

4TH CIVIL No. E072470
COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

M. G.,
Plaintiff and Appellant,

v.

Michael Hestrin as District Attorney,
Defendant and Respondent.

APPEAL FROM THE
RIVERSIDE COUNTY SUPERIOR COURT
Hon. Jon D. Molloy
Case No. MCW1800102

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND PROPOSED AMICUS CURIAE BRIEF
OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 25 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF AND APPELLANT**

Katie Townsend (SBN 254321)

**Counsel of Record*

Bruce D. Brown**

Gabriel Rottman**

Lin Weeks**

REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th Street NW, Suite 1020

Washington, D.C. 20005

Telephone: (202) 795-9300

Facsimile: (202) 795-9310

ktownsend@rcfp.org

** *Of counsel*

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

**TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF
THE FOURTH APPELLATE DISTRICT, DIVISION TWO:**

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press, The Associated Press, Association of Alternative Newsmedia, Berkeleyside Inc., California News Publishers Association, Californians Aware, CalMatters, The E.W. Scripps Company, Embarcadero Media, First Amendment Coalition, Fox Television Stations, LLC, Gannett Co., Inc., Greater Los Angeles Pro Chapter of the Society of Professional Journalists, KPBS, KQED Inc., Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, and Tully Center for Free Speech, (collectively, “proposed amici”) respectfully request leave to file the attached brief as amici curiae in support of Plaintiff and Appellant Miguel Guerro. Lead amicus the Reporters Committee for Freedom of the Press has previously appeared as amicus curiae in numerous cases involving access to judicial records under state and federal law in courts around the country, including in California, as have many of the other amici.¹

¹ A full description of each of the amici is attached to this Application as Appendix A.

INTEREST OF AMICUS CURIAE

As members and representatives of the news media, proposed amici frequently rely on access to judicial records to gather information and keep the public informed about the functioning of the justice system. Accordingly, proposed amici have a strong interest in ensuring that documents filed by law enforcement entities as they seek court approval for their use of surveillance tools, such as wiretaps, are available to the public and the press after their corresponding investigations conclude. Moreover, press and public access to wiretap materials post-investigation unquestionably improves public oversight of law enforcement's use of—and judicial authorization for the use of—wiretaps in this State. Indeed, the utility of public access to such materials is especially evident in light of the potential abuse of this statutory surveillance tool that took place in Riverside County, giving rise to this case.

Further, public access to wiretap materials post-investigation like those sought by Appellant will shed light on government surveillance practices, an area of particular importance to members of the news media because of the damage that overuse of such practices can do to reporters' ability to communicate with their sources. Reporters often rely on sources who do not want their identities to be publicly revealed to obtain important information about matters of public interest. When the public is denied access to wiretap materials, even after the investigation to which they pertain has concluded, reporter-source communications are chilled and corroded, stifling newsgathering and making it more difficult for the public to stay informed.

For these reasons, which are discussed in more detail in the attached brief, proposed amici agree with Plaintiff and Appellant that the trial court erred in holding that the public has no First Amendment right of access to wiretap materials post-investigation. Proposed amici respectfully request that the Court accept and file the attached amicus brief. No party or counsel for any party authored this brief in whole or in part or funded its participation.

Dated: January 31, 2019

Respectfully submitted,

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Katie Townsend (SBN 254321)
Bruce D. Brown**
Gabriel Rottman**
Lin Weeks**
***Of counsel*

/s/ Katie Townsend
Katie Townsend
*Counsel of Record for Amici
Curiae*

APPENDIX A: DESCRIPTION OF AMICI

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

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

Berkeleyside Inc. publishes Berkeleyside, one of the leading independent, online news sites in the country. For 10 years, Berkeleyside has provided in-depth civic and accountability journalism on Berkeley, CA.

The California News Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 400 daily, weekly and student newspapers and news websites throughout California.

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

CalMatters is a nonpartisan, nonprofit journalism organization based in Sacramento, California. It covers state policy and politics, helping Californians to better understand how their government works while serving the traditional journalistic mission of bringing accountability and transparency to the state’s Capitol. The work of its veteran journalists is shared, at no cost, with more than 180 media partners throughout the state.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in

digital audio technology and measurement services. Scripps serves as the long-time steward of the nation’s largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Embarcadero Media is a Palo Alto-based 40-year-old independent and locally-owned media company that publishes the Palo Alto Weekly, Pleasanton Weekly, Mountain View Voice and Menlo Park Almanac, as well as associated websites. Its reporters regularly rely on the California Public Records Act to obtain documents from local agencies.

