

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**IN RE APPLICATION OF JASON  
LEOPOLD AND BUZZFEED, INC. FOR  
ACCESS TO CERTAIN SEALED COURT  
RECORDS**

No. \_\_\_\_\_

**Oral Argument Requested**

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF THE APPLICATION OF JASON LEOPOLD AND BUZZFEED, INC.  
FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS**

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**PRELIMINARY STATEMENT**

U.S. Drug Enforcement Administration (“DEA”) investigative authority, as set forth in 28 C.F.R. § 0.100 and in the Controlled Substances Act, is limited to enforcing federal crimes related to drugs. On June 2, 2020, Applicant Jason Leopold (“Leopold”) of BuzzFeed, Inc. (“BuzzFeed”) (collectively, “Applicants”) reported that the DEA had been granted a temporary delegation of “non-Title 21 enforcement duties” by the Attorney General pursuant to 21 U.S.C. § 878(a)(5), empowering it to enforce all federal criminal laws, on a nationwide basis, in the wake of protests sparked by the police killing of George Floyd in Minneapolis, Minnesota on May 25, 2020. *See Appl.*, Exhibit A, Jason Leopold and Anthony Cormier, *The DEA Has Been Given Permission To Investigate People Protesting George Floyd’s Death*, BuzzFeed News (June 2, 2020), <https://www.buzzfeednews.com/article/jasonleopold/george-floyd-police-brutality-protests-government>.

Applicants’ reporting relied on a two-page memorandum, dated May 31, 2020, from Timothy Shea, Acting Administrator of the DEA, to the Deputy Attorney General. *See Appl.*, Exhibit B. The memorandum reflects that the DEA requested—and was granted—a “designat[i]on to enforce any federal crime committed as a result of protests over the death of George Floyd . . . on a nationwide basis for a period of fourteen days.” *See id.* According to the memorandum, this temporary designation authorized DEA Special Agents and Task Force Officers to, *inter alia*, “conduct covert surveillance[,]” and “engage in investigative and enforcement activity” to enable the “DEA to assist to the maximum extent possible in the federal law enforcement response to protests which devolve into violations of federal law[.]” *Id.*

By its concurrently filed Application, Applicants move the Court for an Order unsealing court records related to any requests—made by or on behalf of the DEA—for judicial authorization

for it to engage in electronic surveillance for any non-Title 21 investigative or law enforcement purpose. Specifically, Applicants seek an order unsealing the following:

1. all original or renewed applications and supporting documents filed with the Court on or after May 31, 2020, for any search warrant under the Stored Communications Act (“SCA”), *see* 18 U.S.C. §§ 2701–2712, sought by or for the DEA for a non-Title 21 investigative or law enforcement purpose, regardless of whether the warrant was issued or executed, as well as any other court records related to such applications (collectively, “Warrant Materials”);
2. all original or renewed applications and supporting documents filed with the Court on or after May 31, 2020, seeking authorization for the DEA to use a pen register or trap and trace device pursuant to 18 U.S.C. §§ 3121–3127 for a non-Title 21 investigative or law enforcement purpose, regardless of whether such authorization was granted or a pen register or trap and trace device was used, as well as any other court records related to such applications (collectively, “PR/TT Materials”); and
3. all original or renewed applications and supporting documents filed with the Court on or after May 31, 2020, for any order pursuant to 18 U.S.C. § 2703(d) of the SCA sought by or for the DEA for a non-Title 21 investigative or law enforcement purpose, regardless of whether the order was issued or executed, as well as any other court records related to such applications (collectively, “Section 2703(d) Materials”).

Because the Justice Department’s 14-day delegation of “non-Title 21 enforcement duties” to the DEA pursuant to 21 U.S.C. § 878(a)(5), as reflected in the May 31, 2020 memorandum from Acting Administrator Shea, ended on June 14, 2020, unsealing of the aforementioned judicial records should not implicate ongoing law enforcement investigations. And, while only temporary,

the exercise of non-Title 21 law enforcement authority by the DEA is an issue of abiding public interest and concern. Unsealing the Warrant, PR/TT, and Section 2703(d) Materials requested by Applicants will shed light on the DEA’s extraordinary involvement in the federal law enforcement response to the nationwide protests that began after the killing of George Floyd. Specifically, it will help inform the public about the DEA’s use of electronic surveillance tools in connection with those protests.

