Joshua Hanners
E-mail: redallaw@gmail.com
ISB# 12053
Redal & Redal
5431 N. Government Way Suite 101A
Coeur d'Alene, ID 83815
Telephone: (208) 676-9999

Michael S. Zummer*
E-mail: afbilitigation@gmail.com
La. Bar No. 31375
2337 Magazine St. Unit D
New Orleans, LA 70130
Telephone: (504) 717-5913
*Pro Hac Vice Application Forthcoming

Counsel for Movant Zachery C. Schoffstall

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN RE APPLICATION OF THE UNITED STATES FOR A SEARCH WARRANT OF THIRTY-SEVEN ELECTRONIC DEVICES SEIZED FROM JARED M. BOYCE, NATHAN D. BRENNER, COLTON M. BROWN, JOSIAH D. BUSTER, MISHAEL J. BUSTER, DEVIN W. CENTER, DYLAN C. CORIO, WINSTON W. DURHAM, GARRET J. GARLAND, BRANDEN M. HANEY, RICHARD J. JESSOP, JAMES M. JOHNSON, JAMES J. JOHNSON, KIERAN P. MORRIS, LAWRENCE A. NORMAN, JUSTIN M. OLEARY, CAMERON K. PRUITT, FORREST C. RANKIN, THOMAS R. ROUSSEAU, CONOR J. RYAN, SPENCER T. SIMPSON, ALEXANDER N. SISENSTEIN, DEREK J. SMITH, DAKOTA R. TABLER, STEVEN D. TUCKER, WESLEY E. VAN HORN, MITCHELL F. WAGNER, NATHANIEL T. WHITFIELD, ROBERT B. WHITTED,	Misc. Case No.: 2-24-mc-00231-BLW **MEMORANDUM IN SUPPORT OF MOVANT'S MOTION TO UNSEAL**

GRAHAM J. WHITSOM, AND CONNOR P. MORAN IN KOOTENAI COUNTY, IDAHO ON JUNE 11, 2022

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BACKGROUND

This motion relates to a matter of significant public interest. Although it has been more than two years since federal officials obtained a search warrant for the electronic devices of thirty-one reported members of the Patriot Front (hereinafter "Patriot Front members"), who were arrested by state officials in Kootenai County, Idaho on June 11, 2022, no federal charges have been brought against them. In fact, state prosecutions have proceeded against the Patriot Front members with mixed results. *See* Declaration of Zachery Schoffstall ("Decl.") ¶¶ 8, 38-39, 44; *State v. Jessop*, No. CR28-22-8596 (Idaho Dist. Ct. Mar. 6, 2024) (Decision on Appeal of Magistrate Court's Order) at 130; *State v. Rousseau*, No. CR28-22-8737 (Idaho Dist. Ct. July 9, 2024) (Decision on Appeal of Magistrate Court's Order) at 3-4, 105. Yet, the federal search warrant application, affidavit, and accompanying materials remain under seal, and the public is deprived of learning what basis federal officials had for obtaining a search warrant for the Patriot Front members' devices, even though state proceedings show that federal officials have refused to provide their affidavit and delayed release of the fruits of the search to the detriment of the state proceedings. Decl. ¶¶ 38-42.

The public interest in these materials is heightened by Movant's firsthand experience with them. He was the Federal Bureau of Investigation ("FBI") supervisor over his agency's assistance to state officials in the matter until shortly before the federal search warrant was issued. Decl. ¶¶ 6-9. FBI agents under his supervision declined to swear to an affidavit prepared by U.S. Department of Justice ("DOJ") attorneys with DOJ's counterterrorism section and the U.S. Attorney's Office for the District of Idaho ("USAO") because the affidavit excluded exculpatory information known to the agents that contradicted the affidavit's conclusion there was probable cause to search the electronic devices. *Id.* ¶¶ 10-23.

