[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5128

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE APPLICATION OF LOS ANGELES TIMES COMMUNICATIONS LLC TO UNSEAL COURT RECORDS

LOS ANGELES TIMES COMMUNICATIONS LLC,
Petitioner-Appellant,

v.

UNITED STATES,
Respondent-Appellee,

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:21-mc-00016-BAH (The Honorable Beryl A. Howell)

BRIEF FOR PETITIONER-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner-Appellant Los Angeles Times Communications LLC certifies as follows:

A. Parties and *Amici*

Petitioner-Appellant is Los Angeles Times Communications LLC.

Respondent-Appellee is the United States of America, represented by the Acting United States Attorney for the District of Columbia.

No *amici* appeared in the district court. The following *amici* are expected to appear in support of Petitioner-Appellant:

- Brief of *Amici Curiae* Media Organizations

Petitioner-Appellant is unaware of any *amici* expected to appear in support of Respondent-Appellee in this appeal.

B. Rulings Under Review

Petitioner-Appellant seeks review of the final Memorandum Opinion and Order of the U.S. District Court for the District of Columbia in *In re Application of Los Angeles Times Communications LLC to Unseal Court Records*, No. 1:21-mc-00016, 2021 WL 2143551 (D.D.C. May 26, 2021) (Howell, C.J.) that (1) denied Petitioner-Appellant's application to unseal certain court records, and (2) denied Petitioner-Appellant's motion to unseal the sealed motion of the United States for leave to file its response to the application under seal, and the attachments thereto.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel are not aware of any related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

As required by Circuit Rule 26.1, Petitioner-Appellant states that Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

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[1] Authorities upon which Petitioner-Appellant chiefly relies are marked with asterisks.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as this appeal is taken from a final order entered by the District Court. Petitioner-Appellant timely filed a Notice of Appeal on June 7, 2021. *See* App. 4; Fed. R. App. P. 4(a)(4)(A)(iv).

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that the public's qualified common law right of access to a search warrant and related judicial records related to a closed investigation of Senator Richard Burr (the "Search Warrant Materials") was overcome by countervailing interests because "no disclosure of search warrant materials would be appropriate" in a closed investigation that did not result in criminal charges, App. 9, and "had not been acknowledged by the government," App. 11, even where the existence of the investigation was publicly known and the target publicly confirmed its existence.

2. Whether the District Court erred in concluding that the public's qualified First Amendment right of access to the Search Warrant Materials was overcome by compelling interests because "no disclosure of search warrant materials would be appropriate," App. 9, in a closed investigation that did not result in criminal charges and "had not been acknowledged by the government,"

App. 11, even where the existence of the investigation was publicly known and the target publicly confirmed its existence.

3. Whether the District Court erred by failing to consider redaction as a less restrictive alternative to wholesale sealing of the Search Warrant Materials.

4. Whether the District Court erred in sealing (without affording Petitioner-Appellant an opportunity to object) and maintaining under seal the Government's opposition to Petitioner-Appellant's motion to unseal the Search Warrant Materials and supporting documents, in their entirety, "for the same reason" the District Court denied Petitioner-Appellant's motion to unseal the Search Warrant Materials themselves. App. 13 n.9.

STATEMENT OF THE CASE

This appeal arises out of Petitioner-Appellant's motion to unseal a search warrant and related judicial records in a closed investigation into stock trades made by a sitting United States Senator after he received a non-public briefing in January 2020 about the novel coronavirus, COVID-19.[2]

[2] Petitioner-Appellant draws on public reporting throughout the sections that follow because this Court can and should "tak[e] judicial notice of facts generally known as a result of newspaper articles" in resolving a motion to unseal judicial records. *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991).

I. The Justice Department's investigation into stock trades made by Senator Richard Burr

On January 24, 2020, members of the United States Senate received a closed-door briefing on the then-nascent threat posed by the spread of COVID-19. *See* Mary Clare Jalonick & Brian Slodysko, *Senators Deny Trading on Virus Info as Scrutiny Mounts*, AP News (Mar. 20, 2020), http://bit.ly/3ueBiPJ. On February 12, 2020, the Senate Committee on Health, Education, Labor and Pensions hosted another non-public briefing for lawmakers on the same topic. *See id.* The next day Senator Richard Burr, a member of that Committee, together with his wife, sold 33 stocks collectively worth between $628,000 and $1.72 million, including as much as $150,000 of stock in the hotel sector. *See* Eric Lipton & Nicholas Fandos, *Senator Richard Burr Sold a Fortune in Stocks as G.O.P. Played Down Coronavirus Threat*, N.Y. Times (Mar. 19, 2020), https://perma.cc/K4S7-5XPK.

Shortly thereafter, the stock market began to decline due to concerns about the economic impact of the emerging pandemic. *See* James F. Peltz, *Stocks Tumble as Coronavirus Spreads, Sparking Worry of Global Economic Slowdown*, L.A. Times (Feb. 24, 2020), http://lat.ms/3krp2XO. And the stock transactions of Senator Burr and some of his colleagues—documented in mandatory disclosures to the Senate—"attracted heavy scrutiny as the coronavirus pandemic continue[d] to disrupt everyday life, wiping out jobs and personal wealth." Jalonick & Slodysko, *supra*.

In March 2020, the Department of Justice launched an investigation into trades Senator Burr and several other Senators made in the early days of the COVID-19 crisis. *See* David Shortell et al., *Justice Department Reviews Stock Trades by Lawmakers After Coronavirus Briefings*, CNN (Mar. 30, 2020), https://perma.cc/XA7C-LZKV. All denied wrongdoing, and Senators Kelly Loeffler, James Inhofe, and Dianne Feinstein were all notified by the Justice Department in May 2020 that the investigations into their stock trades had been closed. *See* Aruna Viswanatha, *Justice Department Closing Insider-Trading Investigations into Three U.S. Senators*, Wall St. J. (May 26, 2020), https://perma.cc/EQ44-898T. But the inquiry into Senator Burr, the only Senator to "acknowledge[] directing his trades himself," continued. Kasie Hunt et al., *Justice Department Drops Insider Trading Investigations of Three Senators*, NBC News (May 26, 2020), https://perma.cc/67M2-PG76.

As part of that investigation, the FBI served a search warrant at the Senator's Washington, D.C.-area home on May 13, 2020, and took custody of his cell phone that same day. *See* Del Quentin Wilber & Jennifer Haberkorn, *FBI Serves Warrant on Senator in Investigation of Stock Sales Linked to Coronavirus*, L.A. Times (May 13, 2020), http://lat.ms/2N0cTNh. The next day, Senator Burr stepped down as Chairman of the Senate Intelligence Committee, calling the Department's investigation "a distraction to the hard work of the [C]ommittee." Katie Benner &

Nicholas Fandos, *Richard Burr Steps Back from Senate Panel as Phone Is Seized in Stock Sales Inquiry*, N.Y. Times (May 14, 2020), https://perma.cc/Q7Z7-NC4S.