### **FACTUAL BACKGROUND**

**I. On May 31, 2020 the Justice Department granted the DEA’s request for temporary authorization to engage in general law enforcement activities.**

The death of George Floyd at the hands of Minneapolis police on May 25, 2020, prompted large, nationwide protests against police violence and for racial justice. On June 6, 2020, a reported “half a million people turned out in nearly 550 places across the United States” in response to Mr. Floyd’s killing. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

On June 2, 2020, BuzzFeed News reported that the DEA had been temporarily “assign[ed] non-Title 21 enforcement duties”—*i.e.*, law enforcement duties beyond the agency’s investigative and enforcement authority under the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*—in connection with the federal law enforcement response to the protests that were, at that time, occurring throughout the nation. Appl., Exhibit A. According to a two-page memorandum, dated May 31, 2020 from DEA Acting Administrator Shea, obtained and published by BuzzFeed News, the DEA asked for and was granted the authority, “on a nationwide basis for a period of fourteen days,” to “(1) conduct surveillance and protect against threats to public safety; (2) share intelligence with federal, state, local, and tribal counterparts; (3) if necessary, intervene as Federal

law enforcement officers to protect both participants and spectators in the protests; and (4) if necessary, engage in investigative and enforcement activity including, but not limited to, conducting interviews, conducting searches, and making arrests for violation of federal law.” Appl., Exhibit B. In requesting this extraordinary authority, the DEA stated: “Police agencies in certain areas of the country have struggled to maintain and/or restore order.” *Id.*

BuzzFeed News’ reporting that the Justice Department had temporarily granted the DEA expanded law enforcement powers was preceded by a statement by Attorney General Barr on May 30, 2020, in which he blamed “anarchistic and far left extremists, using Antifa-like tactics” for violence during the demonstrations, and pledged that Department of Justice components, including the DEA, would “support . . . local efforts and take all action necessary to enforce federal law.” Department of Justice, Office of Public Affairs, *Attorney General William P. Barr’s Statement on the Death of George Floyd and Riots* (May 30, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots>. In a statement made on June 1, 2020, President Donald Trump similarly asserted broad federal authority, stating that he was “mobilizing all available federal resources—civilian and military—to stop the rioting and looting . . . .” Statement by the President (June 1, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/>. And, since early June, federal agents have been seen patrolling the streets of several U.S. cities. *See, e.g.,* Mike Baker, Thomas Fuller & Sergio Olmos, *Federal Agents Push Into Portland Streets, Stretching Limits of Their Authority*, N.Y. Times (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html>.

On June 2, the same day BuzzFeed News reported that the Justice Department had temporarily expanded the DEA’s investigative and law enforcement authority in connection with

the protests, Appl. Exhibit A, it was also reported that Attorney General Barr had personally ordered federal law enforcement to clear the area outside of the White House for President Trump's photo op in front of St. John's Church the previous day, *see* Carol D. Leonnig, Matt Zapposky, Josh Dawsey & Rebecca Tan, *Barr personally ordered removal of protesters near White House, leading to use of force against largely peaceful crowd*, Wash. Post (June 2, 2020), [https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html).<sup>1</sup>

On June 5, 2020, BuzzFeed News reported that an email obtained by its reporters "showed that the DEA [on June 2, 2020] was seeking to send 25 agents to assist with 'security' in Washington[, D.C.] as well as members of the DEA's Special Response Team, which among other activities conduct surveillance." Jason Leopold and Anthony Cormier, *Lawmakers Call for Halt To Covert Surveillance of Protesters by DEA*, BuzzFeed News (June 5, 2020), <https://www.buzzfeednews.com/article/jasonleopold/lawmakers-call-for-halt-to-covert-surveillance-of>. The article highlighted concerns about the DEA's "history and practice of disproportionately targeting people of color" and the implications of a "wider deployment of the DEA" for non-Title 21 law enforcement purposes—concerns raised in a letter to Attorney General

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<sup>1</sup> The incident, during which peaceful protesters and journalists were violently "cleared" from Lafayette Square by law enforcement, drew widespread criticism, including from retired military officers. *See* Peter Baker, et al., *How Trump's Idea for a Photo Op Led to Havoc in a Park*, N.Y. Times (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html>; Tom Jackman & Carol D. Leonnig, *National Guard officer says police suddenly moved on Lafayette Square protesters, used 'excessive force' before Trump visit*, Wash. Post (July 27, 2020), <https://www.washingtonpost.com/nation/2020/07/27/national-guard-commander-says-police-suddenly-moved-lafayette-square-protesters-used-excessive-force-clear-path-trump/>; *see also* *Reporters Committee submits letter for hearing on Park Police attack on Australian journalists*, Reporters Comm. for Freedom of the Press (June 29, 2020), <https://www.rcfp.org/wp-content/uploads/2020/06/House-Natural-Resources-Committee-Letter.pdf>.