The exculpatory information was the result of a previous FBI investigation of the Patriot Front and its associates, showing that the group—while expressing a despicable ideology—was formed for the lawful purpose of First Amendment protected activity. *Id.* ¶¶ 10, 12. An FBI counterterrorism official wrote that the Patriot Front "does not advocate for violence and removes or suspends members who perpetrate or discuss violence. Firearms are not permitted at [Patriot Front] functions and [Patriot Front] members sign a legal waiver indicating they will not break the law." *Id.* ¶ 12.

Despite this exculpatory information, DOJ and USAO attorneys were pressuring the agents under Movant's supervision to swear to an affidavit contradicted by it. *Id.* ¶¶ 16-22. Movant told an FBI supervisor of his, an Assistant Special Agent in Charge ("ASAC"), that he believed there was pressure on the agents to obtain the search warrant for DOJ and the USAO. He also told the ASAC that he would not pressure the agents to attest to the affidavit. *Id.* ¶ 19. When the ASAC and other FBI executives in Salt Lake City (the field office that supervises Idaho) asked Movant to assign an agent who had not reviewed the same exculpatory information the other agents knew, he refused to do so. *Id.* ¶ 20. Movant refers to this manipulation of the warrant process as "agent-shopping." *Id.*

After Movant's refusal to find an affiant ignorant of exculpatory information that contradicted the affidavit, the FBI executives removed him from supervision of the case. They informed him that the affidavit was on the Deputy Attorney General's desk, and they had lost confidence in his ability to lead the investigation. *Id.* ¶ 24. FBI executives also asked another supervisor in Idaho to supervise the case. That supervisor swore to the affidavit to obtain the search warrant, even though she had not reviewed the FBI case files to the extent the previous agents had, nor did she have any conversations with the other Idaho agents about their opposition to the

warrant, or substantive discussions with other FBI agents who had investigated the subjects and/or the Patriot Front. *Id.* ¶ 34. FBI executives subsequently took retaliatory steps against Movant, including performance reviews that contrasted significantly from his performance review about a month before the affidavit issue, removal from his position, temporary duty assignments, an attempt to transfer him for loss of effectiveness, and disciplinary action. *Id.* ¶¶ 24-33. Even though the FBI has refused to provide him with the final search warrant affidavit, which is essential to his defense against these administrative actions, on August 9, 2024, the FBI removed him from the FBI. *Id.* ¶¶ 33, 45.

Movant has also suffered professional reputational damage from the FBI's actions against him. Various state and local law enforcement officials in Idaho necessarily became aware of his removal from his supervisory position. Also, members of the media have publicized the FBI's actions against him. *Id.* ¶ 48.

Movant shares no political sympathies with the Patriot Front, or any other political extremism or bigotry, but he refused to take actions that he believed would withhold exculpatory information from this Court and violate the Patriot Front members' constitutional rights. *Id.* ¶ 46.

Considering the Ninth Circuit recognizes that the public has a qualified right to access search warrant documents after an investigation is over, Movant requests the unsealing of the application, affidavit, and accompanying materials used to obtain a search warrant for any electronic devices seized from the following Patriot Front members, who were arrested in Kootenai County, Idaho on June 11, 2022: Jared M. Boyce, Nathan D. Brenner, Colton M. Brown, Josiah D. Buster, Mishael J. Buster, Devin W. Center, Dylan C. Corio, Winston W. Durham, Garret J. Garland, Branden M. Haney, Richard J. Jessop, James M. Johnson, James J. Johnson, Kieran P. Morris, Lawrence A. Norman, Justin M. Oleary, Cameron K. Pruitt, Forrest C. Rankin, Thomas

R. Rousseau, Conor J. Ryan, Spencer T. Simpson, Alexander N. Sisenstein, Derek J. Smith, Dakota R. Tabler, Steven D. Tucker, Wesley E. Van Horn, Mitchell F. Wagner, Nathaniel T. Whitfield, Robert B. Whitted, Graham J. Whitsom, and Connor P. Moran.

