UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In the Matter of the Application of the Reporters Committee for Freedom of the Press to Unseal Certain Search Warrant Materials	**Case No.: 20-MC-00082** **MEMORANDUM IN SUPPORT OF APPLICATION TO UNSEAL CERTAIN SEARCH WARRANT MATERIALS**

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I. Introduction

By this Application, the Reporters Committee for Freedom of the Press (the "Reporters Committee" or "RCFP") respectfully requests that the Court enter an order unsealing (1) Stored Communications Act ("SCA") search warrant applications, supporting materials, and any related orders ("SCA search warrant materials") pertaining to now-inactive investigations, *see* 18 U.S.C. §§ 2701–13, from January 1, 2018 to the date of the Court's Order; and (2) all docket sheets[1] reflecting SCA search warrant materials filed from January 1, 2018 to the date of the Court's Order, whether or not those investigations are still active.

On a forward-looking basis, RCFP also respectfully requests that the Court enter an Order requiring the United States Attorney's Office to, prospectively, move to unseal SCA search warrant materials when the corresponding investigation becomes inactive, and requiring the Clerk of the Court, prospectively, to unseal any SCA search warrant materials still under seal 180 days after their filing, absent a showing by the United States Attorney's Office that sealing is necessary to serve a compelling interest and narrowly tailored to that interest, and a Court orders that those materials be maintained under seal for an additional period of time not to exceed 180 days. RCFP further respectfully requests that docket sheets reflecting future-filed SCA search warrant materials be publicly accessible.

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[1] This Application uses "docket sheets" to include the information that normally appears when a case number is entered into ECF when a case is not sealed, including the caption, attorneys, titles of individual documents, and so on.

The Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee has a powerful interest in vindicating the rights of the press and the public to access the SCA search warrant materials and related docket sheets at issue.

As discussed in more detail below, the SCA provides that a governmental entity may require an electronic communication or remote computing service provider to disclose the contents of a wire or electronic communication, or a record of other information pertaining to a subscriber or customer, by obtaining "a warrant issued using the procedures described in the Federal Rules of Criminal Procedure . . . by a court of competent jurisdiction." 18 U.S.C. § 2703(a)–(c). The SCA does not require that courts issuing these warrants do so under seal. *Id.*; *In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1129 (D.C. Cir. 2020). Yet applications for SCA search warrants in the District of Minnesota are regularly filed under seal and, in most instances, SCA search warrant materials and related docket information remain under seal indefinitely, without any individualized factual findings made as to why such sealing is necessary to serve a compelling interest or is narrowly tailored to such an interest.

This routine, and often indefinite, sealing of court records is inconsistent with the presumption of public access guaranteed by the First Amendment and common law. The public's constitutional and common law rights of access extend to SCA search warrant materials and related docket sheets. These rights are essential to maintaining public trust in the courts; they bolster both fairness and the appearance of fairness, and provide the press with information it needs to keep the public informed about its government. For the reasons herein, the Reporters Committee respectfully requests that the Court grant this Application.

II. Background

The SCA allows government entities, by certain procedures, to compel electronic communication service and remote computing service providers to disclose the contents of stored wire and electronic communications, records of those communications, and other information pertaining to subscribers. *See* 18 U.S.C. § 2703. It grants federal courts the power to authorize search warrants for such information "using the procedures described in the Federal Rules of Criminal Procedure." *Id.* §§ 2703(a), (b)(l)(A), (c)(l)(A). The relevant federal rule that governs SCA search warrants is Federal Rule of Criminal Procedure 41.