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

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

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

The Greater Los Angeles Pro Chapter of the Society of Professional Journalists (“SPJ/LA”) is a chapter of the Society of Professional Journalists. SPJ/LA is dedicated to improving and protecting journalism in the greater Los Angeles area. Founded in 1934, SPJ/LA provides educational programming for journalists and the public and promotes First Amendment issues of concern.

KPBS news serves the people of the San Diego and Imperial County region with trustworthy, in-depth information that allows the community to hold its leaders accountable. KPBS reaches more than 1 million people across television, radio, and digital platforms. The outlet is a non-profit department of San Diego State University. KPBS follows the Public Media Code of Integrity and the NPR Ethics Guidelines.

KQED Inc. is a nonprofit public benefit corporation organized under the laws of California and engaged in dissemination of news and information since its founding as a public broadcasting station in 1953. At all times relevant to this proceeding, KQED’s core mission has been the pursuit and publication/broadcast of information in the public’s interest. KQED has advanced this purpose not only through its consistent San Francisco Bay Area and statewide news reporting, which relies heavily on the use of the California Public Records Act, but also as a champion of public access to some of the most serious information maintained by government: law enforcement use of deadly force, police misconduct and the broader operations of our state’s criminal justice system.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information websites, www.latimes.com, attracts audiences throughout California and across the nation.

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

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

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other regional and community papers throughout the United States, as well as numerous related online news sites.

MPA – The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports,

lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

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

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

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

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

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

4TH CIVIL No. E072470
COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

M. G.,
Plaintiff and Appellant,

v.

Michael Hestrin as District Attorney,
Defendant and Respondent.

APPEAL FROM THE
RIVERSIDE COUNTY SUPERIOR COURT
Hon. Jon D. Molloy
Case No. MCW1800102

**AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS
IN SUPPORT OF PLAINTIFF AND APPELLANT**

*Katie Townsend (SBN 254321)

**Counsel of Record*

Bruce D. Brown**

Gabriel Rottman**

Lin Weeks**

REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

1156 15th Street NW, Suite 1020

Washington, D.C. 20005

Telephone: (202) 795-9300

Facsimile: (202) 795-9310

ktownsend@rcfp.org

** *Of counsel*

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(e)(1) and (2), the Reporters Committee for Freedom of the Press, by and through its undersigned counsel, certifies that it is an unincorporated nonprofit association of reporters and editors with no parent corporation or stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Lance Knobel, Tracey Taylor and Frances Dinkelspiel (Berkeleyside's three founders) own 94% of Berkeleyside.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

CalMatters is a nonprofit California public benefit corporation recognized under Section 501(c)(3) of the Internal Revenue Code. No entity or person has an ownership interest of 10 percent or more of CalMatters.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

Embarcadero Media is an independent and locally-owned media company. No entity or person has an ownership interest of 10 percent or more of Embarcadero Media other than founder William Johnson.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

Fox Television Stations, LLC is an indirect subsidiary of Twenty-First Century Fox, Inc., a publicly held company. No other publicly held company owns 10% or more of Twenty-First Century Fox, Inc. stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The Greater Los Angeles Pro Chapter of the Society of Professional Journalists is a non-stock corporation with no parent company.

KPBS is owned by San Diego State University.

KQED Inc. is a nonprofit public benefit corporation. No entity or person has an ownership interest of 10 percent or more of KQED Inc.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and

Bluestone Financial Ltd. each own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The News Leaders Association has no parent corporation and does not issue any stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

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

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

Amici have no financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: January 31, 2020

/s/ Katie Townsend
Katie Townsend
*Counsel of Record for Amici
Curiae*

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS2

TABLE OF AUTHORITIES..... 7

INTRODUCTION..... 10

ARGUMENT 12

I. The public has a qualified First Amendment right to access wiretap materials post-investigation..... 12

 A. Both “history and utility” support a First Amendment right of access to wiretap materials post-investigation. 12

 B. Public access to wiretap materials post-investigation is necessary for effective public oversight of the justice system and improves the functioning of the process for obtaining judicial authorization for wiretaps. 14

 C. History supports a qualified constitutional right of access to wiretap materials post-investigation..... 17

II. The news media has a particular interest in access to wiretap materials post-investigation, as government surveillance without public oversight corrodes reporter-source relationships. 19

 A. Confidential sources are essential to the news media. 19

 B. Wiretapping and other forms of government surveillance without public oversight chills confidential sources’ willingness to speak to reporters..... 20