LEGAL STANDARDS

The law recognizes two qualified rights of access to judicial proceedings and records, a common law right "to inspect and copy public records and documents, including judicial records and documents," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted), and "a First Amendment right of access to criminal proceedings" and documents therein, *Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

The Ninth Circuit has adopted a strong presumption in support of the common law right to inspect and copy judicial records and a balancing test "that accommodates both the presumption to which the common law right of access is entitled and the limitations that may properly be placed upon it." *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293–94 (9th Cir. 1986). "Where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulated facts known to the court, not on the basis of unsupported hypothesis or conjecture." *Id.* at 1294 (quoting *United States v. Edwards (In re Video-Indiana, Inc.)*, 672 F.2d 1289, 1294 (7th Cir. 1982)). "Such factors as promoting the public's understanding of the judicial process and of significant public events justify creating a 'strong presumption' in favor of copying access." *Id.* (footnote omitted). "Counseling against such access would be the likelihood of an improper use, 'including publication of scandalous, libelous, pornographic, or trade secret materials; infringement of fair trial rights of the defendants or third persons; and residual privacy rights.'" *Id.* (quoting *United States v. Criden (In re National Broadcasting Co.)*, 648 F.2d 814, 830 (3d Cir. 1981) (Weis, J., concurring)).

The Ninth Circuit specifically recognizes post-investigation search warrant materials as "judicial records and documents" to which there is a common law right of access. *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194 (9th Cir. 2011) ("the public has a qualified right of access to warrant materials after an investigation has been terminated"). However, the Ninth Circuit has held that members of the public have neither a First Amendment nor a common law right of access to search warrant materials while a pre-indictment investigation is under way. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1218, 1219 (9th Cir. 1989).

In *Custer Battlefield Museum*, the Ninth Circuit declined to reach the question of whether a First Amendment right of access applied to post-investigation search warrant materials. 658 F.3d at 1196–97. However, the Supreme Court has described an "experience and logic" test to determine whether the First Amendment right of access applies to judicial records. *Press–Enter.*, 478 U.S. at 9. Under that test, the public's qualified First Amendment right of access to judicial documents and proceedings attaches where: (a) the types of judicial processes or records sought have traditionally been available to the public, and (b) public access plays a "significant positive role" in the functioning of the process. *Id.* at 11; *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982).

ARGUMENT

The public should see the materials DOJ officials used to obtain a search warrant for the Patriot Front members' electronic devices. Movant has standing to file this motion because he has suffered an injury in fact, and, alternatively, his request to unseal the search warrant materials is consistent with the Ninth Circuit's precedent allowing parties to intervene under Federal Rule of Civil Procedure 24(b). The common law right of access applies to these materials because the investigation into the Patriot Front members related to the events of June 11, 2022, appears to be

over. Also, the Patriot Front members have been formally charged in state court and the prosecutions are almost complete. In addition to the common law right of access, the First Amendment right of access to court records compels the release of the search warrant materials. Finally, this Court should release the records under its discretionary authority, particularly since the Judiciary has an obligation to protect the integrity of the courts, and DOJ attorneys and FBI executives appear to have manipulated the search warrant process to exclude exculpatory information from this Court by "agent-shopping."

I. Movant Has Standing to Assert the Public's Right of Access, or, Alternatively, He Should Be Allowed to Intervene.

Under Supreme Court and Ninth Circuit precedent, Movant has standing to challenge the exclusion of the press and general public from criminal proceedings, including motions to unseal search warrant materials. Alternatively, if this Court decides the Federal Rules of Civil Procedure apply, Movant may intervene under Rule 24(b)(1)(B).

A. Movant Has Standing to Challenge the Sealing of the Search Warrant Materials in These Criminal Proceedings.

To have standing in an action, the party asserting the claim must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). However, the Supreme Court has observed that representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from criminal judicial proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982). While the Ninth Circuit has not directly addressed the issue, at least one court in this Circuit has decided that when a member of the public seeks to unseal records "[o]nly a colorable claim is required, regardless of its strength, for if the courts were to require more than a colorable claim, 'we would decide the merits of the case before satisfying ourselves of standing." *In re Granick*,

388 F. Supp. 3d 1107, 1117 (N.D. Cal. 2019) (quoting *Carlson v. United States*, 837 F.3d 753, 758 (7th Cir. 2016)). In *Carlson*, the Seventh Circuit held that a "plaintiff suffers an injury-in-fact when she is unable to obtain information that is statutorily subject to public disclosure. Injury-in-fact can arise from a comparable common-law source." 837 F.3d at 758 (citations omitted).