News reporting citing senior sources at the Department of Justice noted that, in light of the "sensitivity surrounding the decision to obtain a search warrant on a sitting senator," the decision to serve the warrant "was approved at the highest levels of the department . . . meaning that Attorney General William P. Barr signed off on it." Benner & Fandos, *supra*. And the Department's decision to obtain the warrant—a more dramatic investigative step than any it took with respect to other Senators whose trades had been under review—prompted a robust public debate about whether the scrutiny of Senator Burr was warranted, or whether the step reflected retaliation for the Senator's role in the Senate Intelligence investigation of Russian interference in the 2016 election. *Compare, e.g.*, Jon Healey, *Is the FBI's Investigation of Richard Burr Political Retribution? No. He Earned It All By Himself*, L.A. Times (May 14, 2020), https://lat.ms/3z8uTHj, *with* Devlin Barrett et al., *Sen. Richard Burr Stepping Aside as Intelligence Committee Chair Amid FBI Investigation of Senators' Stock Sales*, Wash. Post (May 14, 2020), https://perma.cc/4X8F-RDTN (noting public "doubts about the Justice Department's motives in Burr's case"). The final report of that investigation was submitted for classification review the same day that Senator Burr stepped down as chair of the Senate Select Committee on Intelligence. *See* Mary Clare Jalonick,

Burr Submits Final Russia Report Before Leaving Chairmanship, AP News (May 15, 2020), https://bit.ly/3tDP3b1.

On January 19, 2021, Senator Burr publicly announced that the Department of Justice had closed its investigation into his stock trades, stating that "the Department of Justice informed me that it has concluded its review of my personal financial transactions conducted early last year. The case is now closed." *See* Vanessa Romo, *DOJ Drops Insider Trading Investigation into Sen. Richard Burr*, NPR (Jan. 19, 2021), https://perma.cc/EU3S-RFYH. The Department's decision was widely reported and Senator Burr's statement was confirmed by official sources to multiple news organizations. *See, e.g.*, Eric Tucker & Mary Clare Jalonick, *Justice Dept. Won't Charge Sen. Burr Over Stock Sales*, AP News (Jan. 19, 2021), https://bit.ly/3hgSfV1 ("A Justice Department spokesman confirmed it would not bring charges[.]"); Matt Zapotosky & Felicia Sonmez, *Justice Dept. Will Not Pursue Charges Against Sen. Richard Burr over Stock Sales at Outset of Pandemic*, Wash. Post (Jan. 19, 2021), https://perma.cc/2WMS-E2XX ("A Justice Department spokesman confirmed the matter is closed[.]"); Aruna Viswanatha, *DOJ Inquiry Into Sen. Richard Burr's Stock Trades Ends Without Charges*, Wall St. J. (Jan. 19, 2021), https://perma.cc/PE4M-B4KS ("A spokesman for the Justice Department confirmed that the investigation had been closed[.]").

II. Petitioner-Appellant's motions to unseal

On February 24, 2021, in furtherance of the *Los Angeles Times*'s reporting about the now-closed investigation into Senator Burr's stock trades, including the extraordinary decision of the Department of Justice to seek a search warrant targeting a sitting Senator, Petitioner-Appellant moved the U.S. District Court for the District of Columbia for an order unsealing the search warrant, the application, any supporting affidavits, return, docket sheet, and any other judicial records related to the warrant served on May 13, 2020. *See* App. 2.

On March 31, 2021, the United States Attorney for the District of Columbia (the "Government") filed a sealed motion for leave to file the Government's opposition to that motion under seal, attaching its response as a sealed exhibit. *See* App. 3. That same day—fewer than three hours later—the District Court issued a minute order granting the Government's sealed motion to seal, *see* App. 3, without affording Petitioner-Appellant an opportunity to respond. The order contained no findings as to a need for sealing, reading only: "The Court ORDERS that the Government's memorandum and its supporting materials are SEALED." App. 3.

On April 5, 2021, Petitioner-Appellant filed a separate motion to unseal the Government's sealed motion for leave, along with its attachments and exhibits. The motion requested that, at a minimum, the Government be required to file redacted versions of those documents on the public docket, and that Petitioner-

Appellant be granted leave to respond to the arguments made therein. *See* App. 3. The Government again moved for leave to file its opposition to that motion under seal, *see* App. 3, and the District Court again granted that motion for leave in a minute order that contained no findings as to any need for sealing. *See* App. 4.

III. The District Court's Memorandum Opinion and Order

On May 26, 2021, the District Court issued a Memorandum Opinion and Order denying both Petitioner-Appellant's motion to unseal the Search Warrant Materials and Petitioner-Appellant's motion to unseal the Government's opposition filings. *See* App. 5. In the District Court's view, "[a]ssuming that the requested materials exist, and that the qualified public right of access attaches" under the common law and First Amendment, "no disclosure of search warrant materials would be appropriate in a closed, non-public investigation that has not resulted in criminal charges, and where individual privacy and governmental interests may be implicated." App. 10.

In so holding, the District Court's Memorandum Opinion and Order identified three kinds of interests that "may be implicated" in such cases. App. 11. First, it identified possible "privacy interests of the subject of the investigation . . . 'including avoiding the stigma of having [the subject's] name associated with a criminal investigation and keeping secret the fact that they were subjects of a law enforcement investigation, as well as a second, distinct privacy interest in the

contents of the investigative files.'" App. 12 (quoting *In re Application of WP Company LLC* ("*In re WP II*"), 201 F. Supp. 3d 109, 123 (D.D.C. 2016) (cleaned up)). Second, the District Court said, "such warrant materials may implicate the privacy interests of third parties." App. 12. Finally, the District Court concluded that "interests of the government can also be implicated," offering the example of the need to preserve witness confidentiality. App. 12 (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)).

The District Court acknowledged that its analysis under the common law was governed by this Circuit's decision in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), which sets out a six-factor test weighing "(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings," *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017) (Garland, J.) (citation omitted); *see* App. 8. The District Court did not, however, consider several of those factors. The District Court did not discuss the need for public access to the Search Warrant Materials. Nor did the District Court address whether parties other than the Government had objected to disclosure, and the

docket does not reflect any objection from Senator Burr. *See* App. 2–4. Nor did the District Court discuss the weight to be given to the purpose for which the materials were introduced—obtaining a warrant targeting a sitting United States Senator.

In considering the extent of previous access, the District Court rejected the suggestion that its analysis should take into account information already in the public domain—including Senator Burr's public acknowledgments of the now-closed investigation and the disclosures of government sources who confirmed investigative details to the press—concluding that the three secrecy "interests" the Court identified "are no less great where some of the relevant information has been reported on in the news media." App. 12. "Without acknowledgement by the government," the District Court concluded, "media coverage regarding the existence of a criminal investigation or search warrant does not extinguish the substantial privacy interests underlying search warrant materials, particularly where the specific information in the materials has not been disclosed." App. 12.