CONCLUSION25

CERTIFICATE OF WORD COUNT26

PROOF OF SERVICE27

TABLE OF AUTHORITIES

Cases

Ashcraft v. Conoco, Inc. (4th Cir. 2000) 218 F.3d 282 21

Cottone v. Reno (D.C. Cir. 1999) 193 F.3d 550..... 18

F.T.C. v. Standard Financial Management Corp.
(1st Cir. 1987) 830 F.2d 404..... 13

Globe Newspaper Co. v. Superior Court for Norfolk County
(1982) 457 U.S. 596 15

In re Application of Newsday, Inc. (4th Cir. 1991) 805 F.2d 74 18

In re N.Y. Times Co. (2d. Cir. 1987) 828 F.2d 110 18

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court
(1999) 20 Cal.4th 1178 10, 13, 14

Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona
(9th Cir. 1998) 156 F.3d 940 17

Press-Enterprise Co. v. Superior Court of California for Riverside County
(1986) 478 U.S. 1 14

Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555 13

Seattle Times Co. v. U.S. Dist. Court (9th Cir. 1988) 845 F.2d 1513 17

Smith v. U.S. Dist. Court for Southern Dist. of Illinois
(7th Cir. 1992) 956 F.2d 647 13

United States v. Business of Custer Battlefield Museum and Store
Located at Interstate 90, Exit 514, South of Billings, Montana
(9th Cir. 2011) 658 F.3d 1188 18, 24

Zerilli v. Smith (D.C. Cir. 1981) 656 F.2d 705..... 19, 21

Statutes and Regulations

28 C.F.R. § 50.10 21

California Penal Code § 629.50 10

Other Authorities

Aamer Madhani and Kevin Johnson,
Journalism Advocates Call Leak Investigations Chilling,
 USA Today (May 21, 2013) 22

Andrew Buncombe, *How Woodward met Deep Throat*,
 Independent (June 3, 2005) 20

Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*,
 Washington Post (May 19, 2013) 22

Ann E. Marimow, *Justice Department’s Scrutiny of Fox News Reporter James
 Rosen in Leak Case Draws Fire*, Washington Post (May 20, 2013)..... 22, 23

Brad Heath and Brett Kelman, *Justice Officials Fear Nation’s Biggest Wiretap
 Operation May Not Be Legal*, USA Today (Nov. 11, 2015)..... 11, 16, 17

Carl Bernstein & Bob Woodward, *All the President’s Men* (1974)..... 20

Charlie Savage and Adam Goldman,
Senators Clash over Impact of Wiretap Flaws on Broader Russia Inquiry,
 N.Y. Times (Dec. 18, 2019) 15

Charlie Savage,
Carter Page FISA Documents Are Released by Justice Department,
 N.Y. Times (July 21, 2018) 15

David Johnston and James Risen,
Secret U.S. Endorsement of Severe Interrogations, N.Y. Times (Oct. 4, 2007) 20

Frederik Obermaier et al., *About the Panama Papers*, *Suddeutsche Zeitung* (2016) 20

Gov’t Obtains Wide AP Phone Records in Probe, AP in the News (May 13, 2013)..... 21

Ian Shapira, *Long-ago Wiretap Inspires a Battle with CIA for More Information*,
 Washington Post (March 2, 2013)..... 16

James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*,
 N.Y. Times (Dec. 16, 2006) 20

S.E. Williams, *There Was So Much Wiretapping in Riverside County . . . Even the
 Bugs Had Bugs*, *The Voice* (Feb. 25, 2016) 11, 17

Scott Shane and Colin Moynihan,
Drug Agents Use Vast Phone Trove, Eclipsing N.S.A. 's,
 N.Y. Times (Sept. 1, 2013)..... 23

Susan McGregor, *Digital Security and Source Protection for Journalists*,
 Tow Center for Digital Journalism (June 2014)..... 19

Washington Post, *CIA Report on Project Mockingbird* 16, 24

*With Liberty to Monitor All: How Large-Scale US Surveillance is Harming
 Journalism, Law, and American Democracy*,
 Human Rights Watch (July 28, 2014) 24

INTRODUCTION

The press and public’s well-settled constitutional right of access to judicial records is necessary for meaningful, effective public oversight of the judicial system. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1207–09 (*NBC Subsidiary*)).) Where, as here, law enforcement officials have executed a wiretap issued under California Penal Code § 629.50, *et. seq.*, and closed their investigation, the public has a qualified constitutional right to inspect the applications, orders, and other judicial records filed with the court in connection with law enforcement’s request for judicial authorization for that wiretap (hereinafter, generally, “wiretap materials”). Accordingly, for the reasons detailed herein, amici agree with Appellant that the wiretap materials at issue here may remain sealed only if, and only to the extent that, such sealing is necessitated by a compelling government interest.¹

