ORAL ARGUMENT NOT YET SCHEDULED

Appeal No. 18-5276

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jason Leopold and
Reporters Committee for Freedom of the Press,

Appellants,

v.

United States of America,

Appellee.

On Appeal from the United States District Court for the District of Columbia
Hon. Beryl Howell No. 1:13-mc-00712

BRIEF OF *AMICI CURIAE* FORMER UNITED STATES MAGISTRATE JUDGES IN SUPPORT OF PETITIONERS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), and Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioners, Docket No. 21.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners, Docket No. 21.

C. Related Cases

The ruling under review has not been, and is not, the subject of any other petition for review.

Dated: January 25, 2019

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GLOSSARY OF ABBREVIATIONS

CM/ECF	Case Management/Electronic Case Files
PR/TT	Pen Register and/or Trap and Trace
SCA	Stored Communications Act, 18 U.S.C. §§ 2701–2712
USAO	United States Attorney's Office

STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in the Addendum accompanying the Brief of Petitioners and the Relevant Statutes Addendum that accompanies this brief.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are former federal magistrate judges with experience with and interest in the unsealing of federal surveillance orders and applications. *Amici* include the following:

Mildred E. Methvin served as a United States Magistrate Judge for the Western District of Louisiana from 1983 to 2009. She worked as a recall Magistrate Judge for the District of Maryland in 2011 and the Middle District of Pennsylvania from 2011 to 2013. She served as a Louisiana state district judge *pro tem* for six months in 2014. She is a former Assistant U.S. Attorney and is currently an attorney and mediator in Louisiana.

Brian Owsley served as a United States Magistrate Judge for the Southern District of Texas in Corpus Christi from 2005 to 2013. A graduate of Columbia Law School, he is a former trial attorney for the United States Department of Justice and a current assistant professor of law at University of North Texas at Dallas College of Law.

Viktor Pohorelsky served as a United States Magistrate Judge for the Eastern District of New York from 1995 to 2015 and for an additional three years in that district on recall. Prior to his appointment as a magistrate judge, he had a fourteen-year career as a litigator both in private practice and as an Assistant United States Attorney in the Southern District of New York. He is now retired.

Stephen Wm. Smith served as a United States Magistrate Judge for the Southern District of Texas in Houston from 2004 to 2018. A graduate of Vanderbilt University and the University of Virginia Law School, he is currently the Director of Fourth Amendment & Open Courts at Stanford Law School's Center for Internet and Society.

David Waxse served as a United States Magistrate Judge for the District of Kansas from 1999 to 2014 and for an additional four years in that district on recall. Prior to his appointment as a magistrate judge, he was a partner at Shook, Hardy & Bacon and is the former Chair of the Kansas Commission on Judicial Qualifications.

Amici submit this brief to offer their perspective on the administrative process and burdens of sealing and unsealing based on their individual experiences as magistrate judges.[1] With more than 90 years of cumulative service on the bench, *amici* are well-positioned to reflect on the potential administrative effects of implementing the relief the Petitioners request. *Amici* have each presided over a criminal docket and have firsthand experience with unsealing sealed orders and requests for extensions of sealed orders. Judges Smith and Owsley each have experience with attempting to proactively unseal large numbers of closed, sealed

[1] *Amici* act in their individual capacities. All views expressed here are their own and do not represent the views of current or former employers.

criminal surveillance applications and orders and thus understand the challenges associated with unsealing these filings, the benefits of doing so, and how the unsealing process can be improved.

Amici thus file this brief in support of Petitioners to clarify how the requested relief will affect the administrative load of the courts, United States Attorneys' Offices, and clerks' offices and to explain why the district court's concerns regarding administrative burden are overstated.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* certify that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and that no party or person—other than the *amici curiae*, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Given the high variance of practices across courts, the administrative burden of a request for judicial records should not determine the existence of a common law right of access. Rather, a court should consider administrative burden when determining how and when to provide access to such records. In the instant case, the burden posed by the Petitioners' requested relief, especially their requested prospective relief, is not so great as to require a court to curtail or deny access to the judicial records in question.