In a footnote, the District Court also rejected Petitioner-Appellant's motion to unseal the Government's opposition filings "for the same reason that petitioner's motion to unseal the search warrant materials is denied." App. 13 n.3. The District Court dismissed Petitioner-Appellant's objection to the denial of an opportunity to be heard on the Government's motion to seal its opposition,

concluding that this Court's decision in *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991), which held that a motion to seal a plea agreement cannot ordinarily be granted without first affording the public notice and an opportunity to object, "do[es] not necessarily apply generally to all motions to seal," App. 13 n.3. In the alternative, the District Court held that "even if the test from *Robinson* applied here, the D.C. Circuit acknowledged in that case that in some cases it would be necessary for motions to seal and the district court findings reached in granting those motions to be sealed themselves," and stated that "[t]his is such a case." *Id.*

This appeal timely followed.

SUMMARY OF ARGUMENT

Petitioner-Appellant seeks access to sealed search warrant materials in a closed investigation that was widely reported in the press; that the target, United States Senator Richard Burr, has already publicly acknowledged; and that spokespersons for the Justice Department have confirmed is closed. The public is presumptively entitled to inspect those warrant materials under both the common law and First Amendment. Yet rather than consider whether those presumptions prevail over any specific countervailing interests presented in this case, as this Court's precedent requires, the District Court instead issued an opinion that would foreclose access to a whole category of judicial records—warrant materials "[i]n

closed investigations not acknowledged by the government," App. 14—on the basis of interests that might hypothetically be implicated in scenarios other than the one at issue here. The District Court reached that result based on secret arguments to which neither the public nor Petitioner-Appellant has had any degree of access, undermining the public's "strong interest in monitoring . . . the positions that its elected officials and government agencies take in litigation," *Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014), as well as "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions," *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986).

Applying the appropriate test to the facts presented here, the public's interest in access to the Search Warrant Materials obtained in connection with the investigation of Senator Burr outweighs any competing interests asserted by the Government. The District Court's failure to confront those facts is underlined by its conclusion that the outcome of this case was "dictate[d]," App. 14, by the result in an entirely different district court decision seeking search warrant materials that "b[ore] no direct relationship to matters of public trust," *In re WP II*, 201 F. Supp. 3d at 130, and would have revealed a private individual's "sexual preferences and partners," *id.* at 126. Here, there can be no question that the public trust was squarely implicated by the Justice Department's inquiry into whether Senator Burr relied on non-public information—obtained in his official capacity—when making

stock trades before a major market decline. *See* Wilber & Haberkorn, *supra*. And, regardless of the Government's ultimate decision not to pursue charges against Senator Burr, the public has an interest in understanding whether that investigation was adequately predicated, whether its course sheds light on the adequacy of the rules governing Members' stock trades, and whether the Justice Department paid due heed to the weighty separation of power issues that its decision to seek a warrant targeting Senator Burr implicated.

Because the District Court's failure to "balance the interests presented" *in this case* is inconsistent with this Circuit's case law, *MetLife*, 865 F.3d at 665, Petitioner-Appellant respectfully requests that this Court reverse the District Court's Memorandum Opinion and Order, with instructions to make public on remand any information that the Government cannot justify redacting under this Court's exacting precedents on the public's right of access to judicial records.

ARGUMENT

"The public's right of access to judicial records is a fundamental element of the rule of law." *In re Application of Leopold to Unseal Certain Electronic Surveillance Applications & Orders*, 964 F.3d 1121, 1123 (D.C. Cir. 2020). The law vindicates that principle in two separate yet overlapping ways: The common law recognizes a "right to inspect and copy public records and documents, including judicial records and documents," *Nixon v. Warner Commc'ns, Inc.*, 435

U.S. 589, 597 (1978), and "[t]he [F]irst [A]mendment guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed," *Robinson*, 935 F.2d at 287. Because the common law alone requires all of the relief requested, Petitioner-Appellant respectfully submits that the Court's analysis should begin there. *See In re Leopold*, 964 F.3d at 1126–27.

I. The public's common law right of access attaches to the Search Warrant Materials.

The threshold consideration under the common law is whether particular documents are judicial records, a question this Court resolves *de novo*. *See MetLife*, 865 F.3d at 666. If they are, a "strong presumption in favor of public access" attaches, *id.* at 665 (citation omitted), and it may be overcome only after careful application of the six-factor test set forth in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), to "the interests presented by a given case," *MetLife*, 865 F.3d at 665; *id.* at 666 (stating that the *Hubbard* test is the "lodestar" of this Court's analysis). The Search Warrant Materials at issue here are judicial records.[3]

[3] Petitioner-Appellant does not know whether the Government disputes that the common law right attaches to the Search Warrant Materials at issue because of the sealing of the Government's opposition. In past cases in this Circuit, the Government has "concede[d] that there is a common law right of access to search warrant materials" but contested the existence of a First Amendment right of access. *See In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records* ("*In re N.Y. Times Co.*"), 585 F. Supp. 2d 83, 87 n.2 (D.D.C. 2008).

This Court's test is straightforward: "If the goal in filing a document is to influence a judge's decisionmaking, the document is a judicial record." *CNN v. FBI*, 984 F.3d 114, 118 (D.C. Cir. 2021). As other circuits have found, warrant materials fit the bill—and the common law presumption of access therefore attaches to them—because the applications and affidavits "are central to a court's probable cause determination." *United States v. Custer Battlefield Museum*, 658 F.3d 1188, 1193 (9th Cir. 2011) (citation omitted); *see also, e.g.*, *In re Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989); *Matter of EyeCare Physicians of Am.*, 100 F.3d 514, 517–18 (7th Cir. 1996); *Matter of Search of 1638 E. 2nd Street, Tulsa, Okla.*, 993 F.2d 773, 775 (10th Cir. 1993).

The same conclusion follows from this Circuit's precedent. For one, this Court has concluded on essentially identical grounds that electronic surveillance applications and orders, including warrants under the Stored Communications Act, are judicial records; such applications are "filed with the objective of obtaining judicial action or relief," *In re Leopold*, 964 F.3d at 1129 (quoting *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 291 (4th Cir. 2013)), and such orders reflect the court's judgment, the "quintessential business of the public's institutions," *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). Indeed, the public's common law

right of access attached in *Hubbard* itself because the warrant-related materials at issue—documents seized pursuant to a search warrant—factored into a court's analysis of the legality of a search. *See MetLife*, 865 F.3d at 666–67. District courts in this Circuit have likewise recognized "a qualified right of access to inspect warrant materials following the close of an investigation." *In re N.Y. Times Co.*, 585 F. Supp. 2d at 87; *accord In re Application of WP Company LLC* ("*In re WP I*"), No. 16-mc-351, 2016 WL 1604976, at *2 (D.D.C. Apr. 1, 2016); *In re WP II*, 201 F. Supp. 3d at 129.[4]

Here, Senator Burr has represented that the relevant investigation is closed, *see* Romo, *supra*; Department of Justice officials have confirmed that fact to members of the press, *see, e.g.*, Tucker & Jalonick, *supra*; Zapotosky & Sonmez, *supra*; Viswanatha, *DOJ Inquiry Into Sen. Richard Burr's Stock Trades*, *supra*; and the decision below hews to that assumption, *see* App. 6. Accordingly, by the lights of all the Circuits to address the issue, and consistent with prior decisions of the District Court, it should be clear beyond cavil that the common law presumption attaches to the Search Warrant Materials at issue here.