Press and public access to wiretap materials post-investigation unquestionably improves public oversight of law enforcement’s use of—and judicial authorization for the use of—wiretaps in this State. Indeed, the utility of public access to such materials is

¹ Amici are the Reporters Committee for Freedom of the Press, The Associated Press, Association of Alternative Newsmedia, Berkeleyside Inc., California News Publishers Association, Californians Aware, CalMatters, The E.W. Scripps Company, Embarcadero Media, First Amendment Coalition, Fox Television Stations, LLC, Gannett Co., Inc., Greater Los Angeles Pro Chapter of the Society of Professional Journalists, KPBS, KQED Inc., Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, and Tully Center for Free Speech. Full descriptions of amici are included with the motion that this brief accompanies.

especially evident in light of the apparent abuse of this statutory surveillance tool that took place in Riverside County, giving rise to this case. In 2015, Riverside County courts authorized three times as many wiretaps as did courts in any other state or federal jurisdiction. (S.E. Williams, *There Was So Much Wiretapping in Riverside County . . . Even the Bugs Had Bugs*, *The Voice* (Feb. 25, 2016).²) The rampant overuse of wiretaps has caused decreased public trust in law enforcement and even led some prosecutors to decline to use evidence obtained using Riverside County wiretaps for fear that they were unconstitutionally obtained. (Brad Heath and Brett Kelman, *Justice Officials Fear Nation's Biggest Wiretap Operation May Not Be Legal*, *USA Today* (Nov. 11, 2015).³)

Press and public access to wiretap materials post-investigation helps inform the public of both recent and historical newsworthy events. For example, the news media has used publicly available wiretap materials like those sought by the Appellant here to provide insight into the use of the Foreign Intelligence Surveillance Act to intercept communications of a U.S. citizen and advisor to a presidential campaign, leading to both judicial and legislative scrutiny of FISA warrant procedures. And when the CIA declassified records that documented its authorization of warrantless wiretaps in the 1970s, it became clear that the agency had been targeting journalists reporting on that agency.

Further, public access to wiretap materials post-investigation like those sought by Appellant will shed light on government surveillance practices, an area of particular

² <https://perma.cc/QZM7-CZZG>.

³ <https://perma.cc/F56A-GWV6>.

importance to members of the news media because of the damage that the overuse of such practices can do to reporters' ability to communicate with their sources. Reporters often rely on sources who do not want their identities to be publicly revealed to obtain important information about matters of public interest. Accordingly, surveillance without adequate public oversight, like what occurred in Riverside County, can chill reporter-source communications and corrode reporter-source relationships, stifling newsgathering and making it more difficult for the public to stay informed.

Appellant is a retired California Highway patrol officer with no criminal record. (M.G. Br. at p. 13.) Now that the investigation into Appellant has concluded, public access to the application, supporting documentation, and wiretap order targeting Appellant will provide insight into how law enforcement sought and obtained judicial authorization to execute a wiretap targeting him. For the public to have confidence in the wiretap process in this State, press and public access to wiretap materials post-investigation is necessary. This Court should thus reverse the decision of the trial court and find a qualified First Amendment right of access to those materials.

ARGUMENT

- I. The public has a qualified First Amendment right to access wiretap materials post-investigation.**
 - A. Both “history and utility” support a First Amendment right of access to wiretap materials post-investigation.**

Amici agree with Appellant that the public has a qualified constitutional right to access wiretaps applications, orders, and related materials post-investigation. As Appellant correctly explains (M.G. Br. at 15), the California Supreme Court, relying on

longstanding precedent from the U.S. Supreme Court, has found a qualified First Amendment right of access to certain judicial proceedings and documents filed with courts. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1207–09.) This right of access is grounded in the necessity of public understanding and oversight of the judicial system. (See, e.g., *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 572 [“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.”]). As the California Supreme Court explained in *NBC Subsidiary*, access to judicial proceedings will “enhance the performance and accuracy of trial proceedings, educate the public, and serve a ‘therapeutic’ value to the community.” (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1200.) The right to access these proceedings plays a particularly important role when courts are responding to requests from the executive branch. (Cf. *Smith v. U.S. Dist. Court for Southern Dist. of Illinois* (7th Cir. 1992) 956 F.2d 647, 650 [“The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public’s right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.”] [quoting *F.T.C. v. Standard Financial Management Corp.* (1st Cir. 1987) 830 F.2d 404, 410].)