Here, Movant has suffered an injury-in-fact because he has been denied access to the materials that he needs to defend himself in proceedings to remove him from the FBI for his refusal to pressure his agents to attest to an affidavit that they did not believe was full and accurate and his refusal to engage in agent-shopping. Movant supervised the FBI's efforts in the investigation under which the search warrant was sought. He witnessed DOJ attorneys and FBI executives pressure agents under his supervision to sign an affidavit for that search warrant which excluded exculpatory information that contradicted the affidavit's probable cause determination. When those agents determined they could not swear to the affidavit under oath, Movant refused to go along with a scheme by FBI executives, ostensibly at the behest of DOJ attorneys, to find an agent ignorant of the exculpatory information to sign the affidavit. Those officials then went around Movant and had another FBI supervisor in Idaho sign the affidavit, who had not reviewed the same exculpatory information the previous agents had. Because of his refusal to go along with the agent-shopping scheme, the FBI has removed Movant from its ranks (among other acts of reprisal). Since the affidavit has been sealed, he cannot show that the affidavit excludes exculpatory information. Movant has also suffered an injury-in-fact to his professional reputation because the removal from his position and proposed removal from the FBI have been publicly reported.

Thus, Movant has made a colorable claim of injury-in-fact that is traceable to the sealing of the search warrant materials and can be redressed by unsealing those materials. Even if he had not suffered this injury-in-fact related to his employment and professional reputation, he has been

unable to obtain information to which he has a common law right, as will be discussed in Section II below, and he has made a colorable claim of that separate injury in fact.

B. Alternatively, Movant May Intervene Under Federal Rule of Civil Procedure 24(b)(1)(B).

Under Federal Rule of Civil Procedure 24(b)(1)(B), this Court "may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The Ninth Circuit has held that "Rule 24(b) permits limited intervention for the purpose of challenging a protective order." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). In fact, the D.C. Circuit has observed that every "'circuit court that has considered the question . . . has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.'" *League of Women Voters of U.S. v. Newby*, 963 F.3d 130, 135 (D.C. Cir. 2020) (citations omitted). "Permissive intervention to litigate a claim on the merits under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Beckman Indus.*, 966 F.2d at 473.

In the context of an intervenor seeking to modify a protective order, the Ninth Circuit has held that an independent ground for jurisdiction is not required, though, because "intervenors do not seek to litigate a claim on the merits . . . . They ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order." *Id. See also San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999). Since Movant does not seek to litigate any claim on the merits, but only challenges this Court's sealing of search warrant materials, there is no need for an independent ground for jurisdiction.

In determining whether a motion to intervene is timely, the Ninth Circuit has held that a court must consider three factors: "'(1) the stage of the proceeding at which an applicant seeks to

intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay.'" *League of United Latin Amer. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (citations omitted). Movant's motion to intervene is timely. First, the Ninth Circuit has observed that "delays measured in years have been tolerated where an intervenor is pressing the public's right of access to judicial records." *San Jose Mercury News*, 187 F.3d at 1101. Second, Movant's delay in seeking the search warrant materials has been necessary to allow the state prosecutions of the Patriot Front members to come to a general conclusion. Thus, the state's prosecution and the defendants' privacy interests would not be as severely affected. Third, since the Ninth Circuit recognizes a common law right of access to search warrant materials after an investigation has finished, *Custer Battlefield Museum*, 658 F.3d at 1194, Movant's delay has allowed him to meet that requirement, or come as close as he reasonably can, since he does not have access to federal investigative files. Similarly, the delay will not prejudice federal investigators, if there is any active investigation, since it has allowed the federal investigators two years to determine if any federal charges are warranted. Of course, that is unlikely considering the Patriot Front members have been prosecuted in state court.

