the police." (quotations omitted) (citations omitted)); *see also All Funds on Deposit at Wells*

Fargo Bank, 643 F. Supp. 2d. at 584 ("There can be no doubt that a court's determination that a person's property may be seized involves the adjudication of that person's substantive rights, or that information upon which the court relies in making that determination directly affects the adjudication."). Accordingly, the common law presumption of access applicable to the Search Warrant Materials here "is at its zenith." *Bernstein*, 814 F.3d at 142; *see also All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d. at 584 (holding that the common law presumption of access to search warrant affidavits is "entitled to great weight.")

C. The district court erred in not applying the common law presumption of access to the Search Warrant Materials.

In denying Defendant-Appellant's motion, the district court did not consider or apply the common law presumption of public access to the Search Warrant Materials. Defendant-Appellant's motion asked the district court to order that the Search Warrant Materials "no longer [be] subject to the Court's Protective Order[,]" and noted that search warrants and search warrant materials are subject to a strong presumption of public access. *See* Letter, *United States v. Schulte*, 1:17-cr-00548 (Mar. 26, 2019), ECF No. 82 (quoting *United States v. Cohen*, 366 F. Supp. 3d 612 (S.D.N.Y. 2019)); *see also* Letter, *United States v. Schulte*, 1:17-cr-00548 (Apr. 15, 2019), ECF No. 88 (arguing in reply to the government's opposition to Defendant-Appellant's motion that the Search Warrant Materials should not be subject to the protective order and are also "judicial documents"

entitled to a strong presumption of public access). Regardless of whether this Court considers Defendant-Appellant's motion as one requesting modification of a protective order or one requesting the unsealing of judicial documents, and regardless of whether Defendant-Appellant initially agreed to a protective order restricting public access to the Search Warrant Materials, the district court was obligated to consider whether the common law presumption had been overcome in determining whether the Search Warrant Materials should be publicly accessible. *See San Jose Mercury News v. U.S. Dist. Ct.*, 187 F. 3d 1096, 1101 (9th Cir. 1999) ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away.")

It is without question that the district court had the power to unseal the Search Warrant Materials, even in the absence of any request to do so, because "[e]very court has supervisory power over its own records and files." *Time Warner Commn'cs*, 435 U.S. at 598. This Court has itself *sua sponte* unsealed judicial records and required district court review of other records filed under seal to determine whether they should remain sealed, without considering whether a person or entity had asserted a specific interest in obtaining access to them. *See Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 307 (2d Cir.1997).

Moreover, the district court, as the "representative of the public interest in the judicial process" had a duty to consider whether, as judicial documents, the Search Warrant Materials must be made available to the public pursuant to

common law, even if only in redacted form. *See Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir.1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)."). For example, in *In re Avandia Marketing, Sales Practices and Prods. Liability Litig.*, the U.S. Court of Appeals for the Third Circuit recently held that the district court erred in applying the "good cause" standard governing protective orders under Federal Rule of Civil Procedure 26(c) in assessing "motions for continued confidentiality" of certain documents filed in connection with a motion for summary judgment. Nos. 18-2259 & 18-2656, 2019 WL 2119630, at *5–*7 (3d Cir. May 15, 2019). The Third Circuit held that, because the documents were judicial records subject to the common law right of access, the district court "was *obligated* to apply the exacting common law right of access standard . . . before granting [the party's] motions for continued confidentiality." *Id.* at *6 (emphasis added).

The Third Circuit has also required district courts to apply the common law presumption of access to judicial records in response to a motion to modify a protective order. In *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, a third party "moved to intervene permissively in a settled lawsuit for the limited purpose of modifying a court-imposed protective order to gain access to material that had been filed with the court under seal pursuant to that order." 998 F.2d 157, 158 (3d Cir. 1993). In that case, the district court entered a protective order upon the joint

motion of the parties that covered documents and materials exchanged during pretrial discovery; the protective order specified that all "confidential information" exchanged by the parties would be filed under seal. *Id.* The district court denied the third party's motion, "noting only that it had approved a comprehensive protective order relating to information obtained in discovery . . . ." *Id.* at 160 (quotations omitted). The Third Circuit vacated the district court's order and remanded. *Id.* at 168. It held that there is a presumptive common law right of public access to material filed in connection with nondiscovery pretrial motions, *id.* at 164, and that the district court's order was "inconsistent" with Third Circuit precedent requiring "careful factfinding and balancing of competing interests . . . before the strong presumption of openness can be overcome." *Id.* at 167.