Under *NBC Subsidiary*, courts should take into account “two complementary considerations” to determine whether the First Amendment right of access applies to the wiretap materials Appellant seeks: “(i) history—*i.e.*, whether there is a ‘tradition of accessibility’ . . . and (ii) utility—*i.e.*, whether ‘public access plays a significant positive

role in the functioning of [the proceeding in question].” (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1206 (quoting *Press-Enterprise Co. v. Superior Court of California for Riverside County* (1986) 478 U.S. 1 (*Press-Enterprise II*)).) The second of these two considerations is, as the California Supreme Court has recognized, the most important: “[A]lthough evidence of such a historical tradition is a factor that strengthens the finding of a First Amendment right of access, the absence of explicit historical support would not . . . negate such a right of access.” (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1214.)

B. Public access to wiretap materials post-investigation is necessary for effective public oversight of the justice system and improves the functioning of the process for obtaining judicial authorization for wiretaps.

Press and public scrutiny of wiretap materials post-investigation “plays a particularly significant role in the actual functioning of the process” used by law enforcement to obtain judicial authorization for the use of wiretaps. (*Press-Enterprise II*, 478 U.S. at p. 11.) Such access improves the functioning of the process for obtaining judicial authorization for wiretaps in myriad, specific ways well beyond a mere “recitation that government proceedings will benefit by being open to the public,” as Respondent claims. (Hestrin Br. at 12.)

Specific information from wiretap materials post-investigation enables the public to understand and monitor how the government obtains wiretaps and for what purposes. For example, in 2018, documents related to federal law enforcement’s interception of communications of Carter Page, a former campaign advisor to President Donald Trump, were declassified and made publicly available. (See Charlie Savage, *Carter Page FISA*

Documents Are Released by Justice Department, N.Y. Times (July 21, 2018).⁴) The records—which included wiretap applications, renewal applications, and approvals by “senior law enforcement officials in two administrations and by federal judges”—revealed details of the surveillance undertaken by the FBI of Page under the Foreign Intelligence Surveillance Act (“FISA”). (Savage, *supra*.) Public access to those records led the Foreign Intelligence Surveillance Court to order that the FBI “propose changes in how investigators seek their permission for national security surveillance targeting Americans,” (Charlie Savage, *Court Orders F.B.I. to Fix National Security Wiretaps After Damning Report*, N.Y. Times (Dec. 19, 2019)⁵), and resulted in testimony during multiple United States Senate hearings regarding the FBI’s use of FISA surveillance. (Charlie Savage and Adam Goldman, *Senators Clash over Impact of Wiretap Flaws on Broader Russia Inquiry*, N.Y. Times (Dec. 18, 2019)⁶.) Although FISA wiretaps operate under a different legal framework than those used to gather evidence for criminal proceedings, the equities of permitting some transparency into both the FISA and criminal court wiretap process are similar.

Public access to records concerning wiretapping of individuals’ phones by the government also effectuates a “major purpose” of the First Amendment right of access to judicial records: “to protect free discussion of governmental affairs.” (*Globe Newspaper Co. v. Superior Court for Norfolk County* (1982) 457 U.S. 596, 604 (*Globe Newspaper*))

⁴ <https://perma.cc/8Z3C-WHFF>.

⁵ <https://perma.cc/KV33-FVCE>.

⁶ <https://perma.cc/KL86-ZTZH>.

(citations omitted) [quoting *Mills v. Alabama* (1966) 384 U.S. 214, 218].) For example, in 2007, the CIA declassified documents related to “Project Mockingbird,” an operation “targeting two Washington-based newsmen [Paul Scott and Robert Allen] who, at the time, had been publishing news articles based on, and frequently quoting, classified materials of [the CIA and other agencies].” (See Ian Shapira, *Long-ago Wiretap Inspires a Battle with CIA for More Information*, Washington Post (March 2, 2013)⁷; Washington Post, *CIA Report on Project Mockingbird (CIA Report)*⁸.) The records showed that the journalists’ phones had been tapped without warrants, but with the approval of the CIA director, who was under pressure from then-Attorney General Robert F. Kennedy and Defense Secretary Robert McNamara. (Shapira, *supra*.) This historical example demonstrates that public access to wiretap materials can uncover misuse of wiretaps.