As to the third requirement for intervention, a common question of law and fact between the movant's claim or defense and the main action, like the independent jurisdictional basis, is not required when an intervenor seeks to challenge a protective order. *Beckman Indus.*, 966 F.2d at 474.

Thus, Movant should be allowed to intervene for the limited purpose of asserting the public's right to access these documents.

II. The Documents in This Case Should be Unsealed.

This Court should grant Movant's request to unseal the search warrant application, affidavit, and accompanying materials that federal officials filed to obtain a search warrant for the

Patriot Front members' electronic devices under the common law right to access, First Amendment right to access, or this Court's own discretionary disclosure authority.

A. Under the Common Law Right of Access, the Warrant Materials Should be Unsealed.

The Ninth Circuit has held that warrant materials are judicial records and documents that may be subject to the common law right of access. *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1193 (9th Cir. 2011). The next question is whether the public has a right of access to the warrant materials in this case.

1. The Warrant Materials Should Be Unsealed Because the Investigations into the Patriot Front Members for their Actions Related to Their June 11, 2022, Arrests Appear to Have Been Terminated.

The Ninth Circuit has held that "the public has a qualified right of access to warrant materials after an investigation has been terminated." *Id.* at 1194. The state and federal investigations appear to have been terminated. The Patriot Front members were arrested about two years ago, and the federal search warrant was presumably obtained shortly afterwards. However, there have been no federal charges and no publicly reported federal investigative activity to Movant's knowledge. Based on these facts, there is sufficient basis to conclude that the federal investigation has been terminated.[1]

Most importantly, considering all thirty-one of the Patriot Front members arrested on June 11, 2022, have been prosecuted or face prosecution in state court[2], there is minimal chance they will be prosecuted for those same actions in federal court. First, federal prosecution of many of the

[1] While federal agencies may have an open file, such files can remain open for administrative purposes for years after investigative activity has ceased. Decl. ¶ 47. Thus, even if the FBI's file is still open or pending, that does not mean the investigation continues with any realistic chance of prosecution.

[2] There are bench warrants for two defendants for failure to appear. Decl. ¶ 44.

Patriot Front members is likely statutorily barred because of their state prosecution. The Patriot Front members were charged with conspiracy to violate Idaho's riot statute. The federal anti-rioting statute is 18 U.S.C. § 2101. Under the federal statute, "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts." 18 U.S.C. § 2101(c). Thus, all the Patriot Front members who have been acquitted or convicted cannot be charged under this statute in federal court.

Second, federal policy makes prosecution of the Patriot Members unlikely under the Petite Policy, which is as follows:

> This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

U.S. Department of Justice, Justice Manual § 9-2.031. The mixed record of the state prosecution suggests that both the second and third prerequisites of the Petite Policy cannot be satisfied. Many of the Patriot Front members pleaded guilty to related misdemeanor charges or city infractions, Decl. ¶ 44, which would vindicate any federal interest. Furthermore, the dismissal of charges against other Patriot Front members raises doubts about whether the admissible evidence would be sufficient to obtain a conviction in federal court.

While federal agencies' investigative files may remain administratively open, there is no basis to believe that the investigation continues or that the Patriot Front members will be prosecuted in federal court for any activity related to June 11, 2022. Furthermore, because federal agencies can leave their investigative files open for as long as they want, the termination of an

investigation for common law right of access purposes should be when an agency ceases meaningful investigative activity. Otherwise, federal agencies could evade public review of their use of search warrants simply by not going through the administrative steps of closing their investigative files, such as returning or destroying evidence and filing the appropriate paperwork. *Id.* ¶ 47.

Here, federal officials' actions show that they have an interest in keeping their case files open in order to prevent the release of the search warrant materials. First, Movant has provided emails showing there was exculpatory evidence that was not included in drafts of the search warrant affidavit, and it is reasonable to conclude that—after his and his agents' removal from the case—exculpatory evidence was not inserted into the final affidavit. *Id.* ¶¶ 10, 12. This impropriety was caused by members of the USAO and DOJ who have the authority to decide whether to seek—or oppose—the unsealing of these records.