The common law right of access is grounded in the importance of judicial transparency and accountability to the public, not whether providing the records is convenient for the government. Considering administrative burden as a factor in how and when the public may access certain judicial records, rather than a factor in whether the public has a right of access to those records at all, is more appropriate because of the practical consequences for the public and the courts. First, it will make determinations of whether a right to certain types of documents exists more uniform by preventing bureaucratic differences, such as the size or workload of a government office, from affecting the determination. Second, it will incentivize courts, United States Attorneys' Offices ("USAOs"), and clerks to improve the manner in which they produce and keep records.

Many of the dire outcomes predicted by the district court have not come to pass when *amici* have unsealed judicial records. To the contrary, Petitioners present a workable scheme that, with adaptations for the specificities of the district, can be adopted widely. With more and more courts accepting electronic applications for surveillance orders, real-time reporting of basic case information can be done with minimal burden on the courts, USAOs, and clerks' offices. Mandatory unsealing of surveillance applications and orders associated with closed or old investigations can also be implemented without substantial administrative overhead. In *amici*'s experience, prosecutors usually do not request extensions for the overwhelming majority of closed or old cases. Moreover, those that did request extensions did not indicate that doing so created an unworkable burden. Finally, unsealing basic case information or the applications and orders themselves will not endanger future investigations or impair law enforcement's ability to conduct surveillance.

There are also practical and administrative benefits to providing the full prospective relief requested by practitioners. Maintaining sealed documents imposes additional administrative and financial costs on the courts and clerks' offices. Decreasing the number of sealed documents will reduce these costs. Unsealing more surveillance applications and orders will also give appellate courts

more chances for review, which will give much-needed guidance to both district courts and magistrate judges.

ARGUMENT

I. Administrative Burden Should Not Determine the Existence of a Common Law Right of Access to Judicial Records.

Because administrative practices vary greatly among courts, clerks' offices, and USAOs, the administrative burden imposed by a request for judicial records should not determine the existence of a common law right of access to those records. Otherwise, differences in record-keeping practices and administrative capacity will drive the determination of whether such a right exists, causing the right to vary significantly from district to district. In reaching its decision below, the district court ignored the larger history of the common law right of access, the treatment of that right in this Circuit, and the practical consequences of treating administrative burden as dispositive of whether that right exists.

The common law right of access to judicial records is grounded in the importance of judicial transparency and accountability to the public, not the convenience of the government. Open court proceedings are one of the oldest American common law traditions, older than even the Constitution itself. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565–69 (1980) (reviewing the history of open trials, their importation to the United States, and their development in common and statutory law). From this custom of openness in the

courtroom came a tradition of openness in and access to judicial records, which the Supreme Court first directly recognized in 1978: "[C]ourts of this country recognize a general 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). It was this very tradition that moved magistrate judges and former magistrate judges like *amici* to unseal surveillance orders and other judicial records during their time on the courts.

Consistent with the importance of judicial transparency and public accountability, courts have only limited the right of access to judicial records when there is an equally important countervailing concern. This Court has limited the right of access to court records in response to privacy interests, national security concerns, trade secrets, and potential of threats of prejudice. *See United States v. Hubbard*, 650 F.2d 293, 316 (D.C. Cir. 1980) (quoting *Nixon*, 435 U.S. at 598). Although many D.C. courts have subsequently applied the *Hubbard* test, no court thus far has recognized government inconvenience, or even the inconvenience of an opposing private party, as a valid basis for holding that no right of access exists in the first place.

This is not to say that a court can never consider administrative burden in the context of providing access to judicial records. However, government convenience and administrative burden are more appropriately accounted for when

deciding how to provide access to records, rather than when considering whether or not a right of access exists in the first place. Factoring administrative burden into the *mode* of access, as opposed to the *right* of access, will have important practical and policy consequences for the common law public right of access. First, it will make determinations of whether a right of access to records exists more uniform by preventing bureaucratic differences, such as the size or workload of a government office, from affecting the public's rights. Second, it will incentivize courts, USAOs, and clerks to improve the manner in which they produce and keep records.