Barr and Acting Administrator Shea by Rep. Jerrod Nadler (D-NY) and Rep. Karen Bass (D-CA). *Id.* As BuzzFeed News reported, Rep. Andy Levin (D-MI), Rep. Ilhan Omar (D-MN), and Rep. Jamie Raskin (D-MD) also sent a separate letter expressing concern that the May 31, 2020 memorandum providing DEA with a temporary delegation of non-Title 21 law enforcement authority “fails to describe or place any guardrails around” DEA’s extended surveillance powers, “thus opening the door to sweeping, warrantless surveillance activities inconsistent with the preservation of civil liberties.” *Id.*

**II. Warrant, PR/TT, and Section 2703(d) Materials related to the DEA’s temporary exercise of non-Title 21 law enforcement authority are sealed.**

On information and belief based upon public reporting, DEA Special Agents and Task Force Officers may have sought, via Justice Department attorneys, search warrants under the SCA, pen register or trap and trace orders,<sup>2</sup> and/or Section 2703(d) orders<sup>3</sup> in order to conduct electronic surveillance of protestors in connection with the DEA’s temporary exercise of non-Title 21 law enforcement authority described in the May 31, 2020 memorandum from Acting Director Shea.<sup>4</sup> On information and belief, judicial records related to those requests are sealed.

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<sup>2</sup> Pen registers and trap and trace devices are law enforcement surveillance tools the use of which is governed by 18 U.S.C. §§ 3121–3127 (the “Pen Register Act” or “PRA”). “Pen registers record telephone numbers, e-mail addresses, and other dialing, routing, addressing, or signaling information that is transmitted by instruments or facilities—such as telephones or computers—that carry wire or electronic communications.” OIG, *A Review of the FBI’s Use of Pen Register and Trap and Trace Devices Under the Foreign Intelligence Surveillance Act in 2007 through 2009 — Executive Summary* at 1 (June 2015), <https://oig.justice.gov/reports/2015/o1506.pdf>. “Trap and trace devices record similar information that is received by such instruments or facilities.” *Id.*

<sup>3</sup> Under 18 U.S.C. § 2703 of the Stored Communications Act (“SCA”), a court may issue an order authorizing the government to, *inter alia*, require electronic communication service or remote computing service providers to disclose certain communications metadata related to a subscriber or customer. 18 U.S.C. § 2703(a), (b)(1), (c)(1)-(2).

<sup>4</sup> The DEA reportedly has access to two types of electronic surveillance tools—stingrays and dirtboxes (or “DRT boxes”)—that intercept data from mobile phones by “simulat[ing] cell phone towers in order to force mobile phones and other devices to connect to it instead of to a legitimate cell tower.” Kim Zetter, *How cops secretly track your phone*, *The Intercept* (July 31, 2020),

Because the DEA was granted such non-Title 21 law enforcement authority for a short, fixed period of time that, per the May 31, 2020 memorandum, ended on June 14, 2020, unsealing of the judicial records sought by this Application should not implicate any ongoing law enforcement investigations. Applicants therefore request that any and all such judicial records—including docket sheets—be unsealed. To the extent necessary to facilitate such unsealing, Applicants also request that the DEA, U.S. Attorney’s Office, and/or Department of Justice be directed to provide a list of the specific magistrate case numbers associated with the applications and orders sought to be unsealed by this Application.

### ARGUMENT

#### **I. The sealed Warrant, PR/TT and Section 2703(d) Materials are judicial records.**

“The common-law right of public access to judicial records ‘is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch.’” *In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) (“*Leopold*”) (quoting *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017)). As the D.C. Circuit has stated, public access to judicial records “serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.” *United States v. Hubbard*, 650 F.2d 293, 314–315 (D.C. Cir. 1980) (“*Hubbard*”). Such public access thus plays a particularly vital role in matters that concern actions taken by the executive branch. As the U.S. Court of Appeals for the Seventh Circuit has explained, “in such circumstances, the public’s right to know

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<https://theintercept.com/2020/07/31/protests-surveillance-stingrays-dirtboxes-phone-tracking/> (“In doing so, the phone or other device reveals information about itself and its user to the operator of the stingray.”). The devices are considered particularly controversial because they “don’t just pick up data about targeted phones,” but also pick up data from “any phone in the vicinity” of the device. *Id.*

what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.” *Smith v. U.S. District Court*, 956 F.2d 647, 650 (7th Cir. 1992) (“*Smith*”) (quoting *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)); *see also United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (stating the “courts must impede scrutiny of the exercise of [judicial] judgment only in the rarest of circumstances,” especially “when a judicial decision accedes to the requests of a coordinate branch”).