Second, the state court proceedings show that federal officials have withheld evidence to the detriment of the state prosecutions in what appears to be an effort to avoid unsealing the search warrant affidavit. Two state cases have been dismissed because state prosecutors could not turn the electronic information over to defendants in a timely manner, and did not receive the full search warrant materials, chains of custody, and other federal records to turn over to the defense. *Id.* ¶¶ 38-42. In fact, the state prosecutor said he "begg[ed]" the FBI for materials. *Id.* ¶ 42. It is difficult to imagine the USAO and DOJ plan to prosecute individuals when they have failed to support those individuals' prosecution in state court for the very acts they could have faced in federal court.

Finally, according to a state prosecutor, the USAO partially unsealed the search warrant to show the state court and a defense counsel, but not the search warrant affidavit. *Id.* ¶ 41. Thus, the USAO and DOJ have provided the information downloaded from the electronic devices, partially

unsealed a copy of the warrant, but have kept the affidavit sealed, begging the question of whether the USAO and DOJ have a legitimate reason in keeping their files open, or whether they are simply concealing an affidavit which Movant has shown likely excluded exculpatory information.

2. Since the Patriot Front Members Have Been Charged in State Court, the Common Law Right of Access Applies to the Search Warrant Materials.

The Ninth Circuit has not decided the specific question of whether search warrant materials are subject to the common law right of access after an indictment. *Custer Battlefield Museum*, 658 F.3d at 1192 n.3. However, the same rationale for a common law right of access after the termination of an investigation would apply to a right of access after a defendant is formally charged in federal or state court.

First, although federal court precedent refers to a qualified right to access after indictment, the right to access should apply equally to any formal charge. Under Federal Rule of Criminal Procedure 7, felonies must be charged by indictment, unless waived by the defendant. However, in Idaho state court, under Idaho Criminal Rule 7, felony offenses may be prosecuted by indictment or information. Thus, there is no reason to distinguish between indictments and state charges by bill of information in deciding if the common law right of access to judicial materials applies. Furthermore, the Patriot Front members were charged with misdemeanor conspiracy to riot. Decl. ¶ 44. So, even in federal court, a bill of information would have been sufficient to charge them. FED. R. CRIM. P. 58(b)(1). Considering misdemeanor charges are *less* severe than felonies, there is no reason to create a *higher* bar for public access to records related to them.

Second, the rationale from *Custer Battlefield Museum* applies equally to warrant materials after a defendant is formally charged, as it does after an investigation is terminated. The Ninth Circuit observed that "'[s]earch 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.'" *Custer Battlefield Museum*, 658 F.3d at 1193 (citation omitted). "This 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.'" *Id.* (citation omitted). Also, "'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.* (citation omitted). Access to warrant materials after a formal charge serves these same purposes that the Ninth Circuit relied upon to decide a qualified right of access exists after the termination of an investigation.

Here, the Patriot Front members were charged in state court and the federal search warrant for their electronic devices was discussed in the state court proceedings. The state prosecutors and investigators publicly acknowledged the existence of the federal search warrant and that the FBI had obtained the devices from state officials. *State v. Jessop*, No. CR28-22-8596 (Idaho Dist. Ct. Mar. 6, 2024) (Decision on Appeal of Magistrate Court's Order) at 96–97. So, there is no investigative reason to conceal the warrant's existence from the public.

Also, the *Jessop* court determined that there was no evidence in the record that the FBI even conducted its own investigation. *Id.* at 99. The *Jessop* court determined that the FBI appeared to act as an agent of the state. *Id.* Thus, the state proceedings indicate there is no active federal investigation separate from the state, and the formal state charges serve as a sufficient basis for a qualified common law right of access to the search warrant materials.