If the existence of the right of access to judicial records depends on the administrative burden on the courts, clerks' offices, or USAOs, the right will change based on how the records are kept by each office. Under the district court's interpretation of *Hubbard*, two requestors making the exact same request to different courts could have different rights. For example, a right of access might exist in one court where the records are kept electronically, but not in a second where records are kept on paper and thus more burdensome to access. Moreover, this variance would not just be across different districts; it could also mean that the right of public access could depend on the preferences of the magistrate judge who receives the matter. Magistrate judges have varying systems for surveillance application and orders, with some having moved exclusively to e-filing for

applications and others receiving applications on paper. Telephone Interview with Judge Stephen Smith, Former Federal Magistrate Judge (Jan. 11, 2019) [hereinafter *Smith Interview*]. The administrative burden of later unsealing applications assigned to judges who prefer paper will be higher. *Id.* Thus, if courts consider administrative burden in determining whether there is a common law right to certain documents, that right could turn on which magistrate judge happened to be on duty when a group of applications and orders came in.

Furthermore, factoring administrative burden into the existence of a right of access could also result in the common law right of access to certain documents fluctuating based on arbitrary factors such as the size of the USAO or how busy the USAO is at the time of the request. In the instant case, the district court estimated that retrospectively extracting information from pen register and trap and trace ("PR/TT") matters could take 788 hours. *See* JA908. However, the district court does not provide any information about the USAO's staff size or workload. Without this context, it is impossible to know whether 788 hours is a trivial amount of time, equivalent to other everyday administrative tasks the office must complete, or the amount of time that would be spent on a larger project. Telephone Interview with Judge Mildred Methvin, Former Federal Magistrate Judge (Jan. 10, 2019) [hereinafter *Methvin Interview*]. Following the district

court's logic, a right of access to judicial records might exist in some districts and not others based on the capacity of the USAO at the time the request is filed.

Finally, if administrative burden is dispositive of whether the public has a right of access, agencies can effectively insulate their records from common law access by keeping poor documentation or refusing to move to electronic systems. The level of administrative burden that courts, clerks, and USAOs face to produce court records is, at least to some extent, under their control. A rule that makes the common law right depend upon low administrative burdens could disincentivize offices from improving their record systems. Instead, this Court should adopt an interpretation that incentivizes offices to improve the efficiency, uniformity, and transparency with which they keep records. Requiring offices to comply with these requests, while giving them additional time or flexibility in fulfilling the requests as needed, will encourage offices to improve record-keeping, thereby reducing the burden of such requests in the future.

II. The Relief Scheme Requested by the Petitioners Is Practicable.

The court below denied the Petitioners' request for retrospective relief and limited their request for prospective relief. *See* JA924–25. In doing so, it overestimated the burden that providing such relief would place on the courts, clerks, and USAOs. In particular, the limitations the court placed on prospective relief are unduly strict. Based on *amici*'s collective experience, basic case

information can be reported in real-time without significant administrative overhead. Likewise, applications related to closed cases can be periodically unsealed without significant burden and without posing a risk to ongoing investigations. In fact, there are practical and administrative benefits to such unsealing.

A. Real-Time Reporting of Basic Case Information Does Not Create Significant Administrative Burden.

Petitioner's first request for additional prospective relief is the "real-time unsealing and public posting on PACER, upon initial filing of sealed PR/TT, § 2703(d), and [Stored Communications Act ("SCA")] warrant materials" of each matter's basic case information. *See* Pet'rs' Br. 48–49. Basic case information includes the case number, case name, date of application, and magistrate judge assigned to the case. *See id.* Basic case information itself serves two important purposes. First, without the docket number, interested parties are unable to request that closed or old matters be unsealed. *Smith Interview*. Second, the basic case information provides interested parties with data regarding the number of each type of surveillance order request. *Id.* The district court only briefly addressed the merits of this request, on the ground that Petitioners did not ask for real time information at the outset of the case. JA950–53. To the extent that this Court considers the issue, *amici* propose that real-time reporting of basic case information can be conducted with minimal administrative burden.

Although the process of sealing and unsealing surveillance matters varies greatly from court to court and even judge to judge, *amici* observe that national trends are making it less, rather than more burdensome to unseal documents. In line with the general trend toward electronic filing, many courts are moving to electronic filing of sealed surveillance orders. The Central District of California is currently piloting a program for filing PR/TT and SCA orders on the Case Management/Electronic Case Files ("CM/ECF") system, *see* C.D. Cal. Gen. Ord. No. 17-02 (2017), and several courts in the Southern District of Texas have already started putting surveillance orders into CM/ECF. *Smith Interview*. Basic case information on the docket sheet can then be made available to the public through PACER without manual work from the clerk's office and with nominal overhead. Telephone Interview with Judge Brian Owsley, Former Federal Magistrate Judge (Jan. 10, 2019) [hereinafter *Owsley Interview*]; *Smith Interview*.