The need for public oversight of the process used by law enforcement to obtain judicial authorization for wiretaps is especially acute in Riverside County, where, as *USA Today* and *The Desert Sun* jointly reported, “a single state court judge[’s] orders] . . . allowed investigators—usually from the U.S. Drug Enforcement Administration—to intercept more than 2 million conversations involving 44,000 people.” (Heath and Kelman, *supra*.) A lack of access to the underlying wiretap materials themselves has left many questions unanswered, however. (See *ibid.* [“Because wiretap orders are sealed, there is no way to know precisely how many of them were sought by the DEA and the local officers it deputized to work on a drug task force.”].) The inability of the press and

⁷ <https://perma.cc/K7C7-FYZA>.

⁸ <https://perma.cc/3BTK-NPK7>.

the public to access the wiretap materials has undermined public confidence in the wiretap process in Riverside County. As a result, even potentially validly obtained wiretaps went unused, as “Justice Department lawyers in Los Angeles . . . mostly refused to use the results in federal court because they have concluded the state court’s eavesdropping orders are unlikely to withstand a legal challenge.” (*Ibid.*; see also Williams, *supra* [describing *People of California vs Koan You Lay*, in which “prosecutors ultimately determined the wiretaps used by the DEA were illegal [and] as a result, four suspects went free”].)

C. History supports a qualified constitutional right of access to wiretap materials post-investigation.

Amici agree with Appellant that the Court can and should recognize a qualified First Amendment right of access to wiretap materials post-investigation in light of the overwhelming utility of public access in this context. (See M.G. Br. at 18, 21; see also *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona* (9th Cir. 1998) 156 F.3d 940, 948 [“Even if the historic right of post-trial access were not dispositive, the ‘logic’ prong of the *Press–Enterprise II* formulation would be.”]; *Seattle Times Co. v. U.S. Dist. Court* (9th Cir. 1988) 845 F.2d 1513, 1516–17 [even without an “unbroken history of public access,” the First Amendment right exists if “public scrutiny” would “benefit” the proceedings].) Further, contrary to Respondent’s arguments (see Hestrin Br. pp. 8–9), though wiretap materials are a relatively new type of judicial record in California, history too supports a qualified constitutional right of public access to such materials post-investigation.

First, judicial records connected to other types of law enforcement investigative tools—such as search warrants—are routinely accessible to the public post-execution and/or post-investigation. As the Ninth Circuit explained in *United States v. Business of Custer Battlefield Museum and Store Located at Interstate 90, Exit 514, South of Billings, Montana*:

Post-investigation . . . warrant materials “have historically been available to the public.” *In re N.Y. Times Co.*, 585 F.Supp.2d at 88. “Search warrant applications . . . generally are unsealed at later stages of criminal proceedings, such as upon the return of the execution of the warrant or in connection with post-indictment discovery.” *Wells Fargo*, 643 F.Supp.2d at 581. “[A]lthough the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal.” *Gunn*, 855 F.2d at 573 (emphasis added). In the post-investigation context, warrant materials have generally been open to the public.

((9th Cir. 2011) 658 F.3d 1188, 93–94 (citation omitted).)

In addition, courts have held that there is a constitutional right of access to wiretap applications, orders, and tapes that have been introduced at trial or otherwise made part of the court record. (*In re N.Y. Times Co.* (2d. Cir. 1987) 828 F.2d 110 [qualified First Amendment right of access applied in the context of a motion to unseal that had been filed with the court, supporting documentation for which included a wiretap application, order, affidavit, and excerpts of recording]; see also *In re Application of Newsday, Inc.* (4th Cir. 1991) 805 F.2d 74 [finding a common law right of access to search warrant application containing information obtained via wiretap, but not reaching the First Amendment question]; *Cottone v. Reno* (D.C. Cir. 1999) 193 F.3d 550, 552 [wiretap recordings requested under FOIA must be released . . . “when a requester precisely

identifies specific tapes that have been introduced into evidence and played in open court during a public criminal trial”].) Though the wiretap materials sought by Appellant here were not used at trial, these cases demonstrate that courts have not, historically, treated wiretap materials as absolutely secret.

II. The news media has a particular interest in access to wiretap materials post-investigation, as government surveillance without public oversight corrodes reporter-source relationships.

A. Confidential sources are essential to the news media.

Journalists rely on relationships with sources to report the news fully and effectively, and some sources will disclose information only if they trust that reporters will keep their identities confidential. (See *Zerilli v. Smith* (D.C. Cir. 1981) 656 F.2d 705, 711 (*Zerilli*) [“[J]ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.”]; see also Susan McGregor, *Digital Security and Source Protection for Journalists*, Tow Center for Digital Journalism (June 2014) at 12 [“There are no stories without sources.”].)