There is a general lack of transparency surrounding the government's use of SCA search warrants. While the SCA sometimes requires notice to the subscriber, at other times it allows notice to be withheld or delayed. *Compare* 18 U.S.C. § 2703(b)(1)(A) (allowing the government to obtain the contents of a wire or electronic communication "without required notice to the subscriber or customer, if the governmental entity obtains

a warrant"), *with* 18 U.S.C. § 2703(c)(3) ("A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer."), *and* 18 U.S.C. § 2705(a)(1) (allowing the government to seek an order authorizing it to delay notification). When notice is not required or may be delayed under SCA §§ 2703 or 2705, the government may seek a non-disclosure order prohibiting the third-party service provider to whom the warrant or order is directed from disclosing its existence to any person "for such period as the court deems appropriate." 18 U.S.C. § 2705(b).[2]

The Reporters Committee has reason to believe that a substantial number of SCA search warrants are sought by government entities from district courts across the country each year. Transparency reports from service providers suggest that successful applications for SCA search warrants are common, have increased over the years, and affect thousands of users. Google, for example, has reported that, in the second six months of 2019, the most recent period for which it has made data available, it received 10,498 user data requests via search warrants from the United States; that some data was produced in response to 88% of those requests; and that 21,856 user accounts were specified. *Google Transparency Report*, https://perma.cc/FT7F-GE4U (last visited Dec.

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[2] In 2017, the Department of Justice implemented internal guidelines to address the problem of prosecutors requesting gag orders under 18 U.S.C. § 2705(b) as a matter of course. *See* Ellen Nakashima, *Justice Department Moves to End Routine Gag Orders on Tech Firms*, Wash. Post. (Oct. 24, 2017), http://perma.cc/NV2Y-X624; *see also* Rod J. Rosenstein, Office of the Att'y Gen., Mem. on Restoring Public Confidence in the FBI (May 9, 2017). These guidelines reflect the government's own recognition of a need for transparency regarding its demands for individuals' electronic data from third-party service providers.

7, 2020). By contrast, Google reported that, in the last six months of 2012—the first period for which it has made search warrant data publicly available—it received 1,896 user data requests via search warrants from the United States; that data was produced in response to 88% of those requests; and that 3,152 user accounts were specified. *Id.* This data from only one corporation suggests that the government's use of search warrants to obtain information, including content information, from e-mail accounts has significantly increased in the past several years. Moreover, it appears that many orders obtained by government entities under the SCA are sought in investigations that never result in a prosecution, making it "reasonable to infer that far more law-abiding citizens than criminals" may be affected. Hon. Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 Harv. L. & Pol'y Rev. 328 n.83 (2012).

Petitioner is informed and believes that the District of Minnesota routinely seals SCA search warrant materials, as well as the docket sheets reflecting them, and that these records typically remain under seal indefinitely. According to Local Rule 49.1, SCA search warrant materials in this district are automatically sealed unless and until a court orders them unsealed. *See* D. Minn. R. 49.1(c)(1)(B)(iii) (stating "an application, any supporting documents, and an order disposing of an application" under the SCA "must be filed under seal and must not be unsealed except by court order"). The local rule does not specify any limitations on the duration of the sealing, nor does it outline any specific process for unsealing. *See id.* Because many of the docket sheets in such matters appear to be sealed, Petitioner does not know the precise number of SCA search warrant matters that have been sealed in this district and are therefore inaccessible to the press and public.

But it observes in the local rules that, in the regular course, SCA search warrant materials and docket sheets are sealed in this district. By this Application, RCFP respectfully requests that this Court issue a court order pursuant to the common law and the First Amendment that would make public SCA search warrant materials and docket sheets.

III. Argument

The right of public access to judicial proceedings has long been considered a vital "safeguard against any attempt to employ our courts as instruments of persecution." *United States v. Thunder*, 438 F.3d 866, 867 (8th Cir. 2006) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). When the public has access to judicial proceedings and related documents, "respect for the law is increased," and the public develops "a strong confidence in judicial remedies" that "could never be inspired by a system of secrecy." *Id.* (quoting 6 J. Wigmore, *Evidence* § 1834, 438 (J. Chadbourn rev. 1976)); *see also* 28 C.F.R. § 50.9 ("Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure."). Openness can also uncover misconduct when it occurs and so discourage it from reoccurring.[3]