In addition, the same standard governing access to the Search Warrant Materials under the common law applies regardless of whether a request for public access is made by a criminal defendant—like Defendant-Appellant here—or by a member of the public or the press. For example, in *Ayala v. Speckard*, this Court, sitting *en banc*, considering three unrelated criminal cases in which the prosecution sought to close the courtroom during the testimony of undercover police officers. 131 F.3d 62, 64–65 (2d Cir. 1997) (*en banc*). In each case, the closure of the courtroom was opposed by the criminal defendant. *Id.* On appeal, this Court applied both the qualified First Amendment right of public access to a criminal trial and the Sixth Amendment guarantee to every person accused in a criminal

prosecution to a public trial. *Id.* at 68–69 (noting that the "rigorous standards" for closure of a criminal trial under the First Amendment "were explicitly applied to limitations on a defendant's Sixth Amendment right to a public trial . . ."); *see also Waller v. Georgia*, 467 U.S. 39, 46 (1984). Similarly, in this case, even though it is a criminal defendant who seeks to make the Search Warrant Materials public, the district court must apply the same common law standard as it would if the request were made by a member of the media or the public.

Here, the district court erred by failing to apply the common law presumption of access to the Search Warrant Materials and by failing to make specific, on-the-record findings that the strong presumption of access has been overcome by countervailing factors.[3] Accordingly, this Court should vacate the district court's orders and remand with instructions to the district court to apply the common law presumption of public access to the Search Warrant Materials.

[3] The district court concluded that the protective order should not be modified in part because "[t]he Government represents that its investigation is continuing." ECF No. 87. Although countervailing factors that may overcome the common law presumption of access in a given case may include whether public access would "reveal details of an ongoing investigation" *Bernstein*, 814 F.3d at 143, the court must specifically find the existence of such a countervailing factor and balance it against the presumption of access before it may seal or continue to seal a judicial document in whole or in part. *Amodeo II*, 71 F.3d at 1051–52.

D. A qualified First Amendment right of access also applies to the Search Warrant Materials.

The presumption of access to judicial documents is "secured by two independent sources: the First Amendment and the common law." *Bernstein*, 814 F.3d at 141 (citing *Lugosch*, 435 F.3d at 121); *see also Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013) (recognizing that the presumptions in favor of public access include "a strong form rooted in the First Amendment and a slightly weaker form based in federal common law"). Though this Court has recognized a qualified constitutional right of access to certain judicial documents, *see Lugosch*, 435 F.3d at 120, it has not addressed the applicability of the First Amendment presumption of access to search warrants, search warrant applications, and related filings. And, because the district court below failed to consider the public's common law right of access to the Search Warrant Materials at issue, and because that alone requires reversal, the Court need not determine the applicability of the First Amendment right in this case.

Though the Court need not reach the issue, *amici* agree with Defendant-Appellant that the public has a First Amendment right of access to such materials, at least after a warrant has been executed and returned. *See* Redacted Br. for Def.-Appellant Joshua Adam Schulte 15–18, EFC No. 29. To determine if a First Amendment right attaches to a record or judicial process, courts apply a two-pronged "experience" and "logic" test that considers the historic openness of the

process and the role of public access in the functioning of that process. *See, e.g., Press-Enter. Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). This test requires consideration of "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 1, 8, 9. If both questions are answered affirmatively, a constitutional right of access applies. *Lugosch*, 435 F.3d at 120.

Experience counsels in favor of a First Amendment right of access to the Search Warrant Materials at issue. As courts in other circuits have recognized, search warrant materials have historically been open to the public post-execution. *See In re Gunn*, 855 F.2d at 573 (stating that "search warrant applications and receipts are routinely filed with the clerk of court without seal"); *Goetz*, 886 F.2d at 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"). A district court in this Circuit has likewise recognized that search 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." *All Funds on Deposit*, 643 F. Supp. 2d at 581.

Logic too supports a First Amendment right of access. As discussed above, a court's decision to grant a search warrant application adjudicates an individual's

substantive Fourth Amendment rights. Access to search warrant materials post-execution plays a significant positive role in the functioning of the criminal justice system by enabling meaningful public oversight not only of that judicial decisionmaking, but also of actions taken by the executive branch. *See In re Gunn*, 855 F.2d at 573 ("[P]ublic access to documents filed in support of search warrants . . . may operate as a curb on prosecutorial or judicial misconduct.").

Where, as here, the First Amendment right of access applies, the burden imposed on a party seeking to maintain secrecy is a heavy one. Because the Search Warrant Materials are subject to the First Amendment presumption of public access, they may remain under seal only if the district court makes "specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124 (citation omitted).

II. In determining whether the Search Warrant Materials may remain under seal, the district court must consider the public interest, which in this case weighs in favor of disclosure.