Many major news stories have relied on confidential sources. For example, in 2006, *The New York Times* reported on an illegal wiretapping program carried out by the NSA that monitored phone calls and e-mail messages of individuals suspected of involvement in terrorist activities without court review or a warrant. (See James Risken and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16,

2006).⁹) The report, which used information provided by multiple confidential sources, is evidence of both the importance of such sources to the press and public and the abuse of surveillance methods that can occur without public oversight. (See *ibid.* [“Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for The New York Times because of their concerns about the operation’s legality and oversight.”].)

Numerous other history-altering news reports have relied on confidential sources as well, including reporting about the U.S. government’s use of harsh “enhanced” interrogation techniques on terrorism suspects (see David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007)¹⁰), the private sector’s use of offshore financial havens to launder money and evade taxes (see Frederik Obermaier et al., *About the Panama Papers*, *Suddeutsche Zeitung* (2016)¹¹), and the involvement of the Nixon Administration in the Watergate break-in and subsequent cover-up (see Carl Bernstein & Bob Woodward, *All the President’s Men* (1974) at p. 71; Andrew Buncombe, *How Woodward met Deep Throat*, *Independent* (June 3, 2005).¹²)

B. Wiretapping and other forms of government surveillance without public oversight chills confidential sources’ willingness to speak to reporters.

When sources fear that the government is monitoring their communications or will learn their identities—through wiretapping or by other means—they are less likely to

⁹ <https://perma.cc/UU4J-YE9U>.

¹⁰ <https://perma.cc/Z922-C84R>.

¹¹ <https://perma.cc/9NW2-Y2KZ>.

¹² <https://perma.cc/9V7T-NZ4X>.

speak to reporters. Indeed, several federal appellate courts have recognized as a general matter that discouraging confidential sources from speaking to the press can stifle the flow of information to the public. (See *Zerilli, supra*, 656 F.2d at p. 711 [“Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.”]; *Ashcraft v. Conoco, Inc.* (4th Cir. 2000) 218 F.3d 282, 287 [“If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public’s understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.”].) The Department of Justice’s “News Media Guidelines” similarly recognize that the unrestrained use of law enforcement tools can undermine the news media’s ability to inform the public about its government. (See 28 C.F.R. § 50.10 [“In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, *and safeguarding the essential role of the free press in fostering government accountability and an open society.*”] (emphasis added).)

An example of the harmful impact of surveillance on the press came to light in 2012, when the Justice Department seized records for more than 20 phone lines used by reporters for the Associated Press without prior notice. (*Gov’t Obtains Wide AP Phone Records in Probe*, AP in the News (May 13, 2013) (hereafter *AP Phone Records*

Report)¹³.) After the public revelation of this sweeping collection of AP’s phone records, the Associated Press’s President and CEO Gary Pruitt noted that the effect on journalistic sources (and, thereby, reporting) was severe. Pruitt recounted that “[o]fficials that would normally talk to us and people we talk to in the normal course of newsgathering are already saying to us that they’re a little reluctant to talk to us” for “fear that they will be monitored by the government.” (Aamer Madhani and Kevin Johnson, *Journalism Advocates Call Leak Investigations Chilling*, USA Today (May 21, 2013).¹⁴)

Similarly, when in 2010 the Justice Department seized the content of then-Fox News reporter James Rosen’s personal emails, it was reported that the motivation for the seizure was Rosen’s communications with a source named Stephen Jin-Woo Kim. (Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, Washington Post (May 19, 2013)¹⁵; Ann E. Marimow, *Justice Department’s Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, Washington Post (May 20, 2013) (hereinafter *Marimow May 20, 2013*)¹⁶.) Rosen was never charged with a crime, and indeed the

¹³ <https://perma.cc/T2WJ-8Y36>. The government obtained AP’s phone records through a subpoena, not a wiretap. (*Ibid.*) Nevertheless, this example demonstrates that the corrosive impact of unchecked surveillance on the reporter-source relationship is far from a hypothetical concern. (See *Ibid.* [“These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP’s newsgathering operations, and disclose information about AP’s activities and operations that the government has no conceivable right to know,” Pruitt said.])

¹⁴ <https://perma.cc/KZ85-ESWE>.

¹⁵ <https://perma.cc/W57F-MTNW>. The Justice Department seized Mr. Rosen’s emails pursuant to a search warrant. Though not involving a wiretap, this example, like that of the seizure of AP’s phone records, illustrates the very real threat of government surveillance to reporters’ ability to maintain the confidentiality of their sources.