[3] Take, for example, the case of Jacob Wetterling, who was tragically abducted from his rural Minnesota home in 1989. Records related to searches conducted in the case were initially sealed. Once unsealed, they revealed that local police ignored critical information early on in their investigation and instead scrutinized and trailed a local music teacher for almost thirty years. Jennifer Brooks, *Unsealed Court Documents Detail*

Journalists and the public have a strong interest in access to information about the mechanisms by which federal law enforcement officers obtain private electronic communications records. *See, e.g.*, Jacqueline Thomsen, *Secret Electronic Surveillance Records Must be Released, DC Circuit Rules*, Law.com (July 7, 2020), https://perma.cc/VSN7-PBMF (discussing case litigated by the Reporters Committee and journalist Jason Leopold in the District of Columbia Circuit seeking unsealing of, among other things, SCA search warrant materials); Peter J. Henning, *Digital Privacy to Come Under Supreme Court's Scrutiny,* N.Y. Times (July 10, 2017), https://perma.cc/SW8S-5HAQ (discussing cases addressing the scope of government surveillance authority under the SCA). But under the District of Minnesota's current docketing and filing system, reporters and the public must rely on happenstance to uncover such information.

The Reporters Committee, for example, previously petitioned the District of Minnesota to unseal surveillance records—including search warrant materials, Pen Register and Trap and Trace materials, and SCA § 2703(d) materials—related to the criminal investigation of FBI whistleblower Terry J. Albury, who was prosecuted for the unauthorized disclosure of information to the news media about the FBI's surveillance of journalists, its infiltration of political and religious groups, and its use of race and religion as criteria for selecting targets of surveillance. Pet. Mem., *In re Application of Reporters Committee for Freedom of the Press for Access to Certain Sealed Ct. Records*, No. 0:18-mc-00085 (D. Minn. Oct. 31, 2018), ECF No. 2 ("*Albury*"). The district court granted the

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Search for Jacob Wetterling, Star Trib. (Sept. 10, 2016, 7:56 AM), https://perma.cc/KD5C-6YWJ.

Reporters Committee's application and unsealed three search warrants and four SCA § 2703(d) orders. Minute Order, *Albury*, No. 0:18-mc-00085 (D. Minn. Oct. 31, 2018), ECF No. 7. When the Reporters Committee filed its application in *Albury*, it was aware of just one search warrant relevant to the case and only because there was a prosecution of Albury and because Minnesota Public Radio News had obtained a copy of the affidavit and reported on it. *See* Mukhtar M. Ibrahim, *Federal Documents Outline Steps FBI Took to Investigate One of Its Own,* Minn. Pub. Radio News (Mar. 29, 2018), https://perma.cc/RW2E-72V6. Had the government not prosecuted Albury, there would have been no public trace of the surveillance matters.

The right of public access to judicial proceedings and records is protected by both the First Amendment and the common law. The First Amendment and common law rights of public access are distinct but related. In determining whether the First Amendment right of public access attaches, courts look to two complementary and related considerations: experience and logic. *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 9 (1986) ("*Press-Enter. II*"); *In re Search Warrant for Secretarial Area Outside Off. of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (plurality opinion); *see also Press-Enter. II*, 478 U.S. at 10 n.3 (noting that some courts have recognized a constitutional right to access pretrial proceedings given their "importance[,]" even though they had "no historical counterpart"). Where it attaches, this qualified constitutional right can be overcome only if—and only to the extent that—sealing or closure is necessary to achieve a compelling interest. *Gunn*, 855 F.2d at 574.

The common law right of access attaches to "judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Once a court has determined that the common law right of access attaches, it then balances that right against any competing interest in confidentiality. *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013).

Whether the Court analyzes the relief sought by the Reporters Committee under the First Amendment, the common law, or both, the Court should grant this Application. There is a First Amendment right to SCA search warrant materials and docket sheets, just as there is a First Amendment right to other kinds of search warrant materials and docket sheets. *Gunn*, 855 F.2d at 573–75. There is also a common law right to both SCA search warrant materials and docket sheets. *Leopold*, 964 F.3d at 1130. RCFP therefore respectfully requests that this Court grant the instant Application and unseal: (1) SCA search warrant materials pertaining to now-inactive investigations from January 1, 2018 to the date of the Court's Order; and (2) all docket sheets reflecting SCA search warrant materials from the same date range, whether or not the investigations are still active. RCFP also requests certain forward-looking relief.