Not only is the presumption of access to the Search Warrant Materials heightened because they were used to determine "substantive legal rights," *Bernstein*, 814 F.3d at 142, but this Court has also noted that the presumption of access to judicial documents is particularly strong in cases, like this one, in which there is a heightened public interest in the subject matter of the case itself. *See, e.g.*, *id.* (finding that strong public interest in the subject of a case weighs against

sealing documents related to the matter); *Lugosch*, 435 F.3d at 113, 123 n.5 (discussing that public interest in a matter is part of the "broader context" to be considered in determining the weight of the presumption of access); *see also Amodeo II*, 71 F.3d at 1048 (noting that essential monitoring of the courts "is not possible without access to testimony and documents that are used in the performance of Article III functions").

The public's interest in access to the Search Warrant Materials is particularly strong because the application for and issuance of a search warrant involves the exercise of both judicial and executive branch authority. *See United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008). Here, public access to the Search Warrant Materials will shed light on how the executive branch handles investigations into allegations of unauthorized access to and transmittal of classified information.

The criminal prosecution of Defendant-Appellant and the facts that underlie this case have been the subject of widespread news reporting and public discussion, and this context strengthens the public interest in access to the Search Warrant Materials. The "Vault 7 leak," as it has come to be known, was the subject of extensive reporting when it occurred in 2017. *See, e.g.*, Scott Shane, et al., *WikiLeaks Releases Trove of Alleged C.I.A. Hacking Documents*, N.Y. Times (March 7, 2017), https://perma.cc/8NZ2-YMVY; Brandon Valeriano, *WikiLeaks strikes again. Here are 4 big questions about Vault 7*, Wash. Post (March 8, 2017), https://perma.cc/97U4-Y55X.

By shedding light on how government agencies collect, use, and withhold from the public security vulnerabilities, *see* Shane, *supra* (reporting that the documents "include[d] instructions for compromising a wide range of common computer tools for use in spying: the online calling service Skype; Wi-Fi networks; documents in PDF format; and even commercial antivirus programs of the kind used by millions of people to protect their computers"), the leaked Vault 7 documents raised questions about how the government treats vulnerabilities, and whether government policies with respect to vulnerabilities and their exploitation might affect the lives of everyday Americans. In addition, the Vault 7 documents raised questions about the government's cyber capabilities by suggesting that the government controls many technological vulnerabilities and exploits known as "zero days"—"possible avenues of attack . . . [that are] yet to be discovered and can act as open doors to inaccessible systems." Valeriano, *supra*. These revelations have influenced the ongoing debate over to what extent the government should share known vulnerabilities in technology products with the private sector so that they may be fixed. *Id*.

Access to the Search Warrant Materials would allow the public to better understand both the executive branch's investigations into unauthorized disclosures of classified information and the ongoing public debate about how and when the government can withhold information about security vulnerabilities from the public. The significant public interest in the subject matter of this case

increases the weight accorded the presumption of access to the Search Warrant Materials, and the district court should consider this context when applying the common law presumption of access on remand.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to vacate the district court's orders and remand with instructions to the district court to apply the common law presumption of public access to the Search Warrant Materials.

Respectfully submitted,

/s/ Katie Townsend

Katie Townsend
Counsel of Record
Bruce D. Brown
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
ktownsend@rcfp.org

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Washington, D.C.

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was 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.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100

countries. On any given day, AP's content can reach more than half of the world's population.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The California News Publishers Association ("CNPA") is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

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.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

The E.W. Scripps Company serves audiences and businesses through local television, with 52 television stations in 36 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency

Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

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 Investigative Reporting Program (IRP) at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

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.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919,

represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

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 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 New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

Reveal from The Center for Investigative Reporting, 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.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, all in Washington state.

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.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

Additional Counsel:

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

Karen Kaiser
General Counsel
The Associated Press
200 Liberty Street
20th Floor
New York, NY 10281

Jim Ewert, General Counsel
California News Publishers Association
2701 K St.
Sacramento, CA 95816

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Matthew Leish
Assistant General Counsel
Tribune Publishing Company
4 New York Plaza, 7th Floor
New York, New York 10004
Counsel for Daily News, LP

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Jonathan Donnellan
Ravi V. Sitwala
Diego Ibarguen
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
Counsel for The Media Institute

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW
Suite 610
Washington, DC 20036

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY14202
Counsel for National Press Photographers Association

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

D. Victoria Baranetsky
General Counsel
Reveal from The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Katie Townsend
Katie Townsend
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: June 11, 2019
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on June 11, 2019.

Dated: June 11, 2019

By: */s/ Katie Townsend*
Katie Townsend
Counsel for Amici Curiae