¹⁶ <https://perma.cc/4SZ4-9L85>.

affidavit submitted in support of the FBI’s search warrant application described lawful and not uncommon reporter-source communications—Rosen “asked, solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information . . . by employing flattery and playing to Mr. Kim’s vanity and ego.” (*Marimow May 20, 2013, supra.*)

By some indications, the danger posed by widescale surveillance to the journalist-source relationship has only grown in recent years. In 2013, *The New York Times* reported on the existence of The Hemisphere Project, “a partnership between federal and local drug officials and AT&T,” in which “the government pays AT&T [employees] to . . . sit alongside Drug Enforcement agents and local detectives and supply them with phone data from as far back as 1987.” (Scott Shane and Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*, N.Y. Times (Sept. 1, 2013)¹⁷.) The program, which is mainly authorized by administrative subpoenas, “covers every call that passes through an AT&T switch—not just those made by AT&T customers,” and “includes information on the locations of callers.” (*Ibid.*)

Wiretaps, specifically, can reveal both a source’s identity and the information he or she provided to a reporter. Accordingly, sources who fear that the government is monitoring their phone calls with reporters are less likely to speak to reporters at all. In the “Mockingbird” wiretapping of two journalists also discussed above, the CIA catalogued the sources who were recorded through the wiretapped journalists’ phones:

¹⁷ <https://perma.cc/4D6Z-E6VH>.

The intercept activity was particularly productive in identifying contacts of the newsmen, their method of operation and many of their sources of information. For example, it was determined that during the period they received data from 13 newsmen, 12 of whom were identified; 12 senators and 6 members of Congress, all identified; 21 Congressional staff members, of whom 11 were identified, 16 government employees, including a staff member of the White House, members of the Vice President's office, an Assistant Attorney General, and other well-placed individuals.

(*CIA Report, supra.*) Fear of government surveillance is only heightened when members of the press and public have no access to judicial records that could help them understand how the wiretap process works. (*Cf. Business of Custer Battlefield Museum* (9th Cir. 2011) 658 F.3d at p. 1194 [the “tradition of openness serves as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police[, . . . and it] is important to the public’s understanding of the function and operation of the judicial process and the criminal justice system”]). And it is especially acute when abuse of wiretaps, like that in Riverside County, comes to light, but the public is still unable to access judicial records that would show how these wiretaps were obtained.

Wiretapping and other forms of government surveillance without public oversight compromises the ability of the news media to ensure the confidentiality of their sources. It therefore threatens the integrity of newsgathering and the ability of the press to report on important public affairs. (See *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, Human Rights Watch (July 28, 2014)¹⁸ [“[O]ne of the most common concerns journalists expressed to

¹⁸ <https://perma.cc/HF7K-9FPA>.

us was that their sources were drying up.”].) Public access to wiretap materials post-investigation is necessary to counteract the chilling effect that government surveillance can have on confidential sources’ willingness to speak to reporters.

CONCLUSION

Public access to wiretap materials post-investigation would help the public understand the legal standards for obtaining judicial authorization for wiretaps and give sources greater confidence to speak to reporters. And public access to wiretap materials post-investigation that reveal problems with the process of obtaining judicial authorization for wiretaps will encourage reform and allow reporters and confidential sources to take steps to protect such sources’ identities.

For all of these reasons amici urge this Court to reverse the order of the trial court.

Dated: January 31, 2020

Respectfully submitted,

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
Katie Townsend (SBN 254321)
Gabriel Rottman**
Bruce D. Brown**
Lin Weeks**
***Of counsel*

/s/ Katie Townsend
Katie Townsend
*Counsel of Record for Amici
Curiae*

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached amici curiae brief was produced using 13-point Roman type, including footnotes, and contains 4,152 words. I have relied on the word-count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: January 31, 2020

/s/ Katie Townsend

Katie Townsend

Counsel of Record for Amici Curiae

Document received by the CA 4th District Court of Appeal Division 2.

PROOF OF SERVICE

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

On January 31, 2020, I served the foregoing documents: **Application for Leave to File Amici Curiae Brief and Proposed Amici Curiae Brief of the Reporters Committee for Freedom of the Press and 25 Media Organizations in Support of Plaintiff and Appellant** as follows:

[x] By TrueFiling electronic delivery:

All counsel of record

[x] By mail: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed below and dropped the envelope off at a United States Postal Service facility, with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

Clerk of the Court
Riverside Superior Court
4100 Main Street
Riverside, CA 92101

For delivery to:
Honorable John D. Molloy
Department 67

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

Executed on January 31, 2020, in Washington, D.C.

By: /s/ Lin Weeks
Lin Weeks
lweeks@rcfp.org