A. There is a First Amendment right of access to both SCA search warrant materials and docket sheets.

Courts have emphasized two "complementary considerations" in assessing whether the First Amendment guarantees the public a qualified right of access to a particular proceeding or related document. *Press-Enter. II,* 478 U.S. at 8. The first consideration—"experience"— looks to "whether the place and process have historically

been open to the press and general public." *Id.* The second consideration—"logic"—looks to "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*; *see also Gunn*, 855 F.2d at 572–73.

The First Amendment right of access is "not absolute." *Gunn*, 855 F.2d at 574. Documents or proceedings to which the constitutional right applies may be restricted from public view if the party seeking sealing meets its burden to show that sealing is "necessitated by a compelling government interest" and "narrowly tailored to that interest." *Id.* (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987)). The court must make "specific, on the record findings" as to the compelling interest shown and why sealing is narrowly tailored to that interest; the court's "findings must be specific enough to enable the appellate court to determine whether its decision was proper." *Id.*; *cf. Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004) ("A compelling government interest permits a court to take evidence under seal as long as the court makes specific findings regarding the necessity of such a step.").

Here, both experience and logic make clear there is a First Amendment right of public access to SCA search warrant materials and docket sheets.

1. There is a First Amendment right of access to SCA search warrant materials.

There is a First Amendment right to SCA search warrant materials. Applying the *Press-Enterprise II* experience and logic framework, the Eighth Circuit in *Gunn* held that the First Amendment right of public access extends to materials filed in support of a search warrant, such as warrant affidavits. 855 F.2d at 573; *id.* at 576 (Heaney, J.,

concurring and dissenting).[4] A publisher and a newspaper editor had sought access to materials filed in support of two search warrants, arguing they had a First Amendment right to inspect these documents. *Id.* at 570, 572–73. The court reasoned that experience supported a constitutional right of access because under "common law judicial records and documents have been historically considered to be open to inspection by the public." *Id.* at 573. The court held that logic, too, supported a constitutional right of access because "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." *Id.* "Moreover, even though a search warrant is not part of the criminal trial itself, like voir dire, a search warrant is certainly an integral part of a criminal

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[4] Some other circuits have disagreed with this holding and held that the right of access does not attach until the relevant investigations are no longer active. *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989) (finding no First Amendment right of access to search warrant affidavits "in the interval between execution of the warrants and indictment" but finding qualified common law right of access); *In re Search of Fair Fin.*, 692 F.3d 424, 427–33 (6th Cir. 2012) (finding no First Amendment right to search warrant materials in case where indictment not yet issued, but common law right of access may apply); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213–19 (9th Cir. 1989) (finding no First Amendment or common law right of access to search warrant affidavits but expressly not deciding whether there is a right of access after an investigation has concluded); *see also In re Application of N.Y. Times Co. for Access to Certain Sealed Ct. Recs.*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (finding qualified First Amendment right of access to post-investigation warrant materials and distinguishing *Goetz* and *Times Mirror* as concerning active criminal investigations). The Eighth Circuit has the better approach. The right of access always attaches to warrant materials, but the presumption of access may be overcome under certain circumstances, including where disclosure would jeopardize an active criminal investigation. *Gunn*, 855 F.2d at 573–74. In any event, here, the Reporters Committee only requests the unsealing of SCA search warrant materials related to now-inactive investigations.

prosecution. Search warrants are at the center of pre-trial suppression hearings, and suppression issues often determine the outcome of criminal prosecutions." *Id.* For these reasons, the court held that there is a qualified First Amendment right of access to search warrant materials. *Id.* at 575.