[4] Under this Circuit's test for whether the presumption attaches in the first place, a warrant application seeks to "affect[] a court's decisionmaking process" as soon as it is filed. *MetLife*, 865 F.3d at 667. Accordingly, in Petitioner-Appellant's view, the presumption of access attaches to all search warrant materials filed with the court; the status of a related investigation is an "interest[] presented by a given case" to be weighed in the usual *Hubbard* test. *Id.* at 665.

II. The District Court erred in concluding that the common law right of access to the Search Warrant Materials was overcome.

Where, as here, the common law affords a "strong presumption in favor of public access," it may be found to be outweighed only after careful consideration of the six factors enumerated in *Hubbard*: "(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings." *MetLife*, 865 F.3d at 665 (first quoting *Hubbard*, 650 F.2d at 317; then quoting *Nat'l Children's Ctr.*, 98 F.3d at 1409). While this Court, as a general matter, reviews a district court's weighing of those case-specific interests for abuse of discretion, *see In re Leopold*, 964 F.3d at 1131, "[w]hether the lower court applied the proper legal standard in exercising [its] discretion" is "a question of law reviewed de novo," *id.* (quoting *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349 (D.C. Cir. 2003)).

Here the District Court erred as a matter of law by failing to apply the proper legal standard to the Search Warrant Materials at issue. While the District Court notionally applied the *Hubbard* test, *see* App. 8–9, its order cannot fairly be read as a weighing of the interests implicated by "the relevant facts and circumstances of [this] particular case," *In re Application of Nat'l Broad. Co., Inc.*, 653 F.2d 609,

613 (D.C. Cir. 1981) (citation omitted). Several of the *Hubbard* factors most relevant here make no appearance in the decision below. Instead, the District Court held generally and broadly that "no disclosure of search warrant materials would be appropriate in a closed, non-public investigation that has not resulted in criminal charges, and where individual privacy and governmental interests may be implicated." App. 10. As discussed below, the District Court arrived at the conclusion that this investigation is non-public only by adopting a novel rule that requires courts to ignore what the public already knows. But even if the investigation into Senator Burr's stock trades could reasonably be characterized as "non-public," which it cannot, the District Court's categorical rule could not be squared with this Court's precedents. Interests that *might* be presented in *other* cases have no place in the fact-specific, case-specific *Hubbard* analysis, *see MetLife*, 865 F.3d at 665, and the District Court erred by failing to properly apply the *Hubbard* test to the case in fact before it.

A. The District Court erred as a matter of law in treating interests only hypothetically presented in other cases as dispositive here.

The District Court based its decision on interests that "may" be presented in situations where warrant materials relate to a federal criminal investigation that has not yet been acknowledged by the Government, App. 10, 11, 12, even where those interests plainly have no application to this case. For one (and most starkly), the District Court stressed that individuals have an interest in "'avoiding the stigma of

having [their] name associated with a criminal investigation' and 'keeping secret the fact that they were subjects of a law enforcement investigation,'" App. 12 (quoting *In re WP II*, 201 F. Supp. 3d at 123 (alteration in original)), even though Senator Burr—the target of the warrant and the relevant, now-closed criminal investigation—has already publicly confirmed those facts, *see* Romo, *supra*.

The District Court's generalized approach cannot be squared with *Hubbard*. As this Court recently reiterated, the *Hubbard* test deals in "particularized" interests, *In re Leopold*, 964 F.3d at 1132 (quoting *Hubbard*, 650 F.2d at 323–24), not blunderbuss "reasons for sealing entire categories of past and future filings," *id.*[5] *Hubbard* also made express that the degree to which information has "already entered the public domain through other channels" should be considered in that "particularized" fashion, 650 F.2d at 318 n.99, just as "the potential for prejudice inherent in the documents' release must be assessed with specific reference to the documents' contents," *id.* at 323 n.116. There is no exception to that principle in cases where "an investigation has not led to criminal prosecution." App. 12. To the contrary, *Hubbard* expressly acknowledges that public access to investigative materials may sometimes be warranted not only *despite* a non-prosecution decision but also *because* of such a decision, offering the example of an instance "where a

[5] *Hubbard* discusses "generalized interests" in its analysis, 650 F.2d at 317, but by "generalized interests" the Court meant interests specific to the case that could "be weighed without examining the contents of the documents at issue," *id.*

governmental failure to prosecute in the light of overwhelming probable cause substantially impugns the integrity of the prosecutorial function." 650 F.2d at 323.

In the District Court's view, its contrary approach was "dictate[d]" by "[t]he principles articulated in *In re WP II*." App. 14. That district court decision is not binding on this Court. And, in any event, that decision only underlines that the common law analysis, properly applied, must be tethered to the facts of each case.

In *In re WP II*, having won access to warrant materials related to a closed investigation into certain campaign finance violations, the *Washington Post* sought further access to warrant materials related to any "ancillary" investigations that did not result in criminal charges. 201 F. Supp. 3d at 113. The district court denied the motion, not on the theory that previously unacknowledged investigations may *never* be subject to public access, but because of the interests implicated by the *Post*'s motion on the particular facts before it. The district court emphasized that the single "[m]ost significant[]" consideration in *In re WP II* was that the specific warrant materials sought would—on the *Post*'s own account—"touch upon highly intimate personal details, including sexual preferences and relationships that are not known to the public." *In re WP II*, 201 F. Supp. 3d at 129. And while the materials would certainly reveal "intimate personal details regarding [businessman Jeffrey E.] Thompson's sexual preferences and partners," *id.* at 126, any information contained was "unrelated to the activities at issue in the Campaign

Finance Investigation," a "separate" matter, *id.* at 119. As a result, the district court explained, the materials sought were "highly attenuated from the core public interests identified by the Post in its initial motion" because they bore "no direct relationship to matters of public trust," *id.* at 130, and in light of Thompson's sexual privacy interests the balance of considerations weighed against disclosure.

To restate the facts of *In re WP II* is to demonstrate why its holding is not relevant here. The same balance of interests cannot possibly govern the decision whether to release warrant materials that reveal only the sexual preferences and partners of a private businessman and the decision whether to release warrant materials that would shed light on a high-profile inquiry into whether a sitting Senator used his office for private advantage, as well as the unusual investigative steps taken by the Government—including obtaining a search warrant targeting that Senator's phone—to conduct that inquiry. *See* Wilber & Haberkorn, *supra*.