Some judges have gone further and now accept sealed applications electronically. For example, judges in Houston and Brooklyn have begun exclusively accepting sealed applications for surveillance warrants over email. *Smith Interview*; Telephone Interview with Judge Viktor Pohorelsky, Former Federal Magistrate Judge (Jan. 10, 2019) [hereinafter *Pohorelsky Interview*]. This trend has proven popular with prosecutors and seems likely to continue. *Smith Interview*. When the government submits a sealed application electronically, basic

case information for sealed applications could be entered in CM/ECF or another public-facing system with relative ease, and the cost of making basic case information available in real-time would be minimal.[2] *Id.*; *Owsley Interview*.

At least one district has already implemented a real-time reporting system on paper. The Eastern District of Virginia maintains a dedicated docket for sealed surveillance applications and orders that is available to the public from the E.D. Va. Clerk's Office. *See* JA864. This docket keeps a "running list" of PR/TT and SCA applications that includes a standardized set of case information: the case number, judge, and status of whether the case is sealed or unsealed. *Id.* As the district court noted, there do not appear to have been any negative consequences of maintaining this public system. *Id.*

In this case, the Clerk's Office and USAO have signed a Memorandum of Understanding ("MOU"), which takes advantage of the aforementioned administrative efficiencies gained from e-filing by granting blanket permission for prosecutors to file sealed applications and orders electronically. Mem. Of Understanding: Electronic Filing of Certain Sealed Applications. and Orders (May 31, 2018). Further, the MOU standardizes the case captions that prosecutors and

[2] Even for magistrate judges maintaining a paper docket, paper applications and orders can be scanned into the case management system, at which point they may be handled similarly to applications and orders originally filed electronically. *Smith Interview*.

courts use when filing sealed surveillance applications and orders. *Id.* Although the format may differ based on the type of application, the new standardized captions do not include any sensitive, personal, or identifiable information, such as the names or phone numbers of the targets. As a result, the information from the case captions can be entered into CM/ECF without the need for any manual review or redactions. This further reduces the administrative burden of making basic case information available in real-time. Thus, to the extent this Court considers prospective access to basic case information, the administrative burden on the clerks' offices or USAOs should not stand in the way of real-time reporting.

B. Periodic Unsealing of Surveillance Applications and Orders Does Not Create a Significant Administrative Burden.

Petitioners' second request for prospective relief is for mandatory unsealing of closed or old criminal surveillance matters. *See* Pet'rs' Br. 61–62. Specifically, Petitioners sought to compel the government agency requesting the sealed order to "promptly move to unseal or partially unseal upon the close of the related criminal investigation." JA921–22 (internal quotations omitted). For matters that remain sealed 180 days after filing, Petitioners sought to have the court issue show cause orders to the requesting agency. *See id.* The district court again expressed concerns regarding the administrative burden that mandatory unsealing would place on the courts, USAOs, and clerks' offices. *See id.* Although experiences and practices obviously differ among courts, the district court's concerns have not been borne

out by *amici*'s experiences in unsealing surveillance applications and orders of closed criminal matters.

Amici and their fellow magistrate judges have observed and used a variety of approaches to unsealing surveillance orders and applications. Former United States Magistrate Judge Smith sent notices to his USAO once a year of his intention to unseal surveillance applications and orders associated with closed, old, or inactive criminal investigations. *Smith Interview*. Judge Smith then gave the USAO both the opportunity to review any of the sealed files (if necessary), and the option of requesting for extension (with a proper justification). *Id.* When attempting to unseal a large number of old criminal surveillance applications and orders, former United States Magistrate Judge Brian Owsley sent notices to his USAO of his intent to unseal in waves. *See* Brian Owsley, *To Unseal or Not To Unseal: The Judiciary's Role in Preventing Transparency in Electronic Surveillance Applications and Orders*, 5 Cal. L. Rev. Circuit 259, 260–61 (2014). Judge Owsley started with an initial wave comprising orders and applications that were more than five years old. *Id.* Although Judge Owsley's orders were not ultimately unsealed, the USAO did not file any requests for extensions of sealings in this initial wave. *See id.* at 260–62; *Owsley Interview*. Some judges have also adopted a policy limiting their sealing orders to a specified period of time, after which the entire matter is to be unsealed absent an application for an extension of