3. The Public Interest in Disclosure of the Warrant Materials Outweighs Any Countervailing Concerns.

The common law right of access is qualified, though, and in deciding whether there should be access in a specific case, the court "should balance the public's interest in disclosure against

any countervailing concerns that may apply. But the court may not restrict access to the documents without articulating both a compelling reason and a factual basis for its ruling." *Custer Battlefield Museum*, 658 F.3d at 1196. Here, the information gleaned from *Jessop* confirms the substantial interest the public has in these search warrant materials. In that case, the state disclosed the existence of data extracted from the devices, *Jessop*, No. CR28-22-8596 at 108, which raises the question of what legal authority the FBI had to do that, how the FBI obtained that authority, and why the FBI got involved in a state case, particularly when no federal charges have been brought.

Also, the issues raised in Section II.A.1 above—showing the USAO and DOJ have an improper interest in keeping these records under seal—confirm the public has a substantial interest in their unsealing. The public interest in disclosure is further heightened by Movant's experience in the drafting of the affidavit and DOJ's agent-shopping for an affiant. Movant's allegations tend to be corroborated by the fact that the state averred in *Jessop* that "it did not plan to introduce anything located on the phones at trial . . . ." *Id.* at 111. While searches under the authority of legitimately obtained warrants sometimes yield no inculpatory evidence, the state's decision not to use any of the information the FBI obtained tends to confirm Movant's observation that there was insufficient probable cause for the warrant in the first place.

The public's interest in disclosure is also heightened by the fact that an AUSA who later participated in the search warrant process participated in the June 11, 2022, event. She has claimed she did so in her official capacity gathering intelligence or to assist people in leaving the area in case there was unrest. Setting aside the unusual, and in Movant's experience, unprecedented, nature of an AUSA acting as an intelligence gatherer and apparent evacuation facilitator, her statements beg the question of how she could act as an attorney on the case when she may have made herself a fact witness. Decl. ¶ 11.

Also, the fact that FBI executives told Movant that the affidavit was on the Deputy Attorney General's desk, *id.* ¶ 24, further increases the public interest in disclosure. If the search warrant affidavit related to electronic devices of thirty-one individuals arrested on state misdemeanor charges was important enough for the Deputy Attorney General of the United States, it is important enough for the public to see.

Finally, the FBI executives' reprisal against Movant after his refusal to agent-shop and pressure his agents to attest to an affidavit that they did not believe met the probable cause standard increases the public interest in disclosure of the warrant materials. The public has a right to know when the FBI retaliates against employees after they allege FBI executives and DOJ attorneys engaged in wrongdoing. In fact, a senior FBI official acknowledged the impropriety of the FBI's treatment of Movant. After the head of the FBI's Human Resources Division stopped the Salt Lake City executives' attempt to transfer him for loss of effectiveness, he told Movant, "I'm sorry…this is not how we treat our people." *Id.* ¶ 31. The first step to uncover the FBI's mistreatment of a whistleblower in this case is to unseal the warrant materials.

The countervailing concerns in favor of keeping the warrant materials sealed are limited. First, as discussed above, the existence of the warrant has been publicly acknowledged by the state. The USAO unsealed the warrant for review by the state court and defense counsel. Second, the names of all thirty-one Patriot Members involved have been publicized. They have been charged. Some have been convicted and some have not. Evidence against them has been publicly released. Therefore, there is little privacy interest in withholding the warrant materials. Finally, DOJ can argue in favor of redacting some of the information, such as personally identifying information of the defendants or the names of confidential sources or methods.

However, considering the agent-shopping and improper pressure on agents that Movant witnessed, the identity of the FBI agent who signed the affidavit must be disclosed. That agent's knowledge and experience with the Patriot Front investigation is key to determining whether DOJ engaged in wrongdoing. While the FBI may argue that its agents are not safe from the Patriot Front if their agents are identified, the identities of a whole host of state officials who have participated in the state case are publicly available. There is no reason to conceal federal agents' names.