In re WP II's procedural handling of the *Hubbard* analysis is also an instructive contrast. The *Hubbard* test does not ask a district court to imagine what privacy interests might conceivably be at play; instead, it weighs whether someone in fact "*has* objected to disclosure" and, if so, "the strength of any property and privacy interests *asserted*." *Nat'l Children's Ctr.*, 98 F.3d at 1409 (emphasis added). In *In re WP II*, then, having required the Government to notify "each of the individuals whose interests [might] be impaired" by the *Post*'s motion, the

district court weighed in the analysis the fact that all "oppose[d] further unsealing." 201 F. Supp. 3d at 129. Here, by comparison, the analysis of potential privacy interests was entirely abstract. *See* App. 8. To Petitioner-Appellant's knowledge, the party most straightforwardly implicated by its motion, Senator Burr, registered no objection, and there is no basis in the public record to conclude that he concurs in the District Court's account of potential harms to his interests. It should be intuitive that a court asked to weigh "the possibility of prejudice to those opposing disclosure," *Nat'l Children's Ctr.*, 98 F.3d at 1409, commits error if it imputes prejudice to individuals who have not opposed disclosure, *see* Romo, *supra*.[6]

The effect of the District Court's reliance on these generic, hypothetical interests was to shift the burden to Petitioner-Appellant to prove the specific contents of documents to which Petitioner-Appellant does not have access. *See* App. 14 ("In closed investigations not acknowledged by the government, public access to materials has historically been limited, and petitioner presents no reason to believe that the significant interests that counsel against such access would *not* be present in this case." (emphasis added)). But the point of having a "presumption of access" is that the burden is on the party advocating for secrecy to

[6] There may be unusual situations in which third-parties cannot identify themselves for purposes of making an objection without defeating their own privacy interests. *See CNN*, 984 F.3d at 120 (intelligence sources). Given what Senator Burr has already voluntarily disclosed publicly, however, that is plainly not the situation here.

"rebut" it. *In re Leopold*, 964 F.3d at 1129 (citation omitted). Were it otherwise, the Government's superior knowledge of the contents of the records would give it "a nearly impregnable defensive position" in opposing disclosure. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). In expecting that members of the public preemptively debunk each interest that "may be implicated" by a certain kind of filing, App. 11, without access to the documents or even the Government's characterization of the interests at stake in the documents, the District Court's framework would erect just that kind of wall around this class of judicial records.

It is possible the District Court issued sealed findings of fact that turn on different considerations than its publicly available redacted Memorandum Opinion and Order. But if so, the public decision would even more clearly amount to an impermissible advisory opinion, issued without jurisdiction to the extent it purports to resolve "abstract hypotheticals" unrelated to the controversy actually presented. *Irregulators v. FCC*, 953 F.3d 78, 82 (D.C. Cir. 2020); *cf. Labow v. Dep't of Justice*, 831 F.3d 523, 534 (D.C. Cir. 2016) (rejecting an approach to Freedom of Information Act litigation that would require courts to resolve "[o]pen-ended hypothetical questions" about the circumstances under which justifications for secrecy not actually presented might prevail (citation omitted)). At base, on no view does *Hubbard* authorize courts to approach the common law through any lens

other than "the interests presented by a given case." *MetLife*, 865 F.3d at 665. The District Court's contrary approach, at once hypothetical and categorical, was error.

B. The District Court erred as a matter of law in concluding that, under *Hubbard*, only a narrow category of Government disclosures can be weighed when determining to what extent further disclosure would prejudice other parties' interests.

A closely related flaw in the decision below is its refusal to confront the central fact of this case: Senator Burr publicly announced that his transactions were investigated by the Department of Justice and that the Department informed him the investigation was closed. *See* Romo, *supra*. These and other facts about the investigation have been confirmed by news organization after news organization, relying on government sources in a position to know, including spokespersons authorized to speak for the Justice Department. *See* Tucker & Jalonick, *supra*; Zapotosky & Sonmez, *supra*; Viswanatha, *DOJ Inquiry Into Sen. Richard Burr's Stock Trades*, *supra*. The District Court made express that it assigned those disclosures no weight at all in its analysis because they did not come via press conference or press release. *See* App. 12 (emphasizing that the other interests implicated "are no less great where some of the relevant information has been reported on in the news media," absent "acknowledgement by the government"). But this Court's precedents cannot support that categorical rule, which makes little practical sense and does not fairly describe the facts of this case.

For one, the District Court seems to have relied on a misunderstanding about the conventions of sourcing, conflating the question whether information is attributed to a named official with the question whether the Government has "voluntarily disclosed" it. App. 13. But the Government routinely makes authorized disclosures conditional on the information not being attributed to a particular speaker. *See, e.g.*, *Background Press Call by a Senior Administration Official on Afghanistan*, The White House (Apr. 13, 2021), https://perma.cc/2U4Y-EVWA. The confirmations given by Justice Department spokespersons to multiple news outlets that the Burr investigation was closed plainly fall within that category. *See* Tucker & Jalonick, *supra*; Zapotosky & Sonmez, *supra*; Viswanatha, *DOJ Inquiry Into Sen. Richard Burr's Stock Trades*, *supra*. Those disclosures are no less official for not having a name attached to them, and it was error for the District Court to ignore them when weighing whether *further* confirmation of their truth could cause harm to any party's interests.

But it was error, too, for the District Court to suggest that the only disclosures that matter to the *Hubbard* analysis are those with an official imprimatur. To be sure, Petitioner-Appellant agrees that the common law would never allow the Government to withhold information "already validated by an official source." *Robinson*, 935 F.2d at 292. That much should be trivially true; there is no confidentiality interest in concealing such information, so any public

interest will necessarily justify access because "something . . . outweighs nothing every time." *Beck v. Dep't of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (citation omitted) (omission in original). But it is hard to see how the common law right could be thought "fundamental to a democratic state" if it provided for disclosure *only* of information the Government has already confirmed at its sole discretion. *Hubbard*, 650 F.2d at 315 n.79 (citation omitted). This Court has not, in fact, so limited the reach of the public's presumptive rights; nor for that matter have other courts.

In *Robinson*, for instance, this Court noted that the Government's confidentiality interests are diminished not only where information has been formally avowed, but also where it "might easily be *surmised* from what is already in the public record." *Robinson*, 935 F.2d at 292 (quoting *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825–26 (9th Cir. 1985)) (emphasis added). Courts routinely take that pragmatic approach when considering what is already in the public domain.[7] And for good reason: The Government's burden is not merely to show

[7] *See, e.g.*, *United States v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986) (public knowledge that official had a "possible connection" to an investigation diminished privacy interest in the fact that he received a target letter); *Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 229 (5th Cir. 2020) (public knowledge that parties reached a settlement diminished privacy interest in its amount); *United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011) (public knowledge of information in warrant materials already "reported by the media" diminished any interest in sealing them); *United States v. Zazi*, Nos. 09-CR-663, 10-CR-0019, 2010 WL 2710605, at *3–5 (E.D.N.Y. June 30, 2010).

"that the search warrant affidavits include more detail than what has already been reported by the media"; of course they do, which is why there is a public interest in knowing what they say. *United States v. Cohen*, 366 F. Supp. 3d 612, 626 (S.D.N.Y. 2019). Instead, the Government can only rebut the presumption in favor of access by demonstrating that cognizable interests would be "harmed" by those new details out of proportion to the public values served by transparency. *Id.*

In that analysis, it is simply unrealistic to presume that the public assigns no weight to news reporting—that public knowledge of whether Senator Burr was being investigated by the Government turns solely on whether the Government (and only the Government) confirms it in a certain way. The public knows, as this Court has underlined, that "journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). And the public knows, too, that rigorous standards govern reliance on unnamed sources in order to safeguard the reliability of reporting that makes use of them. *See, e.g.*, *Los Angeles Times Ethics Guidelines*, L.A. Times (June 2014), https://perma.cc/7Q3C-2BXA; *cf.* Jeffrey Gottfried & Mason Walker, *Most Americans See a Place for Anonymous Sources in News Stories, But Not All the Time*, Pew Research Ctr. (Oct. 9, 2020), https://perma.cc/G6DC-75ZP (finding that the views of a supermajority of Americans on use of unnamed sources "echo[] the standards of professional

journalism organizations"). Thus, whether or not public reporting absent an official confirmation can "extinguish" secrecy interests entirely, in all cases, App. 12, it blinks reality to suggest that the volume of coverage of this particular investigation has no relevance to judging how much deniability is left to defend.