the sealing order. *Pohorelsky Interview*. The District of Arizona already uses such a system. *See* Az. LRCiv 79.1. There, all sealed surveillance orders are automatically unsealed after 180 days. *See id.* The clerk of court notifies the Arizona USAO of the unsealing 60 days before the documents are to be unsealed, giving the USAO the chance to request an extension if appropriate. *See id.* This approach has the benefit of being easily administrable for the courts because it does not require tracking whether cases have closed.

Amici have not observed the administrative burden of implementing mandatory unsealing of surveillance applications and orders related to closed criminal investigations that troubled the district court. Nor, in *amici*'s experience, have USAOs struggled to review the applications and orders that magistrate judges proposed to unseal. In fact, USAOs opposed unsealing in only a few cases, and where the USAO did respond with a request for an extension, courts were equipped to decide on whether to keep the matter sealed.

1. USAOs Did Not Report that Reviewing Sealed Filings Created a Significant Administrative Burden.

The district court expressed concern that mandatory unsealing would require the USAO to review sealed applications and orders to determine whether to request an extension, placing an unworkable burden on the USAO. *See* JA922. *Amici*, who have served as magistrate judges in various federal districts, have not found this to be the case. None of the *amici* received complaints from USAOs

regarding the obligation to review applications and orders to determine whether they could be unsealed and, if so, with what redactions. *Methvin Interview*; *Owsley Interview*; *Pohorelsky Interview*; *Smith Interview*. Indeed, some judges felt that the USAO understood that indefinite sealing should not be the default position. *Methvin Interview.*

One reason that reviewing applications and orders is less burdensome than it might first appear is that the applications and orders in general contain more boilerplate information than secret or sensitive information. *Owsley Interview*; *Pohorelsky Interview*. In many districts, PR/TT applications and orders do not contain any background factual information, and the only information that would need to be reviewed and redacted is the name and telephone number of the target. *Pohorelsky Interview*. Although § 2703(d) orders and SCA warrant applications and orders contain factual information and may therefore need to be reviewed more substantively by the USAO, they are also primarily made up of boilerplate language. Often, sensitive information tends to appear in the same sections of each document. *Id.*; *Smith Interview*. The fact that applications and orders contain standardized language limits the need for a detailed review of all the parts of the document. Instead, prosecutors can quickly check through each document to find the sections that require redaction, if any.

Additionally, to minimize downstream redaction costs when prosecutors are less familiar with cases, courts could require that unsealed, redacted versions of the application and order could be filed contemporaneously with the sealed copies. This is already done routinely in civil matters, and it would reduce the need to retrospectively review the applications and orders for sensitive and personal information later. *Pohorelsky Interview*.

2. USAOs Only Objected to Unsealing Closed Criminal Matters in a Small Number of Cases.

The district court also worried that mandatory unsealing would consume an "unworkable" amount of USAO resources, as the USAO would have to respond to each show cause order. JA922. In *amici*'s experience, prosecutors rarely sought extensions of seals for applications and orders associated with closed, old, or inactive criminal investigations.

In most cases, the USAOs did not respond to notices to unseal applications and orders at all. Former United States Magistrate Judge Brian Owsley found that when he gave notice that he planned to unseal a large class of surveillance applications and orders older than five years, the USAO, after reviewing the files, did not oppose the unsealing of a single application or order. *See* Owsley, *To Unseal or Not To Unseal*, *supra* at 260–61. Former United States Magistrate Judge Stephen Smith noted that the USAO responded to notices of intention to unseal applications and orders in less than ten percent of cases, with many of the

responses being requests for more information about the case itself. *Smith Interview*. In some cases, prosecutors requested extensions or argued that redactions were insufficient, but in Judge Smith's experience, responses of any kind were the exception. *Id.*

Prosecutors likely declined to respond because cases in which the order has long lapsed, and which have been sealed for six months or more, are unlikely to be related to ongoing investigations. For example, in the case of PR/TT orders, the lifespan of the order itself is only 60 days unless there is an extension. Pen Register Act, 18 U.S.C. § 3123(c)(2). For long-term, active investigations, prosecutors proactively file for extensions, and such extensions are routine. *Methvin Interview*. Where a prosecutor has allowed a surveillance order to lapse, this may suggest that the investigation is no longer active, and thus the prosecutor does not have an incentive to request an extension to the sealing of that order.