B. The First Amendment Right of Access Compels Disclosure of the Search Warrant Materials.

Although the common law right of access is sufficient to decide this matter, if this Court disagrees, the First Amendment right of access also compels unsealing these search warrant materials. While this issue has not been decided by the Ninth Circuit, *see Custer Battlefield Museum*, 658 F.3d at 1196, post-investigation and post-indictment search warrant materials should be released under the Supreme Court's prevailing "experience and logic" test. *Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 9, 11 (1986). Under that test, the public's qualified First Amendment right of access to judicial documents and proceedings attaches where: (a) the types of judicial processes or records sought have traditionally been available to the public, and (b) public access plays a "particularly significant positive role in the actual functioning of the process." *Id.* at 11; *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

Regarding the first prong of the experience and logic test, post-investigation/post-indictment search warrant materials have traditionally been available to the public. The Ninth Circuit decided that when analyzing the common law right of access for warrant materials after an investigation has been terminated. *Custer Battlefield Museum*, 658 F.3d at 1193. Also, as discussed in Section II.A.2 above, the same rationale applies after defendants have been formally charged in state court.

Regarding the second prong, public access plays a particularly significant positive role in the functioning of the search warrant process. Making affidavits publicly available after an investigation has been terminated or after defendants have been formally charged helps ensure those proceedings are fair. The search of any citizen's home or other property, including electronic devices, is a substantial intrusion into their privacy. The public airing of the manner in which those warrants are obtained serves as a check against government abuse. After all, it is an ex parte process and the judge issuing the warrant can only rely on the information provided to her by prosecutors and investigating officials. For the reasons discussed in Sections II.A.1 and 3 above, there is a substantial public interest in unsealing these materials that outweighs any countervailing concerns.

C. The Court May Unseal Pursuant to Its Discretionary Disclosure Authority.

The Judiciary has an inherent power and obligation to protect the integrity of the courts. "'[T]ampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (citation omitted). Even if this Court determines that the public does not have a First Amendment or common law right to access, its supervisory power over its own records permits it to unseal the documents at issue here. *See In re Motion for Release of Ct. Recs.*, 526 F. Supp. 2d 484, 486–87 (FISA Ct. 2007) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140–41 (2d Cir. 2004) (same).

In fact, if this Court decides that Movant has no standing or denies it permission to intervene, it has an independent duty to evaluate the public's right of access to these proceedings. *See, e.g.*, *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is

duty-bound therefore to review any request to seal the record (or part of it)."); *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 307 (2d Cir. 1997) (unsealing, sua sponte, the record in the case, but allowing a litigant that had identified confidential records to move in the district court for determination of whether any of those documents should remain sealed).

Considering the wrongdoing Movant witnessed, regardless of his ability to move for disclosure of the materials, this Court should nonetheless unseal the identified records.

CONCLUSION

As demonstrated above, Movant has standing and satisfies the requirements for permissive intervention. The Ninth Circuit has recognized a common law right of access to search warrant materials after the termination of an investigation, and the investigation here appears to be over. Alternatively, the formal charges in state court against the Patriot Front members trigger a common law right of access to the materials. The public interest in the release of this information, possibly exposing federal official misconduct, outweighs any countervailing concerns. Furthermore, the First Amendment right of access applies to these materials and serves as an alternative basis for unsealing. Finally, the records should be unsealed under this Court's discretionary authority.

This Court should unseal the materials used to obtain a search warrant for the thirty-seven electronic devices seized from the thirty-one Patriot Front members who were arrested in Kootenai

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County, Idaho on June 11, 2022.

September 18, 2024

Respectfully submitted,

/s/ Joshua Hanners
Joshua Hanners
Counsel for Movant

AND

Michael S. Zummer* (La. Bar No. 31375)
Counsel for Movant
*Pro Hac Vice Application Forthcoming

CERTIFICATE OF SERVICE

I, Whitney Phelps, certify that on September 18, 2024, a true and correct copy of the foregoing Memorandum in Support of Motion to Unseal was served by U.S. Mail, certified postage prepaid, electronic return receipt requested, on the following counsel for the U.S. government, with a courtesy copy transmitted by electronic mail, to:

Joshua D. Hurwit
U.S. Attorney for the District of Idaho
United States Attorney's Office
1290 West Myrtle Street
Suite 500
Boise, ID 83702

/s/Whitney Phelps
Whitney Phelps
Paralegal to Joshua Hanners