Indeed, even in the *sui generis* grand jury context, where "it is commonly said that when the media reports information alleged to be grand jury material, 'the government is obligated to stand silent' and not confirm the information," this Court has recognized that "[t]here must come a time . . . when information is sufficiently widely known that it has lost its character as Rule 6(e) material." *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994) (quoting *Barry v. United States*, 740 F. Supp. 888, 891 (D.D.C. 1990)). And that time has come, in this Court's view, where for instance "a grand jury witness . . . discusse[d] his role on the CBS Evening News," *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 155 (D.C. Cir. 2007), or an "attorney virtually proclaimed from the rooftops that his client had been subpoenaed to testify before the grand jury," *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998). None of those disclosures reveals precisely as much as an official confirmation would. But this Court's approach to the analysis has been a practical one, because judges "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550

F.2d 1294, 1300 (2d Cir. 1977)). It would be bizarre if warrant materials, subject to the common law presumption of access, were governed by a *harsher* rule than grand jury materials subject to the wholly "unique" degree of secrecy imposed by Rule 6(e). *In re Leopold*, 964 F.3d at 1133 (citation omitted).

Finally, the District Court's bright-line rule would have perverse consequences, handing a dangerous discretion to the Government. "[T]he decision to seal" judicial records "must be made by the judicial officer," who "cannot abdicate this function" to the party claiming a need for secrecy. *Baltimore Sun*, 886 F.2d at 65. In operation, though, the District Court's rule would hand the Government a trump card fit for any case, dispositive for however long it can refrain from holding a press conference to announce the disposition of an investigation already widely reported on by the news media. The predictable result would be a shift from the status quo in which "warrant applications and receipts are routinely filed with the clerk of court without seal" to one in which those materials, even in the most high profile of closed investigations, are only ever made public at the Government's discretion, subject to the demands of its own public-relations strategy. *In re N.Y. Times Co.*, 585 F. Supp. 2d at 88. Such an approach would be a stark departure from our system's conviction that neither "[a] free press" nor a free public can "be made to rely solely upon the sufferance of government to supply it with information." *Smith v. Daily Mail Publ'g Co.*, 443

U.S. 97, 104 (1979). There is nothing to commend the District Court's rule as a practical matter, and no support for it in this Court's precedent. The District Court erred by refusing to weigh Senator Burr's decision to "proclaim[] from the rooftops" that the Government investigated his stock trades, *In re Dow Jones*, 142 F.3d at 505, along with the information that Petitioner-Appellant and other members of the press have reported about that investigation.

C. The *Hubbard* factors that the District Court failed to apply support unsealing, subject at most to tailored redactions.

Proper application of the *Hubbard* test would require far greater disclosure than what the District Court's decision provides—especially in light of the factors the District Court failed to consider entirely. For one, the decision below contains no discussion, whatsoever, of the "need for public access." *Nat'l Children's Ctr.*, 98 F.3d at 1409. That omission should be startling in a case that concerns a high-profile and widely reported federal criminal investigation of a sitting United States Senator. Without prejudging what the Search wWrrant Materials would reveal, it cannot be denied that there is "a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of a Member of Congress . . . as well as agents of the Federal Bureau of Investigation." *In re Nat'l Broad. Co.*, 653 F.2d at 614 (citation omitted).

The Search Warrant Materials implicate any number of cross-cutting public interests of the highest order. It is uncontroversial, for instance, that the public's

interest in access is "especially strong" in cases that involve allegations of potential wrongdoing by public officials. *In re Application of NBC, Inc.*, 635 F.2d 945, 952 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *United States v. Beckham*, 789 F.2d 401, 413 (6th Cir. 1986); *In re Nat'l Broad. Co.*, 653 F.2d at 611. And that much would be true here whether the Search Warrant Materials contain evidence of wrongdoing so decisive that the Government's subsequent decision not to bring charges "substantially impugns the integrity of the prosecutorial function," *Hubbard*, 650 F.2d at 323, or so flimsy as to raise "doubts about the Justice Department's motives in Burr's case," Barrett et al., *supra*.

The materials also implicate the public's interest in understanding whether the regime governing the stock transactions of Members of Congress is adequate to its task. While Members have been prohibited from leveraging their positions to obtain an advantage in the markets for years, *see* Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, 126 Stat. 291, there has never been a prosecution under the Act, *see* Robert K. Kelner et al., *The Challenges of Prosecuting Congressional Insider Trading*, Law360 (June 18, 2020), https://perma.cc/HU2N-3NAR. A number of observers have suggested that the STOCK Act cannot fulfill its purpose because the Speech or Debate Clause, *see* U.S. Const. art. I, § 6, cl. 1, bars investigators from gathering the evidence necessary to determine whether non-public information underpinned a Member's

trades, *see* Kelner et al., *supra*. The Search Warrant Materials sought to be unsealed by Petitioner-Appellant would shed light on the extent of the information the Government sought to seize from Senator Burr notwithstanding the protections of the Clause, which would enrich an ongoing public policy debate about whether the Act should be revised. *See* Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, Forbes (May 26, 2020), https://perma.cc/DE4M-LL2V (noting that the proposed Ban Conflicted Trading Act would avoid the challenges of immunity by imposing a flat ban on Members trading individual stocks).

Finally, the public has an obvious interest in understanding whether the Department of Justice observes adequate safeguards when conducting searches that infringe on the prerogatives of another branch, implicating weighty separation-of-powers concerns. *See, e.g.*, *United States v. Rayburn House Office Building*, 497 F.3d 654, 659–663 (D.C. Cir. 2007) (concluding that "a search that allow[ed] agents of the Executive to review privileged materials without the Member's consent violate[d] the [Speech and Debate] Clause," notwithstanding the use of special procedures detailed in the warrant to narrow the intrusion). The Department of Justice itself recently concluded that its existing policies in that regard are inadequate. *See* Michael Balsamo et al., *Justice Department to Tighten Rules on Seizing Congress Data*, AP News (June 14, 2021), https://bit.ly/3lr8mRd.

The public deserves to understand what precautions the Executive took to accommodate those constitutional interests in its investigation of Senator Burr.