Thus *amici*, who have been through the process of unsealing closed and old matters, have not observed any signs that unsealing closed or old surveillance orders placed a significant burden on their respective USAOs. Most of the time, notice of unsealing did not garner a response at all. In the few cases it did, no USAO complained about the administrative burden of moving for an extension where necessary.

3. Courts Are Well-Equipped to Manage Requests to Maintain or Extend Seals.

Although the district court expressed concerns that courts and USAOs would have to spend significant resources on show cause orders, in *amici*'s experience, both the courts and USAOs were able to manage these requests. In the few cases where a USAO requested an extension to a seal, former Magistrate Judge Stephen Smith required a motion showing a reasonable basis for the extension. *Smith Interview*. If the investigation were ongoing, the showing required was minimal; for closed investigations, on the other hand, it was somewhat higher. In either case, if the USAO made such a showing, the extension was granted for 90 days. *Id.* Some magistrate judges require additional showings, with increasing burdens to meet, from prosecutors making repeated requests for extensions on a single surveillance order and application. *Id.* The requests for extension contained only the facts necessary to justify it, and judges did not feel that reviewing these requests constituted a substantial administrative burden. *Id*.

C. Unsealing Surveillance Applications and Orders Is Unlikely to Reveal Enough Information to Impair Ongoing Investigations.

The district court raised concerns that unsealing surveillance applications and orders would reveal the factual or legal bases on which law enforcement rely to obtain surveillance orders, as well as information about the technical capabilities of electronic surveillance tools. *See* JA922–23. The court worried that,

were these applications and orders unsealed as a matter of course, targets of investigations could use the information therein to frustrate the investigation. *Id.* However, in the experience of *amici*, redacted surveillance orders and applications do not contain enough information to jeopardize ongoing investigations for several reasons.

First, the existence of these orders will not jeopardize ongoing investigations because the name, number, and account information of the target can be redacted. Targets of the investigation or of related investigations will not be able to tell simply from the existence of an order that they were under surveillance. Indeed, redaction should be the first approach to concerns, as opposed to continued sealing.

Second, the factual bases supporting the applications may also be redacted even when the orders are unsealed if they could jeopardize other ongoing or future investigations. As discussed in Section II.B.1, much of the material in sealed applications and orders is boilerplate. Sensitive information and information describing the basis for the order or warrant is often confined to a few paragraphs (or less for PR/TT applications and orders), and is often found in the same place in each application and order. In one magistrate judge's experience, a 15- to 20-page application would usually contain just a few paragraphs justifying the need for the order or warrant. This suggests that these applications and orders do not contain

lengthy explanations of the basis on which the order or warrant is sought. *Smith Interview*. Any factual information that could jeopardize other investigations could therefore quickly be located and redacted.

Third, even if unsealing of these orders reveals "novel" legal theories for obtaining surveillance orders, such revelations are unlikely to jeopardize ongoing investigations. While there have been some prosecutors attempting to use innovative legal arguments in applications (for example, using trap-and-trace orders to request permission to use a cell-site simulator), *Smith Interview*, revealing such theories is unlikely to provide targets with any additional meaningful information beyond the existence of the order itself. Knowing that a trap-and-trace order was used to approve use of a cell-site simulator based on a novel legal argument does not provide the public with more information than the existence of an SCA warrant approving a cell-site simulator.

Finally, sealed surveillance applications and orders themselves do not generally contain much information related to how the device or data collection technique works, nor do they reveal information that is not available in the public domain. Information related to how these devices and data collection techniques operate is commonly known and widely available online—even in judicial decisions themselves. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001) (explaining how a thermal imager works); *United States v. New York Tel. Co.*, 434

U.S. 159, 162–63 (1977) (explaining how pen registers work and how the FBI uses leased lines to install pen registers in an "unobtrusive way" and in "inconspicuous locations"). Targets of investigations are aware of how common surveillance techniques such as pen registers operate. *Owsley Interview*; *Smith Interview*. Even for more novel techniques, information is publicly available. *See* Cong. Research Serv., 115th Cong., Law Enforcement Using and Disclosing Technology Vulnerabilities (2017) (describing how law enforcement surveillance techniques were applied in specific investigations).