The court in *Gunn* ultimately affirmed the district court's sealing order. *Id.* The government had demonstrated that restricting access to the specific search warrant materials at issue in that case was necessitated by a compelling government interest in preventing an ongoing investigation from being severely comprised. *Id.* at 574. The documents described "in considerable detail the nature, scope and direction of the government's investigation and the individuals and specific projects involved," including, importantly, verbatim excerpts from conversations with confidential informants. *Id.* The court also noted that line-by-line redactions were not practicable because "[v]irtually every page contain[ed] multiple references to wiretapped telephone conversations or to individuals other than the subjects of the search warrants or reveal[ed] the nature, scope and direction of the government's on-going investigation." *Id.*

Here, the First Amendment right of public access applies, as it did in *Gunn*. SCA search warrant materials are not meaningfully different from other kinds of search warrant materials, which in *Gunn* were held subject to the First Amendment right of access. *Id.* at 573. Just like other kinds of warrants, an SCA search warrant authorizes a governmental entity to demand access to information that otherwise need not be disclosed. The statute calls an SCA search warrant "a warrant" and requires that it be

"issued using the procedures described in the Federal Rules of Criminal Procedure." 18 U.S.C. § 2703(a). An SCA search warrant also has the potential, like any other warrant, to become central to a criminal trial, if there is standing and reason to challenge the warrant's validity. *See Gunn*, 855 F.2d at 573; *see also In re Up North Plastics, Inc.*, 940 F. Supp. 229, 232 (D. Minn. 1996) ("[A warrant] affidavit must be seen to be effectively challenged."). And, like any other warrant, the standard for issuing an SCA warrant is probable cause. *Leopold*, 964 F.3d at 1124. Although SCA search warrant materials have been sealed in this district, warrants in general "have been historically considered to be open to inspection by the public" and access to SCA search warrant materials in particular "is important to the public's understanding of the function and operation of the judicial process and the criminal justice system"; such access is also likely to "operate as a curb on prosecutorial or judicial misconduct." *Gunn*, 855 F.2d at 573. Thus, here, like in *Gunn*, the qualified First Amendment right of access applies.

Unlike in *Gunn*, however, here there is no compelling interest to overcome the First Amendment right of access as to the SCA search warrant materials sought to be unsealed. Petitioner does not seek SCA search warrant materials from active investigations—only those from investigations that are no longer active. *See id.* at 574; *see also In re Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Inc.*, 710 F. Supp. 701, 704 (D. Minn. 1989) (noting that "the need for secrecy" in sealed documents "diminish[es] as time passe[s]"). And, where individual circumstances may require sealing of particular court documents, in whole or in part, such as where access would compromise the identity of a confidential informant in an

ongoing investigation, *see Gunn*, 855 F.2d at 574, the government may, on a case-by-case basis, seek redaction or limited sealing.

The qualified First Amendment right of access applies to the SCA search warrant materials Petitioner seeks. This Court should therefore make the requested SCA search warrant materials publicly available.

2. There is a First Amendment right of access to docket sheets.

There is also a First Amendment right of public access to docket sheets. Though the Eighth Circuit has not ruled on this precise issue,[5] other circuits have found that the First Amendment right of access extends to court docket sheets in both criminal and civil matters. *See, e.g.*, *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 499–500, 505 (1st Cir. 1989) (holding that blanket prohibition on disclosure of docket sheets from closed criminal cases implicates the First Amendment right of access); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (holding that docket sheets "enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them"); *Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir.

[5] In one unpublished case the Eighth Circuit affirmed the dismissal of an action under 42 U.S.C. § 1983 by a Missouri inmate against a state court clerk who he claimed had refused to provide him a copy of the docket sheet in his underlying criminal case. *Jackson v. Malecek*, No. 93-1378, 1993 WL 315429 (8th Cir. 1993) (per curiam) (unpublished). The court reasoned that the clerk's "alleged action did not impede Jackson's ability to file a habeas corpus petition in federal court and to request the document during case discovery." *Id.* Even if correctly decided, the *Jackson* case is distinguishable because the routine sealing of SCA search warrant docket sheets does indeed negatively impact RCFP by restricting its ability, and the ability of journalists, generally, to access information about the functioning of the judicial system as a whole and in individual cases.