In *Leopold*, the D.C. Circuit held that SCA warrants, Section 2703(d) orders, and orders authorizing the use of a pen register or trap and trace device, are “judicial records,” as such “[c]ourt decisions are the ‘quintessential business of the public’s institutions.’” *Leopold*, 964 F.3d at 1128 (quoting *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir.1996)); *see also In re Application of United States (Appelbaum)*, 707 F.3d 283, 290–91 (4th Cir. 2013) (holding, with “no difficulty[.]” that “the actual § 2703(d) orders and subsequent orders issued by the court are judicial records”).

The Court reached the same conclusion as to “applications for such orders and their supporting documents (e.g., accompanying affidavits)[.]” *Leopold*, 964 F.3d at 1128 (explaining that “[a]pplications for electronic surveillance orders and their supporting documents” are “intended to influence the court . . . .”); *see also Appelbaum*, 707 F.3d at 291 (Section 2703(d) motions “are ‘judicial records’ because they [are] filed with the objective of obtaining judicial action or relief pertaining to [Section] 2703(d) orders.”); *In re Appl. of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 830 F. Supp. 2d 114, 151–52 (E.D. Va. 2011) (applying the common law right of access to materials related to a Section 2703(d) order). And the D.C. Circuit also “reach[ed] the same conclusion as to court dockets.” *Leopold*, 964 F.3d at 1129 (“It would make little sense to provide public access to court documents but not to the indices that

record them and thus make them accessible.”). In sum, all of the Warrant, PR/TT, and Section 2703(d) Materials sought by this Application are judicial records.

**II. A strong common-law presumption of public access applies to the Warrant Materials and Section 2703(d) Materials; the Court should evaluate the entirety of Applicants’ Application using the *Hubbard* test.**

In general, in determining whether a judicial record should be unsealed under the common law, “the starting point . . . is a ‘strong presumption in favor of public access.’” *EEOC*, 98 F.3d at 1409 (quoting *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)); *see also Hubbard*, 650 F.2d at 317 (noting the “important presumption in favor of public access to all facets of criminal court proceedings”). This strong common-law presumption in favor of public access applies to the Warrant and Section 2703(d) Materials at issue here. *Leopold*, 964 F.3d at 1128–29.<sup>5</sup>

To determine whether, as to particular judicial records, the presumption of public access is outweighed by competing interests, courts in this Circuit apply a test derived from the D.C. Circuit’s decision in *Hubbard*, 650 F.2d at 317–22. In this Circuit, the “‘*Hubbard* test has consistently served as our lodestar’ for evaluating motions to seal or unseal judicial records ‘because it ensures that [courts] fully account for the various public and private interests at stake.’” *Leopold*, 964 F.3d at 1127 (quoting *MetLife*, 865 F.3d at 666). Accordingly, in evaluating Applicants’ Application to unseal the Warrant and Section 2703(d) Materials, the Court should apply the *Hubbard* test with a thumb on the scale in favor of disclosure.

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<sup>5</sup> As the D.C. Circuit explained in *Leopold*, because the Stored Communications Act contains no default sealing or nondisclosure provisions, whatsoever, “‘Congress has [not] spoken directly to the issue at hand,’ and the common-law rule applies.” *Id.* at 1129 (quoting *MetLife*, 865 F.3d at 669). This holding is consistent with the Fourth Circuit’s prior decision in *Appelbaum*, 707 F.3d at 291 (holding that, because “[Section] 2703(d) orders are ‘judicial records,’ the common law presumption of access attaches to these documents”).

In *Leopold*, the D.C. Circuit held that the Pen Register Act—unlike the Stored Communications Act—“displace[s] the usual presumption in favor of access.” *Leopold*, 964 F.3d at 1130. However, as the Court held, the Pen Register Act “does not *require* that pen register orders be sealed, and by authorizing the court to order otherwise, Congress plainly contemplated that unsealing may occur. Moreover, because Congress did not specify a standard for making the unsealing determination, it did not displace the common-law standard enshrined in the *Hubbard* balancing test.” *Id.* (italics original). Thus, in evaluating Applicants’ Application to unseal the PR/TT Materials, the Court “should apply the traditional *Hubbard* balancing test—albeit without a thumb on the scale in the case of pen register orders.” *Id.* at 1130–31.<sup>6</sup>

### **III. The Warrant, Section 2703(d), and PR/TT Materials should be unsealed under the *Hubbard* test.**

Under *Hubbard*, courts evaluating whether a particular judicial record should be unsealed consider: (1) the need for public access to the document at issue; (2) the public use of the document; (3) the fact of objection and the identity of those objecting to disclosure; (4) the strength of the generalized property and privacy interests asserted; and (5) the possibility of prejudice. *Hubbard*, 650 F.2d at 317–22.<sup>7</sup> Here, the *Hubbard* factors weigh in favor of unsealing the Warrant, Section 2703(d), and PR/TT Materials sought by this Application.