D. There Are Practical and Administrative Benefits to Unsealing Surveillance Applications and Orders.

Reducing the amount of sealed information that flows through the courts has both practical and administrative benefits for the courts and clerks' offices. First, a reduction in the number of sealed matters would lower the financial cost associated with maintaining sealed files. Maintaining sealed matters, especially for magistrate judges using paper dockets, is actually quite burdensome. *See Smith Interview*; *see also* Stephen Smith, *Gagged, Sealed, & Delivered: Reforming ECPA's Secret Docket*, 6 Harv. L. & Pol'y Rev. 313, 334 (2012) ("[S]ecrecy also has a financial cost, because sealed records are more burdensome for clerk's offices to maintain than open records."); Tim Reagan & George Cort, Fed. Judicial Ctr., Sealed Cases in Federal Courts (2009), *available at* https://www.fjc.gov/sites/default/files/2012/SealCaFC.pdf. To seal a surveillance

application and order, the files must be removed from the general system, placed in a manila folder, and physically stored with the judge. *Smith Interview*. Later requests to access these or associated files must then be handled using the stored hard copies, rather than the general system maintained by clerk's office. For matters that no longer need to be sealed, such as closed criminal matters, magistrate judges and clerks can save on the administrative costs of maintaining these matters separately by proactively unsealing the applications and orders.

Second, when matters are unsealed, or at least the associated docket numbers and type of order are openly available, it is easier for clerks' offices to manage case flow. Up-to-date case management information, including the ability to track the number and type of cases or identify long-term trends in case filings, allows the clerk's office to more efficiently manage the case load for individual judges on the criminal docket. It also allows the clerk's office to predict the document storage needs of the court and plan its own personnel staffing. The more sealed matters that remain, the greater the number of matters that must be managed outside the normal case management process of the clerk's office, and the less helpful this case management information is for the day-to-day functions of the clerk's office.

Finally, unsealing surveillance applications and orders would result in more appellate review, thus giving magistrate judges additional guidance and reducing

their decision-making load. Currently, due to the secret nature of these orders, orders once sealed usually remain sealed indefinitely. *Smith Interview*; *Owsley Interview*. When these orders remain secret, the targets are prevented from challenging the order on appeal, which in turns prevents appeals courts from having the opportunity to review and evaluate orders and their associated statutes. This leaves district court and magistrate judges will little to no appellate guidance, making it more difficult and time-consuming for them to make decisions. *See* Smith, *Gagged, Sealed, & Delivered*, *supra*, at 326–31.

Encouraging courts to unseal as much about closed surveillance matters as possible will thus reduce the administrative burden and costs that maintaining these sealed files places on the courts and clerks' office. Reducing the number of matters that must be accounted for outside the normal case management system will also provide clerks' offices with better visibility into the types of matters filed, and therefore better visibility into the needs of the courts. Finally, encouraging unsealing will reduce the secrecy surrounding surveillance matters and result in more appellate review, providing much-needed guidance to district and magistrate judges.

CONCLUSION

The district court overestimated the administrative burden of the prospective relief requested by the Petitioners. In *amici*'s experience, the potential

administrative burdens of unsealing surveillance applications and orders, and the associated basic case information, are mitigated by three factors: the move to e-filing and CM/ECF, the lack of prosecutorial resistance to unsealing old applications and orders, and the court's administrative savings from maintaining fewer sealed documents. For these reasons, *amici* respectfully request that the Court reverse the district court decision as to the limitations on prospective relief and grant the Petitioners real-time reporting of basic case information as well as mandatory unsealing of orders and applications related to closed investigations or investigations older than 180 days.

Respectfully submitted,

Dated: January 25, 2019

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of the Federal Rules of Appellate Procedure and the Circuit Rules. The document contains 5745 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, I caused the foregoing Brief of *Amici Curiae* Former United States Magistrate Judges in Support of Petitioners to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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ADDENDUM