2014) (holding there is a First Amendment right of access to docket sheets in both civil and criminal proceedings); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (holding that secret docketing system was "an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings"); *but see Fair Fin.*, 692 F.3d at 433 (rejecting First Amendment right of access to docket sheets but recognizing common law right to same).

Experience supports a First Amendment right of access to docket sheets, as they have "historically been open to the press and general public." *Press-Enter. II*, 478 U.S. at 8. "Since the first years of the Republic, state statutes have mandated that clerks maintain records of judicial proceedings in the form of docket books, which were presumed open either by common law or in accordance with particular legislation." *Hartford Courant*, 380 F.3d at 94; *see also United States v. Mendoza,* 698 F.3d 1303, 1306 (10th Cir. 2012) (discussing the history of open dockets and noting that the "supposition that dockets are public records has a long pedigree"); *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders,* 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008) (noting that docket sheets are "hardly ever closed to the public").

And logic, too, supports a constitutional right of access; public access to docket sheets "plays a significant positive role" in the proper functioning of the judicial system. *Press-Enter. II*, 478 U.S. at 8. Docket sheets provide "a kind of index to judicial proceedings and documents." *Hartford Courant*, 380 F.3d at 93. They "furnish an 'opportunity both for understanding the system in general and its workings in a particular case.'" *Id.* at 95 (quoting *Richmond Newspapers*, 448 U.S. at 527). Access to docket

sheets also enables the public and the press to exercise their rights to attend civil and criminal proceedings and to inspect related documents by putting the public on notice of the proceedings taking place in the courthouse. *Id.* at 93–94. Moreover, it would make little sense to allow access to search warrant materials but not to the docket sheets that record them. This Court should therefore find that there is a First Amendment right of public access to the requested docket sheets and that there is no compelling interest shown that would justify their routine and indefinite sealing.

B. Public access to the requested SCA search warrant materials and docket sheets is also compelled under the common law.

1. There is a common law right of access to SCA search warrant materials and docket sheets.

In addition to the First Amendment right of access, the public and press have a common law right to inspect the requested court documents. The courts of this country have long recognized a common law right of access to "judicial records and documents." *Nixon*, 435 U.S. at 597. The common law right of access "bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings." *eBay*, 709 F.3d at 1222. It gives the public a chance "to keep a watchful eye on the workings of public agencies" and "provides a measure of accountability to the public at large, which pays for the courts." *Id.*

The weight of the presumption of access in the Eighth Circuit depends on "the role of the material at issue in the exercise of Article III judicial power" and the "resultant value of such information to those monitoring the federal courts." *Id.* at 1224 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)). Although this Court has

some discretion under the common law to determine whether sealing is proper, the Eighth Circuit has cautioned that "only the most compelling reasons can justify non-disclosure of judicial records." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *In re Gitto Glob. Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)).

The common law right of access attaches to "judicial record[s.]" *eBay*, 709 F.3d at 1222. Once a court has determined that the right attaches, it "must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *Id.* at 1223; *see also United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986); *United States v. McDougal*, 103 F.3d 651, 658 (8th Cir. 1996).

Both SCA search warrant materials and docket sheets are judicial records to which the common law right of access applies. In *Gunn*, the Eighth Circuit assumed that search warrant materials were judicial records to which the common law right of access attached. 855 F.2d at 573; *see also id.* at 576 (Bowman, J., concurring) ("The common law right of access to judicial records . . . would yield in this case precisely the same result that we have reached by other means."). It makes sense that SCA search warrant applications would constitute judicial documents because they are created with the intention to influence courts, and courts make decisions based on these materials regarding whether to grant law enforcement officers access to otherwise private information. *See Leopold*, 964 F.3d at 1128. In *Leopold*, the United States Attorney's Office conceded that SCA search warrant materials are judicial records and,

independently of that concession, the court held that SCA warrants are judicial records to which the common law right applies. *Id.* at 1127–28.[6] Other circuits have also held that the common law right of access attaches to warrant materials in inactive cases. *See, e.g.*, *Baltimore Sun*, 886 F.2d at 62.[7]