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<sup>6</sup> The Court in *Leopold* left open the question “whether the [Pen Register] Act displaces the usual presumption in favor of access to pen register materials other than the orders themselves.” *Id.* at 1130, n.7. Here, as discussed below, all the PR/TT Materials should be unsealed under the *Hubbard* test. Accordingly, “even with different presumptions,” in this case, the *Hubbard* test should not yield a different result for PR/TT orders than for their supporting materials. *Id.*

<sup>7</sup> Some courts in this Circuit have identified a sixth *Hubbard* factor: the purposes for which the documents were introduced during a judicial proceeding. However, the court in *In re Application of N.Y. Times* limited this factor to the facts of *Hubbard* and found it inapplicable to the determination of whether search warrant materials should be unsealed. 585 F. Supp. 2d 83, 93 (D.D.C. 2008).

*First*, the public has a powerful interest in access to the Warrant, Section 2703(d), and PR/TT Materials. As noted above, the public’s right of access to judicial records is of particular importance in matters in which the judicial branch is asked to “accede[] to the requests of a coordinate branch[.]” *Aref*, 533 F.3d at 83; *see also Hubbard*, 650 F.2d at 314–315 (noting that public access to judicial records “ensur[es] the integrity . . . of the law enforcement process more generally”). Here, the DEA’s unusual, temporary participation in the general federal law enforcement response to nationwide protests following the killing of George Floyd have been the subject of considerable public attention—and rightfully so. The public has “a legitimate interest in observing and understanding how and why” the DEA exercised its delegated non-Title 21 law enforcement authority, *In re N.Y. Times*, 585 F. Supp. 2d at 93, including to engage in electronic surveillance of protestors.

*Second*, with respect to “the extent to which information sought [is] already in the public forum,” *Hubbard*, 650 F.2d at 318, the specific judicial records at issue here are under seal. However, the May 31, 2020 memorandum temporarily authorizing the DEA to engage in non-Title 21 law enforcement activities is public. And the fact that DEA Special Agents and Task Force Officers were authorized to “conduct covert surveillance” and “share intelligence” with other law enforcement agencies is also public, as is the fact that the DEA was prepared to send at least 25 agents to Washington, D.C. to engage in non-Title 21 law enforcement activities on or about June 2, 2020. Thus, though the press and the public do not know whether the DEA itself, or the Justice Department on the agency’s behalf, sought or obtained SCA warrants, Section 2703(d) orders, and/or PR/TT orders, in connection with the DEA’s exercise of non-Title 21 law enforcement authority, that the DEA was engaged in non-Title 21 law enforcement activities, including surveillance, is public knowledge.

As to the *third* and *fourth Hubbard* factors, no one has yet objected to the disclosure of the Warrant, Section 2703(d), and PR/TT Materials, or asserted any privacy interests. To the extent such privacy interests may be asserted in the future, there is no indication that the materials sought here contain any specific, intimate personal details, and a generalized privacy interest, without more, is insufficient to prevent disclosure. *In re N.Y. Times*, 585 F. Supp. 2d at 93 (holding that statement that individual “wants ‘to get on with his life,’” without more specific information, is not a “legally cognizable privacy interest”); *Hubbard*, 650 F.2d at 324 (stating that valid privacy interests arise in “intimate details of individual lives, sexual or otherwise”).

*Fifth*, because the DEA’s non-Title 21 activities were authorized only temporarily—for a two-week period, ending on June 14, 2020—unsealing the Warrant, Section 2703(d), and PR/TT Materials now will not prejudice ongoing DEA investigative interests. Accordingly, the fifth *Hubbard* factor also weighs in favor of unsealing.

In sum, because the *Hubbard* factors weigh in favor of disclosure—and particularly in light of the strong presumption in favor of public access to the Warrant and Section 2703(d) Materials—all of the judicial records sought by this Application should be unsealed.

### **CONCLUSION**

For the foregoing reasons, Applicants respectfully request that the Court grant its Application and enter an order unsealing the Warrant, Section 2703(d), and PR/TT Materials.

Dated: September 17, 2020

Respectfully submitted,

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