Not a word on any of these weighty interests appears in the District Court's opinion, but they should without question inform the analysis of what this Court has sometimes characterized as the "single most important element" in the balance—the purpose for which the information was introduced. *Hubbard*, 650 F.2d at 321; *see also CNN*, 984 F.3d at 331 ("When a sealed document is considered as part of judicial decisionmaking, the sixth factor will oftentimes carry great weight."). Here, the Government placed the warrant materials before a court to persuade a federal judge to grant an authorization of enormous moment—a warrant to search and seize effects of a sitting United States Senator, implicating not only "the Fourth Amendment protection against unreasonable searches and seizures" but also the separation of powers. *In re N.Y. Times Co.*, 585 F. Supp. 2d at 90. Access would vindicate the public's right to assure itself the District Court did not "rubber stamp" so consequential a request, *id.*, and to understand on what basis the Government submitted it. The District Court's failure to include any analysis of this factor, which weighs heavily in favor of unsealing the Search Warrant Materials, was error on a material issue in the case.

Finally, to the extent any legitimate interests support secrecy here, Petitioner-Appellant is somewhat handicapped in answering them because the

District Court's opinion does not identify them with specificity. *Contra Robinson*, 935 F.2d at 289 n.9 (holding that a district court "must make every effort to explain as much of its decision as possible on the public record to enable an interested person to intelligently challenge the decision"). Every interest the decision does identify, however, assuming each is even applicable to the facts of this particular case, could be accommodated by the far less restrictive alternative of redaction. *See Custer Battlefield Museum*, 658 F.3d at 1195 n.5 (collecting cases in which redaction, "rather than refusing to unseal the materials entirely," was adequate to protect a range of interests implicated in post-investigation warrant materials, including "the privacy interests of innocent third parties," "confidential informants," and an "ongoing investigation").[8] Yet the District Court's public opinion does not conduct—or explain its failure to conduct—the "document-by-document," "line-by-line" consideration of competing interests that the common law analysis requires. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021) (citations omitted). For that reason too, the District Court's decision to allow blanket sealing of the Search Warrant Materials cannot be upheld.

[8] The Government itself recently moved to unseal investigative materials in a closed investigation that did not result in criminal charges in another district court proceeding, proposing to disclose, *inter alia*, "relevant legal background" and publicly reported facts while redacting the identities of "witnesses and uncharged subjects." Government's Motion to Partially Unseal at 4–5, *In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, No. 1:21-mc-91 (D.D.C. Sept. 10, 2021) (ECF No. 11).

III. The public's First Amendment right of access also attaches to the Search Warrant Materials.

While this Court has not yet addressed the question, the public's First Amendment right of access likewise attaches to the warrant materials in question. In determining whether the constitutional presumption of access applies, courts look to the complementary considerations of "experience and logic," asking "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." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986). Applying that framework, the district courts of this Circuit have concluded that the First Amendment presumption attaches to search warrant materials once an investigation has concluded, *In re WP I*, 2016 WL 1604976, at *2; *In re N.Y. Times Co.*, 585 F. Supp. 2d at 88, while the Eighth Circuit holds that the right attaches to search warrant materials as such but weighs the status of the investigation in determining whether the right is overcome in whole or in part, *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572 (8th Cir. 1988).

Both experience and logic support application of the First Amendment right here. As to experience, "search warrant applications and receipts are routinely filed with the clerk of court without seal," *id.* at 573, a practice reinforced by the fact that the materials are judicial records subject to the common law presumption

of access, *see In re N.Y. Times Co.*, 585 F. Supp. 2d at 89. And, as to logic, "public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct." *In re Gunn*, 855 F.2d at 573. To the extent disclosure at a certain stage of an ongoing criminal investigation would jeopardize legitimate Government interests, that concern can be accommodated by asking whether the right has been overcome as to particular portions of particular records. *Cf. United States v. Sealed Search Warrants*, 868 F.3d 385, 395–96 (5th Cir. 2017) (noting, in the common law context, that investigative interests "are not at all diluted by a case-specific approach" to unsealing warrant materials"). But here, where the relevant investigation is closed, recognizing that the presumption attaches in the first instance is uncontroversial. *See Loughner*, 769 F. Supp. 2d at 1193 (noting the "clear trend" toward disclosure in the post-investigation context).

IV. The District Court erred in concluding that the First Amendment right was overcome by considerations not presented in this case.

Where the First Amendment right attaches, the public can be denied access "only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir.

2011) (citation omitted). While this Court has not clarified the standard governing review of a district court's application of that test, *see Dhiab v. Trump*, 852 F.3d 1087, 1096 n.18 (D.C. Cir. 2017), the decision below was error under any standard. To the extent the *Hubbard* analysis supports unsealing under the common law, the "heightened protections" of the Constitution prevail *a fortiori*. *Robinson*, 935 F.2d at 288 n.7.

The District Court's erroneous approach to the constitutional presumption of access is especially clear in its failure to address alternatives to wholesale sealing. Courts must, when considering available alternatives, make "an explicit finding" as to whether redaction would be viable. *Brice*, 649 F.3d at 796–97. No such finding appears in the District Court's public opinion, nor would one be plausible. Any interest in witness confidentiality, for instance, if that interest is even implicated in this case, could be adequately addressed "by simply redacting the identity and personal identifiers of [any] informants." *In re N.Y. Times Co.*, 585 F. Supp. 2d at 91; *see also supra* note 8. Given the frequency with which the Government successfully redacts and releases warrant materials in the ordinary course, the lack of any public explanation why redaction could not have been accomplished here fell well short of the District Court's obligations under the First Amendment.

V. The District Court erred in denying the public and Petitioner-Appellant any access to the Government's *ex parte* arguments in opposition to unsealing the Search Warrant Materials.

Finally, it bears highlighting one of the more remarkable features of this case: Petitioner-Appellant has been required to litigate this matter with only the most skeletal insight into the Government's legal positions. The District Court's decision to seal the Government's opposition in its entirety abrogated the public's common law and First Amendment rights of access to party briefing, and it operated, too, to deprive Petitioner-Appellant of a fair opportunity to respond to the arguments the Government may have advanced in this case.

A. The common law and constitutional rights of access attach to the Government's opposition to Petitioner-Appellant's motion, as well as the accompanying motion to seal and proposed order.

The common law right of access attaches to the Government's opposition filings because "every part of every brief filed to influence a judicial decision qualifies as a 'judicial record.'" *League of Women Voters v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020); *see also In re McCormick & Company, Inc., Pepper Prods. Mktg. & Sales Practices Litig.*, 316 F. Supp. 3d 455, 467 (D.D.C. 2018) (applying the common law right of access to a party's opposition to a motion to unseal in particular). While this Circuit has not addressed whether the First Amendment right of access attaches to records filed in connection with a motion to unseal, it has strongly suggested that it does. *See In re Motions of Dow Jones & Co.*, 142 F.3d at 501 n.8 (ordering unsealed a district court's orders denying motions to unseal). Other circuits have reached the same commonsense result, because

unsealing proceedings "have historically been open to the public" and "the very issue at hand is whether the public should be excluded or included in various types of judicial proceedings." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1096 (9th Cir. 2014). To Petitioner-Appellant's knowledge, neither the District Court nor the Government disputes the proposition that the right attaches here.

B. To the extent legitimate interests overcome those rights in part, only redaction, not wholesale sealing, would be warranted here.