Docket sheets are also judicial records to which the common law right of access attaches. In *Gunn*, the Eighth Circuit noted that the "case dockets maintained by the clerk of the district court are public records" and ordered the dockets unsealed. 855 F.2d at 575. The D.C. Circuit has similarly concluded that, "Although judges do not always rely upon dockets themselves in reaching decisions, dockets are nonetheless judicial records because they are 'created and kept [by courts] for the purpose of memorializing or recording . . . matter[s] of legal significance.'" *Leopold*, 964 F.3d at 1129 (quoting *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 89 F.3d 897, 905 (D.C. Cir. 1996)); *see also United*

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[6] In *Leopold*, RCFP and journalist Jason Leopold of BuzzFeed News sought to unseal SCA search warrants, court orders pursuant to 18 U.S.C. § 2703(d), and court orders pursuant to the Pen Register Act. 964 F.3d at 1123, 1125. Some information was unsealed at the district court level. *Id.* at 1125–26. Petitioners appealed the denial of aspects of their requested relief: retrospective unsealing of docket information and certain specific details as to pen register matters, and prospective unsealing of SCA warrant materials at the close of investigations. *Id.* at 1126. Reaching only the application of the common law right of access, the D.C. Circuit held that the SCA materials sought were judicial documents to which the strong common law presumption of public access attached and that the administrative burden of unsealing these materials could not foreclose public access. *Id.* at 1128, 1134. It remanded for the district court to determine "how and when greater access can be provided." *Id.* at 1135.

[7] *See also, e.g.*, *In re EyeCare Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (recognizing common law right to warrant affidavits); *In re Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (same as to search warrant materials from inactive investigations); *United States v. Bus. of Custer Battlefield Museum and Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (same).

States v. Criden, 675 F.2d 550, 559 (3d Cir. 1982) (dockets are public records); *Mendoza*, 698 F.3d at 1304 ("Dockets and docket sheets have traditionally been considered public documents."). The requested materials are therefore all subject to the common law right of public access.

2. The common law right of access to the SCA search warrant materials at issue is not overcome.

Because the common law right of access attaches to SCA warrant materials, this Court "must consider the degree to which sealing" them "interfere[s] with the interests served by the common-law right of access" and then "balance that interference against" any benefits of "maintaining confidentiality of the information sought to be sealed." *eBay*, 709 F.3d at 1223. That balance mandates disclosure here.

The routine sealing of SCA search warrant materials in this district severely interferes with the interests served by the common law right of access. Journalists and the public currently have no way of determining what information has been sought by the government pursuant to SCA search warrants in this district, how many SCA search warrants have been applied for, granted, or denied, or what information was presented to justify the warrants. This is vital information for the public and the press to fulfill their oversight function, particularly because SCA search warrants implicate issues of public interest such as personal privacy, policing practices, and criminal justice. Although the government may have competing interests in individual cases, such as when confidential informants are involved, the government cannot show a particularized interest in keeping all SCA search warrant materials pertaining to inactive investigations confidential. The

balance of interests therefore clearly necessitates making the requested documents publicly available.

There is no compelling reason why the requested SCA search warrant materials should not be unsealed. *See Neal*, 461 F.3d at 1053. The common law right of access applies, the presumption of access is strong, and this Court should unseal and make public the requested SCA search warrant materials.

3. The common law right of access to the docket sheets at issue is not overcome.

The common law right of access also attaches to docket sheets, for the reasons stated above. And the balance of interests, again, strongly weighs in favor of disclosing the requested docket sheets. Docket sheets provide an index to and notice of judicial proceedings that is a prerequisite to meaningful public access. *See Hartford Courant*, 380 F.3d at 93. Without access to docket sheets the press and the public have no way of knowing of even the existence of SCA search warrant matters.

No countervailing government interest overrides the public's common law right to the requested docket sheets. The Eighth Circuit has unsealed search warrant docket sheets, including where the relevant investigations were ongoing. *Gunn*, 855 F.2d at 575. Similarly, here, the government has no cognizable interest in keeping the docket sheets sealed. If the right of public access is overcome as to sensitive information in individual docket entries, those may be redacted as necessary on a case-by-case basis. *See Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (ordering "release [of] a copy of the docket sheet in this case, with appropriate redaction of

identifying or sensitive information"). But there is no justification for the routine and indefinite sealing of docket sheets related to SCA search warrant materials.

The common law right of access attaches to docket sheets, just as it attaches to SCA search warrant materials. Balancing the factors at stake, this Court should find that the public is entitled to access the requested docket sheets.

IV. Conclusion

For the foregoing reasons, the Reporters Committee respectfully requests that this Court grant its Application and enter an order unsealing: (1) SCA search warrant materials pertaining to now-inactive investigations from January 1, 2018 to the date of the Court's Order; and (2) all docket sheets reflecting SCA search warrant materials filed from January 1, 2018 to the date of the Court's Order, whether or not those investigations are still active. On a forward-looking basis, it requests that this Court enter an order requiring the United States Attorney's Office to move to unseal SCA search warrant materials when the corresponding investigation becomes inactive, and requiring the Clerk of the Court to unseal any SCA search warrant materials still under seal 180 days after their filing, absent a showing by the United States Attorney's Office that sealing is necessary to serve a compelling interest and narrowly tailored to that interest, and a Court orders that those materials be maintained under seal for an additional period of time not to exceed 180 days. RCFP further respectfully requests that docket sheets reflecting future-filed SCA search warrant materials be publicly accessible.

Dated: December 8, 2020

BALLARD SPAHR LLP

By: *s/ Leita Walker*

Leita Walker (387095)
2000 IDS Center 80 South 8th Street
Minneapolis, MN 55402-2119
Tel: (612) 371-3211
Fax: (612) 371-3207
walkerl@ballardspahr.com

Catherine Crump (*pro hac vice pending*)
Megan Graham (*pro hac vice pending*)
Juliana DeVries (*pro hac vice pending*)
Samuelson Law, Technology and
Public Policy Clinic
UC Berkeley, School of Law
433 Law Building (North Addition)
Berkeley, CA 94720-7200
Tel: (510) 292-6860
ccrump@clinical.law.berkeley.edu

Attorneys for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In the Matter of the Application of the Reporters Committee for Freedom of the Press to Unseal Certain Search Warrant Materials	**Case No. 20-MC-00082** **LR 7.1(F) WORD COUNT COMPLIANCE CERTIFICATE REGARDING THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS TO UNSEAL CERTAIN SEARCH WARRANT MATERIALS**

I, Leita Walker, certify that Petitioner The Reporters Committee for Freedom of the Press' Memorandum in Support of its Application to Unseal Certain Search Warrant Materials complies with Local Rules 7.1(f) & (h).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2016, and that this word-processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that Petitioner's Memorandum contains **6,126** words.

Dated: December 8, 2020

BALLARD SPAHR LLP

By: *s/ Leita Walker*
Leita Walker (#387095)
2000 IDS Center 80 South 8th Street
Minneapolis, MN 55402-2119
Tel: (612) 371-3211
Fax: (612) 371-3207
walkerl@ballardspahr.com

Catherine Crump (*pro hac vice pending*)
Megan Graham (*pro hac vice pending*)
Juliana DeVries (*pro hac vice pending*)
Samuelson Law, Technology and
Public Policy Clinic
UC Berkeley School of Law
433 Law Building (North Addition)
Berkeley, CA 94720-7200
Tel: (510) 292-6860
ccrump@clinical.law.berkeley.edu

Attorneys for Petitioner