Against those presumptions, the only rationale the District Court offered for denying access to the Government's opposition filings was "the same reason that the petitioner's motion to unseal the search warrant materials is denied." App. 13 n.3. Doubtless the records include factual matter that, in Petitioner-Appellant's view, should be unsealed under the analysis applicable to the underlying warrant materials. But surely the Government's opposition filings also include something those materials do not—legal argument explaining why they should remain sealed.

The District Court's judgment that none of those arguments can be disclosed is not explained in the public portions of its ruling and is not, for that matter, plausible on its face. For one, unless the District Court departed starkly from the party-presentation principle, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), the contentions in the Government's opposition should overlap in substantial part with the conclusions that appear in the ruling under review. And this Court's usual practice, intuitively, is that if material can appear in a public

judicial opinion, that material can also be unrestricted in an otherwise-sealed document. *See United States v. Reeves*, 586 F.3d 20, 22 n.1 (D.C. Cir. 2009).

Even if the Government's theory of the case is entirely unlike the District Court's, though, it cannot be the case that the Government could not argue a single proposition of law without revealing sealable factual matter. It is a routine expectation of transparency litigation that the Government be prepared "to justify its actions without compromising its original withholdings by disclosing too much information." *Judicial Watch*, 449 F.3d at 146. The same is true where the Government claims that it cannot confirm or deny the existence of records—it must still articulate in reviewable detail *why* confirmation would cause harm (and why the law entitles the Government to avoid it). *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 374–77 (D.C. Cir. 2007). The result is that the Government routinely files public briefs, subject to redactions if necessary, in cases that touch on the nation's most sensitive secrets, an approach that pays due respect to the public's "strong interest in monitoring . . . the positions that its elected officials and government agencies take in litigation," *Public Citizen*, 749 F.3d at 271. Against that backdrop, the suggestion that there was no alternative to sealing the Government's filings in their entirety—including the Government's position on pure questions of law, such as whether warrant materials are judicial records—cannot be sustained.

C. The District Court's reliance on sealed arguments was inconsistent with fundamental considerations of due process.

The public's right to access the Government's opposition filings is reinforced by the due process concerns raised by the District Court's order. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). As a result, this Court closely guards any exceptions to "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions." *Abourezk*, 785 F.2d at 1061. That rule is rooted in recognition that "due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other." *United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004). Petitioner-Appellant was never afforded that opportunity here.

As an initial matter, the District Court's suggestion that Petitioner-Appellant was not entitled to a chance to object to the Government's submission of wholly sealed arguments should be startling. "A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986). The District Court reasoned

that this Court's decision in *Robinson*—which requires that a court "allow interested persons an opportunity to be heard" prior to entry of a sealing order precisely to avoid those risks, 935 F.2d at 289—might be limited to plea agreements, *see* App. 13 n.3. But that suggestion is specious. The Supreme Court has made clear that if the right of access is "to be meaningful, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (citation and internal quotation marks omitted). As a result, "[t]he courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of access, have uniformly required adherence to such procedural safeguards." *In re Hearst Newspapers, LLC*, 641 F.3d 168, 182 (5th Cir. 2011).

In the alternative, the District Court concluded that *Robinson* "acknowledged . . . that in some cases it would be necessary for motions to seal and the district court findings reached in granting those motions to be sealed themselves." App. 13 n.3 (citing *Robinson*, 935 F.2d at 289 n.10). But the cited portion of *Robinson* discusses procedures for "extraordinary situations" where harm would be caused by the *docketing* of a sealing motion, *Robinson*, 935 F.2d at 289 n.10 (citation omitted) —where, for instance, the timing of the closure motion

might suggest that one of several defendants has decided to testify against his co-conspirators, *see In re Application of The Herald Co.*, 734 F.2d 93, 102 n.7 (2d Cir. 1984). That concern is inapposite here (the Government's motion was, in fact, docketed), and therefore non-responsive to the objection that the District Court should have waited to receive Petitioner-Appellant's opposition to the Government's motion before ruling on it. No harm could conceivably have resulted, and while Petitioner-Appellant's response would necessarily have been "abstract" for lack of access to the underlying filings, "[e]ven abstract arguments will serve to remind the court of the importance of the interests that must be weighed against the government's interest in secrecy." *In re Wash. Post*, 807 F.2d at 391 n.7. The District Court's decision to deny Petitioner-Appellant that chance was, itself, a due process violation. *In re Hearst Newspapers*, 641 F.3d at 186.[9]

More troubling still, though, is the District Court's resolution of the merits of this dispute on the basis of secret arguments to which Petitioner-Appellant and the public had no access. Even in the rarified context of the state secrets privilege, this Court has consistently required "public disclosure by the government . . . of as

[9] The point is not moot because the problem is "capable of repetition, yet evading review." *Robinson*, 935 F.2d at 286 (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976)). As a news organization that routinely asserts the common law and First Amendment rights of access, Petitioner-Appellant can "reasonably be expected" to again be denied access to records without a chance to object. *Id.* And it is, by definition, impossible to fully litigate an objection to the denial of such an opportunity before the district court issues the relevant ruling.

much of the material as it could divulge without compromising the privilege" before resorting to consideration of submissions that an opposing party will not be entitled to see. *Abourezk*, 785 F.2d at 1061. And rightly so: Any other approach risks fundamentally distorting the litigation by placing before the court arguments that have not confronted "the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The District Court's decision here may have been influenced by any number of contentions that Petitioner-Appellant could have answered in the reply brief Petitioner-Appellant never had occasion to file.

Perhaps the Government relied, for instance, on *In re WP II*'s suggestion that warrant materials in unacknowledged investigations are analogous to grand jury materials, 201 F. Supp. 3d at 122, to which Petitioner-Appellant could have responded that the grand jury context is "unique" because Rule 6(e) displaces the common law presumption, *In re Leopold*, 964 F.3d at 1133 (citation omitted); *see also Baltimore Sun*, 886 F.2d at 64. Or perhaps the Government offered characterizations of the degree of secrecy necessary to its investigation that Petitioner-Appellant could have rebutted with reference to public reporting. *Cf.* Charlie Savage, *Times Requests Disclosure of Court Filings Seeking Reporters' Email Data and Gag Order*, N.Y. Times (June 8, 2021), https://perma.cc/RV5N-64RM (noting in another case that the Government obtained a gag order to protect the 'secrecy' of an investigation whose existence was already public knowledge).

Instead, Petitioner-Appellant has been left to shadow-box with arguments that may never have been raised, defending propositions that may not be disputed. That dynamic has undermined the fundamental fairness of this litigation. Independent of the common law and First Amendment rights of access, Petitioner-Appellant's due process right to have its claims resolved on the basis of public arguments was violated by blanket sealing of the Government's filings.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant respectfully requests that this Court reverse the judgment below and remand this matter to the District Court, with instructions to consider whether any redactions the Government may propose, *see In re Leopold*, 964 F.3d at 1134 n.14, can satisfy the common law and constitutional standards under the specific facts presented by this case.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume requirements of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e)(1) because it contains 11,060 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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Date: September 21, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, I electronically filed the foregoing brief with the U.S. Court of Appeals for the District of Columbia Circuit using the CM/ECF system. Counsel for Respondent-Appellee are registered CM/ECF users and will be served by the appellate CM/ECF system.

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